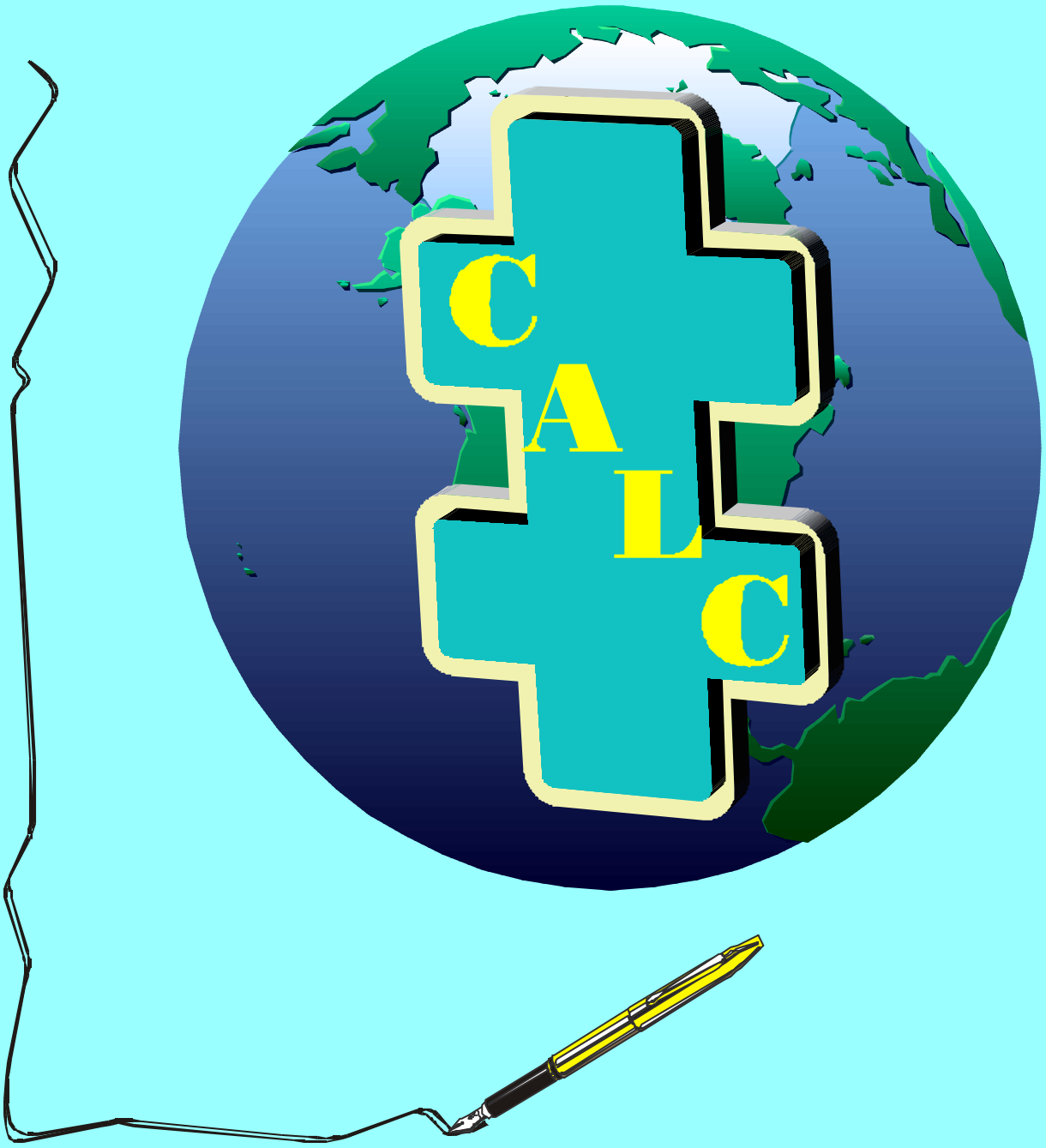
Commonwealth Association of Legislative Counsel



THE LOOPHOLE

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Editorial

It seems that the issue of privatising legislative drafting services will not go away. According to a report published in the Financial Times on 4 January 2000, the UK Government may hire private sector lawyers to draft legislation because of concern over delays in drafting bills by parliamentary counsel. The report stated that UK Ministers had admitted that parliamentary counsel were unable to cope with the heavy workload and that the logjam was threatening the Government's legislative program.

What seems to have given rise to this report was the postponement of the Utilities Bill, which had been expected to be introduced into the British Parliament before the end of 1999. The report also mentioned that the Financial Services and Markets Bill had fallen behind schedule because of delays in drafting large numbers of amendments. Because of this, Ministers were apparently considering contracting out some legislative drafting work to the private sector. "It is something we will have to look at," said a Government spokesman. On the other hand, critics of the proposal pointed out that previous experiments with private sector drafting had not been a success. They claimed that the real solution would be to reduce the volume of legislation. Moreover, any move to use private sector lawyers rather than parliamentary counsel would, it seems, face opposition from senior civil servants on the ground that it would lead to serious conflicts of interest.

In 1995, Kenneth Clarke, who was then the British Chancellor of the Exchequer, farmed out the drafting of part of that year's Finance Bill. Freshfields, the London City solicitors, drafted legislation that purported to simplify the way banks and stockbrokers accounted for tax deducted from foreign dividends and interests. However, according to Edward Troup, who was special adviser to Mr Clarke, the experiment was not a success. "Use of the private sector didn't work because all legislation, particularly tax legislation, is so complex and full of cross references that it is very difficult unless you have lived and breathed it." said Mr Troup, who is now head of tax strategy at Simmons & Simmons, the City lawyers.

The report quoted a spokesman for the English Office of Parliamentary Counsel ("OPC") as saying that legislative drafting was such specialised work that it took 8 years for a lawyer to become sufficiently experienced to become a competent drafter of legislation. The spokesman denied that the OPC was failing to cope and said that an advertisement for new staff that recently appeared in the legal press was "part of the normal recruiting process". The report went on to suggest that UK Government Ministers had become frustrated at the drafting delays, which they say are playing havoc with the legislative timetable. "There must be scope for using outside resources" said a Government member. But Mr Troup countered this by saying that bringing in the private sector was not the

answer. “The solution is providing more resources or, better still, asking why we have so much legislation in the first place.” he said.

Surely Mr. Troup is right? This topic was the subject of much discussion at the 1996 CALC meeting held in Vancouver. From that discussion, it was clear that contracting out legislative drafting work to lawyers inexperienced in that kind of work was not the answer. It is clear from what Chris Jenkins, the then English First Parliamentary Counsel, said at the Vancouver meeting that, by contracting out legislative drafting services to the private sector, the Government significantly increases the amount it incurs in providing those services. Perhaps more importantly, by fragmenting legislative drafting services, a Government would at a stroke not only lose the collective expertise of its legislative drafting office but the advantages that accrue from having legislation expressed in a uniform style and a coherent statute book. And, would the private sector be prepared to meet the cost of training new legislative counsel?

