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THE LOOPHOLE

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Correspondence

Correspondence should be addressed to—

Dr. D. E. Berry, Secretary of the Commonwealth Association of Legislative Counsel, Room 6.16A. Attorney General's Office, Government Buildings, Upper Merrion Street, Dublin 2, Ireland.

Telephone: +353 1 631 4049. *E-mail*: dr_duncan_berry@yahoo.co.uk

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Editor's Notes

This issue of the *Loophole* contains another instalment of papers delivered at the CALC Conference in Hong Kong from 1-5 April 2009. They are united by the theme of concern for the words that endure long after the dust has settled on the legislative process. Our work as legislative counsel prompts us not only to do the best we can to prepare, as Lord Thring said, razors that sell, but also to ensure that they keep shaving for a very long time afterward.

Janet Erasmus's paper begins this issue by demonstrating the longevity of statutes. It has important lessons that remind us not only of the care and attention needed in preparing legislation but also of the durability and adaptability that must be built in to accommodate a constantly changing world. The papers that follow are about various types of scrutiny brought to bear on the work of legislative counsel to ensure that it does indeed stand the test of time.

Drafting legislation is a collaborative exercise in many senses. Mr Justice Bokhary reminds us of this in terms of the role of the courts. Although judges may no longer have a direct role in preparing legislation, they unquestionably do in its operation. The courts take legislative language from the page and translate it into legal results in the cases before them. Legislative counsel and judges are united by the pursuit of common purposes, but our perspectives are somewhat different. It is indeed useful to be reminded of theirs from time to time.

The next three papers take us inside the legislative process to provide glimpses at internal scrutiny mechanisms. Jimmy Ma leads us through the legislative process in Hong Kong and outlines the role that the legal advisors to the Hong Kong Legislative Council play in reviewing draft legislation. Next, Lise Poirier provides an account of the linguistic review that she and her colleagues in the Jurilinguistic Services of Justice Canada provide in a bilingual context. Stephen Argument then discusses the role of legislative counsel in reviewing the policy that they are asked to implement in legislation. These papers provide insight into the processes for preparing legislation and demonstrate the importance of integrating various perspectives in these processes. Finally, this issue concludes with Mark Adler's de-construction of the traditional language used in the UK to draft appropriation Bills. His is the perspective of someone outside the legislative process, reminding us that legislation is not the property of those who prepare or implement it: there is always someone else watching and there is always room for improvement.

I trust you will find much of interest and value in this issue. I would also urge you to pursue these and other topics related to legislative drafting with a view to promoting discussion, whether at upcoming drafting conferences, such as the 2010 CALC-Africa Conference in Abuja or the 2011 CALC Conference in Hyderabad, or in writing. Submissions for *The Loophole* are most welcome.

John Mark Keyes

Upcoming conferences

CALC – Africa

Call for Papers

The first CALC Africa Regional Conference will be held in ***Abuja, Nigeria from 7-8 April 2010***. It will present an opportunity for legislative counsel to share ideas, challenges and network and learn new things about drafting legislation.

The theme of the Conference is ***"Toward Uniformity of Legislation in the Commonwealth"*** and is considered wide enough to embrace a myriad of legislative drafting topics such as anti-corruption, transformation of treaties, clarity of language and emerging trends in legislative drafting.

Proposals for papers should be sent in the form of an abstract including the presenter's name, title, CV and full postal and email addresses, as well as the title of the proposed paper and the main theme of the presentation. The presentations should be designed to be no more than 20 minutes in length with the balance of the time in the session given to discussion of the issues or participatory activities. Eighteen presentations are expected. The deadline for receiving abstracts and papers is ***February 26, 2010***. They can be sent prior to submitting the registration fee and should be directed electronically via email attachment to appiahestelle@yahoo.co.uk.

Canadian Institute for the Administration of Justice (CIAJ)

The next CIAJ Legislative Drafting Conference will be held in Ottawa, Canada from 13-14 September 2010 under the theme *Re-imaging the Law: Legislative Drafting Redefined*.

This conference will focus on what it means to be a legislative counsel today and how the evolving legal concepts of a diverse community are redefining both legislative drafting and the world at large.

Those entrusted with the preparing draft legislation are more than a precious commodity. They bring not only specialized knowledge and understanding to their creation, but must also integrate the new and broader concepts that define communities and countries: What are the responsibilities of the legislative counsel? What are the evolving issues that must be considered and integrated into legislation? What impact is this having on redefining the legislative profile of countries and their governmental components?

Particular topics will include the value of legislative drafting, its professional and ethical dimensions, legislative harmonization and the cultural and linguistic aspects of drafting,

particularly in relation to aboriginal communities. The conference will also include workshops dealing with practical drafting issues in the English and French languages.

Conference participants can expect to come away with a better understanding of the true value and make-up of legislative counsel and how legislation is being changed in broad terms.

CALC 2011

Call for Papers

The next CALC conference will be held in **Hyderabad, India from 2-4 February 2011** under the theme *Legislative Drafting: A Developing Discipline.* This theme speaks to many aspects of legislative drafting and the role of legislative counsel and affords the opportunity for sharing ideas in respect of the following sub-themes:

- Legislative Drafting: Art, Science or Discipline?
- Legislative Counsel in Developing Countries
- Legislating Across Languages: The Challenges of Law-making in Multi-lingual Jurisdictions
- Role and Efficacy of Legislation
- Emerging trends in improving legislative drafting: Harnessing Information and Communication Technology
- The Wavering Line between Policy Development and Legislative Drafting
- Training and Development of Legislative Counsel.

Anyone who wishes to present a paper at the conference should send an abstract to JKeyes@justice.gc.ca, including full name and title, a brief CV, full postal and email address, the title of the proposed paper and a brief summary of the points to be made. The presentation should be 20-30 minutes in length with further time being available for questions. The deadline for receiving abstracts is ***31 May 2010***, but please respond as early as you can.

The organising committee wish to facilitate the participation of members whose attendance is not possibility due to disability, personal circumstances or lack of funding. Though preference will be given to persons who are able to attend the conference and deliver a paper in person, there may therefore be limited opportunities for presentations to be made via web cast if a member is unable to attend. It should be noted, however, that whether web casting will be feasible is still to be determined. Further details about the conference will be provided the *CALC Newsletter* and the CALC Website.

Keepers of the Statute Book: Lessons from the space-time continuum

Janet Erasmus[1]

Abstract:

As legislative counsel, we are responsible for maintaining the legal and linguistic coherence of the statute book for our jurisdiction. It is this responsibility that leads to our being known as "keepers of the statute book". The statute book is not static, and so there is the question of how we might evaluate the development of this responsibility. This paper offers a quantitative approach to that issue, considering the statute book from two perspectives. The first perspective is the change in volume of the statute book over time, the space aspect of the title. The second is the longevity of Acts within our current statute book, the time aspect. For each aspect two jurisdictions are considered: Canada and British Columbia for space, Australia and British Columbia for time. Thoughts are offered on lessons to be learned from these analyses.

Introduction

Francis Bennion has named legislative counsel as "keepers of the statute book". What a lovely word, that – keeper – with its echoes of custodian, preserver and protector. As Bennion has it, this is a role that encompasses the linguistic and the juridical state of the statute book.[1] Or, as Colin Wilson expressed our keeper aspirations in his presentation to the 2007 CALC conference,

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1 Chief Legislative Counsel (British Columbia, Canada). The author wishes to express considerable thanks to Dr. Mark Yunker, husband and organic geochemist/environmental chemist, for his assistance with the data analysis for this paper. No doubt it was much less challenging than the PCA (principal components analysis) used in much of his published work. This paper was presented at the CALC Conference in Hong Kong, 1-5 April 2009.

"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." [2]

However the description is articulated, legislative counsel have heard truth in the title. We recognize that it fits and is fitting. I see this as being particularly true for those of us in Commonwealth jurisdictions where a legislative drafting office serves the executive within a Westminster-style system of responsible government. We draft Bills to give legal effect to government's intentions, as that government changes over time. Legislative counsel in those legislative drafting offices are the ones who appreciate the full scope of the statute law for their jurisdiction. They draft to achieve the consistency in language that will support consistency in interpretation and recognize the need for coherency, both in language and substance between its component Acts.

One might reasonably say that fulfilling the role of keeper is much easier in these modern days than in times past, that modern technology allows us to access its entire content and to identify specific provisions and matters within that content. This access and identification will at least be true for those of us who work in jurisdictions with on-going electronic consolidations that allow us to quickly find the current state of a statute. With a few clicks of the mouse and a few strokes on the keyboard we can conduct a search across the statute books for provisions that deal with related matters or that deal with different matters in a similar way. And legal publishers are providing more and more databases that allow us to locate judicial consideration of particular statutory provisions or particular words and phrases.[3]

The exploration

We have better tools to manage our statute book, but do we have a better sense of what *is* our statute book? And how do we judge the development of our statute book?

This presentation is an exploration of these questions, undertaken by looking at two particular aspects of the statute book, aspects which lead to the title for this presentation – lessons from the space-time continuum:

- *Space* – how has the size of the statute book changed over time
  (the size on the shelf, as it were)
- *Time* – how old are the statutes within the statute book
  (their longevity and demographics)

This exploration is done by way of quantitative analysis of two representative statute books for each aspect. It is not about a search for certain answers, but rather is intended to provide a way towards better questions.

Perhaps a warning is in order at this point. I am sure you caught that "quantitative" word a few moments back. This is a presentation about numbers. And it comes with graphs. I appreciate

that this is not the usual fare for legislative counsel whose stock-in-trade is words and whose craft is their precise construction into statements of particular legal effect. You will not find me saying that a picture is worth a thousand words, but here I hope the pictures will provide a different perspective on many, many thousand words.

The Data

The statute books I am using are, for the space aspect, those from my own jurisdiction of the Province of British Columbia and from the federal Parliament of Canada. For the time aspect, they are from British Columbia and the federal Commonwealth Parliament of Australia. [4]

For both space and time, I am looking at what I will call "principal Acts". These are the main Public Acts intended to have continuing legal operation. Excluded are—

- amending Acts,
- annual Acts such as appropriation Acts, supply Acts and tax rate Acts, and
- validation Acts and transitional Acts that look backwards and forwards, respectively, but have limited temporal application.

Space – how has the size of the statute book changed over time?

We will start with space, for which I am looking at two analyses—

- the size of the statute book, and
- the rate of change in size over time.

The size of the statute book provides us with a measure of our responsibilities. I see this as a reasonably effective measure in that, regardless of the number of Acts into which a statute book is divided, we are keepers for all its pages. The rate of change over time speaks to how quickly or slowly that weight of responsibility is increasing or decreasing.

To state the obvious, a quantitative view of how the statute book has changed in size over time requires being able to identify that size at specific points in time. That is, we need snapshots of the statute book as at some particular dates. On-going print consolidations (whether governmental or private) are just that, on-going. They do not provide the needed data. But statute revisions do.

As I explained in my 2005 CALC conference presentation,[5] Canadian jurisdictions have a history of regular statute revision. From earliest days, the federal Parliament of Canada and the provincial Legislative Assemblies have authorized official revisions of the statute book.

This presentation will be looking at the federal *Revised Statutes of Canada* and the provincial *Revised Statutes of British Columbia*. They provide a data set of 6 editions for Canada and 10 editions for British Columbia.

Table 1: Revised Statutes: Canada and British Columbia

Canada	British Columbia
Dominion of Canada 1867	Province of British Columbia 1871
1886	1877
1906	1888
1927	1897
1952	1911
1970	1924
1985	1936
	1948
	1960
	1979
	1996

In statute revisions, all amendments are consolidated into their principal Acts and provisions that are repealed, spent or without legal effect are omitted. The collective statute book is re-numbered, re-sorted and, in our jurisdictions, refurbished under an authority to alter language to achieve a clear and consistent style.[6]

These statute revisions, published in the form of hardbound books, provide page length as a measurement for judging the changing size of the statute book. The raw data is not lengthy for the space aspect, so I offer the Canadian statute information.

Table 2: Revised Statutes of Canada: actual page length

Year	Pages	Volumes	Notes
1886	2246	2	English only
1906	2940	4	English only
1927	4302	4	English only
1952	5987	4 + 1 Supplement	English only
1970	9497	7 + 2 Supplements	English & French; larger pages, far more text on page
1985	14475	8 + 2 Supplements	English & French; text even more compressed

What started as 2 volumes became 10 volumes over the course of 100 years.

But, as Table 2 indicates, the pages numbers before 1970 are for English-only publications. They are, in effect, only half the statute book. For the 1970 and 1985 revisions, the English and French revisions were published side-by-side in columns on each page. At the same time, the page size itself was larger, the font size was smaller and the text was much denser on the page. Some adjustment for proper comparison is needed.

The adjustment was done by randomly identifying Acts that had not been amended, or had only been minimally amended (a few words) since 1952, then considering the changes in page length between revisions –from 1952 to 1970, and from 1970 to 1985. This allows the pre-1970 revisions to be adjusted to an estimated page length as if the French versions had been included, and for the 1985 revision to be adjusted to the 1970 format.[7]

Table 3: Revised Statutes of Canada: page length adjusted to 1970 format

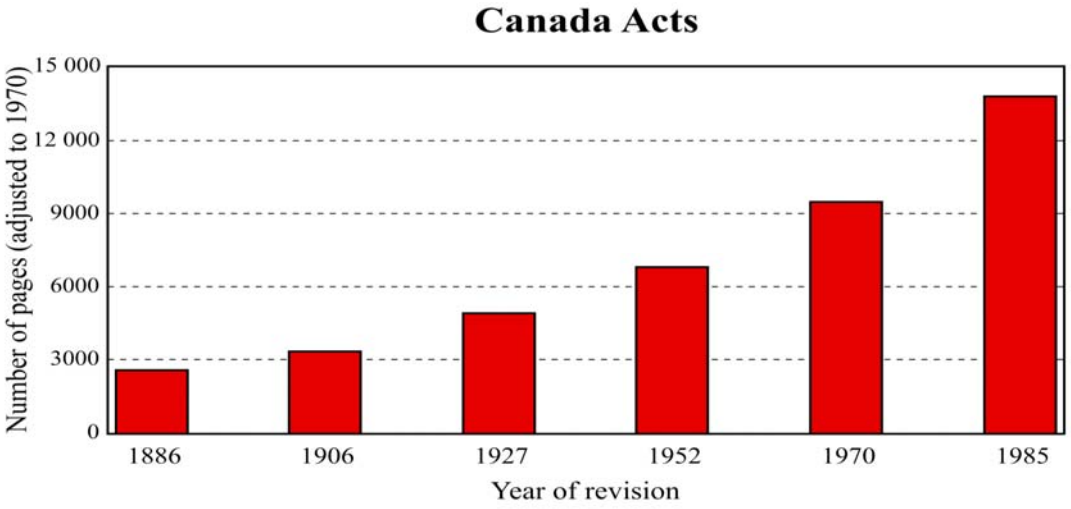
Year	Pages	Adjusted Pages
1886	2246	2550
1906	2940	3338
1927	4302	4884
1952	5987	6797
1970	9497	9497
1985	14475	13788

Similar adjustments were needed for B.C. revisions to recognize their format changes overtime, particularly as the 1996 B.C. statute revision moved to a plain language format that used larger paper but significantly increased the white space on a page.[8]

Space – the Canadian statute book experience

From numbers now to pictures. Let us first consider Canada.

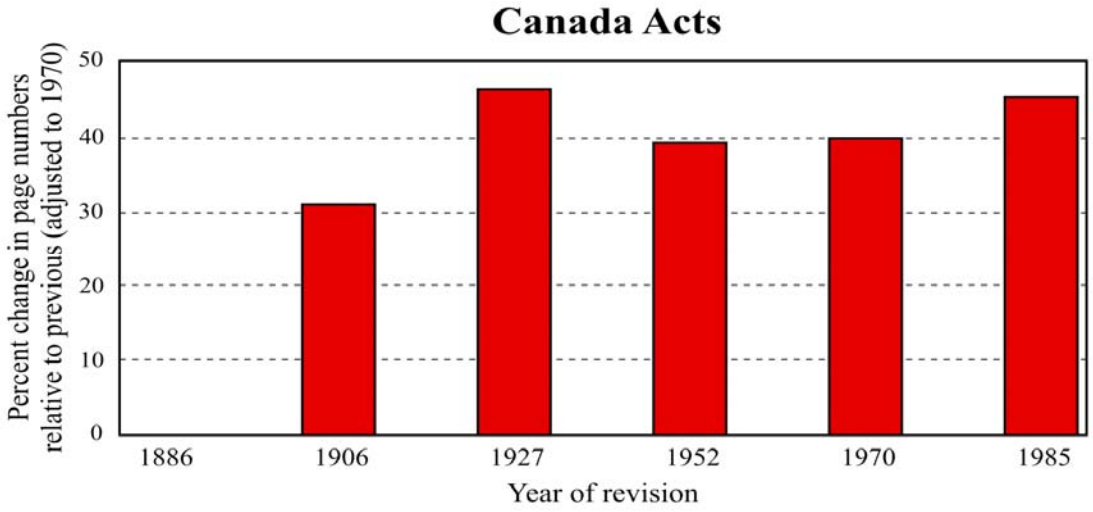
Figure 1: Canada — pages over time (adjusted to 1970 format)



For Canada, the 1985 statute book is close to 5.5 times the size of its 1886 ancestor [9] — considerable growth in the 99 years between the first and last revisions. The changes in size appear as a rising curve. That is, we have had a constantly increasing statute book. But is the rate of increase increasing?

Another graph, this time of the percentage change in page numbers between revisions.

Figure 2: Canada — percentage changes between revisions

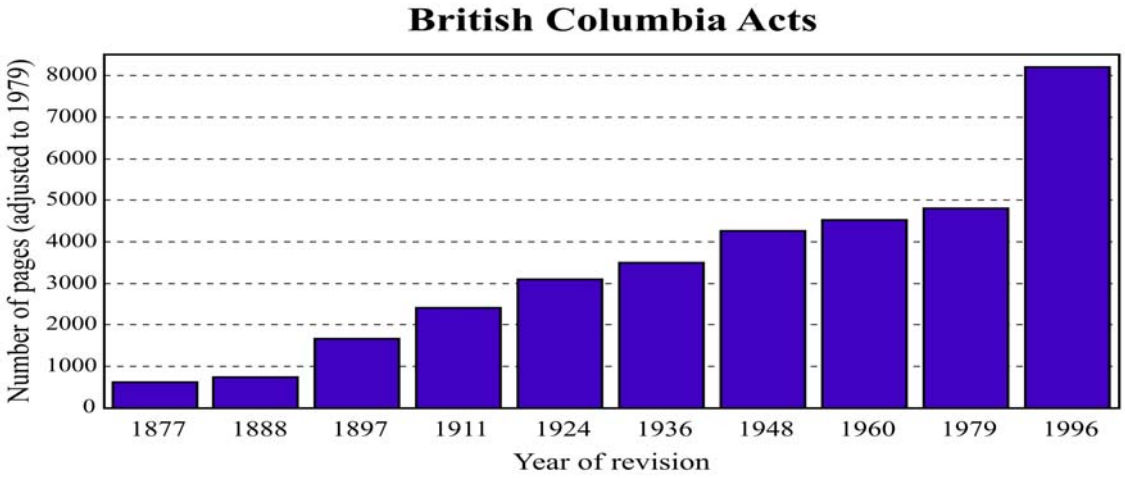


Let us consider the earlier years first. In the 20 years between the first revision and second revision, the Canadian statute book increased by 31%. Between 1906 and 1927, years that spanned the First World War, it increased by 46%, close to doubling in size. The next two revisions each had just over 39% increases, with the last revision having a 45% increase over its 1970 predecessor.[10] (And all this before computers became standard in drafting offices.)

Space – the British Columbia statute book experience

We look now at the British Columbia experience with the size of our statute book.

Figure 3: British Columbia — pages over time (adjusted to 1979)



Here we have a different shape, with a significant rise between 1888 and 1897, but a much less steep curve of growth than Canada through 1924 to 1979. The years between 1979 and 1996 resulted in another significant rise.

If one were to consider the change in size from the 1877 revision (with 815 pages actual and 614 adjusted) to the most recent 1996 revision (with 10 000 actual pages and 8200 adjusted), there would be a 13-fold increase in the statute book. But, in the case of British Columbia, the better starting point is the 1897 statute revision.

