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CONTENTS

CALC's Silver Jubilee

Next April, our Association, known colloquially by its acronym 'CALC' will hold its 10th meeting in Hong Kong, the same city in which it was founded just over 25 years ago. I was fortunate enough to be at the inaugural meeting, which was held in the midst of the Commonwealth Law Conference in one of the big Hong Kong hotels in Kowloon, the Shang-ri La, if my memory serves me correctly.

I had worked as a Crown Counsel in the Attorney General's Chambers from 1971 to 1975 and it came as rather a surprise to find that the hotels where the conference was held were located in what had in my time in Hong Kong been the Hung Hom Railway Station. But then Hong Kong is nothing if not dynamic: you see a building there and a few months later it is replaced by a bigger and better one.

About 70 people, almost entirely legislative counsel, from about 20 Commonwealth countries and territories attended the inaugural meeting. I recall there being a large contingent of Nigerians present, but sadly, because largely of the turbulent history of Nigeria during the 1990s, there are few Nigerian CALC members today. The meeting adopted a new constitution, which had been drafted by the then Hong Kong Law Draftsman, Gerry Nazareth, assisted by two Hong Kong Senior Assistant Law Draftsmen, Jamie Scott and Anthony Watson-Brown. Although Jamie retired in 2001, he continues to be a staunch CALC member and splits his time between Hong Kong and Christchurch, New Zealand. Although this constitution was replaced in 2006, its contents still form the basis of the new constitution.

Every organisation needs a minimum number of officer bearers: CALC was no different. The constitution provided for a President, Vice-President and Secretary. No provision was made for a Treasurer. This was because it was envisaged that CALC would function on the goodwill of large legislative drafting offices and so no provision was made for membership subscriptions.[1] Despite proposals at subsequent CALC general meetings, members have never had to pay subscriptions for their membership. As a moderately large international organisation, CALC must surely be unique in this respect.

Although Gerry Nazareth was nominated as the first President, he deferred to George Engle,[2] the First Parliamentary Counsel of the Office of Parliamentary Counsel in London. Walter Iles, who was then Chief Parliamentary Counsel of New Zealand, was nominated as Vice President, and Geoff Kolts, the First Parliamentary Counsel of the Australian Commonwealth Office of Parliamentary Counsel, was nominated as the Secretary. All were elected by acclamation. Five other delegates from different parts of the Commonwealth were also elected as Council Members. Unfortunately, the ravages of time prevent me from recalling their names.

Although I attended the inaugural meeting, I did not until very recently discover how the decision to establish CALC came about. I therefore consulted the first President, Sir George Engle, about the decision to establish the Association. Fortunately, he was, despite the passage of time, able to throw some light on the matter. He told me that the then UK Attorney General, Sir Michael Havers,[3] was keen on providing a mechanism for putting Commonwealth legislative counsel in touch with one

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1 However, the constitution did leave it open for a general meeting of members to impose membership subscriptions at some future date. The current constitution makes similar provision.

2 Now Sir George Engle.

3 Sir Michael was the father of the well-known film and television actor, Nigel Havers.

another. The idea was enthusiastically supported by Sir George, as First UK Parliamentary Counsel, not least as a way of persuading the Government to pay for a modest number of members of the PCO to attend future Commonwealth Law Conferences! This was something that had hitherto been regarded as unjustified.

Back in 1983, there was a dearth of experienced legislative counsel in most, if not all, of the newly independent Commonwealth countries. Although in the 1960s, a number of UK Parliamentary Counsel, including Basil Humphrey (for one year) and later George Engle (for two years) were seconded to Nigeria as its First Parliamentary Counsel, the then UK First Parliamentary Counsel, John Fiennes, subsequently had to end this practice on the ground that the UK Office of Parliamentary Counsel (which was much smaller than now) could no longer afford to part with any of its counsel because of the increased volume of UK legislation. So part of the thinking behind the formation of CALC was that inexperienced overseas drafters would be able to obtain advice from those more experienced in the older jurisdictions, something that was achieved, perhaps more effectively, by setting up a post-office service via the Commonwealth Secretariat. After the establishment of CALC, the aim of The Loophole was similar. And that was it. Sir Michael's proposal was generally accepted; a constitution to establish CALC was drafted and was adopted at the next Commonwealth Law Conference, which of course was in Hong Kong, it having been decided that the subsequent CALC meetings should coincide with such conferences.

After an initial flurry of new members, membership growth stagnated at about 400. Issues of the CALC journal appeared only spasmodically, but since the mid-1990s have appeared more frequently. Although The Loophole continues to be CALC's flagship publication, at the 1999 CALC conference in Malaysia, it was decided that a CALC Newsletter should be published from time to time. In contrast to The Loophole, which contains more serious articles about legislative drafting and related issues, the Newsletter contains general information about CALC and its members and other information thought to be of interest to CALC members.

By 2000, the membership records had become hopelessly out of date, so a new membership register was prepared. During the last 8 years, the membership has increased considerably, so that at the last count, full members numbered 955. These members are drawn from the UK, Canada, Australia, New Zealand, India, Pakistan, Sri Lanka, Malaysia, Singapore, Brunei, Hong Kong,[4] Ghana, Nigeria, Sierra Leone, Gambia, Kenya, Uganda, Mozambique, Lesotho, Botswana, Zambia, Malawi, South Africa, Namibia, Tanzania, Swaziland, Bermuda, Jamaica, Barbados, Cayman Islands, British Virgin Islands, Guyana, Antigua, Anguilla, Dominica, St Lucia, Trinidad and Tobago, Cyprus, Malta, the Channel Islands, the Isle of Man, Falkland Islands, Fiji Islands, Western Samoa, Tonga, Solomon Islands, and Papua New Guinea.

At the CALC conference in Canada in 1996, it was decided to allow non-Commonwealth legislative counsel to join as associate members. So CALC now has 36 associate members, mostly from Ireland, Hong Kong and the United States.

CALC has been very well served by its officers. Apart from Sir George Engle, who as mentioned

[4] Although Hong Kong is no longer part of the Commonwealth, it was decided that all Hong Kong members who were full members before 1 July 1997 (the day on which Hong Kong was reunified with China), should retain their status. However, people from Hong Kong admitted on and after that date are now admitted as associate members.

above, was the inaugural President, CALC has been well served by subsequent Presidents, Ms Rama Devi (India), Dennis Murphy[5] (NSW, Australia), Hilary Penfold[6] (Australian Commonwealth), Sir Geoffrey Bowman[7] (UK), Lionel Levert[8] (Canada), and Eamonn Moran (Victoria, Australia and Hong Kong). Secretaries have been fewer in number, with Sandra Power (Australian Commonwealth) serving as Geoff Kolts's alter ego. Peter Pagano, the current Chief Legislative Counsel of the Canadian province of Alberta also put in a long stint as CALC Secretary. He was followed by the former First UK Parliamentary Counsel, Edward Caldwell, who served as Secretary from 1992 to 1999, when I took over.

Looking to the future, I believe CALC will continue to grow, both in size of membership and in the quality and quantity of what it offers. The CALC conference in 2003 in Melbourne set a new standard, with a full two day programme being provided for the first time. The 2005 conference in London was even more ambitious, with a record number of members attending. Equally successful, despite a reduction in attendance from London, was the 2007 conference held in the Kenyan capital, Nairobi. Next April will see an even more ambitious programme for the 2009 conference to be held in Hong Kong, the city where CALC was founded 25 years ago. The 2009 conference will be spread over 5 days, with the business programme being for the first time spread over two and a half days. I do not have a crystal ball, but I feel reasonably certain that, by the time it celebrates its Golden Jubilee in 2033, CALC will have risen to new heights as an organization and achieved even bigger and better things than during its first 25 years of existence.

Editor

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5 Former New South Wales Parliamentary Counsel, now retired to the New South Wales country town of Bowral.

6 Now a judge of the Australian Capital Territory Supreme Court.

7 Former First Parliamentary Counsel of the United Kingdom.

8 Former Chief Legislative Counsel of Canada.

MANAGING INCREASING GOVERNMENT EXPECTATIONS WITH RESPECT TO LEGISLATION WHILE MAINTAINING QUALITY: AN ASSESSMENT OF DEVELOPING JURISDICTIONS[1]

Bilika H Simamba [2]

Introduction

The challenge of producing quality legislation at a pace satisfactory to governments is not new of course. It is probably as old as drafting itself. Whereas all legislative drafting offices have to deal with it, the problem is particularly acute in developing countries and small jurisdictions (which we shall collectively call "developing jurisdictions").[3] Governments always seem to require that legislation be produced according to increasingly challenging time schedules. Meanwhile, the need for legislation has not abated. If anything, political, economic and social reforms have resulted in a great increase in the amount of legislation required. Some of this legislation has been necessitated by greater emphasis on economic co-operation groupings, making it obligatory for member states to adopt legal regimes that meet the obligations arising under those arrangements. Also, in recent years many developing jurisdictions have been revising their constitutions with a view to making their societies more democratic. This has often been followed by reviews of their legislation to make it compatible with the new dispensation.

Yet a government cannot pass, and in good time, all the laws that it needs to pass unless it has a well-staffed, competent and efficient legislative drafting office. However, even if a legislative drafting office is competent and reasonably well-staffed, it is unlikely to achieve optimum output if a number of other matters are not addressed. Needless to say, this is the case with both advanced and developing jurisdictions. Whereas every system can be improved, most developing jurisdictions have a wider range of issues to be tackled and some of these tend to be particularly acute in those countries. In discussing

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1 Presented at the CALC Conference, Nairobi, Kenya, 13-15 September, 2007. Some of the ideas expressed in this article were first published in the author's article "Improving Legislative Drafting Capacity" (2002) *Commonwealth Law Bulletin* 1125.

2 LL.B., LL.M. (Zambia); LL.M. in Legislation (Ottawa); a member of the Zambian Bar; Senior Legislative Counsel, Cayman Islands; formerly Chief Parliamentary Draftsman, Zambia.

3 For convenience, in this paper, by "small jurisdictions" we mean those that have a population that does not exceed 200, 000.

the topic one will inevitably find that some of the issues addressed are obvious and taken for granted in developed jurisdictions. This notwithstanding, it is hoped that a debate will be generated that will be of benefit to all.

The meaning of "quality" and "expectations"

At the outset it is appropriate to quickly state what we mean by "quality" and "expectations". Loosely speaking, when we speak of the quality of legislation, we refer to how well conceptualized the legislation is, how plainly the ideas in it have been expounded, as well as the more mundane aspects of editorial quality. This also sums up the expectations of the sponsors of the legislation. In addition, they would like their legislation produced within given time-frames.

The problems stated

The problems of output can be divided into at least four categories. First, there is the obvious difficulty of limited supply of counsel. This is often exacerbated by the second problem of counsel being required to perform other duties such as giving legal advice unrelated to drafting assignments. Third, there is the seemingly unending problem of sub-standard instructions from the sponsors of legislation. Fourth and finally, flawed systems, that is, operating procedures that are inefficient, can be a major bottleneck in the delivery of legislation. These will be considered in turn.

The problems discussed

1. ***Improving the supply of legislative counsel***

British Commonwealth countries, especially those of the south, seek to find permanent solutions to the shortage of legislative counsel. What is more, even when these governments can find legislative counsel, some cannot afford to engage more than one or two. Indeed, many small jurisdictions have only one counsel, when they do have any. Jurisdictions such as the Caribbean islands of Montserrat,[4] the Turks and Caicos Islands,[5] St Lucia[6] the British Virgin Islands,[7] among others, have been known to go for months without a legislative counsel in place, as none qualified and willing to take up the job or jobs could be found. Unfortunately, legislation for a small population does not always translate into a smaller work load, for legislation that applies to 50 thousand people is not necessarily easier to draft or less bulky than that drafted for a jurisdiction of 50 million.

It is not the central purpose of this paper to address the matter of shortage of counsel. However, to the extent that the sufficiency of legislative counsel is an obvious part of the solution to the problem, mention must be made of the dearth of professionals in the area. But because the reasons are well known, it should suffice for present purposes to state them only briefly. They are mainly the desire by

4 Population of 9, 439 in 2006 estimate.

5 Population of 21, 152 in 2006 estimate.

6 Population of 166, 000 in 2005 estimate.

7 Population of 23, 552 in July 2007 estimate.

lawyers to enter private practice later and the absence of conspicuous glamour in drafting. Thus efforts to train lawyers as legislative counsel (at both national and Commonwealth levels) and to retain them thereafter have had limited success.

The latest effort in the Caribbean has been the introduction in January 2007 at the University of Guyana, Turkeyen Campus, George Town, of the Commonwealth Programme for Legislative Counsel in Caribbean Countries.[8] The stated aim of the course is to provide training to counsel and attorneys wishing to enter the drafting field. It is three months long. In charge of the programme are distinguished experts from the United Kingdom and the Caribbean. Upon completion of the programme, participants are awarded a Certificate in Legislative Drafting from the University of Guyana. In April 2007, the programme produced its first thirteen graduates, all lawyers from the Caribbean.

As for the course itself, there is no doubt that it will make a reasonable contribution towards addressing the problem of shortage of legislative counsel. However, past experience with similar courses has shown that it is unlikely to have an overwhelming impact on the problem of improving legislative drafting capacity. Over the decades many people have received at least basic training through courses or on the job but have not stayed in the profession, so the greater problem has been one of retention. One obvious, if difficult, way of retaining lawyers is to remunerate them at significantly higher levels than other legal staff, *as part of their permanent civil service terms and conditions*, rather than as short-lived project staff.[9]

Notwithstanding these constraints, government expectations from those of us who prepare legislation remain high. Even as these efforts to address the problem of insufficient legislative counsel continue, there are a number of easy and inexpensive measures that can be taken to improve the delivery of legislation. It is a major failure of many developing jurisdictions that even simple measures that can improve legislative processes have not been taken. Meanwhile, a lot of effort is put into finding donor countries that can provide money, experts or both, to help with the drafting of legislation.

2. Establishing or maintaining appropriate job descriptions

The seeking and giving of legal advice is a very important part of the legislative process. [10] Legal advice forms part of the work of legislative counsel to the extent that proposals for legislation and the ascertainment of the legal position on any matter at a particular time constitutes part of the early, if tentative, part of the legislative process. Unfortunately, in some developing jurisdictions, especially very small ones, legislative drafting offices are also often asked to provide legal advice in areas unrelated to the drafting. This is usually legal advice relating to difficult problems of statutory

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8 The course was initiated following concerns, not for the first time, appearing in the final communiqué of the 1999 Law Ministers Meeting where "Ministers noted that difficulties experienced by the Commonwealth Secretariat and the Commonwealth of Learning in maximizing the benefits of the innovative distance-learning training programme…".

9 See more detailed discussion in Simamba, *Improving Legislative Drafting Capacity*, op cit.

10 See para 7, Drafting Direction No. 4.5, Drafting Directions Series, 2006, Office of Parliamentary Counsel, Canberra, Australia. Essentially, parliamentary counsel are supposed to give legal advice on issues that are not controversial. A legal issue has to be referred to the Australian Government Solicitor (AGS) if the matter is not clear-cut; raises a real issue of constitutional law; or the client ministry wishes to use the advice for legal or parliamentary proceedings, or public debate.

interpretation. In these small jurisdictions, this aspect of work can assume a miscellaneous aspect. Legislative counsel in such jurisdictions are known to provide legal advice of the general kind that a solicitor general's department would provide in other jurisdictions. This may include advice on companies, citizenship, contracts, customs, immigration and just about every conceivable category of legal advice, excluding perhaps criminal matters, for even small jurisdictions tend to have a department or at least personnel specialized in dealing with crime.[11]

Sometimes legislative counsel even become involved in doling out copies of legislation to other departments in government or even the private sector. This can be an irritation and even impede the performance of their proper functions. Unless a legislative drafting office has the necessary support staff and is appropriately structured, it should not be required to perform that function either on a formal or informal basis.

Legislative counsel, being a scarce resource, should be allowed to confine themselves to the drafting of legislation. They should never be put in a position where they have to decide whether to work on major legislation relating to hedge funds or make a recommendation regarding an application for a licence to solemnize marriages.

3. Substandard instructions

Public officials who assist the government in formulating proposals and conveying those proposals to the legislative drafting office often do not fully appreciate their role, let alone play it effectively. The giving of instructions to legislative counsel is a skill. It requires the instructing official to be familiar with the role of legislative counsel and therefore his or her own role in the drafting of legislation. He or she also needs to be familiar with certain key aspects of the legislative process. An instructing official needs to provide sufficient background materials and reveal the instructing department's reasoning behind proposals in as much detail as possible.

This limited knowledge on the part of officials and therefore poor drafting instructions have further hamstrung legislative counsel in their attempts to increase and improve their output. The matter has been addressed in various jurisdictions. Some, such as Australia[12] and New Zealand,[13] have handbooks which deal with the issue extensively. Others such as Zambia have smaller papers in the form of circulars laying out the basics of giving instructions. In yet other jurisdictions there has been no attempt at any level. A developing jurisdiction, no matter how limited its resources might me, can do at least one thing. It can issue a circular on the basics of preparing drafting instructions. A checklist (with brief explanations) of what officials need to provide can be as short as 3 pages. There are also many

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11 See for some interesting examples by John Wilson in a paper presented to the CALC Conference in July 2005 in London, England, entitled "The Challenges of drafting in a developing country" appearing in *The Loophole,* July 2007, p 36 at p 37 under "Caribbean" (the drafter being required to appear in court) and p 39 under "Role of drafter" (parliamentary counsel being asked to perform political roles such as promoting a bill).

12 Department of the Prime Minister and Cabinet, *Legislation Handbook (including update No. 1 of May 2000)*, Canberra, Australia.

13 Legislation Advisory Committee, *Legislation Advisory Committee Guidelines: Guidelines on Process and Content of Legislation*, 2001 Ed and 2003 Supplement (combined), May 2001, Wellington, New Zealand. The guidelines include Appendix 1 which is headed "Requirements for Instructions for Preparation of Legislation".

published works which mention at least the essentials.

4. Flawed systems

In any professional field, there are certain practices that have been proven to work. The legislative process is not an exception. Unfortunately, in some jurisdictions tested and tried systems have given way to short-term conveniences rendering once fairly efficient systems sluggish. This has been the case in some developing jurisdictions while others seem never to have operated according to well-established legislative processes. Indeed, proper systems have the added bonus of reducing the heat sometimes generated between ministries and legislative counsel.

(a) Legislation drafted without appropriate policy approval

Generally legislation must not be drafted without appropriate policy approval. In the Westminster system or systems that draw on it, this means prior approval in principle by Cabinet or a Cabinet Committee. If there are to be any exceptions, they must be few and clearly defined. In most governments bills generally need approval in principle while only subordinate legislation that has major policy implications needs such approval. It is important that the system of approval in principle operates effectively. If it does not work as it should, the efficiency of the legislative drafting office can be seriously undermined.

Legislative counsel are familiar with the problems of drafting legislation without necessary policy approval. If proposals do not have such prior approval, the time spent drafting the legislation could be rendered a waste if Cabinet or a Cabinet Committee does not in the end approve the legislation. Even if it does, the policy direction agreed on in Cabinet or a Cabinet Committee may change so drastically that the legislation will need a lot of work to turn it around. Quite apart from the possibility of the legislation being eventually nixed by that body, it may never even get there if the government functionary, whose pet project it may have been, is no longer in situ or for some other reason.

Then there are times when Cabinet or a Cabinet Committee changes its mind. A proposal may be approved in principle but when Cabinet or a Cabinet Committee examines the draft legislation with a view to introduction in the legislature, a decision may be made to shelve it temporarily or permanently. This may be due to a better understanding of the proposal or intervening circumstances, making the legislation unnecessary or rendering it not as important as originally thought. Then there are those cases, admittedly rare, when a bill is passed by the legislature and perhaps even assented to but is never brought into force because of heavy lobbying against it. Thus even where the system operates as it should, there are times when properly approved legislation never sees the light of day. When legislation is generally drafted on demand from any ministry or department without Cabinet or Cabinet Committee approval in principle, the number of laws that are drafted but are never enacted proportionately rises.