These points are also raised in Hilary Penfold's article in this issue, which describes here recent work in identifying the outputs of a drafting office and their real costs. She points out that, although privatisation is not currently a big issue in Australia, it occasionally surfaces, albeit in a half-hearted or half-baked way. A past attempt to open legislative drafting to the private sector was accompanied by a proposal that required Australian Office of Parliamentary Counsel to charge for its services, but that did not include supplementation to Government Departments to pay for drafting services that they had previously received free of charge. When some of the more influential Departments realised that they would have to find substantial sums of money for services they had not previously had to pay for, they were most upset. The upshot was that the proposal died a natural death. Surely privatising legislative drafting services would be taking us back to the era before the first Office of the Parliamentary Counsel was established by Lord Thring in 1869. Is it really in the public interest to return to the state of affairs that existed then? Apart from the concomitant delays that resulted from a lack of co-ordination, legislation produced during that era was both inconsistent in style and, largely because it was drafted by barristers at the private bar who tended to have limited legislative drafting experience and skills, variable in quality.

President's Message

This issue of the Loophole is the first produced by the new Council, which was elected at the CALC general meeting held in Kuala Lumpur in September 1999 in association with the Commonwealth Law Conference. A full account of the meeting was published in CALC's most recent Newsletter, published in December 1999 (it is also available on the CALC web site mentioned below).

What's in this Loophole?

Most of the articles are derived from papers given at the CALC sessions in Kuala Lumpur. They cover a range of topics, including detailed drafting issues, different approaches to explaining legislation, and issues about the operation and funding of drafting offices. Each of the papers stimulated enthusiastic discussion when it was delivered, and in almost all cases the discussion had to be cut short to allow the session to run to time. We would welcome a continuation of those discussions in the pages of the Loophole, especially from members who were unable to join us in Kuala Lumpur.

As well, this issue contains the obituaries of two men who played major roles in the development of modern legislative drafting, Sir William Dale from the United Kingdom and John Finemore from Victoria, Australia.

I hope you find this issue of the Loophole interesting. I am sure that, whatever your involvement in legislative drafting, you will find something of relevance.

Update on CALC Activities

- ***Membership lists***

  Work on updating the CALC membership list is proceeding well, we have had a good response to the call for members and prospective members to identify themselves to the Secretary. It is a bit disappointing , however, that the "new" Commonwealth is somewhat under-represented in the active membership list. I encourage all legislative drafters, and those with an interest in legislative drafting, from all parts of the Commonwealth, to maintain or establish links with CALC.

- ***CALC web-site***

  The CALC web site is "up". For the time being it is attached to the Australian Office of Parliamentary Counsel web site (www.opc.gov.au), which means that there is no cost to CALC in setting up or running the site. The CALC site contains ---

  - information about CALC's origins and purpose, and
  - contact details for all members of the CALC Council.

- CALC's current constitution.
- Lists of the legislative drafting offices, and countries, in which there are CALC members.
- Recent CALC publications (the December 1999 Newsletter, and future newsletters and Loopholes, will be available).

- ***Calling all contract drafters***

  The CALC web site also contains a page called "Contract drafters", on which drafters who are available for free-lance or short-term drafting assignments may list their particulars. Trained legislative drafters are in short supply all over the world, and this page could become a useful method of putting the people who want legislative drafters in touch with the legislative drafters who want work. If you are such a legislative drafter, I encourage you to contact the web site with your particulars (or e-mail me at hilary.penfold@opc.gov.au).

- We are looking at the possibility of setting up some kind of bulletin board or discussion group for legislative drafters through the CALC web site.

- ***New constitution***

  A new constitution is also under consideration, although in the short term it has taken a back seat to the more urgent task of updating the membership list.

Thanks to Duncan Berry

I would like to thank Duncan Berry, the new Secretary of CALC, for his work since his election last year. He has been indefatigable on behalf of CALC, especially in producing both a newsletter and an issue of the Loophole in less than 12 months, and in updating the membership list.

Hilary Penfold
Canberra, Australia
June 2000

Legislation and Explanation [1]

Geoffrey Bowman [2]

The nature of legislation

In the eighteenth century a Russian nobleman named Alexander Radishchev wrote a book called "Journey from St. Petersburg to Moscow". In it he criticised bureaucracy and serfdom. Catherine the Great had him arrested, condemned to death and sent to Siberia. Having endured all that, after Catherine's death he was freed and took to drafting legislation. But a fit of melancholia soon descended on him and he committed suicide. Perhaps this should be a lesson to anyone who seeks to become a drafter.

In fact I do not know whether his melancholia was brought about by his drafting. But it might have been. There is all the difference in the world between writing a book with a passionate political motive and writing legislation. For we all know that legislation has a very precise and narrow object. This can make the job seem to some people cabin'd, cribb'd and confined, and perhaps tending towards depression. At the same time I think it presents the draftsman with a challenge, and it is part of the reason for its fascination.

What is this precise and narrow object of legislation? It is to change the law — no more and no less. This may seem obvious, especially to an audience of drafters. But it does no harm to state it. A change in the law may take the form of a repeal of existing law, the alteration of existing rules, or the addition of new legal rules. Sometimes the area of law is what might be described as lawyer's law, such as contract or tort. More often a statute will be operating in a specific area with a more public or political flavour --- such as trade unions or local government or taxation. But the important thing is that it will have one object, and only one. And that is to change the law.

A consequence is that a Bill is not there to inform, to explain, to entertain, or to do anything else which literature aspires to. For instance, the novelist may use repetition as a very effective means of creating atmosphere. You only have to think of the opening of Dickens' "Bleak House", with its constant references to fog. But a statute cannot say the same thing twice simply to emphasise the point. If it did, the reader would wonder whether something stated *only once* was to have equal effect. Nor can a statute restate the same proposition in different words. If it did, the reader would wonder whether it was trying to get across one message or two different ones.

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[1] This article was presented as a paper at the CALC meeting held in Malaysia in September 1999.

[2] Second Parliamentary Counsel, Office of Parliamentary Counsel, England and Wales. The views expressed in this article are those of the author only.

Again, the drafter cannot employ decorative figures of speech. He might have a provision that "a person is guilty of an offence if he commits burglary". He might be tempted to emulate Milton by adding one of his similes — a person is guilty of an offence if he commits burglary —

"As when a prowling wolf,
Whom hunger drives to seek new haunt for prey,
Watching where shepherds pen their flocks at eve,
In hurdled cotes amid the field secure,
Leaps o'er the fence with ease into the fold".

But, interesting though that might make the job, it is not open to the legislative drafter because the simile is completely unnecessary for the purpose of changing the law.

To take another example, the drafter might provide that "this Act extends to England only". Fired by patriotism he might think of John of Gaunt's speech in "Richard II", and he might be tempted to add some of Shakespeare's imagery. You might get this: this Act extends to England only,

"This royal throne of kings, this scepter'd isle,
This earth of majesty, this seat of Mars,
This other Eden, demi-paradise;
This fortress built by Nature for herself
Against infection and the hand of war".

