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If you would like to join CALC, use our [online registration form](#).

Coronavirus Act 2020 COVID-19 Public Health Response (Vaccinations) Order 2021
Commercial Tenancies (COVID-19 Response) Amendment Regulations
2021
COVID-19 (WORKPLACE RESTRICTIONS) (AMENDMENT – ENFORCEMENT OFFICERS) (JERSEY)
ORDER 2021
COVID-19 Recovery Act 2021 *COVID-19 Emergency Response Act (S.C. 2020, c. 5)*

Titles of a selection of recent COVID-19-related legislation from around the Commonwealth

CALC President's Report—May 2021



President
Commonwealth Association of Legislative Counsel

Dear CALC members

Greetings once again to you all. My thanks to your hardworking secretary, Ross Carter, for again producing another interesting and informative edition of the *CALC Newsletter*. (Editor: Thanks also to CALC members and others who contributed so generously to this edition: Lydia Clapinska, Joel Wolchover, Daniel Jenkins, Elizabeth Gardiner, Lucy Marsh-Smith, Anna Powick, Jennifer Cartwright, Karen Kinley, Meredith Leigh, Stephen Mattingley, Valerie Thomas, William Stephenson and John Mark Keyes, Andy Beattie, Diggory Bailey, Matthew Sait, Edgar Schmidt, Helen Xanthaki, and John F Wilson.)

CALC Council meeting on 26 March 2021

In these challenging times when in-person conferences and meetings are out of the question, CALC will continue to make best use of the virtual technologies available to us so that we can keep members up to date with developments in legislative drafting and related matters and facilitate and maintain communication among members throughout the Commonwealth.

This was very much in the minds of your CALC Council when we held our second virtual Council meeting on 26 March 2021. We managed to overcome the challenges of arranging a meeting that would enable Council members from many different time zones across the Commonwealth to join the meeting. Held at 5 pm Western Australian time, this meant that John Mark Keyes joined the meeting at 5 am Ontario time and Ross Carter at 10 pm New Zealand time!

Matters discussed at the Council meeting included the following.

Finances and membership

CALC Treasurer, John Mark Keyes, circulated updated financial statements and reported that CALC's finances are in a good position. Advertising revenue is steady and providing a good source of income.

CALC Secretary, Ross Carter, reported that membership of CALC continues to grow. He noted the importance of members keeping their membership details, especially their email address, up to date. This can be done by contacting Ross at Ross.Carter@pco.govt.nz.

Liaison with Commonwealth Secretariat

Brenda King reported on her attendance, on behalf of the CALC President, at the virtual meeting of the Senior Officials of Commonwealth Law Ministries (SOLM), 16-17 February 2021. A number of Commonwealth Accredited Organisations, including CALC, submitted activity reports to the meeting, and Brenda spoke to CALC's report. A copy of CALC's activity report is available on the CALC website at www.calc.ngo/conferences. The Outcome Statement from the meeting is available at [Final Outcome Statement SOLM 2021](#).

I reported on a virtual meeting with representatives of the Rule of Law Section, Governance and Peace Directorate, Commonwealth Secretariat (ComSec) on 23 March 2021. We discussed a number of issues at that meeting, including the following:

- Initiatives that ComSec is taking in the Caribbean and Southern Africa to enhance the capacity of countries in legislative drafting
- Collaboration between ComSec and CALC with respect to online training in legislative drafting
- Further initiatives to seek information on how ComSec can assist smaller jurisdictions to build up legislative drafting capability
- Agreement to maintain regular communication between ComSec and CALC through a virtual meeting every 2 months.

Strategic planning

The Council agreed that the cancellation of CALC's 2021 biennial conference provides an opportunity to undertake the first ever strategic planning exercise for CALC. CALC members will be surveyed on a range of matters, including what CALC's key priorities should be, the effectiveness of CALC's communications, what initiatives CALC should undertake and what CALC might do to foster and enrich relationships among CALC members and between CALC and other organisations. The results of the strategic planning exercise will be reported to the next biennial conference.

Collaboration with other organisations

The Council discussed how CALC might collaborate with other organisations on matters of mutual interest. These organisations include the [Australian Society for Computers and the Law \(AUSCL\)](#) and the Regulatory Institute (<https://www.howtoregulate.org/about-howtoregulate-org/>). For example, rules as code is a particular focus of AUSCL, and is also something very relevant to CALC members. There is an item about this later in this edition of the *CALC Newsletter*.

Electronic voting

The September 2020 *CALC Newsletter* reported that the CALC Council Governance Working Group, chaired by Ross Carter, is investigating options for using electronic voting for CALC Council elections. Ross reported that the working group is progressing this work, and plans to undertake a trial of an electronic system later in the year. The deferral of the 2021 biennial conference provides more time to progress this work.

The Council endorsed a suggestion at the meeting that the Council also explore using its Zoom software to hold its general meeting by Zoom-cast.

Webinars in 2021

CALC discussed the very successful CALC Australasia and the Pacific Region webinar held in December 2020, and the feedback from CALC members. Most respondents to the survey conducted after the webinar considered that the webinar was very useful or useful. There was excellent member participation in the webinar, and a recording of the webinar has now been made available via the CALC website. The Council considered that the webinar was an excellent pioneering effort.



Respondents indicated that there is overwhelming interest in CALC organising more webinars, and many suggested topics for future webinars. Council members agreed to explore and report back to the Council on holding webinars based on these topics. Jersey is hosting the first ever CALC forum focused on the work of those interested in, or involved with, editing, consolidating and publishing legislation – see page 42.



CALC biennial conference in 2022

The Council discussed when might be an appropriate time to consider whether it is feasible to hold an in-person biennial conference in 2022. It was agreed that it was too early to begin planning for a 2022 conference, but the survey to be conducted as part of the strategic planning exercise

will also canvass ideas for possible conference topics for the next biennial conference.

Other matters – Commonwealth Lawyers Association conference

The latest information I have from the Commonwealth Lawyers Association is that it still plans to hold an in-person biennial conference in The Bahamas in September 2021. If any CALC members are planning to attend the conference, please let Ross Carter know so that CALC might organise an informal gathering at the conference.

Registration details for the CLA conference are available at—

www.commonwealthlawyers.com/clc-2021/#CLC20201_programme



THE LOOPHOLE Call for Papers – Can you help?



CALC's journal, [*The Loophole*](#), is looking for articles.

The Loophole is CALC's flagship publication, very ably curated by an Editorial Board consisting of John Mark Keyes as Editor in Chief and Board members Bethea Christian, Therese Perera and Bilika Simamba. I thank them for their very fine work.

The cancellation of the 2 regional CALC conferences planned for 2020, and of our 2021 biennial conference, means that the number of contributions that would normally have been produced for those conferences will not be available for inclusion in *The Loophole*.

I therefore urge CALC members to consider submitting a contribution for publication in *The Loophole*. Contributions can be about drafting, legal, procedural and management issues relating to the preparation and enactment of legislation. In line with CALC's objects, contributions about editing or translating draft legislation, or the training of legislative drafters, are also welcome.

The global pandemic has provided the impetus for much writing on emergency and public health legislation, but the usual business of law-making and its inherent challenges continue to generate questions that invite our attention. With this in mind, the aim of the next issue is to feature articles on these other topics: **Anything but the Pandemic**.

Please contact John Mark Keyes at calc.loophole@gmail.com for more information. The Editorial Policies relating to *The Loophole* are set out at the start of each issue.



RSS feed on CALC website

An RSS (Really Simple Syndication) feed is being added shortly to the CALC website: www.calc.ngo.

This feed will allow CALC 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.

Instructions on how to use the RSS feed will be made available on the website: www.calc.ngo.

Best wishes

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

Stay safe.



Geoff Lawn

CALC President, May 2021



Drafting through the pandemic: a view from London

By Lydia Clapinska and Joel Wolchover, OPC London

A group of drafters stood in an uneasy circle around an office desk, shuffling to gauge and maintain an appropriate distance from each other and wondering when they would see each other again. There were snacks for sharing (can you imagine?) and a sense of relief and exhaustion and huge trepidation.

This was March 2020 and the last group of drafters to be banished to their homes by the virus were those who worked on the Coronavirus Bill. That Bill was a monumental effort for the Office - a 348 page Bill drafted in 6 weeks and rushed through Parliament in a week. That was 14 months ago and it was the last time many of us set foot in the office.



An empty Westminster bridge – Photograph thanks to Bethany Cannell.



Coronavirus Act 2020

2020 CHAPTER 7

The Coronavirus Bill, with its plethora of emergency powers, marked the start of an extraordinary year.

The most significant change in all our working lives has been the move to working from home full-time. The excellent IT support we enjoy at OPC has helped us to avoid the worst pitfalls of remote working but the challenges have still been enormous - and very varied.

While some of us are fortunate to have dedicated spaces at home to work from, or very on-trend garden outbuildings kitted out with office equipment, others have had to work from their kitchens, bedrooms or children's rooms - in some cases perched on the end of a bed or having to move around to keep out of the way of flatmates.

We are not alone in having to learn the etiquette of “Zoom” - or in our case Google Meet - and the new language of “you’re still on mute!”, “legacy hands”, blurred backgrounds and the awkward wave at the end of a meeting.

Some of us had the added challenge of months of forced home-schooling, during which time we wondered in awe how teachers manage to control 30 children at once, let alone teach them anything. Stories of refusnik children staging protests against their substitute parent-teachers became commonplace. For others loneliness has been the biggest challenge. Many of us have also had caring responsibilities, supporting elderly or isolated relatives, friends and neighbours. Pets assumed a new importance in lockdown - we saw a surge in office puppies and kittens, furry bundles of joy blissfully oblivious to the support and vital companionship they provide.

A common theme, when we discuss the impact of the current situation among ourselves, is that we miss the impromptu chats that arise when you bump into a colleague in the corridor or canteen. Conscious of the effect on our well-being, and the need to maintain the sense of being “an office” while being physically outside our actual office, we have tried a variety of different strategies and events.

We now have a regular well-being newsletter, which details the many sources of support that are available for coping with lockdown (though inevitably, most are accessed online). Tantalisingly, the resources on offer now include a “life after lockdown” series - recognising that the easing of restrictions and the return to what now seems a bygone age of working in physical proximity to one another is likely to present challenges of its own.

Another innovation has been “coffee roulette” - where willing participants are thrown into small groups for an online coffee* and chat (*other hot drinks are available). The office now has a ferociously competitive board game club and (less competitive) book club, which has even featured a discussion with one of the chosen authors. Various one-off events have also kept us entertained and in touch with one another, including a pancake competition for Shrove Tuesday - with prizes for appearance and inventiveness rather than taste - and an online trip to an “escape room” (perhaps slightly ironic, in the circumstances).



We have also taken part in events to raise funds for the London Legal Support Trust, whose funding of free legal advice in the capital and south-east of England has been badly hit by the pandemic (just as

demand for such services has soared). This included a socially distanced sponsored walk, in which participants walked separately, or in family groups, while keeping up a stream of banter on WhatsApp.

One consequence of the pandemic was that the issue which had dominated UK political life since 2016 - Brexit - was largely overshadowed for much of 2020.

But 31 December 2020 (at 23:00 GMT, to be precise) marked the end of the “transition period” agreed between the EU and the UK. This made for interesting times for members of the Office working on the Bill which became the European Union (Future Relationship) Act 2020 (“EUFR”) - which makes changes to domestic UK law necessary to implement the Trade and Cooperation Agreement between the UK and the EU and related agreements.

The timescale for the Bill was highly unusual. Any UK-EU trade deal needed to be implemented by the end of the transition period but the negotiations continued until the last minute and the deal was only agreed on 24 December, with the three draft agreements (the Trade and Cooperation Agreement, the Security of Information Agreement and the Civil Nuclear Agreement) as well as a set of declarations being published by 26 December. The Trade and Cooperation Agreement alone amounted to 1,246 pages.

An 80 page draft Bill implementing these agreements was published on 29 December 2020 and was introduced into Parliament on 30 December 2020. It went through all its Parliamentary stages on the same sitting day and received Royal Assent in the early hours of 31 December. It is thought that it was the largest piece of legislation in modern times to go through Parliament in a single sitting day. The statutory instrument commencing the key provisions of the new Act was signed at 2.36 pm on 31 December 2020 with just a few hours to spare before the 11pm deadline.



European Union (Future Relationship) Act 2020

2020 CHAPTER 29

The timing was therefore very tight and a great team of drafters (about a dozen in total) worked tirelessly to deliver the Bill. As much drafting work as possible was done in advance to try to anticipate what the agreements would contain but, inevitably, it was only at, or towards, the end that there was certainty as to what the agreements actually did contain. And it was also only at a relatively late stage that it was

decided that the agreements would be provisionally applied because there was no longer enough time to ratify them before the end of the transition period. Drafting changes were therefore needed right up until the very end.

Another drafting highlight of 2020 was the Sentencing Act 2020, to be known as the Sentencing Code, which received Royal Assent in October 2020. The new Code consolidated more than 1,300 pages of legislation. The Code followed a Sentencing (Pre-consolidation Amendments) Act, allowing for a “clean sweep” of sentencing procedural law, so that offenders convicted after the commencement of the Code are sentenced according to the most up to date version of the law, irrespective of when the offence was committed.