Despite these obvious reasons why the system of approval in principle is used, there are some developing jurisdictions in which it is not. Legislation is therefore requested lightly and, what is worse, has to be drafted on instructions that are often inadequate. The re-

introduction or introduction of this time-honoured procedural requirement will significantly reduce the pressures that legislative counsel face in delivering legislation in such countries unless some other system is in place that prevents or minimizes the chances of legislation being requested at a whim.

(b) Consultants (ad hoc counsel, lawyers and subject-matter experts)

Sometimes a person, who has or claims to have special knowledge of a particular area (lawyer or non-lawyer) or is a professional drafter, is engaged by the government to draft a particular piece of legislation. Regardless of which category of consultant is engaged, if the consultant is to positively impact the drafting process, there are a number of things to be kept in mind to inform the modus operandi. First, it is important that the consultant is put in touch with legislative counsel as early as possible. The drafting of a piece of legislation must always begin on the right footing. Legislative counsel will be familiar with the legal and broader context in which the law will be drafted, processed and implemented. Accordingly, counsel should be given the earliest possible opportunity to advise and comment on the procedural and substantive side of the proposed legislation. Unless this is done, the "progress" that the consultant may achieve by presenting a "completed" draft may in due course be rendered false.

An appropriate consultant can produce a piece of legislation that is both substantively and stylistically up to standard, even if it may need tweaking here and there. At the other extreme a consultant's draft may call for the legislative counsel to discard it and start afresh. In working with a consultant, therefore, the aim obviously must be to produce a draft that is closer to the former than the latter. With appropriate and early interfacing among the legislative counsel, the instructing official and the consultant, some legislation may be delivered quicker than if the consultant were not involved. Quite apart from the possibility that the consultant's draft may not be of high quality, it brings with it a high expectation on the part of the ministry and the consultant in two respects: that the final bill can be more or less "approved" by legislative counsel without much additional work, if any; and that counsel can attend to it quicker than proposed legislation which has to be drafted from scratch. It is crucial that the legislative drafting office initiate necessary measures to systematically and definitively disabuse client ministries and consultants of any such notion.

Federal Australia has dealt with the issue emphatically. There, the Office of Parliamentary Counsel (OPC) is expressly stated to enjoy a monopoly in the drafting of laws. The relevant guideline states that the drafting of government bills and amendments is tied government legal work and must be undertaken, or arranged, by OPC. That office must identify the policy cited in support of legislation and give assurance that the legislation is in accordance with that policy authority. In this regard, the OPC would only give this assurance about legislation if— [14]

[14] Working with the Office of Parliamentary Counsel: A guide for clients, 2nd ed, Canberra, Australia, July 2002, under 'B.3-OPC's Monopoly', para 33.

- the legislation had been drafted in OPC; or
- the legislation had been drafted by a consultant parliamentary counsel whom OPC regarded as both technically competent and capable of certifying as to the legislation's compliance with policy authority, or
- the legislation had been reviewed by OPC in conjunction with the instructors to the point where OPC was satisfied that it could advise about the legislation's legal effectiveness and its compliance with policy authority.

The guidelines go further to state that legislation drafted outside OPC by a drafter who was not approved by that office "would need to undergo intensive review in OPC before it could be submitted for clearance for introduction" and that "[s]uch a review could only be conducted in accordance with the priority assigned to the legislative project, and might take at least as long as OPC would have taken to draft the legislation in the first place." [15] The guidelines in New Zealand state that: "It is the drafter who has ultimate responsibility for the way a bill or regulations are drafted and for ensuring that legislation will be effective and clear." [16] It is submitted that this power, in both formulations, inheres in every legislative drafting office. However, it would be of great practical help if, as in Australia and New Zealand, it were reduced to a clear policy document to ensure that legislative counsel do not need to enter into unending arguments as to their right to change a draft prepared by a consultant.

It is also worth noting what the guidelines in New Zealand state in connection with the role of a legislative drafting office. They say that: [17]

> Legislative drafters provide a specialist form of legal advice. The relationship between drafter and instructing department is similar to that between solicitor and client.

The significance of this statement lies in the fact that New Zealand is one of those jurisdictions in which the instructing team commonly comprises a legal officer from the instructing department. Thus the client ministry, its solicitor, if any, as well as the consultant, are clients of legislative counsel and must not arrogate to themselves a function that is not theirs.

(c) Legislative counsel attending meetings where instructions are being formulated

Meetings with client ministries are part of the legislative counsel's job. These may take place with or without any formal structure. However, sometimes the legislative counsel is made part of a working group and required to attend all meetings, sometimes held on a regular basis such as weekly. Whereas it is very difficult to make a general

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15 Ibid, para 34.

16 Legislation Advisory Committee Guidelines on Process and Content of Legislation, New Zealand, op cit, at 2.3.2, p 38. See also Statutes Drafting and Compilation Act 1920, s 4, relating to duties of Bill Drafting Department; and Parliamentary Counsel Act 1970 [Aus], s 3 on functions of the Office of Parliamentary Counsel.

17 Ibid, 2.3.2, p 36.

recommendation that will work well regardless of circumstances or the nature of the legislation being considered, certain general observations can be made.

It is of course important for the legislative counsel to gain a deep understanding of the proposals. This may perhaps call for his or her presence at meetings where proposals are being discussed and developed before the clients reach agreement. However, my experience is that there are few such meetings where the legislative counsel's continuous presence is strictly necessary. In many situations, the meetings can still achieve their ends if the decisions and the reasons behind them are recorded in detail and later made available to the legislative counsel. The legislative counsel can then be available to the head of the group for consultation from time to time and attend some of the meetings. It should be remembered that a legislative counsel is often dealing with a number of major pieces of legislation at a time. If, therefore, he or she were to be required to meet regularly with the instructing team for each of the draft legislation being drafted, he or she would have little time left to actually draft the legislation concerned.

It also happens that the instructing team may already have draft legislation prepared by somebody other than the legislative counsel and the legislative counsel is then invited to attend a meeting to discuss the draft. This is also not recommended. Such a draft, regardless of the distinction of the person who drafted it, is often not ready for an open discussion. A draft prepared by someone else must first be examined by the legislative counsel alone, discussed with the key instructing official or officials, and if necessary be redrafted, before it is brought to a plenary session of the group. An attempt to discuss in plenary a draft prepared by someone else, even if the legislative counsel has studied it in advance, amounts to asking the legislative counsel to draft in the meeting which should never be the case. If a legislative counsel is to be invited to attend a meeting to discuss a draft, it should be a draft that he or she has prepared. Indeed, the whole area of meetings is one which needs to be carefully regulated to ensure optimum use of drafting time.

(d) Too much otherwise left to the legislative counsel

There is also the oft-encountered habit of leaving too many duties to the legislative counsel. In some developed jurisdictions, there are style editors and proofreaders. These species of people have not been discovered in some developing jurisdictions. Legislative counsel there have to rely more heavily on themselves and on the instructing officials in dealing with basic editorial issues. And yet it is a quite common for instructing officials to leave much of the proofreading to the legislative counsel. It is not unknown for an instructing official to telephone and say: "The draft is fine but I picked up a typo on page 23. Can you just read through the draft again in case there are any others?" This is unacceptable. Whereas the legislative counsel (with or without appropriate support in the legislative drafting office concerned) is responsible for ensuring that a draft leaves the office in proper shape, counsel shares with the instructing official the duty to ensure that those matters not within counsel's unique expertise are in order. Instructing officials must be made to understand that. At the very least, it is their secondary responsibility to deal with basic literary matters that may have escaped the legislative counsel.

(e) Consultative processes

Governments can choose one of many methods to consult on proposed legislation.[18] Whereas there are many problems associated with unsatisfactory consultative processes, one of the most common affecting legislative counsel in developing jurisdictions is the failure of the principal instructing official in the relevant ministry to take full control of the instructing process. Once this official has submitted the proposals to the legislative counsel and the counsel seeks further instructions, it is not unusual for the counsel's questions to be deflected to some other authority. This may be one of the constituent entities in the ministry, or even someone in the private sector who may have been involved in formulating the proposals. Asking the legislative counsel to collect instructions from various authorities in this manner is most unsatisfactory and considerably delays the completion of legislation.

Further, as the legislative counsel moves towards an agreed draft, all parties in the government who will be affected in one way or another by the legislation must see the legislation and comment on it. This is best done by all representatives of stakeholders in government and, where the government so decides, in the private sector also, sitting together and considering the draft. A draft is more likely to achieve the greatest happiness for the greatest number if the stakeholders can react to each other around the draft, so to speak. Merely sending in comments, especially to a first draft, often does not resolve outstanding issues where there may be conflict or misunderstanding between different wings of government. Indeed, all stakeholders may have to consider a second, third or subsequent draft, the first having been considered by the main instructing official or officials. The number of consultations, however, must be tempered by the need to identify when deadlocks have been reached, at which time the ministry has to decide what the instructions will be. Thereafter, the legislative counsel should finalize the legislation on the basis of the ministry's instructions for submission to the relevant authority.

Another commonly encountered problem has to do with the stage at which an already-prepared draft comes to the legislative counsel. Sometimes a draft prepared by a consultant or even a lay person in the ministry is officially released to the general public as proposed legislation. Thereafter it is later presented, often with changes, to the legislative counsel to deal with "drafting issues" on the assumption that all the concepts have been finalized and are workable. Any attempt by the legislative counsel to ask

[18] See Legislation Advisory Committee Guidelines on Process and Content of Legislation, New Zealand, op cit, para 1.4.3, which outlines different consultative approaches: "These include departmental advisory bodies, secondment of personnel from the private sector, public discussion papers, multi-stakeholder negotiations, focus (consultative) groups, targeted briefings, workshops, questionnaires, public notice and comment, hearings and select committees. The appropriateness of each approach will depend on the issues under consideration, the nature of the group being consulted, and the resources, including time, available for undertaking consultation."

questions is sometimes met with the response: "This draft was considered by all concerned and was circulated to the public. All the issues were dealt with."

This procedure is unsatisfactory. The reality is often that many of the issues raised by the legislative counsel were never considered at all. However, because at that stage the ministry is keen to have the legislation promulgated, the temptation is great on their part to gloss over issues that they never considered. This translates into pressure on the legislative counsel to do the same. It should be obvious that no draft that has not been prepared by the legislative counsel or been reviewed and adopted by the counsel as his own should be circulated to the general public for consultation. What is more, when a draft changes too much after the legislative counsel is through with it, the minister concerned may have to answer too many preventable questions as to why many of the issues that government itself put forward in the draft have changed.

(f) Delayed responses to drafts

It is common in many drafting offices for legislation that has been drafted and sent to the client ministry to take months and even years before comments are received. Nothing can be more indicative of the optional nature of the legislation, the indecision of the sponsors, or their comprehensive ineptitude. It is worthy of note that some jurisdictions take the fact that a draft has been prepared to be a serious matter. In federal Australia, the Cabinet Handbook provides that: [19]

> Departments and authorities consulted on a Bill are to provide their comments in writing to the instructing department *within **5** working days after receipt of the draft Bill.* Comments are copied, by the department providing comments, to OPC and to other departments and authorities which receive copies of the Bill. The instructing department must also provide its comments to OPC *within **5** working days if other departments or authorities are not being consulted, or within **10** working days if there is such consultation*. *(Bold numbers and italics appear in the original.)*

(g) Announcement of legislative proposals

Finally on flawed systems, the announcement of proposals for legislation frequently presents problems for the legislative counsel. Understandably, once politicians take decisions to introduce legislation, they usually want the public to know as soon as possible. When certain situations call for government action, government needs to be seen to be acting as soon as possible. Even where there is no immediate need for legislation, government should be proactive and take measures to arrest any trend that could prove to be a problem in the future. The difficulty with announcements, however, is that politicians tend to commit themselves to time tables before speaking to the legislative drafting office and before they are aware of two things. First, they do not always know the workload of

[19] Legislation Handbook, 1999, Department of the Prime Minister and Cabinet, Canberra, Australia (with Update No. 1 of May 2000 incorporated), para 7.4.

the office. Second, even if they have an idea, they will not always appreciate the amount of work that the particular piece of legislation will involve. In addition, ministers who are new to their roles sometimes do not fully understand the procedure for initiation and processing of proposals. As a result, bowing to either public pressure or their own desire to be seen to be acting in a timely manner, they often announce a date when they expect to have the legislation before the legislature. It is surprisingly common for an announcement to be made even before the legislative drafting office has received the instructions or even heard of the proposals.

Not infrequently the result is that the draft is not produced within the time promised or, even if it is, the draft is hurried, with obvious consequences. The minister has to answer for these failures while probably resisting the pressure to blame the legislative drafting officer. It is advisable therefore, for ministers to speak to the office or the Attorney-General before committing themselves to a definite time-frame. If they have to announce the proposal before consulting, they must make it clear what the time-frame is tentative and that they can only make a firm commitment after consultation. Indeed, it is recommended that, except in truly exceptional circumstances, Cabinet or Cabinet Committee should never set a firm period of time until consultation has taken place. And it must be kept in mind that even after the Department has been consulted and a time-frame has been given by the legislative counsel, this can only be an estimated time for, very often, especially for complex legislation, even the counsel may only appreciate fully what is involved after he or she is well into the assignment.

Legislative counsel's freedom of expression

A legislative counsel often encounters resistance as he or she tries to assess the quality of instructions, especially if they are by way of a draft prepared by a consultant, where there is an attempt to depart from the precise wording used in the instructing materials. Such conflicts often unduly consume the time and energy of both the counsel and client ministry. It is therefore very important that an appropriate authority settle the issue that the wording of a draft is the counsel's as we saw in relation to Australia and New Zealand.

This matter has been given attention by a number of authorities. Driedger has said: "Even assuming that a perfect bill is submitted to the draftsman, he must still subject it to the complete drafting process, for how else can he discover that it is a perfect bill and satisfy himself that it will give legislative effect to the intended policy?"[20] Client ministries must be made to understand that as a trained lawyer and a person who has dealt with other legislation, the counsel can advise as to whether the proposed policy can be implemented in practice. He can raise issues to help refine the policy and assist the client ministry to examine its proposals in the light of existing similar laws.

In this regard, the admonition from the United Kingdom is even more emphatic: [21]

> Nothing is more hampering to Parliamentary Counsel, when the drafting stage is reached, than

[20] *The Composition of Legislation,* Department of Justice, Ottawa, Canada, 1976, p xx. See also pp xv, xvi.

[21] *The Preparation of Bills* (1948), p 8.

> to be obliged to build what is usually a complex structure round 'sacred phrases' or form of words which have become sacrosanct by reason of their having been agreed upon in Cabinet or in one of its committees. A still more serious objection to agreed form of words of this kind is that they often turn out to represent agreement upon words only, concealing the fact that no real compromise or decision has been reached between conflicting views upon some important question.

It is partly for this reason that in some jurisdictions there is a practice that when the proposal to introduce legislation is tabled before Cabinet or a Cabinet Committee seeking approval in principle, it is not accompanied by draft legislation. This prevents any semblance of a claim that the particular draft and all its details were endorsed by Cabinet or are legally above board.

Miscellaneous matters

It does not always happen that all the main instructions are settled and available to the legislative counsel when he or she begins to draft. Meanwhile, a draft may be so urgent or the official just so anxious to proceed that when a possibly major constitutional issue arises, the pressure to prepare a conditional draft is great. In such circumstances, the legislative counsel often has no option but to begin, keeping in mind that some of the provisions will have to change or be expunged depending on what the instructions turn out to be. In other cases, the issue or issues that are still unresolved (legal or otherwise) can be so central to the legislation that a conditional draft will require almost complete revision if the assumption upon which the legislative counsel proceeds does not hold in the end. Where this happens, the instructing official and the legislative counsel should try and make a determination as to whether it is worth commencing to draft.

Another consideration has to do with mindset of the legislative counsel and basic structure of the legislation. If a legislative counsel produces a draft on one set of assumed instructions and the final instructions are different, he has to change his mindset and adjust the draft accordingly. Sometimes the adjustment is imperfect in that, especially in a long and complex draft, some provisions which need change are not so readily identifiable and are, therefore, inadvertently glossed over. The bill may be passed in that form, only for the flaws to reveal themselves when the legislation is operational. Major adjustments of this kind breed errors. Therefore, wherever possible, a draft should not be prepared when a major area which is likely to pervade many parts of the draft has not been settled.

Then there are always the small matters. Many developing jurisdictions do not have paralegals who work on the less exacting part of legislative drafting. Thus often a senior counsel, or even the head of the legislative drafting office, has to attend to small matters such as the making of final changes after the passing of a bill, changing the margins of bills that are to be presented for assent, printing them and numerous other little tasks. One way to look at it is draw an analogy with private practice. In a practice there are certain activities that are charged at a full professional level, while other activities are charged at a lower level. By the same token, legislative counsel must not perform functions that do not call for his or her expertise unless one is merely to check that the work has been carried out satisfactorily.

Also, legislation now is done on computers. Some jurisdictions have special programmes designed to make it easier to present legislation in the right programme and format. However, legislation prepared by consultants poses some possible inconveniences, however small. If a consultant's draft is prepared

in a programme and format that is different from the one used in the office of legislative counsel, an attempt must be made for the consultant to prepare the draft in the office template so that time is not spent on merely converting the work into appropriate electronic form. Especially with large drafts, it is amazing how much time can be taken just to place the draft on the right template. It is particularly wasteful if time has to be taken by legislative counsel because the office does not have a paralegal or even an old-fashioned typist to effect the change.

Institutionalizing the solutions

The legislative counsel knows the things that need to be done in order for his or her work to be facilitated. The problem very often is that this knowledge remains mere personal knowledge. Any attempts to correct the situation while working on individual assignments are often rendered nugatory by a more powerful authority in government informing the legislative counsel that the particular assignment will be delayed if he or she insists on approval in principle, proper instructions or some other matter that would actually assist his or her work. And yet the failure to implement proper systems, quite apart from the fact that it may delay even that particular assignment, renders the whole system inefficient.

The answer to this problem lies at both a macro and micro level. At the macro level two things are needed. First, developing jurisdictions need in the long-term to develop handbooks of the type that has have been instituted in Australia and New Zealand. The handbooks will assist in the management of those legislative processes which have to do with the legislative counsel. Second, the handbooks need to be supported and reinforced by instruction courses on legislative processes and the development of proper instructions. At the micro level the legislative processes that will be contained in the handbooks and the knowledge that will be imparted at courses should be reinforced by the legislative counsel in dealing with individual assignments.

The preparation of a handbook is time consuming and many developing jurisdictions may not have the human and financial resources to prepare one. It is my view that there is need for a template for a Commonwealth legislation handbook. Work on such a handbook can best be piloted through the Commonwealth Secretariat in London. Each Commonwealth jurisdiction can then decide to adopt that template or amend it suitably to make it jurisdiction specific. The handbook, supported by actual courses and ad hoc enforcement of its provisions, will greatly assist in equipping instructing officials with the necessary knowledge to be able to play their roles more effectively.

In considering whether to implement these proposals, we are unlikely to escape the argument that legislative counsel will not have the time to conduct courses. It is likely to be argued that only offices in advanced jurisdictions can afford to do so. This is not the case. Especially if a handbook exists, legislative counsel can take as little as one day every three months to hold a course for key officials to familiarize them with the handbook and related issues. Priority on such courses has to be given to those officials who instruct on legislation frequently. Others can attend if they expect to give instructions in the foreseeable future. A handbook supported by appropriate courses and ad hoc reinforcement in relation to individual assignments will produce immense results in educating instructing officials and therefore improving the delivery of legislation.