But such an imaginative flight is forbidden to the drafter. However wonderful the images may be, he cannot use them because they are completely unnecessary for the purpose of changing the law.

The result of this precise and confined purpose — to change the law, and nothing else — is that legislation speaks in a monotone and its language is compressed. It is not so easy for a reader to find his bearings or to understand the message quickly. The question I want to consider is this: how can the reader be helped to find his bearings, to navigate round the legislation, and to assimilate the new law?

Purposive provisions in legislation

One option is to add, in the text of the Bill itself, something on top of the words needed to change the law. Sometimes this sort of provision is called purposive. It occurs where the draftsman sets out the detailed rules and then, *in addition*, gives the reader the purpose behind them. Let us call the detailed rules the specific provisions and the addition the purpose provision. Let me give an example. The Family Law Act 1996 contains provisions about such matters as divorce and separation. Section 1 states that the court must have regard to certain general principles — for instance, that marriage is to be supported, and that the parties to a marriage that may have broken down are to be encouraged to take steps to save it.

Let me approach purpose provisions in stages. First, it is often not easy to say what the purpose of a piece of legislation is. If you ask a politician, a lawyer, an economist and a man in the street what the purpose of a particular piece of legislation is, you might get four different answers. In fact, some purpose provisions are worthless. Professor Reed Dickerson told the Renton Committee on legislation that general purpose provisions tend to "degenerate into pious incantations....such as....the one in a recent Ecology Bill, which in substance said "Hurrah for Nature!"

I can give an example of this difficulty from my own experience. I drafted some complex legislation commonly known as FOREX. It taxes notional gains, and relieves notional losses, caused by currency movements. I was once asked whether I could have made it more user-friendly by prefacing it with a statement of its purpose. Frankly, I found it difficult to say what the purpose was. I imagine that a tax lawyer, an accountant, an economist and a politician would all have given different answers. But, so far as I could see, the purpose was to ensure that neither the Treasury nor the taxpayer gained or lost too much if a particular currency rose or fell inordinately in value. Even assuming this was an accurate statement of the purpose, I doubt whether it would have helped anyone to understand the legislation.

The next point about a purpose provision is that it can actually be dangerous. If it conflicts with a specific provision, which is to prevail? Someone applying the specific provision might arrive at a result fundamentally different from that reached by someone relying on the purpose provision.

The next point is that, even if there is no obvious conflict, the relationship between the specific provision and the purpose provision may not be clear. Then there is a danger that the purpose provision will simply be ignored or cause confusion. Section 776(1) of the Income and Corporation Taxes Act 1988 provides that "This section is enacted to prevent the avoidance of tax.....". Section 776(2) contains detailed rules. In *Page v Lowther*[3], Mr Justice Warner said, "it would.... be dangerous in the extreme for a judge to take it upon himself to modify the meaning of words in subsection (2) ..... according to his own conception of what does and does not constitute tax avoidance." This was supported by the Court of Appeal. Apparently, some have taken this to mean that the courts would not apply the purpose provision in subsection (1). Others say that it does apply, that if there is no tax avoidance the section cannot operate, but that the phrase "avoidance of tax" is objective (was tax avoided?) and not subjective (was there an avoidance motive?). If that was the drafter's intention, it seems to me that he could have expressed it more clearly.

In other words, the device of simply adding a purpose provision without a clear indication of its relationship to the specific provisions can be confusing. A purpose provision has a tendency to

3 (1983) 57 TC 199.

become rather like the shot of a blunderbuss --- ill focused and of indefinite effect. My view is that they should be avoided. If it is wished to alter the effect of the specific provisions of a Bill, it should be done by precise changes to those provisions and not by broad incantations of indefinite effect. In fact there are not many examples in our statutes of broad purpose provisions of the kind I have described — and I am not surprised.

Explanations in legislation

Another way of helping the reader is to include explanatory material in the text of the Bill itself. This is not quite the same as purposive material. Purposive material is a sort of overlay, telling the reader to construe the legislation with certain principles in mind. It is operative in the sense that it is intended to have a legislative effect — though it is not always clear what that effect should be or whether it should have the same weight as the main provisions. Explanatory material, on the other hand, is not designed to be operative. It is there to explain, without affecting the operative provisions themselves; or at least I think that is the assumption. But explanatory material in statutes gives rise to difficulties.

This brings me to the fact that the Inland Revenue is undertaking a tax law rewrite, in which they hope to rewrite the tax law in a user-friendly way. The team has produced various documents illustrating the techniques they may eventually adopt. The project is proving very valuable in showing how legislation can be made easier to read. I think it is also proving valuable in showing the limits of what can be done in the text of the Bill itself. And this comes out especially with regard to explanatory material.

For instance, there are notes and there are signposts directing the reader to other provisions. Another technique is to include material as a way of easing the reader into the provisions; it might be called an introduction or an overview. But sometimes this apparently explanatory material consists of a mixture of inoperative explanation and vital operative provisions. Let me give an example from the early experiments of the tax law rewrite team. A chapter about holdover relief on gifts of business assets began with an overview. The first sentence stated that "This Chapter provides for relief on gifts of business assets by an individual or trustees of a settlement". As far as I could see, this was repeated nowhere and amounted to an operative provision. Much of the rest of the overview seemed to be a summary of provisions that followed. If the reader was expecting the overview to be inoperative and something he need not read carefully he would fall into a trap, because he would miss a vital operative provision.

In other words, if apparently explanatory material in fact consists partly of mere explanation and partly of vital operative material, it creates problems for the reader. It takes him time and trouble to

distinguish between the two. And important operative material can easily be overlooked if it is hidden among mere explanations.

So far as I can tell, the more recent experiments of the tax law rewrite team avoid this by ensuring that overtly operative provisions appear in the operative material and not just in the overview. But another problem is that the introductory or overview material might be expressed in general terms not quite reflecting the precise terms of the main operative provisions. Let me give an example, again from the early experiments of the tax law rewrite team. In the overview I have already mentioned there is a statement that there is a charge to tax if the transferee becomes non-resident, followed by an invitation to "see" some later provisions. When you look at the later provisions you find that, if the transferee is an individual, the charge arises only if he becomes non-resident within a certain period and only if an exception about employment abroad does not apply. So the statement in the overview that there is a charge to tax if the transferee becomes non-resident is too sweeping and therefore misleading. If it is to be useful it needs to be accurate. For instance, it might say that there is a charge to tax *in certain circumstances if* the transferee becomes non-resident.

The point is that, if the overview material is expressed in general terms not quite reflecting the precise terms of the operative provisions, it is misleading because it does not give the reader an accurate picture. If it causes him to adopt a wrong assumption, it can cause him trouble rather than help him. It is worse than that, though. If the courts decided to treat the introduction or overview as operative, it could have the effect of glossing or over-riding the more specific provisions, and thus producing an unintended effect.