The first 2 revisions were smaller because a considerable portion of legislated law in the early years of the Province was Imperial law adopted through the Colony of British Columbia's *English Law Ordinance 1867*. It was not until the 1897 statute revision that the Imperial enactments were directly imported into our statute book.

If one uses the 1897 revision as our reference point, the 1996 statute book is just under 5 times the size of its 1897 ancestor.[11] Somewhat less than Canada's proportional increase over the equal 99-year period between first and last revisions.

And what has been happening to the rate of change for British Columbia?

Figure 4: British Columbia — percentage change over time

We see significant increases in the first 20 years of the twentieth century, followed by 50 years of low growth, then a very sharp rise in recent times. Here our 71% increase between the most recent statute revisions far outstrips the federal 45% increase.[12]

Space – some questions for the future

I have been able to use physical statute volumes here to determine the size of the statute book and to consider how it has grown, but it seems that this may soon become much more difficult. This leads to some thoughts for the future.

How will we know our statute book?

Space is indeed becoming a final frontier for the statute book. Its boundaries are lost as we move from paper to electronic consolidations, something that can be increasingly expected as jurisdictions statutorily mandate their electronic consolidations to be admissible as official evidence in court.[13] How will we know our statute book? Looking at numbers in the form of collective kilobytes does not provide the same immediate (and visceral sense) that we know the extent of just what it is we are keeping. Even with the technological wonders of search engines, how much greater will be the challenge of maintaining the integrity of our statute books?

At least for Canadian jurisdictions, our statute revisions have allowed the regular development of consistent language. Search tools allow us to have reasonable confidence that we have identified most of relevant provisions when considering the use of specific statutory language.

There is some hope of dealing with the growing statute book. I can only imagine how much more challenging this is for other jurisdictions.

How much law is too much law?

To be a keeper of the statute book requires believing that law, at least law in a parliamentary democracy, is a good thing for society. But there is that oft-quoted saying that one can have too much of a good thing. How much law is too much law, and how will we know when we are there if we cannot see the physical evidence of its size?

Certainly in the area of regulatory law there have been for a number of years now loud complaints from the business community about the extent of unneeded legislation and its impact on the commercial world. Indeed, in British Columbia, our current government came into its first mandate in 2001 with a commitment to reduce the regulatory burden by 33% in 3 years. To do this, they started counting "musts" and the associated requirements in all statutes, regulations and policies of the province. They met their target and have continued with progress reports ever since.[14] To that extent, at least, the size of our statute book is being measured in some form.

Time – how old are the statutes in the statute book?

We are keepers of the statute book as received from our predecessors and, as legislative counsel, we may reasonably hope and expect that some of what we write will be passed into the care of our successors. How long our work is likely to survive can inform us about this responsibility to the future.

For a jurisdiction with any length of legislative history, much of what we write will be in the form of amendments to existing Acts, and quantitative consideration of such amending legislation would I expect be highly informative. But data for the longevity of amending legislation would be challenging to develop and more complex to analyse, and so the time aspect of this presentation is explored through consideration of principal Acts. Not only is the data available, but principal Acts are independently interesting.

Principal Acts are legislative responses to then-current issues, considered by our governments and parliaments to have sufficient importance to require a full Act as legislative response. Some will deal with matters only minimally touched before by legislation. Others will replace existing laws in a manner that has sufficient change to justify repealing the former Act. Looking at longevity provides information about how long such issues are likely to be relevant to our society.

So – how old are our laws? Let's look first at year-by-year data. As mentioned earlier, for the time aspect I am using Australian Commonwealth Acts and British Columbia Acts for consideration and comparison. (In this paper, Figure 5 presents the graphs for both jurisdictions and is shown on the next page.)

When looking at these graphs, you will note that the grid line values for the British Columbia charts are about one-half those for Australia. This is because the total number of British Columbia principal Acts in force is half that of Australia, with British Columbia coming in with 513 Acts and Australia with 1018 Acts. (This of course says nothing about relative size of the statute books, just the number of chapters into which they are divided.)

Time – the Australian statute book experience

One might reasonably expect that the Australian Acts-in-force balance would be heavily weighted towards recent years as the issues addressed by recent Acts are more likely to be currently relevant. And so the graph indicates.

Beyond this expected result, the graph gives us other information of interest.

For example, the first thing to strike me in looking at this graph was that some years were remarkably effective in producing surviving legislation, and not just recent years that were effective in this way. Consider, for example, the spikes shown for 1973 to 1975. Those years, over 30 years past now, provided Australia with 75 Acts that are still in force for the nation – 7% of the total statute book as measured by number of Acts.

Conversely, there are a number of gaps in the graph. These are years for which there are no surviving Acts. For Australia's there are 14 years unrepresented in the statute book.[15]

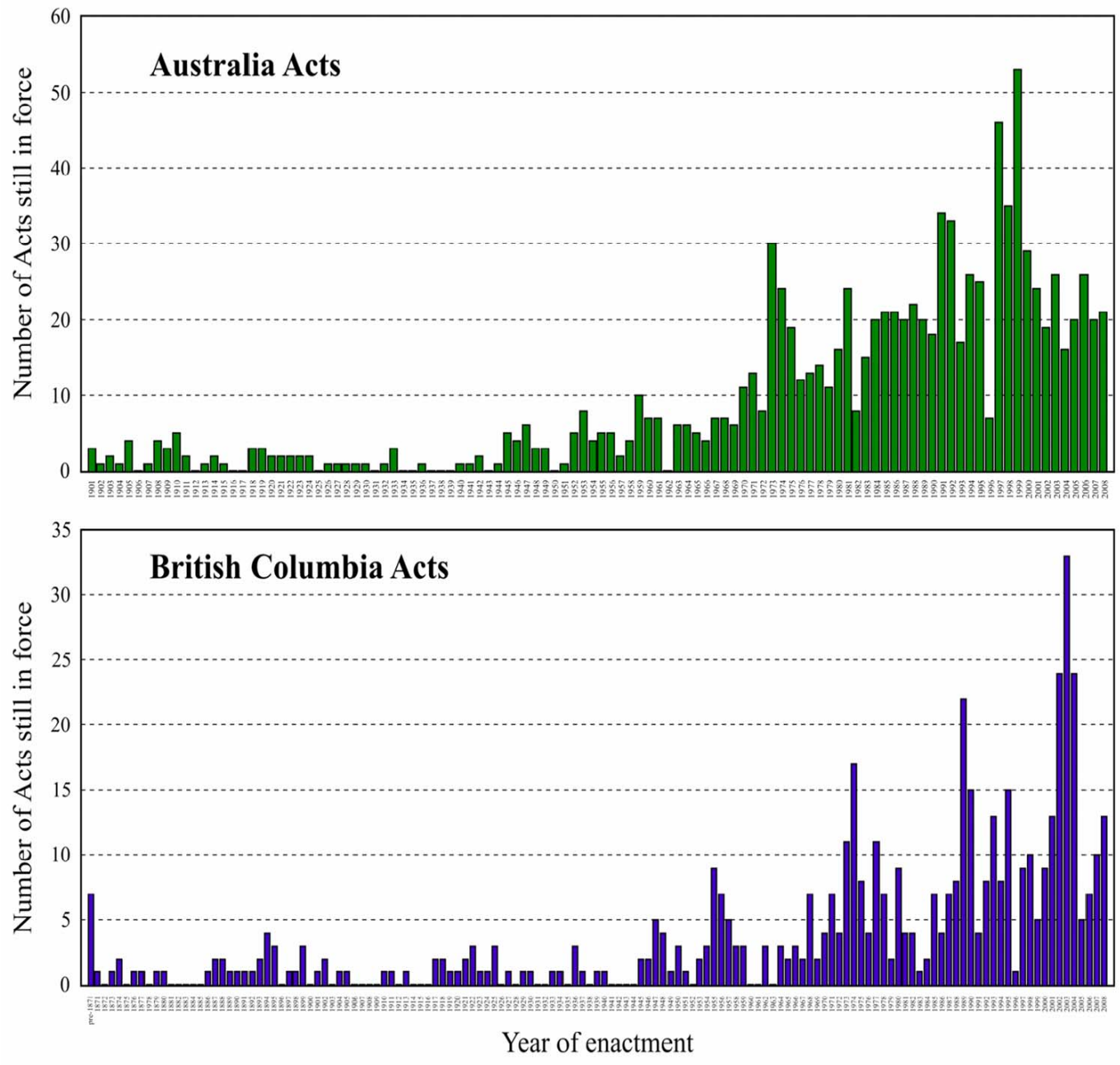
If survival of one's laws is any measure of a government, some clearly had more success than others. (Perhaps there may be some interesting information for political science consideration in the low points and high points of this graph.)

The second thing it tells us that, although there are gaps along the way, many Acts from the earliest days of the country are alive today. For example, Australia's earliest Acts include:

Acts Interpretation Act 1901	*Defence Act 1903*
Customs Act 1901	*Amendments Incorporation Act 1905*
Excise Act 1901	*Census and Statistics Act 1905*
Judiciary Act 1903	*Quarantine Act 1908*

These are not only alive as law, they are active as law.

Figure 5: Longevity of Australia and British Columbia Acts: Number of Acts enacted in a particular year that were still in force as of 31 December 2008



Time: The British Columbia statute book experience

We now consider the British Columbia graph of year-by-year longevity.

As with Australia, there is weighting towards more recent years and there are significant high points and low points. But, for British Columbia, recent years have considerably more year-to-year variability in the number of Acts that passed into law and survive. British Columbia also has more years than Australia without surviving legislation: 34, with 24 of those coming after 1900.[16]

An unexpected parallel here is that the same years in the 1970s were particularly productive for having surviving legislation. For British Columbia, 1973 to 1975 provided 36 Acts that remain in force – like Australia, 7% of the total statute book.

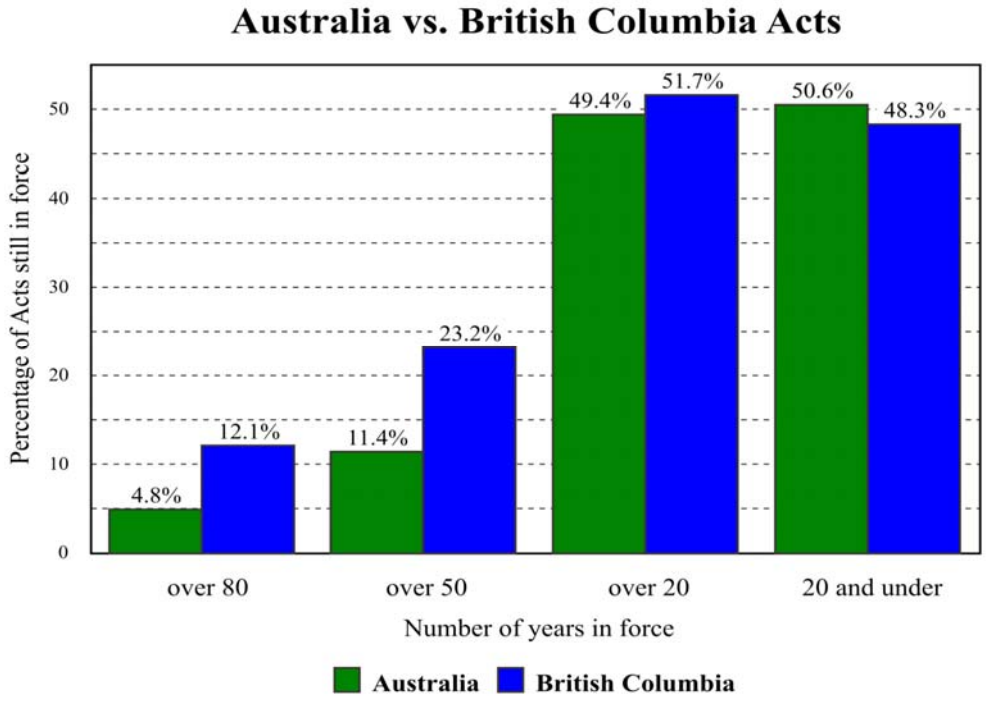
British Columbia also has a goodly number of Acts surviving from its earliest years, many through adoption of Imperial Acts. British Columbia's oldest surviving Acts include:

Fraudulent Conveyance Act (Imperial, 1563)
Power of Appointment Act (Imperial, 1830)
Wills Act (Imperial, 1837)
Court Agent Act (1873)
Trustee Act (1876)
Trespass Act (1877)
Hotel Keepers Act (1888)
Partnership Act (1894)

Time: A comparison of longevity

The next graph provides a comparison of longevity between the Australian and British Columbia statute books.

Figure 6: Australia and British Columbia — percentage of Acts still in force by age group



Both Australia and British Columbia are close to 50-50 for the percentage of their Acts that are older than 20 years and the percentage that is younger than this, with British Columbia slightly heavier on the older law.

It is when we look further back that we see a distinct variation between the jurisdictions. For Australia, slightly over 10% of the laws are over 50 years old. For British Columbia, it is closer to one-quarter of our laws that are middle-aged and beyond. And for truly senior-citizen laws, British Columbia has 12% of its statutes over the age of 80, while Australia has less than 5%.

Time: Some questions for the future

Why the longevity?

To start with thoughts from this last comparison, if law from over 80 years ago is alive and well and active, it seems clear that there is continuity to the issues faced by our societies. And that these older Acts continue suggests that the legislative solutions to those problems, or at the least the framework for those solutions, are effective to the extent that they have been able to stand the test of time.

Why the difference in longevity?

Do Australia and British Columbia have such different demographics for their older statutes because the problems addressed were different? Possibly, I think. For example, Australia as a nation must address matters of defence, which is not a constitutional concern of British Columbia as a province. Are the solutions different, or were the original solutions different and are now moving to a conjunction of approach? Again, I say possibly. Certainly I am aware that British Columbia Government policy analysts are looking farther afield than just other Canadian jurisdictions for models of approach.

There is another factor to explore also. British Columbia has had regular statute revisions. We have been able to modernize our language and reach consistency in expression within statutes and between statutes. With regular revision there has not been an identified need to conduct a "clean sweep" to remove variation that has developed over time though amendment. I can well imagine that a keeper of the statute book would be strongly inclined to suggest replacement over amendment where statute revision has not been available, and particularly so with the relatively recent initiatives to bring plain language techniques to the drafting of legislation.[17]

Whose law is it?

Here there is an answer as well as a question. For legislative counsel within a government legislative drafting office, we have a clear client relationship: we write our law to give legal effect to the current government's intended policy. We do this with a view to making the new law

proposed for enactment by the British Columbia Parliament operate coherently with other legislated law and with the common law of our jurisdiction. But what we see from the longevity is that we do not write it only for government or for our current society. We also write it for our grandchildren. We are keepers of the statute book for future generations as well as for the present. What does this entail? What should it entail?

This is my opportunity for personal reflection and I offer two thoughts about this responsibility:

- First, keeper for generations supports a view that law should be drafted to be robust.
- Second, the demonstrated longevity of legislation indicates that we should have care to its language.

Law should be drafted to be robust

What do I mean by this? Well, once upon a time that seems long ago in a galaxy not so very far away, I was an oceanographic chemistry technician. This was in the days when computers were "mainframes" living in air-conditioned splendour with giant saucer "eyes" of their massive tape drives storing less information that those flash-drive sticks that clip onto my son's keychain. Computer technicians were computer programmers and wrote in a language beyond the ken of others. There I learned the meaning of robust. We had one programmer who could do a quick fix in a couple of hours to let our chemistry lab add another parameter for a testing system. But after a couple of these additions, he might explain that the program would need to be entirely rewritten to add anymore. And then we had another programmer who would ask a question or two about what we were adding and why, then come back the next day with a revised program that could add any number of further parameters. His basic program was adaptable and was stable through adaptations. It was robust.

So it should be with legislation. In a changing world, law needs to be responsive to change. It should be drafted with a solid framework that allows amendment without complete gutting and restructuring. A contribution to the future—our grandchildren and future legislative counsel.

I say this, yet at the same time I think this may be becoming more difficult. The nature of written communications is increasingly ephemeral: think email, texting and twitter. The simplification of written communication leads to its devaluation, an inability to read complex statements and expectations that such a communication takes no time to prepare. As papers from the 2007 CALC Conference described,[18] there is a challenge shared by many jurisdictions in how to manage government's expectations while maintaining quality. That quality includes robustness and, in my view, quick and dirty legislation has the problems similar to quick and dirty programming, only its consequences may last over a much longer time.

Care for the language of the law

As many of you will appreciate, I have been and continue to be an advocate for plain language in legislation. But you will not find me proposing that colloquial language is plain language.

I recall another time many years past when for a summer while in law school, I worked for the Law Reform Commission of Canada. At that time one of the Commission's projects was some re-writing of the *Criminal Code* of Canada, and I attended a meeting between Commission staff working on the project and the legislative counsel who had been assigned from the Department of Justice to assist the Commission. A staff member was suggesting that a provision be stated in colloquial language – I believe it was to the effect of requiring a person to "hand over" evidence to a police officer – and I recall both the legislative counsel and myself having a simultaneous response of indrawn breath and the start of: "But ….." (It seems I had the heart of a legislative counsel even in those days.)

The desire for providing law in plain language must never give way to writing only for the current generation and its expressions. It must hold to a linguistic continuity for reasons of comprehension as well as reasons of juridical integrity. That said, I do not resile from my belief in plain language – we *can* write the law clearly to be understood across generations.

An invitation for future exploration

Having had this recent experience of browsing through a limited number of statute books, I offer a few thoughts for what might be done for the benefit of future explorers into the history of the statute book:

- First, I suggest that legislative drafting offices that have not done so already start building their databases of legislative history – tracking each Act from birth to death, through renamings and revisions.
- As the statute book lengthens and ages, tracking the full status and implications of the law becomes increasingly challenging. I suggest that non-textual amendments be avoided if at all possible. That is, provisions which add to, modify, override or provide exceptions to an existing Act should be made by amendment to the Act or, at the least, indicated by a pointer added to that Act.
- Finally, I highly commend a naming convention for Acts that allows one to immediately identify whether it is a principal Act or an amending Act. British Columbia had such a convention from the very start and, in conducting the research for this presentation, I found myself blessing our first legislative counsel for their wisdom in this. The Australian data was much more challenging, with many if not most amending Acts giving no indication of this in their short titles.

To close, I express the hope that this approach to the history of legislation has at least been interesting for you. I am also hoping that it has you wondering just what information a similar analysis for your jurisdiction might have and what more might be gleaned from such data.

I look forward to a future time when we will see and hear reflections from other jurisdictions on their travels through space and time in the statute book.

May we keep it well.

Endnotes

[1] Francis Bennion, 9 September 2002 notes to *The Times* Register (Lives Remembered), www.francisbennion.com, Doc. No. 2003.017-LR006 Site Map Ref. 2.3.3.4. & 8.2, in which he praises Godfrey Carter of the UK Office of Parliamentary Counsel:

> In my copious writings on the subject I refer to legislative counsel as the keepers of the statute book. Carter rightly held that in their drafting work they must accept and act on the responsibility of ensuring that the statute book is kept in the best possible condition juridically as well as verbally.

[2] Colin Wilson, "Managing Increasing Government Expectations With Respect To Legislation While Maintaining Quality", *The Loophole*, January 2009, p. 23.

[3] While fee-for-service publishers have been providing these searchable databases for some time, we are not seeing this on free-to-the-public websites. For example, the Canadian Legal Information Institute "Noteup" feature within its legislation database allows searches for court cases that have considered specific statutory provisions.

[4] British Columbia "space" data came from the printed volumes of the *Revised Statutes of British Columbia* and historical tables associated with the printed annual statute books. The "time" data came from the historical database of Acts maintained by our Registrar of Regulations. The Registrar, Gail Nash, has been with the British Columbia Office of Legislative Counsel for over 30 years, has annotated our statutes for amendments through that time and, with the advent of computers in the office, early on identified the usefulness of a database for our legislation.

Canadian "space" data came from the printed volumes of the Revised Statutes of Canada and historical tables from the printed annual statute books.