In some developing jurisdictions one cannot speak of solving legislative drafting capacity without

mentioning donor agencies. International organizations such as the Commonwealth Secretariat and the World Bank/IMF, and agencies from individual countries, help to find and fund consultants to draft legislation. Whereas many such projects have achieved tremendous results for the countries concerned, it is submitted that many have not achieved optimum results, the reason being that the legislative counsel had to work with officials who did not give them the appropriate support even in basic areas. It is therefore recommended that in legislative support projects that run for months or years, the initial weeks should be taken up by legislative counsel imparting to likely instructing officials what will be expected of them.

Conclusion

The inefficiencies that manifest themselves in the legislative systems on the executive side of government are often a result of failure to implement measures that do not call for a large outlay of resources. Indeed, many of these measures are in routine operation in many Commonwealth countries. Perhaps the most glaring deficiency is the lack of proper instructions and expectations that are formed without sufficient knowledge of what the drafting of legislation involves and the way it is processed through the government system. If some of the suggestions outlined above are implemented I believe that legislation in many such jurisdictions will increase substantially and be of better quality without increasing the number of legislative counsel. On the whole it is only by training instructing officials to properly interface with legislative counsel, better managing our legislative processes, as well as expectations of sponsors of legislation, that we can produce and be seen to be producing the optimum quantity and quality of legislation.

MANAGING INCREASING GOVERNMENT EXPECTATIONS WITH RESPECT TO LEGISLATION WHILE MAINTAINING QUALITY

Colin Wilson [1]

Introduction

It is tempting to spend the time allotted to me in analysing the title of this session. What are government expectations? Are they increasing? Are they, as the use of the word "managing" in the title might suggest, inconsistent with maintaining quality? What do we mean by quality anyway? But I will try to resist the temptation to discuss those interesting questions in any detail. I will concentrate instead in looking at how we in Scotland have sought to meet the challenges of delivering the Scottish Government's annual programme of legislation over the 8 years since the establishment of the Scottish Parliament.

Background

First, a little background. The Scottish Parliament was established in 1999 by an Act of the United Kingdom Parliament[2]. It has legislative competence to pass Acts on "devolved" matters. Those are matters that are not reserved to the UK Parliament by the Scotland Act. Ministers in the devolved Scottish Government (whose official, rather unilluminating, title is the Scottish Executive[3]) have executive powers somewhat wider than the legislative competence of the Scottish Parliament.

Bills introduced into the Scottish Parliament, whether Government Bills or Bills sponsored by backbenchers or parliamentary committees, are scrutinised by the relevant subject committee. So, for example, a Criminal Justice Bill will be referred to the Justice Committee. That means that a Bill has

1 First Scottish Parliamentary Counsel, Office of the Scottish Parliamentary Counsel, Edinburgh

2 Scotland Act 1998 c.46

3 S. 44, Scotland Act 1998

to jostle for a place on a committee's agenda alongside the other work that the committee has in hand. That has consequences for the Government's legislative programme.

An added dimension is that since the Scottish Parliamentary elections in May 2007, Scotland has had a minority devolved government, formed by the Scottish National Party. It is not yet clear what effect the parliamentary arithmetic will have on the Government's ability to deliver its legislative programme and to resist backbench Bills that it does not like.

Government expectations and quality

Having promised to resist the temptation to analyse the title, I'm now going to break that promise! What is the source of the seeming tension that can arise between government expectations and the maintenance of quality in Bills? I think it boils down to the difference between Ministerial expectations and the counsel's aspirations.

Different Ministers may well have different expectations in relation to legislation. But they all expect a Bill to do a political job for them. For example, a Bill may be a response to a real-life incident. A couple of weeks ago, a doctor in Glasgow was stabbed by one of her patients. That incident prompted the Minister to declare publicly that the law relating to protection of emergency workers is to be amended to afford greater protection to doctors. Ministers tend to focus on the most immediate issues: getting a Bill ready for introduction on time; getting it through the Parliament with a minimum of fuss; and then bringing it into force by a target date. They tend to be less concerned with things that might go wrong in the long run: that same long run in which, as Keynes said, we are all dead.

The parliamentary counsel's aspirations are, I submit, wider. The parliamentary counsel of course wants many of the same things as the Minister. It is the counsel's job to draft a Bill that meets the policy; and to do so in a way that is robust enough to withstand critical scrutiny, including that of the courts. He or she also aims to draft the Bill in such a way as to facilitate debate during its parliamentary passage. And of course the counsel wants the Bill to be passed by the Parliament – and to be passed largely unaffected by external amendment.

But in doing all this, the parliamentary counsel has other, perhaps more altruistic, aspirations. As a professional drafter, he or she wants to produce the best Bill possible in the circumstances. It is the parliamentary counsel who has the prime interest in maintaining the quality of the product.

As to the other aspirations, the parliamentary counsel also has in mind the logical and principled development of the law and the legal system; and the need to ensure the coherence of the statute book. To give practical effect to those aspirations, the parliamentary counsel will want to ensure that the Bill is drafted in clear, unambiguous language; that it integrates properly with existing legislation on the subject; and that it is accessible to those who will use the resulting Act.

What sort of tension can arise between government expectations and the parliamentary counsel's aspirations? The two most common areas of conflict are lack of time to prepare a Bill and lack of resources (both people and instructions). Other sorts of difficulty might include a Ministerial desire to include overtly political (or "sloganeering") material in Bills.

How is a balance maintained between those expectations and aspirations? Is it for the parliamentary counsel to seek to do this? Before attempting an answer I want to turn to look at the Scottish

experience.

The Scottish experience

So, how do we in Edinburgh go about delivering the Scottish Government's legislative programme? First of all, I should say that we are fortunate not to have had any real problems in recruiting, training and retaining good parliamentary counsel. In recent years OSPC has grown slowly but steadily until we now have reasonable drafting capacity to meet the normal demands placed on us. But drafting capacity alone is not enough.

3 further elements have contributed to the delivery of the Scottish Government's legislative programme, all of which focus on those essential ingredients of time and resources. Each of them has evolved considerably in the light of experience over the past 8 years.

Central management of the legislative programme

First, a process for the central management of the government's legislative programme. The Minister for Parliamentary Business and his officials draw up a draft legislative programme for the coming parliamentary year based on bids from each policy Minister. The draft programme is considered by the Cabinet Sub-Committee on Legislation, a Ministerial committee attended by a number of senior officials, including me. That is my opportunity to ensure that the drafting resources in OSPC, taken as a whole, are adequate to deliver all the Bills in the programme by the proposed introduction dates.

Once the draft legislative programme has been agreed and approved by the Scottish Cabinet, the First Minister of Scotland announces it to the Parliament – indeed the statement for the coming year was made just last week.

The Cabinet Sub-Committee on Legislation has a continuing role in relation to the legislative programme, receiving regular reports on the progress of Bills in the programme and being ready to take action to resolve any difficulties that may emerge. Officials supporting the Minister for Parliamentary Business will intervene if the drafter of a Bill has concerns about the Bill that cannot be resolved within the Bill team; and the matter can be taken up at Ministerial level if a solution cannot be found.

Managing each Bill

The second element is the management of each individual Bill. In the early days of the Scottish Parliament, Bill teams were largely left to their own devices in preparing their Bills. The Minister for Parliamentary Business's officials would monitor progress rather than chase it. Problems sometimes emerged at a very late stage simply because Bill teams were reluctant to admit that anything was wrong. And sometimes warnings were simply ignored and Ministers decided to press on regardless.

The Bill for the Mental Health (Care and Treatment) (Scotland) Act 2003 was an example of that. It went ahead, very late in the first session of the Scottish Parliament, simply because Ministers had given a commitment that it would be enacted in that session. It turned out to be far larger and more complicated than anyone had bargained for. OSPC managed to negotiate the postponement of the original unrealistic introduction date to allow more time for the Bill's preparation; but not to have the Bill held over to the second session. The resulting Act has already had to be amended in a number of respects to make provision plugging policy gaps or replacing poorly thought out original policy. Partly

as a result of that, and following the recommendation of an official working group which looked at the working of the legislative process, there has more recently been an increasing emphasis on proactive management of Bills from the centre.

Once the legislative programme is agreed, the policy officials for each Bill are required to prepare a detailed timetable setting dates for the completion of each of the key things that has to happen if their Bill is to be ready for introduction on time. They have to agree the timetable with the instructing solicitor and OSPC to ensure that sufficient time is allowed for instructing and drafting the Bill.

During preparation of the Bill, there will be at least one Bill management meeting involving the Minister in charge of the Bill, the Minister for Parliamentary Business, the Lord Advocate (who is the senior law officer in Scotland) and the members of the Bill team, including the parliamentary counsel in OSPC. That meeting checks that the Bill is on track to be ready for introduction on time and that any policy issues, legal concerns (for example about the Bill's legislative competence), and concerns about its parliamentary handling or anything else have been identified and are being dealt with. The meeting is preceded, a couple of weeks earlier, by a meeting of officials to prepare for it. The imminence of the Ministerial meeting helps to concentrate minds and to ensure that no unwelcome surprises occur there.

The process has several advantages—

- Each of the players, including the parliamentary counsel, knows what needs to be done, who needs to do it, and by when. That can ensure that all, including Ministers, share the same expectations in relation to the Bill
- If things begin to go wrong, for example if the timetable slips, that can be identified early and remedial action taken, increasing the likelihood that the Bill can be delivered on time. In one recent Bill, for example, it became clear to the parliamentary counsel that the lead policy official was struggling to cope with the demands of the Bill. Following a meeting of the Bill team at which the lack of progress was highlighted, senior policy officials agreed to play a more active role in the Bill, enabling the backlog of work to be cleared
- Those charged with managing the legislative programme, including the Cabinet Sub-Committee on Legislation, have good line of sight into each of the Bills and can see the overall picture, including the implications of problems in one Bill on the handling of another. This is particularly important where a Bill encounters difficulties during its parliamentary passage
- The Minister responsible for a Bill is encouraged to take a more direct interest in its preparation, particularly when he or she has to answer to fellow Ministers, acting with delegated authority of the Scottish Cabinet, for the state of readiness of the Bill.

There are some potential risks too—

- Compliance with the timetable may become an end in itself, and people may spend more time chasing progress, or explaining why it hasn't been made, than making it

- The amount of time allowed for drafting, which is based on an estimate by me before the Bill has been instructed, may prove to be inadequate. Below, I will consider some of the ways in which counsel in OSPC try to make the best use of the time available
- The existence of the system can create increased expectations as to the number of Bills that can be produced, or how quickly they can be prepared. Picking up Bismarck's comment about the making of laws being like the making of sausages[4], it is rather like having a state-of the-art sausage machine – if you turn the handle faster, you expect more sausages to come out at the other end.

Team work on a Bill

But project management, however good, can't guarantee the quality of a Bill. It is people, not processes, that deliver quality. And it is how people interact with each other that can make the difference. That is the third element that I want to look at.

Over recent years there have been significant developments in the way that counsel in OSPC work with policy colleagues and instructing solicitors. We are beginning to see evidence that these changes are having a positive effect. The common theme is flexibility – being prepared to get involved in ways that the handbook on instructing Bills doesn't contemplate if that makes sense in the circumstances of a particular Bill.

Getting involved early

I try to allocate Bills to drafting teams in OSPC as early as possible, and certainly well before the drafting instructions are available. The parliamentary counsel in OSPC will set up an early meeting with the policy officials and the instructing solicitor. As well as enabling everyone to get to know each other, an early meeting helps to establish the sense of a shared purpose which is vital to the success of the Bill preparation process. The OSPC parliamentary counsel can also provide hints and tips, or more formal training if requested, on how to navigate the process for instructing Bills. The policy officials working on a Bill often have little or no previous experience of Bill work. There is central guidance and support and training available to them, but that is a little like giving someone a manual on how to drive a car and handing them the car keys – they may manage to drive the car by following the instructions, but they won't do it well. We encourage members of the Bill team to come to us with queries about any aspect of the Bill process or parliamentary procedure.

How a team works will vary from one Bill to another depending on the subject matter, the relative experience of the different players and their knowledge of the subject area. What is important is a willingness to be flexible, to be relaxed about precise boundaries of responsibility and not to retreat into blaming each other when something goes wrong.

Getting involved at the policy development stage

We encourage policy officials to let us see background documents at an early stage, so that the parliamentary counsel can begin to get a feel for what the Bill will involve and can offer any preliminary comments on what is proposed. Parliamentary counsel will also attend significant policy

[4] "Laws are like sausages. It's better not to see them being made."

meetings if other commitments allow.

One recent example of this was in relation to the Bill for the Protection of Vulnerable Groups (Scotland) Act 2007, which dealt with criminal disclosure checks for people working with children and vulnerable adults. The policy was complicated and spanned 3 policy departments. Time was short because of the impending Scottish parliamentary election. The Bill was extremely important to Ministers. I allocated the Bill to a parliamentary counsel who had been in the team that had drafted a Bill on the same topic a few years before. Armed with that knowledge of the subject-matter, the parliamentary counsel was able to make a vital contribution to getting the project started. Having sat through policy meetings where officials were unable to articulate clearly how the scheme would operate in practice, the parliamentary counsel thought that he could see what they were grasping at and obtained their agreement to work up, without instructions, draft provisions as a basis for further discussion. Those provisions provided the catalyst for crystallising the policy thinking and enabling the preparation of the Bill to proceed. The parliamentary counsel was praised by policy officials for his role in unblocking what one official described as "policy constipation".

In another recent Bill on adoption, policy officials were proposing to implement a raft of changes to the law by textually amending the already heavily amended principal Act on the topic. The early involvement of the parliamentary counsel enabled them to campaign, successfully, for the whole Act to be restated with the necessary changes. The resulting Act was warmly welcomed as making a difficult and complicated area of law more accessible.

Getting involved in different ways

Counsel in OSPC have also been increasingly prepared to get involved in ways that might have been frowned on a few years ago, for example, in attending conferences or seminars with stakeholders where the proposed legislation, and the problems that it is intended to tackle, are being discussed by those to whom it will apply. Recent examples include conferences on the regulation of charities and on flood prevention, and an expert reference group on public health. Hearing those who will be affected by legislation explaining their concerns at first hand can often help to convey to the parliamentary counsel the nature and depth of feeling about a point in a way that written drafting instructions do not.

Flexibility in how we communicate with other members of the Bill team helps to ensure that we all make best use of the available time. While it is vital to maintain an audit trail of instructions received and how they are dealt with, we are happy to discuss matters in face-to-face meetings, by telephone or by email as appropriate. But it does require more in the way of organisational effort from the parliamentary counsel in keeping track of instructions. We also encourage instructing solicitors to talk to the parliamentary counsel before getting too far into preparing drafting instructions. That can save a lot of wasted effort on the part of the instructing solicitor and result in better instructions.

Parliamentary counsel are encouraged to be prepared to explain and defend their chosen drafting approach. We have found, for example, that some plain language techniques attract adverse comment simply because they are unfamiliar – "that doesn't look like real legislation", we are told.

In-Bill and post-Bill reviews

We have recently instituted what are known as in-Bill and post-Bill reviews. These are meetings of the Bill team which happen shortly after the introduction of a Bill and again following the completion of

the Bill's parliamentary passage. The Bill team has a chance to discuss how the process has gone and to identify anything that might have been done differently. These have been effective in providing constructive feedback and a chance to learn lessons for the future.

The buddy system

I have realised for some time that I can't realistically keep a close eye on every Bill that is being drafted in OSPC. And while junior counsel gain exposure to different drafting styles as they move from one drafting team to another, senior counsel don't have that opportunity. So OSPC has recently introduced what has been described as a "buddy" system, in which drafting teams are paired off and each team is expected to take a particular interest in the Bills being drafted by the other. Early results are encouraging, and there are signs that teams have been discussing the relative merits of different drafting approaches and, on occasion, altering their drafting as a result. If it works, it will help to improve the quality of our drafting through learning from each other.

Conclusion

So how does the Edinburgh parliamentary counsel fare in seeking to maintain the balance between expectations and aspirations? The parliamentary counsel is in a peculiarly privileged and indeed pivotal position. As well as being aware of the expectations and requirements of Ministers, he or she is able to understand the interests of those who will ultimately use the legislation and how those interests might be served in the way that the Bill is drafted.

Ministers, for understandable reasons, are often concerned more with getting legislation successfully onto the statute book than with the detail of how the legislation will work once enacted. It is, I suggest, for the parliamentary counsel to take an active role in advancing the interests of users of legislation, and that is something that my colleagues in OSPC have in mind when drafting. That can be a lonely role when others simply want a Bill that will pass into law with a minimum of fuss; and the parliamentary counsel may face accusations of striving for unnecessary perfection.

I have outlined how, in the Scottish context, the process for managing the legislative programme and the Bills in it helps to shape government expectations and to ensure that those expectations are met. And the developments in how OSPC counsel work with policy officials and instructing solicitors (and, indeed, each other) are undoubtedly helping to produce legislation that has been more thoroughly thought through. The system is far from perfect, but the combination of the developments in the processes and in the way we work has resulted in real improvements in the delivery of the government's legislative programme to Ministers' satisfaction while enabling parliamentary counsel to ensure that the Bills that we draft are as good as we can make them.

QUALITY CONTROL MEASURES IN THE LEGISLATIVE SERVICES BRANCH OF THE CANADIAN DEPARTMENT OF JUSTICE

Ingrid Ludchen [1]

A team approach to the drafting of legislation has been developed over a number of years in the Legislative Services Branch in the Federal Department of Justice in Ottawa, Canada. Two legislative counsel—one francophone, one Anglophone— work on each draft government bill and regulation to ensure that the French and English texts each stand on their own and are not mere translations of the other.

Three units in the Legislative Revision Services Group within the Branch provide important practical support to the legislative counsel. These units are the Bijural Revision Services Unit (Taxation and Comparative Law), the Jurilinguistic Services Unit, and the Legislative Editing and Publishing Services Section.

The Bijural Revision Services Unit is responsible for coordinating efforts aimed at ensuring bijuralism in federal legislation**.** The members of the unit systematically review both existing and new legislation, in order to ensure that the civil law and common law traditions are reflected in federal Acts and regulations, in both official languages. In addition, the unit provides consultative services in civil law and comparative law.

The Jurilinguistic Services Unit consists of 10 people with backgrounds in translation and law who assist legislative counsel by providing linguistic advice and ensuring that the two official-language versions of draft legislative texts are parallel in meaning. The jurilinguists carry out a side-to-side

[1] Chief Legislative Editor, Legislative Editing and Publishing Services Section of the Legislative Services Branch of the Canadian Department of Justice.

review of the French and English texts.

The Legislative Editing and Publishing Services Section, which is the focus of this paper, is made up of three groups:

- the Legislative Editing Office,
- the Publishing Team, and
- the Database Management Services Unit.

While all three groups play a role in the quality assurance of Canadian federal legislation, the Legislative Editing Office has the most direct involvement with the legislative counsel and their legislative texts.

Two teams of legislative editors—one French, the other English—review the work of approximately 30 legislative counsel in the Legislation Section and 70 legislative counsel in four Regulations Drafting Sections (one main section at Justice headquarters and three smaller sections on site at the Departments of Health, Transport and Environment). Half the counsel draft in French and the other half draft in English. Each editing team consists of seven editors and one supervisor, who provides training, assigns files and offers advice and guidance.

As most of you are no doubt aware, legislation is often complex and much of it is drafted under tight time constraints. It is always helpful for another pair of eyes to review a text, especially when they bring a different perspective to the review.

When legislative counsel review a text, they naturally tend to look for and primarily see the legal problems. It is difficult for any writer to edit his or her own work, as there is a point at which the writer can no longer "see the forest for the trees". Provisions laboured over with colleagues and clients and revised numerous times can be omitted in error from a final text. An editor following the logic of the text can readily identify the omission.

