CALC Newsletter

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In this issue—

If you would like to join CALC, use our online registration form.

Meredith Leigh, Andrew Borrowdale, Brenda Hale, Guzyal Hill, David Parker, Zöe Rillstone, John Mark Keyes

CALC President's Report—November 2021

President
Commonwealth Association of Legislative Counsel

Dear CALC members

I extend greetings once again to you all. These remain challenging and uncertain times, when legislative drafting offices continue to be under pressure to produce both legislative responses to the pandemic and business as usual legislation, as well as operate in unusual and stressful working conditions. A key focus of your CALC Council in these times has been to facilitate and maintain communication among CALC members throughout the Commonwealth, and I thank your indefatigable CALC Secretary, Ross Carter, for once again producing an informative and engaging newsletter.

CALC Council meeting on 22 October 2021

When your new CALC Council met for the first time during our conference in Zambia in April 2019, we agreed that during our term of office we would look to hold virtual Council meetings using simple video-conferencing software. Although there would be the challenge of different time zones to overcome, we considered that meeting like this would make us feel more like a team.

Since then, your CALC Council has held 3 virtual Council meetings, the latest on 22 October 2021. Despite the challenges of arranging a meeting that would enable Council members from many different time zones across the Commonwealth to join the meeting, most Council members were able to attend. I believe that meeting in this way has certainly enabled your Council to operate as a team, and I thank all members of the CALC Council for their contribution during 2021.

Matters discussed at the latest Council meeting

Finances

CALC Treasurer, John Mark Keyes, reported that CALC finances are in good shape, with assets of 80,000 UK pounds. This provides a good base for CALC's next conference. CALC continues to receive a steady income from the advertising of drafting jobs.

Membership

CALC Secretary, Ross Carter, reported that membership of CALC continues to grow. CALC now has over 2,500 members, with editors and translators applying for membership in greater numbers since the JLDO/CALC webinars in September 2021.

2021 webinars

The Council received reports on the 2 webinar series held in 2021. These were—

- the Jersey Legislative Drafting Office / CALC webinars for legislative editors/translators called "Connections: Legislative editing across continents and nearer to home", held on 8 and 9 September 2021, and

- the 3 webinars on Rules as Code, held in collaboration with the Australian Society for Computers and Law (AUSCL) on 8 September 2021.

Feedback from participants was that these webinars were a great success. The Council congratulated Lucy Marsh-Smith (assisted by Kate Hannah) for organising the legislative editors/translators webinars, and agreed that CALC should do more to address the interests of this group. The Council also congratulated Katy Le Roy and Wendy Gordon for working with AUSCL to organise the Rules as Code webinars.

Feedback on these webinars also indicated that CALC members would like CALC to organise further webinars. A CALC Europe webinar is being planned, possibly for early 2022, and webinars on training for legislative drafters and other topics such as delegated legislation were also discussed. Council members will investigate these suggestions further and report back to the Council.

CALC strategic planning survey results

The Council received a report on the results of the strategic planning survey conducted in August/September 2021. More details on the results of the survey are set out below.

Around 180 people completed the survey, and the Council thanks everyone who responded to the survey. The general thrust of the responses is that CALC's current objects and activities are generally considered to be appropriate, but there are some areas that warrant further consideration. Some perennial issues were raised, such as drafter shortages and training, skills transfer from experienced drafters to newer drafters, the maintenance of drafting standards and opportunities for regional conferences.

The Council noted that CALC is now a more diverse organisation, with regional representation on the CALC Council, and greater representation of women on the CALC Council and among CALC membership. There is a need for CALC to increase its diversity even more, and to reach out to the next generation of legislative drafters.

The Council agreed to prepare a draft strategic plan that incorporates the results of the survey, and present the plan to the next CALC conference.

Planning for a CALC biennial conference in 2022

The Council discussed the timing of the next conference. Discussions were informed by feedback on the Commonwealth Lawyers Conference that was held in The Bahamas in September 2021.

The Council agreed that, since the last conference was held in 2019, and because the CALC Constitution requires a general meeting at least every 5 years, planning should begin for a conference in 2022 in The Bahamas.

Consideration would be given to a hybrid conference, with the conference being held in-person but with the option of virtual attendance (live streaming) for some or all of the conference. The option of a wholly virtual conference will also be investigated, in case an in-person conference is unable to proceed. If only a virtual conference can be held, the election of a new CALC Council would be conducted electronically.

More information will be provided to CALC members as planning progresses.

CALC website

The Council expressed its appreciation for Ross Carter's ongoing work to maintain the CALC website as a vital communication channel for CALC members.

Ross noted that various collections on the website have been updated, including pandemic-related material and the collection of legislative drafting manuals.

The Council noted the recent addition of an RSS feed to the website, which enables members to be notified whenever certain pages on the website have been updated, such as when—

- new issues of *The Loophole* or *CALC Newsletter* are published,
- new advertisements are added to the Employment page, and
- new items are added to the "What's New?" page (eg, webinar recordings).

Instructions on how to use the RSS feed are available on the home page of the CALC website: www.calc.ngo.

If members have any suggestions for material that can be added to the website, please contact Ross at Ross.Carter@pco.govt.nz.

The Loophole

The Editor-in-Chief of The Loophole, John Mark Keyes, reported that the next issue was close to publication. It has now been published. John Mark noted that there is a ongoing need for more material for publication.

The Loophole is CALC's flagship publication, and I urge CALC members to consider submitting material for publication.

Please contact John Mark Keyes at calc.loophole@gmail.com for more information about submitting material for publication.

Best wishes

Best wishes to all CALC members and their families, friends and colleagues.

Please feel free to contact me or any CALC Council member about any matter relating to CALC. I can be contacted on geoff.lawn@pco.wa.gov.au. Contact details for other CALC Council members are in the Members' Area on the CALC website. See https://www.calc.ngo/contact-details-calc-council.

As this is the last *CALC Newsletter* for 2021, I wish all of you the compliments of the season, and a safe and productive 2022.

Stay safe.

Geoff Lawn

CALC President, November 2021

Responses to CALC's strategic planning survey 2021

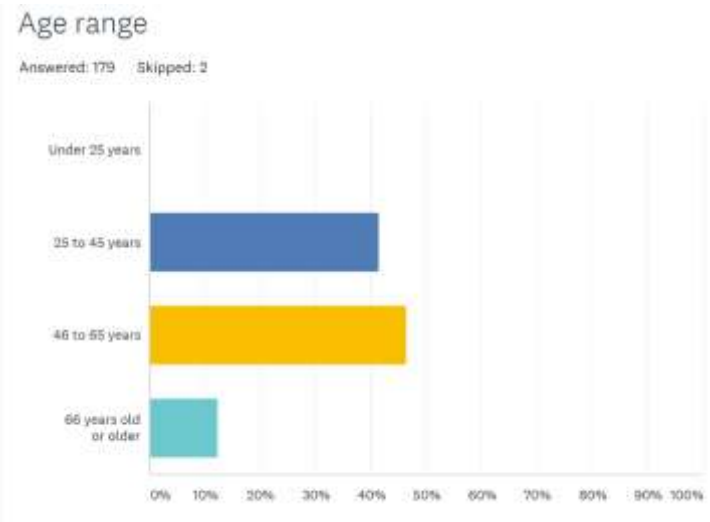
Thanks for helping shape the future of CALC

Many thanks to the 181 respondents to CALC's strategic planning survey.

CALC's Council is very pleased with the responses and the data obtained.

All but 6 of the 181 respondents were CALC members. 30% of respondents were also members of other law-related organisations. Most of the CALC members were drafters, but it was pleasing to see responses also from editors and translators of legislation, and from trainers of drafters of legislation. There was a good geographical spread. Respondents were also from a pleasing range of settings (law drafting offices, law reform bodies, government departments or agencies, law drafting consultants, law teachers, judges, retired drafters, lawyers in private legal practice interested in CALC's objects and activities).

There was an almost exact 50/50 gender balance among respondents, with the age range as follows:



Reponses were from CALC regions as follows:

- Africa (10.78%);
- Americas (17.37%);
- Asia (8.38%);
- Australasia and the Pacific (32.93%); and
- Europe (30.54%).

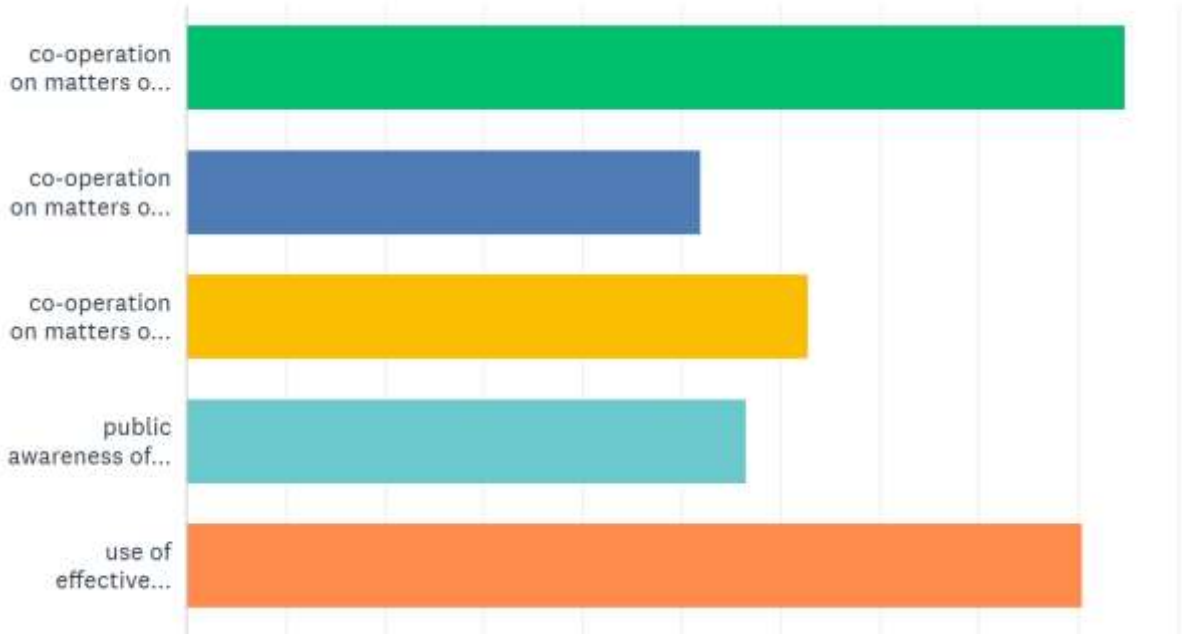
Respondents identified many particular issues or challenges facing their region that CALC should address. These included the following:

- support for drafters, and drafters gaining experience, in small jurisdictions
- plain language and clarity of the law
- the training of junior drafters and retention strategies
- drafting in multi-lingual jurisdictions
- the use of technology in legislative drafting

- drafter exchange and secondment programs
- training in revision and publication of laws
- the continuing impact of Brexit.

Summary of responses

CALC's current objects and activities are generally considered to be appropriate.



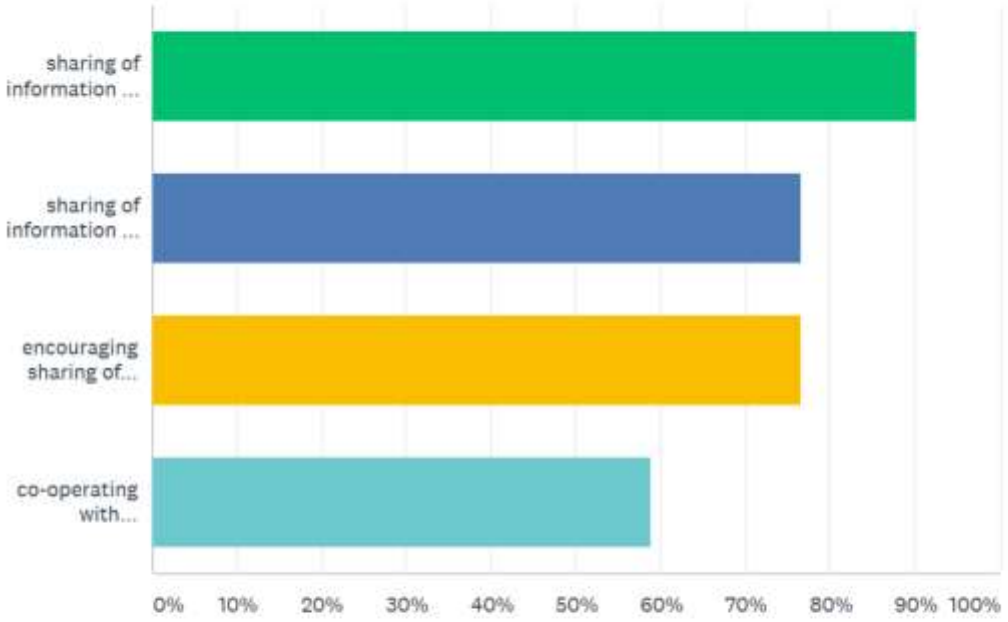
ANSWER CHOICES		RESPONSES	
co-operation on matters of common interest among legislative drafters:		94.87%	148
co-operation on matters of common interest among legislative editors or translators:		51.92%	81
co-operation on matters of common interest among trainers of legislative drafters:		62.82%	98
public awareness of, or information on, legislative drafting and legislative drafters' role:		56.41%	88
use of effective legislative drafting practices and techniques.		90.38%	141
CALC should also consider promoting the following other objects: [state]	Responses	0.00%	0

Total Respondents: 156

CALC's general activities are also considered to be appropriate.

Are CALC's general activities appropriate?CALC's most important current activity(ies) is or are (select all that apply):

Answered: 153 Skipped: 28



ANSWER CHOICES	RESPONSES	
sharing of information and assistance on preparing, enacting, and publishing legislation	90.20%	138
sharing of information on recruitment, training, and retention, of legislative drafters	76.47%	117
encouraging sharing of comparative legal materials and precedents	76.47%	117
co-operating with appropriate organisations on matters of common interest.	58.82%	90

Total Respondents: 153

Some perennial issues were raised (eg, drafter shortages and training, skills transfer, maintaining drafting standards, opportunities for regional conferences). New areas were also raised for consideration. These include the following:

- the development of model laws
- promoting the awareness of drafting principles
- encouraging public recognition and the importance of the role of drafters
- encouraging young law students to pursue a career in legislative drafting
- a buddy or mentor scheme for legislative drafters (particularly for more junior drafters)
- encouraging more interaction with academics and the judiciary about legislative drafting
- more activities and sharing of information with respect to legislation editors/translators.

Many respondents considered that these are the current challenges that matter most for CALC:

- technology (eg, drafting and publication tools, automated decision making, Rules as Code) -- 72.08%:
- as lawyers, maintaining the Rule of Law, and addressing other Rule of Law issues -- 59.74%:
- working with others to produce high-quality legislation (including editing and translation) -- 68.83%.

Respondents overwhelmingly considered CALC webinars, and CALC information on non-CALC webinars of interest, to be useful or very useful, especially as the ability to travel has been affected by COVID-19.

What people would value if an in-person main CALC Conference is held in the Bahamas in 2022

To the question about what people would value if an in-person main CALC Conference is held in the Bahamas in 2022, responses were as follows:

	1 = NOT MUCH	2	3	4	5 = VERY HIGHLY	TOTAL	WEIGHTED AVERAGE
attending in person (instead of by live webinar, or by recordings available later)	22.39% 30	5.97% 8	15.67% 21	23.13% 31	32.84% 44	134	3.38
attending remotely via live webinar	5.34% 7	13.74% 18	18.32% 24	29.01% 38	33.59% 44	131	3.72
viewing recordings made available afterwards	6.72% 9	6.72% 9	23.88% 32	26.87% 36	35.82% 48	134	3.78
linking with the CLA's Commonwealth Law Conference (for in-person attendance at both)	41.23% 47	14.04% 16	20.18% 23	16.67% 19	7.89% 9	114	2.36

[Note: the opportunity has now passed for CALC's linking with the CLA's Commonwealth Law Conference held in September 2021 in The Bahamas.]

Respondents indicated the topics they considered of most interest as follows:

ANSWER CHOICES	RESPONSES	
role of legislative counsel	65.33%	98
diversity and (in)equality (eg, age, gender, race, religious belief, sexual orientation, disability)	38.00%	57
drafting techniques (eg, plain language) and theory (eg, skills-based training)	84.67%	127
training of drafters	69.33%	104
technology (eg, drafting and publication tools, automated decision making, Rules as Code)	68.67%	103
publication of legislation	41.33%	62
editing or translation of legislation	31.33%	47
multi-lingual legislation	32.00%	48
rewriting and updating, revision, or consolidation, of legislation	66.00%	99
legislative case studies (eg, emergencies, large or complex Bills, model laws)	64.00%	96
law drafting office administration and processes	42.67%	64
statutory interpretation, including with judge-made law	60.00%	90
constitutional law, especially law or practice related to human rights or legislative procedure	46.00%	69
legislation about legislation (eg, drafting, publication, interpretation, general clauses)	64.67%	97
organisation of statute book (legislation in force)	43.33%	65
judicial or law reformers' viewpoints on legislation and legislative drafting	52.00%	78
legislation-related history, personalia, or literature (eg, textbooks, articles, book reviews)	38.00%	57

CALC website, publications (The Loophole and CALC Newsletter), and email updates

Responses showed both strong support and appreciation for, plus ideas to improve, these resources and activities for the benefit of CALC members.

CALC's relationships with other organisations

Responses showed that respondents value a lot CALC's co-operating with related organisations.

They also helped identify other organisations that CALC should develop a closer relationship with.

Other ideas on how CALC should develop

Respondents also provided other ideas on how CALC should develop in the future.

Some interesting suggestions include the following:

- conducting research into the opportunity costs of poorly drafted legislation and the causes of poor legislation
- providing instructional webinars that would include an exam leading to a diploma in legislative drafting
- more consciously cater for academics and legal practitioners with an interest in legislative drafting
- create a private group on social media such as Facebook and Yammer so CALC members can communicate in real time
- more networking opportunities for junior drafters, such as a junior drafters' panel at a CALC conference or more informal online discussion groups.

Next steps – development of draft strategic plan

When circulating the survey, it was stated that:

- the objective is to develop a strategic plan that will identify how CALC needs to develop in the future to better serve its members:
- the Council will present the plan to the next conference:
- the strategic planning exercise will also assist the Council to plan for the next conference.

CALC's Council is now using the survey responses to help develop a draft strategic plan.

Australian Government OPC, Canberra, Australia: Meredith Leigh new First Parliamentary Counsel

Congratulations to Meredith Leigh on her appointment as the new First Parliamentary Counsel, Australian Government Office of Parliamentary Counsel (OPC), Canberra.