During the pandemic period over 3,600 pages of primary legislation drafted by OPC has made it onto the statute book, covering agriculture, fisheries, terrorist offenders, pensions, telecommunications, trade, finance, internal markets and Windrush compensation to name but a few. (The [Windrush Compensation Scheme \(Expenditure\) Act 2020](#) gives the Home Office parliamentary financial authority to make payments under the [Windrush Compensation Scheme](#).)

The Coronavirus Act was the flagship piece of primary legislation responding to the pandemic but an enormous amount of secondary legislation, under that Act and existing public health legislation, also needed to be produced at great speed.



Daniel Jenkins is head of the Government Legal Department's SI Hub - a team of around 30 specialist secondary legislation drafters established in 2016 to draft statutory instruments (SIs) across central government departments - who are based down the corridor from OPC's offices in 1 Horse Guards Road. He explained: "The pandemic led to a huge amount of secondary legislation, across pretty much all policy areas - from education to entertainment, from elections to employment, from social security to criminal justice.

"By mid-March 2021, the Government had made 332 coronavirus-related SIs and, including all those made by the administrations in Scotland, Wales and Northern Ireland, that figure rises to 778. Most significantly, the Government has made around 120 SIs imposing business closures, social distancing measures and travel restrictions.

"The biggest challenge for us has undoubtedly been the need to legislate at speed. We've been completing SI projects which, in normal times would take weeks or months, in days or even hours. Secondary legislation has been in the spotlight like never before. Our drafters, in the SI Hub and across government, have risen to the challenge brilliantly."

The Mother of Parliaments, too, has had to adapt to social distancing. Unlike some legislatures, the decision was taken not to relocate temporarily to a larger venue where members could all be physically present but socially distant. Instead a hybrid system was introduced, with some members of each House physically present in the Chambers and others appearing in debates online - the Zoom backgrounds of some of their Lordships in particular revealing rather grand surroundings.

Remote voting was briefly introduced in the Commons but the procedure expired in May 2020.

Instead, electronic pass readers have been installed in the division lobbies to make the traditional process of casting a vote by walking through one of the lobbies safer and more efficient. As well as pass readers in the Commons lobbies, the Whips hold large numbers of proxy votes for those not attending Parliament - almost 600 of 650 MPs are now voting by proxy and almost 500 of these proxies are held by



just one Government and one Official Opposition whip - a significant change in a Parliament for which voting in person through the lobbies has been such an essential part of life as an MP. Remote voting continues in the Lords.

It's hard not to be impressed, watching hybrid proceedings on parliamentlive.tv, at how well the legislature has adapted to operating in pandemic conditions. Drafters at OPC, under the brilliant leadership of First Parliamentary Counsel Elizabeth Gardiner CB QC (Hon), have also shown and continue to show great resilience in these unprecedented times.

In the words of Elizabeth Gardiner:

"At the end of December 2020, with the key legislative building blocks for EU Exit in place (just!) and the General Election having returned a Government with a healthy majority, I don't think I was alone in anticipating a period of relative calm in the world of UK legislation. Yet, within a matter of weeks, the pandemic had emerged and things looked very different.

"As we worked at pace to re-purpose and greatly expand our contingency drafting for a Pandemic Flu into something fit for the challenges of COVID-19, I recall that I kept having to remind myself how to spell "coronavirus" - a word now indelibly marked on all of us.

"More than a year on, we have successfully recreated the spirit and capability of OPC from our homes. Colleagues have been magnificent - rising to every challenge and caring for each other along the way. We've seen it takes more than a pandemic to interrupt the flow of legislation, with a bumper crop of 53 Bills (and over 3,600 pages) passed, most of them having nothing whatsoever to do with COVID-19.

"We will look back on these days as extraordinary in so many ways, but also with pride at what was achieved. We are already thinking about what we might do differently as a result of the experience - and I for one will leave lockdown with a heightened appreciation for the small things in life."



India – COVID-19 crisis – plight of people of India

Lucy Marsh-Smith writes: I have been very moved by the plight of the people of India.

I was the first of several generations of my family not to be born in that country. My grandfather, Reginal Norman Marsh-Smith, was Inspector General of Police there and when he left India in the 1940s he wrote this wonderful poem which I have always treasured:

AN ENGLISHMAN'S THOUGHTS ON INDIA

I have a love for India,
The land where I had my birth,
I have a passion for India,
Her vastness, her grandeur, her worth.

I've spent a life-time in India,
I know of her joy and her pain,
I have been long years in India,
I know of her loss and her gain.

I owe a debt to India,
A debt I can never repay,
I've eaten the salt of India,
To that salt I'll be true always.

I owe a duty to India,
To help her with all my might,
I'll take a vow for India,
To her my troth I'll plight.

I have a fear for India,
That she may be a prey to strife,
I have a dread for India,
Lest she thus imperil her life.

I have a hope for India,
That she may be prosperous, happy, and free,
I have a vision of India,
Of her greatness about to be.

I have a prayer for India,
That my fear and dread may be wrong,
I ask God's blessing for India,
That my hope may prove true ere long.

11.3.46

R.N.M-S

75 years on India is facing a different sort of threat, one that my grandfather could never have imagined. I wanted, through CALC, to express my sorrow for the current situation and hope that the terrible suffering of the Indian people, and in other countries in the Commonwealth, may be relieved as medical supplies and vaccines get to where they need to be.

Till then I share my grandfather's hopes and prayers for future prosperity and the relief of suffering of the Indian people and the long-term defeat of COVID-19.



New Zealand: New Chief Parliamentary Counsel

13 APRIL 2021

Appointment of Chief Parliamentary Counsel



HON DAVID PARKER

Attorney-General

Attorney-General David Parker today announced the appointment of Cassie Nicholson as Chief Parliamentary Counsel for a term of five years.

The Chief Parliamentary Counsel is the principal advisor and Chief Executive of the Parliamentary Counsel Office (PCO). She is responsible for ensuring PCO, which drafts most of New Zealand's legislation, provides high quality services and advice to the Government and Parliament.

Ms Nicholson holds a BA/LLB (Hons) from Victoria University of Wellington, was a Commonwealth scholar and holds an LLM from the London School of Economics and Political Science.

She has more than 20 years' experience at the Parliamentary Counsel Office and has held the position of Deputy Chief Parliamentary Counsel (Drafting Legislation), since 2016. Her previous experience includes leading complex policy reforms and working, in her early career, as a commercial lawyer in the private sector.

"Cassie is a respected leader with a deep understanding and knowledge of the work of the Parliamentary Counsel Office," David Parker said.

"She is a dedicated public servant and understands the role of the agency within New Zealand's law making system."

Ms Nicholson starts in the role on 7 May 2021. The current Chief Parliamentary Counsel, Fiona Leonard, finishes her term on 6 May 2021.

"I would like to thank Fiona Leonard for her service as Chief Parliamentary Counsel. She has made a significant contribution to ensuring our system of government works smoothly," David Parker said.



CALC members also congratulate Cassie on [the following award](#):

LawFuel's 2020 New Zealand Lawyer of the Year



Cassie Nicholson – Legal First Responder

Government legal counsel Cassie Nicholson, perhaps the key legal figure behind the mountain of legal work required to be climbed during the Covid-19 pandemic, is LawFuel's Lawyer of the Year for 2020.

Drafting unprecedented, urgent legislation and legislative 'orders' in the midst of a pandemic was the principal challenge facing Cassie Nicholson and her team during 2020.

Working in the unglamorous-sounding Parliamentary Counsel Office with a team of 35 government lawyers, she was at the coal face dealing with pandemic legislation involving around 110 pieces of legislation and other legal instruments.

As Deputy Chief Parliamentary Counsel, Cassie Nicholson had to marshal not only her legal and leadership skills, but also her ability to inspire a team facing a world-changing pandemic.



Parliamentary Counsel's Office (NSW) @NSWPCO · Apr 15

Congratulations to New Zealand's new Chief Parliamentary Counsel, Cassie Nicholson, who takes up the role in May.

We look forward to working with you as part of the Australasian Parliamentary Counsel's Committee.

New Zealand: DCPC (Drafting) & Director (Access)

Law Drafting

The Law Drafting group is led by the Deputy Chief Parliamentary Counsel (Drafting), Richard Wallace takes up this role from 24 May 2021 in an acting capacity.

Drafting work is carried out by **Parliamentary Counsel**, all of whom are lawyers, grouped into four drafting teams. Their work is both challenging and specialised, and yet the issues they deal with range across a wide spectrum.

The group also provides secretarial and legal policy support to the [Legislation Design and Advisory Committee \(LDAC\)](#).

See [Shape the future of New Zealand law](#) for more about working as a drafter, including the qualities needed for the job and drafter profiles.



Richard Wallace

Access to Legislation

The Access to Legislation group is led by Acting Director Access to Legislation, Michelle Groves.

The Access to Legislation Group is responsible for providing free and ready access to up-to-date legislation, and provides Bills and Supplementary Order papers to Parliament. The group provides support to Parliamentary Counsel through the team of **Counsel's Assistants**, quality assurance of legislation through the **Legislation Services Unit**, and is responsible for publishing legislation in hard and electronic copy through its **Publishing Unit**.

The group includes a small legal policy team.



Michelle Groves

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

Meredith Leigh is currently acting in the office of First Parliamentary Counsel at the [Australian Government Office of Parliamentary Counsel](#) (OPC), Canberra.



Meredith Leigh

Meredith Leigh joined OPC in February 1998 and was appointed as Second Parliamentary Counsel in March 2016. She is currently acting in the office of First Parliamentary Counsel. She is also on the Board of the Australian Government Legal Service.

2021



CALC members congratulate Peter Quiggin PSM QC on his appointment as a Queen's Counsel, and on his recent retirement.

Hon Christian Porter MP, Attorney General for Australia, made the [announcement](#) of Peter's appointment as QC on 15 October 2020, in recognition of his significant experience, and his outstanding skills and expertise, in legislative drafting.

Peter retired as First Parliamentary Counsel in April 2021, after 31 years at OPC.

Peter was appointed as First Parliamentary Counsel in 2004. He leaves a deep and lasting impact, both on OPC and on the broader drafting community. In his role as First Parliamentary Counsel, he has championed a clearer laws agenda, promoting plain English drafting, reducing complexity, and publishing drafting directions and guidance material. Since 2012, when OPC took on the function of drafting subordinate instruments and publishing the Federal Register of Legislation, Peter has been a strong advocate for the importance of

publicly accessible laws. He has always been a firm supporter of building drafting communities, with his significant involvement in CALC, and his role as a long-standing member of the [Australasian Parliamentary Counsel's Committee](#).

Peter was awarded a Public Service Medal in the 2008 Australia Day Honours List for outstanding public service in delivering the government's legislative agenda at a time of significant legislative change and in a number of critical areas. Peter has also served as CALC's President from 2011 to 2017. As CALC members appreciate, Peter also showed outstanding leadership and service in that role.

Here is a recent photo of Peter with the banner that celebrates OPC's 50th anniversary (1970–2020).

Canada – Nova Scotia Update

By Karen Kinley, Office of the Legislative Counsel, Nova Scotia



NOVA SCOTIA
LEGISLATURE

The Office of the Legislative Counsel in Nova Scotia is unique in Canada as we are responsible for the drafting of government bills but are not part of the Department of Justice. We are an office of the House of Assembly. We are parliamentary counsel, legislative counsel and law clerks which means that we give legal advice to the Assembly, the Speaker, its committees and its offices and we draft both government and opposition bills, but no government regulations.



Gordon Hebb, QC, Chief Legislative Counsel; Heather MacDonald, Legislative Assistant;
James Charlton, former Legislative Counsel, current Chief Clerk of the Nova Scotia House of Assembly;
Nicole Leblanc-Murray, Legislative Assistant; Philip Grassie, Legislative Counsel; Karen Kinley, Legislative Counsel.

Our office has five lawyers and three legislative assistants. Gordon Hebb, our Chief Legislative Counsel, is the longest-serving Chief Legislative Counsel in Canada and has been in his role as Chief for over 27 years and in this office for over 45 years. Gordon loves his job so much that even COVID lockdowns have not stopped him from coming into the office daily. Gordon only recently gave up his weekly “gentlemen’s” hockey games.

Karen Kinley joined the office in 2009, after 23 years of a rural private practice in Lunenburg county. She is the mother of four and the first grandparent in the office. She and her husband are founding members of the coastal rowing program in Lunenburg.

Philip Grassie came south from the Nunavut Legislative Counsel Office in 2016, thus making for a slightly easier climate adaptation when his wife moved from the Philippines to Canada. He and Rodelyn are expecting their first child this fall.

Erin Fowler loved her time in Halifax at Dalhousie University’s Schulich School of Law so much that she made the move from the research office at Queen’s Park in Ontario to come to our office in 2019 when James Charlton moved to Alberta. She and her partner packed up their two dogs and are renovating a home and adding a guest room for the many visitors they are likely to receive.