Legislative editors in Ottawa are not lawyers so they bring no legal assumptions to a text being reviewed. The role of the editors in the legislative drafting process is seen as representing the public to whom the draft law is directed. If the editors don't understand a provision, there is a strong likelihood that members of the public won't understand it either.

The editors do bring to their work a variety of educational backgrounds and life experiences. A number of editors have a Bachelor's or Master's degree in English or French, journalism, communications, history, geography, mathematics and so on. At present, several editors each have over 30 years of experience working in the Branch with legislative texts. With this great experience, they can be particularly helpful to new counsel.

All editors have the same basic qualities:

- knowledge of grammar,
- an eye for detail, and
- a logical mind.

I also believe intellectual curiosity is an important quality in a good editor; a desire to want to understand and a willingness to dig to find meaning. This is particularly helpful in the Legislative

Editing Office, where any editor may be asked to review a bill or regulation dealing with any matter under federal jurisdiction.

All editors are bilingual to the extent that they can read well in their second official language. While editors are not responsible for comparing the content of the French and English texts, it is often helpful to do so when the text in one language being edited is unclear in any respect.

The editors review a text by reading it from top to bottom (remember that it is the jurilinguists that carry out the side-to-side review). Editors check for technical errors such as errors in grammar, spelling, style and format, and ensure adherence to drafting rules and conventions.

When an editor makes a structural change—for example, dividing a section into two or more subsections—the editor will consult with their colleague in the other language unit to ensure that the same change is made in both language versions.

The editors also review the texts for sense and logic, clarity, consistency of expression and of course accuracy. In effect, editors critique the texts with the goal of making them clear and correct.

Editors are helpful in spotting conceptual problems. An editor's directed questions following careful analysis of a draft provide valuable feedback to the legislative counsel on how well the meaning of a provision has been communicated and which areas require rethinking or redrafting. Time permitting, editors will work on a text until they feel they understand it and have raised all the questions they believe are necessary in order to clarify any problems they may have encountered in it.

Newly hired editors generally undergo a personalized training program for a period of one to three years, depending on the person's background, knowledge and experience. During that time, they learn about the many aspects of legislative drafting and editing. They have an opportunity to read the Branch's manuals on drafting, procedures and conventions, and are given research exercises to complete, as well as bills and regulations to edit and review with their supervisor. The Branch offers a number of courses (such as "Legislative Drafting and Statutory Interpretation" and "The Regulatory Process", as well as workshops on topics such as "Definitions" and "Sentence Structure") that the editors are encouraged to attend. During this training, editors are made to understand that there are no "silly" questions, and that it is better to ask the legislative counsel "Is this what you mean?" and be told "Yes, of course," than not to ask and risk a potentially serious error slipping into the legislation because no one else noticed the problem.

Whenever a new legislative counsel joins the Branch, their first draft bill or regulation is edited by the editing supervisor. This allows the supervisor to determine what type of assistance the new counsel needs. The supervisor then meets with the counsel to explain why changes were made to the draft and also what the editors require from the counsel, such as the number of copies of a draft and adequate time to carefully review a text. General information about the service that the Legislative Editing Office provides, including the verification of cross-references and the titles of documents incorporated by reference, is also offered.

An explanation of the meaning of the editorial marks used in the review of drafts is also given. This follows from an incident many years ago when a legislative counsel complained to me, as editing supervisor, that an editor had been rude to him by writing, under a correction in the margin beside an incorrectly spelled word in his text, "See Oxford English Dictionary". He felt insulted by what he perceived as someone's having said to him, essentially, "Go look it up!" I hastened to assure him that

this was standard editing shorthand meant to convey the fact that the editor had spotted the error, verified the correct spelling, corrected it and given the source for reference, all to inform the legislative counsel that care had been taken in ensuring the accuracy of his text.

The supervisors make it clear to legislative counsel that the editors are available to help them with their texts but that the final decision on whether or not to accept a suggestion for a change rests with the counsel. Editors understand that there may be policy or political considerations that prevent legislative counsel from making a change even when they agree that it would improve the text.

An editor's insightful comments on a text can lead to a review of policy and to the identification of legal problems. Over the years, many notes of appreciation have been sent by grateful counsel thanking editors for their helpful comments and suggestions.

A lawyer once expressed his appreciation of the editorial assistance provided to him by the Legislative Editing Office by saying, "I disregard the advice of the editors at my peril."

An editor's task is to help improve draft legislative texts but not to impose their personal style or preferences. The goal is a clear and accurate text, not just a "different" text. Early in my career as a legislative editor, I came upon a provision that contained three words that I thought should be changed. Before doing so, I checked the words I wanted to propose in the dictionary, only to discover that my words were all synonyms for the words the counsel had chosen. I was reassured that the meanings were the same—and clear—and made no comment to the counsel about the provision. There was nothing wrong with what the counsel had written, and so there was nothing that I needed to correct.

There are generally three types of comments or corrections an editor might make:

- The first is an outright *correction*: if a word is clearly wrong, the word is corrected; the new word is circled and the wrong one is crossed out.
- The second is the *suggestion* of a word or phrase set within quotation marks, followed by a question mark. This is a clear indication that the suggestion is for the counsel's consideration, with "clearer?" or "better?" added as appropriate.
- The third is a *comment or question* identifying an issue or problem that is more complex than the simple changing of a few words. The editor attempts to explain the problem as clearly as possible so that the counsel understands the issue and can deal with and resolve it. Such a substantive comment is often written on a cover page or separate sheet attached to the draft so the editor is not constrained by space. Redrafted provisions may be included.

With editors focussing on technical and language issues, legislative counsel can focus on legal issues. It has been our experience that the use of legislative editors is a cost-effective and efficient way to improve the quality of legislation.

The Legislative Editing and Publishing Services Section also produces a number of tools that assist legislative counsel and editors in their work. Among these are a consolidated, bilingual set of statutes and regulations, and a *Table of Public Statutes and Responsible Ministers* that sets out a history of amendments and coming-into-force information related to Acts and their amendments.

The two other groups in the Legislative Editing and Publishing Services Section also play a role in quality assurance. The two members of the Publishing Team have been with the Branch for many

years, performing data entry and verification functions in the preparation of final printed copies of draft bills. They share a keen eye for detail with the rest of the Section's staff and spot and correct typographical errors and problems such as paragraphs that are deleted in one language version but not in the other. By correcting the errors or bringing them to the attention of legislative counsel or editors, as appropriate, errors can be corrected before the drafts are printed and widely distributed.

The Database Management Services Unit and other consolidation staff also notice errors that slip through despite everyone's best efforts. The consolidation editors will bring to the attention of appropriate staff problems encountered in carrying out the instructions in amending clauses. An example of such an error might be a clause that calls for the repeal of a section that doesn't exist -- resulting from a renumbering error that was missed in the rushed drafting stage or that occurred during the bill's progress through Parliament. As soon as such errors are found, action can be taken to remedy them.

As you can readily see, quality assurance in legislation is indeed a team effort.

AUSTRALIAN OFFICE OF PARLIAMENTARY COUNSEL'S QUALITY ASSURANCE PROCESSES FOR BILLS

Meredith Leigh [2]

Overview

The Australian Office of Parliamentary Counsel has two major processes for quality assurance for Bills. These are:

- the drafting team arrangements, and
- formal editorial checking processes.

Both of these are supported by automated checking processes. In this paper, provide an overview of the two major processes. The paper will concentrate in the automated checking processes that OPC has developed.

Background about OPC

The Office of Parliamentary Counsel (OPC) was established under the Parliamentary Counsel Act 1970. OPC only drafts principal legislation and is not responsible for the publication or consolidation of legislation. OPC has about 50 staff.

Quality assurance arrangements

Drafting team arrangements

Drafting is carried out in teams consisting of parliamentary counsel (who are all lawyers) and

[2] This paper was presented by Meredith Leigh, First Assistant Parliamentary Counsel of the Australian Office of Parliamentary Counsel. It is based on material prepared by Peter Quiggin, First Parliamentary Counsel in that Office.

administrative support staff. Most of the teams involve only two parliamentary counsel (a senior counsel and an assistant counsel) but some involve more counsel working together in a variety of arrangements.

The senior counsel is ultimately responsible for the quality of every Bill produced by the team.

While there are some variations in working arrangements, senior counsel would generally be closely involved in all projects. This direct involvement of an experienced and highly skilled counsel ensures that Bills are well thought-out and well constructed.

Having two counsel read all work also provides a substantial level of quality assurance.

Informal editorial processes

Our executive assistants (support staff) have been trained in editorial work. Parliamentary counsel will often get these staff to perform what we call "service centre checks". These are effectively a cut-down version of the formal editorial check that I will discuss soon. However, one additional check that is done as part of the service centre check is to "read in" amendments to Principal Acts.

Formal editorial processes

All Bills go through a series of editorial checks and through editorial clearance before they are introduced.

These editorial checks are done by staff who have been through an intensive training program in OPC. Bills continue to cycle through the checking process until all errors and editorial suggestions have been satisfactorily dealt with. Generally, Bills will have around 2 to 4 editorial checks.

Electronic tools to assist with quality assurance

Overview

OPC has developed a number of Microsoft Word macros that perform a number of checks on Bills. We have looked at some commercial systems but considered that they were too expensive and, to the extent that they had in-built checks, were checking for the wrong things.

Operation of macros

Basically, the macros all work by going over a document looking for text strings, combinations of text strings, particular formatting (such as spaces, tabs or styles). The macros then produce reports that advise the user of:—

- formatting errors (eg the wrong number of tabs or spaces);
- possible formatting problems;
- other errors (eg incorrect words — pubic vs. public);
- possible breaches of Drafting Directions;
- matters that need consideration by the legislative counsel (eg the geographical jurisdiction for offences);

- matters that require action by the legislative counsel (eg referring the Bill to another Government agency).

The reports can be printed out. In addition, hypertext links in the reports can immediately take the user to the point in the document where the issue has been found. This allows formatting errors etc to be corrected immediately.

I will now show you some examples of the macros, and the results reports.

How the macros work

There are two basic approaches used by the macros. The first has the checks "hard coded" or programmed into it. The second uses checks that are inputted into the macro from either a table or a database. (Originally we used a table, but we found that as we included more and more checks, this became a bit slow and we found that we could speed it up by using a database.)

We have the "hard coded" macro mainly because there are some checks that are very hard (if not impossible) to do using the other macro but which can be hard coded fairly easily.

The table (or database) that provides input for the second macro is kept up-to-date by one of our parliamentary counsel. When people suggest additional things that should be checked for, she considers how a check could be written to do this.

Basically, each row in the table is a separate check. The table has a number of columns. The macro searches for either one or 2 strings, as specified in the first and third columns. You can also specify that the first string must have a particular style, and that, if there is a second string, it appears within a specified distance from the first string. Both of these features allow you to limit the number of hits you would otherwise get. The macro can be programmed to check for every occurrence of a string, or only the first occurrence. In one of the columns, you include the report to be generated if the string is found.

What are the benefits of automated checking

The major benefits of the automated checks are:

(a) **speed—**the checks are very quick to run;

(b) **accuracy**—the checks can detect things that are very difficult for humans to detect;

(c) **flexibility**—the range of checks can be added to as new issues arise.

Speed

The macros each take less than a minute to run on all except the largest Bills. In this time over 250 separate checks are run by the macros.

Accuracy

The macros check for a range of things, many of which are difficult to pick up by reading the Bill. These include that the correct number of tabs and spaces are included.

Many of the checks also pick up errors (such as words that are similar to each other) that can be missed by human readers. Some of these checks have been added as a result of errors that have been detected in Bills and Acts.

Flexibility

We have continually added checks to the macros. Some have been done as errors have been detected in Bills. Others have been added as additional rules and requirements have been introduced into OPC.

Possible drawbacks of reliance on macros

One concern that we have had is that having a large number of macros is that parliamentary counsel and others may rely on the macros too much and not do sufficient checking themselves.

We have tried to alleviate this by ensuring that parliamentary counsel continue to understand their responsibility for ensuring the accuracy of the Bills and by having an extensive human editorial checking.

Implementing a similar scheme in other offices

Often the hardest thing about automating a process is coming up with the idea to automate it. We have now done that for you. Another difficulty is working out a basic approach to automation: our automated checks basically rely on the search function in Microsoft Word (although the search function in nearly any system should be sufficient).

If you wanted to automate checks within your own office, a good starting point would be to think about the checks that you would like to automate and then think if there are unique text or character strings that can be used to detect those things.

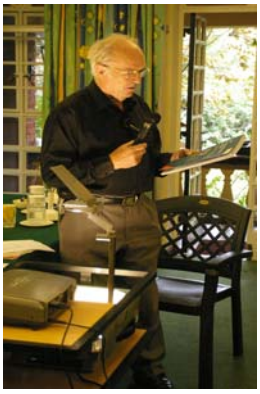
To properly implement the system you will need some IT expertise. However the OPC system started using some pretty simple macros that were written by parliamentary counsel with an interest in IT. After we employed professional IT staff the macros became more complex and did a wider range of checks. However, the fundamental approach has not changed.

Conclusion

OPC has found the use of automated checking processes to be an excellent adjunct to the checking of Bills by parliamentary counsel and by trained editorial checkers. The checks are very fast and are able to pick up a wide range of errors and issues, some of which are difficult to detect by reading the Bill. We recommend that other offices investigate the implementation of such checks.

REDUCING THE COMPLEXITY OF LEGISLATIVE SENTENCES

Duncan Berry [1]



1—Introduction

Legislative counsel have been subject to much criticism over the years because readers have found legislation difficult to access, read, understand and use. There is little doubt that much of this criticism is justified; much legislation is indeed not effectively communicated to its various audiences. The reasons for this are many and complex. Communication difficulties arise in a number of areas, one of which is the structure of the legislative sentence. I have identified a number of aspects of legislative sentences where these difficulties are evident. These are—

- Legislative sentences that are too long or too complex;
- Overloading legislative sentences by including too many ideas;
- Complex conditional sentences;
- Centre-embedded clauses and phrases;
- Unduly compressed wording
- The over use or inappropriate use of negatives;
- The inappropriate use of passive verbs;
- Failure to use appropriate parallel sentence structures.

Other factors affecting the communication of legislative sentences include uncohesive sentence structure, syntactic ambiguity, the use of provisos and the creation of exceptions, but I do not propose to deal with them in this paper.

[1] Consultant Legislative Counsel.

2—Long and complex legislative sentences

One of the major reasons why readers of legislative documents have difficulty in understanding them is that long and complex sentence structures overtax the cognitive capacity of the short-term memory. Readers of documents (and particularly complex legislative documents) can absorb only so much new information at one time. At the end of a legislative sentence, readers stop to construct a meaning from what they have just read. A long sentence contains more ideas than readers can absorb when they come to the end of the sentence. A long sentence also tends to be grammatically complex and this tends to make it difficult for readers to relate to the various ideas that the sentence contains.

The relevant research literature—Short sentences are intuitively appealing and indeed the research literature supports the view that they enhance comprehension. Coleman (1962) confirmed that shortening sentences contributes to understanding written text. Research carried out in developing and validating readability formulas supports the general conclusion that shorter sentences make prose more readable.[2]

Other research has found that factors other than sentence length influence comprehension. Rohrman (1968) has shown that the grammatical complexity of a sentence is important. And Perfetti (1969 a, b) and Kintsch and Keenan (1973) have shown that whether a sentence is sparse or dense in terms of the amount of information can be more significant for comprehension than length of sentence. The important point to derive from the research is that, while length of a sentence is an important consideration, it is not sufficient in itself to ensure that the sentence will be easy to understand.

However, as Bransford and Franks (1971) have pointed out, there are times when long sentences (relatively speaking) can be easier for readers to understand and remember than a series of very short sentences. This is probably because very short sentences tend to be devoid of a strong thematic structure.

The message for legislative counsel is clear. Those counsel who draft legislative documents containing sections and subsections made up of short legislative sentences will enable their audiences to understand the text more easily. However, shorter sentences do not necessarily mean fewer words in the overall text. Just because a revised legislative document contains fewer words does not automatically mean that it is more comprehensible. Brevity is no substitute for clarity. And fewer ideas are remembered from a précis than from an expanded text (Wason, 1962).

So how should legislative counsel go about reducing the length of legislative sentences? A partial solution to this problem is to place any subsidiary, explanatory or qualifying material in another sentence either in the same section, subsection or clause or in another subsection or subclause juxtaposed to the one containing the main proposition. On the other hand, research studies make it clear that authors should not overdo short, simple sentences. The need to maintain the thematic structure of the text overrides the need for the text to be written in short sentences. This is because lack of thematic organisation slows readers down and as a consequence makes it more difficult for them to understand the text (Kieras, 1978).

2 For a review of research on readability formulas, see Redish, 1980.

Some writing style manuals purport to impose word limits.[3] Such a limitation may be useful as a guideline, but it may not always be an adequate measure by itself. For legislative counsel, the important thing to remember about sentence length is to present their audiences with only as many ideas as they can be reasonably expected to handle at any one time. The following sentence contains at least five ideas that would be easier to understand if they were written in two shorter sentences.

TOO LONG:

(3) The regulations may make provisions for or with respect to the conditions to be complied with in respect of the free distribution of clinical samples of therapeutic goods, as referred to in subsection (2), and without affecting the generality of the foregoing provisions of this subsection, may provide that any of the prescribed provisions of this Act and the regulations shall apply to and in respect of those samples as if their distribution or intended distribution were a sale or intended sale.

MY REDRAFT:

(3) The regulations may prescribe the conditions that are to be complied with in relation to the free distribution of clinical samples of therapeutic goods (as referred to in subsection (2)). The regulations may also provide for specified provisions of this Act or the regulations to apply in respect of those samples as if their distribution or intended distribution were a sale or intended sale.

There are no hard and fast rules for determining whether a sentence is too long. A sentence that might be short enough for a judge to cope with may be too long for a police officer. In deciding sentence length, legislative counsel should take into account factors such as—

- the needs of their audiences;[4]
- the complexity of the ideas being expressed; and
- the content of the preceding text.

When redrafting legislative sentences that are too long, legislative counsel should try to organise and separate the various ideas in it. First, they should find the subject and the main verb. Next, they should work out how the other phrases in the sentence relate to the subject and main verb, asking themselves whether those phrases are conditions, qualifications, exceptions, elaborations, reasons or results. Legislative counsel should also ask themselves whether the phrases refer more directly to one of the other phrases than to the subject and main verb. By identifying the parts of the sentence and their relation to each other, they can judge which parts are not crucial to the basic idea that is intended to be conveyed by the sentence. They will then know which parts to redraft in separate, shorter sentences. The following examples illustrate how legislative counsel might go about redrafting legislative sentences that are too long.

TOO LONG:

3 The New South Wales Parliamentary Counsel's Office has a rule that a legislative sentence that is not tabulated ("paragraphed") should not be more than five lines long ("the five-line rule"). (Five lines would normally contain about 40 to 60 words.)

4 And in particular, the need to match audiences' expectations.

If the application is rejected on the ground that it is considered to be improperly lodged because of a failure to submit the relevant certificate, the application fee may be refunded.

MY REDRAFT:

The Board may refund the application fee if it rejects an application because the applicant did not provide it with the relevant certificate.

Despite the fact that long sentences are now generally frowned on by legislative drafting offices, it is still possible to find legislative sentences containing more than 200 words. Krongold (1992: 516) cites this example from the *Workers Compensation Act* (Nova Scotia).[5] Section 9 (1) reads as follows:

TOO LONG:

9. (1) Where, in any industry to which this Part applies, personal injury by accident arising out of and in the course of employment is caused to a worker, compensation as hereinafter provided shall be paid to such worker, or his dependants, as the case may be, except where the injury:
   (a) does not disable the worker for a period of at least three days from earning full wages at the work at which he was employed, provided however that where a personal injury by accident results in a permanent partial disability to the worker, the Board may pay compensation notwithstanding that such personal injury does not disable the worker for a period of three days from earning full wages at the work at which he was employed, the amount of such compensation to be in the discretion of the Board; or
   (b) is attributable solely to the serious and wilful misconduct of the worker, unless the injury results in death or serious and permanent disablement.