Australian Government

Attorney-General for Australia and Minister for Industrial Relations

Appointment of First Parliamentary Counsel

Media Release 5 October 2021

I am pleased to announce the appointment of Ms Meredith Leigh as the new First Parliamentary Counsel, the head of the Office of Parliamentary Counsel.

Ms Leigh brings a wealth of expertise and experience to the role having held a variety of positions at the Office of Parliamentary Counsel since 1998. She has been involved in the drafting of over 350 Commonwealth Bills and over 150 Commonwealth instruments.

The office of First Parliamentary Counsel plays an important role in the advancement and maintenance of high quality legislation. Ms Leigh is highly regarded and her appointment to this specialised role will be widely welcomed.

The Office of Parliamentary Counsel is the Commonwealth's principal provider of professional legislative drafting and publishing services. It provides drafting and advisory services for Bills, legislative instruments and other instruments, as well as comprehensive public access to Commonwealth legislation through the Federal Register of Legislation site.

Ms Leigh will commence her seven year appointment on 11 October 2021.

I take this opportunity to thank Ms Leigh for acting as First Parliamentary Counsel while the merit selection process was conducted.

On behalf of the Australian Government, I congratulate Ms Leigh on her appointment.

Biography

Ms Leigh holds a Bachelor of Arts, Bachelor of Laws and a Master of Laws. She was admitted as a legal practitioner to the Supreme Court of NSW in 1997. Ms Leigh joined the Office of Parliamentary Counsel in 1998 and served as Assistant Parliamentary Counsel, Senior Assistant Parliamentary Counsel and First Assistant Parliamentary Counsel before being appointed as Second Parliamentary Counsel in 2016.

Jersey LDO and CALC webinars on editing, consolidating and publishing legislation

LEGISLATIVE DRAFTING OFFICE
Turning policies into Jersey law

Jersey Legislative Drafting Office (LDO) and CALC hosted 2 webinars for legislation editors and translators on 8 and 9 September 2021.

These webinars were a great success, as shown by—

- the good level of response to the webinars – 70 participants; and
- a results survey, which elicited a lot of very positive feedback plus suggestions for future webinars.

Jersey LDO staff who organized the webinars (including especially Lucy Marsh-Smith and Kate Hannah) are very much to be commended for their efforts in making possible the webinars. Many thanks also to the presenters in the 2 webinars: Lucy Marsh-Smith, Jersey; Heather Mason, Jersey; Guto Dafydd, Wales; Christina Wasyliw, Manitoba; Joanna Sharp, Yukon; Siobhan Mahoney-Bougourd, Guernsey; Yen Mascarenhas, Western Australia; and Kate Hannah, NSW/Jersey.

The webinars were a unifying exercise for editors, revisers, and translators, and showed that their role is an indispensable part of the legislative drafting process and that there is a role for a network for them.

CALC has noticed a distinct increase in membership applications from editors and translators.

The webinars showed that CALC could do more to address the interests of editors and translators. Perhaps editors and translators could take forward their work as a group (perhaps a session at a CALC conference devoted to that group).

If you missed the webinars, but would like to view on-demand recordings of them plus slides for them, please login at www.calc.ngo and go to the Members' area: https://www.calc.ngo/members.

See also Kate Hannah's item, about these webinars, on the next page.

Making webinar connections

by Kate Hannah

The Jersey Legislative Drafting Office hosted two webinars, on the Jersey evening of the 8th and morning of the 9th September, for editors and translators of legislation. The theme of the webinars was "Connections: Legislative editing across continents and nearer to home".

Lucy Marsh-Smith (head of the Jersey LDO) set the scene by describing the professional skills and contribution of editors and translators of legislation, and the benefits of sharing ideas, tools and experiences. She was followed across the two webinars by speakers from Jersey, Guernsey, Wales, Australia and two Canadian provinces (including a heroic effort by Christina in the middle of the night), and an interloper from across jurisdictions (that was me). Listening in were people from those jurisdictions, as well as from the Seychelles, Isle of Man, Cayman Islands, Ireland, South Africa, Singapore, Brunei, Kenya and more.

1. What skills do you look for at recruitment - what makes someone right? How do you train new and existing staff to retain skills and develop them?
2. What is in your Editor's/Translator's Toolkit?
    - how do you work, electronically/paper/audio etc?
    - what resources do you use to help your editorial work? eg
        - knowledge management tools like a wiki or a paper collection or advice?
        - paper or electronic compendiums or precedent text collections?
        - electronic checking tools run over files or built-in drafting tool controls?
        - document management systems for tracking, reviewing and organising work?
        - other things?
    - what is your favourite tip or tool?
3. How do you see the role or methods that you use developing? How has your work changed recently, or what would you like to change?

The webinars were loosely crafted around these questions:

Speakers covered elements of recruitment, especially the necessity of an eye for detail, and training tools such as mentoring and reading lists, role/placement rotation and the unavoidability of on-the-job legislation learning because it is a specialised field. They also delved into the tools they use such as exclusion dictionaries, supplementary dictionaries, space and other format checkers, text glossaries, citation checkers, text matching tools and the benefits of translation comparisons and other text review. There were also spreadsheet work and deadline trackers, checklists of different kinds and considerations for managing them, and if and how they are retained. We looked also at drafting manuals at various stages (some established, others works in progress) and under various names and

their update process and cycles, including touching on who updates them (often taken up by editors), and the alternative or companion option of a wiki.

There was a great range of approaches to work and tools in use, and also lots of common ground in many areas, especially relating to the type of skills needed in the editor or translator role. It was also clear that there is much more to discuss on these and other questions.

The full list of speakers across the 2 webinars (in different combinations) was:

- Lucy Marsh-Smith, Principal Legislative Drafter, Legislative Drafting Office, Jersey
- Heather Mason, Legislation Editor, Legislative Drafting Office, Jersey
- Siobhan Mahoney-Bougourd, Legislation Editor and Information Manager, Law Officers of the Crown, Guernsey
- Guto Dafydd, Head of the Legislative Translation Unit, Wales
- Christina Wasyliw, General Counsel & Deputy Legislative Counsel, Legislative Counsel Division, Manitoba Justice, Manitoba
- Joanna Sharp, Legislative Editor, Justice, Legislative Counsel Office, Yukon
- Yen Mascarenhas, Senior Legislation Officer, Parliamentary Counsel's Office, Western Australia
- Kate Hannah, Legislation Services Consultant (currently working for Jersey LDO), formerly employed in NSW Parliamentary Counsel's Office

Very great thanks to all of them for their time, generosity and inspiring talks and presentations.

Thank you also to everyone who joined the webinar, to the CALC Council for support and advice and helping to make it all happen, and to the LDO team for their work behind the scenes, especially Brenda DeLouche.

Did you miss the webinars or want to catch up with them again? The recordings of the webinars are available from the members section of the CALC website: https://www.calc.ngo/members.

Not a member? Why not become one today – see http://www.calc.ngo/user/register.

Would you like to run something similar? Get in contact with Ross Carter (Ross.Carter@pco.govt.nz), CALC Secretary, for discussions on format, topics and support from CALC. There is lots of interest and lots of ideas to explore, so give it a go!

Kate Hannah, Legislation Services Consultant (currently working for Jersey LDO), formerly employed in NSW Parliamentary Counsel's Office

Lucy Marsh-Smith interviews Lady Hale

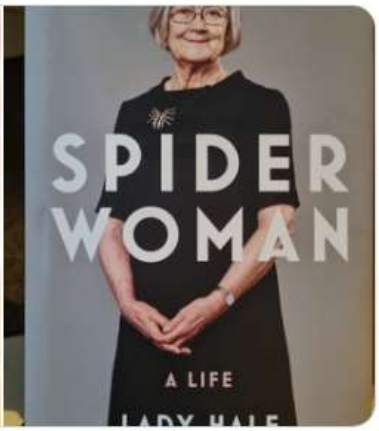
Legislative Drafting Office, Jersey
@JerseyLDO

Delighted that Baroness Hale (former President of the UK's Supreme Court) found time to call in on our team meeting today
A fascinating discussion included-
🔸 comparing Jersey & UK legislation
🔸 whether gender-neutral drafting should lead to using the singular "they"
#LadyHale 🕷

3:39 AM · Oct 20, 2021 · Twitter Web App

4 Retweets **2** Quote Tweets **23** Likes

Legislative Drafting Office, Jersey @JerseyLDO · Oct 20
Replying to @JerseyLDO
Lady Hale is in Jersey talking about her book "Spider Woman", and being interviewed about her life by @LucyMarshSmith1 (head of our office) for the Jersey Gilbert and Sullivan Society's 40th anniversary celebrations at @JsyArtsCentre last night & tonight



Jersey – visit to LDO by Lady Hale

Baroness Brenda Hale, former president of the Supreme Court of the United Kingdom, travelled to Jersey in October to join in the 40th anniversary celebrations of the Jersey Gilbert and Sullivan Society.

While she was in the island she visited Jersey's Legislative Drafting Office and joined in a team meeting.

A fascinating discussion ranged across many subjects including the usefulness or otherwise of purpose clauses (with a New Zealand angle from one of our team), and whether gender-neutral drafting principles should now lead to using the singular "they".

In another first for the office, this led to the office appearing in the gossip columns – or at least the "Steerpike" column (billed as "the latest tittle tattle from Westminster and beyond") in *The Spectator* on 25th October.

Visit to Gibraltar drafting office 1.11.21 and connections beyond

Gibraltar – CALC Europe region rep Lucy Marsh-Smith seems to be on a mission to visit the drafting offices of the region outside of the UK, starting with Gibraltar on 1st November 2021. This was after, having spent some of the weekend being treated to some of the sights by office head Paul Peralta.

Lucy met all but 2 of the 9-strong drafting team, which is part of the AG's department and now separate from the advisory counsel. The drafters occupy an interest old building with lintels above internal doors. Apparently, it was originally occupied by soldiers and was probably parts of a courtyard later roofed in.

The drafters are now entirely home grown which is impressive for a small jurisdiction. Relationship with Ministers is close and there aren't the same detailed instructions from policy officers that occurs in most jurisdictions, posing an additional dimension of challenge to this hard-working team. Brexit has clearly generated a lot of work, as has Covid. In both these areas Gibraltar is unique because of their relationship with Spain and the reliance on migrant workers, meaning that the border always needed to remain open.
So soon after the editors' conference Lucy was keen to ask about support services for the drafters, but this seems to be confined to the consolidations for their newly revamped website www.gibraltarlaws.gov.gi. Lucy met Jason, the member of the AG's Department who has the important job of keeping the website up to date (from the photo you can see he is a bit shy). There is point in time

going back to 1984 (though not 100% verifiable). A time-line is accessible for each piece of legislation, showing each update and from when it applied, so you can select which date in the past to use.

Left: Paul Peralta who seems to be hiding behind the biggest computer screen of any drafter.
Right: Jason doing consolidations.

Isle of Man – Later in November 2021 Lucy made a brief visit to the Isle of Man drafters encountering some faces old and new. The Manx drafters are responsible for drafting Acts of Tynwald but there is also a team of officers who draft secondary legislation now working in the AG's Chambers who in Lucy's day were housed in their respective policy departments. A key member of Chambers is Jayne Hubble, who recently attended the Editors' Forum. Like Jason in Gibraltar, she keeps www.legislation.gov.im up to date, amongst her other responsibilities. A recent significant achievement for the Isle of Man is the long-awaited consolidation of secondary legislation which will eventually lead to the whole Manx statute book being available on-line in and up to date. With Guernsey joining Jersey in having an established editor post, it is planned for the 3 Crown Dependencies to have an on-line network to share ideas, especially as Jersey and Isle of Man both use the iLaws template. Following the editors' event Jersey has already shared its exclusion dictionary.

Guernsey – Finally – though she may not have told them yet – Lucy has planned a pre-Christmas visit to the Guernsey drafters and their editor, so we may hear more from the Channel Islands next time.

Lucy outside the main Government office, Gibraltar.

New Zealand – Casenote: NZSC decision in *Trans-Tasman Resources*

In *Trans-Tasman Resources Limited v The Taranaki-Whanganui Conservation Board* [2021] NZSC 127, the Supreme Court's Judges said that Treaty of Waitangi clauses "must be given a broad and generous construction. An intention to constrain the ability of statutory decision-makers to respect Treaty principles should not be ascribed to Parliament unless that intention is made quite clear."

The appellant sought marine consents and marine discharge consents in order to undertake seabed mining within New Zealand's exclusive economic zone. By a majority decision, the decision-making committee (DMC) of the Environmental Protection Authority granted the application for consents with conditions under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (the EEZ Act). The first respondents successfully challenged the DMC decision in the High Court as wrong in law. The Court of Appeal dismissed the appellant's appeal, upholding the High Court's decision to quash the decision of the DMC and refer the matter back for reconsideration. The appellant was granted leave to appeal to the Supreme Court on the question of whether the Court of Appeal was correct to dismiss the appeal.

In considering the effect of the Treaty of Waitangi clause in s 12 of the EEZ Act, all members of the Supreme Court agreed that a broad and generous construction of such Treaty clauses, which provide a greater degree of definition as to the way Treaty principles are to be given effect, was required. (At [150]–[151] per William Young and Ellen France JJ, [237] per Glazebrook J, [296] per Williams J and [332] per Winkelmann CJ.)

An intention to constrain the ability of statutory decision-makers to respect Treaty principles should not be ascribed to Parliament unless that intention is made quite clear. (At [149] per William Young and Ellen France JJ, [237] per Glazebrook J, [296] per Williams J and [332] per Winkelmann CJ.)

Here, s 12(c) provided a strong direction that the DMC was to take into account the effects of the proposed activity on existing interests in a manner that recognises and respects the Crown's obligation to give effect to the principles of the Treaty.

It followed that tikanga-based customary rights and interests constitute "existing interests" for the purposes of the s 59(2)(a) criterion, including kaitiakitanga and rights claimed, but not yet granted, under the Marine and Coastal Area (Takutai Moana) Act 2011. (At [154]–[155] per William Young and Ellen France JJ, [237] per Glazebrook J, [296]–[297] per Williams J and [332] per Winkelmann CJ.) For the purposes of the EEZ Act, tikanga Māori has the same meaning as in s 2(1) of the Resource Management Act 1991, definition, that is, "Maori customary values and practices".

Further, drawing on the approach to tikanga in earlier cases such as *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 (SC), all members of the Court agreed that tikanga as law must be taken into account by the DMC as "other applicable law" under s 59(2)(l) of the EEZ Act where its recognition and application is appropriate to the particular circumstances of the consent application at hand. (At [169] per William Young and Ellen France JJ, [237] per Glazebrook J, [296]–[297] per Williams J and [332] per

Winkelmann CJ. Williams J at [297] (with whom Glazebrook J agreed at n 371) wished to make explicit that these questions must be considered not only through a Pākehā lens.)

Natalie Coates, legal counsel for Te Kāhui O Rauru, who appeared for the iwi in both the Court of Appeal and Supreme Court, told Radio New Zealand the Supreme Court's decision was precedent-setting:

> "This is an exciting day for iwi. The Supreme Court decision is precedent setting and will have implications beyond the specific EEZ Act.
>
> "The Court has given strong and clear direction about the central role that Te Tiriti has in our constitution and in the law that will guide how all Treaty clauses in legislation are interpreted in the future. Tikanga was also affirmed as being part of our law."

A report in the *New Zealand Herald* on 30 September 2021 says Trans-Tasman Resources believes it now has an open pathway to getting consent, via reconsideration by the EPA, to carry out seabed mining from offshore Pātea. A report in the *Whanganui Chronicle* on 29 October 2021 says Trans-Tasman Resources has formally asked the EPA to reconsider its consents to mine iron-sand offshore from Pātea. The report also indicates that there continues to be significant opposition to the proposal, including from South Taranaki iwi Ngāti Ruanui, and from environmental groups including Kiwis Against Seabed Mining.

New Zealand – Casenote: NZSC decision in *Fitzgerald*

The Supreme Court's 7 October 2021 decision in the case of *Fitzgerald v R* [2021] NZSC 131 exemplifies rights-consistent interpretation under s 6 of the New Zealand Bill of Rights Act 1990 (the Bill of Rights).

Background

The Sentencing Act 2002 was amended in 2010 to incorporate a "three strikes" regime, providing mandatory sentencing for certain categories of repeat offenders. This appeal concerned application of that regime in circumstances where the resulting sentence on conviction for a "third strike" offence is so disproportionately severe as to breach s 9 of the Bill of Rights.

The appellant suffers from long-standing and serious mental illness. He committed a third strike offence in December 2016 when he approached a woman on Cuba Street, Wellington, and attempted to kiss her mouth. She moved her head so that he kissed her cheek instead.

The appellant was convicted of indecent assault in respect of this conduct. Because this was a third strike offence, he was sentenced in the High Court under s 86D(2) of the Sentencing Act to 7 years' imprisonment (the maximum sentence for indecent assault), even though the offending was at the lower end of the range for the offence, and despite his mental health condition being linked to the offending.

The appellant applied for a discharge without conviction for the offence of indecent assault under s 106 of the Sentencing Act, which provides that "the court may discharge the offender without conviction, unless by any enactment applicable to the offence the court is required to impose a minimum sentence". The High Court Judge held that a discharge without conviction was not available for third strike offences, as the Court was required to impose a minimum sentence.

The appellant appealed his conviction and sentence to the Court of Appeal. He argued that the Court could and should discharge him without conviction, as to do otherwise would be inconsistent with s 9 of the Bill of Rights. Section 9 affirms that everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment. The majority of the Court of Appeal agreed with the High Court Judge that a discharge without conviction was not available for third strike offences.

Issues on appeal

Leave to appeal was granted on the question of whether the Court of Appeal was correct to find that s 106 of the Sentencing Act did not apply to the appellant.

An alternative argument was raised during the hearing, after which the Court amended the grant of leave. The question added by that amendment was whether s 86D(2) of the Sentencing Act should be interpreted as subject to a limitation that the requirement to sentence an offender to the maximum sentence does not apply where to do so would constitute a breach of s 9 of the Bill of Rights and New Zealand's international obligations.

It was common ground between the parties that the sentence imposed on the appellant was disproportionately severe, in breach of s 9.

Appellant's arguments on the appeal

The appellant argued that interpreted in light of the Bill of Rights, a discharge without conviction was available for third strike offences. In the alternative, the appellant submitted that it is possible, through ordinary methods of statutory interpretation, to read a proviso into s 86D(2) that the maximum sentence need not be imposed where the sentence would be in breach of s 9 of the Bill of Rights.

Crown's argument on the appeal

The Crown argued that the clear wording of s 106 excludes the discretion to discharge without conviction for third strike offences, and that to find otherwise would override the purpose of the three strikes regime and create perverse outcomes. As to the s 86D(2) issue, it said that a rights-consistent interpretation of s 86D(2) is not available due to the clear statutory language and purpose.