Annette Boucher, our half Legislative Counsel, half Assistant Clerk of the House, retired March 1st and we are replacing her with a full time Legislative Counsel. But I must give fair warning, people who come here are reluctant to leave. James Charlton left our office to become the Chief Legislative Counsel for the province of Alberta, but returned to Nova Scotia after 2½ years and is now the Chief Clerk of the House.



Karen and her grandson, Charlie, on his visit to her office.

Our House of Assembly adjourned its 2020 spring sitting on March 10th, days before our province went into lockdown, and only met again on December 18, 2020 to prorogue. In addition to our regular duties, the staff in our office have been using the lockdowns to work from home on a complete revision of the statutes. (Our last revision was in 1989.)

Our new premier, Iain Rankin, and his cabinet were sworn in on February 23, 2021 and introduced a Speech from the Throne on March 9th. Nova Scotia has fared well during the pandemic, mostly due to the fact that we are a fairly isolated province and have tight-knit communities that take lockdowns seriously. Three days after this spring sitting adjourned on March 19th, our capital city of Halifax went into a tight lockdown. Cases peaked over the next few days and the rest of the province was locked down as well. We are hoping this lockdown results in a downward trend and then a summer with eased restrictions and at the least, more “staycations” within the four Atlantic provinces.

This article was inspired by Lucy’s article on Jersey and perhaps it will inspire another Leg Counsel to write about their jurisdiction. In case it doesn’t – tag, Alex from Northern Ireland, you’re it!

CALC – Collaboration with Australian Society for Computers & Law (AUSCL) – Rules as Code webinars



AUSCL Australian Society for Computers and Law

<https://www.linkedin.com/company/auscl>

The Australian Society for Computers and Law (AUSCL) is one of Australia's leading interdisciplinary think-tanks on issues arising at the intersection of technology, law and society. It is a registered Australian non-profit charity with a charter to advance education and advocacy.

The mission of AUSCL, as a registered charity, is to advance education and advocacy on topics such as Rules as Code. AUSCL is therefore delighted to be sharing initiatives with CALC members.

AUSCL is keen to support CALC members to upskill with Rules as Code.

AUSCL has posted recordings of its First and Second Masterclasses on Rules as Code:

- 25 March 2021 – <https://www.youtube.com/watch?v=OTZ4PS5VZG8&t=10s>
- 14 April 2021 -- <https://youtu.be/ZF3hY0bnqBw>

Here is a link to AUSCL's 11 May 2021 Third Masterclass (Presented by Natalia and AustLII Datalex):

- <https://racmasterclass3.eventbrite.com.au>

CALC encourages CALC members to:

- Subscribe to AUSCL's mailing list for future events: <https://ausclsubscribe.eventbrite.com.au>
- Join the ANZ Rules as Code Community of Practice: <https://community.codeforaustralia.org/t/about-the-rules-as-code-community-of-practice/11>
- Subscribe to AUSCL's YouTube Channel for access to on demand recordings

Australia – Senate Committee Report on Australia as a Technology and Financial Centre – Rules as Code

This Australian Senate committee has been doing and reporting on a multi-phase inquiry on this topic. In its [Second Interim Report](#), the Committee makes a number of recommendations, including some related to Rules as Code. The report's summary, and recommendations, say, in relevant part:

Rules as Code initiatives

The committee received strong evidence about the potential for a 'Rules as Code' approach to developing legislation and regulations to drive efficiency and spur innovation in the administration of the law and in service delivery. A range of research initiatives and pilot projects have already been undertaken in this area, and there is significant interest across industry, academia and government agencies in various Australian jurisdictions.

Key stakeholders in the Rules as Code and LawTech domains have urged that a government innovation hub for coding of legal rules, along with a regulatory sandbox to enable the implementation and assessment of results from this hub, should be created to help drive momentum in this area. The committee agrees that this concept should be progressed by the federal government.

- 7.38 A number of challenges still need to be worked through if a Rules as Code approach is to become embedded in government processes. This will require collaboration between policy experts, lawyers, legal drafters, researchers, software developers, and service providers, as well as upskilling in relevant public service agencies.
- 7.39 Key stakeholders in the Rules as Code and LawTech domains have recommended that a government innovation hub for coding of legal rules, along with a regulatory sandbox to enable the implementation and assessment of results from this hub, should be created to help drive momentum in this area. The hub could be responsible for developing strategic priorities for coding innovation, undertaking pilot projects in association with relevant agencies and partners, assessing results, and driving national and international collaboration.
- 7.40 The committee considers that this initiative will reap a dividend of accelerated digitisation in government services and put Australia at the forefront of this domain internationally, creating new opportunities for our LawTech and RegTech companies.

Recommendation 9

- 7.41 **The committee recommends that the Australian Government establish a Commonwealth 'Rules as Code' innovation hub, accompanied by a regulatory sandbox, to advance legal coding approaches to Commonwealth legislation and regulation.**

CALC – Collaboration with Regulatory Institute – Institute's *Handbook: How to regulate?* (2nd edition)



By Valerie Thomas, Lisbon, who manages and represents the Regulatory Institute

The Regulatory Institute is a non-profit think tank that conducts research on regulation and provides pro bono consultancy services on legislation and regulatory techniques. Our research articles are freely available on our website www.howtoregulate.org and cover a range of regulatory sectors using examples from many jurisdictions.

Our flagship [Handbook: How to regulate?](#) outlines a basic universal method for regulating using reference regulation from over 40 jurisdictions. This recently updated second edition goes beyond the first edition by presenting two additional perspectives on regulation:

- a macro-view: an introduction into the topic of regulatory architecture that can help in the harmonious configuration of different pieces of regulation; and
- a micro-view: a typology of requirements and other provisions that helps to complement or otherwise improve individual provisions.

These additional perspectives and about 70 new sections and subsections complement the inventory of regulatory techniques and methodology of the first edition.

Identifying generally interesting and useful regulatory techniques from so many different and diverse jurisdictions and sectors confirms the basic assumption of the *Handbook*, that 'regulatory techniques' are universal, not limited to specific sectors. Regulators can all learn from each other, across jurisdictions and sectors, by profiting from the remarkable intelligence laid down in existing legislation.

The *Handbook* is made freely available because better regulations benefit us all.

If you would like to know more about our work please visit our [website](#). We also welcome collaborations with regulatory officials and legislators, please contact the Manager of the Regulatory Institute, Ms Valerie Thomas at manager@regulatoryinstitute.org.



Case note: Regulatory charges and Henry VIII clauses in the Supreme Court of Canada's *References re Greenhouse Gas Pollution Pricing Act*

William Stephenson, Legislative Counsel | Conseiller législatif
Office of the Law Clerk and Parliamentary Counsel, House of Commons, Canada

The Supreme Court of Canada recently ruled that Canada's federal carbon pricing scheme set forth in the *Greenhouse Gas Pollution Pricing Act* (GGPPA) is constitutional, putting an end to protracted litigation against the legislation by three provinces.¹ Beyond the federal division of powers issues that took centre stage, the Court dealt with two further issues of interest to legislative counsel: (1) whether the regulatory charge in the GGPPA should be characterized as a tax; and (2) whether the regulation-making provisions and Henry VIII clauses in the GGPPA conferred such broad and unconstrained powers as to be unconstitutional.

I. Context

Canada's carbon pricing scheme was enacted in 2018, as part of an omnibus budget implementation bill.² The scheme involves a fuel charge and a pricing mechanism for industrial greenhouse gas emissions and is framed as a backstop to be imposed on provinces that do not enact a carbon pricing system equivalent to the federal model.³

¹ *References re Greenhouse Gas Pollution Pricing Act*, [2021 SCC 11](#) [Reference]; *Greenhouse Gas Pollution Pricing Act*, [SC 2018, c 12, s 186](#).

² Bill C-74, *An Act to implement certain provisions of the budget tabled in Parliament on February 27, 2018 and other measures*, [1st Sess, 42nd Parl, 2018](#). The appropriateness of including such a complex scheme in an omnibus bill is a question for another day.

³ See *Legislative Summary of Bill C-74*, Library of Parliament: [Publication No. 42-1-C74E](#) (20 April 2018) at section 2.5.

It did not take long for Alberta, Ontario and Saskatchewan to refer questions to their Courts of Appeal seeking guidance on the constitutionality of the scheme. The main issues raised before each court were whether the GGPPA respected the division of powers set out in the *Constitution Act, 1867*⁴ and caselaw on Canadian federalism, including whether the Act falls within the national concern doctrine under the federal government's peace, order and good government powers.

Majorities on the Courts of Appeal of Ontario⁵ and of Manitoba⁶ ruled that the GGPPA was constitutional. The majority on the Court of Appeal of Alberta ruled that the Act was unconstitutional.⁷ At least one justice on each court wrote a dissenting opinion. The case inevitably went before the Supreme Court of Canada, where a majority ruled that the GGPPA was properly enacted as a matter of national concern under s. 91 of the *Constitution Act, 1867* and that the GGPPA was constitutional in every other respect. But there were three strong dissents.

While the *Reference* is a major development in the law of federalism in Canada, two further issues addressed by the Court warrant attention. First, in ruling on the distinction between a regulatory charge and a tax, the Court was in agreement that although the regulatory scheme at issue was meant to influence behaviour and was established for the public good, it was not a tax in disguise. In so doing, the Court reaffirmed and clarified the criteria it had previously set out for distinguishing between a regulatory charge and a tax. Second, the three dissenting justices, each writing separately, expressed significant concern

⁴ [30 & 31 Victoria, c 3 \(UK\)](#).

⁵ *Reference re Greenhouse Gas Pollution Pricing Act*, [2019 ONCA 544](#).

⁶ *Reference re Greenhouse Gas Pollution Pricing Act*, [2019 SKCA 40](#).

⁷ *Reference re Greenhouse Gas Pollution Pricing Act*, [2020 ABCA 74](#).

about the Act's "breathtakingly broad" regulation-making authority and Henry VIII clauses. Justice Côté, especially, delivered a stinging rebuke of what she saw as the inordinate discretion conferred on the executive to alter the very nature of the scheme and to override the GGPPA itself. The majority, however, held that the regulation-making authority was sufficiently circumscribed by the purpose of the Act and that Henry VIII clauses were an acceptable feature in Canadian legislation.

II. Regulatory charge or tax?

Whether a charge constitutes a tax can have critical constitutional implications for the charge, because of the constitutional requirements for taxation provisions. Section 53 of the *Constitution Act, 1867* states that tax bills must originate in the House of Commons. But courts have interpreted s. 53 as also standing for the constitutional principle there should be no taxation without representation. The Supreme Court of Canada, in *Re Eurig Estate*, affirmed this principle, which "ensures parliamentary control over, and accountability for, taxation."⁸ In that case, the Court found that a probate fee constituted a tax. Since the fee had been imposed by the provincial Lieutenant Governor in Council without proper delegation, the probate fee was unconstitutional.

As *Eurig* highlights, the principle of no taxation without representation also constrains the delegation of taxation powers. While s. 53 does not prohibit Parliament from delegating taxation power, it does require legislatures "to use a high degree of specificity in enabling provisions" that delegate taxation powers.⁹

⁸ [1998] 2 SCR 565 at paras 30-32 [*Eurig*].

⁹ John Mark Keyes, *Executive Legislation*, 2nd ed (Markham: LexisNexis, 2010) at 122, 118.

Finally, a further constitutional wrinkle for regulatory charges is s. 125 of the *Constitution Act, 1867*, which provides that the federal and provincial governments are not liable to taxation. This means that a fee that is found to constitute a tax cannot be imposed on government or an agent of the Crown. This was the issue in *Westbank First Nation v. British Columbia Hydro and Power Authority*, where the Westbank First Nation sought to impose a levy on the provincial power authority.¹⁰ The Supreme Court of Canada held that s. 125 of the *Constitution Act, 1867* shielded the provincial power authority, as an agent of the Crown, from the levy, since the levy constituted a tax. The levy was therefore inapplicable to the power authority.

In Canada, the criteria for determining whether a levy or regulatory charge amounts to a tax have been largely set since 1931 in *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction*.¹¹ They have, however, been reiterated and expanded in more recent cases.¹² A levy or regulatory charge will be a tax if it is “(1) enforceable by law; (2) imposed under the authority of the legislature; (3) levied by a public body; and (4) intended for a public purpose.”¹³ These criteria will generally be sufficient to determine whether a levy amounts to a tax. However, to these criteria, the Court in *Westbank* added a fifth for determining whether a charge is a tax or a regulatory charge: Is the charge “unconnected to any form of a regulatory scheme?”¹⁴ If all of these questions can be

¹⁰ [1999] 3 SCR 134 [*Westbank*].

¹¹ [1931] SCR 357.

¹² *Eurig*, *supra* note 8; *Westbank*, *supra* note 10 (though dealing with s 125 of the Constitution Act, 1867, the criteria still apply); *620 Connaught Ltd v Canada (Attorney General)*, 2008 SCC 7 [*620 Connaught*]. See generally *Keyes, Executive Legislation*, *supra* note 9 at 115 to 126.