MY REDRAFT: I have redrafted the provision into four manageable chunks:

9. (1) Compensation is payable to a worker or to the worker's dependants in accordance with this section if, while the worker was working in an industry to which this Part applies, a personal injury is caused to the worker because of an accident arising out of and in the course of employment.
   (2) Compensation is payable under this section only if—
      (a) the injury disables the worker from earning full wages from performing the kind of work at which the worker was employed, and
      (b) the disability lasts for 3 days or more.
   (3) However, if the injury results in the worker becoming partially and permanently disabled, the Board can still pay compensation even if the injury does not disable the worker from working for 3 days or more. In that case, the compensation is to be an amount of the Board's choosing.
   (4) Compensation is not payable under this section if the injury is attributable solely to the serious and wilful misconduct of the worker unless the injury results in the worker's death or being seriously and permanently disabled.

The redraft is clearly an improvement, although it remains open to the criticism that, subsection (3) apart, it is drafted in the passive voice with no agent mentioned (truncated passive). The only clue as to

[5] RSNS 1989, c. 508, s. 9.

who is to do the paying is in subsection (3). Writing in the active voice and avoiding unnecessary words can often help to reduce sentence length. Sentences containing too much information, like the one that comprises section 9(1) of the Nova Scotia *Workers Compensation Act*, are manifestly too long.

As the research literature suggests, legislative counsel do not need to make every sentence short: too many short sentences can make a section or subsection seem choppy or too fragmented. A well-constructed long sentence can give needed variety to the rhythm of the text. Moreover, some ideas may make more sense when presented together in one long sentence than in several short ones. Drafting a legislative provision in very short sentences can make the entire text longer and indeed make it seem that readers will have to take on board more information than would be the case with longer sentences. However, readers will probably understand the text better because they will be able to pause and construct meaning from the ideas as they go along.

Until recently, most legislative drafting offices in Australia and in other common law jurisdictions have made it a rule to allow only one sentence for each subsection or undivided section. Many legislative drafting offices still have such a rule. This is a major cause of unnecessarily long legislative sentences. This rule is quite unwarranted. Legislative counsel should therefore consider dividing a long subsection or undivided section into two, or even three, shorter sentences.[6]

Another reason why legislative sentences written in the traditional form may be unnecessarily long is that they sometimes repeat unnecessary information. The following subsection is taken from section 4 of the *Fixed Penalty (Criminal Proceedings) Ordinance* (Cap.240) (HK):

> (2) Where a notice under section 3(1) or (3) has been withdrawn under this section and any sum has been paid pursuant to that notice, the Director of Accounting Services shall, on demand by the person on whom the notice was served, repay to that person the sum so repaid.

Looking at this subsection, is it necessary to tell readers that it applies "[W]here a notice under subsection 3(1) or (2) has been withdrawn"? Surely all that the reader needs to know is that, on being requested to do so, the Director of Accounting Services has an obligation to repay money paid under a notice "withdrawn under this section". Assuming this to be the case, it would have been simpler and much more succinct to say—

> (2) The Director of Accounting Services must, on being requested to do so, repay money paid by a person under a notice that is withdrawn under this section

Similarly, a legislative sentence may become unnecessarily long when a legal proposition (specified in a subsection of the relevant section) is negated by a later one, as in the following example:

> (1) A financial institution must not do ....
>
> (2) Subsection (1) does not apply to a financial institution that has complied with section 57 if ....

Surely it would be sufficient to say—

> (2) Subsection (1) does not apply if ....?

In this example, subsection (1) has spelt out the whole case, so it is unnecessary to repeat it when

[6] However, legislative counsel should not exceed 3 sentences when drafting a subsection or an undivided section. This is because of potential problems with cross-references and future amendments.

partially negating it.

Similarly with unnecessary cross-references in a legislative sentence, not only are readers provided with information that they do not need but the information is likely to distract them from focusing on the main thrust of the sentence. The following extract is taken from section 6 of the *Fixed Penalty (Traffic Contraventions) Ordinance* (Cap 237) (HK):

> (1) *Subject to subsections (2) and (3)*, the driver of a motor vehicle shall not cause the motor vehicle or any part thereof to stop in a zebra controlled area.
>
> (2) Nothing in subsection (1) shall prevent a motor vehicle from stopping in any length of road on any side thereof –
>
> (a)—(c).
>
> (3) Nothing in subsection (1) shall prevent a motor vehicle from stopping in a zebra controlled area –
>
> (a)—(b)

Do the italicised words contribute to the readers' understanding of the section? Would a court interpret the section differently if those words were omitted? One might also wonder whether the inclusion in subsection (1) of the words "or any part thereof" are necessary. Why not say—

> (1) The driver of a motor vehicle must ensure that no part of the vehicle stops within a zebra controlled area?

The opening words in subsections (2) and (3) could also be made easier to read (and slightly shorter) by changing the words "Nothing in subsection (1) shall prevent…" to "Subsection (1) does not prevent…"

The conclusion to be drawn from all this seems to be that legislative counsel should draft legislative sentences that do not overtax people's short-term memories. On the other hand, people are able to bear in mind more than one idea or concept at a time, so sentences should not be too choppy or over fragmented.

3—Not overloading sentences by including too many ideas

The relevant research literature—A legislative sentence becomes hard for readers to understand when it has too much information packed into it. This problem is closely related to the previous section, which dealt with unnecessarily long sentences. However, even short sentences can be hard to understand if they contain too many ideas. As Felker, Redish and Peterson (1985: 54) have pointed out, sentences do not have to be long to tax the user's short-term memory. Research conducted by Kintsch and Kominsky (1977: 491) established that propositional density (the number and organisation of ideas) is a more inhibiting factor than sentence length.

There is an extensive and varied body of research relating to the problem of overloading sentences with too many ideas. One area of research has focused on how extra information in a sentence makes sentence structure more complex. One way of looking at structure is in terms of the number of ideas in sentences. Several studies have examined this aspect of structure. In general, results show that sentences with many clauses or subordinate clauses are harder to understand. As might be expected, Forster (1970) and Forster and Ryder (1971) found that sentences with two subordinate clauses are

harder to understand than sentences with only one. The location of extra clauses within a sentence is also important. It is also the case that sentences with subordinate clauses located at the beginning or in the middle of a sentence tend to be harder for readers to interpret than when located at the end of the sentence. Miller and Isard (1964), Fodor and Garrett (1967), Hakes and Cairns (1970) and Larkin and Burns (1977) have supported this finding.

Other researchers have investigated the structure of sentences in terms of how words are grouped from left to right in the sentence. Those researchers have also studied problems involving the addition of words and phrases to sentences. The results of their studies confirm the benefits of locating the extra information at the end of the sentence. For example, studies by Martin and Roberts (1966) and by Martin, Roberts and Collins (1968) show that most sentences with words or phrases located before the subject, or between the subject and the verb, are harder to remember (e.g. "The very nicely built house collapsed.") The typical explanation for these findings involves short-term memory. People can deal with only a limited amount of so much information at any one time.

Research by Creaghead and Donnelly[7] found that readers make more comprehension errors with sentences containing relative clauses—clauses that contain a relative pronoun such as *who*, *that*, or *which* —that are embedded in the middle of a sentence ("The report *that John wrote* won an award") than with relative clauses that are at the end of a sentence ("The society gave an award to the report *that John wrote*").

A second area of research has focused on how extra information makes the content of the sentence denser.[8] Density refers to the number of sentence ideas combined in a sentence (e.g. "The red bird flew" contains two sentence ideas—"The bird is red" and "The bird flew"). The results of this research generally show that "dense" sentences take longer to read and are harder to understand. While the research does not indicate how much information is "excessive" in particular sentences for particular audiences, the overall results show that, as more information is included in a sentence, readers take longer to understand the sentence.

How the research literature can help legislative counsel to produce more usable legislative documents—The research literature suggests that, in drafting legislative sentences (and, in particular, when scrutinising their work), legislative counsel should look for excess information in those sentences in the following situations:

(1) *When too much information is located before the subject of the sentence.* Too much information before the subject of the sentence can make it difficult for readers to find the main clause of the sentence. In most legislative sentences, this information is in the form of one or more left-branching conditional clauses or phrases, which can cause comprehension difficulties for readers of legislative documents. Later, I will show how the research literature on this topic can help legislative counsel to reduce the complexity of legislative sentences that have a lot of information before the subject of the sentence.

(2) *When too much information is embedded between the subject and the verb*. A sentence that

[7] 1982: 177-186.

[8] Kintsch and Keenan, 1973; Graesser, Hoffman and Clark, 1980.

contains text embedded between the subject and the verb makes it difficult for readers to determine what the subject of the sentence is doing or is supposed to do. Readers will find it difficult to store, process and recall the embedded text. Too much information in a legislative sentence, even with correct punctuation, is hard to understand. In discussing legal texts, Danet (1980: 482) made the following point:

> Each sentence is made to count for too much. In other kinds of prose, the writer often expresses an idea one way and then restates it in somewhat different form, giving readers more time to digest it.[9]

Later, I will show how the relevant literature can help legislative counsel to deal with legislative sentences that have embedded text located between the subject and the verb.

(3) *When too much information is located between the verb and the object*. A sentence that contains text embedded between the verb and the object [10] also makes it difficult for readers to discover what the action or activity in the sentence relates to. Later, I will show how the relevant literature can help legislative counsel to deal with legislative sentences that have embedded text located between the verb and the object.

(4) *When too much information is located at the end of the sentence.* If there is too much information at the end of the sentence, this can cause readers to forget who has done what to whom by the time they finish the sentence. Furthermore, there is a very real danger that locating words at the end of the sentence will make the sentence ambiguous. This is because it will be unclear which of the earlier words the words located at the end of the sentence are referring to. Take the following risible example taken from a US statute:[11]

> No one shall carry any dangerous weapon upon the public highway except for the purpose of killing a noxious animal or a policeman in the execution of his duty.[12]

The way this legislative sentence is written of course makes it appear that the it is lawful to carry a dangerous weapon on the public highway for the purpose of killing a policeman! I have redrafted the example as follows:

> A person (other than a police officer acting in the course of the officer's duty) must not, while on a public highway, carry a dangerous weapon for a purpose other than killing a noxious animal.

Another approach (arguably clearer) would be to say:

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[9] In other words, one of the reasons why readers have difficulty in understanding complex documents, such as statutes and statutory rules, is that sentence structures overtax the cognitive capacity of the short-term memory. Research studies in cognitive psychology point to several sources of difficulty. Sentence length has already been mentioned, but a sentence does not have to be long to tax a user's short-term memory. Prepositional density, that is, the number and organisation of ideas, is apparently more significant than the number of words (Felker, Redish and Peterson, 1985: 54). Even in sentences of reasonable length, grammatical structure can create comprehension problems.

[10] The research mentioned in paragraph (2) above is also relevant to this kind of sentence.

[11] Cited in Bowman (2000).

[12] The phrase at end of this sentence is often referred to as a dangling participle.

> A person must not, while on a public highway, carry a dangerous weapon for a purpose other than killing a noxious animal.
>
> Subsection (1) does not apply to a police officer acting in the course of the officer's duty.

The following is another example of how excess information at the end of a sentence can not only reduce the comprehensibility of the sentence but also make it ambiguous:

> The Governor-General, may by order published in the Gazette, exempt charities and associations providing educational services from the requirements of *the Income Tax Assessment Act 1936*.

There is more than one way in which the comprehensibility of the example can be improved and, depending on the meaning intended, the ambiguity removed. The following are my redrafted versions of the example:

> The Governor-General may, by order published in the Gazette, exempt from the requirements of the *Income Tax Assessment Act 1936* any association that provides educational services or any charity.
>
> The Governor-General may, by order published in the Gazette, exempt from the requirements of the *Income Tax Assessment Act 1936* any charity or association if the charity or association provides educational services.

As the research suggests, a legislative counsel who has drafted a provision that contains too much information should break it up into two or more sentences. For example, this one long sentence has intrusive information that could easily be transferred to another sentence:

> Any interested person may, not later than 30 days after the publication of the proposed environmental plan in a newspaper circulating in New South Wales, lodge with the general manager of the local council an objection in writing regarding the plan.

The following is my draft of this sentence:

> Any interested person can object to the local council's proposed environmental plan. The objection must be in writing and be lodged with the local council's general manager within 30 days after the plan was published.[13]

Legislative counsel can usually avoid inserting excess information into legislative sentences by keeping those sentences short. As the research literature indicates,[14] the inclusion of conditions can result in a sentence becoming overloaded. This can be avoided by reorganising the text so as to make the conditions clear or by including them in another sentence. Excess information can also be removed from sentences by omitting unnecessary words or phrases.

Despite what has been said above, it is possible to write perfectly correct and clear sentences with added words, clauses or phrases:

- before the subject of a sentence,

[13] This is a case in which it is appropriate to use the passive voice. There is no need to repeat the actor here because it is quite clear that the "objector" is the "interested person" mentioned in the previous sentence.

[14] Holland and Rose (1981).

- between the subject and the verb,
- between the verb and the object, or
- at the end of a sentence.

Not every sentence has to follow a simple subject-verb-object format. The key is to avoid adding so much information at any of these points that the meaning of the sentence becomes ambiguous or unclear or that the action in the sentence becomes hard to follow.

4—Reducing the complexity of conditional sentences

The nature of complex conditional sentences— This topic is closely connected to the previous one. Legislative documents teem with conditional sentences (which more often than not are "left branching" rather than "right branching"). A conditional sentence is a sentence of the form "If A, then B," or "When A is the case, do B." For example:

> If you are a householder, you must complete Form 10.

Conditional sentences are often so complicated that many readers find them more difficult to understand than other kinds of *sentences*. The more conditions a sentence contains, and the more different combinations of conjunctions ("ands" and "ors"), the more difficult the sentence will be for readers to understand.[15]

Such sentences typically specify one or more contingencies that have to arise in order to bring about some legal consequence. Because the law has to draw many fine, conditional lines to indicate when it applies and when it does not, form again follows function. However, as Benson[16] points out, ordinary English prose deals with contingencies in ways that are simpler than the long conditional sentences characteristic of legal writing. For instance, "A person who..." instead of "If a person ..., the person ..."

Conditional sentences become more complicated when they contain several conditions, or several ways of combining conditions. For example, note the several conditions that have to be met in the following sentence:

> To be eligible for benefits, you must show either your identification card and driver's licence or a notarised birth certificate.

As the number of conditions increases, sentences become more and more difficult until they end up being unintelligible to all but the most persistent reader. The following sentence, taken from section 17 of the Canadian *Narcotics Control Act* (RSC 1985, c. N-1), is an example of a daunting provision that imposes significant demands on the user's processing abilities:

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[15] Research by Felker, Redish and Peterson (1985: 54-55) suggests that complex conditional sentences of the kind that abound in legislative documents are likely to be difficult for readers to understand. They also found that readers can assign themselves to the appropriate condition more quickly and accurately by other means, such as from a diagram, flow-chart or algorithm, rather than from a single prose sentence. Their research also indicates that listing the conditions using typographical cues or writing the parts of the condition as separate statements are other solutions that work well.

[16] 1985: 519.

If, on the hearing of an application made under subsection (1), it is made to appear to the satisfaction of the judge that the applicant is innocent of any complicity in the offence with the person who was convicted thereof, and that the applicant exercised, with respect to the person permitted to obtain possession of the conveyance, all reasonable care in order to be satisfied that the conveyance was not likely to be used in connection with the commission of an unlawful act or, in the case of a mortgagee or lien holder, that the applicant exercised, with respect to the mortgage or lien-giver, all reasonable care in order to be so satisfied, the applicant is entitled to an order declaring that the interest is not affected by the forfeiture and declaring the nature and extent of the interest.
[*The different conditions are shown in italics*.]
It is very difficult to sort out the various conditions in this sentence and to keep track of what happens under different circumstances. Furthermore, the user has to wade through 112 words of "conditions" before reaching the legal subject and the legal action of the sentence!

The relevant research literature—That readers find conditional sentences more difficult to understand than other kinds of sentences has considerable research support. Wright and Hull have conducted research to find out whether the location of conditional clauses in sentences affects readers' understanding of those sentences.[17] The data from their research show that the question "How should one write commands or instructions so that they can be easily followed?" does not provide a simple answer. The clause order that facilitates recoding operations does not necessarily facilitate the execution of action plans. Thus, a command or an instruction contained in a sentence that corresponds to the temporal order in which an action plan would be executed (that is first check the prevailing contingency, then select the appropriate action) was found to be easier to carry out (and presumably easier to understand) than a command or an instruction contained in a sentence in which the subordinate conditional clause occurred at the end. On the other hand, it seems that readers of a sentence find the sentence easier to understand and use if words requiring difficult cognitive processing are set out later in the sentence. As a consequence, "unless" offers a counter example to the general observation that the normal ordering for conditional statements is to have the conditional subordinate clause *precede* the conclusion (i.e. the main clause).[18]

Another group of studies demonstrates that *and-or* conditions and other words that link parts in an "if" condition can be difficult to process. Haygood and Bourne (1965), Neisser and Weene (1962) and Neimark and Slotnick (1970) found that "or" and two-category concepts such as "not both/and" and "not either/or" are difficult for people to understand. Holland and Rose (1980) confirmed that adult readers found it difficult to carry out an instruction when it contained "or", "not either/or" and "not both/and" conditions. Holland and Rose concluded that, in general, people can grasp "and" constructions ("A, B, C *and* D") more easily than "or" constructions ("A, B, C *or* D") or mixed ones ("A *or* B *and* C *or* D").

A further group of studies demonstrates solutions to the problems of interpreting "and/or" conditions. Those studies show that separating the parts of the condition usually helps readers not only to proceed more quickly but also to make fewer errors. The following three ways of separating conditions appear

17 Wright and Hull, 1988: 187-211.

18 Comrie, 1986.

to help readers to understand conditional sentences more easily:

- *Changing the wording*—The Holland and Rose study[19] found that separating the parts of an "or" construction by repeating the "or" conjunction ("A *or* B *or* C *or* D") eliminated the ambiguity of that construction.
- *Separating the parts graphically by putting them in a vertical list*—A study by Wright and Reid[20] found that simply listing the parts of a condition in separate prose statements improved how people follow instructions that contain complex conditions.
- *Changing the instruction into an algorithm*—With this method, the "ands", "ors" and "nots" are removed and replaced by arrows or other special directions that show readers how to proceed. A study by Holland and Rose[21] found that algorithms helped readers avoid nearly all the errors that they made with prose.

How the research literature can help legislative counsel to produce more usable legislative documents—Sentences containing complex conditional clauses are usually long ones. Because the research literature shows that generally readers are able to understand the shorter sentences more easily,[22] one way legislative counsel can assist readers' understanding is by breaking sentences up into lists that, in effect, become short sentences. If different conditions apply to different persons in different circumstances, one way in which legislative counsel can make the conditions more comprehensible is to construct a table to show the various complex relationships.[23] Another possibility that legislative counsel might usefully take from the research literature is to differentiate conditional clauses by employing techniques, such as italics, underlining, capital letters, bold face type or other highlighting techniques, to make the *and* and *or* conjunctions distinctive.

There are at least three general rules legislative counsel should follow when drafting legislative sentences containing conditional clauses. The rules are as follows:

(1) If there is only one condition, normally state it first. Take the following example:

If a person is over 65 years of age, he or she is entitled to receive a benefit provided under section 43.[24]

However, if the condition is a condition subsequent, the condition should usually be located after the main clause of the sentence.

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19 1980.

20 1973: 160-166.