Decision – effect of breach of s 9 – implied exception to s 86D(2)

By majority, comprising Winkelmann CJ, Glazebrook, O'Regan and Arnold JJ, the Supreme Court allowed the sentence appeal.

Winkelmann CJ, Glazebrook, O'Regan and Arnold JJ agreed that the appellant's sentence was so disproportionately severe as to breach s 9 of the Bill of Rights, and that this right is not subject to reasonable limits under s 5. They held that Parliament did not intend, in enacting the three strikes regime, to require judges to impose sentences that breach s 9 of the Bill of Rights and New Zealand's

international obligations. They considered it possible, and therefore necessary, to interpret s 86D(2) so that it does not require the imposition of sentences that would breach s 9. Glazebrook, O'Regan and Arnold JJ held that where the maximum sentence produced by s 86D(2) would breach s 9, an offender should instead be sentenced in accordance with ordinary sentencing principles.

Winkelmann CJ agreed that ordinary sentencing principles will apply, but considered that s 86D(2) adds a sentencing principle that recidivism by those caught by the regime is to be viewed as very serious and worthy of a stern sentencing response.

William Young J was of the view that the language, scheme and purpose of the three strikes regime do not allow for the interpretation reached by the majority. He would construe s 86D(2) as not being subject to any exception.

Decision – discharge without conviction

All members of the Court dismissed the appellant's application for a discharge without conviction.

Glazebrook, O'Regan and Arnold JJ held that in the rare cases where the three strikes regime will not apply because the maximum sentence required under it would breach s 9, a discharge without conviction will be available as part of the usual suite of sentencing options, including in this case. For the purposes of the appeal, it was unnecessary for them to determine whether a discharge without conviction would be available where a third strike sentence does not breach s 9.

Winkelmann CJ considered that the discharge without conviction jurisdiction is available for offenders found guilty of a third strike offence, applying the usual principles for the exercise of that discretion, whether or not the resulting sentence would breach s 9 of the Bill of Rights. However, she acknowledged that usually, third strike offending viewed in its overall circumstances will place it outside the category of case where a discharge without conviction would be appropriate. She found that the present case came very close to being one of the rare third strike cases in which a discharge would be appropriate, and might have been such a case were it not for public safety concerns.

William Young J considered that the power to discharge without conviction is not available where the three strikes regime applies because the regime imposes a minimum sentence and, even if it were available, a discharge would not be appropriate in this case.

Disposition

Based on the conclusion of the majority on the sentence appeal, the matter was remitted to the High Court so that the appellant could be re-sentenced in accordance with ordinary sentencing principles, taking into account his significant mental health issues.

Resentencing

Fitzgerald spent four years and a half years in Rimutaka Prison after the indecent assault in 2016. Following the Supreme Court's 7 October 2021 decision, Newshub reported that Fitzgerald was resentenced by the High Court to 6 months in prison with no conditions (see also *Stuff* item):

> "He has served way too long," Justice [Simon] France told the [High] court.
>
> Because Fitzgerald has already served that time he will be processed for release into temporary supervised accommodation.
>
> In response, he [Fitzgerald] said "thank you" to the judge as he started his first day of freedom after more than four years behind bars.

Detailed analysis of meaning and effect of s 6 – Winkelmann CJ

"The meaning and effect of s 6 of the Bill of Rights lies at the heart of this appeal", said Winkelmann CJ (at [12]).

Chief Justice Winkelmann's key reasons proceed under these questions, and include these answers:

(a) What is the relationship between the s 6 direction and other possible meanings? In particular, what role does s 5 of the Interpretation Act [1999, replaced by s 10 of the Legislation Act 2019] play in the s 6 interpretive exercise?

- "since *Hansen*, this Court has said that the six-step methodology does not apply to the exercise of statutory powers: *D v New Zealand Police* [2021] NZSC 2, (2021) 29 CRNZ 552 at [101]–[102] per Winkelmann CJ and O'Regan J and [259], n 361 per Glazebrook J. . . ([46], n 66) Since *Hansen*, various commentators have argued that there is a lack of clarity in the majority's six-step test and uncertainty as to when it is to apply. In this case, however, no issue arises under s 5. There can be no limits placed upon the s 9 right that could be counted as reasonable. I do not, therefore, propose to apply the *Hansen* methodology in this case, but rather address myself to the statutory framework of ss 3, 4 and 6. [See *Cropp v Judicial Committee* [2008] NZSC 46, [2008] 3 NZLR 774 at [33] for an example of this approach.]": [46]-[47].
- "s 6 is naturally read as creating a starting presumption that a rights-consistent meaning should be given to enactments where the application of that enactment to a particular case engages the affirmed rights and freedoms, in the sense that it touches upon those rights and freedoms. And it makes clear that a rights-infringing interpretation is to be avoided where possible. This construction of s 6 is consistent with the rights-affirming and promoting purpose of the Bill of Rights, placing Bill of Rights-consistency at the heart of the statutory interpretation process. For this reason, I see s 6 as the central provision and the starting point for the interpretive task where the application of an enactment to a particular case engages the affirmed rights and freedoms": [48].
- "What of the relationship between s 6 of the Bill of Rights and s 5 of the Interpretation Act, the latter of which focuses the interpretive task upon text and statutory purpose? Another way of characterising s 6 is that it is a direction to the courts that they should presume a statutory purpose that the application of the enactment that falls to be construed does not breach the affirmed rights or freedoms, unless the language of the statute clearly excludes that possibility. On this approach, s 6 reconciles readily with s 5

of the Interpretation Act in the sense that s 5 is allowed its usual operation. Where legislation engages an affirmed right or freedom, by reason of s 6, one of the purposes to which s 5 of the Interpretation Act directs the court is Bill of Rights-consistency. But where the language is clear enough to exclude the possibility of a rights-consistent purpose and effect, s 5 of the Interpretation Act applies to give effect to the remaining (rights-inconsistent) text and purpose.": [49].

- "The latter proposition also flows out of and is consistent with the s 4 direction that the courts cannot decline to apply any provision or enactment and cannot hold any provision to be impliedly repealed, revoked, invalid or ineffective, by reason only that the provision is inconsistent with any provision in the Bill of Rights.": [50].
- "The [principle of legality] is a common law principle of statutory interpretation which exists independently of the Bill of Rights, to protect and uphold certain rights and values that the common law has identified as fundamental or as having a constitutional nature. Although it operates to protect the rights and freedoms affirmed in the Bill of Rights, it is not displaced or confined by the Bill of Rights. As a common law principle it continues to develop, as seen in recent decisions of the United Kingdom Supreme Court and the decision of this Court in *D v New Zealand Police*. . . . in *D v New Zealand Police*, . . . the majority of this Court endorsed the statement that Parliament cannot abridge fundamental rights and freedoms by general or ambiguous words. The majority found that parliamentary materials suggesting a rights-infringing purpose were insufficient to abridge those rights and freedoms, in the absence of express words in the statute or a necessary implication arising from the words of the statute.": [51]-[53].
- "Clearly, s 6 incorporates aspects of the principle of legality in relation to the affirmed rights and freedoms, in that courts applying it will proceed on the basis that clear words are needed if legislation is to be construed as abridging fundamental freedoms. Just as with the principle of legality, it is the language of the statute which must be clear enough to exclude the possibility of a rights-consistent purpose and effect – it is not enough that parliamentary materials might suggest this. . . . But the s 6 direction is not simply a statutory embodiment of the principle of legality. It requires that when the courts undertake the interpretive exercise, they must presume a rights-consistent purpose. Section 6 therefore mandates a more proactive approach to interpretation – proactively seeking a rights-consistent meaning. Hence . . . the interpretive principle contained in rights-charters such as New Zealand's Bill of Rights is distinct from the orthodox formulation of the principle of legality in that it allows for "reading down otherwise clear statutory language, adopting strained or unnatural meanings of words, and reading limits into provisions". . . It may be, therefore, that in some cases s 6 will go further than the principle of legality.": [55]-[57].

(b) Just how far should a court go in the interpretive exercise to find a rights-compliant interpretation?

- "The next issue that arises is how far the courts should go in striving for a rights-consistent meaning. The answer is to be found in a conventional analysis of ss 4 and 6. I start with s 6, which is where the interpretation process should start. The rights-consistent meaning must only be possible – it need not be the most likely meaning or even a likely meaning. In *Hansen*, 'possible' was construed as meaning reasonably

possible. . . if the word ['possible'] means no more than 'tenable', as Tipping J suggests in *Hansen*, I am content with it, since that is consistent with the words of s 6 itself: a meaning that 'can be given'.": [58].

- "Section 6 makes clear that it must be possible to arrive at the rights-consistent meaning *through the process of interpretation*. This is familiar territory for courts. It is the courts' constitutional function to interpret and apply legislation enacted by Parliament, and the courts have a range of common law techniques to assist with this. Which of these techniques is appropriate in any given case may vary depending upon the nature of the right and upon the nature of the breach that is sought to be avoided.": [59].
- "Section 4 sets the outer limits of what is possible – the meaning arrived at cannot amount to a refusal to apply the enactment, and nor can it amount to treating the enactment as invalid, ineffective, impliedly repealed or revoked.": [60].
- "Reaching a meaning different to the plain or ordinary meaning is a conventional outcome of statutory interpretation, where that is necessary to correct errors in statutory expression and to achieve clear legislative purpose.": [61].
- "'Reading in' and 'reading down' provisions in order to align with parliamentary purpose are two closely connected and commonly employed techniques of statutory interpretation. Courts have long 'read down' broadly expressed statutory powers and provisions so as to align with the purpose of the legislation, including by 'reading in' significant qualifications.": [62].
- "There is, of course, a line to be drawn between what is legitimate interpretation and what is illegitimate judicial amendment of a provision. Just where this line lies is a question of constitutional significance. The most obvious limit on s 6 comes by way of s 4, as I mentioned above at [60] – the rights-consistent meaning must not entail a refusal to apply the legislative provision.": [66].
- ". . . reading in or reading down a provision to reach a rights-compliant interpretation will be illegitimate if that interpretation is inconsistent with the scheme of the legislation or with its essential principles. . . the purpose of the enactment, as gleaned from the words of the enactment itself and the statutory context, may mean that the rights-compliant interpretation is not possible without disapplying the legislation in question in some way, which s 4 precludes. . . . Another recognised limitation is where the rights-consistent interpretation imposes on the court a task beyond its institutional competence.": [67]-[69].
- "In summary, therefore, s 6 is a powerful interpretive obligation that complements and strengthens the use of common law purposive interpretive techniques together with the principle of legality. But meanings reached by way of s 6 must still be arrived at through the process of interpretation. Where the language of a provision is clear enough to exclude the possibility of a rights-consistent meaning, s 4 requires the courts to give effect to the rights-inconsistent meaning."

As to the particular issue, Winkelmann CJ concluded:

- "when deciding between this broad interpretation of s 86D for which the Crown contends, and a narrower one which would exclude the Bill of Rights from the enactments referred to

[in s 86D(2)], it must be recalled that s 6 requires a rights-consistent interpretation where that is possible. And there are several reasons here why the narrow meaning [of the introductory words 'despite any other enactment'] is both possible and to be preferred.": [114].

- "there is logic to reading those introductory words as being directed primarily at other provisions within the Sentencing Act which would require a lesser sentence to be imposed": [115].
- "The presumption of rights-consistency (and therefore the conclusion that Parliament did not intend to exclude the Bill of Rights by way of the words 'despite any other enactment') applies with particular force in this case for two reasons. First, the right in question is one in respect of which no permissible derogation has been recognised, either at international law or common law. To impose a sentence in breach of this provision entails not only a breach of one of the fundamental rights running through the common law, and now embodied in the Bill of Rights, but also a breach of New Zealand's international obligations, as explained above. It follows that the presumption that statutes should be read, so far as possible, consistently with New Zealand's international obligations is also engaged.": [116].
- "Secondly, a related point is that the direction given by Parliament is to the judicial branch of government, and instructs judges as to how they must sentence. Sentencing for criminal offences is the constitutional role of the third branch of government – the judicial branch. . . . In exercising the discretions conferred under the Sentencing Act, judges are bound by the Bill of Rights and must respect and affirm the rights and freedoms preserved there. That is the effect of s 3 of the Bill of Rights. Yet the Crown's argument entails the proposition that Parliament's purpose in enacting s 86D includes requiring judges, in exercising their responsibility to sentence offenders, to impose sentences which are so disproportionate to the gravity of the offending as to breach s 9 of the Bill of Rights. . . . It is, of course, true that sentencing judges must respect the supreme law-making power of Parliament, a fact reflected in s 4 of the Bill of Rights. But in interpreting s 86D(2), judges must apply the s 6 presumption of rights-consistency. The courts will be very slow to conclude that Parliament wished to direct another branch of government to breach a right as fundamental as that affirmed in s 9, and in a manner that implicates that branch in a breach of New Zealand's international obligations. Rather than using general words, such as 'despite any other enactment', Parliament must in some way address itself explicitly to the Bill of Rights. I say explicitly because, for all the reasons outlined above, it is inconceivable that Parliament would leave to necessary implication a direction to the courts of the sort the Crown argues is entailed in s 86D(2).": [117]-[119].
- "the words 'despite any other enactment' do not in themselves show that Parliament intended s 86D(2) to operate in breach of s 9, and do not preclude a proviso being read into s 86D(2) in accordance with s 6 of the Bill of Rights, if such a proviso could be shown to align with the underlying purpose of the provision and the wider three strikes regime": [121].

O'Regan and Arnold JJ

O'Regan and Arnold JJ

O'Regan and Arnold JJ's reasons included the following points:

- "the Crown accepts that the sentence of seven years' imprisonment imposed on the appellant crosses the high threshold set in s 9 – the sentence is grossly disproportionate, such

as to shock the national conscience. Not only does the sentence breach s 9, but it is likely also to put New Zealand in breach of its international obligations.": [167].

- "the decision of this Court in *Attorney-General v Taylor* that the High Court has the power to make declarations of inconsistency (which is likely to be given legislative recognition[:New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill 2021 (230-2) (select committee report)]) indicates that the legislature does have substantive obligations under s 3(a) in relation to legislation . . . under s 3(a), the legislature has accepted that there are fundamental human rights standards to which it should adhere in the legislation it enacts. To facilitate this, Parliament has, in s 7, imposed an obligation on the Attorney-General to bring to its attention any provision in a Bill that appears to be inconsistent with any of the rights or freedoms contained in the Bill of Rights. Further, Parliament's direction to the courts in s 6 that a Bill of Rights-consistent meaning of an enactment is to be preferred wherever that enactment 'can be given' such a meaning is also, in our view, an acknowledgement by Parliament of its obligations under s 3(a) in relation to legislation.": [170]-[171].
- "Parliament has accepted that it has obligations under s 3(a) of the Bill of Rights in relation to its legislative functions. However, it has retained the right to enact legislative provisions that: (i) are inconsistent with the rights and freedoms in the Bill of Rights; (ii) cannot be justified as reasonable limits under s 5; and (iii) are not properly amenable to a rights-consistent interpretation under s 6. Where that combination occurs, s 4 requires the courts to apply the legislation as enacted even though it is inconsistent with the Bill of Rights.": [173].
- "the question is whether there is only one (Bill of Rights-inconsistent) meaning that can properly be given to s 86D(2), so that the Court is bound by s 4 to adopt and apply that meaning, or whether there is a Bill of Rights-consistent meaning that "can be given" to s 86D(2), so that it should be 'preferred' under s 6.": [176].
- "For some of the Judges in *Hansen*, the United Kingdom courts had gone too far under the guise of 'interpretation' . . . However, the essential point is clear – an alternative rights-consistent meaning under s 6 must be tenable in light of text and statutory purpose.": [181].
- "the Court [in *Cropp*] said that counsel was 'correct in pointing out that the courts will presume that general words in legislation were intended to be subject to the basic rights of the individual', citing Lord Hoffmann's reasons in *R v Secretary of State for the Home Department, ex parte Simms* . . . a point that emerges clearly from *Hansen* is that meanings ascribed under s 6 should not be inconsistent with the purpose of the enactment at issue . . . While there remains some dispute about the precise scope and meaning of s 6 of the Bill of Rights, there seems little doubt that it at least requires the courts to take a similar approach to that adopted under the common law 'principle of legality'. [. . . How much further s 6 goes is not an issue that we need to address here.]": [184] and [207].
- " . . . in the cases discussed, apparently unrestricted general words were not sufficient to displace presumptions reflecting core legal values. In each instance, the effect of the Court's decision was to limit the general statutory language by making it subject to an unexpressed qualification that protected the relevant core value. To render the core value inapplicable, the statutory language had to address that value explicitly.": [215].
- "just as the principle of legality means that Parliament must use explicit language to override fundamental values protected by the common law, so too must it use explicit language where it seeks to override an absolute right protected by the Bill of Rights, such as the right protected by s 9. If Parliament wished to require the courts to sentence offenders in a way

that breached s 9 of the Bill of Rights, it needed to say so explicitly rather than relying on the general words 'Despite any other enactment'. . . We consider that s 86D(2) can be given a rights-consistent meaning under s 6. This can be done by excluding from its ambit cases where compliance with the section produces a sentence that is not simply severe, excessive or disproportionate, but is so grossly disproportionate as to breach s 9 of the Bill of Rights. This interpretation does not deprive s 86D(2) of any meaning . . . ": [218]-219].

- "As William Young J points out,318 this interpretation requires adding an unexpressed qualification to the text of s 86D(2), namely that the subsection is subject to the Bill of Rights, and s 9 in particular. As we have said, the courts have long viewed that process as legitimate – indeed, necessary – where fundamental rights are involved; s 6 of the Bill of Rights certainly does not diminish or constrain that, but rather, confirms or enhances it.": [220].
- "The Bill of Rights is properly characterised as a constitutional statute . . . No issue of implied repeal of an enactment, or refusal to apply it, arises in the present case. Here, the issue concerns the proper interpretation of an enactment in light of the principle of legality and Parliament's direction in s 6 of the Bill of Rights. The emphasis that Laws LJ [in *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2003] QB 151] placed on the need for unambiguous clarity of statutory purpose in the context of the repeal of a constitutional enactment applies equally where, as here, it is argued that a provision deprives a person of the benefit of an absolute right protected by the Bill of Rights.": [221]-[224].
- "For completeness, we note that there is another presumption of interpretation which provides some support for this conclusion, namely the presumption that legislation should be read, so far as possible, as being consistent with New Zealand's relevant international obligations . . . ": [225].
- "Accordingly, we conclude that, interpreted in accordance with Parliament's direction in s 6 of the Bill of Rights, s 86D(2) does not require the courts to impose the maximum sentence on conviction of a third strike offence in the rare cases where the resulting sentence would breach s 9 of the Bill of Rights.": [231].