Another problem arises if the main operative provisions are amended by later legislation. Unless the explanatory material is amended so as to bring it into line, it will become increasingly misleading. The trouble is that amendments often have to be drafted rapidly to meet deadlines, and it would be all too easy to overlook some explanatory provision — perhaps situated in another part of the Act.

These difficulties have now been acknowledged by the tax law rewrite team. In a publication of October 1998 they expressly refer to the fact that the additional material might lead to conflict with the main substantive provisions, making the legislation ambiguous or ineffective. And they add that it could also make it a more complicated matter to amend the legislation subsequently.

In that publication and subsequent ones the rewrite team assert that overviews and notes containing explanatory material "do not form part of the legislation itself but are intended to assist the reader when read in conjunction with it". I do not know what the authority is for this assertion. The question of the weight to be given to the overviews and notes would be one for the courts. If the assertion turns out to be without foundation we are no further forward, and the problems

acknowledged by the team remain. And even if the assertion turns out to be well founded and the explanatory material really is inoperative, there are problems.

First, I think it is unfair to mix up operative material (that is, the main legislative provisions) and inoperative material (overviews etc). The reader is left to sort out which is which, and to decide what weight (if any) to give to any particular provision. The second problem is that, if the operative material is amended by later legislation, the inoperative overviews and notes with which it is punctuated cannot be amended by the later legislation — precisely because it is inoperative. It will become out of date and increasingly dangerous, yet it will presumably still appear in the text that has been amended. Again, this problem is acknowledged by the team in the publication of October 1998; but I do not know what the answer is.

In other words, there are problems with explanatory overviews and notes printed in the legislative text; and this is so whether or not they are taken to form part of that text (or, to put it another way, whether or not they are taken to be operative). Publications from the rewrite team subsequent to that of October 1998 have not suggested any solution to the problems.

Material in legislative text: conclusions

One should not have a closed mind on these matters. But my own view at the moment is that the legislative text should be confined to doing only so much as is needed to change the law. Purposive provisions should be treated with great caution. If a specific provision needs modifying, it should be done by incorporating any modification directly and precisely in the specific provision itself. And explanatory material should be kept out.

There is nothing new about my conclusion. In 1597 the Lyons edition of Lucas de Penna's Commentaries was published. In "The Medieval Idea of Law" (published in 1946) Walter Ullmann says: "Lucas considers the external shape of the laws as of no less importance than their contents. The principle in framing laws should be this: simplicity and lucidity of style, brevity of language, employment of unambiguous terms, and avoidance of superfluous expressions ..... He bitterly deplores the use of empty phrases in laws, because they are apt to obscure their object and purpose." If you take "superfluous expressions" or "empty phrases" to include material not intended to have legislative effect, you can see that people were aware of the problems at least 400 years ago. And of course legislative drafters and others have repeated the warnings down the centuries. A saying attributed to a former member of the Parliamentary Counsel Office is "excess matter in Bills, as in people, tends to go septic". And there is a lot in it.

Although I am by no means the first to conclude that legislative text really should be confined to so much as is essential to change the law, I hope it has been useful to hear my case against the background of recent developments.

Pepper v Hart

So superfluous material should be kept out of the legislative text. The next question is whether the reader can be helped by material *outside* the legislative text itself. This leads naturally to a consideration of *Pepper v Hart*[4]. In that case the House of Lords decided that, if a provision of an Act is ambiguous or obscure or leads to absurdity, statements by ministers on the Bill which became the Act can be used as an aid to interpretation.

One of the problems with *Pepper v Hart* is that it operates against an unscientific background and that, accordingly, its effect can be capricious. This arises because it is a matter of chance whether a minister is asked to clarify a particular issue as a Bill passes through Parliament. Some issues may be discussed and others may be ignored; and the issues discussed may be trivial while those ignored may be important. Worse than that, a minister may get his facts wrong; and it is even known for a minister dealing with a given point to read out by mistake a note designed to deal with an entirely different point. Even if a mistake is picked up and a statement is later made by way of correction, it might be missed by the reader of *Hansard*.

And that brings me to another of the problems with *Pepper v Hart* — the availability of material in *Hansard*. Put briefly, it is not easy to get swift and cheap access to *Hansard.* Moreover, several debates will take place at different stages as a Bill goes through Parliament, so that different issues of *Hansard* will have to be traced. And that is quite apart from the time it takes to study the material in order to find out whether or not anything useful was said.

There is another potential problem with *Pepper v Hart*. This problem would arise if we ever went over to drafting in general principles. This occurs where the whole legislative proposition is couched in generalities. It differs from the sort of purposive provision I have been discussing, where general words are *added to* the main legislative proposition. The interesting thing is that there are few practical examples of drafting in general principles. People cite "thou shalt not kill", but nobody believes that you could couch the modern law of homicide in four words. There is also "Thou shalt neither vex a stranger, nor oppress him: for *ye* were strangers in the land of Egypt". But again this could hardly form our law on race relations. Some people say we should adopt the European style, which is said to be in the form of statements of general principle without much detail. But Sir William Dale, who advocated the continental style, said in his book: "the common idea, that continental legislation is drafted only in terms of principle, is demonstrably mistaken".

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4 [1993] 1 All ER 42

But suppose we did go over to drafting in general principles. Would the courts regard such provisions as "ambiguous or obscure" within the principle in *Pepper v Hart* ? I do not know. But if they did, there would be a great temptation for ministers to flesh out the general legislative provisions with statements in Parliament. The consequences would be potentially dangerous, because you would get a shift of legislative power from Parliament to the executive.

Altogether, then, *Pepper v Hart* is an unwelcome decision. Recently I attended a discussion held by the Statute Law Society and attended by two Law Lords. One said that *Pepper v Hart* is a bad decision and should be overturned by legislation. The other thought the decision would wither away because judges are tending to find that resort to *Hansard* makes no difference to the outcome anyway.

Explanatory notes

So, purposive or explanatory material in the Bill itself creates problems. And the use of material outside the statute under *Pepper v Hart* creates problems. Can anything else be done? Well, yes it can. The Government can produce material designed to help the reader.

Material of various sorts has been produced by the Government for some time. For instance, until recently any Government Bill would have an explanatory memorandum attached to it. But these were often little more than a brief summary of the clauses of the Bill. In addition, notes on clauses, explaining the Bill in layman's terms for the benefit of ministers, were sometimes made available to other people. But again these often did little more than summarise the clauses of the Bill.

However, in November 1998 documents of a new kind began to appear. These are called Explanatory Notes. These notes are produced with each Government Bill. They are prepared by the sponsoring Department. They represent an expanded and improved version of the sort of material that used to appear in the explanatory memorandum and the notes on clauses. They are revised when a Bill is passed, to reflect the Act in its final form and to serve as assistance to the user of the Act.

There are no fixed rules about what the notes should contain. But they will usually include a brief overview of the legislation as well as more detailed explanations of the clauses. They might contain background information about such things as the existing law, whether statute law or common law. They might alert the reader to definitions appearing in other parts of the Bill or Act concerned. They might explain cross-references to other statutes. They might contain worked examples — perhaps calculations showing how to work out a fee or a rate.