21 1981.

22 See section 2 above.

23 See section 5 below.

24 I would be inclined to draft the provision this way:

"A person who has reached 65 years of age is entitled to receive a benefit under section 43."

(2) If there are several conditions, then state the main proposition first and list the conditions or exceptions afterwards. Take the following legislative sentence:

At least thirty calendar days prior to the public hearing on the draft environmental plan, or if no public inquiry is held, a reasonable period before lodgement of an environmental plan with the Minister for approval, the draft environmental plan must be submitted to the Director for a second review.

In this example, readers only get to the subject of the sentence "the draft environmental plan" after reading through the 36 italicised words. Readers will therefore find this sentence very confusing. To improve the comprehensibility of the sentence, I have redrafted the sentence as a right-branching sentence so that the excess information is treated as conditions subsequent:

The draft environmental plan must be sent to the Director for a second review—

(a) if a public inquiry is to be held on the plan—at least 30 days before the inquiry; or

(b) if no public inquiry is held—within a reasonable period before the environmental plan is lodged with the Minister for approval.

The following sentence shows how a legislative provision that was originally in the form of a left-branching conditional sentence can be redrafted as a more comprehensible right-branching sentence:

A person is entitled to receive a benefit under section 45 if the person:

(a) is over 65 years of age, or

(b) is a veteran, or

(c) is handicapped.

The following is a further example of another legislative provision that has similarly been redrafted:

A person is entitled to vote in a local council election if the person—

(a) resides in the council's area, and

(b) has reached 18 years of age, and

(c) is registered with the council as an elector.

As can be readily seen from these examples, it is important to state each of the conjunctions *and* and *or* very clearly. Punctuation alone should not be relied on to make the relationship of the conjunctions clear.[25] Conditions linked by both the conjunctions *and* and *or* will not only make the sentence more complex but are likely to be a source of ambiguity. In such a case, it is necessary to make clear to readers which conditions go together. Take the following sentence:

[25] This is the view of Driedger (1974).

A person must complete form 1 in Schedule 2 if the person has an income of more than $25,000 per year, is a resident of the council area, and is under the age of 65 years of age, or is self-employed, and carries on business in that area.

The dilemma for readers trying to fill out the form is whether they must satisfy each of the first three conditions or *whether* it is sufficient if they satisfy only the last two conditions. Alternatively, do readers only have to fill out the form if they meet the first two conditions (i.e. "$25,000 or more per year"; "a resident") *and* meet at least one of the other conditions (i.e. "under 65 years of age"; "self-employed"; "carry on business in the council's area")?

Legislative counsel can resolve the ambiguity caused by the mixed conditional clauses by redrafting and indenting the sentence. My redraft of the sentence (which assumes that the first explanation of the *ambiguity* is what was intended) illustrates how this can be done:

A person must complete Form 1 in Schedule 2 if the person either—

(a) has an income of more than $25,000 per year, is a resident of the council area and is under 65 years of age, or

(b) is a self-employed person who carries on business in the council area. [26]

Probably the main point that legislative counsel can learn from the research literature is that, when both of the conjunctions *and* and *or* occur in a conditional sentence, they should take particular care to indicate which conditions should be grouped together.

(3) If there are different provisions for different cases, it may be possible to construct a table to make those provisions clearer than would be the case if straight prose were to be used. For an example of such a table, see section 124 of the Local Government Act 1993 (NSW).

5—Prefer right branching sentences to left-branching and centre embedded ones

The relevant research literature—Research conducted by Fodor and Garrett (1967: 295) clearly establishes that sentences containing centre-embedded clauses are more difficult for readers to process, understand and recall. Other research by Fodor, Bever and Garrett (1974) showed that a greater burden is imposed on a reader's short-term memory when a clause or phrase is located in the middle of a

[26] Another (slightly longer) approach would be to draft the provision as follows:

A person must complete Form 1 in Schedule 2 if either—

(a) the person—
  (i) has an income of more than $25,000 per year,
  (ii) is a resident of the council area, and
  (iii) is under the age of 65 years of age, or

(b) the person—
  (i) is self-employed, and
  (ii) carries on business in the council area.

Although this is longer, the structure is parallel and the potential ambiguity is more clearly avoided. The downside is that the text has become more fragmented.

sentence rather than at the end of the sentence. In testing a set of jury instructions, Charrow and Charrow (1979: 1372) found that not only did participants find sentences containing three or more centre-embedded clauses difficult to understand but also that their comprehension of those sentences was significantly improved by modifying the instructions to reduce the number of centre-embedded clauses and phrases.

So how can this difficulty be alleviated? One way may be to redraft a left-branching or centre-embedded sentence as a right-branching sentence. The relevant research literature shows that readers find right-branching sentences (i.e. sentences with subordinate clauses or phrases tacked onto the end) easier to understand than centre-embedded sentences. According to Hirsch (1977: 118), in the progressive, unreduced form of expression where right-branching clauses and prepositional phrases occur, syntactic predictability is high, short-term memory strain is low, and the possibility of syntactic ambiguity is at its least. The regularity and consequent predictability of the basic clausal form permits the reader to process "the word sequences into stable groups that do not need to be revised".[27] (Over a variety of measures, other researchers have also found that the comprehension and general processing of right-branching sentences is better than that of centre-embedded sentences.[28]

The relative position of words in a sentence imposes certain demands on readers regardless of the way the structure is processed. However, according to Weckerly and Elman (1992), the representational demands imposed on readers are less extreme than with centre-embedded sentences. Consider the following example:

> The man hit the woman who had a dog that bit the girl.

The initial noun that the reader encounters is immediately followed by a verb. After seeing this verb, the reader can forget the initial noun because its verb has been located. For the verb, the reader need only store the information about an appropriate object in generating its predictions. As the reader encounters the object of the sentence, the reader will expect either that the sentence will be resolved or that the previous noun will be the start of another relative clause. With a right-branching sentence, the reader only has to retain information about one noun after encountering the relative pronoun. The reader not only has to store less information but also has only to store that information over a much shorter distance. No level of embedding needs to be stored, because no resolution crucially depends on it.

How the research literature can help legislative counsel to produce more usable legislative documents—The research literature strongly suggests that legislative counsel can make their documents more comprehensible by drafting sentences containing text specifying circumstances, conditions, exceptions or modifications as right-branching sentences.[29] Examples of legislative provisions recast as right-branching sentences are set out elsewhere in this paper.[30]

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27 Hirsch, 1977: 118.

28 Blaubergs and Braine, 1974; Blumenthal and Boakes, 1967; Cairns, 1970; Larkin and Burns, 1977, Marks, 1968; Miller and Isard, 1964; Schelsinger, 1968; and Weckerly and Elman, 1992.

29 See the references listed in the previous subsection of this section.

30 See section 4 above.

Because the courts have in the past tended to adopt a literal approach to the interpretation of legislation, legislative counsel have tried to ensure that the policy objectives of the legislation are not frustrated by judges who adopt such an approach rather than a purposive approach. What some legislative counsel do is to go into extreme detail in an attempt to cover every conceivable contingency and be all-inclusive, sparing no effort to paint judges into a corner from which they cannot escape. The end result is inordinately long and complex provisions crammed with detail after detail and copious embedded text that distracts the reader from the central message. The text ends up being so complex that it is beyond the cognitive capacities of readers to understand. The following example of a provision of this kind is taken from section 32 of the *Public Health and Municipal Services Ordinance* (Cap 132) (HK). Subsection (1) reads—

(1) If any septic tank, cesspool, trap, siphon or any sanitary convenience is, or has been, so constructed, or is so situated, as to be, or to be likely to be, a nuisance or offensive to public decency, the Authority may, whether the same was constructed before or after the commencement of the Buildings Ordinance (Cap 123), or of this Ordinance, cause a notice to be served upon the owner of the premises in question, or where the owner is absent from Hong Kong or cannot be readily found or ascertained by the Authority or is under disability, upon the occupier of the premises in question, requiring him, within such time as may be specified in the notice, to remove, reconstruct, screen or otherwise alter such septic tank, cesspool, trap, siphon or sanitary convenience, as the case may be, in such manner as to abate the nuisance or to remove the offence against public decency or the likelihood thereof.

A brief analysis of this subsection reveals the following:

- a string of nouns (“septic tank, cesspool, trap, siphon or sanitary convenience”) that is repeated later in the subsection;
- a string of verbs with different tenses designed to cover different contingencies (“is, or has been , so constructed, or is so situated, as to be, or to be likely to be a nuisance or offensive to public decency”);
- a centre-embedded adverbial phrase (“whether the same was constructed before or after the commencement of the *Buildings Ordinance* (Cap 123) (HK), or of this Ordinance”);
- an adverbial subordinate clause (“or where the owner is absent from Hong Kong or cannot be readily found or ascertained by the Authority or is under disability”);
- another centre-embedded adverbial phrase (“within such time as may be specified in the notice”);
- another string of verbs (“to remove, reconstruct, screen or otherwise alter”);
- yet another adverbial phrase covering four different contingencies (“in such manner as to abate the nuisance or to remove the offence against public decency or the likelihood thereof”).

The subsection is written this way despite the fact that the main audience for this subsection is health workers employed in the Hong Kong Food and Environmental Hygiene Department. Those workers are not lawyers and most of them would not have received a tertiary education. Yet despite this, the

subsection contains no fewer than 159 words. However, all that is required is a provision empowering the relevant authority[31] to serve notices on the occupiers of premises on which a "sanitary convenience" is located requiring the convenience to be removed or modified so as not to be a nuisance! I venture to suggest that even experienced lawyers and judges would find this provision daunting.

I have redrafted the provision so that for the most part the subordinate clauses of the provision are right branching. The following is the redraft:

(3) A person who claims to be the owner of the article* may make a written claim to the Authority within 48 hours after the notice was posted.

(3A) On receiving such a claim, the Authority shall deliver the article to the claimant if satisfied—

(a) that claimant is the owner of the article; and

(b) that the article is not—

(i) being detained or being otherwise dealt with under another enactment; or

(ii) required as an exhibit in any legal proceedings.

However, the Authority must pay to the claimant such amount of compensation as it thinks just if the article has been sold or otherwise disposed of under the proviso to subsection (1).

[***Note:** The original provision referred to "article, thing, furniture or paraphernalia". This string of nouns is clearly tautologous, since an "article" is a "thing" and vice versa, and "furniture" and "paraphernalia" are articles. Even if some of these words had been necessary, the drafter of the original provision could have simplified the section by defining "article" as including "furniture, paraphernalia and any other thing".]

The redrafted version is not only much less daunting, but also allows readers to progress through the three new sentences without having to store a considerable amount of information over a distance and then to regress in order to integrate that information with other information in the sentence.

6—Alleviating the comprehension problems of centre-embedded sentences

The relevant research literature—Although the research literature shows that readers of documents find right branching sentences easier to understand, it has, according to Weckerly and Elman (1992), been demonstrated that centre-embedded sentences can nevertheless be more easily processed by including semantically constrained lexical items. They have also identified various reasons why the comprehensibility of centre-embedded sentences and right-branching sentences might differ. These include—

- adherence to canonical word order,

[31] Until 2000, the relevant authority was the Urban Council (in the case of Hong Kong Island and Kowloon) and the Regional Council (in the case of the New Territories and the outlying islands). The Hong Kong Government has since taken over the functions of those councils.

- difficulty of subject-verb matching in the matrix and embedded clauses,
- distance between subjects and verbs, and
- consistency of role assignments for nouns in both main and subordinate clauses.

According to Weckerly and Elman, researchers have often cited the limitations of working memory to explain certain processing biases of the human parsing mechanism, and, in particular, to explain the readers' difficulties in processing centre-embedded sentences.[32] They suggest that, if the process of parsing-comprehension is viewed as movement from one state to another as in a "connectionist network", then memory limitations are not an arbitrary number but are due to the nature of representations in human memory in sentence processing, with a representation being able to hold only so much information over a certain distance. A reduction in the amount of information to be stored, and in the distance over which the information has to be stored, will facilitate the processing of sentences, as is the case with right-branching sentences.

In other research involving the positioning in sentences of subordinate adverbial clauses, the data indicated that under certain conditions people preferred sentences having the clause in the middle of the sentence.[33] Moreover, in sentences containing such clauses the reading time was significantly faster where the clauses came at the beginning or in the middle of the sentence than it was where the clauses were placed at the end of the sentence. But even with a sentence that has a clause embedded in the middle, readers will have considerable difficulty understanding it if there are too many embedded words between the subject and the verb or the verb and the object of the sentence. This is because the embedded words tend to disrupt the flow of text ideas and draw attention away from the main focus of the main proposition. However, Weckerly and Elman[34] found that not all centre-embedded sentences are equally difficult to process. On testing two sets of centre-embedded sentences, they concluded that semantic information that uniquely linked a subject with its verb aided comprehension of the sentences. They found that semantic information provided by the verb can help in two ways. Firstly, it helps readers to pinpoint the noun that serves as its subject by incompatibility of the other nouns stored in the short-term memory. Secondly, because this resolution can be made with higher probability, readers are put in a more precise state of expectation for the next word.

More recently, Gibson and Thomas (1999) studied readers' comprehension of centre-embedded text such as—

> The ancient manuscript that the graduate student who the new card catalog [*sic*] had confused a great deal was studying in the library was missing a page.

Their goal was to find out under what circumstances readers fail to notice that a syntactically obligatory verb phrase was missing from a centre-embedded sentence. An example of such an ungrammatical sentence was—

> The ancient manuscript that the graduate student who the new card catalog [*sic*] had confused a great deal was studying in the library.

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32 Weckerly and Elman, 1992.

33 Wright, 1985: 89.

34 1992.

Gibson and Thomas found that participants in their study rated two items equally difficult to understand, even though the sentence with the missing verb phrase should be rejected as uninterpretable. This was because one of the constituents of the noun phrase was missing its required companion (i.e. its verb phrase). This study illustrates that, particularly when a sentence becomes extremely difficult to parse and interpret, readers adopt a "good-enough" strategy in trying to understand it. The upshot is that readers will even tolerate outright ungrammaticality.[35]

How the research literature can help legislative counsel to produce more usable legislative documents

(1) *Centre*-embedded *text located between the subject and the verb*—The most likely place to find centre-embedded text in legislative sentences is between the subject and the verb and of course this will cause comprehension difficulties for readers of legislative documents containing those sentences. So how can legislative counsel reduce these difficulties? Usually, the information contained in centre-embedded text will be ancillary to that contained in the main clause of the sentence. One way to address the problem is to redraft the centre-embedded text as a separate sentence or subsection that immediately follows a sentence or subsection containing the main clause of the original sentence. The following example, taken from the Fixed Penalty (Criminal Proceedings) Ordinance (Cap. 240) (HK), show how this can be done:

> **8. Evidence by certificate**
>
> A certificate in the prescribed form *stating* –
>
> (a) that the person specified in it was at the time so specified either the registered owner of the vehicle, or the holder of the driving licence, so specified;
>
> (b) that the address specified in it was at the time so specified the registered address of such person;
>
> (c) that payment of the fixed penalty in respect of the scheduled offence was not made before the date specified in the certificate; and
>
> (d) in the case of an application under section 3A(1), that the person specified in it had not, before the date specified in the certificate, notified the Commissioner of Police that he wished to dispute liability for the offence,
>
> *and purporting to be signed by or on behalf of the Commissioner of Police* shall be admitted in any proceedings, or in any application under section 3A(1), on its production without further poof and –
>
> (i) until the contrary is proved, the court shall presume that the certificate was so signed; and
>
> (ii) in the certificate shall be prima facie evidence of the facts stated therein.

There are 126 words between the main subject and the first verb. This is far too much information for the user's short-term memory to have to process while at the same time having to retain information about the subject of the sentence. Forcing readers to read many sentences like

[35] Gibson and Thomas, 1999.

this will quickly become a chore for them. One way of making this sentence clearer is to transfer the "excess" information to one or more other sentences or subsections. The following is my redraft of the section:

8. Certain certificate evidence to be admissible in legal proceedings

(1) A certificate that complies with subsection (2) is admissible in evidence in legal proceedings, other than a hearing to which subsection (3) applies.

(2) A certificate referred to in subsection (1) must state—

(a) that a specified person was at a specified time either the registered owner of a specified vehicle, or the holder of a specified driving licence; and

(b) that a specified address was at a specified time the person's registered address; and

(c) that payment of a fixed penalty specified in respect of a specified scheduled offence was not made before a specified date,

and must purport to be signed by or on behalf of the Commissioner of Police.

(3) A certificate that complies with subsection (4) is admissible in evidence at the hearing of an application under section 3A(1).

(4) A certificate referred to in subsection (3) must state—

(a) that a specified person was at a specified time either the registered owner of a specified vehicle, or the holder of a specified driving licence; and

(b) that an address specified in the certificate was at a specified time the person's registered address; and

(c) that payment of a specified fixed penalty in respect of a specified scheduled offence was not made before a specified date,

(d) that the person had not, before a specified date, notified the Commissioner of Police that the person wished to dispute liability for the offence,

and must purport to be signed by or on behalf of the Commissioner of Police.

(5) A certificate that is admitted in evidence under this section is proof of its contents in the absence of evidence to the contrary.

(6) In this section, "specified", in relation to a certificate, means specified in the certificate.[36]

Note how the embedded text has been relocated to new subsections. Although longer overall, the redrafted section is arguably much less daunting and easier for readers to read and understand that the original section. This is because readers will be able to read each sentence without having to store so much information over a distance and then to regress in order to integrate that

[36] Subsection (6) could probably be omitted. I believe most readers would infer that this is what "specified" was intended to mean.

information with other information in the sentence.

(2) *Centre*-embedded *text located between the verb and the object*—A sentence that contains text embedded between the verb and the object also makes it difficult for readers to discover what the action or activity in the sentence relates to. [37]

The following example is taken from section 59 of the *Police Force Ordinance* (Cap. 232) (HK):

> (4) Notwithstanding subsection (2)(a), the Commissioner may retain, until the person attains the age of 18 years, or until a period of 2 years has elapsed since the person was cautioned as hereinafter referred to, whichever is the later, the identifying particulars of a person under the age of 18 years who has been arrested for an offence, who has not been charged with that offence, but who has instead, in accordance with guidelines approved by the Secretary for Justice, been cautioned by a police officer of the rank of superintendent or above as to his future conduct.

There are 31 words between the verb and the object of the sentence, which means that the information about the subject and the verb has to be retained in the user's short-term memory while the user processes the additional information contained in the centre-embedded text. The ideas contained in the sentence are also very compressed, making the sentence hard to unravel. In order to address these difficulties, I have redrafted the provision as follows:

> (4) Despite subsection (2), the Commissioner may retain the identifying particulars of a person under the age of 18 years who has been cautioned about an alleged offence. The information may be retained only—
>
> (a) until the person reaches 18 years of age, or
>
> (b) until the elapse of 2 years from the date on which the person was cautioned,
>
> whichever is the later.
>
> (4A) A person is cautioned for the purposes of subsection (4) if the person has been cautioned by an authorised police officer as to the person's future conduct after having been arrested for an offence for which the person was not charged.
>
> (4B) In this section—
>
> "authorised police officer" means a police officer of the rank of superintendent or above;
>
> "cautioned" means cautioned in accordance with guidelines approved by the Secretary for Justice.

By moving the "excess" information to other subsections, the verb and object are brought together. Although more words are used, the revised version is arguably easier to read and understand than the original one. As with the redraft of the provision contained in the previous example, readers can progress through each subsection without having to carry several ideas over a distance and then regress through the sentence in order to integrate those ideas with other information in the sentence.

(3) *Centre-embedded text generally*—The relevant research suggests that even when the drafter of a legislative sentence includes a centre-embedded clause or phrase in the sentence the sentence can

[37] See the research literature referred to in the previous section.

be made easier for readers to understand in the presence of semantic constraints. In their research, Weckerly and Elman (1992) provide examples of the following two sentences:

> The man the woman the boy heard left.
>
> The claim the horse he entered in the race at the last minute was absolutely false.