Glazebrook J's reasons

Glazebrook J's reasons included the following points:

- "To accept the Crown's submissions in this case would mean finding that Parliament's purpose in enacting the three strikes regime was to require judges to impose sentences on mentally ill persons, like Mr Fitzgerald, that breach s 9 of the Bill of Rights (a right not subject to any reasonable limits). This is despite both Parliament and judges being bound by the Bill of Rights as a result of s 3(a) of the Bill of Rights, and despite the fact that the imposition of such sentences would mean a breach of New Zealand's obligations under international law. To attribute such a purpose to Parliament would be surprising.": [247].
- "the legislative history makes it plain that this was not in fact Parliament's purpose. The purpose of the regime was that it would apply to the very worst repeat violent offenders and the language was broadly drawn to ensure all such offenders would be included. To meet the concerns about possible overreach, an administrative process [(the review of third strike charges by the local Crown Solicitor)] was put into place to make sure that the regime was properly directed. [That administrative process seems to have failed in this case . . . in any

event, the administrative process was neither a sensible nor principled means of addressing concerns around inappropriately harsh outcomes.]": [248].

- "I consider that reading down s 86D(2) so that it does not require the imposition of sentences that breach s 9 of the Bill of Rights is not only possible, but also necessary to accord with parliamentary purpose.358 This is particularly so given the interpretive presumptions of consistency with international law359 and with fundamental human rights. It is also highly significant that the s 9 right is contained in the Bill of Rights, a statute that has constitutional status.": [250].
- This interpretation is also supported by the principle of legality. The principle of legality means that plain words are needed to override fundamental rights embedded in the common law.363 This is on the basis that, if Parliament wishes to override such rights, it must show that it knows it is doing so and that it is prepared to face the consequences. This requires such rights to be overridden explicitly or by necessary implication. The words '[d]espite any other enactment' in s 86D(2) do not reach the threshold of being clear or explicit enough to override such a fundamental right as the one at issue in this case.": [251].

William Young J's reasons (dissenting)

- "I am of the view that s 86D of the Sentencing Act required Simon France J to impose a sentence of seven years' imprisonment and, for this reason, I would . . . dismiss the appellant's challenge to the sentence imposed, save possibly to amend the sentence by ordering under s 34(1)(a)(i) of the Criminal Procedure (Mentally Impaired Persons) Act 2003 that the appellant serve it as a special patient under the Mental Health (Compulsory Assessment and Treatment) Act 1992.": [254].
- "Primarily in issue is the application of 'can be given a meaning' in s 6 of the Bill of Rights. On the Humpty Dumpty approach to interpretation,379 there is no limit to the meaning which can be attributed to language. Applying that approach to s 6 would enable a judge to give any enactment a Bill of Rights-consistent meaning despite that meaning not being in accordance with its text and purpose. As will become apparent, I do not regard this as appropriate.": [290] and fn 379 ("As discussed by Lord Atkin in *Liversidge v Anderson* [1942] AC 206 (HL) at 245, albeit in that example it is the user of language who decides what it means rather than the listener or reader.")
- "In the context provided by s 4, s 6 of the Bill of Rights and s 5(1) of the Interpretation Act should be read together so that the words 'can be given a meaning' are construed as:

  … can, in light of its text and purpose, be reasonably given a meaning.": [293].
- "This approach is entirely consistent with the leading case, *R v Hansen*. . . In *Hansen*, there is much discussion of a series of English cases concerned with the application of s 3 of the Human Rights Act 1998 (UK), which is similar in language and purpose to s 6 of the Bill of Rights. In these cases what was described in *Hansen* as a more 'adventurous' approach to interpretation had been adopted. One of these – *R v Lambert* – had resulted in a provision substantially similar to s 6(6) being held to impose an evidential burden only. Tipping J appears to have had this in mind when he referred to 'unreasonably possible' interpretations, which on his approach are not mandated by s 6. McGrath J too made it clear that he did not regard the approach adopted in the English cases as appropriate in New Zealand That none of the five Judges was prepared to follow *Lambert* is highly significant.": [294]-[302].

- "I am in complete agreement with the views of the High Court Judge and the majority in the Court of Appeal. Section 86D (as I construe it below) requires a sentence of seven years' imprisonment. This means that a lesser sentence may not be imposed. The obvious purpose of the minimum sentence carve-out in s 106 is to prevent a court sidestepping the obligation to impose a particular sentence by the simple expedient of discharging an offender without conviction.": [308].
- "In the absence of the three strikes regime, the appellant would not have been discharged without conviction. On the assumption that s 86D requires a sentence of seven years' imprisonment to be imposed on the appellant upon conviction, invoking the application of the three strikes regime to the appellant to justify a discharge without conviction would be strikingly inconsistent with the scheme of the regime under which previous strike convictions result in heavier rather than more lenient sanctions. Such a result would be so paradoxical as to leave the Court open to the criticism of having gamed the statute." [318}.

- "The view of the majority is that s 86D(2) should be construed as if it read:

  > Despite any other enactment *(but not including the New Zealand Bill of Rights Act 1990)*, if, on any occasion, an offender is convicted of 1 or more stage-3 offences other than murder, the High Court must sentence the offender to the maximum term of imprisonment prescribed for each offence *but must not do so if this would result in disproportionately severe punishment under s 9 of the New Zealand Bill of Rights Act*.

  The italicised portions are what must be read in. Although there are two insertions, they can be treated as amounting to one exception.": [323].
- "I see a number of textual objections to the majority's interpretation:

  (a) It involves reading in an exception which is not provided for.

  (b) The exception is a flat contradiction to the generality of the words 'Despite any other enactment'. Within the three strikes regime, the words 'Despite any other enactment' are used only in s 86D. If those words are construed as only applying to the Parole Act and other provisions of the Sentencing Act, they duplicate what is separately provided for in s 86I.407 So, since the Parole Act and Sentencing Act are already taken out of play and in the absence of any other statutes to which the words 'any other enactment' could refer, it might be thought plain that it includes the Bill of Rights. As well, the approach favoured by the majority is a far from natural interpretation of the phrase. 408":

  [324](a) and (b), and nn 407 and 408
  (407: "The phrase "despite any other enactment" also appears in s 6(2) of the Sentencing Act. It was in issue in *D v New Zealand Police* [2021] NZSC 2, (2021) 29 CRNZ 552, where it was held to trump a provision to the contrary in a different statute, the Child Protection (Child Sex Offender Government Agency Registration) Act 2016; albeit that this was to the advantage of the offender."
  408: "As *D v New Zealand Police*, above n 407, shows.").

- "[T]he principle of legality has resulted in rights-protecting exceptions being read into statutory provisions. . . . I do not see these cases as providing assistance in the present context. Section 86D is not a generally-worded provision. It is instead extremely precise

and peremptory . . . The expressions 'Despite any other enactment', 'on any occasion' and 'the High Court must' seem to me to admit of no ifs and no buts.: [327] and [328].

- "There are suggestions in some of the reasons of the majority that the overriding of a right recognised by the Bill of Rights requires express reference to that right and to it being overridden. [See Winkelmann CJ's reasons at [119] and the reasons given by Arnold J at [218].] To this suggestion, I have three responses:
  (a) There are many ways in which meaning can be conveyed. As will be apparent, I consider that the language of s 86D is crystal clear. I do not think it appropriate to impose, in the guise of an interpretative principle, what is likely to become a manner and form provision: that is, that Parliament can achieve certain legal consequences only by resort to a particular verbal formula.
  (b) Such a requirement does apply under s 33 of the Canadian Charter of Rights and Freedoms (usually referred to as the 'notwithstanding clause'). Inclusion of such a provision was an option when New Zealand adopted the Bill of Rights in 1990. For the courts now to introduce a functional equivalent of the notwithstanding clause goes beyond what I see as their legitimate mandate under s 6 of the Bill of Rights.
  (c) It is not consistent with *Hansen*. Section 6(6) of the Misuse of Drugs Act did not refer specifically to, and explicitly override, s 25(c) of the Bill of Rights. But it was nonetheless held to apply in accordance with its natural wording. Reference may also be made to *Cropp v Judicial Committee* [2008] NZSC 46, [2008] 3 NZLR 774. In that case, a generally-expressed power to make rules directed to the safety of racing authorised the making of a rule requiring the provision of urine samples for drug analysis; this notwithstanding the absence of express reference to s 21 of the Bill of Rights.": [329].
- "The difference between my approach and that of the majority turns on me having a more restricted view of what constitutes a reasonably possible interpretation. I see this as limited to what can be justified by reference to the text of the statute, allowing for purpose and applying ordinary principles of interpretation. If the interpretation contended for is not a starter on that approach, I see its adoption via s 6 as statutory revision, not interpretation.": [330].
- "One final point is that s 86D, as interpreted by the majority, will provide some difficulties or uncertainties in application. On the logic of that interpretation, I can see two possible approaches, neither of which are particularly satisfactory:
  (a) On the first, the High Court Judge should have imposed a sentence which was as harsh as it could possibly be without infringing s 9 of the Bill of Rights. This would be a pretty strange exercise for a sentencing judge.
  (b) On the second, the High Court Judge should have treated the exception as disapplying s 86D. Two versions of this approach have been suggested: one that he should have sentenced the appellant in accordance with ordinary principles [See the reasons given by Arnold J at [231] and Glazebrook J's reasons at [252].]; the other that a sterner than usual response may have been appropriate [See Winkelmann CJ's reasons at [138].]. I see neither version as particularly respectful of the legislative scheme.": [331].
- "Accordingly, I construe s 86D as meaning what it says.": [332].

Commentary

- The Supreme Court's majority holding was suggested by the Supreme Court itself during the substantive hearing, after which the Court amended its grant of leave to appeal: [109]. The initial approved leave question was only whether the Court of Appeal was correct to find that s 106 (discharge) of the Sentencing Act 2002 does not apply to the appellant. (Compare, for example, *Ellis v R* [2019] NZSC Trans 31 at pp 52-58, especially p 56: "SOLICITOR-GENERAL: I would appreciate an opportunity to think about that point . . . . WINKELMANN CJ: And you had no notice of it." See also *Ellis v R* [2020] NZSC 89 at [3]-[5].)
- Both the Court of Appeal, and the Supreme Court, declined to consider making a declaration that s 86D(2) is inconsistent with the Bill of Rights: [32]. See also [170]. But presumably a declaration of that kind could, if the Court held s 4 of the Bill of Rights applied, have followed.
- "'Experience with weak form [rights-review of legislation] systems is … thin,' Tushnet observes, 'but … there is some evidence, mostly from Canada but some from New Zealand, that weak form systems do become strong form ones'[: (2004) 2(1) NZJPIL 7]. A constitutional change of that significance is best made openly and with the necessary parliamentary and public support.": *Burrows and Carter – Statute Law in New Zealand* (6th ed, 2021), p 447.
- *Fitzgerald* involves both continuity and change.
- Continuity of basic rights-consistent interpretation under the Bill of Rights and common law. This is clear from the many old and new cases on rights-consistent interpretation, under the Bill of Rights and common law, mentioned in the reasons of the majority Judges in *Fitzgerald*.
- The relationship between (1) s 6 of the Bill of Rights and (2) rights-consistent interpretation at common law (a, or the, "principle of legality") could have been, but was not, made clear legislatively by the Bill of Rights. At the least, they are complementary and similar in effect.
- Change (increase) in the strength of Bill of Rights s 6 interpretation, over (not irresistably clear contrary) enacted text, and at least in these exceptional circumstances, where mutliple factors combined so that an "adventurous", but "tenable", rights-consistent meaning "could be given" (even though it involved reading in a very significant implied exception):
    - a grossly disproportionate mandatory sentence of a mentally ill defendant limiting a basic right incapable of limitation at international law and usually protected in sentencing by the judicial branch of government; and
    - a default "ordinary sentencing regime" existed and could be relied on instead; and
    - Executive Government has long proposed repeal of the regime, and has now introduced a Bill to repeal it: Three Strikes Legislation Repeal Bill (79—1), introduced 11 November 2021, see, eg, cl 10 and the Schedule, including cl 14; Hon Kris Faafoi, "Government moves on 'three strikes' law" (Media release, 11 November 2021).
- Aspects of *Hansen* have, most probably, now been clarified or overruled (at least implicitly), as is clear from William Young J's very sharply critical dissent, and from, for example, Coxon (2021) 42(3) Stat LR 344 (who compares the UK and New Zealand Acts, which now converge more). See also https://ukconstitutionallaw.org/2021/12/01/andrew-geddis-and-sarah-jocelyn-is-the-nz-supreme-court-aligning-the-nzbora-with-the-hra/.

- But different basic rights affirmed by the Bill of Rights are subject to different justified limits, and this matters a lot. See also *Four Midwives, NZDSOS and NZTSOS v Minister for COVID-19 Response* [2021] NZHC 3064 (12 November 2021) at [49] per Palmer J, citing *Borrowdale v Director-General of Health* [2021] NZCA 520 at [141] per Collins J for the Court of Appeal, and *Chisnall v The Attorney-General* [2021] NZCA 616 at [181]-[190] per Cooper J for the 5-Judge court. Compare also *Paul v Mead* [2021] NZCA 649 at [33] and [79] per Goddard J.
- What amounts to "irresistable clarity" for s 4 of the Bill of Rights is, now, perhaps less clear. The Court did not discuss the effectiveness of the overriding words in the Child Protection (Child Sex Offender Government Agency Registration) Act 2016, Schedule 1, cl 12, enacted in response to its earlier decision in *D (SC 31/2019) v New Zealand Police* [2021] NZSC 2. That cl 12 overrides any "contrary law", including, expressly, section 6(1) and (2) of the Sentencing Act 2002, and sections 25(g) and 26(2) of the New Zealand Bill of Rights Act 1990. Legislation overriding basic rights without demonstrable justification should, anyway, be rare. As Andrew Geddis notes, here, Parliament told the Supreme Court "thanks for giving your view of what the law should be—but we actually really do want to do this … so, we are.": "Parliament, The Courts And The End Of Three Strikes (For Now)", *Pundit*, 23 November 2021. Whether such express overrides will result in declarations of inconsistency at the domestic or international level remains to be seen. See also the Attorney-General's 8 November 2021 vetting report on Greg O'Connor's Member's Bill the Child Protection (Child Sex Offender Government Agency Registration) (Overseas Travel Reporting) Amendment Bill.
- Sir Geoffrey Palmer KCMG AC QC PC, architect of New Zealand's Bill of Rights Act, enacted in 1990 as an "ordinary statute" capable of override by other legislation, has long proposed that it be elevated to a supreme law – perhaps just by simply repealing s 4 of the Bill of Rights.
- If basic rights-consistent interpretation under s 6 of the Bill of Rights is so intense that s 4 of the Bill of Rights has little, or no, effective operation, a similar outcome is anyway achieved.
- *Fitzgerald* shows the ample scope for interpretive arguments despite, and after, *Hansen*. (Compare the High Court's decision in *Re AMM* [2010] NZFLR 629 (HC) (on the Adoption Act 1955).) As Paul Rishworth QC noted in [2012] NZ L Rev 321, 338–340: "We have not heard the last word on strained meanings". *Fitzgerald* will in some cases encourage them more.
- Legislation's text and legal meaning may, to uphold absolute or illimitable affirmed basic rights, increasingly diverge. If so, legislation's legal meaning will, increasingly, be ascertainable only from the case law (which, ideally, would also be reflected in legislative databases, so as to ensure adequate joined-up access to the effective law in force).

New Zealand – Casenote: NZCA decision in *Borrowdale*

On 2 November 2021, the Court of Appeal gave its decision in *Borrowdale v Director-General of Health* [2021] NZCA 520.

KEVIN STENT/STUFF

Wellington lawyer Andrew Borrowdale challenged aspects of the legality of the country's first level 4 Covid-19 lockdown in 2020. (File photo)

Collins J gave the court's reasons rejecting both grounds of appeal:

- *The first ground of appeal:* that the Director-General exceeded the powers conferred upon him by s 70(1)(f) and (m) of the Health Act 1956 when he issued 3 Health Act Orders:

- *The second ground of appeal:* that the Director-General in 1 of those Orders delegated the decision on what businesses were "essential businesses" to officials at MBIE and other departments. This, it was argued, offended the Latin maxim *delegatus non potest delegare* — a person vested with a statutory power must exercise that power personally and not sub-delegate that power to another person.

The New Zealand Law Society was granted leave to intervene.

Its submissions on the appeal are available here.

First ground of appeal – interpretation points on empowering provision

The NZCA generally took a robust and unfussy approach to conferral and use of emergency powers in a global pandemic. See, eg, at [190]: "the special powers in s 70(1) of the [Health] Act [1956] are emergency powers that may be exercised at very short notice and in circumstances where the full magnitude of the emergency is not appreciated".

On the first ground of appeal, the Court's conclusions were:

- "Applying all relevant construction principles, we are satisfied that Parliament intended s 70(1)(f) and (m) of the Act to be broad enough to authorise the three Health Act Orders."
- "Parliament's intended meaning of s 70(1)(f) and (m) of the Act limits the rights and freedoms affirmed by ss 16, 17 and 18 of the NZBORA, but these limits are justified in a free and democratic society."

Second ground of appeal – unauthorised subdelegation

On the second ground of appeal, the NZCA's decision also contains some helpful analysis of the New Zealand cases on unauthorised subdelegation. See also John Mark Keyes *Executive Legislation* (3rd ed, LexisNexis Canada, 2021) ch 15 (subdelegation and the transformation of authority), and Carter, McHerron, and Malone *Subordinate Legislation in New Zealand* (LexisNexis, 2013) at [12.3] (Issues concerning subdelegation of legislative power).

The NZCA analysed the order concerned—

- as involving no (sub)delegation; but
- as involving some probably unauthorised exemptions (that were not subject to a challenge by Mr Borrowdale) – see [195] and [196](b):

"This case has been argued on the narrow basis that the Director-General (A) unlawfully delegated his powers under s 70(1)(m) of the Act to other officials (B). The case has not been argued on the basis that Ministers (C) made exemption decisions that were beyond their lawful powers although it does appear that Ministers and other officials probably acted ultra vires when directing that certain businesses be exempt from those that were required to close."

This NZCA approach involves reading the clause concerned as 1 composite phrase (the High Court's analysis treated everything after a central comma as advisory guidance, which the NZCA considered a bit artificial – see [179]-[181]):

[6] The First Health Act Order, which cited s 70(1)(m) of the Act, required the closure of all premises in New Zealand except for those that were listed in the appendix to the Order. Included in the appendix were "essential businesses", which were said to be businesses that were essential to the provision of the "necessities of life" and those businesses that supported them, "as described on the Essential Services list on the covid19.govt.nz internet site maintained by the New Zealand government".

The NZCA's approach thus involves the clause "adopting" descriptions on the website.