For Australian "time" data, I relied on the Australia's www.ComLaw.gov.au (ComLaw) website maintained by the Australian Government Attorney-General's Department, and particularly on its Chronological Table of Acts. This Table lists all Acts by year. As the table states, "Short titles of Acts that were repealed, inoperative or had lapsed are printed in italics." For Acts passed in 1973 or later, I was able to check the Table against ComLaw's full text of Acts by year of enactment. For earlier legislation, I relied on the italics. It appears from the Chronological Table of Acts that Australia has been far more active than British Columbia in changing the names of Acts by amendment, where in British Columbia this is generally a matter for statute revision. I am most grateful that the Table provided this backward naming information.

[5] J. Erasmus, Statute Revision in British Columbia – Recent developments from a jurisdiction with a long history of statute revision. The Loophole, October 2007, pp. 50-65.

[6] The powers for conducting a revision of Canadian statutes are found in section 6 of the *Statute Revision Act*, R.S.C. 1985, c. S-20, including, for example, section 6 (e), which provides authority to "make such alterations in the language of the statutes as may be required to preserve a uniform mode of expression, without changing the substance of any enactment." The powers for conducting a revision of British Columbia statutes is found in section 2 of the *Statute Revision Act*, R.S.B.C 1996, c. 440, which includes authority to "alter language and punctuation to achieve a clear, consistent and gender neutral style".

[7] Twelve Acts of Canada, varying in 1952 length from 1.2 pages to 15.2 pages, provided adjustment factors that:

1 page RSC 1970 = 0.88 page RSC 1952,
1 page RSC 1970 = 1.05 page RSC 1985.

[8] For the 1996 to 1979 adjustment, 13 British Columbia Acts, varying in 1979 length from 3.8 pages to 44 pages, provided the adjustment factor that:
1 page (RSBC 1996) = 0.82 page (RSBC 1979).

For the 1960 to 1979 and the 1948 to 1979 adjustments, 15 British Columbia Acts, varying in 1979 length from 1 to 46 pages, provided the adjustment factors that:
1 page (RSBC 1960) = 0.87 page (RSBC 1979)
1 page (RSBC 1948) = 0.79 page (RSBC 1979)

For the 1936 to 1979 adjustment, 8 British Columbia Acts, varying in 1979 length from 1 to 46 pages, provided the adjustment factor that:
1 page (RSBC 1936) = 0.75 page (RSBC 1979)

The 1936 factor was applied to the earlier statute revisions as having similar format.

The following is the resulting data for British Columbia statute revisions:

Revised Statutes of British Columbia: page length adjusted to 1979

Year	Actual Pages	Adjustment Factor	Adjusted Pages
1877	815	0.75	614
1888	989	0.75	745
1897	2213	0.75	1667
1911	3197	0.75	2408
1924	4106	0.75	3093
1936	4635	0.75	3491
1948	5391	0.79	4261
1960	5193	0.87	4515
1979	4800		4800
1996	10000	0.82	8200

[9] The calculation for growth in the Canadian statute book between 1886 and 1985 comes more precisely to the 1985 statute book being 5.4 times the size of its ancestor

13788 ÷ 2550 = 5.4.

[10] The percentage increases as shown in Figure 2:

Revised Statutes of Canada: percentage change over time

Year	Adjusted Pages	% increase from previous revision
1886	2550	-
1906	3338	30.9
1927	4884	46.3
1952	6797	39.2
1970	9497	39.7
1985	13788	45.2

[11] The calculation for growth in the British Columbia statute book between 1897 and 1996 comes more precisely to the 1996 statute book being 3.7 times the size of its ancestor:

8200 ÷ 1667 = 4.9.

[12] The percentage increases as shown in Figure 4:

Revised Statutes of British Columbia: percentage change over time

Year	Pages (adjusted)	% increase from previous revision
1877	815	-
1888	989	21.3
1897	2213	123.8
1911	3197	44.5
1924	4106	28.4
1936	4635	12.9
1948	5391	22.3
1960	5193	6.0
1979	4800	6.3
1996	8200	70.8

[13] The official recognition of electronic consolidations has been given in a number of Canadian jurisdictions.

The Province of New Brunswick, Canada, has had official status for its electronic statutes since 2005, with a new *Queen's Printer Act*, S.N.B. 2005, c. Q-3.5, establishing that "publish means to make public by or through any media" and supporting amendments to the *Evidence Act,* R.S.N.B. 1973, c. E-11, section 62, allowing prima facie evidence of a statute to be given in court by production of "what purports to be a copy of [the statute], purporting to be published or printed by or by the authority of … the Queen's Printer for … the province."

The Province of Ontario gave official recognition of copies of statutes downloaded from its e-Laws website (<http://www.e-laws.gov.on.ca/>) on November 30, 2008 under Ontario Regulation 413/08 as authorized by section 41 (1) (b) of the *Legislation Act, 2006*, S.O. 2006, c. 21, Sch. F.

And, most recently, official recognition of federal legislation in Canada was given by section 31 of the *Legislation Revision and Consolidation Act*, RSC 1985, c. S-20, which came into force on June 1, 2009.

[14] Current information on this initiative can be found on the British Columbia Government website at: http://www.regulatoryreform.gov.bc.ca/.

[15] For Australia, the years without surviving legislation are:

1906	1912	1925	1931	1943	1950	1962
	1916		1934			
	1917		1935			
			1937			
			1938			
			1939			

[16] For British Columbia, the years without surviving legislation are:

1872	1881	1896	1900	1912	1926	1931	1941	1952	1960
1875	1882		1900	1914	1928	1932	1942		1961
1878	1883		1903	1915		1935	1943		1963
	1884		1906	1916		1938	1944		
	1885		1907						
	1887		1908						
			1909						

[17] Indeed, I have been able to write about the use of revision to accomplish plain language changes that would otherwise have required statutory amendment:

J. Erasmus, "Cleaning up our Acts: British Columbia Statute Revision" provides an opportunity to make some plain language changes, *Clarity*, December 1996.

J. Erasmus, "The B.C. statute revision experience: tax law rewrite on a shoestring", *The Loophole*, June 1999.

[18] See Colin Wilson's paper cited above in Endnote 2, and Bilika H. Simamba, "Managing Increasing Government Expectations With Respect To Legislation While Maintaining Quality: An Assessment Of Developing Jurisdictions", *The Loophole*, January 2009.

Legislative drafting: a judicial perspective

Hon. Mr Justice Bokhary PJ[1]

Abstract:

Drafting should neither create complication nor sacrifice certainty in the pursuit of simplicity. Statutes are meant to be workable. Courts strive to give legislation a workable construction. Drafting is especially difficult when the legislative "will" is an uncomfortable amalgam of conflicting wishes. Then the courts' best course may be to hold an even balance by following the language of the statute as closely as possible. In a plain case of drafting error the courts' interpretative role includes adding, omitting and substituting words to preserve the statute's obvious purpose. If the intention is to cast a wide net, care must be taken to employ sufficiently wide language. Some subjects call for considerable statutory detail. Others are well served by statements of intention. Everyone must guard against attempts to employ legislation by reference to subvert democracy by making it difficult for legislators to see what the promoters are doing and then for the public to see what has been done. Legislative counsel construct statutes to embody the legislature's purpose. Courts construe statutes purposively. They work towards the same objective.

Introduction

The earliest law-givers appear to have seen the law as unalterable and to have directed their efforts to making that law known rather than to creating new laws.[2] Eventually it came to be

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[1] Justice of the Court of Final Appeal, Hong Kong. This paper was presented at the CALC Conference in Hong Kong, 1-5 April 2009.

[2] FA Hayek, *Law, Legislation and Liberty,* Vol.1 (Revised 1982 ed.) at p. 81.

recognised that "the legislator is the law-maker who can overtly change the law [while] the interpreter is the law-maker … whose innovation is firmly restrained by the duty to explain his conclusions as consonant with existing legal authority".[3]

There was a time when judges regularly took part in the drafting of statutes, but that was centuries ago.[4] Today's judges are concerned with the product rather than the process of legislative drafting. Can we nevertheless offer something of use to legislative counsel in their work? Our best chance of doing so lies, I think, in providing them with a better understanding of how we do our own work. Any observations that we make on how they do their work should be made with a proper understanding of the difficulties that they face.

Constitutional cases

Where its constitutionality is challenged, legislation may be upheld, read down or struck down. More often, the judicial function is to apply legislation – after interpreting it where necessary. Constitutional rights and freedoms, the Court of Final Appeal has consistently declared, are to be interpreted generously so that people may enjoy them in full measure. Extra-judicially, I have added that constitutional cases should be decided "in a manner which is fully faithful both to the letter and to the spirit of the constitution, and which accords with the highest ideals of the people at their best".[5]

Ordinary Cases: Purposive Interpretation

Conformably with that constitutional approach, we interpret ordinary legislation purposively. In *Medical Council of Hong Kong v. Chow Siu Shek* we held that "it is necessary to read all of the relevant provisions together and in the context of the whole statute as a purposive unity in its appropriate legal and social setting [and] to identify the interpretative considerations involved and then, if they conflict, to weigh and balance them".[6]

Being the author of that expression "the whole statute as a purposive unity", I should disclose that I formulated it after and despite hearing the story of an eminent Queen's Counsel (later a Law Lord) opening a company appeal to the House of Lords by reading from the 1948 United Kingdom Act , starting at section 1. When he had read up to section 32 and was still going strong, he was asked from the chair whether he intended to read out the *entire* Act. "Yes" he said. "Why?" he was asked. Because, he explained, on the last occasion when he had appeared before their Lordships, he relied on a single subsection of the same Act, but his argument was rejected on the basis that the subsection had to be read in the context of the Act as a whole. He was promptly told that he did not have to read out any more of the Act.

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3 Peter Birks and Grant McLeod, *Justinian's Institutes* (1987) at p. 11.

4 Julius Stone, *Legal System and Lawyers' Reasonings* (1964) at pp 237n and 349.

5 *Making Law in the Courts* (2002) 10 APLR 155 at p. 160.

6 (2000) 3 HKCFAR 144 at p.154B-C.

Where an argument is rejected because it fails to approach a statute as a purposive unity, it should not be difficult to indicate precisely why it so fails. The Court of Final Appeal once did so in a single sentence when we said, in regard to the *Inland Revenue Ordinance*, Cap.112, that the taxpayer's argument "focuses on the operation of sections 15, 20B and 21A to the point of losing sight of section 60's proper role as preserved by the proviso to section70."[7]

Every statute must, as Lord du Parcq observed in *Bombay Province v. Bombay Municipal Corp*, "be supposed to be 'for the public good', at least in intention".[8] And there is nothing new in the idea of purposive interpretation aimed at promoting underlying legislative policy. In *Stradling v. Morgan* the Barons of the Exchequer said that "the sages of the law … have ever been guided by the intent of the Legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and good discretion".[9] Context and object were stressed by Chief Justice Abbott in *R v. Hall*. Meaning is, he said, "to be found not so much in a strict etymological propriety of language, nor even in popular use, as in the subject or occasion, on which they are used, and the object that is intended to be obtained."[10] That statement was cited with approval by Lord Romilly MR when giving the advice of the Privy Council in *The "Lion"*.[11]

In the famous note which he added to his report of the decision of the Court of Common Pleas in *Eyston v. Studd*, Edmund Plowden wrote that "it is not the words of the law, but the internal sense of it that makes the law, [which] consists of two parts, *viz* of body and soul, the letter of the law is the body of the law, and the sense and reason of the law is the soul of the law".[12] Citing that in *Ho Choi Wan v. Hong Kong Housing Authority*, I ventured to observe that "[t]he imagery is of another age, but accords with the modern view of the law as a rational problem-solver [and also] with the concept of giving a statute the construction that best furthers its policy".[13] None of this is to ignore the words of the statute. The intention of the legislature is, as Lord Nicholls of Birkenhead explained in *R v. Environment Secretary, ex p Spath Holme Ltd*, "the intention which the court reasonably imputes to [the legislature] in respect of the language used".[14] Lord Chancellor Jowitt's 1946 statement in *Joyce v. DPP* about a 1351 statute – namely that "[i]t is not an extension of a penal law to apply its principle to circumstances unforeseen at the time of its

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7 *Lam Soon Trademark Ltd v. Commissioner of Inland Revenue* (2006) 9 HKCFAR 391 at p. 399E-F.

8 [1947] AC 58 at p. 63.

9 (2 Eliz. I) 1 Plowden 199 at p. 205.

10 (1882) 1 B & C 123 at p. 136.

11 (1869) LR 2 PC 525 at p. 530.

12 (1574) 2 Plowden 459 at p. 465.

13 (2005) 8 HKCFAR 628 at p. 652B-C.

14 [2001] 2 AC 349 at p. 396G.

enactment, so long as the case is fairly brought within its language"[15] – shows that statutes are construed as always speaking, purposively and with due regard to their wording.

Something more readable

Lord Justice Mackinnon called the *Bills of Exchange Act, 1882* "the best drafted Act of Parliament ever passed".[16] Other contenders include the *Partnership Act, 1890*, the *Sale of Goods Act, 1893* and the *Marine Insurance Act, 1906*. Of these four statutes, the credit goes principally to Sir Frederick Pollock for the one on partnership and to Sir Mackenzie Chalmers for the other three. Each of those four statutes addresses a subject on which the persons most likely to be involved tend to be knowledgeable themselves and moreover to have ready access to legal advice.

On other subjects – such as one's job, to take a single example –people naturally like to be able to discover their legal position by reading the relevant statute for themselves. But in Hong Kong – and I suspect in a number of other places, too – the statute on employment is hard even for lawyers, let alone laymen, to follow. Some of these difficulties flow from the nature of the subject, but others are due to drafting style. In *Knill v. Towse*[17] the question was whether a person was entitled to vote in two electoral divisions at the same election. Giving the judgment of the Divisional Court of the Queen's Bench Division, Mr Justice Mathew stressed how important it was that "in practical matters of every day concern, such as the possession and exercise of the franchise … the law conferring it, and the rules which govern its exercise, should be easily comprehensible by the mass of the ordinary voters".[18]

None of that is to deny that the law has, to some extent, a vocabulary of its own. Some expressions are so deeply embedded in the cases that it may be preferable to adhere to them even though better expressions could be found if one were starting with a clean slate. Sitting in the High Court of Admiralty, Sir William Scott (later Lord Stowell) said that the expression "particular average" was "not a very accurate expression" for what it meant was "no average at all, but still the expression [was] sufficiently understood, and received into familiar use".[19] Legal terms of art have their place.

As simple as possible but no simpler

I think that it has been said – and it is certainly worth saying – that everything should be made as simple as possible but no simpler. Drafting is of course open to legitimate criticism if it creates complication. But it is always necessary to bear in mind the point made in the Renton Report that

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15 [1946] AC 347 at p. 366.

16 *Bank Polski v. K J Mulder & Co*. [1942] 1 KB 497 at p. 500.

17 (1889) 24 QBD 186.

18 Ibid. at p. 196.

19 *The "Copenhagen"* (1779) 1 Ch Rob 289 at p. 293.

"the draftsman must never be forced to sacrifice certainty for simplicity, since the result may be to frustrate the legislative intention".[20]

Where the substance of a statutory scheme is highly complex, it is difficult to see how the scheme can be expressed fully and accurately in a simple form. Hong Kong's tax regime being relatively simple, the Inland Revenue Ordinance is for the most part expressed in terms of corresponding simplicity. Tax avoidance is dealt with by a general anti-avoidance rule rather than a host of targeted anti-avoidance rules. A more complicated tax regime would naturally call for more elaborate provisions. Since persons are to be taxed by the legislature and not the courts, it is of constitutional importance that the legislature makes it clear what taxes it is imposing. None of this is to forget Jacqueline Dyson's valuable observation that "[q]uite apart from any simplification of the language used by the legislators, general principles drafting could be used so that the courts could go further than they have in adopting a purposive method of construing Finance Acts".[21] Mind you, I would not blame legislative counsel if they are not wholly convinced that ministers would always stand up for general principles drafting when quizzed by legislators on the implications of the proposed statute. And what about the judges? I can say at least that, as has been explained by Sir Anthony Mason, we ought to appreciate that general principles drafting may call for greater breadth of vision on our part and certainly increases the importance of our having an informed understanding of the relevant legislative scheme and the ways in which it can operate.[22]

Deeming

Statutory deeming is common, and is resorted to for a variety of purposes, the primary purpose being, as Viscount Simonds said in *Barclays Bank Ltd v. Inland Revenue Commissioners*, "to bring in something which would otherwise be excluded".[23] Sir Robert Megarry[24] has drawn attention to this sentence which appeared, almost unchanged, in at least 16 National Insurance Acts in more than 25 years:

> "For the purposes of this Part of this Schedule a person 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."

Wording of that type is almost traditionally cited for the purpose of raising a laugh against legislative counsel. But to be fair, the sentence's longevity suggests that it played its part in enabling those who administered the National Insurance scheme to carry out Parliament's intention. And I have a feeling that it would take very many more words to express the same idea

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20 Cmnd 6053, para. 11.5 (UK).

21 *Legislation and the Courts* (ed. M Freeman) (1997) at pp. 58-59

22 *The Mason Papers* (ed. Geoffrey Lindell) (2007) at p. 54.

23 [1961] AC 509 at p. 523.

24 *A New Miscellany-at-Law* (2005) at p. 192.

in a more readable form. That said, it is necessary to remember that "it is always difficult to foresee all the possible consequences of the artificial state of affairs that the deeming brings into being".[25] Since a thing may be deemed for all or only some purposes and as between all or only some persons, it would help the courts if legislative counsel always made the position express rather than leave it to implication.

Origin of Interpretation Clauses

Next, I venture to offer some observations on interpretation clauses. Such clauses do not appear to be of any antiquity. In 1852, Lord St Leonards LC said that they were of "modern origin".[26] By 1865, Chief Justice Cockburn had lost patience with interpretation clauses. He voiced the hope that "the time will come when we shall see no more of interpretation clauses, for they generally lead to confusion".[27] In 1885 Lord Blackburn referred to "the soundness of the objection of the old school of draftsman to the introduction of interpretation clauses".[28] Even in recent times, it has been said that when statutes provide definitions, that "often creates more problems than it solves"[29] and that the "definitions themselves are often not clear and may be subject to interpretation".[30] On the other hand, it is pointed out in a leading text (one of the editors of which had been First Parliamentary Counsel) that interpretation clauses "are responsible for a great deal of economy in drafting".[31] And—at least as importantly, I think—that provides a corresponding measure of economy in reading.

Noting that interpretation clauses now form an established and important feature of our statute law, the Court of Final Appeal has said that—

> "no useful purpose would be served by viewing interpretation clauses with hostility or suspicion. The proper approach is to read them purposefully and with the context very much in mind."[32]

Unless the context otherwise requires

Whether of the "means" or "includes" type, the definitions given in interpretation clauses are generally if not invariably qualified by the formula "unless the context otherwise requires" or some such formula. A point has been made about that by Sir William Dale in this imaginary conversation:

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25 *Murphy v. Ingram* [1973] Ch 434 at p. 446.

26 *Dean of Ely v. Bliss* (1852) 2 De GM & G 459 at p. 471.

27 *Wakefield Local Board of Health v. West Riding & Grimsby Railway Co*. (1865) 6 B & S 794 at p. 801.

28 *Mayor of Portsmouth v. Smith* (1885) 10 App Cas 364 at p. 374.

29 Lord Reid in *Brutus v. Cozens* [1973] AC 854 at p. 861H.

30 *Sutherland Statutory Construction,* 5th ed. (1992), vol.2A, at p. 152, para. 47.07.

31 Cross on *Statutory Interpretation*, 3rd ed. (1995) at p. 120.

32 *Lisbeth Enterprises Ltd v. Mandy Luk* (2006) 9 HKCFAR 131 at p. 139G-H.