The notes are designed to help the reader to navigate round the legislation and to help him to assimilate the new law. The notes are not intended to be part of the law itself. For instance, they are

not intended to resolve ambiguities; if ambiguities are discovered while the Bill is being drafted, the drafter should remove them. Nor are the notes designed to sell the Bill or the policy underlying it; they are neutral in tone. It may be, of course, that the courts will be referred to the notes in argument. If so, it will be for the courts to decide what status to give to them (if any). But there should be little scope for this. That is because they will be prepared so as not to take the law beyond what the legislation itself does.

Several Bills have now passed under the new system of explanatory notes, and the resulting Acts have emerged with them. As far as I can tell from people's reactions, the notes are regarded as useful and the system is recognised as a success.

I think the attraction of the scheme of things we now have springs from a simple fact — that the text of the Act is confined to legislative (that is) operative material, and that any inoperative material appears in a document separate from the legislative text. This leads to several advantages.

- First, the reader knows what is operative and what is not, because there is no mixing of two sorts of material in one text.
- Secondly, there is less risk of conflict *within* the legislative text, because everything in it is of equal weight; and this in turn arises from the fact that it is all essential for the purpose of changing the law.
- Thirdly, because the explanatory notes are constructed on a logical and scientific basis, there is less of the hit-and-miss effect that *Pepper v Hart* can produce.
- Fourthly, because the notes are in one document, they are easy to find.

Postscript

I said earlier that the purpose of an Act is to change the law, not to explain, entertain and so on. However, that does not prevent legislation from giving rise to entertainment unintentionally. For instance, there is the American statute, which provides that —

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

And there is the Indian statute passed after a serious railway accident at a junction. It provided that, when two trains approach at an intersection, each must wait until the other had passed!

There is the more rarefied kind of wry entertainment that a drafter himself can derive from spotting the blunders or inelegancies in the products of his colleagues. At a social occasion one of my children once asked one of my colleagues if I laughed much at work. The answer was, "Only when he reads other people's Bills". I have certainly derived some entertainment from other people's work. For instance, there was the statute from Azerbaijan. It looked like a straight copy of our Interpretation Act — including the section with the sidenote "Application to Northern Ireland".

And I derive entertainment from the creative aspect of the job, and even from a little fantasising. I used to do a lot of tax legislation, both national and local. In local taxation you tend to define a financial year as a period of twelve months beginning with April 1. This always reminded me of the beginning of Chaucer's "Canterbury Tales", and I felt tempted to say April "When smale fowles maken melodye,

That slepen al the night with open eye".

But then the old reminder comes along. You cannot indulge these fantasies — because you are there to change the law, and nothing more. As I indicated earlier, it is this that makes legislative language unusual. The result is that anyone who spends his professional life writing statutes can tend to get a rather odd view of the world. If the mental processes used in his professional life spill over into his private life the consequences can be interesting. You become incapable of understanding the simplest sentence. Everything seems ambiguous. For instance, I once saw an advert for a "massive carpet sale". Does this mean a sale of massive carpets, or a massive sale of carpets of different sizes, or what? If a sign on an escalator says that "dogs must be *carried*" you can easily change its meaning by changing the emphasis to "*dogs* must be carried"; do you go in search of a dog in order to obey the sign?

And that brings me to one advantage of working in this stark and precise literary environment — namely, that the drafter's perspective can help him to derive entertainment from many forms of the written word. I once saw a sign on a railway platform: "Passengers must cross the line by the subway". Does this mean that, assuming you *want* to cross the line, you must do so by the subway? Or does it mean that, whether you want to or not, you must cross the line? And what happens if, once you get to the other side, there is a similar notice directing you back again? The literal-minded passenger could spend the rest of his life crossing back and forth!

I started with Alexander Radishchev. Maybe it *was* the legislative drafting that drove him to suicide after all.

Drafters' Devils

David Hull [1]

Compared with advocacy, law drafting is a gentle discipline, but it has its own demons.

For example, there may be a problem of inadequate instructions. Mention this at a gathering of legislative draftsmen and heads will nod reflexively. Everyone knows at once what you are talking about. Touch on the topic of a brief delivered in the form of a draft law and you may even provoke a scowl or two.

At the other end of the process, when it comes to the result, there is a continuing debate about clarity — what it means, its proper place, the things that are said to work against it, the need to move with the times and the quicksand of fashion.

Legislation is a means of carrying out a policy that is, for whatever reasons, to have the force of law. It is an essential method of dispatching public business, and therefore it is politically important.

In the ordinary course, the preparation of a law depends on a political decision to include it in a programme of legislation and this is obtained on the submission of a summary of the proposal. Then the project is developed in detail.

For this purpose, a distinction is conventionally drawn between the substance of the policy and its expression as a law. The first is regarded as the domain of those who give the instructions. In most cases they will be officials in the Department whose political head is promoting the Bill. For his part the legal draftsman's role is to achieve the second object. He will be expected to do so in a way that is sometimes described as being "legally effective". Law drafting offices also seek to ensure the coherent development of the body of law as a whole, which is a broader ambition.

Nothing matters more than the ideas that make up the substance of the policy. If they are lacking, the outcome will be unsatisfactory, though the consequences may not be obvious or dramatic. Flaws in policy tend to be less visible and more debatable than technical mistakes and of course, in interpreting a statute, a court of law will try to make it work as far as it can properly do so.

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[1] Assistant Law Draftsman, States Greffe, Jersey; former Chief Justice of Swaziland; former piusne judge of Bermuda and of Cayman Islands; former Attorney General of Gibraltar and of Western Samoa; former Parliamentary Counsel in New Zealand. The views expressed in this article are those of the author alone.

The boundary between policy and its expression is not clear-cut. Although the legal draftsman needs a sufficient brief to enable him to begin, what this means is that the client Department should provide instructions in detail that amount to a reasonably complete working proposal. Legislation, typically, is general and prospective in its purposes. It is seldom possible to foresee and address all of its implications at once. In practice, the policy is developed further in the dialogue that takes place during the drafting process itself. On receiving his instructions, a draftsman analyses them critically. If necessary, he discusses and argues them with the instructing officials. He then prepares a first draft for their consideration. They in turn scrutinise it and comment. This process is repeated until the project is ready to go forward. Along the way, any of the participants may identify an issue that needs to be considered. To do so is often to point to a solution. By the nature of its work, a law drafting office is also likely to be able to contribute on matters of common technique, such as licensing systems, the definition of criminal offences and rights of appeal. Although they may be seen as "machinery", they are matters of substance.

The involvement of a legislative draftsman in the development of policy is well recognised. However, the extent to which the drafting of a law shapes that policy may be underestimated. According to some philologists, the very act of expressing an idea in words is inherently creative. Whenever he does so, a legal draftsman is therefore moulding the idea. For most of us, this may not be in consequence of any conscious awareness of the deeper reaches of philosophy. As much as any other branch of legal practice, law drafting is a practical affair (not least because it is carried on in a political environment). Nonetheless, as with other aspects of the discipline, the force of that fact is something that becomes apparent with experience.