At [166][d], Collins J for the NZCA says: "The Director-General issued the First Health Act Order on 25 March, which, as we have explained, adopted the list of essential businesses on the covid19.govt.nz website." See also [185](b):

> Even if the Director-General's consideration of the draft list of essential businesses was not sufficient for him to have retained control over deciding what would constitute essential businesses, any deficiencies at that stage in the Director-General's decision-making were remedied when, on 25 March, he adopted the definition of essential businesses and the list of those businesses that had been posted on the covid19.govt.nz website on 23 March.

Even if there was a (sub)delegation, the NZCA suggests at [188] that it was not unlawful because "the criteria the Director-General approved [in the order concerned] were sufficient for other officials to carry out the administrative task of identifying what businesses were essential. This places the circumstances of this case in a vastly different category from the facts of *F E Jackson and Co Ltd* [*v Collector of Customs* [1939] NZLR 682 (SC)], in which the terms of the purported delegation provided absolutely no guidance on who could qualify for an import licence".

At [176], the Court specifies a number of "Factors that may help in deciding if there has been a valid sub-delegation of powers pursuant to legislative authority". Interestingly, the Court did not refer to any reports on this issue of New Zealand's Regulations Review Committee. See, for example, page 59 of this August 2020 RRC report, where the RRC says -- on the Social Security (COVID-19—Temporary Additional Support and Expiry and Regrant of Benefits) Amendment Regulations 2020 (which were based on the discretion given being administrative not legislative, and replicating an earlier similar provision): "Our concern [ie, RRC's concern)]is that the empowering provisions do not authorise the regulations to further delegate the power to determine this time frame. It appears to be Parliament's intention that the period is prescribed in the regulations directly." (Unauthorised sub-delegation of powers is also mentioned in the RRC's later, 30 November 2021 report discussed on page 56 of this edition of the *CALC Newsletter.*) The First Special Report of Session 2021–22 by the UK Joint Committee on Statutory Instruments—*Rule of Law Themes from COVID-19 Regulations*—21 July 2021, discussed by Daniel Greenberg (2021) 42(3) Stat Law Rev v at vi adds: "The presumption against the sub-delegation of legislative power is a long-standing and important principle and the Committee was concerned that the pandemic should not become an opportunity to depart from it unnecessarily. The Committee believes that statutory instruments should not delegate legislative power unless expressly permitted to do so by the enabling power, and that enabling powers should not permit legislative sub-delegation as a matter of course."

Costs in NZCA

The NZCA declined to award costs against him (at [198]): [198] Normally costs would be awarded to the respondents. We are, however, departing from the usual practice in this case because the issues raised by the appeal engage matters of significant public importance. Dr Borrowdale and his counsel have provided an important service to the community by presenting the Court with the issues that we have addressed. In those circumstances we decline to make any order for costs.

News media reports

- Appeal over legality of 2020 Covid-19 level 4 lockdown dismissed, RNZ, 2 November 2021:
- Covid-19: Borrowdale legal challenge to early lockdown measures fails, *Stuff*, 2 November 2021:
- Court of Appeal case over legality of 2020 level 4 lockdown dismissed, *Newshub*, 2 November 2021.

Appeal to NZSC

Mr Borrowdale did not apply, before the deadline, to New Zealand's Supreme Court for leave to appeal.

Australia – Legislative Drafters' Guide to National Uniform Legislation

Dr Guzyal Hill

Abstract:

National uniform legislation is a complex and growing area of legislation. To date, the research in the area has been sparse and disparate. This guide provides main summary of the research of national uniform legislation as a body of law, highlighting the main findings with the appropriate acknowledgement of where the research has been published. The aim of the body of this research is to produce a practical and structured guide to legislative drafters, policy officers and law reformers working with existing and new sets of uniform Acts.

Introduction

When I first started working for the Office of the Parliamentary Counsel in the Northern Territory, Australia, I was presented with a red-covered copy of the PCC Protocol on national uniform legislation. National uniform legislation – I was told – was a complex and growing field. I read the Protocol, understood very little, yet was still attracted to its enigma. It promised something. The knowledge on national uniform legislation was disparate and sparse. I found no literature to help me conceptualise the complex topic of national uniform legislation to guide me as a legislative drafter. That is why when I had a fortunate opportunity to become a legal scholar, I dedicated myself to creating an academic body of knowledge about national uniform legislation.* This article provides a practical guide to this body of research, highlighting the main findings with the appropriate acknowledgement of where the original research has been published.

* In addition to the Protocol on Drafting National Uniform Legislation, there are resources created by Parliaments and some academic work for specific areas of law. The leading examples of the first are extensive work of the Parliament of Western Australia and the Research Brief by the Queensland Parliament; and the example of the second is work by Dr Eric Windholz dedicated to harmonisation of Work Health and Safety regulation.

Guzyal Hill and John Garrick, 'The Power of National Uniform Legislation: What is its Rate of Proliferation and What Factors are Driving it?' (2021) 95 Australian Law Journal **350**

This article provides a big-picture context of national uniform legislation and depicts the growth of national uniform legislation as a diagram. The article argues, although national uniform legislation, as a complex legal phenomenon, has advantages and disadvantages, it is an inevitable occurrence in today's legal landscape. National law reform debate takes place against a backdrop of ever more complex and heated challenges, both local and global. New and even frightening challenges to sovereign nations have emerged. Yet one thing remains clear: a continued growth of national uniform legislation is foreseeable. Critical forces driving harmonisation have been identified and grouped into four categories: political, economic, social and technological. The list of driving forces we have identified is not exhaustive, but recent developments in connectivity (and serious contestation over who may be allowed to provide new technology to government systems and major infrastructure development) are only likely to add impetus to a further proliferation of national uniform legislation. The ongoing challenges of 2020 and beyond – bushfires, floods, global warming, COVID-19 pandemic and major international trade disputes – all serve to intensify debate over reform directions, while it also becomes obvious that uniform legislation is not the first instance response to these crises.

Guzyal Hill, 'Referred, Applied and Mirror Legislation as Primary Structures of National Uniform Legislation' (2019) Bond Law Review **81** https://blr.scholasticahq.com/article/10865-referred-applied-and-mirror-legislation-as-primary-structures-of-national-uniform-legislation

This article might be useful for drafters who are starting to work with national uniform legislation. If we analyse the database of uniform Acts prepared by the Parliamentary Counsel's Committee, three main structures can be presented in the Figure on page 97. This article provides detailed examination of each of these structures: referred, applied and mirror. Additionally, hybrid structure is analysed as a combination of referred and mirror or referred and applied legislation.

This research is published in open access and is available to everyone interested.

Guzyal Hill, Avoiding a 'Catch 22'—Major Lessons From a Meta-Analysis of Reports of the Parliament of Western Australia on Threats to Sovereignty by National Uniform Legislation. (2021) *Bond Law Review* **37** https://blr.scholasticahq.com/article/19356-avoiding-a-catch-22-major-lessons-from-a-meta-analysis-of-reports-of-the-parliament-of-western-australia-on-threats-to-sovereignty-by-national-unifo

This article is useful for drafters who want to avoid falling into the trap of scrutiny by summarising the main practices that have been recognised as threat to sovereignty. This research has examined 173 Parliamentary reports to create a checklist of practices that have been found to infringe sovereignty. The major categories of threats to sovereignty identified through this research can be summarised in the following lessons: (1) imposition of deadlines for scrutiny and enabling the Executive to control the commencement dates; (2) limitation of scrutiny of amendments in applied structure; (3) inclusion of Henry VIII clauses that enable

primary legislation to be amended by subsidiary legislation; (4) drafting legislation in skeletal form; and (5) non-inclusion of the review provisions.
This research is published in open access and is available to everyone interested.

Guzyal Hill, 'How does the Area of Law Predict the Prospects of Harmonisation?' (2020) 41 (1) Adelaide Law Review **267** https://law.adelaide.edu.au/system/files/media/documents/2020-08/How%20Does%20the%20Area%20of%20Law%20Predict%20the%20Prospects%20of%20Harmonisation.pdf

This study has empirically examined how the area of law impacts the prospects for harmonisation. Some areas of law have not required national uniform legislation due to the clear distribution of power in the Constitution. Underpinning this has been the absence of consensus between jurisdictions on the need for a national response in a given area, or the inability to find a policy model that would satisfy every jurisdiction involved.
The quantitative findings from this study support the direct impact of the area of law on the volume of national uniform legislation and its level of uniformity. Specific areas of the law were found to be more susceptible to higher or lower levels of uniformity. Whether these were based on an historical position, reflected consensus achieved among the Australian states and territories over the need for a national response or were partially the result of the most recent reforms, commercial and corporate law, government and energy and resources were found to be highly uniform. In contrast, legislation regulating family law and relationships, road regulation and criminal law (with the notable exception of counter-terrorism legislation) was mostly non-uniform and unsustainable, even in cases where some uniformity had been achieved, and considerable effort and resources had been expended on harmonisation. In the area of energy and resources, the jurisdictions have only come to consensus when there has been strong institutional support, with some sets of uniform Acts requiring up to three national regulators. This level of resource provision in the harmonisation effort is extraordinary and would be harder to achieve in other areas of law. In the area of family law and relationships, the jurisdictions have preferred to maintain divergent regulations unless faced with strong actions from the Commonwealth. Without a rigid structure of referred legislation enacted from the outset, it is more likely that the regulation will remain at the 'some similarities' level in this area of law. The law of business, trades and professions has required time and a constant consensus searching effort to reach a higher level of uniformity, due to the presence of strong advocacy coalitions. Under these circumstances, set deadlines and incentives would not be effective measures.

Guzyal Hill, Untapped Opportunities for the Use of AI in Comparing Legislation for National Reforms. in J Boughey & K Miller (eds), The Automated State: Implications, Challenges and Opportunities for Public Law (**Federation Press, 2021) 215**

This chapter focuses on identifying the untapped opportunities for the use of advanced technology in comparing legislation among jurisdictions, which is an essential step for legislative harmonisation in Australian federation. The development of national uniform legislation involves various entities comparing laws at the stages of policy development, legislative drafting and implementation. Accurate and prompt comparison of legislation across jurisdictions is essential in conditions of strategic national reform and in crisis situations. Technology is emerging for superior navigation of the complex decision-making required in the course of comparison, including the LexisNexis Similar Provisions function, the natural language processing (NLP) summarising function, development of 'machine-consumable' legislation, and use of ontologies.

Guzyal Hill, 'Categories of the 'Art of the Impossible': Achieving Sustainable Uniformity in Harmonised Legislation in the Australian Federation' (2020) 48 ***Federal Law Review*** **350** **https://journals.sagepub.com/doi/10.1177/0067205X20927808**

This article is another big picture article, the main argument being that if we analyse the database of uniform Acts prepared by the Parliamentary Counsel's Committee in light of the public policy theories, we can see that national uniform legislation can be achieved through (1) through the long and winding road to harmonisation, (2) very fast through prompt action by all jurisdictions, (3) pragmatically, or (4) in a difficult and almost impossible manner due to the presence of strong advocacy coalitions who argue against uniformity.

A video abstract of this article can be watched here: https://www.youtube.com/watch?v=Z_VoaNCCDzE&t=88s

Guzyal Hill, John Garrick Hill and Nat Barton, 'Faultlines of Federation: Australia's Intergovernmental Cooperation and Human Rights During the Pandemic', (2021) 30 ***Journal of Transnational Law and Policy*** **119**

The COVID-19 pandemic has challenged previously understood boundaries between jurisdictions and the balance of power between national, state and territory governments in Australia. The crisis served as a catalyst for long called for—yet unexpected—reform of the peak intergovernmental body, the Council of Australian Governments ('COAG') which was replaced by the National Cabinet to ensure rapid coordinated intergovernmental responses.

This article examines whether the new National Cabinet is going to be an effective institution of intergovernmental cooperation in Australia's federalist structure. Is it capable of protecting human rights? Three main areas of rights protection are examined including health, work and rights of residents in aged care.

Guzyal Hill and John Garrick, 'A Critical Review of Australian Law Reform Architecture for developing national uniform legislation: Reinvent, Create, or Strengthen?' Australian Law Journal **(forthcoming in 2022)**

This article provides a big-picture context of the institutional architecture for developing national uniform legislation by examining the National Cabinet, the Australian Law Reform Commission and the Australasian Parliamentary Counsel's Committee. The U.S. Uniform Law Commission and the Canadian Uniform Law Conference provide comparative models for Australia (as dedicated bodies) for discussing and agenda-setting for national uniform legislation. After examination, the permanent institutional support in Australia is found to be under resourced. The Hon Michael Kirby observed (in 1977): 'No procedure has been devised to secure a truly national approach to law reform … our Federation lags seriously behind others in developing an indigenous mechanism for promoting, in an orderly fashion, the uniform reform of areas of the law outside Commonwealth competence.' … The same, or similar, can be observed in the 2020s.

Items of interest

Western Australia – Legislation Act 2021 (WA) assented to on 24 August 2021

Government of Western Australia
Department of Justice
Parliamentary Counsel's Office

Western Australian Legislation

Act's assent and contents

The Legislation Act 2021 (Western Australia) was assented to on 24 August 2021.

It is an Act —

• to provide for public access to Western Australian legislation; and

• to provide for the official status of published versions of Western Australian legislation; and

• to provide for Western Australian legislation to be kept in an up-to-date form and consistent with current drafting practice; and

• to repeal the Reprints Act 1984; and

• for related purposes.

Object

The object of this Act is for Western Australian legislation to be easy to find, use and understand.

This object is to be achieved by —

(a) providing for Western Australian legislation to be made publicly available; and

(b) giving official status to Western Australian legislation in both hard copy and electronic form; and

(c) conferring power on the Parliamentary Counsel to make editorial changes so that, in appropriate cases, Western Australian legislation can be kept up-to-date, modernised and simplified, and errors can be corrected, without the need for the changes to be enacted by Parliament.

Commencement

Part 1 of the Act came into operation on 24 August 2021.

The rest of the Act (Parts 2 to 6) comes into operation on a day fixed by proclamation.

Jersey – Legislation (Jersey) Law 2021 brought into force

On 28 September 2021, the Legislation (Jersey) Law 2021 was brought into force.

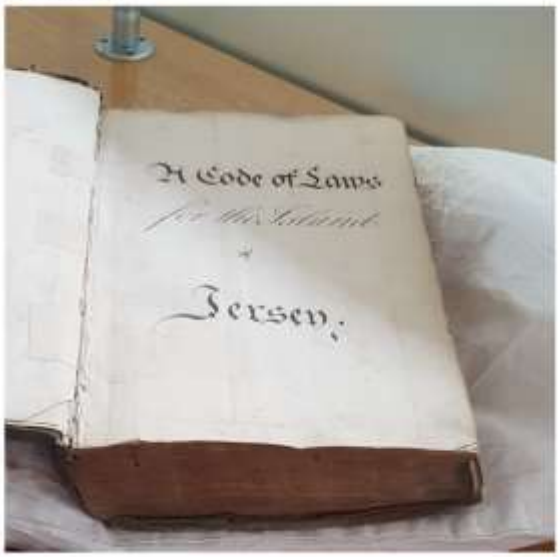
It puts Jersey's Legislative Drafting Office onto a statutory footing, and creates a set of powers to edit legislation so that the office can produce continually updated official consolidations of all Jersey's legislation.

The date was picked as the day after a special Bank Holiday to celebrate the "Corn Riots" which led to the island's "Code of Laws" of 1771, the first consolidation of Jersey's legislation.

The commencement meant the office had to replace the entire current collection of legislation on the Jersey Legal Information Board website (https://www.jerseylaw.je/ shared with court judgements and other legal information) in a nerve-wracking operation over the long weekend.

The office also took the opportunity to work with the website to produce a new interface and searches geared to the current consolidated system instead of the previous annual "Revised Edition" system, including allowing individual enactments to be tagged with multiple subjects. That of course added to the stress of the switch-over, and the editorial team are still hunting down bugs, but the result is another step towards the goal of a "point in time" system (perhaps next year if all goes well).

How it started



How it's going

Jersey LDO has updated the jerseylaw.je website to take account of these changes and has improved the search facilities. This work forms part of Jersey LDO's ongoing Beyond 250 project to celebrate the anniversary of the 1771 Code of Laws.

Access to Jersey's legislation law change

22 September 2021

On Tuesday 28th September 2021, the day after the Corn Riots bank holiday, the Legislation (Jersey) Law 2021 will come into force, improving islanders' access to Jersey's legislation and bringing changes for the Legislative Drafting Office.

The Legislative Drafting Office has been continually producing updated unofficial versions of legislation showing all new amendments as soon as they come into force. That has been particularly important for islanders during the Covid-19 epidemic. On Tuesday those updated versions will become the official versions of the law, so they can be relied on and used in court.

The jerseylaw.je website, run by the Jersey Legal Information Board, will see its legislation pages completely replaced. People will find it easier to search for relevant legislation by the subjects that it covers or the words in its title.

The new Law will also set out the Legislative Drafting Office's other duties for the first time. It will formally update the name from "Law Drafts*man*'s Office" to reflect modern gender-neutral drafting.

Lucy Marsh-Smith, the Principal Legislative Drafter (head of the office) said "We are really pleased to have been able to work with the Jersey Legal Information Board to bring forward these improvements in time to form part of the celebrations of the 1771 Code, the Corn Riots, and Democracy Week. Over the rest of this year our *Beyond 250* project will see us producing further improvements in access to our legislation. It is vital for islanders to be able to find and rely on the up-to-date legislation that governs our lives, particularly when it changes as fast as it has over the course of the Covid-19 pandemic."

Here is an extract from the Legislation (Jersey) Law 2021, Article 19:

PART 4

LEGISLATIVE DRAFTING OFFICE

19 Legislative Drafting Office

(1) The office previously known as the Law Draftsman's Office is renamed the Legislative Drafting Office.

(2) The primary objective of the Legislative Drafting Office is to produce high-quality legislation that can be easily understood and is readily accessible to all persons.

(3) The senior officer of the Legislative Drafting Office is the Principal Legislative Drafter.

New Zealand – Legislation Act 2019 commenced on 28 October 2021

Most of the Legislation Act 2019 (New Zealand) came into force on 28 October 2021. The Act promotes high-quality legislation for New Zealand that is easy to find, use, and understand.

What does the Act do?

Interpretation of legislation: The Act provides principles and rules about the interpretation of legislation. These includes providing default definitions (eg the definition of working day), and rules about the commencement, amendment, and repeal of legislation. See Part 2 of the Act.

Secondary legislation: The Act is part of a legislative package that clarifies the law relating to secondary legislation. The Act defines secondary legislation in section 5(1). An instrument is secondary legislation if it is stated by an Act to be secondary legislation. The related Secondary Legislation Act 2021 has inserted those statements into each relevant empowering provision in Acts of Parliament.