In the second sentence, the three nouns (subjects) create strong, although different, semantic expectations about which verbs and objects those subject nouns relate to. One might expect the semantic information to help the reader to resolve more quickly the various subject-object relationships and thus to aid processing the sentence.[38] On the other hand, the verbs in the first sentence provide the reader with no such help, because all three nouns might plausibly be the subjects of all three verbs.

7—Unduly compressed text

Compressed wording—Compression is one of the five factors that Bennion[39] identifies as obstacles to understanding legislative documents. Compression in legislative documents takes several forms and is largely a product of attempts by legislative counsel to be brief and to secure certainty of legal effect while at the same time trying to satisfy the demands for such documents to be worked out in close detail. There is little doubt that compressed wording is difficult to understand and, almost without exception, it is preferable to sacrifice economy of expression in order to achieve greater clarity, even if it means using more words.[40] Legislative counsel can undoubtedly improve the readability and comprehensibility of legislative sentences by avoiding the kind of compression that involves over-reduction and regression, which, even though it will make the sentences shorter, will also make the task of readers more difficult than it need be by distracting their attention from meaning to sentence structure.

One instance of compression is the overuse of defined terms in order to shorten a legislative document. In this instance, in order to understand the text, the user has to read, comprehend and memorise complex definitions. Otherwise the text ends up being incomprehensible gibberish. The Renton Committee sympathetically received complaints that "skilfully compressed wording" in legislation was difficult to understand and I strongly support the Committee's view that it is "preferable to sacrifice such elegant economy of expression in order to achieve greater clarity *even at the cost of increased length*" (Renton Report, 1975). The Committee gave the following example from the *National Insurance Act 1946* (UK), Schedule 1, Part II:

> For the purposes of this Part of this Schedule, a person of over pensionable age, not being an insured person, shall be treated as an employed person if he would be an insured person were he under pensionable age and would be an employed person were he an insured person.

This provision has the dubious merit of being brief, but is it comprehensible to anyone unable to solve cryptic crossword puzzles? In the opinion of the Renton Committee, any enactment of that kind was

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38 See Bever, 1970; King and Just, 1991; Schlesinger, 1966; and Stolz, 1967.

39 Bennion, 1990: 217-223.

40 See Berry, 1987: 9.

likely to be provocative and the more so the more skilfully it was compressed. Its provocative quality is that to unwary readers it is gobbledegook. Unless readers appreciate that the sentence is full of defined terms and have read and memorised them, it is indeed gobbledegook. The fact that these terms are defined elsewhere in the Act only marginally mitigates the difficulty that this kind of drafting causes to readers of the Act.

Covering too many cases by a single sentence or formula—Another kind of compression arises when legislative counsel try to cover too many cases by a single sentence or formula. Regrettably, legislative counsel have been particularly guilty of this vice. The following example is taken from the *Fixed Penalty (Criminal Proceedings) Ordinance* (Cap 240) (HK). Section 9A reads as follows:

> **9A. Additional penalty in proceedings on complaint**
>
> Where a person, having notified the Commissioner of Police, in accordance with a notice under section 3(3), that he wished to dispute liability for a scheduled offence or having been given leave under section 3B(1)(a) and having been served with a summons, does not appear before the court or, having appeared, offers no defence or a defence which is frivolous or vexatious, the magistrate shall, in addition to any other penalty and costs, impose an additional penalty equal to the amount of the fixed penalty for that offence.

Apart from being too long and too difficult to read, this sentence contains at least one ambiguity.[41] Buried in the text are 6 different cases, which only become apparent after close analysis. Compare the above with my redraft of the same provision.

> **9A. Magistrate must impose additional penalty on certain persons**
>
> (1) This section applies to a person who, after—
>
> (a) having notified the Commissioner of Police, in accordance with a notice under section 3(3), that the person wishes to dispute liability for a scheduled offence; or
>
> (b) having been given leave under section 3B(1)(a),
>
> and after having been served with a summons—
>
> (c) fails to appear before the court; or
>
> (d) having appeared before the court, offers no defence; or
>
> (e) having so appeared, offers a defence that, in the opinion of the court, is frivolous or vexatious.
>
> (2) A magistrate who convicts a person to whom this section applies of a scheduled offence must, in addition to any other penalty and costs that the magistrate imposes for the offence, impose an additional penalty equal to the amount of the fixed penalty for the offence.

Another example is to be found in section 11 of the *Theft Ordinance* (Cap 210) (HK). The section comprises two subsections but those subsections encompass no fewer than six offences. These

[41] I gave this example to 6 students who were taking a legislative drafting course. Despite being experienced lawyers, none of them was able to identify the ambiguity!

offences are as follows:

- entry as a trespasser with intent to steal;
- stealing or attempting to steal after entry as a trespasser;
- entry as a trespasser with intent to inflict bodily harm;
- inflicting or attempting to inflict grievous bodily harm after entry as a trespasser;
- entry as a trespasser with intent to rape;
- entry as a trespasser with intent to do unlawful damage.

It would be very much simpler for readers if the various offences were described separately. In other words, there should have been six shorter subsections or paragraphs, each containing a separate burglary offence, "instead of a drafter's omelette frying them all together in one pan" (Bennion, 1990: 219). Further examples of legislative provisions where too many complex ideas were compressed into too few words are—

- section 2 of the *Official Secrets Act 1911* (UK) (which has since been repealed and replaced by other legislation), and
- sections 5, 7 and 8 of the *Corrupt and Illegal Practices Ordinance* (Cap 288) (HK)[42] (which respectively prohibited people from bribing others at elections, giving treats to others at elections, and using or threatening to use force at elections).

Defective paragraphing— If you have a look at Hong Kong legislation, you will of course find that many of the provisions of the legislation are tabulated or "paragraphed". However, many of these provisions have been drafted incorrectly. This is because the drafter, in searching for brevity, has compressed the text so that different cases are dealt with in one formulation when it would be more comprehensible to present each case in turn separately. The drafter has inappropriately used a single statement to encompass a wide variety of circumstances. Take the following example, which deals with the interdiction of members of the Hong Kong Police Force. Section 17(2) of the Police Force Ordinance (Cap. 232) (HK) reads:

> A police officer who has been interdicted under—
>
> (a) subsection (1)(*a*), shall be allowed to receive such proportion of his pay, not being less than one-half, as the Commissioner shall in every case direct, until such time as he may be convicted of an offence whereupon the matter shall be determined under section 37(4);
>
> (b) subsection (1)(b), shall not on that account receive less than his full pay.

If the text of section 17(2) had not been paragraphed,[43] it would have read:

> A police officer who has been interdicted under subsection (1)(a), shall be allowed to receive such proportion of his pay, not being less than one-half, as the Commissioner shall in every case direct, until such time as he may be convicted of an offence whereupon the matter shall

[42] This was repealed by the Elections (Corrupt and Illegal Conduct) Ordinance (Cap. 554) (HK).

[43] The process of "paragraphing" is sometimes called "indenting" or "tabulating".

> be determined under section 37(4); subsection (1)(b), shall not on that account receive less than his full pay.

This is clearly incomprehensible nonsense. The problem has arisen because the drafter has inappropriately compressed the text. A legislative sentence that is paragraphed should still make grammatical sense even if it had not been paragraphed.

In the following redraft of section 17(2), I show how the subsection could be "decompressed":

> (2) A police officer who has been interdicted under subsection (1)(a) is entitled to receive such proportion of his pay (but not less than one-half) as the Commissioner directs *until such time as the officer may be convicted of an offence*. If the officer is convicted, the matter is to be determined under section 37(4).
>
> (2A) A police officer who has been interdicted under subsection (1)(b) is entitled to receive full pay despite being interdicted under that provision.

Legislating by reference—Difficulties of comprehension are even more likely with another form of compression. This is the well known drafting practice of legislating by reference, or more descriptively the device of applying, with specified modifications, detailed provisions currently existing in a particular legislative document to a new situation that those provisions were not designed to cover. "As-if-ism", as Bennion[44] calls it (or the statutory pretence that something is so when it is not) appears in a wide variety of forms. In one example, found in the *Pastures Protection Act 1934* (New South Wales),[45] section 39A applied the provisions of sections 602—613 of the *Local Government Act 1919* (New South Wales). Those sections provided for the sale of land for failure to pay local authority rates owing to a Pastures Protection Board in respect of the land. Another example of "as-if-ism" commonly occurring in Australian legislation is the application of the provisions for company winding-up in legislation governing the winding-up of bodies corporate other than companies, for example building societies, co-operatives and credit unions. An even worse example is section 6(1) of the *Agriculture (Miscellaneous Provisions) Act 1944* (UK). The subsection reads as follows:

> The improvement of *Live Stock (Licensing of Bulls) Act 1931* shall ... apply to pigs as it applies to cattle, and for that purpose references therein [to various matters shall be construed as references to other matters].

Legislating by reference also occurs when an expression in one legislative document is defined by reference to a definition of the same or a similar expression in another legislative document, instead of by repeating the relevant text.[46] This is not only inconvenient to readers but ineffective communication. Readers should not be expected to have to look in another document to find out what

44 1990: 221.

45 This Act was subsequently replaced by the *Rural Lands Protection Act 1989* (NSW). The procedure for selling land for non-payment of levies owing to a rural lands protection board is now set out in detail in Schedule 5 to that Act. The *Rural Lands Protection Act 1989* (NSW) has in turn been replaced by the *Rural Lands Protection Act 1998* (NSW).

46 An example is the expression "established office", which was defined in section 2 of *the Provisional District Boards Ordinance* (Cap. 366) (HK) as being "an office within the meaning of paragraph (a) of the definition of 'established office' under section 2(1) of the *Pension Benefits Ordinance* (Cap. 99)". The Provisional District Boards Ordinance has since been repealed.

a particular expression means.

Legislating by reference is all too prevalent in common law jurisdictions. This is because it provides an easy (some would say lazy) way of legislating in order to be brief. The use of this technique is very convenient for those legislative counsel who are pressed for time, but the convenience is at the expense of readers. Sometimes existing legislative provisions are incorporated into a Bill by reference in order to reduce the amount of debatable text with a view to accelerating the Bill's passage through the legislature.

This drafting device is particularly user-unfriendly because, if a later legislative document applies by reference the provisions of an earlier one to a different set of circumstances (almost invariably with modifications), readers who want to know how they are affected by the applied provisions in the context of the later document are forced to transform[47] the provisions of the earlier document to fit the context of the later one. It is not only hugely time-consuming for readers to have to recreate the text to fit that context but forcing readers to read a legislative provision drafted for one kind of case as if instead it were drafted in terms of another requires considerable cognitive skill, a skill that they may not have. Another difficulty is that, in order to be able to find out what the "applied provisions" are, readers are forced to refer to the provisions of another legislative provision or document that may not be immediately available. The use of this drafting device compounds the usual comprehension difficulties involved in understanding texts and the situation is exacerbated in cases where readers are required to take on board specified modifications to the original text that is being applied.

8—Avoiding multiple negatives: Writing positive sentences

The relevant research literature—The research literature clearly establishes that positive sentences are easier to understand than negative ones. Psychologists studying language comprehension have explored several aspects of how people make quantitative comparisons (Clark and Clark, 1977). One of the findings to come from these studies is that people find it easier to reach decisions that invoke positive terms (more, bigger, greater, taller, heavier) than decisions involving negative terms (less, smaller, shorter, lighter). In one experiment carried out by Wright and Barnard (1975: 7-14) involving a comparison of numerical tables, it was shown that people were better at making "more than" decisions than they were at making "less than" decisions. Two or more negative words in a sentence become very hard for users to understand. When sentences have two or more negative words, many users will stop and ask themselves, "What did that say?" and then reread the sentence at least once more. Legislative counsel who avoid using two or more negatives in a sentence and instead write positive statements will find that the sentence will be easier to use.

A number of studies have investigated both single and multiple negatives. Most results confirm that negation in either form complicates understanding. Studies by Clark and Card (1969), Mehler and Miller (1964), and Savin and Perchonock (1965) show the advantage of positive sentences over negative sentences. In particular, those studies established that readers had a better recall of positive sentences. Wason (1961), Trabasso, Rollins and Shaughnessy (1971), Just and Clark (1973: 29-30) and Just and Carpenter (1976) found that positive sentences could be judged true or false more quickly and

[47] I.e. engage in a kind of mental gymnastics!

more accurately than negative sentences. In addition, Clark (1969) and Roberge (1976) both found that it was easier to reason with positive sentences. Other studies have investigated various forms of negative expressions. These include, most commonly, negation in the form of a "not" in a sentence; negation of a word, such as "unhappy" (Sherman, 1976); and negation that occurs implicitly, within a word, such as "forget" as against "remember" (Just and Clark, 1973). Moreover, Sherman (1976) showed that the more negative phrases and clauses sentences contain the more readers find them harder to understand. The studies mentioned above are reviewed in Clark and Clark (1977a) and Wason and Johnson-Laird (1972).

Further research has been carried out by Wright and Hull (1988: 187-211) with respect to written instructions or commands containing conditionals ("if", "if...not" and "unless"). One experiment showed that "if...not" is represented as positive action and negative condition, whereas "unless" is represented as a negative action and a positive condition (e.g. "A must not do X if....), even when the text would permit other recoding options. A second experiment, focusing on "unless", suggested that errors arose mainly from recoding operations, whereas speed of response was determined by the order of the main clause and the conditional subordinate clause used for the instruction or command. The third experiment dealt with prohibitions ("A must not do X"). The use of prohibitions was found to impair performance with "if" and "if not" but to facilitate performance with "unless". Wright and Hull say that this is consistent with the finding that users represent (or "recode") "unless" in instructions and commands as "A must not do X if....", with reader-generated representation of the negative action being cancelled by the explicit prohibition in the instruction. In an earlier study, Wright (1977a: 93-134) found that, in some tasks in which an event "X" occurred, an instruction having a double negative (e.g. "do not... unless X) received a faster response than an instruction with only one negative (e.g. "do not... if Y).

A related problem[48] is that some sentences involving negative conditionals such as "unless" can cause serious comprehension difficulties for users. It will be recalled that research studies conducted by Wright and Wilcox[49] strongly suggested that "do unless" was consistently recoded as "do not if" and that recoding operations involving negative conditionals could be highly error-prone, particularly when the negative conditional being recoded occurred early in the sentence (i.e. "Unless A is B, X must do Y B").

How the research literature can help legislative counsel to produce more usable legislative documents—First, a legislative counsel should seriously consider redrafting a legislative sentence that contains multiple negatives. It is quite likely that the legal proposition embodied in the sentence is expressed in an unnecessarily complicated way and could be stated more simply. The research strongly suggests that users will find it easier to interpret a legislative sentence that is written positively and avoids double negatives. Sometimes, however, it will be legitimate for a legislative counsel to use a double negative in order to convey a precise shade of meaning (e.g. as in the phrase "not unlike").

Given that the research suggests that people find it harder to work with instructions or commands containing "unless", the question arises as to the role of "unless" not only in legislative documents but

[48] Discussed in section 4 above.

[49] 1980: 428

in language in general. One question that arises is do we need both "if...not" and "unless"? Wright and Hull[50] have suggested that one answer why they co-exist may be because of their differences in illocutionary force. They further suggest that, where writers intend prohibitions, it may be safer to make these explicit. In cases where "unless" cannot be avoided, the instruction or command should first specify the action and then specify the condition information, because this clause order facilitates the recoding operations that users will usually apply to the instruction or command. On the other hand, the research indicates that, in the case of positive conditionals (e.g. "If A does X...), significantly more errors were made when the subordinate clause was mentioned after the main clause. However, mentioning the action either before or after the subordinate clause had no effect on the error rate when negative conditionals were used.

Thus the sentence—

> *No* person may enter the licensed premises *unless* permitted by the Authority.

could be redrafted as follows:

> A person may enter the licensed premises only with the permission of the Authority.

Similarly the sentence—

> An inspector must not exercise the power conferred by this section except when in possession of a certificate of authority issued by the Director.

could be recast in the following way:

> An inspector may exercise the power conferred by this section only when in possession of a certificate of authority issued by the Director.

In sum, the research literature suggests that legislative counsel should use two or more negatives within a single sentence only when this is unavoidable. This extends to cases involving negative conditionals. "A person must do...if...." is better than "A person must not do...unless...."

9—Prefer the active voice whenever appropriate

The relevant research literature—The research literature supports the principle of using the active voice in preference to the passive. A large body of research started in the early 1960s showed that active sentences are easier for users to understand than passive ones. The research related to how quickly people could understand or use sentences and how accurately people later recognised or recalled sentences. The relevant research studies are reviewed in Fillenbaum (1971) and Palermo (1978).

Other studies of verb voice, in isolated sentences or in oral conditions, support the popular belief that active voice (e.g. "John wrote the report") facilitates recall more than passive voice ("The report was written by John"). However, two other studies have reliably examined active and passive voice constructions in paragraphs. Those other studies show that recall of meaning is equivalent for both active and passive sentence structures.[51]

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[50] 1988: 187-211.

[51] See Blount and Johnson, 1971; and Rhodes, 1997.

Felker and others (1981, 27-31) maintain that active sentences maintain the underlying logic (which is most important in legislative sentences) of being formulated on the basis of "who did what to whom where, when and subject to what conditions", thus helping the document users to keep the distinctions clear. Text consisting of active sentences conveys the impression of prose that "moves along".

Some later studies have qualified the results of the research studies favouring the use of the active voice by showing that, in certain well-defined contexts, passive sentences are as easy or easier to understand than active sentences. Those contexts are ones in which the writer intends readers to focus their attention on the object of the action. Among these studies, Turner and Rommetveit (1968) and others such as Huttenlocher and Weiner (1971), Wannemacher (1974) and Hupet and LeBouedec (1975), found that in these cases passive sentences were easier for people to understand, use and remember. Osgood (1971) and Johnson-Laird (1968) found that, when selecting sentences to refer to the object of the action, people preferred passives. However, in more common sentence contexts, where the focus is on the actor, most experimental studies still find that the active voice is better than the passive.[52]

Recent research by Ferreira and Stacey (2000) has confirmed that readers find active sentences easier to understand than passive ones. The research, which involved passive sentences, was motivated by three hypotheses:

- first, that syntactic assignment of thematic roles is easier in canonical syntactic structures, such as the active than in non-canonical structures such as the passive;
- second, that schematic information influences syntactically vulnerable thematic role assignments; and
- third, that an animacy contrast between the participating nouns in the sentence enhances the bindings of thematic roles to concepts.

Ferreira and Stacey tested these hypotheses in three experiments. The first experiment was designed to evaluate whether passive sentences are systematically misinterpreted. The second experiment used the same experimental materials as the first one. However, the task was changed. Instead of judging the plausibility of the sentence, participants were asked to name out loud either the *agent* or the *patient*[53] of the sentence. The first and second experiments demonstrated that a non-canonical syntactic structure, such as the passive, is difficult to understand. The third experiment was carried out in part to find out whether the results of the second experiment could be replicated. It expanded the first and second experiments by comparing the two non-canonical structures—the active-cleft[54] and the passive.[55] The third experiment showed that the active-cleft is no harder than an ordinary active sentence, suggesting that the frequency of the global syntactic form is not what determines whether a structure is canonical. The results of the experiments imply that the thematic roles assigned by language-specific mechanisms are quite fragile. Ferreira and Stacey suggest that the language comprehension system may depend on non-linguistic sources to reinforce these linguistically based interpretations—sources such as

52 Layton and Simpson, 1975; Kulhavy and Heinen, 1977.

53 I.e. the person or thing to whom or which an act was done.

54 An "active-cleft" is a relative clause with an active verb that qualifies the subject of the sentence.

55 For example, compare "It was the man who bit the dog" (active cleft) and "The dog was bitten by the man" (passive).

immediate context and world knowledge.