> "*Solicitor*: I am not an expert in copyright law, you know. But let us see what the Act says. You've explained your objection to 'In this Act "copyright" … means …' Now read on.
>
> *Author*: 'means the exclusive right …'
>
> *Solicitor*: You've left something out, 'except where the context otherwise requires'.
>
> *Author*: That is to say, copyright means what the Act says it does, except where it means something different?
>
> *Solicitor*: More or less – it's a favourite formula. One has to wait and see whether in any passage the general drift indicates something different.
>
> *Author*: I do not call that helpful. The seed of uncertainty is sown at the outset." [33]

Such a reaction, while understandable, is hardly the last word on the subject. Speaking from experience, a legislative counsel has pointed out that "having stipulated a meaning for a word it is extraordinarily, almost uncannily, difficult to use it only in that sense".[34] And it is in any event a canon of statutory construction that definitions are to be read subject to anything that is, as Lord Selborne once put it, "repugnant in the context, or in the sense".[35]

Purposive interpretation in context involves guarding against the tendency which Lord Radcliffe identified when he observed that—

> "[i]n our history of judgment-making too many decisions have begun by insisting that particular words have one particular meaning and then deducing that, if they have, certain consequences must necessarily follow."[36]

There are two statements which I would cite to illustrate how context controls meaning. One involves a statute. It is Lord Justice Salmon's statement in *Harrington v. Croydon Corp* that the words "reasonable expense" in section 27(2)(a) of the *Housing Act 1964* "must mean reasonable to those called upon to bear it."[37] The other statement involves a grant of land. It is Lord FitzGerald's statement in *Lord Advocate v. Young* that "[b]y possession is meant possession of that character of which the thing is capable".[38]

No matter how obscure

Common law courts have no tablets on which they may inscribe *non liquet* (it is not clear). No matter how obscure the words of a statute are, a common law court is, at least in general, duty-bound to arrive at a determination as to their legal meaning. As is only too well-known, Viscount Simonds complained in *St Aubyn v. Attorney General* that the provisions concerned were

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[33] *Legislative Drafting: A New Approach (1977)* at p. 7.

[34] G C Thornton, *Legislative Drafting*, 4th ed. (1996) at p. 154.

[35] *Meux v. Jacobs* (1875) LR 7 HL 481 at p. 493.

[36] "Not in Feather Beds", *Law and Order* (1968) at pp. 214-215.

[37] [1968] 1 QB 857 at p.869F.

[38] (1887) 12 App Cas 544 at p. 556.

"couched in language so tortuous and obscure that [he was] tempted to reject them as meaningless".[39] Of course he resisted the temptation. Even the difficulties are far less than those in that case, they can still be quite considerable – perhaps of the type described by Janet O' Sullivan in her case commentary on the decision of the House of Lords in the limitation case of *Haward v. Fawcett*[40]. She noted, without exaggeration, that "the words of the statute may require some bending when dealing with cases of professional advice".[41]

Statutes are, as Lord Dunedin once observed, "designed to be workable".[42] If, as can sometimes happen in an imperfect world, the drafting leaves something to be desired, the slack must be taken up by interpretation. According to Lord Eldon—

> "There was an Act for rebuilding Chelmsford Gaol: by one Enactment the New Gaol was to be built by the Materials of the Old Gaol: by another the Prisoners were to be kept in the Old Gaol till the New Gaol was finished."[43]

Those involved in the rebuilding project would have had to make workable sense of the Act. I do not know the circumstances, but perhaps the Act might be taken to mean this. So much of the Old Gaol as could be spared without rendering it unfit to house prisoners should be used, together with new materials, to build the New Gaol up to the stage when it becomes fit to house prisoners. The Old Gaol should then be completely demolished. And its remaining materials should be used on so much of the New Gaol as remains to be built.

Some approach such as that is, I think, not only called for by the principle that statutes are meant to be workable. It is also, I think, supported by what Baron Pollock described in *Mavro v. Ocean Marine Insurance Co*. as "the well-known canon that requires a meaning to be given to every part of an instrument, if possible".[44] That applies with at least as much force to a statute as to a contract.

A legislative counsel's lot …

All legislative counsel enjoy the satisfaction of doing important work. Some win undying fame: as Lord Thring did when, between 10 am and 6 pm on a Friday, he produced the Bill which was printed by Saturday morning and went on to become the *Representation of the People Act, 1867*.

But a legislative counsel's lot is sometimes not a happy one. His task would of course be far simpler if people who consult statutes always do so with a view to understanding them. Unfortunately, it is necessary to draft statutes with it in mind that people sometimes find it convenient to put forward what they know to be a misunderstanding of them. This regrettable

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39 [1952] AC 15 at p. 30.

40 [2006] 1 WLR 682.

41 PRFN 2006, 22(2) 127 at p. 130.

42 *Whitney v. Inland Revenue Commissioners* [1926] AC 37 at p. 52.

43 *Lord Eldon's Anecdote Book* (Eds: ALJ Lincoln and RL McEwen) (1960) at pp. 76-77.

44 (1875) LR 10 CP 414 at p. 419.

fact of life has been pointed out by a judge with legislative drafting experience. Thus in the extradition case of In *Re Castioni*, Mr Justice Stephen said that he had often drafted Acts which

> "although they may be easy to understand, people continually try to misunderstand, and in which therefore it is not enough to attain to a degree of precision which a person reading in good faith can understand; but it is necessary to attain if possible to a degree of precision which a person reading in bad faith cannot misunderstand."[45]

Sir James Stephen has been quoted as saying that—

> "every now and then Parliament arrives at a conclusion which is designedly left in obscurity, and if you send that to your draftsman, and the draftsman says, does this mean A. or does this mean B., it is rather uncomfortable for Parliament to say some of us wanted A. and some of us wanted B.; and we should like it to be capable of interpretation in either way. That is the truth with regard to a great many Acts of Parliament, but it is one of those kind of truths which you cannot tell bluntly and in plain language."[46]

I leave it to others to say what Ludwig Wittgenstein (1889-1951) meant by his statement in the *Tractatus Logico-Philosophicus* that "[w]herof we cannot speak, thereof we must be silent".[47] At any rate, Sir James has spoken plainly enough. How might the courts deal with such a situation? In the voting qualification case of *Cull v. Austin*, Mr Justice Brett (later Lord Esher) said that the statute

> "must have been discussed and settled in almost every clause by persons having different views of the most earnest kind; and that the best way for the Court to hold a strictly even balance is, to follow as nearly as possible the words used in each clause of every section of the Act."[48]

The politics behind legislation sometimes involves considerable compromise. For example, Attorney General (later Lord Chief Justice) Hewart once said at the second reading of a liquor licensing Bill that the Bill represented a sincere and honest effort to express what was ascertained to be the highest common measure of agreement.[49] Presumably the drafter knew that. In his autobiography, Lord Wheatley speaks of daily discussions with parliamentary counsel on current and prospective Bills when Lord Advocate.[50]

Obvious blunders

What can a court do in a plain case of drafting error? The House of Lords held that in such a case the interpretative role of the court includes the power of adding words to, omitting words from or

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45 [1891] 1 QB 149 at p. 167.

46 Sir Alison Russell, *Legislative Drafting and Forms*, 4th ed. (1938) p.23n.

47 Seventh section.

48 (1872) LR 7CP 227 at p.235.

49 R Jackson, *The Chief* (1959) p. 115.

50 One Man's Judgment (1987) p. 126.

substituting words in a statute so as to preserve the obvious purpose of the statute.[51] When the question came before us, we followed that. I said that—

> "[o]ne course is to permit an obvious drafting mistake to undo the intention obviously to be attributed to the Legislature. The other one is to grasp the nettle of recognising the draftsman's obvious blunder for what it is and treating the product of such blunder as otiose thus preserving such intention. In my judgment, our proper course in this day and age of purposive interpretation is undoubtedly the latter one."[52]

The court steps in to the legislative counsel's aid to correct human error.

Insufficiently wide language

Sometimes the problem is the use of insufficiently wide language. It occurred in section 154(1) of the *Public Health Act, 1936*, by which rag and bone men were prohibited from delivering "any article whatsoever" to any person under the age of 14. In *Daly v. Cannon*[53] a boy under that age took some rags to a rag and bone man and received in return a goldfish. Charged under section 154(1), the rag and bone man was acquitted by the justices, who held that a goldfish is not an "article" within the meaning of the subsection. Agreeing with that, the Divisional Court dismissed the prosecutor's appeal. Lord Goddard CJ observed (i) that rag and bone men, realising that a bowl would be an "article", insisted that boys bring their own containers and (ii) that if the Act had said "article or thing", a goldfish would be covered by the word "thing". My comment is that given how astute people can be in getting round the wording of a statute, care must be taken to employ sufficiently wide language if the intention is to cast a wide net.

As he always did inimitably well, Sir James Comyn made a serious point with humour when he offered his *Bad Goods Act 1994* which – having criminalised the "sale, giving or otherwise parting to another of bad goods" – defined "goods" to mean "anything" and "bad" to mean "not good".[54]

The point of using sufficiently wide language is also illustrated by a recent decision of ours.[55] By section 41(3) of the *Buildings Ordinance*, building works "not involving the structure of any building" are exempted from the requirement of the Building Authority's approval for the carrying out of building works. The Court of Appeal had held that "involving the structure" of a building is to be equated with holding the building up. That view was rejected on appeal to us. As to purpose, we construed the exception narrowly in a manner consistent with the public safety

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51 *Inco Europe Ltd v. First Choice Distribution [*2000] 1 WLR 586.

52 *Chan Pun Chung v. HKSAR* (2000) 3 HKCFAR 392 at p. 398A-B.

53 [1954] 1 WLR 261.

54 *Leave to Appeal* (1994) at p. 59.

55 *Mariner International Hotels Ltd v. Atlas Ltd* (2007) 10 HKCFAR 1.

statutory scheme of which it forms a part. And as to language, we said that the word "involving" is one of the broadest words of association known to the English language. [56]

A new legislative drafting style?

Should statutes, or at least certain types of statute, be drafted in a new style: expressing aims and purposes and leaving it to the judges to fill in any gaps in the details? Lord Denning favoured such a move;[57] Lord Evershed proposed "a recession from … extreme elaboration";[58] and Lord Radcliffe went so far as to say that "[s]tatutes should be ideas of law, not law itself".[59] Even under the present drafting style, some statutes include a statement of general principle – sometimes called a "purpose clause" – meant to provide the context in which the detailed provisions of the statute are to be read. Indeed the inclusion of statements of intention has been traced to the use of preambles.[60] But such inclusion is by no means free from controversy. It is said in a leading text edited by a parliamentary counsel (Daniel Greenberg whose presence graces the distinguished gathering which the conference organisers have has assembled and to which this paper is respectfully presented) that opinions are sharply divided as to whether such clauses do, or may do, more harm than good.[61]

In Hong Kong, it has been clearly understood since 1972 (when the Court of Appeal's predecessor the Full Court decided *Elson-Vernon Knitters Ltd v. Sino-Indo-American Spinners Ltd*[62]) that the Objects and Reasons (nowadays called the Explanatory Memorandum) annexed to a Bill may be looked at for the purpose of ascertaining the mischief which the proposed legislation was intended to remedy. Such memoranda can play a useful role, and the *Elson-Vernon* case has twice been applied by the Court of Final Appeal twice (in *Director of Lands v. Yin Shuen Enterprises Ltd*[63] and *Secretary for Transport v. Delight World Ltd*[64]). But if the mischief to be remedied is worth stating, I consider it preferable that it be stated in the Bill itself, so as to become part of any resultant statute.

There is, as Serjeant AM Sullivan observed, a modicum of truth in the old saying "Show me the judge and I'll tell you the law" [65]. And Mr Justice William Brennan has pointed out that even in constitutional guarantees, judges like sufficient detail to avoid adjudication by personal

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56 Ibid. at p. 26F.

57 *The Discipline of Law* (1979), Ch.2.

58 *Essays on Jurisprudence from the Columbia Law Review* (Second printing 1964) at p. 97.

59 *Not in Feather Beds: The Lawyer and his Times* (1968) at p. 272

60 DC Pearce and R Geddes, *Statutory Interpretation in Australia*, 6th ed. (2006) at p. 154.

61 *Craies on Legislation*, 9th ed. (2008) at p. 352.

62 [1972] HKLR 468 at pp. 474-476.

63 (2003) 6 HKCFAR 1 at p.15B.

64 (2006) 9 HKCFAR 720 at pp. 730J-731B.

65 *The Last Serjeant* (1952) p.112.

predilection.[66] This is not to suggest that judges would often differ if left to say what is ultimately just. And the cases most likely to dismay the public are those in which the letter of the law appears to have been pursued to the point of injustice.

Both in the selection of a legislative drafting style and in the interpretation of legislation however drafted, due regard must be had both to wording and to ascertainable purpose. As Judge Learned Hand said, "the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing [but it must be remembered] that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning"[67].

A Canadian jurist has given it as his perception that precision is all-important in the English legislative style while concision is all-important in the French legislative style.[68] If it comes to choosing between different drafting styles or techniques, is the choice to be made across the board or more selectively?

Some subjects call for considerable statutory detail and do not readily lend themselves to statements of legislative intention. Others call for less detail and would be very well served by such statements. A prime example of a statute that avoids detail and depends on a statement of intention is the *Protection of the Harbour Ordinance*, Cap.531. Resulting from a private member's Bill, this Ordinance consists of only four sections. Its intention and effect is contained in a single section, namely section 3, which reads:

> "(1) The harbour is to be protected and preserved as a special public asset and a natural heritage of Hong Kong people, and for that purpose there shall be a presumption against reclamation in the harbour.
>
> (2) All public officers and public bodies shall have regard to the principle stated in subsection (1) for guidance in the exercise of any powers vested in them."

At the opposite extreme are the criminal statutes of traditional China. Professors D Bodde and C Morris say that those statutes always endeavoured to foresee all the possible variations of any given offence and lay down a specific penalty for each such variation, so that the court was – at least in theory – left with no discretion in sentencing.[69] But the reality, as we shall see, was not quite so inflexible.

Whether at one extreme or the other, a statute may require interpretation before application. Even the *Protection of the Harbour Ordinance* did. We interpreted it before applying it in *Town Planning Board v. Society for the Protection of the Harbour Ltd*. By a judgment of the Chief Justice for the Court, we ascribed to it a "strong and vigorous statutory principle of protection and

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66 *Human Rights and Constitutional Law* (ed. James O'Reilly) (1992) at p. 118.

67 *Cabell v. Markham* 148 F 2d 737 (1945) at p. 739.

68 Louis-Philippe Pigeon, *Drafting and Interpreting Legislation* (1988) at pp. 7-8.

69 *Law in Imperial China* (1967) at p. 496.

preservation" to be implemented by interpreting the presumption against reclamation in such a way that "it can only be rebutted by establishing an overriding need for reclamation".[70] The concept of such overriding need comes from statutory interpretation. And it is key to application. The fact that no agency was created to police and pursue harbour protection leaves the Ordinance less effective than it would otherwise have been. But that is a question of policy and what it was possible for the promoters to achieve. The omission is certainly not a drafting matter.

As to the traditional Chinese criminal statutes, what Professors Bodde and Morris[71] tell us about their interpretation comes to this. If a literal interpretation of a statute carrying a drastic penalty would include some less serious wrongs, that statute would be interpreted to exclude those less serious wrongs, and a more lenient way of punishing them would be found. Equally, if a literal interpretation of a statute calling for mild punishment would include some more serious wrongs, that statute would be interpreted to exclude those more serious wrongs, and a more severe way of punishing them would be found.

Democracy and legislation by reference

Legislation by reference always has its drawbacks. Lord Justice Farwell described it as a "pernicious practice"[72]. But the technique is, I think, sometimes acceptable. What must be constantly guarded against with the utmost vigilance is the misuse of this drafting style to subvert democracy. Lord Justice Mackinnon has told of[73] an explanation which he once received as to why legislation by reference had been resorted to and a recommendation for a comprehensive new Act had been rejected. He was told that a Bill so drafted would be intelligible to any Member of Parliament of the meanest parts, who could debate every section of it, and move endless amendment.

Unfortunately, that instance does not appear to be an isolated one. Sir Mackenzie Chalmers identified two reasons why ministers and departments liked legislation by reference.[74] First, the public could not understand such legislation, so that the department had a pretty free hand. Secondly, the Bill would be very difficult to amend in committee, because legislators would not be able to follow its inferential details. In my view, legislative counsel should never lend their talents to the attainment of such anti-democratic objectives. They have "in reality a great deal of power over what the statute says and achieves",[75] and they must not abuse that power. Reassuringly a parliamentary counsel has declared that "no drafter here would entertain a request to draft a provision in a way that obscured its effect".[76] Certainly the judiciary should never

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70 (2004) 7 HKCFAR 1 at p.17C-D.

71 Above n. 69 at p. 497.

72 *Chislett v. Macbeth & Co.* [1909] 2 KB 811 at p.815.

73 *The Statute Book* (1942) at p. 14.

74 Lord Brightman, *Drafting Quagmires* (2002) 23 Statute Law Review 1 at p. 2.

75 Francis Bennion, *Statutory Interpretation*, 5th ed. (2008) at p. 477.

76 J.R. Spencer, *The Drafting of Criminal Legislation* [2008] CLJ 585 at p. 597.

interpret statutes so as to give the executive any statutory powers that have not been obtained from the legislature by straightforward methods.

Conclusion

A due measure of certainty is a component of the rule of law. And this brings us to the proposition which I have never seen more clearly put than by Lord Nicholls of Birkenhead who wrote that "[l]anguage is an imperfect means of communication. So the law must find some way to ascribe to language when used as the source of legal right or obligation a certainty of meaning it inherently lacks."[77] To serve the law in that endeavour is the duty of those who draft and those who interpret.

In times past when statutes were enacted by the Crown on petitions by Parliament, drafting them was the work of the King's Council, and naturally, as Sir William Holdsworth wrote, the judges and others learned in the law had a principal share in such work.[78] In 1305 Chief Justice Hengham said to counsel, "do not gloss the statute; we know it better than you do, because we made it".[79] Those days are gone, but there remain characteristics which the common law process and legislative drafting share.

The ideas, policies and words of the past echo in the successive judgments by which the common law is developed. Statute law, too, often discloses incremental advancement. Thus in a case on the *Poor Law (Scotland) Act, 1934*, Lord Thankerton noted that the right to poor relief in Scotland was purely statutory, and was first conferred by a 16th century statute.[80] Lord Atkin detected an unmistakable "trend" in the legislation.[81] Drafted to facilitate updated "always speaking" interpretations, legislation, like the common law, is kept up to date by judicial decisions. Adjudication is on past events while legislation is generally directed only to the future. Even so, legislation is informed by the past. And adjudication not only attaches consequences to past events but also provides precedents for the future. Just as the clear formulation of principle is the hallmark of enduring cases, so it is that the statutes which have stood the test of time are those containing well-drafted statements of principle.[82] But ultimately it is in the nature of progress that propositions of law are but a phase in a continuous growth.[83] As the Federal Court of India said and the Privy Council agreed, the re-adjustment of rights and duties is an inevitable process, and one of the legislature's functions, where circumstances make such a step necessary,

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77 *My Kingdom for a Horse: The Meaning of Words* (2005) 121 LQR 577 at p. 577.

78 Holdsworth's *History of English Law* (1938), Vol. XI at p. 366.

79 YB 33-35 Ed I (RS) 83.

80 *Duncan v. Aberdeen County Council* [1936] 2 All ER 911 at p. 916.

81 Ibid. at p. 914.

82 *Legislation and the Courts* (ed. Michael Freeman) (1997) at pp. 8-9.

83 O W Holmes Jr, *The Common Law* (1881) (Dover edition 1991) at p. 37.

is to effect the re-adjustment with justice to all concerned.[84] Much the same thing can be said about what the courts do when they develop the common law.

Both endeavours aim for predictable justice according to law. Sometimes predictability alone may be the most that either can provide. Take the case where the interests of two innocent victims clash. Sir Frederick Pollock and Professor F W Maitland say that "no law can be made which will not seem unjust to the loser".[85] Would splitting the loss remove, halve, leave unaffected or double the sense of injustice? All that I would say is that any statutory or judge-made law governing such a split had better be clear or else even predictability would be lost.

Legislative drafting is as difficult as it is important. As Lord St Leonards famously observed, "nothing is so easy as to pull [statutes] to pieces, nothing is so difficult as to construct them properly".[86] Legislative counsel construct statutes for the purpose of embodying the legislature's intention. Judges construe statutes purposefully. Legislative drafting and statutory interpretation have the same objective. Both are vital to the rule of law. I would be very happy if I have managed to make some contribution to a better understanding between the exponents of each, and I am most grateful for this opportunity to make the attempt.

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84 *Thakur Jaganath Baksh Singh v. The United Provinces* [1946] AC 327 at p. 337.

85 Pollock and Maitland's *History of English Law*, 2nd ed. (1898), Vol.1at p. xxvii.

86 *O'Flaherty v. M'Dowell* (1857) HL Cases 142 at p. 179.