Drafting and publishing of legislation: The Act sets out responsibilities for drafting and publishing of legislation, and provides tools for simplifying legislation and keeping it up to date. See Part 3 of the Act. The tools include:

- **Error correction and other editorial changes:** The Act allows some errors to be corrected and other editorial changes to be made, to keep legislation up to date and maintain its accessibility for users.
- **Revision Bills:** The Act allows for a process to systematically re-enact earlier law to modernise it and make it more accessible without changing its effect (except within narrow limits).

There are future amendments to the Act in Schedule 2 of the Legislation (Repeals and Amendments) Act 2019. They are not yet in force but will replace sections 69 to 77 to provide for online publication of all legislation in one place.

Disclosure requirements: The Act sets out disclosure requirements for Government-initiated legislation, to support parliamentary and public scrutiny of legislation. See Part 4 of the Act, which is yet to come into force.

Parliament's oversight of secondary legislation: The Act supports parliamentary oversight of and control over secondary legislation. See Part 5 of the Act.

Parliamentary Counsel Office: The Act sets out the objective and functions of the PCO—drafting and publishing legislation and other functions that support the stewardship of New Zealand legislation. See Part 6 of the Act.

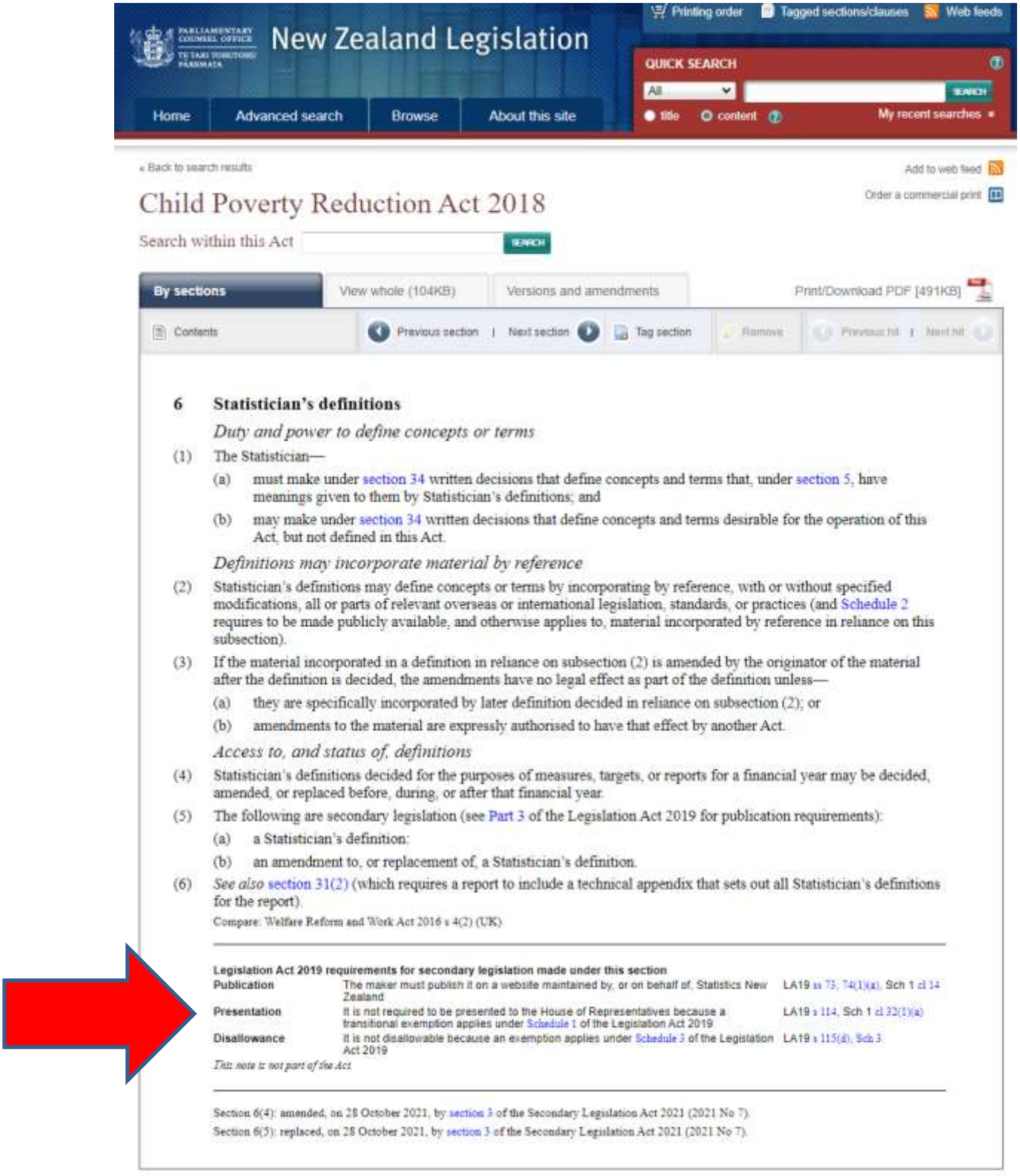
History of the Act

On 28 October 2019 the Legislation Act 2019 and associated Legislation (Repeals and Amendments) Act 2019) were enacted. And on 24 March 2021 the Secondary Legislation Act 2021 was enacted.

The Legislation Act 2019 forms a package with the Secondary Legislation Act 2021 and the Legislation (Repeals and Amendments) Act 2019. The reforms made by the package include the repeal, on 28 October 2021, of the earlier Legislation Act 2012 and the Interpretation Act 1999.

For more about how the changes made, or to be made, by the Legislation Act 2019, see this table.

These changes include inserting, in legislation, new "PPD tables" which set out publication, presentation, and disallowance requirements—providing new clarity to both makers and users of secondary legislation. Here is an example of a "PPD table", from the Child Poverty Reduction Act 2018, section 6:



New Zealand Legislation

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6 Statistician's definitions

Duty and power to define concepts or terms

(1) The Statistician—

(a) must make under section 34 written decisions that define concepts and terms that, under section 5, have meanings given to them by Statistician's definitions; and

(b) may make under section 34 written decisions that define concepts and terms desirable for the operation of this Act, but not defined in this Act.

Definitions may incorporate material by reference

(2) Statistician's definitions may define concepts or terms by incorporating by reference, with or without specified modifications, all or parts of relevant overseas or international legislation, standards, or practices (and Schedule 2 requires to be made publicly available, and otherwise applies to, material incorporated by reference in reliance on this subsection).

(3) If the material incorporated in a definition in reliance on subsection (2) is amended by the originator of the material after the definition is decided, the amendments have no legal effect as part of the definition unless—

(a) they are specifically incorporated by later definition decided in reliance on subsection (2); or

(b) amendments to the material are expressly authorised to have that effect by another Act.

Access to, and status of, definitions

(4) Statistician's definitions decided for the purposes of measures, targets, or reports for a financial year may be decided, amended, or replaced before, during, or after that financial year.

(5) The following are secondary legislation (see Part 3 of the Legislation Act 2019 for publication requirements):

(a) a Statistician's definition:

(b) an amendment to, or replacement of, a Statistician's definition.

(6) *See also* section 31(2) (which requires a report to include a technical appendix that sets out all Statistician's definitions for the report).

Compare: Welfare Reform and Work Act 2016 s 4(2) (UK)

Legislation Act 2019 requirements for secondary legislation made under this section

Publication	The maker must publish it on a website maintained by, or on behalf of, Statistics New Zealand	LA19 ss 73, 74(1)(a), Sch 1 cl 14
Presentation	It is not required to be presented to the House of Representatives because a transitional exemption applies under Schedule 1 of the Legislation Act 2019	LA19 s 114, Sch 1 cl 32(1)(a)
Disallowance	It is not disallowable because an exemption applies under Schedule 3 of the Legislation Act 2019	LA19 s 115(d), Sch 3

This note is not part of the Act.

Section 6(4): amended, on 28 October 2021, by section 3 of the Secondary Legislation Act 2021 (2021 No 7).

Section 6(5): replaced, on 28 October 2021, by section 3 of the Secondary Legislation Act 2021 (2021 No 7).

Also:

For **PCO-drafted** secondary legislation	A new secondary legislation tab and links will be added to Acts, enabling you to access PCO-drafted secondary legislation for that Act—to be implemented over the next few months

Understanding …	The rules for interpreting legislation shift from the Interpretation Act 1999 into the Legislation Act 2019—with some enhancements	Part 2 of the Legislation Act 2019 becomes key when reading legislation	We will put up new guidance for users to better support their understanding of legislation

Even while latent, Part 2 featured in case law. An example is *R v Gallagher* [2021] NZHC 2508 at [25] ("s 5 of the Interpretation Act 1999 . . . has been re-enacted as s 10 of the Legislation Act 2019"). See also *Fitzgerald v R* [2021] NZSC 131 at [43](a) fn 60 per Winkelmann CJ ("Section 5 of the Interpretation Act 1999 is soon to be replaced by s 10 of the Legislation Act 2019 (which, at the time of writing, has not yet come into force)."). See also [249] and fn 356 per Glazebrook J ("Section 5 of the Interpretation Act 1999 is to be replaced by s 10 of the Legislation Act 2019 see also above at n 60 per Winkelmann CJ."). See also *Amaltal Fishing Co Ltd v Ministry for Primary Industries* [2021] NZHC 2275 at [99] per Grice J (31 August 2021). At [102] and [141], Grice J said: "At the same time, the charges involved in this case are criminal charges. Their interpretation and application must therefore bear in mind the stricter standard and precision required for the attribution of legal liability in criminal offences. . . Criminal law in particular must be accessible, 'intelligible, clear and predictable' . . . here a key factor in interpretation is the fact that the MRA forms part of a wider scheme with the Fisheries Act, which contains specific attribution provisions. The MRA does not."

In *Bolton v The Chief Executive of the Ministry of Business, Innovation and Employment* [2021] NZHC 2897, dated 28 October 2021, at [47], Venning J cites s 5(1) of the Interpretation Act 1999 despite its repeal on 28 October 2021 (doubtless because the decision reviewed was subject to s 5(1) before its repeal). Similar is the reference in *Sandhu v Gate Gourmet New Zealand Limited* [2021] NZCA 591 at [40]. In *Four Midwives, NZDSOS and NZTSOS v Minister for COVID-19 Response* [2021] NZHC 3064 (12 November 2021) at [23], Palmer J said "On 28 October 2021, most sections of the Legislation Act 2019 came into force and the Interpretation Act 1999 was repealed. Section 10(1) effectively confirms the Supreme Court's approach in [*Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22]] by requiring that '[t]he meaning of legislation must be ascertained from its text and in the light of its purpose and context'. Section 10(2) adds that '[s]ubsection (1) applies whether or not the legislation's purpose is stated in the legislation'." *See also Afghan Nationals v The Minister for Immigration* [2021] NZHC 3154 at [68] per Cooke J and *Minister of Conservation v Mangawhai Harbour Restoration Society Incorporated* [2021] NZHC 3113 at [56] and n53 per Campbell J (IA99 s 5(1) still applies under LA19 s 33 to appeals heard pre-repeal, but result the same even if LA19 s 10 applied as "context" was also considered under IA99 s 5(1)). Compare *Ellis Family Trustee Limited v Clegg* [2021] NZHC 3201 at [58] and n 2 per Campbell J (specific transitional, but IA 1999 ss 17 and 18 still apply, under LA19 s 33, despite their repeal).

New Zealand and New South Wales – legal challenges to COVID-19 measures

Many legal challenges to COVID-19 measures have arisen recently in New Zealand and New South Wales:

- *GF v Minister of COVID-19 Response* [2021] NZHC 2526 [24 September 2021] -- Unsuccessful application for judicial review of COVID-19 Public Health Response (Vaccinations) Order 2021.

- *Bolton v The Chief Executive of the Ministry of Business, Innovation and Employment* [2021] NZHC 2897 [29 October 2021] – Successful challenge to decision declining application or request for an exemption from isolation in an MIQ facility and proposal instead to self-isolate at home under strict conditions.

- *Te Pou Matakana Limited v Attorney-General* [2021] NZHC 2942 [1 November 2021] – Successful challenge to Ministry of Health decision not to provide individual data of unvaccinated Māori people, to enable targeted delivery of COVID-19 vaccination services. A second, later decision made by the Ministry of Health to not to provide individual data of unvaccinated Māori people, to enable targeted delivery of COVID-19 vaccination services, has also been challenged and the matter has been set down for hearing on 25 November 2021.

- *Four Aviation Security Service Employees v Minister of COVID-19 Response* [2021] NZHC 3012 [8 November 2021] – Unsuccessful challenge to Order requiring Aviation Security Service employees to be vaccinated.

- *Four Midwives, NZDSOS and NZTSOS v Minister for COVID-19 Response* [2021] NZHC 3064 [12 November 2021] -- Unsuccessful application for judicial review of COVID-19 Public Health Response (Vaccinations) Order 2021. The words of the Act encompass the power to require a person not to associate with others unless vaccinated, and to be vaccinated in order to engage in an activity. Interpreting the empowering provision in light of its purpose and context does not detract from that. The right to refuse to undergo medical treatment under s 11 of the Bill of Rights is engaged here. No order can be made under the empowering provision that limits the right unless it is reasonable, prescribed by law and can be demonstrably justified in a free and democratic society under s 5 of the Bill of Rights. In this case, the applicants do not argue the Order is an unjustified limit. The Bill of Rights does not require the usual purposive interpretation of empowering provision to be narrowed to mean that the Order is outside its scope. Indeed, the text of the Act explicitly indicates that Parliament envisaged that orders may be made which limit rights under the Bill of Rights, as long as the limits are justified under s 5. The common law principle of legality, which requires legislative limitations on fundamental rights to be clearly expressed, does not require a different interpretation. *See also* [2021] NZSC 163 (leave declined).

- An unsuccessful New South Wales challenge to vaccination orders is *Larter v Hazzard (No 2)* [2021] NSWSC 1451 [10 November 2021]. And see also *Kassam v Hazzard; Henry v Hazzard* [2021] NSWSC 1320 [15 October 2021].

New Zealand – COVID-19 Response (Management Measures) Legislation Act 2021

This omnibus bill made amendments relating to matters that were aimed at assisting the Government and New Zealanders to more effectively manage, and recover from the impacts of COVID-19.

Among other changes, the Bill included tenancy measures introduced to further support COVID-19 impacted businesses and tenants.

Introduced on 28 September 2021, the Bill became law on 2 November 2021.

The Bill as introduced amended or modified the following legislation:

- Climate Change Response Act 2002:
- Consumer Information Standards (Origin of Food) Regulations 2021:
- Contract and Commercial Law Act 2017:
- Coroners Act 2006:
- COVID-19 Recovery (Fast-track Consenting) Act 2020:
- COVID-19 Response (Requirements For Entities—Modifications and Exemptions) Act 2020:
- Credit Contracts and Consumer Finance Act 2003:
- Criminal Procedure Act 2011:
- Epidemic Preparedness Act 2006:
- Gambling Act 2003:
- Land Transport Act 1998:
- Local Electoral Act 2001:
- Property Law Act 2007:
- Rating Valuations Act 1998:
- Residential Tenancies Act 1986:
- Resource Management Act 1991:
- Secondary Legislation Act 2021.

The Bill was on 29 September 2021 referred to the Finance and Expenditure Committee, who reported on the Bill to the House on 14 October 2021, recommending by majority that the bill be passed, and that the House take note of its recommendations in the report. Because of the tight timing for the Committee's report back to the House, the Committee did not include its recommendations in a revision-tracked version of the Bill. It expected the House to have the opportunity to consider its recommendations through a Supplementary Order Paper at the Committee of the whole House stage.

That is indeed what occurred. The Bill had its second reading on 19 October 2021. SOP No 78, setting out Government amendments, was considered and adopted by a Committee of the whole House on 27 October 2021. The Bill had its Third reading on 28 October 2021, and got Royal assent on 2 November 2021.

The resulting COVID-19 Response (Management Measures) Legislation Act 2021 commenced on 3 November 2021.

New Zealand – COVID-19 Response (Vaccinations) Legislation Act 2021

Amendments in this Amendment Act made vaccination a more prominent part of New Zealand's COVID-19 response framework. The Bill for this Amendment Act—

- was introduced on 23 November 2021,
- received Royal assent on 25 November 2021, and
- came into force on 26 November 2021.

Amendments to COVID-19 Public Health Response Act 2020

The Amendment Act amended the COVID-19 Public Health Response Act 2020 (**the Act**) to—

- provide for the broadening of COVID-19 orders to better reflect the new measures and intentions under the COVID-19 Protection Framework (also called the "Traffic Light System"):
- provide for forms of acceptable evidence of compliance with COVID-19 orders:
- make it an offence to hold, store, use, or disclose personal information from COVID-19 vaccination certificates through the verification process, except for law enforcement purposes:
- provide that enforcement officers can direct a person to produce evidence to demonstrate compliance with an order under the Act.

In addition, the Bill amends the Act to—

- support future vaccination or testing mandates for work in the public interest:
- provide for regulations to be made that prescribe an assessment tool that persons conducting a business or undertaking (PCBUs) may to use to ascertain whether it is reasonable for work carried out for the PCBU to be carried out only by workers who are vaccinated or tested.

Amendments to Employment Relations Act 2000

The Amendment Act also amended the Employment Relations Act 2000 to provide for reasonable paid time off for employees to be vaccinated.

In addition, amendments in the Amendment Act also provide for a 4-week paid notice period for termination if the work requires vaccination but an employee is unvaccinated. The termination notice will be cancelled if the employee gets vaccinated during that period, unless cancelling the notice would unreasonably disrupt the employer's business.

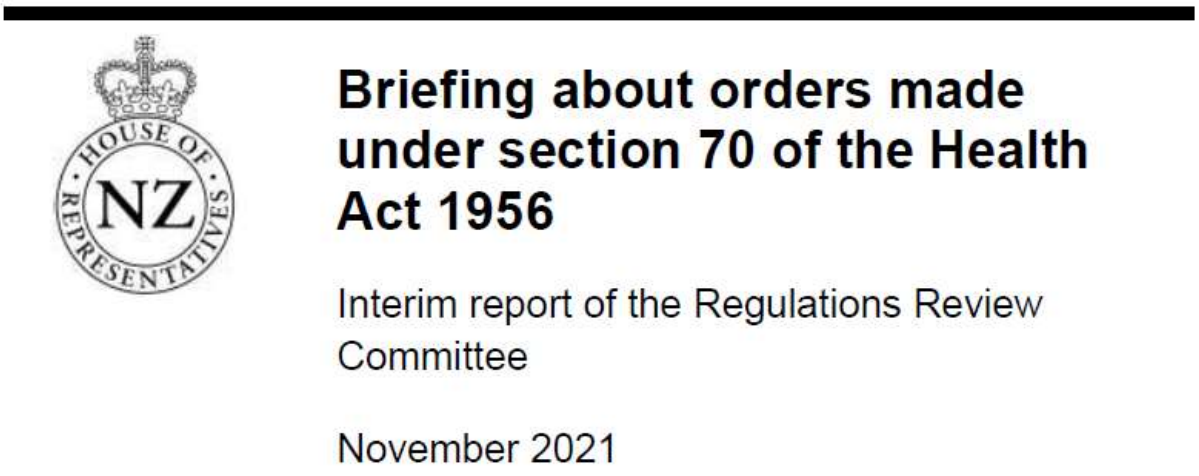
The employee will still be able to bring a personal grievance in relation to the ending of the employment agreement and can terminate their employment early by mutual agreement with their employer.