So, while a legislative draftsman's role in policy may be described cautiously as a minor one, to be exercised with discretion and chiefly to identify and fill in "lacunae", that is not a sufficient account of it. Driedger, the leading Canadian authority, drew the distinction more sharply. "It is not the function of a draftsman," he wrote, "to *originate or determine* policy."[2] (Emphasis added.)

By the words "to originate", he must have meant to initiate the proposal for legislation. There is no doubt that, in the course of their work, legal draftsmen do contribute original ideas in support of the general purpose. The point is that it is for the instructing client to decide whether or not to adopt the idea.

In the same way, the instructing officials by their own comments influence the expression of the law. It will occasionally seem to them that their draftsman is stubborn about his own form of words. One explanation is likely to be that he no longer remembers just why he chose them. However, he is

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[2] Elmer A Driedger Q.C., *"The Composition of Legislation"* (Second Edition, Revised), at *xv.* (The Department of Justice, Ottawa)

confident that he had good reasons for doing so, and he knows from past experience that it is not wise to depart too readily from your draft. On the other hand, he may just be a little inflexible.

Collectively, they both influence the result. When the question eventually comes to be put, a final draft has a way of commanding the initiative. It is the result that matters, politically and to the public. The division of function is an internal working method. If a law has shortcomings, the officials and the draftsman are both liable to be held to account, jointly and severally. The latter may hear a defect of substance criticised as a drafting error. He will not like it very much, and it may not be fair comment. But politicians and the public have their own instincts, and it may be a safe verdict as far as the public interest goes.

On all of these considerations, a legislative draftsman himself has a healthy interest — professionally and personally — in the quality of the instructions he receives.

In an extreme case, an inadequate brief is immediately recognisable. It will barely carry a proposal beyond the submission on which political approval to proceed was secured. This will probably be attributable to a lack of resources (for example, as in the case of a very small, developing country which has been provided with law drafting assistance but not with complementary aid for the substance of a project). Where resources are available, the likely reason is that the task of preparing the instructions has been underestimated, and assigned at an inappropriate level.

The deficiencies are usually more oblique. They may not be evident until drafting has begun. However, the problem may be indicated in various ways.

The absence of any explanation of the background to a proposal is, for the reasons set out below, a reliable sign that it is imperfectly developed. Instructions that are preoccupied with particular details, and are to a degree haphazard, with a corresponding lack of attention to general principle, are also symptomatic. They may be written in legalistic language. It may be apparent that the instructing official sees his relationship with the legal draftsman as being that of a lay client and his solicitor, as if he were a private individual asking a lawyer to prepare a domestic lease. On the other hand, he may reveal, by the way in which the brief is couched and in which the work proceeds, a literal and formal understanding of the meaning of the words "instructions" and "to draft". Each expression is a term of art, and persons who use them self-consciously tend not to understand them properly.

Dealing with the problem requires tact, and carries with it an obligation. It flows from a lack of understanding of how a law is prepared. An official who is responsible for working up a policy is not a layman. He may be expected to know his subject, to think in depth, to have powers of critical analysis and to be able to explain himself fluently and discursively. But for anyone providing a

specialist service, there is a certain disadvantage in being seen to direct a client how he must go about using it. The need for a sufficient brief arises because of the division of function. The discipline of law drafting stands on the virtues of that division. It is therefore incumbent on those who practise the discipline to explain themselves to their clients.

Most law drafting offices publish guidelines as to how instructions are best given.[3] If these are to be effective, they should explain why it is so. As far as the nature of the process is concerned, it is important to stress two things.

The idea that, to work its legal spell, a law must resort to incantation is surprisingly widespread. People who are not lawyers sometimes become uneasy if they think a draft does not have a legal flavour. It is not universally understood that the best way to give instructions, and to comment on drafts, is in everyday language. The instructing official needs to know this.

For a successful outcome, he must also appreciate why a critical exchange is essential. This means in the first place that he must be aware that a statute, characteristically, does not explain its motives. What it does is to state a legal effect, which is not the same thing. For that basic reason, if everyone who takes part in its preparation is to understand clearly where the project is heading, the person who provides the instructions must explain the reasons behind it. He has to be able to do this for his own benefit, to be sure that he has thought them through properly himself, but it is also necessary to enable the draftsman and the other people who may be consulted in the course of the exercise to contribute usefully.

The instructing official should appreciate that policy is developed significantly by the drafting process, and why that is so. He must be made as conscious as the draftsman of the fact that if the critical exchange does not take place, something will almost certainly be overlooked, and that this can happen as easily in a project that is simple and straightforward as in a more complicated matter.

The problem of inadequate instructions frequently arises when they are delivered in the form of a draft law. It is a precept of practice within the discipline that such instructions are undesirable. One school of thought, arguably the wiser, is that they should simply be returned. Most legal draftsmen have heard of the legendary practitioner who wordlessly tears them up in front of his startled clients and sends them away to try again. There have been such draftsmen, but the reality is that law drafting offices from time to time receive and act on instructions in that form.

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[3] For example, the Law Draftsman' s Office in Jersey published in 1997 its booklet *"Making New Laws (A handbook for instructing officers)".* (States Printers)

There are compelling reasons for the rule of practice. The immediate one is that they create extra work unnecessarily, but this is a consequence rather than the real vice in them.

Instructions in the form of a draft law do not explain themselves. They therefore raise a question whether the person who has prepared them has considered the policy he is charged with developing. He has not demonstrated that he has done so.

There is a serious risk of failure of communication. For one thing, the instructing official will be inclined to think that his intention has been understood. The legislative draftsman will want to be sure that he does understand the reasons for the proposal. He will therefore be concerned to identify those reasons from the instructions — such as they are — that he has. To do so involves an unnecessary process of inference. To some extent it will inevitably be a chance affair. He may identify all the relevant points. He may not. In a task as important as the preparation of a public statute, the risk should not be taken. There are better ways of going about it.

The common reason why instructions are given in the form of a draft law is not that the client fancies his hand. It is that the proposal is to follow a law that has already been passed somewhere else. To do this successfully involves knowledge, skill and judgement. It requires an understanding of the legal effect of that law in the place where it was made, the reasons for it and the exercise of judgement as to whether — and if so, to what extent — it is suitable for one's own needs.

If the other law is put forward as the bare brief, that is a very strong reason for thinking that its implications have not been weighed and, more often than not, it is the truth of the matter.

And then there is this other demon, the one within.

Some years ago Martin Cutts, a professional writer too and a proponent of clear expression, wrote to the Parliamentary Counsel Office in England. He wanted to know if laws could be written more readably. Letters were exchanged over a period of time. Eventually Cutts was invited to see if he could do better.

The invitation was accepted. Choosing the Timeshare Act 1992 for his exercise, Cutts produced a discussion booklet, "Unspeakable Acts?"[4] In it he set his own effort, which he called the "Clearer Timeshare Act", alongside the official version. He then solicited the response of the Office and public comment.