¹³ *Eurig* *supra* note 8 at para 15.

¹⁴ *Westbank* *supra* note 10 at para 43.

answered in the affirmative, the levy, fee or charge will normally be characterized as a tax.¹⁵

To answer the fifth criterion, the court must engage in a two-step analysis to determine first the existence of a regulatory scheme and second a relationship between the charge and the scheme.¹⁶ To determine the existence of a regulatory scheme, the court must find some or all of these indicia:

(1) a complete, complex and detailed code of regulation; (2) a regulatory purpose which seeks to affect some behaviour; (3) the presence of actual or properly estimated costs of the regulation; (4) a relationship between the person being regulated and the regulation, where the person being regulated either benefits from, or causes the need for, the regulation."¹⁷

To then identify a relationship between the charge and the scheme, the court must find that the "revenues are tied to the costs of the regulatory scheme" or that "the charges themselves have a regulatory purpose, such as the regulation of certain behaviour."¹⁸

The opponents of the GGPPA had argued that the *Greenhouse Gas Pollution Pricing Act* did not meet the second step of the regulatory scheme test, because the relationship between the charge and the scheme was insufficient. The revenues collected must also be used to cover the cost of the scheme or used for a connected regulatory purpose. Concluding otherwise would undermine the principle of no taxation without representation implicit in s. 53 of the *Constitution Act, 1867*.¹⁹

¹⁵ *Ibid.*

¹⁶ *Ibid* at para 44; Keyes, *Executive Legislation*, *supra* note 9 at 119-120.

¹⁷ *Westbank*, *supra* note 10 at para 44.

¹⁸ *Ibid.*

¹⁹ *Reference*, *supra* note 1 at para 214.

In response, the Court reaffirmed the framework set out in *Westbank* and 620 *Connaught* and focused on the two-step analysis under the fifth criterion. The Court agreed with the Federal Court of Appeal's holding in *Canadian Assn. of Broadcasters v. Canada (F.C.A)* that the regulatory charges need not reflect the cost of the scheme.²⁰ Instead, the required relationship will exist when the charges themselves have a regulatory purpose.²¹ The Court emphasized that this does not open the door to disguised taxation, since courts faced with this issue must scrutinize the scheme to identify the primary purpose of the levy. Any attempt to circumvent s. 53 of the *Constitution Act, 1867* by disguising a tax as a regulatory scheme would be colourable.²² The majority concluded that the levies imposed by GGPPA are regulatory charges whose purpose is to advance the Act's regulatory purpose by influencing behaviour. Accordingly, the "levies are constitutionally valid regulatory charges."²³ Justice Brown, despite writing in dissent on the question of division of powers, agreed with the majority on this point concluding that "the charges imposed by the Act, in pith and substance, relate to the regulatory purpose of changing behaviour, for the broader purpose of reducing GHG emissions."²⁴ Furthermore, the GGPPA's "provisions reveal that it does not relate to the raising of revenue for federal purposes."²⁵

The *Reference* thus confirms that the *Westbank* framework is determinative and that charges that relate to the regulatory purpose of influencing behaviour is sufficient to establish the required relationship between the charge and the regulatory scheme.

²⁰ *Ibid* at para 216.

²¹ *Ibid*, citing *Westbank supra* note 10 at para 44.

²² *Reference, supra* note 1 at para 218.

²³ *Ibid* at para 219.

²⁴ *Ibid* at 409.

²⁵ *Ibid*.

III. Unconstitutional delegation of law-making powers?

The Court also engaged in a substantial discussion, spearheaded by Justice Côté's forceful dissent, of the extent to which Parliament can delegate its law-making function.

Justice Côté agreed with the majority's formulation of the national concern analysis, but wrote that the GGPPA as drafted did not "accord with the matter of national concern ... because the breadth of the discretion conferred by the Act on the Governor in Council results in the absence of any meaningful limits on the power of the executive."²⁶ The Act relied too heavily on the executive to develop minimum standards on carbon pricing without itself setting basic standards.²⁷ Moreover, the Act's Henry VIII clauses that allow the Governor in Council to override the Act itself violate sections 17 (constitution of Parliament of Canada) and 91 (legislative authority of Parliament of Canada) of the *Constitution Act, 1867* and the constitutional principles of parliamentary sovereignty, the rule of law and the separation of powers.

Justice Côté argued that the text of ss. 17 and 91 of the *Constitution Act, 1867* "both affirm that the authority to legislate is exclusively exercisable" by Parliament.²⁸ Based on these provisions and the Court's constitutional jurisprudence on Parliament's legislative authority, it is impermissible for the executive to amend legislation.²⁹ She noted that most of the cases cited as support by the majority did not deal directly with Henry VIII clauses, except for *Re Gray*,³⁰ which was so unique as to be of little precedential value. *Re Gray*

²⁶ *Ibid* at para 222.

²⁷ *Ibid* at para 235-240.

²⁸ *Ibid* para 247.

²⁹ *Ibid* at paras 248-252.

³⁰ (1918), 57 SCR 150.

upheld an Order in Council made pursuant to a Henry VIII clause nullifying a statutory exemption from military service during World War I. The Court at the time, however, noted that this was done in in the urgency of war. Furthermore, the Senate and House of Commons passed a joint resolution approving the exact text of the regulations made the next day. Still, the dissenting justices in *Re Gray* thought that even the urgency of war could not justify legislating in this way.³¹ The Court has confirmed several times that, while Parliament cannot delegate legislative powers to another legislature, it can delegate regulation-making and administrative powers to subordinate boards and agencies.³² But Parliament cannot delegate its primary legislative authority. In light of these cases, Justice Côté suggested that the caselaw is inconclusive.

In further support of her reading of sections 17 and 91 of the *Constitution Act, 1867*, she then turned to the ways Henry VIII clauses offend three constitutional principles. First, with respect parliamentary sovereignty, she quoted A.V. Dicey's proposition that "no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament."³³ She then cited several UK sources, including a 2010 Mansion House Speech by the Lord Chief Justice of England and Wales, who declared that the "proliferation of clauses like these will have the inevitable consequence of yet further damaging the sovereignty of Parliament and increasing yet further the authority of the

³¹ Reference, *supra* note 1 at paras 253-57.

³² Reference *re Pan-Canadian Securities Regulation*, 2018 SCC 48 at 74; *R v Furtney*, [1991] 3 SCR 89; *Attorney General of Nova Scotia v Attorney General of Canada*, [1951] SCR 31; *Reference as to the Validity of the Regulations in Relation to Chemicals*, [1943] SCR 1.

³³ *Introduction to the Study of the Law of the Constitution*, 10th ed (London: MacMillan, 1959) at 39-40.

executive over the legislature . . . Henry VIII clauses should be confined to the dustbin of history.”³⁴

Second, she noted three main rule of law concerns presented by Henry VIII clauses: (1) allowing the executive to amend a statute circumvents the constitutional manner and form requirements; (2) if the text of the statute were amended by the regulations, the text statute book might not reflect the change, thus leading to confusion;³⁵ and (3) granting the executive authority to amend a statute without meaningfully enforceable limits violates the very core of the rule of law, which is to prevent the arbitrary use of power.³⁶

Finally, on the issue of separation of powers, Justice Côté noted that much of the caselaw deals with limiting judicial interference with the legislative and executive branches. However, just as important is limiting the executive’s interference in the legislative process. The concept that Parliament enacts legislation and that the executive implements it must be protected, first, because the legislature is best suited to set policy into legislation, thanks to its democratic nature and its deliberative and scrutinizing processes and, second, because preserving Parliament’s authority to legislate helps prevent the concentration of power in the executive.³⁷

³⁴ Lord Judge, July 13, 2010 at 6; see also Lord Judge, “Ceding Power to the Executive; the Resurrection of Henry VIII”, speech delivered at King’s College London, April 12, 2016 (online), at 3. See also *R (Cart) v Upper Tribunal*, [2009] EWHC 3052 (Admin), [2011] QB 120 at paras 37-39, per Laws LJ; *R (Privacy International) v Investigatory Powers Tribunal*, [2019] UKSC 22, [2020] AC 491 at paras 189-90 and 208-10.

³⁵ Citing Elmer A Driedger, *The Composition of Legislation: Legislative Forms and Precedents*, 2nd rev ed (Ottawa: Department of Justice, 1976). While this may be less of a concern given the flexibility of online publication of statutes, it could at the very least present a publication dilemma regarding how to present the text of the statute.

³⁶ *Reference*, *supra* note 1 at paras 270-278.

³⁷ *Ibid* at paras 279-293.

Justice Brown, in his dissent, noted that the delegation in the GGPPA is “breathtakingly broad”.³⁸ He thought that the majority’s view that the purpose of the Act and the potential for judicial review of the regulations made under the Act was an incomplete response to the concerns the impugned provisions raised, since it was unclear how a court would review regulations for compliance with the division of powers. He endorsed Justice Rowe’s guidance on conducting that review in the future. He also wrote that the majority’s response to Justice Côté’s concerns, especially those relating to the separation of powers, “largely misses the point” by treating the matter simply as an administrative law issue.³⁹ But since he would have held that the GGPPA failed on the national concern question, it was not necessary for him to provide an opinion on delegation in this *Reference*.

Justice Rowe also noted that the GGPPA confers “exceptionally broad authority” on the Governor in Council to “create policy in the regulations.”⁴⁰ He anticipated future challenges to the regulations and therefore set out a methodology for reviewing regulations for compliance with the division of powers, an exercise that is normally reserved for primary legislation. In setting out this methodology, he noted that *Vavilov* requires a correctness standard for constitutional questions, which would be consistent with the review of regulations for compliance with the division of powers. In reviewing the regulations, a court should then follow the division of powers analysis for legislation *mutatis mutandis*. But Justice Rowe reiterated that the regulations must constitute an

³⁸ *Ibid* at 410.

³⁹ *Ibid* at para 414.

⁴⁰ *Ibid* at para 595.

exercise of authority that is within the federal competence. Parliament “cannot delegate power that it does not have.”⁴¹

The Chief Justice, writing for the majority, saw little problem with the delegation in the GGPPA, stating that broad delegation is permissible, so long as the legislature does not abdicate its legislative role.⁴² The Chief Justice also subtly fired back on the issue of parliamentary sovereignty, writing that “the choice and the extent of any such delegation were matters for the legislature, not the courts.”⁴³ Citing *Re Gray*, the Chief Justice held that Henry VIII clauses are an acceptable feature in Canadian legislation. All of the enabling provisions were within constitutionally acceptable limits, exercises under these provisions could be judicially reviewed and Parliament could at any time revoke the regulation-making powers. Accordingly, there was nothing unconstitutional about the delegated authority.⁴⁴

Whether or not one fully embraces Justice Côté’s forceful critique of Henry VIII clauses, her reasons represent an opportunity to reflect on the appropriateness of such provisions. The discussion of delegation in each of the reasons also presents an excellent framework for considering whether regulation-making provisions are framed within meaningful boundaries. Still, the majority in the *Reference* clearly upheld the legitimacy of Henry VIII clauses in Canadian legislation.

⁴¹ *Ibid* at para 603

⁴² *Ibid* at para 85, citing *Hodge v The Queen*, (1883) 9 App Cas 117.

⁴³ *Reference*, *supra* note 1 at para 85.

⁴⁴ *Ibid* at paras 83-88.

Conclusion

Although the *Reference* will stand out primarily as a key development in the law of Canadian federalism, its guidance on regulatory charges as well as on delegation should not be overlooked. Canadian legislative counsel and commonwealth legislative counsel whose jurisprudence may be similar can look to the decision to ensure that regulatory schemes are crafted to avoid being characterized as a tax, while recognizing that there is some flexibility for using financial charges to influence public behaviour. Justice Côté's discussion of delegation and Henry VIII clauses is a reminder that, while they may be a legitimate legislative tool, drafters should carefully consider the extent of the power conferred on the executive. Given the ink spilled on these issues, this is unlikely to be the last word on the subject.

John McCluskie CB QC



John McCluskie wrote the laws of Scotland for almost five decades, rising to head the Scottish drafting team at Westminster and then Holyrood, when devolution established the Scottish Parliament and transferred much law making to Edinburgh.

As a legislative drafter for governments of various political colours, he wrote the Bills that introduced and later repealed the poll tax in Scotland, established the nation's 'right to roam' and made Scotland the first part of the UK to ban smoking in bars and restaurants.

McCluskie loved language, whether telling stories or deploying words, with precision and efficiency, to shape the law. Reflecting on his career, he spoke of "the satisfaction of doing one of the very few creative jobs in the legal profession".

John Cameron McCluskie CB QC, died from a heart attack in his sleep on 7 August. He was 74.

Born in Glasgow just after the war, he surmised with some mirth that he'd been conceived on VE day. He attended Hyndland school and the University of Glasgow, graduating in law in 1967.

As a young solicitor he served as assistant clerk in the new town of Cumbernauld and with the south of Scotland electricity board before securing a job in the Lord Advocate's Department in London in 1972.

McCluskie was the first solicitor to be employed by this tiny government department - a Scottish enclave in Whitehall providing high level legal advice to ministers and writing the laws of the land.