Scrutiny of legislative drafting by the Legislature: The role of the legal Advisers of the Hong Kong Legislative Council

Jimmy Ma[1]

Abstract:

The present legislature of Hong Kong is set up by the Basic Law in 1997 but retains the structure of its pre-1997 predecessor. This article gives an account of the Hong Kong legislative scrutiny process, and the role played by legal advisers of that legislature. The author highlights some unique features of the Hong Kong system and describes the hands-on experience of his team of legal advisers in operating in a bilingual context under the new constitutional regime established by the Basic Law.

Introduction

1. The last time I attended a CALC Conference was in 2005. To participants that I talked to at that conference, it seemed that the mechanism that Hong Kong had put in place to assist legislators to scrutinise legislation was rather unique. It appears to be little heard of that the drafter of a government Bill has to appear before the committee set up to study the Bill to explain and sometimes defend his or her drafting. What is more, the legal adviser to that committee also makes a routine appearance and is expected to comment on the drafting as well as on the legislative counsel's defence of his or her drafting. That is very much our way of doing things here. It works well and most importantly, it is generally accepted by our legislators.

2. There may well be other features that you may find unique in the following account of the scrutiny system in the Legislative Council (LegCo) of the Hong Kong Special Administrative Region and the part played by my team of legal advisers. In this paper, I propose to first set out the legislative process on Bills and subsidiary legislation in Hong Kong and the mechanism put in place to assist LegCo to perform its legislative role effectively. Next, I will discuss the general

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[1] Legal Adviser, Legislative Council of the Hong Kong Special Administrative Region. This paper was presented at the CALC Conference in Hong Kong, 1-5 April 2009.

approach adopted by my team of legal advisers in assisting legislators to scrutinise legislation. Last but not least, I will say a few words on the interaction between my team of legal advisers and legislative counsel of the Department of Justice. My focus will be on the operational and practical aspects of the work of my team in the scrutiny process.

The legislative process

3. The present LegCo is set up by the Basic Law, which came into effect on 1 July 1997 when Hong Kong became a Special Administrative Region of China. There are 60 LegCo Members, divided into two halves of 30 Members, representing respectively 5 geographical constituencies and 28 functional constituencies. This division is a significant feature of the legislative process which I will come to later.

4. There are two Articles of the Basic Law which I would mention at this point. Article 73 provides for the powers and functions of LegCo. These include the enactment, amendment or repeal of laws in accordance with the Basic Law and legal procedures. Article 75 empowers LegCo to make rules of procedure on its own, provided that they do not contravene the Basic Law.

5. For those who are not familiar with the legislative set up of Hong Kong in colonial times, the then LegCo did not actually enact laws. They were enacted by the Governor, with the advice and consent of LegCo. So LegCo became a legislature with real legislative power, although a regional one for that matter, only on 1 July 1997. It is a relatively youthful legislature, but the *Rules of Procedure* of the new LegCo have inherited and preserved many procedural rules from the pre-1997 era, including the three-reading procedure that Hong Kong has long been accustomed to.

6. I do not think I need to explain the three-reading procedure as I believe it should be familiar to you. However, an important feature is introduced by Annex II of the Basic Law and is reflected in the *Rules of Procedure*. That is the separate voting procedure. For the passage of Bills introduced by the government, a simple majority vote of Members present is required. But for the passage of motions, Bills or amendments to government Bills introduced by individual Members, a simple majority vote of Members present of each of the two groups is required, i.e. Members returned by functional constituencies and Members returned by geographical constituencies. So, as far as voting on a matter initiated by a Member is concerned, we have a unique procedure which has been described as a bicameral voting system.

7. Another feature which you may find interesting is the referral of a Bill to the House Committee after the motion for its second reading has been moved but before a full debate takes place. The referral gives the House Committee opportunity to consider whether to set up a Bills Committee. This arrangement enables Members to set up a Bills Committee to consider in depth the general merits and principles of the Bill before they are adopted by the Council through passing the second reading motion. And, as a consequence, proceedings at Bills Committee could become prolonged as debates over policy will very often involve consideration of much broader

issues than purely drafting or technical ones, and the engagement of the public over the merits or otherwise of the relevant policy becomes the norm.

8. To complete the picture, let me also mention briefly the making of subsidiary legislation. The procedure is stipulated in the *Interpretation and General Clauses Ordinance* (Cap. 1) and has remained largely intact since 1997. Depending on the enabling provision in the primary legislation, subsidiary legislation is either made under the negative vetting procedure of section 34 of Cap. 1 or under the positive vetting procedure of section 35. The difference is that under the former, the subsidiary legislation is made by the delegated authority, gazetted and then tabled in LegCo, which then has the opportunity to amend or repeal it within a fixed period of time, whereas the latter procedure requires that after the subsidiary legislation is made it has to be approved by resolution in LegCo for validation. This is similar to the affirmative or negative resolution in the United Kingdom Parliament.

Scrutiny mechanism

9. Scrutiny of legislation by LegCo, whether primary or subsidiary, is in effect carried out by committees set up for specific legislation. In the case of a Bill, as I have mentioned, it is as a rule referred to the House Committee after its second reading has been moved. The House Committee, consisting of all Members with the exception of the President, is responsible for house-keeping matters and will decide whether a Bills Committee needs to be set up to study the Bill in detail. If a Bills Committee is set up, it will meet to scrutinise the policy and drafting aspects of the Bill. After completing its work, it will make a report on the outcome of its deliberations to the House Committee and recommend that the Bill is ready for resumption of second reading debate.

10. The House Committee is also responsible for appointing, if necessary, a subcommittee to study a piece of subsidiary legislation that has been tabled for negative vetting or submitted for LegCo's approval. A subcommittee functions in the same way as a Bills Committee.

11. It has become an accepted practice that before introducing any Bill (other than the purely technical ones) the Administration consults the relevant policy panel of LegCo on the legislative proposals being considered for introduction. Usually, an outline of the proposals with only the essential details is provided. Only occasionally will a draft Bill be provided. There is a similar practice for the more important subsidiary legislation.

Role of the legal advisers in legislative scrutiny

12. As far as my team of legal advisers is concerned, scrutiny of a Bill starts as soon as the copy of the Bill is received by LegCo before it is formally introduced at first reading. A legal adviser is assigned to work on the Bill at the first opportunity and will oversee, from our perspective, the passage of the Bill through the entire legislative process. Our scrutiny of the Bill has to be undertaken as soon as practicable to enable the adviser to write up a report on the bill for the House Committee meeting next following the Bill's first reading. In the report, we are expected

to highlight for Members salient points about the Bill that they would be interested to know, whether the Bill concerns any significant policy or measure or is just technical in nature, the effectiveness of its provisions as drafted in achieving its avowed objectives and whether there are any underlying legal issues that need to be canvassed. The report also encapsulates any concerns that Members might have expressed when they were consulted earlier on the legislative proposals in the relevant policy panel. If we genuinely feel that a Bills Committee is called for, we will recommend one in our reports. The Members then make their own decisions on whether to form a Bills Committee, with or without any recommendation from us.

13. Even if no Bills Committee is set up, our work may still go on. We will continue to sort out the problems arising from our scrutiny, if any is still outstanding. Where necessary, a legal adviser will make a further report to Members to draw attention to any matter on which the adviser fails to get a satisfactory response from the Administration. It is then up to Members to decide whether a Bills Committee is necessary after all to follow up the matter raised by the legal adviser. Committee stage amendments are sometimes proposed by the Administration, whether as an afterthought or as a result of our queries. Members may also propose such amendments for one reason or another. These will also be scrutinised by the legal adviser in the usual way. A report may be made to Members on these amendments.

14. The role of the legal adviser becomes more prominent when a Bills Committee is formed. We attend all its meetings to offer assistance to Members, upon request and at any appropriate time with, of course, the permission of the Chairman. Our involvement in the deliberations of the committee varies, depending on the nature of the Bill. Generally, we offer our views on legal and drafting matters that arise during the deliberations. In particular, during the clause-by-clause examination of the Bill, the legal adviser is expected to provide a marked-up copy (a form of keeling schedule) of an amending Bill, showing the ordinance as proposed to be amended by the Bill to facilitate the examination. The on-the-spot legal support provided to a Bills Committee is of course complemented, very often, by correspondence with the Administration over any queries that the legal adviser may raise and wish to tackle outside of meetings to save Members' time, plus any written advice submitted upon the request of the committee or as needed.

15. At this point, I must be quick to correct the impression that our service is confined to Bills Committees. Whilst it is true that our priority is accorded to the Bills Committee, we do provide legal support to individual Members on all LegCo matters. For instance, Members may need a legal adviser to advise on particular matters arising from Bills that are of special interest to them or to assist them on particular Bill amendments they are considering to propose. Very often, a Member who wishes to propose an amendment will seek the support of the Bills Committee for a proposed amendment. If the Member succeeds in getting majority support, the proposed amendment may eventually be moved by the chairman of the Bills Committee on behalf of the committee. If this happens, the legal adviser to the committee will have to take on an additional role as drafter of the amendment.

16. If a Member finds it necessary to consider proposing an amendment or for that matter, the Bills Committee wishing to consider the same, very often the legal adviser will be called on to advise, or at least give a preliminary view on whether the proposed amendment could actually be admitted for debate under the LegCo's *Rules of Procedure*. The question usually revolves around whether the proposed amendment may have charging effect or is within the scope of the Bill. Under our *Rules of Procedure*, the President has to rule on whether a proposed Committee Stage amendment is admissible under the *Rules of Procedure* and there is a body of previous rulings which the President will give weight to in making his ruling. The scope rule is an important means by which Members' amendments may be made to stay within certain parameters.

17. It is an established practice that the President will invite the Member who wishes to propose the amendment and the Administration to each make representations on the question of admissibility if it is in issue. As Counsel to the Legislature, I would also be asked to advise. The point I wish to make here is that there is an aspect of our scrutiny in relation to giving that advice that is quite different from normal legislative scrutiny. I am sure different legislatures may have different practices but I doubt that this aspect of our work is wholly unique.

Approaches to Legislative Scrutiny

18. I have perhaps said enough about our role in legislative scrutiny. It would not be complete without saying something on the general approaches that we take in that work. From time to time, parliamentary counsel have written or spoken on principles of legislative scrutiny. Whatever the common law jurisdiction of their origin, or whether they were talking from their own perspective as parliamentary counsel or from that of the parliamentary committee which conducted the scrutiny, there is much that is universal in these principles and which I find familiar in my own experience. I would group the general principles or standards that my team follow in practice in their scrutiny of legislation into 3 heads, namely—

(a) whether the legislation reflects the declared policy objectives or intent of the Bill;

(b) whether it is effective in implementing such objectives or intent; and

(c) whether it would give rise to legal issues that need to be canvassed.

19. It is obvious that the first thing that has to be ascertained about a Bill is its policy objectives. It is not our job to pass judgment on the merit of the policy objectives of a Bill. However, it is essential that the policy objectives of the Bill can be made reasonably clear so that we can understand the provisions properly and assess their proper function in the Bill. We will raise a query if we find a provision that does not seem to relate to the objectives of the Bill as we understand them to be. Sometimes, the problem is rather that the objectives of the Bill are not made clear enough so that we have to seek elaboration from the Administration to help us understand how the provisions relate to them.

20. There is a good example of a Bill not reflecting fully its policy intent in the *Education (Miscellaneous Amendments) Bill 2003*. The Bill sought to repeal a provision in the principal Ordinance which requires the registration as a separate school of any evening school run by an

educational institution. The purpose was to remove duplication of work, speed up the processing of applications and create a more business-friendly environment. However, it transpired during the scrutiny of the Bill that it was the Administration's policy with regard to a private evening session of a school that received a subsidy from the Government that it should still be required to be registered as a separate school. We observed that the simple repeal of the provision would be against the latter policy. As a result, a committee stage amendment had to be made for rectification.

21. Only after ascertaining the policy objectives and satisfying ourselves that the provisions of the Bill do have a functional relationship with those objectives are we in a position to assess the effectiveness of the provisions or measures contained in the Bill to implement the policy objectives. We have to look at the nature of the measures that are provided for, for example, what duties are imposed, what powers are exercisable, whether and how non-compliance is sanctioned, what rights are reserved and what remedies are available. The legal and, as far as we can, the practical effect of these various measures, individually and as a whole, have to be analysed legally to see if such measures are excessive or ineffectual in relation to what they are designed to achieve. I expect my colleagues, who sometimes also receive specific requests from Members, to identify weaknesses as such in the Bill and to suggest ideas for improvements. However, we always caution ourselves to be circumspect in making these suggestions, which must be strictly on a professional and non-partisan basis.

22. When viewed against the policy intent, the effectiveness of some proposed measures could sometimes become quite questionable. The *Trade Descriptions (Amendment) Bill 2007* was meant to strengthen the protection of consumers against certain undesirable trade practices. One of the undesirable trade practices to be tackled was misleading price indication. The Bill proposed to prohibit the display, in the course of any trade or business, of signs that failed to give clear information as to the price of the goods set by reference to a weight unit. A query was raised on the effectiveness of the provision in the situation where the price of goods was set not by weight unit but by other units, such as a unit of quantity. In the end, the Administration agreed to widen the reference to weight unit to other units of measurement.

23. A legislative proposal may sometimes be over-inclusive in its effect. This is the case with the *Trade Descriptions (Provision of Information on Regulated Electronic Products) Order* made in 2008. The Order as tabled required any person who supplied any regulated electronic product in the course of trade or business at retail level to issue to a purchaser an invoice or receipt containing specified particulars at the time of supply. These particulars included a description of the relevant electronic product, its core features, availability or otherwise of after-sale services and information relating to such services if available. Failure to comply was made an offence. As drafted, there was no exemption to retailers running small second-hand stalls on the streets, although these stalls usually sold low price products and the stall owners might not have adequate knowledge to provide the prescribed information. The obvious compliance difficulties faced by them could undermine the effectiveness of the Order. The matter was raised and discussed during

the deliberations of the subcommittee formed to study the Order. An amendment was subsequently made to provide that the requirement would only apply to retailers whose trade or business is conducted on premises included in the valuation list under the *Rating Ordinance*. The effect is that retailers operating small stalls on the streets would be exempted.

24. Another aspect about the effectiveness of legislation concerns of course the drafting of the provisions. It is of fundamental importance that they must be effective in imparting their intended meaning with clarity and certainty. Actually, clarity and certainty within the context of the particular provision or the particular Ordinance may be affected by the style of drafting of legislation in general. So we do concern ourselves with any changes in style or arbitrariness in style that may have an impact on interpretation of the statutes. However, we realise there is a need to modernise the style of legislative drafting so that it uses plainer language and becomes easier to understand. This is a trend that we will certainly support.

25. There is an additional dimension to our scrutiny of the drafting aspects of legislation caused by the requirement that every Bill or piece of subsidiary legislation be bilingual. In addition to the usual issues of clarity and certainty, this gives rise to the problem of "matching", that is, to match the corresponding Chinese and English clauses as far as possible in form and structure as the vast differences in the two languages would allow.

26. Legislative counsel know better than us the importance of clarity and certainty in drafting legislation and what the standards are. Our practical concern as legal advisers is that the drafting would not create unnecessary interpretation difficulties. While each bilingual text should follow the same standards of clarity and certainty, the two texts, as between themselves, should not differ in meaning and effect. However, due to the wide differences between the Chinese and English languages in syntax, diction and context, this is not easily or always achievable. In 2001, the LegCo Panel on Administration of Justice and Legal Services discussed the drafting policy on bilingual legislation. There was a suggestion at the Panel meeting that both the Chinese and English texts should also match language-wise as far as possible.

27. Last but not least is the multitude of superior and related law, constitutional and legal principles and procedural law that we have to be constantly aware of as they may impinge in some way on certain provisions of a Bill. I will include under this head such matters as consistency with the Basic Law, impact on the constitutional role of and accountability to the legislature, effect on common law principles and other statutes, human rights considerations and procedural fairness.

28. It is the practice of the Administration to include in a LegCo Brief its views on the Basic Law and human rights implications with a statement to the effect that the legislation in question is compatible. My colleagues have to come to their own views independently on the compatibility as well as on the other implications. If any problem is perceived, sometimes with a fine-tooth comb as the problem may not be readily apparent and it may come in the form of an unintended side-effect, it will be reported to Members. Ultimately, it is up to Members to form their own

view about whether it is safe to enact the legislation as it is, with the understanding that the while the legislature may make laws, it is the judiciary which determines the legality of any of the laws made if ever it is challenged.

29. The Basic Law, in particular, presents unique problems of interpretation and application, not the least because it is a piece of national law made by the National People's Congress of the People's Republic of China under a system that is entirely different from that of Hong Kong. In addition, the jurisprudence on many of the rights protected by it has still to be built up. For instance, Article 6 stipulates that the "Hong Kong Special Administrative Region shall protect the right of private ownership of property in accordance with law". Article 105 further provides that the Region "shall, in accordance with law, protect the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property and their right to compensation for lawful deprivation of their property". Questions about whether legislative proposals were able to comply with those two articles have come up from time to time.

30. When the *Land Titles Bill* was introduced in 2002, an issue arose as to whether the proposed cap on indemnity in cases of fraud was consistent with those articles. Again, in the *Smoking (Public Health)(Amendment) Bill 2005*, compliance with the two articles was raised when it was proposed to ban the use of misleading descriptors, such as "mild" and "light" on cigarette packages. There was a view that the proposed amendment would cause deprivation of the tobacco brands which contained "mild" or "light" in their registered trade marks. In 2006, as a preventive measure against avian flu, the *Waste Disposal Ordinance (Amendment of Fourth Schedule) Notice 2006* and the *Public Health (Animals and Birds) (Licensing of Livestock Keeping) (Amendment) Regulation 2006* were made to ban backyard poultry keeping. Unsurprisingly, the issue of whether the ban violated Article 105 arose again. In each of these instances, we had to provide and present our views to Members. Whilst Members appreciate that very often on such issues, there can be no definitive legal advice, the analysis that we provide assists them to understand the issues better and to make their own judgments accordingly on a better informed basis.

Interaction with Hong Kong legislative counsel

31. By way of conclusion, I must mention the role played by the legislative counsel of the Hong Kong Department of Justice in our work. It is the experience of every member of my team that an important, if not the most important, facilitator of our work on legislative scrutiny is the legislative counsel of that Department who actually draft the Bills and assist the officials from the policy bureaux in ensuring that the Bills pass through the legislative process. This includes attending the meetings of the Bills Committees to answer queries on drafting matters and drafting any committee stage amendments. We find it necessary to establish contact with the legislative counsel at the first opportunity and to maintain contact throughout the passage of the Bill. When necessary, this takes the form of formal communication, but we find it always very fruitful to carry on a professional dialogue on an informal basis with the counsel concerned whereby we would exchange our views on particular drafting points or incidental legal issues.

32. Although the legislative counsel and the LegCo legal advisers have to serve different interests, experience has shown that there is enough common and neutral ground on which we can work together, particularly in the technical drafting aspects, and facilitate each other's work without compromising our respective positions. After all, irrespective of our different clients, I think we share a common goal and the mutual responsibility to improve the professional quality of the laws that are made.

Whose law is it? A jurilinguistic view from the trenches

Lise Poirier[1]

The only tool of the lawyer is words. We have no marvellous pills to prescribe for our patients. We have no Superconducting Supercollider to help us find the Higgs boson. Whether we are trying a case, writing a brief, drafting a contract, or negotiating with an adversary, words are the only things we have to work with.[2]

Charles Alan Wright

If legal concepts are the skeleton of the law, then words are the muscle.

Lise Poirier

Abstract:

This article is about the work of the jurilinguist as it applies to legislative drafting, hence the allusion to the trenches in the title. It explains what the relatively new field of jurilinguistics consists of and examines the role of the jurilinguist in the Canadian Federal Government. It focuses on the difficulties posed by bilingual legislative texts and the ways jurilinguists can help legislative counsel. It traces a brief history of the beginnings of jurilinguistics. It gives examples of points of contact between the two legal systems found in Canada (common law and civil law) and between its two official languages (English and French) and outlines the problems that arise from those points of contact and some possible solutions. This article also more generally examines the drafting of Canadian legislation from the point of view of the linguistic approach taken by jurilinguists.