[4] Martin Cutts, "Unspeakable Acts?", 1993. (Words at Work)

The correspondence was now passed to counsel who had produced the Act in question. He did not accept that the alternative achieved the intended effect of the law.[5]

When he had his responses in, Cutts revised his draft and published it in a second booklet, which he called "Lucid Law".[6] The Right Honourable Sir Thomas Bingham, then Master of the Rolls, contributed a foreword. It concluded with the following sentences:

> "This invaluable report invites readers to make their own comparison and decide: who has won the challenge? If the vote goes for the Clearer Timeshare Act an important point has been made."

That would also have been the case if the expert version were thought to have prevailed.

Thirty years ago, it would have been unusual to extend the kind of invitation Cutts received. Had it been done, a private reply would probably have been expected. I doubt that anyone would have foreseen that a very senior judge would publicly proclaim the affair a contest. Times have changed of course, but the language of public statutes has always been a matter of critical interest. Complaints that laws are hard to read usually assert one of the following things:

(a) they are too long-winded;
(b) they use language that is unfamiliar to most people; or
(c) they are convoluted.

Sir Robert Micklethwaite QC, the Chief National Insurance Commissioner, illustrated one facet of the last point vividly when he told the Renton Committee in the 1970s:

> "A statute should not only be clear and unambiguous, but readable. It ought not to call for the exercise of a crossword/acrostic mentality which is able to ferret out the meaning from a number of sections, schedules and regulations."[7]

Another common form of convolution is to introduce a gratuitous step for the reader to have to digest, as when he is told unnecessarily that A will apply in case B as if case B were case C (instead of the direct proposition A applies in case C).

In recent years, the plain English movement has been in the forefront of those who assert that laws can be written more clearly. Their views have influenced the drafting styles of some offices. However, committed legal draftsmen do not yield against their better judgement to what they may regard as the trends of the moment. In 1994 Jack Stark, who was then Assistant Chief Counsel in the Legislative Reference Bureau of the State of Wisconsin, had this to say:

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5 Euan Sutherland, (Parliamentary Counsel), *"Clearer Drafting and the Timeshare Act 1992: A Response from Parliamentary Counsel to Mr Cutts",* Statute Law Review, Vol. 14, No. 3, Winter 1993, p. 163. (Sweet & Maxwell)

6 Martin Cutts, *"Lucid Law (The sequel to 'Unspeakable Acts?')",* 1994. (Plain Language Commission)

7 *The Preparation of Legislation,* (1975), Cmnd. 6053, at p. 28. (HMSO)

"The plain language school has already supplied its meagre store of help."[8]

One of his points was that the school does not say what clarity means. It only advocates its use, or identifies ways in which its presence can be recognised or tested. In the context of writing laws, it cannot mean a mere lack of ambiguity. That is subsumed in the concept of accuracy, which itself refers to the coincidence of the effect that the draftsman achieves with the intention of the person who promotes the draft law.

What the plain language school really means, says Stark, is that laws should be quickly understood by those to whom they apply, but that virtue is far outweighed by other considerations. A draft law that is expressed so that everyone can immediately understand it, but does not reflect the intention of the legislator, is not worth the paper it is written on. Accuracy is the overriding consideration.

He also asserts that the plain language school is mistaken in assuming that meaning can be easily stated and easily understood, and that it is mistaken in the priority that it attaches to the convenience of the reader. The weight of empirical evidence, he claims, is to the contrary. Citing Wittgenstein's theories of language, he argues that because of the intimate connection between one's choice of language and the nature and quality of one's thoughts, the best way to improve the quality of a draft is by focusing on the draftsman.

Stark's article drew a response from Martin Cutts and another from Joseph Kimble, an associate professor of law at the Thomas M. Cooley Law School in Lansing, Michigan. Both were dismissive. Cutts described it as "an attempt to debunk the idea of plain English in the law" and, later, as "a travesty of the position of plain language exponents".[9] Kimble quoted two statements from the end of the article, calling one "cavalier" and the other "insular".[10] Neither addressed the substance of Stark's points.

Law drafting is a serious business. Many practising legislative draftsmen will, I think, lean towards the view that Stark's opinions carry the greater weight. If readability in the popular sense were the determining factor, the public would naturally have better options. The reason that law drafting is done by lawyers is that expertise in law is desirable. One reason that a specialised discipline emerged within the profession is that, given that premise, it calls for an ability to express laws in a way that will be understood not only by lawyers but also by those who wish to make or apply them, or who are subject to them.[11]

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8 Jack Stark, *Should the Main Goal of Statutory Drafting be Accuracy or Clarity?* Statute Law Review, Vol. 15, No. 3, 1994, p. 207. (Sweet & Maxwell)

9 Martin Cutts, *Plain English in the law,* Statute Law Review, Vol. 17, No. 1, 1996, p. 50. (Sweet & Maxwell)

10 Joseph Kimble, *Clarity and precision in legislative drafting: Are they mutually exclusive goals?*, The Loophole (The Newsletter of the Commonwealth Association of Legislative Counsel (CALC)), December, 1997, p. 12

11 The Parliamentary Counsel Office in England was established (in 1869) partly to take the writing of statutes out of the hands of conveyancers

In fact, Cutts' thesis was not that a reader should be able to understand a law quickly, but that he should be able to do so easily, and reference to indices is one method of defining a thing. Cutts also drew attention to the need, for ease of understanding, to be concerned not only with the language used but also with the physical layout of a statute and its typography. Both of those other considerations are the business of any legal draftsman, the first as a matter of course and the second to the extent that he can be expected to contribute ideas towards the development of his office's "house style".

Intelligibility is an essential requirement for legislation, for two reasons. One, as the Right Honourable Lord Simon of Glaisdale said to the Statute Law Society, is:
"It is an aspect of the Rule of Law. People who live under the Rule of Law are entitled to claim that that law shall be intelligible."[12]
The other is that it increases the likelihood that the law will be obeyed. Even a dictator finds it convenient to be understood.

However, the habits of expression that trouble the plain language school are not universal, and its views are not original. Drafting styles differ from place to place. The need for clarity of legislative expression was recognised and practised, in English-speaking jurisdictions, even long before Sir Ernest Gower's well-known book on plain language was published in 1948.[13] From their earliest days, new colonies and countries had the opportunity and the motivation to write clear laws. There was an urgent need to establish a body of law and legislation was the obvious vehicle.

No other source could compete with it in immediacy, generality or creativity. In those circumstances, legislative draftsmen enjoyed a double advantage. The medium afforded greater freedom of expression, and they were less constrained by the need to take into account a long, comprehensive and sophisticated tradition of case law. Around the Commonwealth — and it seems reasonable to infer that it was in direct consequence of these things — many large and small countries were soon distinguished by the standard of expression of their statutes. Canada is a pre-eminent example. The clarity of its legislation can be seen at once, by turning through a random selection of current laws. New Zealand has enjoyed a similar reputation. I was always given to understand that in the middle of the century, its laws were used as models at a distinguished American law faculty. Each country has produced a leading writer (Driedger himself, and Thornton) in what is a very small field of legal literature. Both have emphasised the importance of clarity.