He was later admitted to the faculty of advocates and appointed QC in 1990, soon after becoming department head at the relatively young age of 43.

His career was sufficiently long for him to see some of what he created, destroyed. One of the first Bills he worked on established Scotland's regional councils under Labour in the 1970s. The Conservatives had him abolish this tier of local government in the 1990s.

The community charge or poll tax proved so controversial, it was repealed within a few years of its introduction but as McCluskie always maintained "the policy of the Bill is not the drafter's business". Translating policy into workable legislation was his specialist skill.

The official who instructed him on the poll tax, Muir Russell, recalls an "extremely bright and able lawyer with a quirky way of challenging you, to make sure you got exactly what you wanted". Russell (now Sir Muir) would become his boss as permanent secretary of the Scottish administration after devolution.

At Holyrood, McCluskie wrote the first Act of the new Parliament. It was an emergency law produced so quickly, the final draft still had the version number on the cover. The minister in charge, Jim Wallace, quipped that it must be good because the drafter had 14 goes at writing it.

There was groundbreaking legislation giving the public new rights of access to land and it was while roaming the countryside himself that McCluskie realised the need to tighten the wording to avoid inadvertently empowering people to tramp through each other's gardens.

He took a practical approach to the law, spending hours with a measuring tape to define how enclosed a public space must be to become smoke-free in 2006. He was not convinced any formula would be workable and was relieved when the ban was generally accepted without his exemption system being put to the test.

For years, McCluskie worried about a possible error in sex shop regulation he had drafted. The law targeted those selling "anything" that might stimulate sexual activity, which MP Donald Dewar argued could hit double bed retailers. After the law was approved, without revision, McCluskie began to think Mr Dewar had been right.

During his career, McCluskie developed a catchphrase to help him avoid blundering into difficult situations: "to do nothing, is always an option". While he was never afraid of hard work, experience taught him that rushing to action could often make a problem worse.

McCluskie was sometimes mistaken for the late judge, Lord (John) McCluskey - which was not always a problem. When both men checked into a conference hotel, McCluskie found himself upgraded to the presidential suite, while Lord McCluskey got by in a standard room. Doing nothing, on that occasion, proved the best option.

McCluskie was unconventional. He wore a flat cap, drove an old Land Rover and spent much of his spare time in woodland with his dog, felling trees with a chainsaw. Who's Who lists his hobbies as "watching mogs, walking dogs, cutting logs".

He drove the bus for Leuchie House respite centre, near North Berwick of which he was also a trustee.

He enjoyed poetry - whether performing Robert Burns or penning lines of his own. To sum up his legal work, he often quoted a verse he'd adapted: "I'm Scottish parliamentary counsel. I draft the nation's laws. And of half the litigation, I'm undoubtedly the cause." Self-deprecation came as standard.

His fascination with chainsaws brought him into conflict with authority. When he took a pair to work to show colleagues, security refused him entry to government buildings in Edinburgh on grounds of public safety.

After retiring from the Civil Service, McCluskie continued to draft legislation, first as a consultant to the Irish government and, until his death, on behalf of backbench MSPs. When the law requiring sanitary towels and tampons to be made available free of charge in Scotland, is passed, it will be his last Act.

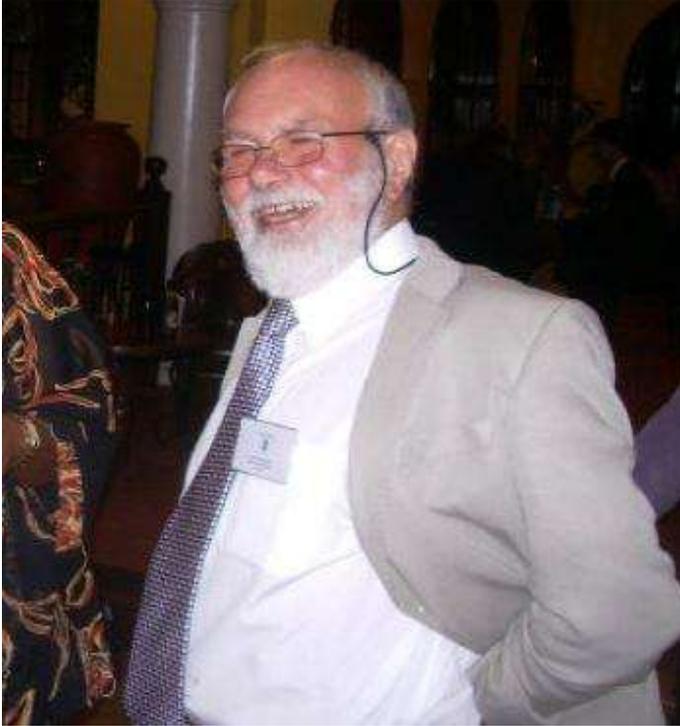
Paying tribute to his friend, the former Lord Advocate, Lord Rodger, McCluskie used words many would now consider equally applicable to him. "We admired him for his intellect and legal ability; but there was more to it than that - we held him in great affection just for himself".

John McCluskie is buried in Binning Memorial Wood, East Lothian, which he personally thinned of trees to prepare it as a burial ground. He is survived by his wife of 50 years, Janis (nee McArthur), their daughter Kathryn, son Robert and grandchildren, Mylo and Isla.

GLENN CAMPBELL -- BBC Scotland's chief political correspondent and a good friend of John's. Glenn, who holds the copyright in this obituary, has kindly permitted it to be published by CALC.

Clive Borrowman

Law drafting adventurer finally laid to rest in Jersey



CALC members in many jurisdictions will be sad to learn of passing of Clive Borrowman, drafting globetrotter, who died in Jersey on 6 February 2021, aged 81. Clive Edward Borrowman was born in Chigwell, on the borders of Greater London and Essex, on 7 May 1939, just before the start of World War 2, and could remember the devastation of the bombing. He was the son of a window cleaner who attended Grammar School before his national service, declining to stay on in the army as a commissioned officer in favour of a career in law. A modest man who did not attend University, he studied while he worked, passing the Law Society's Qualifying Examination with distinction in most subjects. In 1967 he was top across the country, above all of those with degrees from prestigious institutions.

Clive was admitted as a solicitor of England and Wales in 1971. His first legal role was as assistant solicitor with the Port of London Authority which he held till 1974. It was around this time he met his wife Sue, a teacher, on a skiing trip in Europe. He must have decided early on that he would not stay in the UK as he told me that he knew she was the one for him. "She was Australian, they will go anywhere. I said I had somewhere she could stay but didn't tell her there was no spare room. I just wanted her with me." It was a love match that was to last the rest of their joint lives. Soon they were off to New Zealand where Clive worked for a firm of solicitors before they spent many months touring Australia, a country Clive adopted as his own, earning his keep with labouring, fruit picking, anything that came along. In 1976 Clive took an appointment as the Second Parliamentary Counsel in Papua New Guinea, the beginning of his career as a draftsman who travelled the Commonwealth in a way that was popular in those days, less so now. He often talked about his time in PNG, clearly holding a lasting affection for the people he met. In 1980 he became the Legislative Draftsman and Clerk to the Legislative Assembly of the Australian Territory of Norfolk Island. From there he moved to Fiji in 1983 as Assistant Parliamentary Counsel where he encountered Bill McGregor who was later to employ him again in Jersey. Then Clive and Sue moved to her former home State of Victoria where Clive was the Legislation Manager to the Road Traffic Authority. Clive received a graduate diploma in comparative and international law from Monash University in 1988. They stayed in Australia for a while as Clive moved to be Senior Parliamentary Counsel in Tasmania, a place he grew to love, but in 1991 he was off again, this time to the Cayman Islands as the Parliamentary Counsel, though on occasions he was also acting Attorney General. From 1993 to 1996 he was the Law Draftsman in St Helena. After a spell as a consultant for the Australian National Road Transport Commission, Clive was employed by the Commonwealth Secretariat to draft legislation, first for the British Virgin Islands and then Niue. As was

said at his funeral, it is almost easier to name the places where Clive didn't work than those where he did, but it is right to list these places where he will surely be remembered with great affection. His consultancies also included drafting for the Solomon Islands and Vanuatu, and more recently the Turks and Caicos Islands, St Lucia, the Isle of Man and probably a number of other places too. I recall his saying that had worked for around 50 different jurisdictions.

Clive came to Jersey in 1998 from his posting in Niue. He was full of ideas as to how things should be done in Jersey based on his eclectic experience and wasn't always popular with the managers of the day for voicing them. However, I am proud to have adopted some of his suggestions when I took over as head of the Office. I learnt so much from Clive. In my early days as a drafter he never criticised my work but was pleased to suggest better ways to draft that I was grateful to adopt. He advocated a plain English style and use of "must" long before Jersey was ready for it, and was soon drafting in his preferred style, confident that it would eventually catch on. Clive was never much interested in the theoretical side of drafting, in writing academic papers; it was the craft of the legislative drafter that appealed to him. He liked to draft in the clearest and simplest way possible - job done. It was Clive who introduced me to CALC and encouraged me to look beyond the UK for my ideas. It was a revelation to me; he stood down from Europe Rep on the Council so that I would seek election in his place and increase my engagement with the wider drafting world he knew so well. I owe him a lot.

Having spent his working life on short contracts, Clive continued the same way in Jersey, though this time he did not move on and his contract was renewed several times. When I moved to the Isle of Man in 2008 he told me that it was ever thus: I would spend time wishing I was back where I was before, but then the sun would come out and I would be glad I had moved on. He was himself planning his retirement in Tasmania and when he left Jersey, I feared I would not see him again. For once Clive was wrong: we both decided that the sun shone brighter in Jersey and were reunited here 7 or 8 years ago, though he had already been working for me in the Isle of Man as a consultant drafter. It was the friends he had made in Jersey that brought Clive back. In his later life he took great care of his health, swimming every day from the office and running with the Hash House Harriers. Clive anticipated a very long life as his father had lived to 102. Sadly, it was not to be, and he succumbed to cancer at the age of 81. He leaves his beloved wife Sue, his elder son Marc, an architect currently based in Jersey, younger son Luc, now a senior research officer for the National Disability Insurance Agency in Victoria, plus grandson Zach. Sadly, the Australia-based side of the family were unable to see Clive recently due to the pandemic, or even attend the funeral in person. His death announcement described him not as a lawyer, or a drafter, but as an adventurer, and that is how he saw life as he travelled from drafting office to drafting office. The COVID restrictions depleted the numbers allowed at Clive's funeral, though he would have been amused that just in time I had drafted an Order increasing those numbers. The many friends there were doubtless amazed to learn of the achievements of their running companion. Along with those able to follow the service on-line from across the globe, we said farewell, to the refrains of "Waltzing Matilda," to this Australian-loving Brit, who so gladly made Jersey his last resting place.

Lucy Marsh-Smith
Jersey, March 2021

Some items of interest

Jersey items

New legislation leads to war with the French?

Just in the nick of time for this *CALC Newsletter*, on 5th and 6th May Jersey found itself in the news internationally following the arrival of around 50 French fishing boats, 2 Royal Navy patrol vessels and 2 French naval vessels in and around its waters. Further details can be found [here](#).

This action followed a threat from the French to cut off its electricity, which is supplied to the Island from France via an underwater cable. The catalyst for these dramatic events was licences for fishing in Jersey waters issued to French fishing boats using powers in the newly amended Sea Fisheries (Jersey) Law 1994 and Sea Fisheries (Licensing of Fishing Boats) (Jersey) Regulations 2003.



The amendments to the legislation, which came into force on 30 April 2021, implement parts of the Trade and Cooperation Agreement between the EU and UK. The parts in question relate to fishing in the waters of the Crown Dependencies that replaced an earlier agreement in relation to French fishing in Jersey waters and vice versa.

The Trade and Cooperation Agreement requires Jersey to allow French boats that previously fished in Jersey water to continue do so if they demonstrate that they meet the requisite number of days fishing during the 3 years up to December 2020. The permissions reflect the actual extent and nature of fishing activity that the vessel can demonstrate was carried out in those 3 years. The dispute appears to be about whether some of those vessels have been granted licences that do not reflect that and whether additional conditions have been imposed. Talks to resolve the matter are ongoing.

200 years on from the death of Napoleon in the British dependency of St Helena, the French were seen to flex their muscles in the direction of another British Island. Never mind the presence of the Royal Navy, a member of the Jersey Militia, a sub-unit of the British Army formed in 1337, raised a musket from nearby Elizabeth Castle and fired a shot in the direction of the French. We await the long-term resolution of this conflict, but it is a reminder that sometimes the legislation we draft has significant consequences.