Criticism of speed of legislative process

The speed with which the Amendment Act was passed attracted critical comment from—

- Mr Speaker, in a ruling at the start of the third reading debate on calendar 24 November 2021 (but under urgency an extension of the House's 23 November 2021 sitting day); and
- Victoria University of Wellington / Te Herenga Waka's Law Professors Dean Knight and Geoff McLay, as shown by this item in *Stuff* on 24 November 2021.

New Zealand – Regulations Review Committee (RRC) – Interim report "Briefing about orders made under section 70 of the Health Act 1956"



Briefing about orders made under section 70 of the Health Act 1956

Interim report of the Regulations Review Committee

November 2021

On 30 November 2021, the RRC presented to the House of Repesentatives an interim report entitled "Briefing about orders made under section 70 of the Health Act 1956".

The RRC explains the background as follows:

"Section 70 orders are part of a class of secondary legislation that are not required to be drafted by the Parliamentary Counsel Office or published on the Government's legislation website. [They are unusual in that they were not required to be presented to the House of Representatives under section 41 of the Legislation Act 2012. However, that changed when the Legislation Act 2019 came into force on 28 October 2021. Section 70 orders are now required to be presented under section 114(1) of that Act.] Before the outbreak of COVID-19, the Ministry of Health drafted secondary legislation fairly infrequently. For obvious reasons, entities that draft secondary legislation infrequently do not tend to retain expertise in that skill set. It was unsurprising, therefore, that section 70 orders made by medical officers of health in response to the sudden outbreak of COVID-19 in early 2020 raised concerns in terms of the grounds for bringing secondary legislation to the attention of the House in Standing Order 327(2).

"The RRC of the 52nd Parliament wrote to the Director-General on several occasions noting particular concerns with the section 70 orders and acknowledging the very challenging circumstances in which they were made. Those concerns included questions about whether the orders were covered by the power in section 70, unauthorised sub-delegation of powers, inappropriate incorporation of material by reference, and unclear drafting. Our predecessor's intention was to assist the ministry to improve the legislative quality of future notices. Its August 2020 report noted significant improvement over time in those orders, particularly when they began to be drafted by the Parliamentary Counsel Office and were published on the New Zealand Legislation website.

"In May 2020, the COVID-19 Public Health Response Act 2020 was enacted. From that point, secondary legislation to impose isolation or quarantine, to close premises, and to restrict movement and gatherings across New Zealand were imposed under orders made by the Minister of Health (and subsequently, the Minister for COVID-19 Response) under sections 9 and 11 of that Act. [Those powers were amended in August and December 2020. Further amendments are proposed in the COVID-19 Public Health Response Amendment Bill (No 2), which was reported on by the Health Committee on 11 November 2021. [Editor: See also the COVID-19 Response (Vaccinations) Legislation Act 2021.]] That Act also gives the Director-General of Health equivalent powers, but only within the boundaries of a single territorial authority district. To date, the Director-General has not used the powers under that Act.

"However, in 2021, the Director-General and other medical officers of health have—from time-to-time—continued to use the powers in section 70 of the Health Act 1956 to require isolation or quarantine, and medical testing, for COVID-19 across New Zealand."

Among other things, RRC recommends to the Government that it provide additional legislative drafting support to the D-G of Health. It adds:

"Drafting legislation is a specialist skill. It requires a high degree of written precision and an understanding of the constitutional principles for the design of legislation. Our scrutiny of section 70 orders (and that by the RRC of the 52nd Parliament) has given us an appreciation of the challenges faced in this regard by entities that only infrequently draft legislation and are doing it at speed. To assist those entities, we have collated guidance about the steps they should take towards drafting constitutionally sound secondary legislation. This guidance can be found in Appendix C."

New Zealand – New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill reported by Privileges Committee

New Zealand Attorney General David Parker chairing Parliament's Privileges Committee

On 30 September 2021, the Privileges Committee reported this Bill back to the House, recommending that the Bill be passed. It also recommended, unanimously, amendments to the Bill, and proposed parliamentary rules for a process of active consideration by the House of these declarations.

The Committee said "we are not proposing that either the legislative or executive branches be required by law to respond to a declaration of inconsistency in any particular way. In the spirit of dialogue and our constitutional arrangements, that is properly a matter for each branch to determine on its own."

The Committee recommended to the House amendments to the Bill for the following purposes:

- to clarify that the Attorney-General must notify, rather than report to, Parliament on a declaration ("We see the Attorney-General's role here as being to bring the declaration into the House's consideration, rather than reporting substantively on the declaration."):
- to require the Government to respond to declarations of inconsistency – the Government response would be required within 6 months of a declaration being brought to the attention of the House, but that reporting deadline would also be able to be extended or shortened, as required, by resolution of the House, or by the Business Committee as the House's delegate.

Under the parliamentary rules proposed by the Committee, the Government's response would trigger a debate in the House. The parliamentary process the Committee recommends would involve:

- a declaration of inconsistency being referred to a select committee allocated by the Clerk of the House:
- select committee consideration of and reporting on the declaration within 4 months
- debate in the House on the declaration, the select committee report, and the Government's response to the declaration, upon presentation of the latter.

The aim of this process is to ensure that declarations of inconsistency are given active consideration by the House. It would also ensure that the House discharges its constitutional functions of representation and scrutiny in respect of declarations.

As to the process for adoptiong the package of reforms, the Committee said "We recommend that the proposed rules for declarations of inconsistency be adopted through a sessional order, for the current term of Parliament. We have written to the Leader of the House proposing that he lodge a notice of motion containing the proposed rules, so they could be debated alongside the bill's third reading. This would, of course, be subject to the subsequent stages of the legislative process, and any further amendments to the bill that need to be reflected in the rules. The notice of motion would provide for the rules to take effect on the day on which the bill came into force. We also recommend that the procedure for declarations of inconsistency subsequently be incorporated permanently in the House's rules when the next review of the Standing Orders takes place."

See also https://ukconstitutionallaw.org/2021/12/01/andrew-geddis-and-sarah-jocelyn-is-the-nz-supreme-court-aligning-the-nzbora-with-the-hra/.

In his 2 December 2021 address at Te Herenga Waka / Victoria University of Wellington on "The legal and constitutional implications of New Zealand's fight against COVID", the Attorney-General said:

"The importance I and the government attach to civil liberties has been demonstrated by many active steps.
"The repeal of the repugnant three strikes legislation, the repeal of arbitrary restrictions on prisoner voting rights are specific instances.
"The progression of the so called 'half way house' under the Bill of Rights Act – creating a pathway for a considered and often less politicised response by both Parliament and the Executive to declarations of inconsistency by the higher Courts.
"This will be of enduring effect.
"It has been described by Sir Geoffrey Palmer as perhaps the most important advance for the protection of civil liberties since his Act was passed in 1990."

The following link will take you to the NZCPL event page which links to the recording of the address: https://www.wgtn.ac.nz/public-law/events/past-events/2021-events2/hon-david-parker-the-legal-and-constitutional-implications-of-new-zealands-fight-against-covid

Australia – Law Reform Commission papers and interim report – complexity, legislative design, improving navigability of legislation, and definitions

Australian Government
Australian Law Reform Commission

The Australian Law Reform Commission (ALRC) has recently released several publications as part of its Review of the Legislative Framework for Corporations and Financial Services Regulation.

Two background papers discuss—

- complexity and legislative design, and
- improving the navigability of legislation.

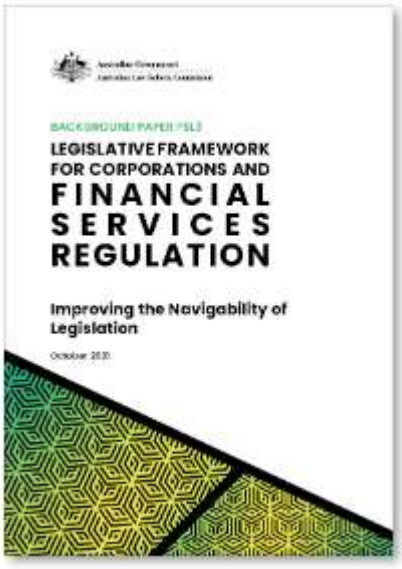
The first Interim Report of the Inquiry focuses on the use of definitions. Although the Interim Report's focus is on corporations and financial services legislation, the Report (and several chapters in particular) discuss issues that relate to legislative drafting more generally, and so are of particular interest to CALC members. (The ALRC says it has drawn on, and was greatly assisted by, articles published in CALC's journal *The Loophole*, and its easily-accessible publications catalogue online.) For example,—

- chapters 2 and 3 discuss legislative complexity (and so build upon the Background Papers), and
- chapters 4–6 discuss the use of definitions in legislation.

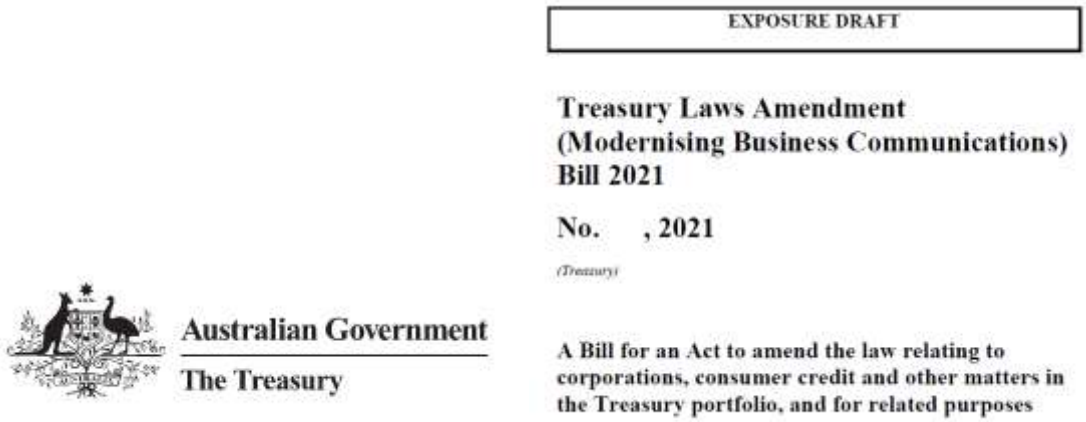
Related website links:

- https://www.alrc.gov.au/inquiry/review-of-the-legislative-framework-for-corporations-and-financial-services-regulation/consultation-doc/ (Background Papers)
- https://www.alrc.gov.au/publication/fsl-report-137/ (Interim Report, a shorter Summary Report, and a sample of prototype legislative drafting)

Submissions on the Interim Report – including from CALC members – are sought by **25 February 2022**.



Australia – Improving the technology neutrality of laws in the Treasury portfolio



EXPOSURE DRAFT

Treasury Laws Amendment (Modernising Business Communications) Bill 2021

No. , 2021

(Treasury)

Australian Government

The Treasury

A Bill for an Act to amend the law relating to corporations, consumer credit and other matters in the Treasury portfolio, and for related purposes

The Australian Government has released exposure draft legislation to modernise business communications by improving the technology neutrality of laws in the Treasury portfolio.

Building on the proposed reforms in the Corporations Amendment (Meetings and Documents) Bill 2021 (the Corporations Amendment Bill) introduced into Parliament in October 2021, the Treasury Laws Amendment (Modernising Business Communications) Bill will provide greater flexibility for businesses, individuals and regulators when communicating with each other.

The exposure draft comprises proposed amendments that:

- expand the scope of the global regimes that allow documents to be signed and sent electronically in the Corporations Amendment Bill.
- legislate relief for companies, registered schemes and disclosing entities sending documents to 'lost members' under the Corporations Act 2001.
- allow notices published in newspapers to be published in any accessible and reasonably prominent manner across Treasury portfolio laws.
- update payment provisions in Treasury legislation to ensure electronic payments can be made.
- update the National Consumer Credit Protection Act 2009 and associated legislation to give consumers and their credit providers greater flexibility when updating their details and when sending documents.

In the next phase of this project, the Government will consider further reforms to improve technology neutrality including:

- communicating with regulators:
- exemptions to the Electronic Transactions Act 1999:
- product disclosure and recordkeeping requirements.

Responses to this consultation can be submitted up until 10 December 2021. Interested parties are invited to comment on this consultation. For more information, *see* this link.

United Kingdom – Favourite repealed conversational legislation

Editor: See the Ecclesiastical Jurisdiction Measure 1963 s 82 (as repealed on 22 July 2004 by the Statute Law (Repeals) Act 2004 (c. 14), Sch. 1 Pt. 6 Group 5).

The Ecclesiastical Jurisdiction and Care of Churches Measure 2018, s 18(2), provides that "The Court of Ecclesiastical Causes Reserved has jurisdiction to hear and determine all suits of duplex querela."

United Kingdom – Legislative drafting practice and statutory interpretation: article by Diggory Bailey in Public Law

Diggory Bailey's recent item "Legislative drafting practice and statutory interpretation: A postscript" [2021] P.L. 687-690, considers the Supreme Court's decision in *R (Maughan) v HM Senior Coroner for Oxfordshire* [2020] UKSC 46, focussing on comments about use of legislative drafting conventions and how they are established and the use of Schedules. (Notably Diggory's item features also in the 2021 Annual Lord Renton Lecture given by The Right Hon Lady Arden of Heswall DBE, on 25 November 2021 – and an on-demand recording link to which is available at www.calc.ngo.)

The item starts as follows:

> The recent Supreme Court decision in *R. (on the application of Maughan) v HM Senior Coroner for Oxfordshire*1 bears out the point made in my article published in the April 2020 issue of Public Law2 about the relevance of legislative drafting conventions to statutory interpretation, but it also serves to highlight some potential pitfalls when relying on external materials to establish those conventions.
>
> 1 *R. (on the application of Maughan) v HM Senior Coroner for Oxfordshire* [2020] UKSC 46; [2021] A.C. 454.
> 2 D. Bailey, "Bridging the gap: legislative drafting practice and statutory interpretation" [2020] P.L. 220. See also D. Bailey and L. Norbury, *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th edn (London: LexisNexis, 2020), Code s.24.10.

For links to drafting manuals and other online drafting resources from around the Commonwealth, *see* https://www.calc.ngo/drafting-manuals-and-other-resources

Jersey – Award winning work by Jersey LDO drafter and editor

Congratulations to Zöe Rilstone, and Jersey LDO and Public Service colleague Kate Hannah, on winning, at recent Jersey Public Service One-Gov Awards, an Innovation Award for their work developing an App:

The One-Gov award was won jointly by Zöe Rillstone and Kate Hannah.

Their award-winning innovation work is described in Lucy Marsh-Smith's nomination for the award:

The Legislative Drafting Office (LDO) draft a number of Orders uprating fees in time for 1st January each year, creating a logjam of work towards the end of the year. The pressure on Departmental officers who instruct the LDO resulted in a lack of clarity in instructions so that the drafting took longer than needed. On their on-line course "Coding the Law" at Flinders University, Zöe and Kate learnt to code in python, develop a project plan, and make an application to assist with the annual fees uprating. The application contains prompts that cover all the information LDO needs to draft that Order, including the powers being exercised, and even calculates the percentage increase in fees. It then compiles the responses into a logically formatted Word document containing the drafting instructions. The app will result in less time spent drafting the Orders, as the drafting instructions will now contain all the required information in a way that is easy to follow, avoiding the need to revert for clarification. It will also mean that the LDO can allow instructors more time to request the drafting at a busy time of year. The LDO congratulates Kate and Zöe for their innovative solution to speed up, simplify and improve the system for uprating fees charged by Jersey Government, developed at no cost to Government. They are providing training to the officers in time for instructions to be received for the 2022 fees.

For more about the on-line course "Coding the Law" at Flinders University, see https://news.flinders.edu.au/blog/2020/07/30/lawyers-up-their-game-with-coding-skills-but-clients-the-winners/.

New South Wales – Crimes Legislation Amendment Bill 2021

Parliamentary Counsel's Office (NSW)
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NSW Attorney General and Minister for Prevention of Domestic and Sexual Violence, Mark Speakman, introduced the Crimes Legislation Amendment Bill 2021 in the Legislative Assembly on 21 October.

The Bill amends six criminal laws to improve criminal investigation, enforcement and police response, and to adjust particular penalties.
The amendments form part of the Government's regular program of legislative reviews and improvements.