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[1] Senior Jurilinguist, Legislative Services Branch, Department of Justice, Canada. This paper was presented at the CALC Conference in Hong Kong, 1-5 April 2009.

[2] Foreword, Brian A. Garner, *The Elements of Legal Style*, 1983

Introduction

A jurilinguist provides advice related to the terminology, syntax, phraseology, organisation of ideas and style that are appropriate to legal language and, specifically, to legislative language and to the subjects dealt with, and also, within the context of bilingual co-drafted Bills and regulations, comparison services to ensure equivalency of the English and French versions. So of course, words and language are central to the jurilinguist's work, hence the quotes above. The first part of this article will describe the context that brought about the creation of jurilinguistics. From there, we will touch on the work of legislative counsel and finally on how the jurilinguists assist them.

Canadian Legal Context

In Canada, at the federal level, the laws belong to two linguistic communities—English and French—which are the two official languages, and are a point of contact between these two communities and between the two systems of law that exist in Canada. In the province of Quebec, civil law applies and in the nine other provinces and three territories, common law. And at the federal level, legislative texts are harmonised with provincial and territorial law.[3]

Subsection 18(1) of the *Constitution Act, 1982*[4] requires that the statutes, records and journals of Parliament be printed and published in English and French and provides that both versions are equally authoritative. Also, the bilingual requirements of the *Official Languages Act*[5] spawned, in the 1970s, a very extensive translation industry, starting with the federal Translation Bureau. Translation units were created throughout the many departments and other public agencies. At that time, the Bills were translated into French by translators who were hard-pressed for time, given the Parliamentary schedule, and who had no contact with the legislative counsel concerned, which would have provided them with useful contextual information. It was felt, within the Justice Department, that co-drafting would give better results. So, in the late 1970s, teams of two legislative counsel, one French, one English, began co-drafting Bills, working together to produce a bilingual version.

Canadian linguistic context

Within the Canadian population of 32 million people, over 6 million consider themselves Francophone, with more than 5 million living in the province of Quebec.[6] As if that weren't enough, another 300 million English-speaking people live south of our border, in the United States. That's an ocean of English in which it can be very easy to drown.

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3 See Marc Cuerrier, "Drafting against a background of differing legal systems: Canadian Bijuralism" presented at the 2007 CALC Conference in Nairobi.

4 http://laws.justice.gc.ca/en/charter/CHART_E.pdf

5 http://laws.justice.gc.ca/en/O-3.01/

6 Statistics Canada, 2006 Census.

In everyday situations, that contact can give rise to misunderstandings and mistakes and, as a Francophone, it's sometimes easy to lose one's way in such an environment. It puts one in mind of the little boy who asked his English teacher if he could use a French word in his composition because he couldn't think of the English one. The French word? "*Carport*". We all have our "carport" moments. I was raised by Anglophones in a French environment. My mother once famously asked a salesclerk in French if the mailman was in the bag, using the word "*facteur*" instead of "*facture*" for "Bill". The salesclerk said "yes". We used to tease her about the way she mangled French, but she paid us back in kind for our mistakes in English. When we said, "I want to wash my hairs." (Using the plural as in French), she would ask: "How many do you have?" Those types of mistakes are called "Gallicisms", when a word is translated literally from French into English without taking into account idioms, usage, proper grammar and cultural references. The opposite is an Anglicism, for example in French "You're welcome" is "*De rien*", "*Je vous en prie*" or "*Il n'y a pas de quoi*", but in Québec, people say "*Bienvenue*". This makes French people from France smile as its only meaning is to welcome someone's arrival.

At other times, knowledge of the two languages can give you an edge, like a friend whose dentist asked her how her gustative papilla were doing, thinking to confuse her, but not realizing that in French, taste buds are called "*papilles gustatives*". So she answered "Fine, thank you".

Mistakes stemming from that contact can be found as well in legal language. Here are a few Anglicisms, where an English word is translated literally into French, without taking into account usage, grammar and cultural references that have crept into in legal texts:

- alternative
- appropriation
- convertible
- subsidiary

In an environment where English is omnipresent, it is so easy to get confused. The English say: "The cat looked at the queen." The French say: "The dog looked at the bishop." In English, you get up on the wrong side of the bed, in French on the wrong foot. Part of the problem is that the French and English languages are very close to each other. Both came into being in countries linked through history; indeed, French was once the language of English law which gives us "doublets" or legal pairs:

- breaking and entering
- fit and proper
- null and void

The two languages borrow from each other quite frequently. "Étiquette" (*estiquet*) became "ticket" in English and the French adopted it again with a different meaning.

In English law, the influence of French has been important, but is not felt today because it goes back many centuries. Words such as "lien", "contract", "justice", "judge", "mortgage" and "parole" were all French words originally.[7]

In English, as in French, words of the other language are used as euphemisms ("*ménage à trois*" sounds better than love triangle) or as a way to give a certain "*je-ne-sais-quoi*" to a text or a conversation. One of the most surprising things about television programs produced in France is the use of English words such as un "*mel*", un "*charter*", le "*chat*" and so on where there exist perfectly good French words: "*courriel*" (e-mail), "*affrètement*" (charter) and "*clavardage*" (chat). In Canada, we tend to make more of an effort to use French words, because we are so much more exposed to English. In fact, the structure of the language is in jeopardy. Francophones use English syntax without even realizing it and that constitutes a much more insidious attack on the French language. "I miss my mother." in French is "*Ma mère me manque*." (Notice the subject goes from "I" in English to "mother" in French). But the literal translation "*Je manque à ma mère*." is often heard. It is a curious construction in French, as though you were thinking backwards, but it is correct.

Other words have a different meaning according to the language. The word "government" is a case in point. In English, its meaning is quite broad. In French, it means the executive branch of power and nothing more. The word is sprinkled in French texts of all sorts. It's a very good exercise in stylistics to find the correct equivalent. Here are some of the possibilities:

- *administration publique*
- *assemblée législative*
- *autorité législative*
- *entité publique*
- *exécutif*
- *État*
- *fonction publique*
- *ministère*
- *organisme administratif*
- *organisme public*
- *pouvoir exécutif*
- *pouvoirs publics*
- *secteur public*

[7] See Malcolm Harvey, *Pardon my French: The Influence of French on Legal English*, in Jurilinguistique ; entre langues et droits, Jurilinguistics: Between Law and Language, Bruylant/Éditions Thémis, 2005

In other drafting situations, the English word needs a definition and not the French or vice versa. The word "edible" was defined by an English drafter of a regulation so that it would apply to human food. The French equivalent "comestible" has no other meaning, so the Francophone drafter did not feel the need to include a definition in the regulations. The two words were treated differently in the two languages, but this does not create a discrepancy.

As you can see, the difficulties involved in producing a bilingual version of statutes are formidable when the legal tradition associated with each language is different.

Legislative counsel and other French-speaking public servants work in a predominantly English environment. As such, legislative counsel face a momentous challenge. In addition to all the intricacies involved in drafting the laws of the land, they have to make sure they are saying the same thing in both languages. The meetings with legislative counsel and their clients are often conducted in English. This places the Francophone counsel at a disadvantage. It's a bit like dancing backwards in high heels.

Jurilinguists to the rescue

The decision was made, in the 1980s, to hire two very experienced translators to help the Francophones draft. The reasoning was that French being the minority language, that was where help was most needed. The term "jurilinguistics" was coined by them at that time, the meaning being the science of linguistics, in the broadest sense, applied to the law or, as I like to say, in the service of the law. So you see the field is quite broad and can involve all manner of stakeholders in the legal field.[8] Here is a more extensive definition given by Jean-Claude Gémar:

> Jurilinguistics is not a « cookie-cutter » discipline. Broader than a purely theoretical system of formulation, the term suggests the state of mind of a specialist (jurist, legislative counsel, judge, linguist, drafter, translator, revisor, terminologist, lexicographer, etc.) who is required, among other things, to formulate, draft, develop, construe, translate and compare legal texts (unilingual, bi- and multi-lingual)… (translation)[9]

And so began a great adventure. Under the jurilinguists' impetus, the legislative counsel began producing more authentic-sounding French texts. The jurilinguists drafted a manual on how to avoid some common mistakes, some of them Anglicisms, and offering solutions to recurring problems.

The legal tradition in each system of law is perhaps the most striking difference that has to be taken into account when drafting federal statutes. On the one hand, the common law tradition tends to go from the particular to the general, with as much detail as possible. On the other hand, civil law lawyers, called "civilians", have learned to be as concise as they possibly can.

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8 For a history of legal drafting, see: http://www.justice.gc.ca/eng/news-nouv/others-autres/2009/doc_32413d.html

9 Jean-Claude Gémar, Nicholas Kasirer (*dir.*), Foreword, Jurilinguistique : entre langues et droits -- Jurilinguistics: Between Law and Language, Bruylant/Éditions Thémis, 2005

What we do is common law in French, but with a twist. The French style is loath to repeat words and phrases; there is more implicit meaning, and more confidence in the reader. For example, it would go without saying in a French normative text, that management should be "good", that finances should be "sound" and administration should be "efficient". Here is a provision where each legislative counsel was true to his or her own legal tradition.

1. Every person attains the age of majority and ceases to be a minor on attaining the age of eighteen years. (Ontario *Age of Majority and Accountability Act*)

153. Full age or the age of majority is 18 years. (Quebec *Civil Code*)

According to one civilian drafter, her common law colleague drafts by putting in everything he thinks he needs and then eliminating what is superfluous. She proceeds the opposite way and they invariably meet somewhere in the middle.

The jurilinguists deal with high levels of government and reversing the tide on some linguistic issues is somewhat akin to a miracle. There are still clients who think that if you have three words in English, you need three words in French.

Consider these definitions from the Canadian *Environmental Protection Act 1999*:

«rejet» S'entend de toute forme de déversement ou d'émission, notamment par écoulement, jet, injection, inoculation, dépôt, vidange ou vaporisation. Est assimilé au rejet l'abandon.	"release" includes discharge, spray, inject, inoculate, abandon, deposit, spill, leak, seep, pour, emit, empty, throw, dump, place and exhaust.

Ten words versus sixteen. But they say the same thing and the effect is the same.

A legislative counsel once consulted me on a phrase in a reference document he was using to draft a Bill. The English read "The improvement of the actual and future well-being of…" As we pondered the way to express it in French, we realised that improving takes place over time and starts in the present and carries on into the future. In French we didn't really need the two adjectives. Of course, legislative counsel have to consult each other and the clients on such matters.

A phrase such as "A question of major national interest" sounds good if read quickly, but if you stop and think about it, wouldn't any question of national interest be major? These are the types of problems jurilinguists bring to the attention of legislative counsel.

To paraphrase our national anthem, the jurilinguists stand on guard for thee, the French language. It becomes second nature and amongst themselves, they will correct each other and question each other's choice of words and ways of expressing ideas. They have a sixth sense which compels them to listen critically to everyone, mostly to themselves, so that they are constantly revising everything they hear and say. It can be very tiring. They listen to the news, to the radio, to

interviews. Some jurilinguists are very slow readers, even when reading for pleasure, because they analyze the grammatical structure of every sentence they read.

Since the arrival of the first jurilinguists, the legislative counsel's role has evolved. Drafting rooms came into being; changing dramatically the way Bills were produced. Nowadays, the two legislative counsel often sit at their computers across from clients who give them instructions. The pace has picked up considerably since the 1970s.

Clients often have unreasonable expectations of walking out of these intensive sessions with a final draft in hand. The jurilinguists can help the legislative counsel with a sober second look. When deadlines are tight, many a legislative counsel has been glad to have someone else cast an eye on his or her draft because they are working so fast.

To quote the jurilinguists' job description, they provide "professional services on all jurilinguistic and linguistic aspects of legislative drafting in one official language and on the legal and cultural consistency of meaning between both official language versions of all federal government legislative texts (Bills, regulations and other statutory instruments)."

And what, you may ask, do jurilinguists *do*? They revise the version in their working language, that is to say their first language, and also do a comparison to ensure that the two versions are saying the same thing. They revise for consistency, logic and style, correctness of language, grammar and syntax. They also provide research on terminology, especially in rapidly-developing technical fields and, while their brief is to adhere to the highest standard of language, there have been instances where they have had to create terms where none existed. To ascertain if one version is saying the same thing as the other, the jurilinguists must think through the text. It is not a cursory reading. It is an in-depth analysis, an examination of one version in relation to the other. And they work in pairs: one Anglophone and one Francophone are assigned to each file.

And it's a jungle out there. Many pitfalls await the unsuspecting jurilinguist, from the aforementioned Anglicisms to the complex legal sentences that go on and on and on, to words that sound alike but mean very different things according to the language. These are called false friends. Here are a few examples.

The word "ethics" in its French form (*éthique*) refers only to a branch of philosophy, but in Canada, you see it everywhere in French used in the English sense because of the co-mingling of the two languages.

The wrong word can create a diplomatic incident. The verb "to ask" translates into "*demander*". An unfortunate translator once got them confused and used "to demand" instead of "to ask" with sorry results.

An interpreter who was working in the House of Commons adapted the saying of an MP: "You can't mix apples and oranges" by using a French saying: "You can't mix rags and tea towels".

But the MP kept up the imagery by putting the fruit in trees. So there was the poor interpreter with his rags going up and down trees.

The results of this contact are inevitable and that is one of the ways that language evolves. In translation school in the 70s, God help the poor student who used words like "system", "control" or "development" in French. Their meaning in French was quite restricted and bore little resemblance to the more extensive English one. Nowadays, they are used liberally in French and elicit no reaction. French dictionaries record them, mentioning their English origin. In translation school, students also had to relearn their language to a certain extent to get rid of the bad habits picked up in their day-to-day life. But in my case, having Anglophone parents, I found myself in the absurd situation of having to learn mistakes I didn't even know existed in order to pass the exams.

In Quebec, a very unique type of slang is spoken. It's called "*joual*", a deformation of the word "*cheval*" (horse), and it is a mixture of archaic French, Anglicisms and atrocious pronunciation. When I was a child, we used to play a game we called "*Wachiprem*" in French. We used to divide up into two teams: one team would hide, the other would go looking and when they were close, the team leader would yell that word so the team hiding could get back to base safely. My parents finally figured out that we were saying a much distorted version of "Run sheep, run."

Young children were told to go to bed or the "*Bonhomme Sept-heures* (Seven O'clock Man), like the Sandman, would find them. The expression is derived from the English word "bonesetter".

A trip to a garage in Quebec can be quite revealing. Any automobile part is called by its English name preceded by a French article: *les brakes, le gear box, le rim du tire*. Government campaigns promoting French have been launched, but with mixed results.

"*Joual*" is pervasive, and if not used by everyone, is understood by all native Québécois. In fact, many writers, singers and other artists use it as a means of asserting their cultural identity.

In the 1980s, translators were seconded from the Translation Bureau of Canada to revise draft regulations. The Regulations and Legislation Sections of the Department of Justice were separate, and didn't even report to the same person. It was decided in the late 1990s to group them together in one Branch along with all the personnel assisting the legislative counsel. In 1999, the Department made the translators offers they couldn't refuse and they became Justice employees and members of an amalgamated unit working on both Bills and draft regulations.

Where do jurilinguists come from? Do they grow under cabbages? They might as well. There is no school or course where the job is taught. All jurilinguists have a background in translation. The field of translation is a good training ground for a prospective jurilinguist. Many jurilinguists also have training in law; some have a law degree, while others have been called to the bar. I am one of those whose background is purely in translation, but I have always maintained that a linguist or translator can "learn" a style and the vocabulary of a particular field, because of the intense intellectual effort required to convey in one language the message of the other. We have

found, over the years, that hiring jurilinguists solely on the basis of their legal background was less successful than hiring people with more experience on the linguistic side of things. Of course, once hired, all jurilinguists receive on-the-job training, or as we say in French: training on the "pile" (*sur le tas*). (This sounds worse than it actually is.)

The new jurilinguists are trained by the chief jurilinguist and by the two senior jurilinguists. Coming as they often do from a translation background, they tend to ensure that the two versions are saying the same thing, but sometimes fail to see the overall picture. It's a common oversight, of which most jurilinguists are guilty in their salad days. Once the equivalency of meaning is established, the jurilinguist must take a step back and analyse what the text means and how it fits into the legislative scheme, in both languages.

Some may object that only a legislative counsel can work on legislation because no one else has the know-how to use the correct words in the proper sense, taking into account all the factors that may impinge on the text, such as Charter issues, case law, and style. But with two legislative counsel and, in the case of Bills, senior counsel reviewing their work, there is enough input from a legal point of view that the draft can benefit from a purely linguistic angle. For where would the statutes be if it were not for words?

The work is highly specialized and there are very few jurilinguists in the federal Public Service. Apart from the team of eleven (four English jurilinguists, eight French) in the Legislative Services Branch at the Department of Justice, there is a unit at the Supreme Court and one at the Department of Foreign Affairs. The service offered is unique. Not only do they revise the drafts, they also provide *ad hoc* linguistic advice, help establish terminology and contribute articles to two manuals, *Legistics*[10] and the *Guide fédéral de jurilinguistique législative française*, on such diverse subjects as "must", "shall" and "may", the use of "such" and paragraphing and how to express mathematical operations.[11]

Jurilinguists also write jurilinguistic opinions at the request of legislative counsel, especially when clients want to use an expression or a word that isn't correct or violates accepted rules of grammar or syntax. They lose some and win some. They don't normally sit in on legislative counsel's meetings with clients, time being too short. But they try to arm legislative counsel with the ammunition they need to successfully do battle and win the day on language issues. It is a very difficult thing to try and get a client to understand that he or she may not be right as far as a question of language is concerned. If a physicist were to give a talk on a Higgs boson, no one would contradict his or her knowledge. But since everyone uses language, they feel, and rightly so, that it is theirs. They have a sense of ownership and can resent being told what the "language experts" think.

10 http://canada.justice.gc.ca/eng/dept-min/pub/legis/index.html

11 http://canada.justice.gc.ca/fra/min-dept/pub/juril/index.html

The actual work of the jurilinguists is done on the paper copy of the Bill or draft regulations. Discrepancies are indicated and the text is marked with questions or comments. Suggestions are made as to the rewording of provisions and solutions are proposed. Jurilinguists also check for consistency, logic and equivalence of meaning. So they are working both vertically and horizontally on the text. The Anglophone and the Francophone jurilinguists working on the file consult each other before handing the work back to legislative counsel. In fact, the presence of another language can help, giving ideas on how to improve each language version.

The jurilinguists are held to a high international standard of language. They use dictionaries, grammar books, guides on style and modern usage, manuals on difficulties, Anglicisms and word combinations, legal dictionaries of course, and specialized lexicons on anything from accounting to tax law, even the Internet. They use terminological data banks; two of the best ones in the world are produced by the Canadian and Quebec governments.[12] Given the variety of subjects that are legislated, especially in regulations, they have to be quick on the draw, know where to search for information and absorb new concepts rapidly. A jurilinguist can be working on regulations concerning oil and gas in the morning and frozen blueberries in the afternoon. The subjects are as varied as the human activities concerned.

They also learn to think on their feet. If a legislative counsel questions a choice of words, the justification can't be: "because". The explanations given must be cogent and clear. It's a job where one becomes intimately familiar with obscure grammar rules and exceptions.

Jurilinguists are also consulted on the meaning and equivalency of existing provisions. Legislative counsel will ask them if they mean the same thing in both languages. And answers are usually needed quickly and require one to think fast. Legislative counsel graciously accept the comments and corrections of the jurilinguists in the spirit in which they are made. The jurilinguists are there to help, not to hinder, and work as a team to produce a better text.

The Legislative Services Branch of the Canadian Department of Justice has an excellent in-house training program to which the Jurilinguistic Services Unit contributes courses on various subjects such as paragraphing, drafting definitions, etc. Some of the jurilinguists teach courses in legal translation at the LL.M level at the University of Ottawa. And they are also called upon to revise bilingual documents produced for conferences, journals and legal opinion banks.