Not sure how well the high vis jacket goes with the more traditional head attire

UK Parliamentary Counsel working for Jersey

Jersey is delighted to welcome Jennifer Cartwright to their team of drafters. Jennifer is currently on a career break from OPC and was working for the Electoral Commission at an earlier stage of that break. We were therefore very pleased that she took on a large project reforming the composition of Jersey's States Assembly and the electoral system. It is the first time that Jersey has made a remote-working appointment. "It was necessary to be much more flexible in time of COVID" Lucy Marsh-Smith - who heads the Jersey Office - explained, expecting Jersey not to be the only drafting office that has needed to adapt to the times. Jennifer said "I've really enjoyed my first few months at the Jersey LDO. Alongside the work that Lucy has mentioned, I've been involved in a diverse range of smaller projects that have given me a taste of the breadth of work undertaken by the office. Having gained all my previous drafting experience in the UK, I'm finding that spending time working in a smaller jurisdiction offers a fresh perspective on the work of a legislative drafter. Operating against a less familiar legislative and procedural backdrop has proved to be interesting and sometimes challenging, requiring nimble thinking at times. In the course of some of my work in Jersey, the experience of being a little closer to the heart of policy development has given a real insight to the practical implications of the words on the page and how they will make a difference. It's also notable that the peer review system, in an office where almost all the drafters have worked in another jurisdiction, inevitably leads to healthy discussion about the pros and cons of different drafting practices and styles. Questioning (or justifying) an approach that is the norm elsewhere makes for a valuable learning experience."



Jennifer added that she is delighted to be the first member of the LDO's drafting team to work on a fully remote basis. The office has embraced flexible working and is making the most of the opportunities, both for individuals and the office as a whole, that it offers. The technology (and colleagues' willingness to make full use of it) means that, despite being UK-based, Jennifer feels very much part of the team. "A stint in Jersey is an experience that I'd highly recommend to any legislative drafters looking to broaden their horizons!", she commented.

Many hands helping in the new way of working

With financial constraints limiting a second full-time appointment, Lucy is also grateful for the assistance of consultant drafters from the Caribbean, the UK and other Crown Dependencies to assist during the busy pre-election year. Microsoft Teams has proved a great way to keep everyone in touch. The Jersey drafters have all mostly been working from home for over a year now and it has worked well for them, though it has been a shame not to meet each other very much. We wish Zöe Rillstone a good trip back to New Zealand to see her family after a separation since she arrived in Jersey 18 months ago. We expect Zöe to find her 2 weeks' isolation in a hotel a great opportunity to do a lot of drafting - no escape there, Zöe!

A time of anniversaries

In March Lucy celebrated 25 years since first coming to Jersey as a drafter. But a more important anniversary was celebrated later in the month, 250 years since the 1771 Code was passed. This milestone will lead to an extra bank holiday in Jersey in September, to mark the anniversary of the 1769 Corn Riots that led to the 1771 Code. One complaint of the Corn Rioters was that the Royal Court and the Lieutenant Bailiff were enacting laws without publishing them, so people could not know how to avoid breaking the law. After the riots all the legislation in force at the time (but not the island's "customary law") was gathered into a single "Code" – not quite A to Z, but Anchorage to Vraics. That Code was approved by the King in the Privy Council on 28th March 1771. Most of the Code was repealed over the centuries but some provisions are still in force, including one that allows islanders to tan leather and another banning cutting rushes on sand dunes. The Code also established the States Assembly as the law-making body for the Island, instead of the Royal Court.



Lucy and her Deputy, Matthew Waddington, visited the Jersey Archives where there was more information about the Corn Riots and an original copy of the 1771 Code.



3 stages of consolidation: the 1771 Code, handwritten in French, the 1973 reprint of the Code and on the iPad the Code as currently in force published on www.jerseylaw.je

The 1771 Code marked the first consolidation of Jersey's legislation. There was an unofficial reprint in the early 1970s, but it wasn't until 2004 that Jersey once again gathered all the current legislation into a single "Revised Edition", and published it on paper in a couple of dozen ring-binders as well as on a website. Jersey produced new Revised Editions once a year till 2019, when they started publishing updated versions within a day or so each time any legislation was amended. It was vital for islanders to be able to see updated legislation straight away, particularly during the COVID-19 epidemic. The anniversary also marks the lodging of the draft Legislation (Jersey) Law which, if passed, will give official status to the updated versions, require the Jersey Legislative Drafting Office to publish consolidated versions as soon as practicable after any legislation is amended, and set out the office's other duties for the first time (as well as formally updating the name from "Law Draftsman's Office").

At the same time the Office launched its “Beyond 250” project to reimagine access to Jersey legislation. The aim is to use the new updated versions of legislation, the powers in the proposed new Law, and improvements to the legislation website to make it easier for people to find the legislation that affects them. The plans include introducing “point in time”, tagging of different categories to assist browsing and an improved search engine.



Jersey is also working on the global “Rules as Code” initiative, to see if computer coding or mark-up could be published alongside the legislation, to make it easier for developers to write programs and apps that can read up-to-date legislation and explain the law or automate aspects of it.

Calling all editors and translators

Jersey is hosting the first ever CALC forum focused on the work of those interested in, or involved with, editing, consolidating and publishing legislation. It will also be of interest to those jurisdictions who produce legislation in more than one language.

The forum is titled “Connections: legislative editing across continents and nearer to home”.

It is a free online event to be held in late July or August. It will run over 2 days in 3 separate sessions of 2 to 3 hours, held at times to enable daytime participation in at least one session, wherever you are based.

There won’t be a call for papers as such, as this event is more informal to encourage a wide range of contributions, but we will set out some themes and invite contributions by way of content or interest in leading discussions.

Though we hope this will be a chance to bring together, albeit remotely, those from various jurisdictions who work on the editorial side of drafting, it is equally open to drafters or other staff who want to know more about the skills, procedures and tools used in editing to produce high quality legislation. Whether you call them editors or something else, every jurisdiction will have people involved in the refinement and production of legislation and turning it from draft to published law.

More details will be sent soon, but for more information or to express interest in the meantime, please contact Lucy Marsh-Smith (L.MarshSmith@gov.je).

Drafters - please bring this item to the attention of your editorial staff and others who might be interested in participating. CALC is very pleased to welcome editors and translators as members. If you would like to join CALC, please use our [online registration form](#), or contact Ross.Carter@pco.govt.nz.

Definition of “Cohort”

Have you ever wondered what exactly a cohort is? Originally it referred to a band of warriors, a unit of a Roman Legion. Dictionary.com gives several definitions, including a group or company, or a companion or associate. In the Singapore COVID-19 (Temporary Measures) (Control Order) Regulations 2020 “cohort” means “a group of individuals with a common intention to meet in person for the same.” But we prefer the Google dictionary definition with its example (look it up for yourself if you don’t believe us):

a group of people with a shared characteristic.
"a cohort of civil servants patiently drafting legislation"

It is gratifying to know that legislative drafting is seen as such a companionable activity and one that is always undertaken with patience. Thanks to Jacquie Miller, a member of Jersey’s drafting cohort, for enlightening us as to this meaning.

United States of America

First Branch Forecast

Mr Daniel Schuman writes a weekly newsletter on the U.S. Congress, called the [First Branch Forecast](#), which focuses on the operations of the U.S. Congress. The Forecast will be of interest to CALC members, especially to the extent that the Forecast discusses legislation and legislative procedures.



**FIRST BRANCH
FORECAST**

Scotland: Where does legislation come from? An interesting blog



Scott Wortley is a Law Lecturer at the University of Edinburgh. PCO Scotland worked with Scott to co-deliver a revised Honours course in Legislation in 2019. The course was a great success, and will now be ongoing. PCO delivered elements on legislative drafting and the students particularly enjoyed this part of the course, producing lots of good drafting during PCO led practical workshops and for final assessment. PCO had planned to report back on the course at the proposed 2020 CALC Cardiff event (like many other plans, unfortunately displaced by COVID-19). PCO will eventually do so at a future opportunity.

Meantime, Scott wrote up a blog based on one of his lectures to students. The blog is about the role of a legislative drafter, and how that role is distinguished from policy making. It's a good read and, although it obviously draws on how things are done in Scotland, it is clearly of more wider interest.

A link Scott's blog is here - https://medium.com/@Scott_Wortley/where-does-legislation-come-from-policy-formulation-to-drafting-3b208732d461

UK: Bridging the gap: legislative drafting practice and statutory interpretation

CALC member Diggory Bailey wrote last year an interesting article on the relevance of legislative drafting conventions to statutory interpretation, and the use of drafting guidance etc:



Diggory Bailey

Diggory Bailey, “Bridging the gap: legislative drafting practice and statutory interpretation” [2020] Public Law 220.

Abstract

This article considers the relevance of legislative drafting conventions to the interpretation of legislation and the basis on which those conventions may be established. It examines drafting guidance and other information published by legislative drafting offices within the United Kingdom and the admissibility of those materials as an external aid to construction. It concludes that they are a potentially valuable but little used resource for those trying to understand and interpret legislation.

Free access is available at this link: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3819349.

For an example of the drafting guidance discussed, see <https://www.gov.uk/government/publications/drafting-bills-for-parliament>



Guidance

Office of the Parliamentary Counsel drafting guidance

Guidance for members of the Office of the Parliamentary Counsel (OPC) who are drafting bills to be considered in Parliament.

Western Australia: Legislation Bill reintroduced as Privileges Bill

Western Australia's *Legislation Bill* was reintroduced on 29 April 2021.



The Bill lapsed when the previous Parliament ended.

When WA's Parliament resumed on 29 April 2021, the Bill was reintroduced, by the Premier, in the Legislative Assembly, and as one of the Privileges Bills.

See [Progress of Bills \(parliament.wa.gov.au\)](https://www.parliament.wa.gov.au/progress-of-bills).

LEGISLATION BILL 2021

Introduction and First Reading

MR M. McGOWAN (Rockingham — Premier) [3.39 pm] — without notice: In order to assert and maintain the undoubted rights and privileges of this house to initiate legislation before dealing with business proposed by the Governor, I move —

That a bill for 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 be introduced and read a first time.

Explanatory memorandum presented by the Premier.

Question put and passed.

Bill read a first time.

For opening procedures comparable to Western Australia's "Privileges Bills", that is, opening procedures to assert and maintain rights and privileges of other legislatures, see, for example,—

- In the UK -- <https://erskinemay.parliament.uk/section/6530/bill-read-pro-forma/>
- In New Zealand – [\(2020\) Standing Order 24 \(Speaker to lay claim to privileges of House\)](#)

The reintroduction of the Bill caused great excitement in the WA Parliament. At the end of the Attorney General's Second Reading speech, the Speaker said this:

The SPEAKER: That is one of the most soporific second reading speeches I have ever heard and I did not have to call anyone to order!

New Zealand: Celebrating the Secondary Legislation Act 2021



Jonathan Robinson, Deputy Parliamentary Counsel (Access), NZ PCO, with Una Jagose QC, Solicitor-General for New Zealand

The New Zealand Law Society co-hosted a function at New Zealand's Parliament on 19 April 2021 to celebrate the Secondary Legislation Act 2021.

The Secondary Legislation Act 2021 became law on 24 March 2021. It will operate alongside the Legislation Act 2019 to implement some of the Regulations Review Committee's recommendations for change and to establish another category of law known as secondary legislation.

The scheme will ensure Parliament has oversight, and can disallow most secondary legislation. (Some secondary legislation will be exempted from disallowance.)



Key contributors Richard Wallace, Jessica Kruger, and Nicky Armstrong, all from NZ PCO

The scheme will also, in time, require centralised publication, at www.legislation.govt.nz, of almost all secondary legislation (local government secondary legislation, for example, will be exempt).

"The Act is now a constellation of laws of enormous practical importance to New Zealand", said Jason McHerron, convenor of the Law Society's Public and Administrative Law Committee.

"One of the core statutory functions of the Law Society is to assist and promote law reform for the purpose of upholding the rule of law and facilitating the administration of justice.



Jason McHerron, Convenor, Law Society's Public and Administrative Law Committee

"The Law Society prepares submissions on Bills and other law reform proposals on behalf of the legal profession and in the public interest.

"For this task it relies on the commitment and industry of its committee members – they are lawyers who volunteer their time and expertise because they care about improving the quality of legislation for the benefit of the community.

"Nothing could be closer to this kaupapa [(plan or purpose)] than the Secondary Legislation Act [that was celebrated at this event].

"In the Law Society's submissions, which were presented by members of its Public and Administrative Law Committee, we welcomed the improvements these laws will make to people's ability to access the law and to understand their obligations and rights.

“As well, we welcomed the fact that these laws uphold the constitutional principle that Parliament is the supreme legislative power in our democracy” said Jason.

Jason also thanked the Attorney-General, the Honourable David Parker for hosting the occasion:

“[I]t is a great honour for the Law Society to celebrate with you. As [former New Zealand Solicitor-General and Supreme Court Justice] Sir John McGrath wrote, maintaining the rule of law requires the senior law officer to have legal and political acumen and the ability to generate political trust. Both you and your predecessor the Hon Chris Finlayson have these qualities. And this is in large measure why this project has been such a success. You have influenced your respective Ministerial colleagues to authorise and encourage the enormous amount of extraordinarily hard work this important project has demanded from the whole of government. Ngā mihi nui ki a kōrua. [Many thanks to you both.]”