The Bill proposes amendments to the following legislation:
- the Crimes Act 1900
- the Crimes (High Risk Offenders) Act 2006
- the Law Enforcement (Powers and Responsibilities) Act 2002
- the Surveillance Devices Act 2007
- the Terrorism (High Risk Offenders) Act 2017
- the Terrorism (Police Powers) Act 2002

The Bill is available on the NSW legislation website:
https://lnkd.in/gBw2Ys-Y

Instructor:
Policy, Reform and Legislation Branch, NSW Department of Communities and Justice

Drafters:
Jason Emmett, Principal Assistant Parliamentary Counsel
Shakira Harrison, Assistant Parliamentary Counsel
Ella Bryant, Assistant Parliamentary Counsel

Production and Access:
Jess Allen, Principal Production and Access Officer,

#nswgovernment #nswlegislation

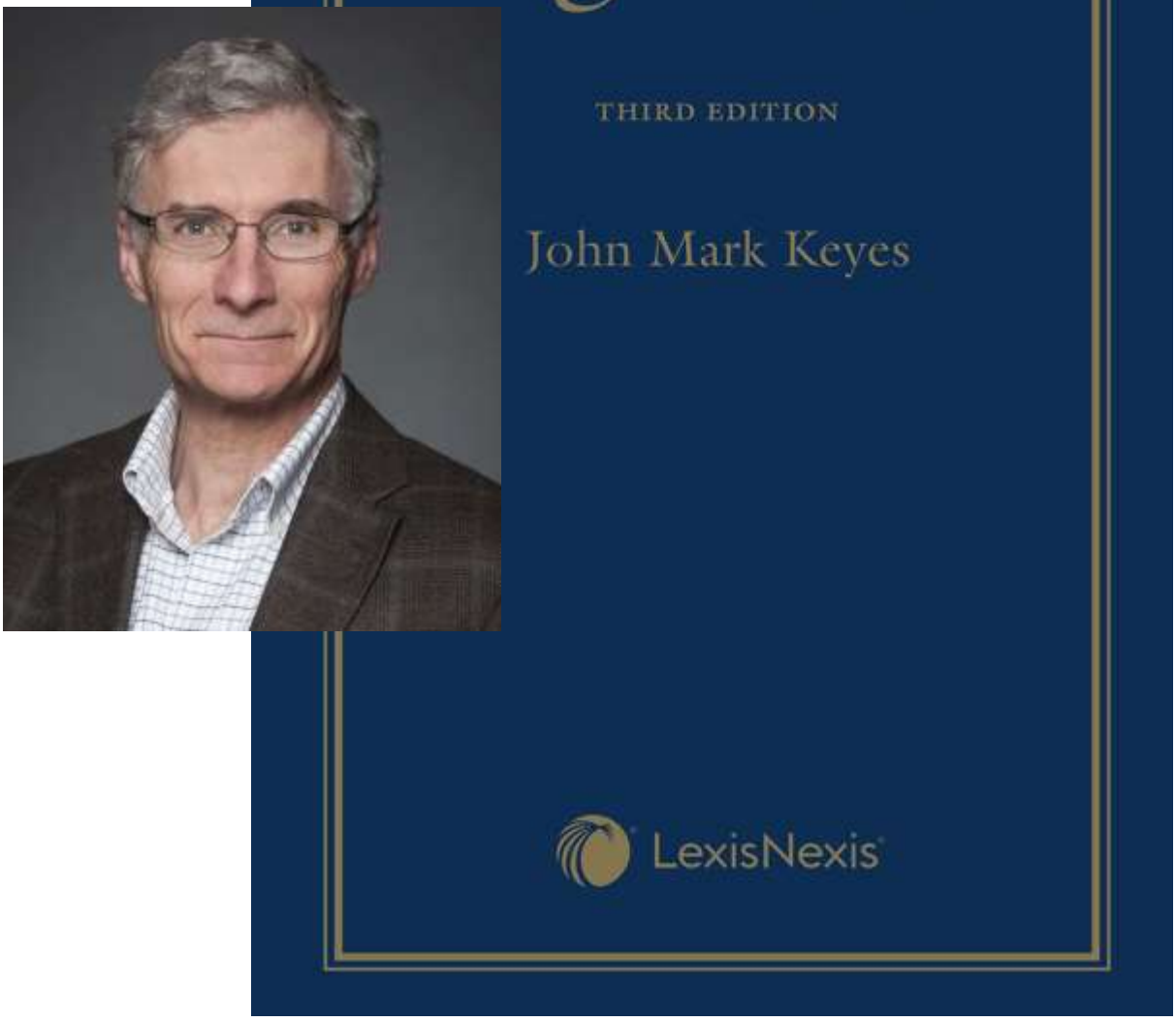
Crimes Legislation Amendment Bill 2021
legislation.nsw.gov.au

New Zealand – Proposal for Digital Legal Systems Lab

A New Zealand research body that has done research and writing about Law as Code is proposing a Digital Legal Systems Lab to build and test digital legal systems. For more information about the proposal, a discussion paper, and an invitation to contribute, see https://www.brainbox.institute/dlslab.

Canada – New, 2021 3rd edition of John Mark Keyes definitive textbook

https://store.lexisnexis.ca/en/categories/shop-by-jurisdiction/federal-13/executive-legislation-3rd-edition-skusku-cad-00834/details



Nigeria

LAW NEWS

Association of Legislative Drafters and Advocacy Practitioners Advocates for Legislative Drafting to be Recognised as an Area of Legal Practice in Nigeria in the Forthcoming LPA Legislation

HALIMA ABIOLA NOVEMBER 14, 2021 LEAVE A COMMENT

The Association of Legislative Drafters and Advocacy Practitioners, ALDRAP, has submitted a proposal to the Senate Committee on Judiciary, Human Rights and Legal Matters urging it to insert a new clause into the Legal Practitioners Bill to back Legislative Drafting as a distinct area of legal practice in Nigeria.

ALDRAP stated this is a letter addressed to the Senate committee signed by its Secretary Dr Tonye Clinton Jaja.

The Association recommended that legislative drafting — the elaborate process of constructing a text of legislation — be made a new sub-discipline of law and subject for legal research and scholarship.

https://loyalnigerianlawyer.com/association-of-legislative-drafters-and-advocacy-practitioners-advocates-for-legislative-drafting-to-be-recognised-as-an-area-of-legal-practice-in-nigeria-in-the-forthcoming-lpa-legislation/

Australia – 2021-22 Review of the Legislation Act 2003 (Aust)

Under section 59 of the Legislation Act 2003 (Aust), the Attorney-General must appoint a body to review all aspects of the operation of the Legislation Act.

The Attorney-General has appointed the following people to conduct this review:

- Ms Sarah Chidgey – Deputy Secretary, Integrity and International Group in the Attorney-General's Department. Ms Chidgey is the chair of the review panel.
- Ms Roxanne Kelley PSM -– Deputy Secretary, Corporate and Foreign Investment Group in the Treasury.
- Mr Peter Quiggin PSM QC – former First Parliamentary Counsel in the Office of Parliamentary Counsel (2004–2021), and former CALC President (2011–2017).

The Review Committee is to report by 5 June 2022 on the review of the Act.

The terms of reference for, and some key issues in, the review are in a Discussion Paper.

Responses are sought by 8 December 2021.

Submissions and feedback received in response to the Discussion Paper will inform the review's final report.

United Kingdom – Official judgment portal set to go live in April 2022

John Sheridan: free repository of court judgments 'is the right thing to do'

Nearly 50,000 court judgments have been set up to be posted online in the first phase of the UK government's plan to create a cutting-edge free repository of legal information, reported Michael Cross in the Law Society Gazette on 29 November 2021.

The service, hosted by the National Archives, will go live in April 2022 when the Ministry of Justice's contract with the British and Irish Legal Information Institute (BAILII) expires.

'We'll meet the deadline, there's no doubt,' John Sheridan, digital director at the National Archives, said in November 2021. The plan, exclusively revealed by the Law Society Gazette in 2020, is to create a comprehensive online archive of 'judgments as data', encoded in a form readable by computer. This will be of benefit to developers of artificial-intelligence-based legal support tools as well as researchers and academic lawyers.

See https://www.lawgazette.co.uk/news/official-judgment-portal-set-to-go-live/5110741.article.

Compare this report released in December 2020 advocating for reform of the process by which written New Zealand judicial decisions are created and published.

The Judges of the New Zealand Supreme Court announced on 24 November 2021 that submissions (together with relevant outlines and chronologies) filed from 1 February 2022 will be published on the Courts of NZ website (https://www.courtsofnz.govt.nz/) for all appeal hearings with only limited exceptions. This initiative aims to improve transparency 0f court processes and advance public understanding of the Court's work.

USA – Article on machine-readable legislation

https://scholarlycommons.law.northwestern.edu/njtip/vol19/iss1/3/

> > >

The Legislative Recipe: Syntax for Machine-Readable Legislation

Megan Ma
Bryan Wilson

Abstract

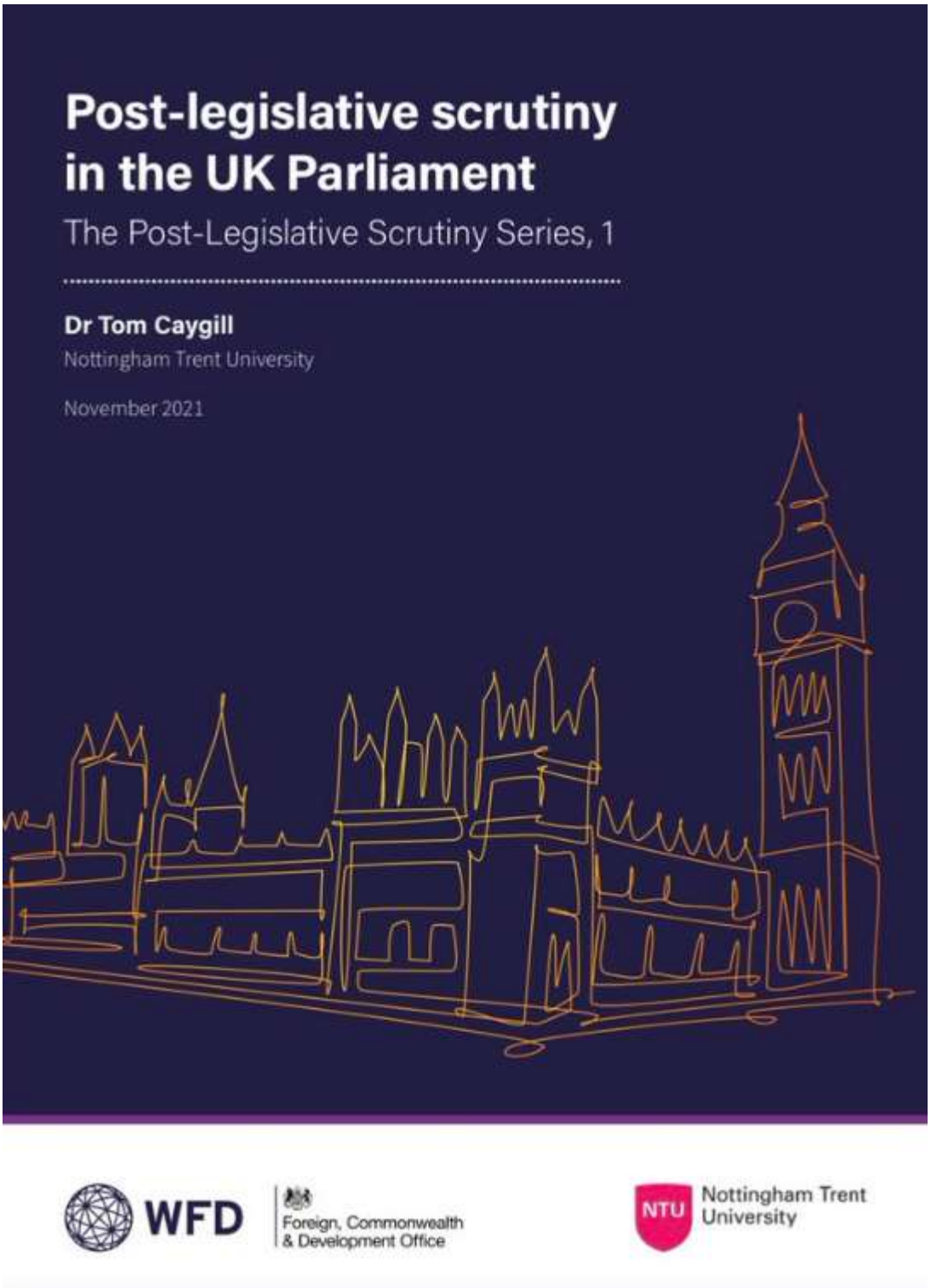
Legal interpretation is a linguistic venture. In judicial opinions, for example, courts are often asked to interpret the text of statutes and legislation. As time has shown, this is not always as easy as it sounds. Matters can hinge on vague or inconsistent language and, under the surface, human biases can impact the decision-making of judges. This raises an important question: what if there was a method of extracting the meaning of statutes consistently? That is, what if it were possible to use machines to encode legislation in a mathematically precise form that would permit clearer responses to legal questions? This article attempts to unpack the notion of machine-readability, providing an overview of both its historical and recent developments. The paper will reflect on logic syntax and symbolic language to assess the capacity and limits of representing legal knowledge. In doing so, the paper seeks to move beyond existing literature to discuss the implications of various approaches to machine-readable legislation. Importantly, this study hopes to highlight the challenges encountered in this burgeoning ecosystem of machine-readable legislation against existing human-readable counterparts.

Recommended Citation

Megan Ma and Bryan Wilson, *The Legislative Recipe: Syntax for Machine-Readable Legislation*, 19 Nw. J. Tech. & Intell. Prop. 107 (2021).
https://scholarlycommons.law.northwestern.edu/njtip/vol19/iss1/3

United Kingdom – Report on post-legislative scrutiny

https://t.co/iE6tptMlDY



Stop Press: Obituary tribute: David Sewell (1960–2021)

David Sewell, for many years parliamentary counsel in the Office of Parliamentary Counsel in London and more recently in the Office of Legislative Counsel in Northern Ireland, died unexpectedly on 28 November aged 61. He is survived by his wife, Gabriel, his son, Zachary, and his stepson, Oliver.

David Sewell on retiring from OPC, London, in 2019

David studied mathematics at Lady Margaret Hall, Oxford, before qualifying as a solicitor. He joined a firm of solicitors in Kent, his home county, and shortly afterwards became a partner in the firm. David was also a notary and spent a brief period with the Law Society before joining the Government Legal Service in the Department of the Environment. While working there, and instructing on what became the Environment Act 1995, he applied to join the OPC. On starting in February 1995, he was immediately assigned to work on that same bill.

During his quarter-century in OPC, David authored innumerable pages of legislation. A considerable number of those were in the area of tax. In addition to annual Finance Bills, David worked on the Tax Law Rewrite, which undertook the rewriting of the UK direct tax statute book and, in the process, made significant modernising changes to the way the OPC drafts all legislation. He worked on a range of tax measures, but was considered to have a special affinity for the taxation of pensions (one of the knottiest areas). With his mathematics background, he could readily see the effect that complex rules were intended to achieve.

His astonishing capacity for hard work was coupled with endless generosity in assisting other members of the office. He gladly shared his wide knowledge of the law and points on drafting and parliamentary procedure. He greatly enjoyed helping less experienced drafters to develop their drafting skills. A keen sense of service led to his becoming the OPC trade union representative. Many counsel have reason to be grateful for his help and advice, particularly on pension matters.

He could take a pen and sheet of paper and, in no time, there would be an orderly sequence of figures written in a fine bold hand.

From OPC, First Parliamentary Counsel, Elizabeth Gardiner, expressed profound sadness at David's untimely death. She says "In the best traditions of the OPC, David combined deep drafting and legal expertise and a phenomenal capacity for hard work (not to mention a little mild eccentricity), but perhaps most importantly he will be remembered by us all for his kindness and generosity of spirit. I worked alongside him on many pension and taxation measures. His capacity to deal with complexity was legendary, but I will also remember the late nights when he might quite reasonably have caught up on some sleep but opted instead to read through 600 plus pages of Finance Bill produced by the rest of the team, helping ensure we had the best possible legislation to introduce. David was a respected colleague, a teacher and a friend to us all, and we will miss him greatly."

David was also a lay reader in the Church of England, where he led services and gave sermons. And he was active in the Lady Margaret Hall Association. For a time, he served as Honorary Treasurer, and Gabriel, a LMH history graduate, served as Honorary Secretary.

At the end of 2019, David retired from the OPC. His colleagues paid warm tribute to him in the customary spoof Bill printed on Commons green paper. He is fondly remembered and will be sadly missed.

Despite retiring from the OPC, he did not retire from drafting. Instead he joined the Office of the Legislative Counsel in Northern Ireland in January 2020. It was great fun for former OPC colleagues to deal with him in his new guise.

In his tribute to David, the acting First Legislative Counsel, Alexander Gordon, writes that the OLC was delighted to welcome such an experienced, diligent, and able drafter to the team. Alex reports that David took to this stage of his career with great relish, and fitted in immediately with office colleagues and officials in the various departments. David, Alex says, also greatly enjoyed the hands-on approach required in Bill work in Belfast, and many departmental officials had gone out of their way to tell him how much they valued the generosity with which David shared his time, effort and skill when working with them. Alex concludes his tribute: "The collection of Assembly Bills drafted by David is a testament to the substantial contribution he managed to make to the law in Northern Ireland during his relatively short period in the office. He will be sadly missed in Belfast too."

(Elizabeth Gardiner QC and Catherine O'Riordan, OPC, London, Alexander Gordon, OLC, Belfast)

New CALC members

New members since 11 May 2021

The following have been recorded as members of CALC (a) since 11 May 2021 (the date when new members were last listed in the *CALC Newsletter* (May 2021 edition, as published on 14 May 2021), and (b) as at 25 November 2021.

Name	Country
Siddiqi, Fahad	Pakistan
Cairns, Kristi	Canada
Amies, Denise	Australia
Redhead, Arya	Grenada
Ben-Or, Gali	Israel
Otieno, Jane	Kenya
Morten, Brigitte	New Zealand
Nelu, Filiga Taukiei	Tuvalu
Percival, Richard	United Kingdom
Digney, Marie	Canada
Keter, Sammy	Kenya
Jankiepersad, Vanna	Trinidad and Tobago
Malone, Tom	Australia
Ambrosio, Richard George	Bermuda
Mendy, Toney F	Gambia
Kirnon, George	Guyana
Cacace, Luigi	New Zealand
Groves, Michelle	New Zealand
O'Donovan, Anne	New Zealand
Paterson, Alexandra	New Zealand
Aslam, Muhammad	Pakistan
Thyroomoody, Tanya	Seychelles
Persotam, Ateeqa	South Africa
Nyathi, Natasha	Zimbabwe
Bailey, Andrea	Canada
Appiah Owusu, Victoria Esmi	Ghana
Dafydd, Guto	United Kingdom
Baksas, Amanda	Australia
Katselas, Tammy	Australia

Name	Country
Mackey, Deborah	Australia
Mascarenhas, Yen	Australia
Somerville, Carolyn	Australia
Williams, Sandra	Australia
Wiseman, Leslie	Australia
Bursey, Jeff	Canada
Dhala, Sherina	Canada
Durham, Devon	Canada
Ross, Rob	Canada
Houston, Jacqui	Australia
Saez, Notre Dame	Australia
Friesen, Lorelei	Canada
Gignac, Monique	Canada
Dei, Angela	Ghana
Frankenburg, Michal	Israel
Hughes, Llion	United Kingdom
Martin, Charlotte	United Kingdom
Alay, Yousef	Saudia Arabia
Norman, Jane	Australia
Phua, Jonathan	Australia
Gibson, Odecca	Bahamas
Elie, Mechelle	Barbados
T, Humda	Canada
Ali, Maida	Kenya
Kithu, Annette	Kenya
Waweru, Veronicah	Kenya
Irvine, Caitlin	United Kingdom
Leung, Stanley	Australia
Ishaq, Abduljabar	Kenya
Herrick, Merlin Jack Spencer	New Zealand
Kiel, Olivia	New Zealand
Ayeni, Ayodele	Nigeria
Dada, Adebanji	Nigeria
Kelle Bula, Zakayo	Nigeria

Secretary Contact Details

To contact CALC's Secretary, Ross Carter, about membership or any other CALC matters (for example, to suggest or send items for this *CALC Newsletter*), email: ross.carter@pco.govt.nz

REFORMATIVE LEGISLATION. NEW LEGISLATION.

Much Needed Legislation. ADVANCED LEGISLATION.

(Old New Zealand newspaper headlines — courtesy of Papers Past)