Conclusion

This paper has been more about the French aspect of things, because this is where the need for jurilinguists was first felt. Of course, the Anglophone jurilinguists face different challenges, in many cases, issues that have already been resolved in French. They continue to grapple with

[12] The federal government's Termium: http://btb.termiumplus.gc.ca/site/termium.php?lang=eng&cont=001 and the Quebec government's *Grand dictionnaire terminologique*: http://www.olf.gouv.qc.ca/ressources/gdt.html

archaic legalese, heavy structures with the excessive use of nouns, the use of neologisms and the tug-of-war between American and British usage:

- archaic legalese – “Notwithstanding” instead of “despite”
- heavy structures with excessive use of nouns – Canadian Broiler Hatching Egg and Chicken Licensing Regulations
- neologisms – blog, cybercrime, cyberspace, environmental footprint, green policy

“*Vive la difference*” is an apt conclusion because the differences between the English and French languages and the two legal traditions inform each linguistic and legal community about the other and enrich us all, expanding our horizons.

Legislative counsel and pre-legislative scrutiny

Stephen Argument[1]

Introduction

The theme of this paper is that (in my experience) legislative counsel undertake a form of pre-legislative scrutiny, in the sense that they draft with one eye on the scrutiny of their drafts that is likely to take place later. In Australia, this scrutiny can be expected to come principally from the legislative scrutiny committees of the various Australian parliaments and from the courts. The paper concentrates on parliamentary scrutiny and on the important relationship between legislative counsel and legislative scrutiny committees.

Legislative counsel and "the first bulwark"

In its *Eighty-seventh Report*, the Senate Standing Committee on Regulations and Ordinances published a Special Report by its (then) Legal Adviser, the late Professor Douglas Whalan, on subdelegation of powers. In that Report, Professor Whalan suggested that the Senate Standing Committee for the Scrutiny of Bills was "the first bulwark" in certain aspects of legislative scrutiny.[2]

One of my primary contentions is that legislative counsel are in fact the first bulwark in legislative scrutiny. In making this assertion, I note that it is neither a novel nor a revolutionary proposition. For example, Miss Rowena Armstrong QC, (then) Victoria's Chief parliamentary counsel, told the Fourth Australasian and Pacific Conference on Delegated Legislation and First

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[1] Legislative Drafter, Commonwealth Office of Legislative Drafting and Publishing, Canberra. Any views expressed in the paper are views of the author and not those of OLDP. This paper was presented at the CALC Conference in Hong Kong, 1-5 April 2009.

[2] Senate Standing Committee on Regulations and Ordinances, *Special report on subdelegation of powers - Eighty-seventh Report* (November 1990), at p. 4.

Australasian and Pacific Conference on the Scrutiny of Bills (held in Melbourne from 28 to 30 July 1993) that—

> it is certainly the very existence of the Parliamentary Committee that often gives the drafter the sanction that is needed: you know what the Committee will say if you try that one.[3]

The point to note here is not the role of the Parliamentary Committee but the fact that the legislative counsel would both refer to the Committee and rely upon it for authority in advising client agencies that legislation might offend the legislative scrutiny principles that the various committees seek to uphold.

A similar point was made by the Commonwealth's (then) First Parliamentary Counsel, Ian Turnbull QC, at a seminar held in 1991, to mark the tenth anniversary of the Senate Standing Committee for the Scrutiny of Bills. Mr Turnbull said—

> I think it is safe to say that the provisions that get into Bills and that come before the Scrutiny of Bills Committee are the tip of the iceberg. I think that a far greater number that would have offended have not been put in Bills because we have advised the departments and the departments have had the sense to withdraw them. After all, when we say that the Scrutiny of Bills Committee does not like something, that is a very important weapon in our armoury.[4]

Mr Turnbull's point was acknowledged by the (then) Deputy Chair of the Scrutiny of Bills Committee, Senator Amanda Vanstone, who thanked the Office of Parliamentary Counsel for its role in assigning "certain unwelcome legislative practices … to the legislative equivalent of Siberia".[5] How does this occur? It may assist to begin by considering the role of the legislative counsel.

The role of the legislative counsel

The current Commonwealth First Parliamentary Counsel, Peter Quiggin, recently made the following statement about the role of a legislative counsel:

> 3. The core function of a drafter is to draft legally effective, clearly expressed legislation that best achieves the instructors' policy intentions and does so, as far as possible, within the timetable set down by the government.
>
> 4. It is worthwhile articulating the parameters within which an Australian Commonwealth drafter works:

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3 Armstrong, RM, "Drafting: Should delegated legislation be drafted by a specialist drafting office?", at p. 4.

4 Turnbull, I, in "Ten years of Scrutiny – A seminar to mark the tenth anniversary of the Senate Standing Committee for the Scrutiny of Bills" (held on 25 November 1991 – available at http://www.aph.gov.au/Senate/Committee/scrutiny/10_years/report.pdf) at p. 62.

5 Vanstone, A, in "Ten years of Scrutiny", above n. 4 at p. 57.

- The drafter's role is collaborative—the drafter is expected to work with the instructing area to analyse policy, flesh out alternatives and resolve problems.[6]

Speaking in 1991, one of Mr Quiggin's predecessors, Mr Turnbull, said (of legislative counsel):

> We are boffins of a sort. Our primary role is to put into legal effect the policy proposals of the Government, and this means that we have no role whatsoever in the formulation of policy. We are part of the Executive described by Senator Vanstone but we are rather a part of the Executive with a difference. As we have no say in the formulation of policy, we tend to adopt possibly a more objective approach to the making of law.

These sentiments are not limited to Australia. Similar views are echoed in a statement from the United Kingdom Office of Parliamentary Counsel:

> Even in their normal default role, parliamentary counsel will often be able to make a significant contribution to policy-making. Their professional expertise and experience can help them to identify and test the consistency and coherence of different policy options, to analyse proposed legislative structures and to identify factual permutations, avoidance possibilities and technical solutions for particular problems. Their insight into the parliamentary process and into the practice of the courts when interpreting and applying legislation may also be of value in this process. So they may be able to draw attention to a proposal that is likely to attract particular difficulties either in Parliament or the courts.
>
> One way in which parliamentary counsel can sometimes help departments is by pointing out that innovative or direct legal solutions about which a department might otherwise have felt inhibitions are permissible and draftable after all. This is why it is often helpful to involve parliamentary counsel in a project early on, and why instructions should explain the reasoning behind a decision to reject an apparently attractive or obvious solution.[7]

This reflects an acceptance that legislative counsel are not mere "wordsmiths" and acknowledges that they can also have a subtle role in policy-making. Again, I note that this point has previously been discussed within CALC. In a paper delivered on his behalf, Stephen Laws, First Parliamentary Counsel of the United Kingdom, has stated:

> … we are professionals with professional standards and we are not officials of the instructing departments – rather we are a central service who can stand outside the policy making process and bring a degree of objectivity to the analysis of what it has produced.[8]

Mr Laws went on to say:

> It is this aspect of the role that is perhaps the area of greatest controversy, and the area where it is most difficult to distinguish between the role of counsel and wordsmith (in the extended sense I have already explained). Increasingly drafters are asked to make a

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6 Quiggin, P, "Training and development of legislative drafters", paper presented to the Commonwealth Association of Legislative Counsel conference in London, September 2005.

7 *CALC Newsletter*, February 2009 at p. 39.

8 *The Loophole*, August 2008, at p. 43.

> positive as well as a critical contribution to the formulation of policy. It is not, if it ever was, acceptable to demonstrate that a set of instructions is analytically incoherent and then to sit back and wait for a better set. Those who detect problems are expected to act like team members and to contribute to finding the solution. This includes the drafter.

He then added a note of caution:

> But where do you draw the line? Lawyers in general, and drafters in particular, do not generally make good policy makers, partly because they concentrate on possibilities rather than on an evidenced-based analysis of what happens in practice.
>
> However there is another element of our independence which undoubtedly gives us the role of counsel, rather than wordsmith. We have a function in the system of being advocates for the protection of the integrity of the statute book, and to ensure that there is no debasement of the currency of the means by which Parliament communicates with the courts.

This is an important point. The role of legislative counsel in protecting the integrity of the statute book *and* in anticipating likely issues with the courts (which, in turn, requires an up-to-date understanding of how the courts deal with various issues) cannot be understated. That said, it is also little-understood. I am confident that most legislative counsel have had experiences of clients where, from the client's perspective, the only thing legislative counsel was being asked to do was to "change a word here and there" and similarly with incredulous responses such as "how could that *possibly* affect the meaning?" I am confident that all of us have had the situation of a client going glassy-eyed in discussions about why a change in approach to the drafting of certain provisions could do them more harm than good.

To labour my reference to Mr Laws' paper just a little further, I note that he went on to say that legislative counsel's role as protectors of the statute book, etc, involved—

> … two things, and matters of substance as well as words. First, it involves fearlessly alerting Ministers to the risks of allowing short term considerations to undermine the respect the courts give to Parliamentary proceedings. The reputation of the Office and the quality of its work is one of the things that ensures that the balance is kept between the principle of Parliamentary sovereignty and the temptation for the courts to make new law to deal with hard cases. It is this that makes United Kingdom drafters so reluctant to accept unnecessary material in statutes.[9]

Secondly, our independent role means it is the function of the parliamentary counsel to draw to Ministers' attention, and particularly to the attention of the Law Officers (who have a general oversight of legal policy questions), anything in a Bill that offends constitutional principle. In those jurisdictions where there are written constitutions and it is a function of the legislative counsel to warrant the constitutionality of the legislation they draft, it seems to me unarguable that, in that function at least, the drafters act as counsel not wordsmiths. But, even in the United Kingdom, the practical need, if policy is to be effectively implemented, of ensuring that Bills conform to the rule of law, and the relatively recent statutory rule that requires Bills to be

[9] Above n. 8.

construed in accordance with the *European Convention on Human Rights*, mean that parliamentary counsel in the United Kingdom have a legal and constitutional input to the drafting of Bills, even in the absence of a written constitution.

Good client service

I think that a simple point here is that a lot of what legislative counsel do is simply to provide good service to their clients. Legislation is drafted in a way that will hopefully not meet with criticism by the courts. Equally, it is drafted in a way that will hopefully not meet with criticism in the parliament, including by parliamentary committees.

Legislative counsel and legislative scrutiny committees

In his contribution to the 1991 Senate Scrutiny of Bills Committee seminar, Mr Turnbull went on to say:

> … we do regard it as part of our role to advise on the legal principles that are involved in legislation. In particular, since the arrival of the Scrutiny of Bills Committee, we regard it as our duty to advise the departments on the Scrutiny of Bills Committee's principles and also the way in which the Committee interprets those principles. At the end of the day, if we have given this advice and the department still wants to go ahead with a provision which we think may be criticised by the Committee, we are bound by the decision of the department, as our function really is to put into legislative form what they want. The result of this, anyway, is that in practice the Scrutiny of Bills Committee and parliamentary counsel work together for the same ends, but we do have different points of view.[10]

I will say some more about Mr Turnbull's "working together" point below. I note that his point about the relationship between drafting and the Senate committees has recently been alluded to by 2 Australian academics, in their work on the effectiveness of parliamentary scrutiny committees in the protection of rights:

> The value of scrutiny then is the medium- and long-term impact on policy officers and drafters—Commonwealth drafters have long been said to draft in the shadow of Senate scrutiny. This is an area that we are particularly interested in continuing to explore.[11]

It remains to be seen what those explorations have revealed but I would be staggered if the conclusion was other than that Mr Turnbull's point was well-made.

While Mr Turnbull's comments were directed specifically at the role of legislative counsel in the Commonwealth Office of the Parliamentary Counsel, in relation to the work of the Scrutiny of Bills Committee, I believe that it is uncontroversial to say that this applies to drafters of both

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[10] Turnbull, I, in "Ten years of Scrutiny", above n.4 at p. 59.

[11] Evans, C and Evans, S, "The effectiveness of Australian parliaments in the protection of rights", paper prepared for delivery at *Legislatures and the Protection of Human Rights Conference*, Melbourne Law School, 20-22 June 2006 (available at http://cccs.law.unimelb.edu.au/go/research-and-publications/legislatures-and-human-rights-project/publications-and-working-papers/index.cfm).

primary and subordinate legislation in the various jurisdictions in which legislative scrutiny committees operate. It is a fact of life that any legislative counsel worth his or her salt will warn their clients against the potential difficulties for provisions that are likely to attract attention from a legislative scrutiny committee.

This reflects my experience as both a legislative counsel and as an instructor of legislative counsel. In my experience as an instructor, I have received (literally) hundreds of comments from legislative counsel about the likelihood of particular provisions attracting the attention of one or other of the Senate's legislative scrutiny committees. If anything, I have found legislative counsel to raise matters out of an abundance of caution. I have invariably found that advice to be wise.

My experience as a legislative counsel is relatively slight, so I do not propose to say too much from that perspective. I do not think I am talking out of school, however, when I say that (in my experience) the training of legislative counsel, drafting manuals and check-lists highlight the work of the various legislative scrutiny committees and the kinds of issues that are likely to attract comment. In the Commonwealth Office of Legislative Drafting and Publishing, the work of the legislative scrutiny committees also features heavily in the training that we provide to our clients about how their interactions with the Office can be optimised. None of this is new or revolutionary. It is common sense. It is about legislative counsel doing what they can to assist in putting into legal effect their clients' policy proposals. As I said, it's about *good client service*.

Working together

I would like to say some more about Mr Turnbull's point about legislative counsel and legislative scrutiny committees working together. In this context, I note that I have a peculiarity of experience, in that I have worked on both sides of the legislative scrutiny "fence", having worked for legislative scrutiny committees prior to becoming a legislative counsel.

One of the things that I have realised, especially after my more recent experience of, at the same time, both drafting (Commonwealth) delegated legislation and also advising on (Australian Capital Territory) subordinate legislation is that, to a large extent, legislative counsel and legislative scrutiny committees have a common goal: to produce "better" legislation. To me, that seems like common sense but I wonder whether that is the case.

"Better" legislation

What do I mean when I refer to "better" legislation? From a legislative scrutiny perspective, I mean legislation that does not offend against the principles of the relevant legislative scrutiny committee. Taking the ACT Committee's scrutiny of subordinate legislation as an example, the Committee considers whether such legislation—

- is in accord with the general objects of the Act under which it is made;
- unduly trespasses on rights previously established by law;

- makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions; or
- contains matter that in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly.

The Committee also considers whether any explanatory statement or explanatory memorandum associated with legislation and any regulatory impact statement meets the technical or stylistic standards expected by the Committee.

As to the subordinate legislation itself, however, surely it is in everyone's interests if subordinate legislation is in accordance with the general objects of the Act under which it is made (whether those objects are expressed or only implied). Indeed, part of a legislative counsel's responsibility is to draft only legislation that is within the relevant legal limitations. If legislation is not "within power", there is always the potential for the subordinate legislation to be found to be invalid. "Better" subordinate legislation, therefore, is within the general objects of the Act under which it is made.

Similarly, it is in everyone's interests that subordinate legislation should not trespass unduly on rights previously established by law. While government departments and agencies might not have quite the same interest in this issue as the Committee, a failure to pay heed to this principle might also be a potential basis for subordinate legislation being found to be invalid, particularly in jurisdictions (such as the ACT) with a Human Rights Act or equivalent.[12] So "better" legislation does not interfere unduly with existing rights.

In the same vein, legislation that makes rights, liberties, etc. unduly dependent on non-reviewable decisions runs the risk of challenge in the courts, on the basis that the legislature could not possibly have intended that decisions in relation to significant rights, etc. were not subject to review. So it is "better" that review is provided for.

It is a bigger stretch for me to make an argument about legal validity and the term of reference that relates to matters that are more appropriately dealt with in primary legislation. That said, from a legitimacy perspective (at least), surely it is "better" for all concerned if problematic initiatives are dealt with in primary legislation, rather than subordinate legislation, if only because, if the legislation is challenged, those defending the validity of the legislation can point to the *Hansard* and argue that, in fact, the legislature *did* intend to make legislation with that effect.

These elements of "better" legislation are not inconsistent with what a legislative counsel is trying to achieve. From a legislative counsel's perspective, "better" legislation is legislation that is within power (and that does not get challenged in the courts) and does its job, preferably in a way that everyone can understand. There is, of course, the added imperative that legislation should

[12] See the decision of the ACT Supreme Court in *SI bhnf CC v KS bhnf IS* [2005] ACTSC 125 (2 December 2005), in which Higgins CJ (among other things) used the ACT's *Human Rights Act 2004* to determine the proper limits of certain legislation.

not get slowed down or tripped-up by comments from a legislative scrutiny committee. The real point, however, is that, in my view, legislative counsel do not *want* their legislation queried by a legislative scrutiny committee, as much because they do not want to risk the legal consequences mentioned above as because they do not wish to attract the ire of a committee. This is, I think, part of what Mr Turnbull was saying.

Legislative counsel and Bills of Rights

It is trite to observe that there is an increasing impetus (especially in Australia) for legislative scrutiny based on "human rights" criteria. In 2 Australian jurisdictions, the ACT and Victoria, human rights legislation is formally part of the legislative framework.[13] This means that legislative counsel in those jurisdictions must now also draft with the rights set out in the relevant legislation in mind. It also means that the relevant parliamentary scrutiny committees scrutinise legislation against criteria set out in human rights legislation.[14]

I do not propose to discuss in any detail the impact of human rights legislation on legislative counsel, not the least because this is clearly still a developing area. I will, however, commend to you a 2006 paper by Joanna Davidson, New Zealand Crown Counsel, on the New Zealand experience of developing legislation, in the context of the (NZ) Bill or Rights.[15] That paper sets out in detail the role of government lawyers in the development of legislation and the impact of the *Bill of Rights* on that process.

I also commend to you the New Zealand Legislation Advisory Committee's publication, *Guidelines on process and content of legislation*,[16] which also sets out in detail the process that needs to be followed in developing legislation in New Zealand, again, particularly with the *Bill of Rights* in mind. The obvious point to make is that (in those jurisdictions that have it) human rights legislation is another thing that legislative counsel have to deal with in providing service to their clients. In some ways, the existence of human rights legislation may actually make the work of legislative counsel easier, in the sense that human rights legislation tends to be more structured than the combined, accumulated learning on the likes and dislikes of legislative scrutiny committees (which may also vary from time to time).

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13 See *Human Rights Act 2004* (ACT) and *Charter of Human Rights and Responsibilities Act 2006* (Vic).

14 Though, interestingly, in the ACT, there is no formal requirement for human rights scrutiny of *subordinate legislation* by the Committee: see *Human Rights Act 2004*, section 38.

15 See Davidson, J, "The role and impact of the government lawyer in pre-legislative scrutiny" (available at http://cccs.law.unimelb.edu.au/go/research-and-publications/legislatures-and-human-rights-project/international-conference/conference-papers-and-presentations/index.cfm).

16 Available at http://courts.govt.nz/lac/pubs/2001/legislative_guide_2000/checklist.html

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Legislative counsel and legislative scrutiny in Canada

Without wishing to labour the international examples, I would also like to draw attention to an explanation of the situation in Canada, that is set out in a paper by Katherine MacCormick and John Mark Keyes, of the Legislative Services Branch of the (Canadian) Department of Justice. I find it particularly interesting in its concentration on the role of legislative counsel:

> As lawyers, drafters have been educated in the values that lie at the heart of our legal system. Although some of these values are now protected by constitutionalized rights, not all of them are, or their protection is quite limited. In Canada, these values include—
>
> - procedural fairness and natural justice;
> - access to the courts;
> - prospective application of the law;
> - property rights;
> - parliamentary sovereignty (non-delegation of authority over fundamental matters such as the imposition of taxation or the creation of offences).
>
> In addition, the Gender Equality Initiative of the Canadian Department of Justice calls on drafters to be especially vigilant that legislation does not have an adverse impact on women or members of other traditionally disadvantaged groups. Drafters should be aware of the Departmental Policy on Gender Equality Analysis and they are encouraged to turn to the gender equality specialists in the Legislative Services Branch for help in identifying these impacts and trying to avoid them.
>
> Drafters have a role to play in ensuring that incursions on these values are fully considered before they are drafted into legislation and that the Cabinet has clearly authorized them. They should look for solutions that achieve the underlying policy objectives without infringing these values.[17]

On this approach, the role of the legislative counsel, if not already onerous enough, is made more onerous because of his or her education in "the values that lie at the heart of our legal system". I have to say that I agree heartily with my Canadian colleagues.