Hon David Parker, Attorney-General for New Zealand, celebrating the Secondary Legislation Act 2021

New Zealand: NZSC and Parliament on Sex Offender Registration Act

[D \(SC 31/2019\) v New Zealand Police \[2021\] NZSC 2 \(9 February 2021\)](#) concerned the interpretation and application of s 9 of the Child Protection (Child Sex Offender Government Agency Registration) Act 2016 (the Registration Act). Under s 9(1) of the Registration Act, where a court sentences a person to a non-custodial sentence for a qualifying offence, the court may order that the person be placed on the Child Sex Offender Register (a registration order). The Registration Act came into force on 14 October 2016.

An issue on the appeal was whether the Registration Act applied to the appellant at all, given he committed the qualifying offence before the Act came into force. Section 6(1) of the Sentencing Act 2002 provides that where the penalty for an offence has been varied between the time the offence was committed and the time of sentencing, the offender is entitled to the benefit of the lesser penalty. Subsection (2) provides that the offender is entitled to the benefit of the lesser penalty despite any other enactment or rule of law. The same right is conferred on everyone charged with a criminal offence by s 25(g) of the New Zealand Bill of Rights Act 1990.

By a majority, comprising Winkelmann CJ, O'Regan and Ellen France JJ, the Supreme Court allowed the appeal and quashed the registration order made in the District Court under s 9(1) of the Registration Act.

Winkelmann CJ, O'Regan and Ellen France JJ held that s 9 of the Registration Act does not apply to offenders such as the appellant who committed a qualifying offence before the Act came into force but were convicted and sentenced after that date. They found that the Registration Act is not sufficiently clear to displace the presumption against retrospective penalties in s 6 of the Sentencing Act in relation to offenders in this category. The appellant was therefore not eligible to be placed on the register. This was sufficient to allow the appeal and quash the registration order made against the appellant.

In contrast, William Young and Glazebrook JJ considered that s 9 of the Registration Act applies to all offenders convicted of a qualifying offence and sentenced to a non-custodial sentence after the Act came into force, irrespective of when the offence was committed (as well as all those convicted before and sentenced after). In their view, this is the only available interpretation of s 9.

A Bill for a Child Protection (Child Sex Offender Government Agency Registration) Amendment Act 2021 was introduced, and passed by the House, on 17 March 2021. It got Royal assent on 22 March 2021.

The Bill amended the Child Protection (Child Sex Offender Government Agency Registration) Act 2016 (the Act) to clarify that the Act provides for registration of all child sex offenders, irrespective of whether offending occurred before or after the Act came into force.

The Bill included a provision that explicitly clarifies that the Act's retrospective application overrides any other law, to the extent that the other law is inconsistent with the Act's retrospective application (including 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). See [clause 12 of Schedule 1](#) of the Child Protection (Child Sex Offender Government Agency Registration) Act 2016 (as at 23 March 2021).

United Kingdom: “Schedule to the Act” vs “schedule of the Act”

Gabriel Tan @finishedloading · Apr 29

Legal twitter! Tired of seeing differing terminology in judgments (sometimes both are used in a single judgment!) and ready to end it once and for all, is it:

Schedule 1 to the Act	60%
Schedule 1 of the Act	40%

10 votes · Final results

2 replies · 1 retweet · 1 like · 1 share

Diggory Bailey @BaileyDiggory · 23h

The practice in Westminster Acts is to refer to a “Schedule to” the Act. In recent times the practice in Acts of the Scottish Parliament has been to refer to a “schedule of” the Act.

1 reply · 1 retweet · 4 likes · 1 share

Gabriel Tan @finishedloading · 23h

Replying to @BaileyDiggory

This is very interesting, is there a reason for the practice of Scottish Acts/SIs to refer to “schedule of”? I notice also that Scotland seems to be the anomaly, with Westminster, Welsh and NI Acts/SIs all using “schedule to”.

1 reply · 1 retweet · 1 like · 1 share

Diggory Bailey @BaileyDiggory · 22h

Yes, but a somewhat niche interest perhaps! Incidentally, Westminster practice is also to use a capital “S” for Schedule.

1 reply · 1 retweet · 3 likes · 1 share

New Zealand – blog post and case on response to COVID-19 pandemic

Knight, Dean R: **New Zealand: Rendering Account During the COVID-19 Pandemic**, *VerfBlog*, 2021/4/19, <https://verfassungsblog.de/new-zealand-rendering-account-during-the-covid-19-pandemic/>, DOI: [10.17176/20210419-101145-0](https://doi.org/10.17176/20210419-101145-0).

See also [Fraser Wright Maddigan v New Zealand Police \[2021\] NZHC 1035](#).

United Kingdom: “Ask a Justice” session

<https://www.supremecourt.uk/ask-a-justice.html>



UK Supreme Court @UKSupremeCourt · Mar 24

Earlier this month, students from Huddersfield New College (@huddnewcoll) met Supreme Court Justice, Lord Sales, in an 'Ask a Justice' session. They asked him about his career, difficult cases, and judicial precedent. Find out more about the programme: [supremecourt.uk/ask-a-justice....](https://www.supremecourt.uk/ask-a-justice.html)



17

8

29



UK Supreme Court @UKSupremeCourt · 9h

Here's a socially distanced photo of the current twelve Supreme Court Justices together after a long time working remotely. The photo was taken after Lady Rose's swearing-in ceremony last week in front of the Supreme Court building in Parliament Square.



United Kingdom – sex versus gender – unlawful discrimination claim

UK legal commentator Joshua Rozenberg, in a recent blog, discusses the question: “Is a belief that sex is different from gender so extreme that it’s unworthy of respect in a democratic society?”

Rozenberg also discusses a related appeal against an employment tribunal decision on a claim of unlawful discrimination. <https://rozenberg.substack.com/p/can-you-believe-sex-is-immutable>

The decision under appeal is [here](#).

Case Number: 2200909/2019



THE EMPLOYMENT TRIBUNALS

Claimant Maya Forstater

Respondent (1) CGD Europe
(2) Centre for Global Development
(3) Masood Ahmed

HELD AT: London Central

ON: 13-21 November 2019

EMPLOYMENT JUDGE: Mr J Tayler

Appearances

For Claimant: Ms A Palmer, Counsel
For Respondent: Ms J Russell, Counsel

JUDGMENT

The specific belief¹ that the Claimant holds as determined in the reasons², is not a philosophical belief protected by the Equality Act 2010.

Australia – Commonwealth – Senate motion on gender-neutral language used in (among other things) legislation

On 16 March 2021, the Australian Senate agreed to the following motion (general business notice of motion no. 1055).

The motion dealt with language used in (among other things) legislation.

The motion was moved by a minor party but supported by the Government.

That the Senate—

- (a) notes that:
 - (i) our fundamental biology and relationships are represented through the following descriptors - mother, father, son, daughter, brother, sister, boy, girl, grandmother, grandfather, aunt, uncle, female, male, man, woman, lady, gentleman, Mr, Mrs, Ms, sir, madam, dad, mum, husband and wife,
 - (ii) broad scale genuine inclusion cannot be achieved through distortions of biological and relational descriptors,
 - (iii) an individual's right to choose their descriptors and pronouns for personal use must not dehumanise the human race and undermine gender,
 - (iv) Dr Lyons from Logan (Queensland) reports incidences of young children feeling stressed and panicked about whether it is okay to use the words boy and girl, and pushing gender-neutral language is no replacement for appropriate emotional and psychological support for children while growing up; and
 - (v) pushing gender-neutral language is no replacement for appropriate emotional and psychological support for children while growing up; and
- (b) calls on the Federal Government to:
 - (i) reject the use of distorted language such as gestational/non-gestational parent, chest-feeding, human milk, lactating parent, menstruators, birthing/non-birthing parent, and
 - (ii) ensure all Federal Government and Federal Government-funded agencies do not include these terms in their material, including legislation, websites, employee documentation and training materials.

The relevant Journal of the Senate is available at

https://parlinfo.aph.gov.au/parlInfo/download/chamber/journals/879760fc-307b-4b68-951f-f37b13b0ab3d/toc_pdf/sen-jn.pdf;fileType=application%2Fpdf

Editor: Thanks to Matthew R Sait , Senior Assistant Parliamentary Counsel, Australian Government Office of Parliamentary Counsel, for drawing this development to our attention.

New Zealand – Item on Bill about “Declarations of Inconsistency”

The [New Zealand Bill of Rights \(Declarations of Inconsistency\) Amendment Bill 2020](#) was on 25 April 2021 the subject of [a feature item](#) prepared by Radio New Zealand’s programme *The House*.

The Bill helps provide a mechanism for the Executive and the House of Representatives to consider, and, if they think fit, respond to, a declaration of inconsistency made under the New Zealand Bill of Rights Act 1990 or the Human Rights Act 1993.

RNZ Home News **Radio** Podcasts & Series Topics Pacific

LAW / POLITICS

Dear Parliament, Try again, Sincerely, the Courts

From **The House**, 7:35 am on 25 April 2021

Share this     

 **Phil Smith**, The House
 @piripismith  piripismith@gmail.com

The New Zealand Law Society’s submission on the Bill is available [here](#).
All submissions on the Bill are available [here](#).

United States of America – A Sharp Divide at the US Supreme Court Over a One-Letter Word



No. 19-863

Title: **Agusto Niz-Chavez, Petitioner**
v.
Merrick B. Garland, Attorney General

Apr 29 2021 Judgment REVERSED. Gorsuch, J., delivered the **opinion** of the Court, in which Thomas, Breyer, Sotomayor, Kagan, and Barrett, JJ., joined. Kavanaugh, J., filed a dissenting opinion, in which Roberts, C. J., and Alito, J., joined.

In an immigration ruling that scrambled the usual alliances, the justices differed over the significance of the article “a.”, Adam Liptak [reports](#) in the *New York Times*.

For the full text of the decision discussed – *Niz-Chavez v Garland, Attorney-General of the United States*, see https://www.supremecourt.gov/opinions/20pdf/19-863_6jgm.pdf

“At one level,” Justice Gorsuch wrote, “today’s dispute may seem semantic, focused on a single word, a small one at that. But words are how the law constrains power.”

See also—

- Jayesh Rathod, “Unusual alliance of justices holds government to strict notice requirement in removal proceedings”, , SCOTUSblog (May. 2, 2021, 3:58 PM), <https://www.scotusblog.com/2021/05/unusual-alliance-of-justices-holds-government-to-strict-notice-requirement-in-removal-proceedings/>
- Jess Bravin, “Unusual Supreme Court Majority Rules in Favor of Guatemalan Who Entered U.S. Illegally”, <https://www.wsj.com/articles/unusual-supreme-court-majority-rules-in-favor-of-guatemalan-who-entered-u-s-illegally-11619743975>

Canada: Legal advice, legal ethics, and Government lawyers

CALC members may find of interest several articles in a recent issue of the Manitoba Law Journal:

- [Edgar Schmidt, “Why the FCA Decision in *Schmidt v Canada \(Attorney General\)* is Clearly Erroneous” \(2020\) 43\(2\) Manitoba Law Journal 149:](#)
- [Edgar Schmidt, “Lawyers Serving the State: Ethical Issues When Administrative Directions Conflict with the Client-State’s Interests” \(2020\) 43\(2\) Manitoba Law Journal 115:](#)
- [Andrew Flavelle Martin, “Folk Hero or Legal Pariah? A Comment on the Legal Ethics of Edgar Schmidt and *Schmidt v Canada \(Attorney General\)*” \(2020\) 43\(2\) Manitoba LJ 198.](#)

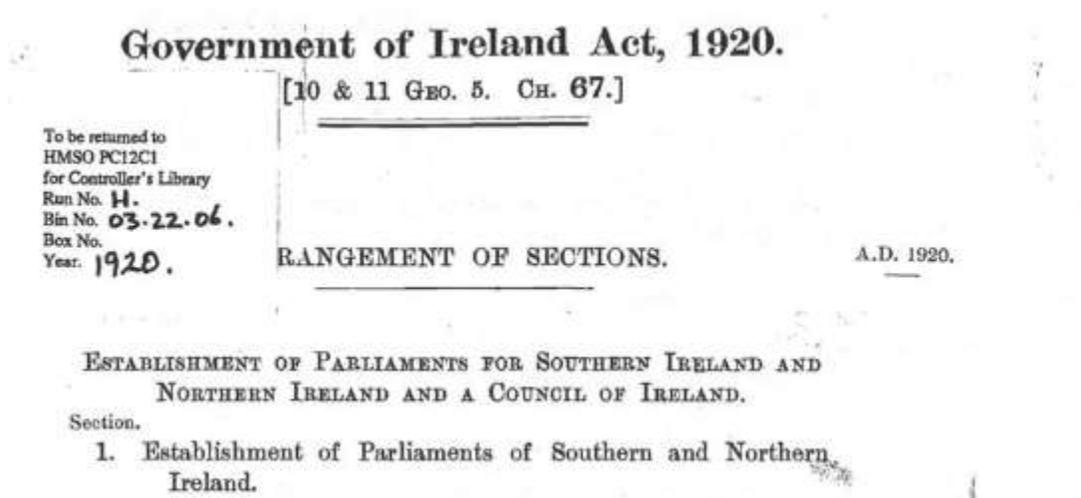
Related earlier articles are, or include, the following:

- [John Mark Keyes, “Loyalty, Legality and Public Sector Lawyers” \(2019\) 97\(1\) Canadian Bar Review 129:](#)
- Eric Pierre Boucher, “Civil Crown Counsel: Lore Masters of the Rule of Law” (August 2018) 12(2) Journal of Parliamentary and Political Law 463.