Ferreira and Stacey[56] believe that the reason passive sentences are hard to understand is attributable to the way thematic roles are assigned and maintained within them. They think this might explain why it is that, in misunderstanding passive sentences, readers do not arrive at some wild interpretation.[57] The error readers invariably make is to end up with the concepts in the wrong places. Ferreira and Stacey maintain that the errors take this particular form because the problem is the binding of thematic roles to concepts within the sentence. They also maintain that looser bindings lead to the roles being shifted from one concept to another within the sentence.[58] They say this idea might also explain why truncated passives are easy to understand.

Unfortunately, the provisions of many legislative documents are drafted in the passive voice and this tends to give those documents an impersonal, dry tone. This often causes users to focus on the wrong element in a legislative sentence, that is, on the person or thing that was being acted on (the agent) rather than on the person or thing that performed the action (the actor). Moreover, some passive sentences are hard to understand because they fail to say by whom the action is being or is to be taken (truncated passives). Replacing them with active sentences will not only liven up the text but will also arguably make the sentences easier to read. Sentences in the active voice also remove uncertainty as to who must *or* may do or must not *or* may not do the action.

For actions that users of legislative documents are expected to perform, there is a good case for expressing the required action in the imperative mood. Research show that users read directions written in the imperative more quickly.[59] Legislative counsel in the New South Wales Parliamentary Counsel's Office draft textual amendments to legislative documents using the imperative mood.

How the research literature can help legislative counsel to produce more usable legislative documents—The voice of a sentence tells users the relation of the subject and the verb. When the subject does the action expressed by the verb, the sentence is in the active voice. Active sentences always follow a subject-verb-direct object sequence. For example:

> The applicant must pay a fee of $100 to the Registrar for registration of the document.

In this example, the applicant is the subject, pay is the verb and fee is the object. Note that *the subject* does *the action* expressed by the verb.

In contrast, in the passive voice *the* action is done *to the subject*. Passive sentences make a direct object into a subject. For example:

> A fee of $100 must be paid *by the applicant* to the Registrar for registration of the document.

Note that the passive voice reverses the order of two elements in the active sentence. What is done precedes the agent doing it. When passive sentences are long, it becomes harder for users to work out *who* is doing *what* to *whom*.

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56 Ferreira and Stacey, 2000.

57 For example, in the sentence "The dog was bitten by the man" readers do not err by thinking that the agent was a cat.

58 This seems to particularly the case when there is no animacy contrast to assist with the bindings.

59 See Mirel, 1991: 109-122.

In order to write an active legislative sentence, the drafter must be clear as to who is the actor (the "who" of who does what to whom). An actor can be—

- a person (e.g. "the Minister prepares .....")
- a pronoun (e.g. "he committed ..."; "they gained .....")
- an organisation (e.g. "The corporation requires....."; "COALSUPER Pty Limited must .....")
- a thing (e.g. "… the ship docks ..."; "… the vehicle stopped .....")

In each of these cases the actor or the subject is doing the action stated by the verb.

The following sentences show what really makes the active and passive voice different. The sentences mean the same, but the passive sentence changes the focus of a sentence. Passive sentences change the order of the actor/doer/agent and what is done.

Active—

> The corporate trustee must prepare a superannuation scheme that complies with Schedule 1.

Passive—

> A superannuation scheme must be prepared by the corporate trustee in accordance with Schedule 1.

Passive sentences become even more of a problem when the writer leaves out an important part of the sentence. A peculiar feature of passives is that the "by-phrase" can be omitted without mentioning the actor. The following is a passive sentence and the same sentence without the by-phrase.

> The form must be completed by the applicant.

> The form must be completed.

By omitting the by-phrase, a legislative counsel can avoid saying who is responsible for the action (a truncated passive). *Sometimes* this can be useful in legislative drafting, for example, in order to declare a right or privilege. However, most sentences drafted this way become vague and uncertain in their operation. This is because users of the legislation are not told who must or must not or may or may not take the action. Such sentences thus become more impersonal, less clear and harder to understand. When a legislative document contains many such sentences, this effect multiplies so that the text of the document becomes virtually unintelligible. The example below consists of long passive sentences, some with the by-phrases omitted. It is typical of older style legislation and is by no means uncommon in more recent statutes. Compare it with the rewritten version, which uses the active voice to make clear to users *who* is doing *what* in each sentence.

PASSIVE VOICE:
5. (1) In prescribed cases, a petition to classify an alien's status for issuance of a visa must be approved before the alien may receive a visa.
(2) A visa may not be issued until the consular officer is in receipt of a certification from the Secretary of the Immigration Department.
(3) After the visa is granted, or it is ascertained that a visa is not required, final transport arrangements may be made.

MY REDRAFT (ACTIVE VOICE):
5. (1) In cases prescribed by the Immigration Rules 1994, an alien is entitled to receive a visa only after the consular officer has approved a petition to classify the alien's status for the issue of the visa.
(2) The consular officer may issue a visa to an alien only after receiving the appropriate certificate from the Secretary of the Immigration Department.
(3) The alien may make final transport arrangements only after the consular officer has issued a visa to the alien, or told the alien that the alien does not require a visa.

In sum, the research suggests that legislative counsel should, as a general rule, draft legislative documents in the active voice. Writing experts and research studies both support the general value of active sentences for understanding. On the other hand, it is perfectly acceptable for legislative counsel to use the passive voice in the following cases:

- in order to avoid repeating what has already been said in the immediately preceding text;
- in order to focus attention on the object of the sentence;
- when the sentence is short and easy to understand.

10—Keep equivalent provisions of sentences parallel

Introduction—Using parallel grammatical and functional structures is arguably one of the most effective devices for persuasive writing. Not only does putting ideas into a parallel structure assist users of documents, but it can also help the author to find out whether or not those ideas can stand together (or cohere). Once an attempt has been made to line up a series having the same grammatical structure, the author can usually tell whether dissimilar ideas have been inappropriately forced into the same framework.

The relevant research literature—As pointed out in chapter 3.4.8 and chapter 5.5, users of legislative documents are likely to be confused if the text lacks a parallel structure. According to Charrow and Charrow (1979: 1381), sentences that have a parallel structure are much easier to remember and read. Felker and others (1981: 53-56) claim that research carried out on surface structure (the external form of a sentence) offers indirect support for the principle that users will find it difficult to understand and use a document whose structure is not parallel. Fodor, Bever and Garrett (1974) have reviewed that research. Although their research did not involve parallel grammatical forms, it did investigate how other surface aspects of sentences that do not change sentence meaning affect reading. These aspects

included the presence of redundant function words, relative pronouns and the position of some words and clauses.

Felker and others (1981: 53-56) also maintained that the presence of surface clues as to what items in a sentence should logically be grouped together makes a big difference as to how competently users will come to grips with the sentence. They point out that the presence of grammatically parallel items is a good indication that those items are equivalent.

Kamil (1972) has conducted three experiments on short-term memory capabilities. One experiment showed that memory was a positive function of the number of words repeated between the clauses of compound sentences. A second experiment showed that when the syntactic surface structures were the same in both clauses, recall was enhanced. The final experiment provided evidence that parallel structures, rather than particular syntactic forms, produced this effect. The experiments supported a 'frame, list, and rule' strategy for remembering compound sentences (of which there are many in legislative documents). Kamil concluded that readers extract frames of similar words from the two clauses, store lists of different lexical items to fit the frame blanks, and then use rules to regenerate the sentence.

Redish (1993: 35) has also shown that users respond to recurring patterns of text and that they try to impose patterns on the text. She maintains that if visual signals (such as numbered, lettered or bulleted lists) are used for revealing the parallelism, the parallel text will be much easier for users to grasp quickly. Other research by Mayer (1993) supports the use of techniques such as bullets, arrows, marginal notes, repetition and white space to highlight relevant information.

How the research literature can help legislative counsel to produce more usable legislative documents—The research literature on parallel structures can help legislative counsel to—

- maintain a parallel grammatical structure, and
- use a parallel functional structure.

(a) Maintaining a parallel grammatical structure

By taking account of the results of the research literature, legislative counsel can maintain a parallel structure—

- in lists of items,
- within a single legislative sentence, and
- among legislative sentences in the same document.

As the research literature suggests, the readability and comprehension of legislative documents can be improved by ensuring that all subordinate propositions have the same grammatical construction, for instance, all nouns, all infinitives, all active voice verb clauses and so on. Consider the following example:

> If a debtor fails to repay a loan by the due date, the lender has the following remedies:
>
> (a) require the debtor to repay the loan immediately;

(b) realisation of any security provided to the lender by the debtor;

(c) the right of set off against any deposit *that the debtor has provided to the lender*.

This example clearly lacks a parallel grammatical structure. Each of the remedies is indicated differently, the first by a verb (require), the second by a nominalised noun (realisation), and the third by a simple noun (the right). Users are likely to be confused because most of them would expect *all* of the remedies to be indicated in a similar way, using either verbs or nouns. They would not expect a mixture of both. Users are likely to be further confused by the inconsistency in language used in paragraph (b) (security *provided to the lender by the debtor*) as compared with paragraph (c) (deposit *that the debtor has provided to the lender*. My redraft of this example removes the confusion:

If a debtor fails to repay a loan by the due date, the lender may—

(a) require the debtor to repay the loan immediately, or

(b) sell any security provided to the lender by the debtor, or

(c) set off against the loan any deposit provided to the lender by the debtor.

A repeated grammatical structure also emphasises important information. When an arrangement of words in one sentence is repeated in another sentence, the repeated structure tends to be emphasised.

(b) Using a parallel functional structure

Users of a legislative document will also be confused if the document is functionally non-parallel. The problem arises when the draft of a legislative document has used similar language to express different ideas. As the research suggests, it is much harder to detect a non-parallel functional structure than it is a non-parallel grammatical structure. The fault will only be detected if the drafter makes a conscious effort to think about the logical structure of the document.

Many legislative counsel include provisions in their documents that are based on precedents from other legislation. What often happens is that provisions are included in a legislative document that are not functionally parallel with other provisions of the document because appropriate modifications have not been made to ensure that those provisions mesh with the rest of the document.

In preparing the outline scheme for a legislative document, a legislative counsel should consider dividing the outline into major categories of equal importance and then subdivide those categories into subcategories. In so doing, the counsel needs to ensure that the structure of the categories and subcategories is in parallel form so that the hierarchy of the document is communicated to the document's users. An appropriate use of visual cues can assist this process. For instance, Part or Chapter headings might all be in bold upper case letters while divisions of Parts might be set out in bold lower case italics. But in any case, whenever provisions or parts of provisions of a legislative document have the same weight, they ought to

be expressed in a parallel functional form.[60]

One important lesson from the research literature is that legislative provisions having the same relationship to a major proposition should have a parallel structure. This is particularly important in the case of long sentences.

In drafting a provision that has several parallel phrases or clauses, a legislative counsel can often make the phrases or clauses easier for users to grasp by placing them in a list. The list can then be highlighted with typographic devices, such as bullets (•), dashes (—), tildes or by numbers and letters (which may be bracketed).

It is quite common to find sentences in which several phrases or clauses have the same relationship to a major proposition. Take the following example:

> Before filling out this form, make sure you have last year's income tax form, a copy of your current group certificate, a number 2 pencil, a legal size envelope, and the address label from the bottom of the enclosed envelope.

This provision could have been redrafted this way:

> Before filling out this form, make sure you have the following:
>
> - a copy of last year's income tax form, and
> - a copy of this year's income tax form, and
> - the address label from the bottom of the enclosed envelope, and
> - a soft pencil, and
> - an A-4 size envelope.

The combined use of parallel structure and bullets makes the passage easier for users to read.

Itemised lists can also lack parallel structure. When drafting a provision containing a list, the drafter should ensure that the list is ordered in a logical sequence, such as a time sequence, a sequence of steps or any other order that is logical and reasonable for presenting the material concerned.[61]

Although it is not usually necessary for two or three parallel items in a sentence to be reduced to a list, it can be desirable to do so in order to avoid an ambiguity (such as in a conditional sentence that contains both *and* and *or* conjunctions). However, it should be pointed out that overusing lists in legislative documents could mean that they become too cluttered and fractured.

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[60] See Rubens and Rubens, 1988: 213-233.

[61] Consider the following instruction:

(a) leave your office;

(b) set off the alarm;

(c) find the nearest exit;

(d) walk through the exit;

(e) do not panic.

11—Conclusion

Few would disagree that much legislative sentences are over-complex and difficult to understand. In this paper, I have tried to identify why such sentences are so difficult for readers to understand and to suggest ways in which legislative counsel can alleviate readers' problems.

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CALC 2009—"Whose law is it?"

The CALC Conference 2009 and CALC general meeting will be held in Hong Kong from 1 to 5 April 2009 (Wednesday to Sunday). Detailed information and a registration form are available at http://www.opc.gov.au/calc/conferences.htm. The registration fee for the Conference is GBP 200. Included in this fee are a cocktail reception, the conference dinner and lunches and morning and afternoon teas during the main business programme. Registration by 28 February 2009 is recommended as registration can only be accepted after that if space is available.

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COMMONWEALTH ASSOCIATION OF LEGISLATIVE COUNSEL

MEMBERSHIP APPLICATION FORM FOR NEW MEMBERS

The Secretary, Commonwealth Association of Legislative Counsel,

Department of Justice, 8/F High Block, Queensway Government Offices, 66 Queensway, Hong Kong§

I, ……,wish to apply to become an individual member/associate individual member* of the Commonwealth Association of Legislative Counsel.

(signed) …….. Applicant

*Note: Persons are eligible to become individual members of CALC if they are or have been engaged in legislative drafting or in training persons to engage in legislative drafting and are Commonwealth persons. A "Commonwealth person" is a person who is a citizen or a permanent resident of, or who is domiciled in, a country or territory that is a member of the Commonwealth of Nations. Persons who have been so engaged but who are not Commonwealth persons are eligible to become associate members of CALC.

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REPUBLIC OF KENYA

MINISTRY OF FINANCE

REQUEST FOR EXPRESSION OF INTEREST (EOI)

Consultancy for legislative drafting assistance to the Legislative Drafting Department of the State Law Office in Kenya—Financial and Legal Sector Technical Assistance project (flstap)

Ref: EOI/PIU/03/2008-2009
Credit No. 3992 KE
Project ID No. P083250.

This request for Expression of Interest follows the General Procurement Notice (GPN) for this project that appeared in United Nation Development Business No. 674 of March 16, 2006 and was updated in UN Development Business No. 707 of July 31, 2007. The Government of Kenya has received a credit from the International Development Association and a Grant from the UK Department for International Development (DFID) towards the cost of the Financial and Legal Sector Technical Assistance Project (FLSTAP). It is intended that part of the proceeds of this credit be applied to eligible payments under the contracts for provision of consultancy services on: "Legislative Drafting Assistance to the Legislative Drafting Department of the State Law Office". This consultancy is expected to take a period of one year

Objective

The objective of this consultancy is to strengthen the capacity of the Legislative Drafting Department of the State Law Office to handle priority legislative drafting and to develop the capacity of the Department through the provision of on-the-job training to the Parliamentary Counsel.

Scope of the Work

The Consultant will provide legislative drafting assistance to the Legislative Drafting Department for a period of one year. The tasks to be performed include:

- Handling the drafting of priority legislation, and in particular financial and legal sector related legislation, in consultation with the Chief Parliamentary Counsel, including the drafting of Bills and subsidiary legislation; ensuring preparation and publication of Annual supplement to the Laws of Kenya; ensuring preparation and publication of Legislative supplement of the Kenya Gazette in liaison with the Government Printer; advising Government Ministries/Departments and State Corporations in legislative and other legal matters; and attending to the passage of Bills in the National Assembly and preparing Vellum Copies for assent and subsequent publication of Acts in the Kenya Gazette;
- Training and supervising junior Parliamentary Counsel, through the provision of structured on-the-job training and assisting in the review and setting up of effective and efficient systems and procedures for undertaking legislative drafting, in consultation with the Chief Parliamentary Counsel;
- Undertaking such other duties as may be assigned to him/her by the Chief Parliamentary Counsel.

Qualifications of the consultant required for the assignment

- Relevant qualifications in law and specialized post graduate qualifications in legislative drafting.

At least 15 years' relevant experience acquired within Commonwealth jurisdictions, with demonstrated expertise in reviewing and drafting legislation and managing a Legislative Drafting office.

- Strong communication and writing skills, IT skills and demonstrated ability to provide on-the-job training to junior parliamentary counsel.

The Ministry of Finance (the Client) through its Project Implementation Unit (PIU) now invites eligible Individual consultants to express their interest in providing this service. Interested consultants shall provide information indicating their professional capability to undertake the consultancy. Such information may include brochures, description of similar assignments, experience in similar conditions, availability of appropriate skills, etc. Consultants should provide the most recent profiles showing their experience, qualifications, capabilities, references and details of past experience especially in the area of their expertise etc.

Interested individual consultants may obtain further information at the address given below during office hours between 0900 to 1630 hours, Monday – Friday inclusive, exclusive of public holidays, before the deadline for the submission of Expressions of Interest. The selection of consultants will be in accordance with procedures set out by World Bank Guidelines: Selection and Employment of Consultants by World Bank Borrowers, May 2004

Complete Expressions of Interest documents in plain sealed envelopes with consultancy reference and name clearly marked on top should be—

(a) placed in the tender box at our offices on the 7th floor, Anniversary Towers, North

Tower, *or*

(b) sent or delivered to one of the following addresses:

Postal Address:
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Attention: Procurement Specialist
P.O Box 00100 – 34542
Nairobi, Kenya.

Physical Address:
Project Implementation Unit
Attention: Procurement Specialist
7th Floor, Anniversary Towers, North Tower.
Plot No. 209/9744, University Way
Nairobi, Kenya.

Telephone No.: +254 20 2210271/2210341

Fax No.: +254 20 2210327,

or

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E-mail: info@flstap.go.ke

The deadline for submission of Expressions of Interest is 19 February 2009 at 1600 hours Kenyan local time.

FALKLAND ISLANDS GOVERNMENT

ATTORNEY GENERAL'S CHAMBERS

Legislative drafter

Applications are invited for the position of Legislative Drafter in the Attorney General's Chambers. The Attorney General's Chambers consists of an establishment of five qualified lawyers and three support staff.

Duties of the post include—

- to draft primary and subsidiary legislation as requested by the Attorney General;
- to provide drafting advice to Legislative Assembly and Executive Council, Government departments, committees and working groups;
- to assist in keeping the laws of the Falkland Islands, South Georgia and the South Sandwich Islands under review;
- to undertake consultation exercises with regard to proposals for the enactment of new laws and the amendment and repeal of existing laws;

- to prepare Executive Council papers with regard to proposed legislation;
- to instruct and liaise with external contract drafters; and
- to assist in the process of improving drafting practices and procedures in the Attorney General's Chambers.

Applicants must be a solicitor or barrister with at least seven years post qualification experience. Applicants must have been admitted or called in the United Kingdom, Ireland or a Commonwealth country.

A two year fixed term contract is offered with annual salary package £90,262. Completed applications to be returned by: 19 February 2009

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The Attorney General's Chambers wishes to establish a list of legislative counsel who are able to draft primary and secondary legislation on a contract basis. Interested legislative counsel should send a curriculum vitae containing details of drafting experience, areas of expertise and the basis for your proposed charging rate.

Expressions of interest should be received by: 19 February 2009

For an application form and information pack, the submission of completed applications; and expressions of interest, contact:

The Recruitment Officer, Falkland Islands Government Office, Falkland House, 14 Broadway, Westminster, London SW1H 0BH, United Kingdom

Telephone: +44 20 7222 2542, Fax: +44 20 7222 2375,

Email: recruitment@falklands.gov.fk