Legislative scrutiny in Hong Kong

It is appropriate that I say something, briefly, about the role of Jimmy Ma[18] and his colleagues as legal advisers to the Hong Kong Legislative Council in the scrutiny of legislation by that Council. As I understand the legislative process in Hong Kong, the legal advisers, on behalf of the Legislative Council, provide advice on both primary and subordinate legislation that is considered by that Council. Mr Ma has indicated that this advice addresses—

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17 MacCormick, K and Keyes, JM, "Roles of Legislative Drafting Office and Drafters" (available at http://www.ciaj-icaj.ca/english/publications/ (look for LD94-Maccormick.eng.pdf).

18 Chief Legal Adviser to the Hong Kong Legislative Council.

- whether the Bill concerns any significant policy or measure or is just technical in nature;
- the effectiveness of its provisions as drafted in achieving its avowed objectives; and
- whether there are any underlying legal issues that need to be canvassed.

From my (admittedly limited) research, it appears that the concept of "underlying legal issues" includes whether or not legislation is in accordance with the *Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* (the Basic Law). The Basic Law, among other things, enshrines many of the principles with which legislative scrutiny committees are concerned, whether or not they operate in a jurisdiction with a Bill of Rights (or equivalent), including—

- that no law enacted by the Legislature shall contravene the Basic Law (Article 11);
- equality before the law (Article 25):
- the right to vote (Article 26);
- freedom of speech, freedom of the press and of publication, freedom of association, freedom of assembly, freedom of procession and of demonstration and the right and freedom to form and join trade unions and to strike (Article 27);
- freedom from unlawful arrest, detention or imprisonment and the prohibition of torture (Article 28);
- protection of private property from arbitrary or unlawful search (Article 29);
- freedom and privacy of communication (Article 30); and
- freedom of conscience and religious belief (Article 32);

This is by no means an exhaustive list and the examples set out are merely illustrative of the sorts of issues that the Basic Law deals with. I also note that, in addition to the enumerated principles, Article 39 of the Basic Law provides:

> The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.
>
> The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article.

As I understand the work of the legal advisers to the Legislative Council, part of their role is to advise on the extent to which legislation complies with the Basic Law and, in particular, to draw to attention instances where legislation may be inconsistent with the Basic Law. Their role seems to be similar to that undertaken by the legal advisers to the various legislative scrutiny

committees in Australia.[19] Indeed, when I looked at some examples of the work of Mr Ma and his colleagues, I was struck by similarities with the work of the Senate Standing Committee on Regulations and Ordinances, in the sense that I found examples of their exchanges of correspondence between and "the Administration" (which I took to be equivalent to "the Government" or "the Department") on issues of concern.[20] While I do not pretend to have undertaken extensive research of this issue, my initial reaction is that the resemblances are uncanny.

The theme of the conference

I would now like to take a little time to address some of the questions posed as part of the theme of the Conference.[21] *Whose law is it?* Unsurprisingly, it is my view that everyone at the Conference has some "ownership" of the law that they draft. Not so much as authors but as people who have an important role to play in the development of legislation and, in particular, as people who (as part of that role) seek to ensure that certain standards (for want of a better word) are met.

How can legislative counsel ensure that legislation is consistent with legal principles and relevant rights-based legislation? Legislative counsel can do this by maintaining their knowledge of the relevant rights-based legislation and also their knowledge of similar rights-based principles, such as those promulgated and policed by legislative scrutiny committees. To what extent is legislation able to withstand judicial scrutiny and, in the case of delegated legislation, parliamentary scrutiny? Obviously, that depends on how well the legislation is formulated. Part of my thesis is that an intrinsic part of the role of a legislative counsel is to do all that he or she can to ensure that draft legislation is able to withstand judicial scrutiny. While there may be policy limitations on this (and while the advice of legislative counsel may not always be followed), part of the role of the legislative counsel is to ensure that his or her instructors are aware of any potential difficulties with legislation and to ensure that policy are decisions are made with those difficulties squarely before the persons making the relevant policy calls.

How can legislative counsel ensure that legislation is both effective and clear to all those who are affected by it, whether as legislators or users? It is a trite answer but, in my view, legislative counsel do this by doing their job properly. They achieve these goals by keeping up-to-date with the law and by keeping up-to-date with the work of bodies such as the legislative scrutiny committees

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19 Note that there is also a unit in the Hong Kong Department of Justice that has this function.

20 See, for example, the correspondence on the *Public Health and Municipal Services (Amendment) Bill 2008* (UK) (available at http://www.legco.gov.hk/english/index.htm).

21 I.e. the CALC conference held in Hong Kong 1-3 April 2009.

Can those affected by a particular law find it easily? As a representative of the Office of Legislative Drafting and Publishing, I am bound to say that those affected by the law can find it more easily if they are in a jurisdiction with a Federal Register of Legislative Instruments and with a database such as ComLaw.

Conclusion

My principal point in this paper is that legislative counsel have an important role in legislative scrutiny and, as a result, in maintaining legal principles and in maintaining human rights. We do so whether or not there are formal Bills of Rights in our various jurisdictions. We do so because, in our drafting, we invariably operate with one eye on the various bodies that may scrutinise our work, including the courts and (certainly in Australian jurisdictions) legislative scrutiny committees. Given those bodies' roles in maintaining legal principles and protecting human rights (whether or not those human rights are enshrined in legislation), keeping that one eye out means that we also have a role to play, even if it goes largely unnoticed.

The Commonwealth Ombudsman, Professor John McMillan, recently made a similar point, when noting the (also under-recognised) role of his Office in human rights protection:

> In summary, human rights protection is ultimately a practical exercise. Human rights principles enacted by the legislature are an important platform for that exercise. So too are courts that can definitively resolve the meaning of those legislative principles. But equally important is a comprehensive system of other agencies and mechanisms that can practically apply those principles in a myriad of different situations.[22]

Protection of human rights is not the sole province of the "human rights lawyers". Many others have a role in protecting human rights, but surely *all* legislative counsel probably have such a role. It's just that hardly anyone knows about it.

Postscript: Maybe we're not all so anonymous after all?

Part of my thesis in this paper is that the role of the legislative counsel in the legislative scrutiny process is under-appreciated. The same might be said of others who are involved in the process, including lawyers within policy agencies who advise on similar issues. A recent New Zealand example may actually tend to *disprove* that.

On 3 March 2009, the *New Zealand Herald* reported on issues arising from a "three strikes and you're out" law that had been proposed by an Act MP, David Garrett. As required by section 7 of the *New Zealand Bill of Rights Act 1990* (and as discussed in the New Zealand material that I have referred to earlier in the paper), the New Zealand Attorney-General, the Hon Chris Finlayson, tabled a report to the Parliament, drawing attention to potential inconsistencies between the provisions of the proposed law and the Bill of Rights. The report indicated that there was an apparent inconsistency between the proposed law and the section of the *Bill of Rights* that

[22] McMillan, J, "The role of the Ombudsman in protecting human rights", at p. 9 (available at http://www.ombudsman.gov.au/commonwealth/publish.nsf/Content/research_speeches_2006).

protected New Zealanders against cruel, degrading or disproportionately severe punishment (section 9). In response, Mr Garrett said that the concerns identified in the section 7 report were not Mr Finlayson's personally but those of "some oik in Crown Law**"**.[23] So much for the anonymity of legal advisers!! On 11 March 2009, Mr Finlayson told the New Zealand Parliament that the opinions expressed in the section 7 report were, in fact, his own.

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[23] See Gower, P, "Change Bill of Rights, says 3-strikes MP", *New Zealand Herald*, 3 March 2009 (available at http://www.nzherald.co.nz/politics/news/article.cfm?c_id=280&objectid=10559642). I am grateful to Michael White, of the New Zealand Human Rights Commission, for drawing my attention to this article.

Legalese and plain language

Mark Adler[1]

This paper's purpose

This paper considers how we might convert the legalese of section 4(1) of the UK's *Appropriation Act 2008* into plainer language. I chose this subsection because it is typical of legalese in that:

- its convoluted style obstructs rather than helps the reader;
- it is based on an old precedent, with additional material bolted on without adequate redrafting; and
- it is regularly re-used (being re-enacted annually with only the figures changing).

Background: how the Appropriation Acts work

The (usually biannual) Appropriation Acts record parliamentary approval of the government's spending estimates and release the approved amounts from public funds. They

> authorise the use of resources … and … apply certain sums out of the Consolidated Fund … and appropriate the supply authorised in this Session of Parliament ….

The annual Consolidated Funds Acts are almost identically worded. They

> authorise the use of resources … and … apply certain sums out of the Consolidated Fund …

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[1] Former UK solicitor in general practice, now retired. I am grateful to Stephen Laws, UK Office of Parliamentary Counsel's specialist on the Appropriation Acts (but not the Acts' drafter), for his patient explanations and advice, without which I could not have written this. This paper was presented at the CALC Conference in Hong Kong, 1-5 April 2009.

The *appropriation*, which is all that distinguishes the two types of Act, is the allocation of funds to particular heads of expenditure. The Consolidated Funds Acts just give the total amount issued for that year.

The numbering system is also slightly confusing. The first Appropriation Act (AA) of the financial year (approving the main estimates for the year which began that April) is passed in July and is the second AA of the parliamentary and calendar years, the March Act having updated the estimates for the financial year then ending. So the subordinate Act is the No.1 Act and the main Act is the No.2 Act. The table below shows this in more detail.

				Year ending 31 March					
				2005	2006	2007	2008	2009	2010
AA	1	2006	Mar	√	√				
	2		Jul			√			
CFA			Dec			√	√		
AA	1	2007	Mar		√	√			
	2		Jul				√		
CFA			Dec				√	√	
AA	1	2008	Mar			√	√		
	2		Jul					√	
	3		Oct					√	
CFA			Dec					√	√

The text of subsection 4(1)

> **4. Appropriation of amounts and sums voted for supply services and limits on appropriations in aid**
>
> (1) All the amounts and sums authorised by this Act and the other Act mentioned in Schedule 1 to this Act, for the service of the year that ended with 31st March 2007 and of the year ending with 31st March 2008, totalling, as is shown in the said Schedule, £22,441,622,000 in amounts of resources authorised for use and £15,099,258,000 in sums authorised for issue from the Consolidated Fund, are appropriated, and shall be deemed to have been appropriated as from the date of the passing of the Acts mentioned in the said Schedule 1, for the services and purposes specified in Schedule 2 to this Act.

170 syllables in 106 words in 1 sentence

Flesch readability score: on scale from 0 (very difficult) to 100 (very easy): -20

Parsing (to unravel the structure)

I find it helpful to begin by breaking a complex paragraph into its component parts, using indentation to show the relationships between those parts, like this:

> All the amounts and sums authorised by
>
> this Act and
>
> the other Act mentioned in Schedule 1 to this Act,
>
> for the service
>
> of the year that ended with 31st March 2007 and
>
> of the year ending with 31st March 2008,
>
> totalling,
>
> as is shown in the said Schedule,
>
> £22,441,622,000 in amounts of resources authorised for use and
>
> £15,099,258,000 in sums authorised for issue from the Consolidated Fund,
>
> are appropriated, and
>
> shall be deemed to have been appropriated as from the date of the passing of the Acts mentioned in the said Schedule 1,
>
> for the services and purposes specified in Schedule 2 to this Act.

The parts can then be more easily re-arranged and each part more easily rewritten.

Considering the detail

In rewriting I consider:

1. what can be omitted; and
2. how what is left can be more naturally expressed.

The numbered notes below show my thinking as I worked on this subsection.

4. Appropriation of amounts and sums[1] voted [2] for supply services [3] and [4] limits on appropriations in aid [5]

(1) [6] All [7] the amounts and sums authorised by this Act and the other Act mentioned in Schedule [8,9] 1 to this Act [10,11] for the service [12] of the year that ended with [13] 31st [14] March 2007 and of the year ending with 31st March 2008 [15], totalling,[16] as is shown in the said [17] Schedule,[18] £22,441,622,000 [19,20] in amounts of resources [21] authorised for use and £15,099,258,000 in sums authorised [22] for issue from the Consolidated Fund,[23] are appropriated [24], and shall [25] be deemed to have been appropriated as from [26] the date of the passing of the Acts [27,28] mentioned in the said Schedule 1,[29] for the services and purposes[30] specified in Schedule 2 to this Act.

Notes

1. **Doubling.** What, if anything, is the difference between amounts and sums?

   There **is** a difference - in this context only, as far as I know - but I suspect it is known only to the Appropriation Act cognoscenti. It arises under the new accounting system introduced in 2000: *sum* is used for *cash* (that is, money in and out) and *amount* for *resources* (that is, *cash* with certain accounting adjustments, for example, depreciation, and payments allocated to one year but paid in another).

   This leaves the question: Is the distinction useful in this context?

   > If so, could it be more clearly expressed? Who is the audience?
   >
   > If not, is there a single word that covers both meanings?

   As amounts and sums are treated in the same way I have assumed that the distinction isn't useful and have provisionally used *money* in my draft revision to cover both meanings.

2. **Doubling.** Is voting different from appropriating?

   Again, there's a coded difference, though it's not used consistently. Stephen Laws says that, traditionally, *appropriate* has been used for the allocation of funds to particular heads of expenditure, whereas *vote* has been used for the allocation of funds to a particular department. But he adds that *vote* is also used to describe the allocation of the total (unapportioned) amount.

   Voted here means *already voted* [in previous Acts] *and voted here.* It seems to me that this is an unnecessary complication, and that *voted* can be omitted.

3. **The heading does not match the text**. *Supply services* are not mentioned in the text. *Supply* seems to be used in its common sense of *provision* and the parliamentary process of which the Appropriation Acts form part is known as the *supply procedure*. On the assumption that the single word *services* is sufficient in the text, I have used only that in my draft revised heading.

4. **Miscuing**. The range of *and* is not immediately clear, and it is necessary to read on and think back to decide that the heading is not

   > Appropriation of amounts and sums voted for
   >
   > … services
   >
   > and
   >
   > limits …

   but

   > Appropriation of amounts and sums voted for supply services
   >
   > and
   >
   > Limits on appropriations in aid.

   To avoid this "reader stumble" in my draft revision I have put a comma after *services.*

5. **Matching heading to text**. *Appropriations in aid* are routine income received by government departments and held back to pay expenses instead of being paid into the Consolidated Fund. Those amounts are extra, not included in the main appropriations. They are dealt with in s. 4(2), so are appropriate in the heading to s. 4.

6. **Overlong sentence**. There are 106 words in this sentence, with only commas to break it up.

7. **Wordiness**. *All* is redundant.

8. **Overuse of capital letters**. *Schedule* is a common noun, so the capital is unnecessary (though this is not a major point). (*Act* is of course a special case.)

9. **Wordiness.** This is a standard clause which allows for more than one Act in the schedule, but while there is only one it would be easier to name the Consolidated Fund Act 2007 in the text than refer to it as *the other Act mentioned in the Schedule*.

   Alternatively, as this Act is also listed in the schedule, *authorised by this Act and the other Act mentioned in Schedule 1* might be reduced to *authorised by the Acts listed in schedule 1*.

10. **Stating the obvious**. *To this Act* is unnecessary. (See UK OPC recommendations and policies on legislative drafting matters in CALC newsletter 2.09, p. 43)

11. **Poor punctuation**. At first I thought this comma was a mistake, wrongly separating the subject of the sentence from its verb. To make sense of it, I had to break off from reading and jump ahead. Was it signalling a pause, closing the parenthesis which should have begun with *and the other Act*, opening a new parenthesis (and if so, where did that end), or what? The problem arises from stuffing too many clauses into one sentence.

12. **Obscure vocabulary**. This use of *service* in the singular is unusual, and contrasts with the use of *services* in the clause heading and in the penultimate line of the subclause. Confusingly, in "supply" parlance, the *service* for the year is the total of the individual *services*.

13. Prepositions signalling wordiness. *Ended with = Ending*.

14. **Wordiness**. *31 March* is now common, and perhaps neater (and recommended by UK OPC).

15. **Repetition.** Of the year that ended with 31st March 2007 and of the year ending with 31st March 2008 = of the years ending 31 March 2007 and 31 March 2008.

16. **Over-punctuation**. Again, too many clauses call for too many commas and make the sentence difficult to parse.

17. **Wordiness**. *Said* is otiose. *As is shown in the Schedule* is also unnecessary but it may be useful.

18. Embedding. The comparatively unimportant aside *as is shown in the said Schedule* unnecessarily separates the verb *totalling* from its complement (£22bn). And this is an ***embedded clause*** within an *embedded clause*, separating the **subject** and its necessary but over-long complement from the *main verb*:

> **All the amounts and sums** authorised by this Act and the other Act mentioned in Schedule 1 to this Act, for the service of the year that ended with 31st March 2007 and of the year ending with 31st March 2008, *totalling,* ***as is shown in the said Schedule***, *£22,441,622,000 in amounts of resources authorised for use and £15,099,258,000 in sums authorised for issue from the Consolidated Fund*, *are appropriated.*

19. **Unnecessary detail**. If the figures are shown in the schedule, is it necessary to repeat them here? Useful, perhaps.

20. **Format.** I wouldn't recommend writing the amount in words, but this figure is difficult to read, and the problem will be worse when inflation takes us into trillions. *22.441622 billion* might be a useful compromise, perhaps (if the convention came to be accepted) using comma separators after the decimal point: *22.441,622 billion*.

21. **Doubling**. Does *amounts of* add anything to *resources*?

22. **Repetition**. *Authorised* is used 3 times in this sentence before we even get to the main verb.

23. **Over-punctuation**. The shower of commas makes it difficult to see which pairs belong together to signal parenthesis, and which have other functions. I think that the one after *Consolidated Fund* should not be there. It doesn't seem to be part of a pair, and it separates the subject from its verb, giving, in effect:

> The sums, are appropriated.

24. **Passive verbs and archaic language**. The traditional use in this context of the passive usually triggers the stilted (and by lawyers, overused) *hereby* to make clear that the appropriation comes from this (performative) statement, and that the legislative drafter is not referring to some pre-existing appropriation. Conversion to the active voice (*This Act appropriates*) avoids this, and usefully promotes the main verb to word 3 of the sentence.

25. **Archaic language**. *Shall* is ambiguous (at least between the future and the imperative). And as this is declaratory even the traditional legislative *shall* to indicate obligation is inappropriate here.

26. **Archaic language and wordiness**. I wonder if it is necessary to create a legal fiction here by deeming. The sums are appropriated, and shall be deemed to have been appropriated as from = The sums are appropriated with effect from.

    I didn't challenge the deeming in the conference handout but wrote "*As from* can always be replaced by a single preposition. *On* would surely do in this case." But if we don't deem, *as from* does indicate that the appropriation is backdated.

27. **Wordiness and repetition**. A surfeit of *of*s signals wordiness. *The date of the passing of the Acts = The date the Acts were passed.* Or perhaps, as appropriation is momentary rather than continuous: *As from the date of the passing of the Acts = when the Acts were passed.*

28. **Overstuffing.** Strictly speaking, there is no single *date of the passing of the Acts*. Presumably this means that the amount authorised by each Act is to be appropriated from the date of that Act, but it doesn't say so.

29. **Embedding.** The 24-word subordinate clause *and shall be deemed …in the said Schedule 1* would be better moved to the end to avoid breaking up the main flow of the sentence.

30. **Doubling**. What is the difference between *services* and *purposes*? They are bundled together in column 1 of schedule 2 and it seems to me that *purposes* would cover both words.

Revision

4. Appropriation of money for services, and limits on appropriations in aid

Version 1

This Act appropriates the money authorised by the Acts listed in schedule 1 for the purposes* listed in schedule 2.

The appropriation of the money authorised by the Consolidated Fund Act 2007 is backdated to the date of that Act.

65 syllables in 40 words in 2 sentences

Flesch score: 49.06 ("difficult")

Version 2

For the purposes* listed in schedule 2, this Act appropriates the money authorised by:

(a) the Consolidated Fund Act 2007, with effect** from the date of that Act; and

(b) this Act, with immediate effect.**

52 syllables in 33 words in 3 "sentences"

Flesch score: 62.36 ("plain English")

Notes

* I have not added *and periods*, since schedule 2 gives as the purposes the use during the specified years.

** Someone has suggested since the presentation that this may be ambiguous (if only technically so), in that it could be the authorisation, rather than the appropriation, which takes effect on those dates. If so, it can be cured, though inelegantly, by replacing *with* with *the appropriation taking*. But does the comma before with prevent the ambiguity?