Northern Ireland: 100 years since Government of Ireland Act 1920

3 May 2021 marks 100 years since the formation of Northern Ireland – the date (3 May 1921) on which the Government of Ireland Act 1920 came into force:

- <https://www.bbc.co.uk/news/uk-northern-ireland-56938540>
- <https://commonslibrary.parliament.uk/100-years-since-the-government-of-ireland-act-1920/>



New Zealand: New President of International Association of Women Judges: Hon Justice Susan Glazebrook

 **Courts of NZ** @CourtsofNZ · May 9

This morning Justice Susan Glazebrook was appointed president of the IAWJ-the first time a NZ judge has headed the organisation that has a membership of over 6000 women judges from 100 different countries. [#IAWJbiennial2021](#)



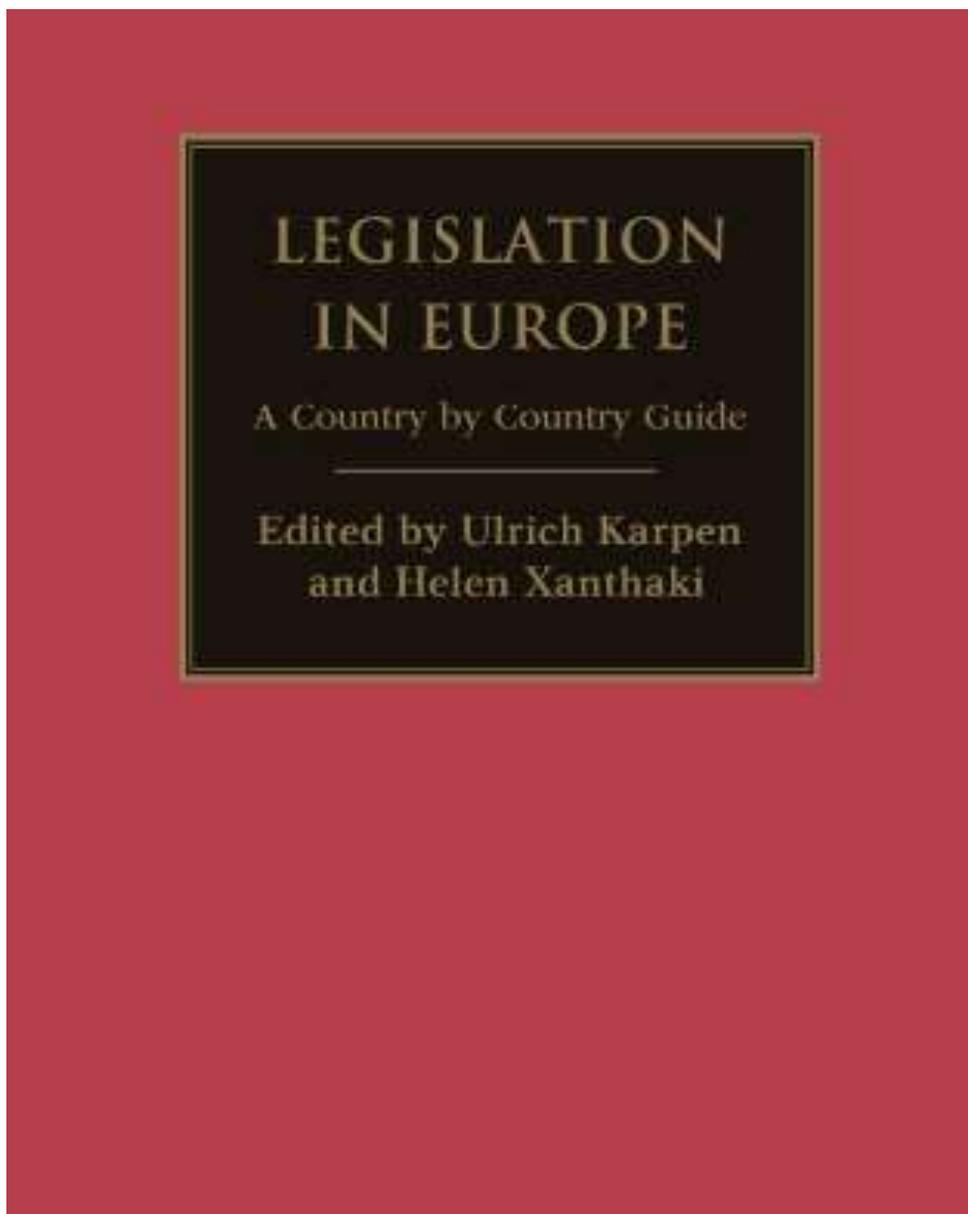
 **Ministry of Justice** @justicenzgovt · May 7

Welcome to the attendees of the [#IAWJbiennial2021](#) @IntlWomenJudges



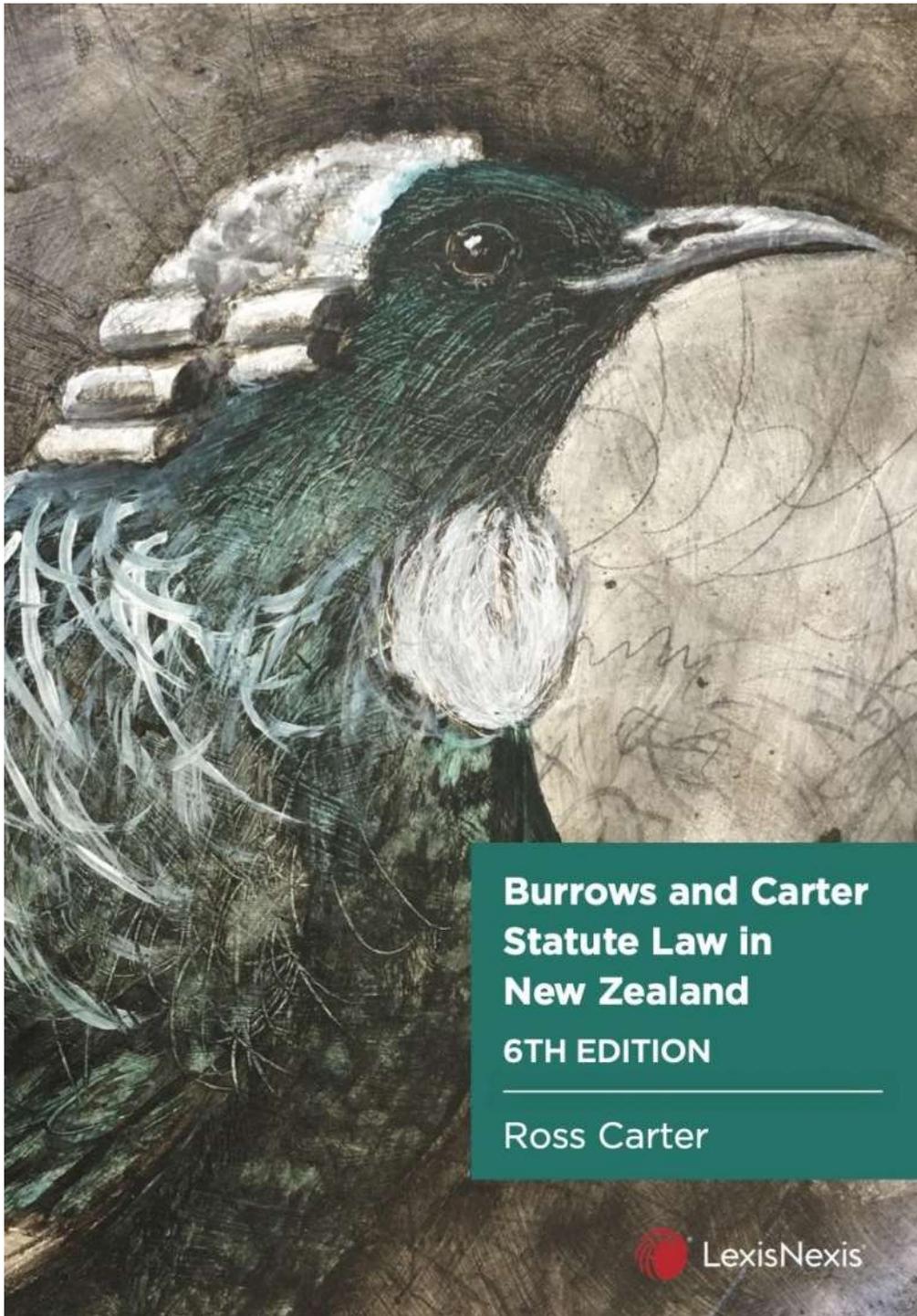
Europe: *Legislation in Europe – A Country-by-Country Guide*

[This new book](#) is edited by Ulrich Karpen and Helen Xanthaki. Following on from the [first volume \(2017\)](#), this unique book is the only collection of native analyses of the status of legislation in 30 European jurisdictions plus the EU. See also [Lucy Marsh-Smith's review at \(March 2021\) The LoopHole 50](#). "Individual chapters provide a fascinating insight into constitutions and law-making in a range of different countries ... It certainly provides a good way to attain a broad overview of how legislation is made across Europe, and an introduction to law-making in a vast array of European countries. It is unique in the wealth of its coverage." See also Daniel Greenberg at [\(2021\) Stat LR advance article](#): "In summary, this book is a masterpiece of brevity and clarity, which will be of inestimable value to anyone who, whether for practical need or simply out of academic interest, wishes to acquire high-level knowledge of the legislative systems in different European countries."



New Zealand – new 6th edition of *Burrows and Carter – Statute Law in New Zealand* (LexisNexis, 2021)

A new, 6th edition of *Burrows and Carter – Statute Law in New Zealand* (LexisNexis, 2021) will soon be available. The release date is 11 May 2021. For more information, see [this page](#).



“I drafted my way” – spoof poem text and performances

And now the end is near,
And so we reach the final clauses.
I’ve made a law that’s clear
In both its structure and its causes.
I’ve made a Bill to pass
Like razors sell, though blunt they may be¹;
And more, much more than this –
I drafted plainly.

Mistakes, I’ve made a few,
But then again, too few to mention.
A comma here, a typo there,
A few departures from convention.
I planned each section head,
Each signpost on the statute’s highway;
And more, much more than this –
I drafted my way.

Yes, there’ve been times, I’m sure you know,
I found the DI’s fairly useless².
But through it all, when there was doubt,
I made a guess to sort it out.
I made a Bill, and it stands still –
It’s drafted my way.

I’ve worked alone through long weekends,
I’ve drafted Bills that were rejected;
And, when the tears subsided, wondered –
Just what was expected?
To think I did all that - and then the legislature voted.
But in committee stage³ –
They saw it my way.

For what I draft is what they get,
If not exactly per instructions.
I write the things they truly need,
According to the best constructions.
The record shows I took the blows –
And drafted my way!

¹ Lord Thring, the first Parliamentary Counsel in London, said that Bills were made to pass “as razors are made to sell.”

² The Drafting Instructions.

³ Comes after the 2nd reading in Westminster legislatures

John F Wilson

(Law Drafting Consultant based in England),

Written for the Commonwealth Association of Legislative Counsel (CALC)

First performed at the PLAIN/Clarity online Conference, October 2020

[You Tube performance 1](#) / [You Tube performance 2](#) / [Vimeo performance](#)

New CALC members

New members since 16 December 2020

The following have been recorded as members of CALC (a) since 16 December 2020 (the date when new members were last listed in the *CALC Newsletter* (December 2020 edition, as published on 17 December 2020), and (b) as at 11 May 2021.

Name	Country
Dibba, Lamin	Gambia
Carroll, David	Australia
Cheung, Gary	Australia
Mules, Phillip	Australia
Rae, Judith	Canada
Ashipala, Hileni	Namibia
Oparaugo, Uchenna	Nigeria
Rahmany, Tania	Gibraltar
Watson, Iona	Australia
White, Christopher	Cyprus
Magor, Samantha	United Kingdom
Torres, Maximilian Hassans	Gibraltar
Beeton, Julie	United Arab Emirates
Chapman, Caroline Ann	Australia
Banerjee, Arnab kumar	India
Gurusamy Naidu, Chinnaraja	India
Taiwo, Tosin	Trinidad and Tobago
Schuman, Daniel	United States
Porco, Stephen	Canada
Taylor, Ellory	Jamaica
Bouchard, Catherine	Canada
Jacobson, Alan	Canada
Martel, Marie-Eve	Canada
Renner, Lisa	Canada
Ahmad, Essa	United Arab Emirates
Bruce, Noel	Saint Vincent and The Grenadines
Dwyer, Jonathan	Jamaica
Tracey, Kerry - Ann	Jamaica
Nwoye, Chijioke Ilm	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](#))