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[12] Right Hon. Lord Simon of Glaisdale, *The Renton Report — Ten Years On*, Statute Law Review, Autumn 1985, p. 133. (Sweet & Maxwell)

[13] Sir Ernest Gowers, *Plain Words* (1948)

There are other long traditions of clear legislative expression throughout the Commonwealth, exemplified by Alison Russell's collection of colonial precedents.[14]

The other reservation that practising draftsmen have about the current school is whether it is in some measure superficial and fashionable. Some, such as Stark, clearly have firm views about that. For others of us, it is more of a feeling, based on those things to which the movement does not seem to attach weight and on some of its own suggested solutions.

For example, it does not dwell on the fact that laws must also be intelligible to those who enact or administer them, which is just as much of a consideration. It does not emphasise either the standard at which a law should be expressed. Statutes are state documents. They deal with matters of consequence. Some plain language proponents belittle this consideration, but how can the recognised standard of good written English be inappropriate? Anything less is patronising, and may also be dangerous. To insist on correct syntax, for example, is not in any meaningful sense at all to be guilty of grammatical obscurantism. A failure to do so may produce the wrong result and — in an adult society anyway — it may not be enough to expect the judiciary to ride purposively to the rescue. On a mature view, in the longer term, to treat laws too casually may turn out to be a good deal less than "user friendly", however seductive that expression may seem at first blush.

On the occasion Lord Simon gave the reason, from the recipients' point of view, why laws should be clearly expressed, Richard Thomas also addressed the Society. He was the Legal Officer for the National Consumer Council. He told them "High-sounding language *humiliates*."[15] I do not think he was being fashionable. If anything, he appears to have anticipated the mood of the present times by a few years. I do think (to put it plainly) that he was laying it on a bit — and missing the point. Most people, confronted by official pomposity, would surely have been amused or angry, but in any case his is neither of the objections that really count.

In some jurisdictions it has become the practice, as a matter of recent choice, to express a criminal offence by saying "a person must not.....", rather than "no person shall.....". One reason for this it that most people, in ordinary speech, say "you must not....." instead of "you shall not.....", which is fair comment. Another is that "shall" is capable of more than one meaning. Whether these are sufficient reasons for abandoning in the closing moments of this millennium a formula that has been with us for some time, and whether it really serves to clarify the meaning of a law, are another matter. For most people "thou shall not kill", in context, is a statement that is well understood.[16]

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14 Sir Alison Russell, *"Legislative Drafting and Forms"*, (1920) (now out of print)

15 Richard Thomas, *"Plain English and the Law",* Statute Law Review, Autumn 1985, p. 139, at p. 143. (Sweet & Maxwell)

16 "No person shall..." is in any case a more definite statement —and if style comes into it, has the force of understatement. "A person must not..." has a hint of anxiety about it.

In recent years the activities of proponents of plain English have nevertheless induced a defensive reaction, not only in places in which their criticisms have force but also in those in which they do not.

One line of defence is that accuracy (or precision) and clarity are sometimes incompatible, and in those circumstances clarity must give way. On this point there is a difference of opinion not only between critic and defender, but also within the discipline itself. The Law Reform Commission of Victoria, Australia, in 1987, reviewing the language of statutes, concluded "In its true sense, precision is incompatible with a *lack of* clarity."[17] As has been seen, Stark has the same view. This is not to say that clarity is necessarily synonymous with simplicity or brevity. Another practising draftsman, Duncan Berry, has reminded us that despite the modern preference for shorter sentences, clarity is sometimes best achieved by taking a longer route. But, although a number of leading practitioners in the discipline believe otherwise, and do so on the strength of their considerable experience, it is difficult to see how a law that is not clear can be said to be accurate.

Another line is that modern legislation is becoming increasingly complex. Thus, the argument runs, it is that much harder to achieve a desirable standard of expression. This is a comparative argument. One would need to be confident either that the Victorians — and the Georgians and even the Elizabethans — did not have the same high opinion of their own affairs or, if they did, that they were mistaken. What is thoroughly modern, at least in the emphasis that is put on it, is that complexity can justify a lack of clarity. Each of us has his own recollections: mine are that John Hobley and Garth Thornton in Hong Kong in the late nineteen-sixties, and Denzil Ward and Jack McVeagh soon afterwards (and for many years beforehand) in Wellington, would have given the argument short shrift. So, I am sure, would many others.

A third is pressure of time. This may seem more persuasive. The conditions in which legislative draftsmen work vary considerably and some offices do so under intense pressure. For professional writers, however, it is a somewhat surprising explanation. Other writers must also cope with pressure. Journalists are an obvious example. No one has stricter deadlines. The fact that they do not underwrite the legal quality of their work is hardly a distinguishing feature for they have their own market, with its own demands, to satisfy.

It is evident that constraints of time are not a justification for poor expression. Legislation is prepared in such conditions in Ottawa, Canberra and Wellington. It has been for years and there is reason for thinking that, in law drafting as much as in other disciplines, pressure is useful for quality.

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[17] Law Reform Commission of Victoria, *Plain English and the Law*, Report No. 9 (Government Printer, Melbourne: 1987), cited by I. Turnbull Q.C., *Legislative Drafting in Plain Language and Statements of General Principle*, Statute Law Review, Vol. 18, No. 1, 1997, p. 21, at p. 24. (Sweet & Maxwell)

To the extent that laws do not fulfil expectations in the way in which they are written, we do perhaps make one rod for our own backs.

The view is sometimes expressed in law drafting circles that the courts must be "driven" to a conclusion, and one of the older axioms in the discipline is Stephen's famous observation that ". . . 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. It is all the better if he cannot pretend to misunderstand it."[18] The two considerations are connected. They suggest (the second as it has been adopted by legal draftsmen) a psychological need to go beyond the objective requirement for accuracy and *guarantee* the outcome in every case.

Both lead to convoluted legislation. The first presumes that judges need to be forced to interpret a statute as the legislature intended, which is incorrect.

The second is more curious. It is one thing to write a law so that an honest person will not misunderstand it and, in a country that subscribes to the Rule of Law, to give him the benefit of ambiguity. But a bad man, pretending? When you think about it, there's a funny thing. Did a jurist as distinguished as Stephen really intend that his remarks should be taken quite so literally down the years?

The importance of punctuation in drafting

An English professor wrote the words, " a woman without her man is nothing " on the blackboard and directed the students to punctuate it correctly.

The men wrote: " A woman, without her man, is nothing."
The women wrote: " A woman: without her, man is nothing. "

So punctuation is everything!

Anon

[18] Sir James Stephen, *"Practical Legislation"*, (1902. p. L) cited by I.M.L. Turnbull, *"Problems of Legislative Drafting"*, Statute Law Review, Summer 1986, p. 67, at P. 68. (Sweet & Maxwell)

Queensland's OPC and Responsibility for Fundamental Legislative Principles [1]

Dawn Ray [2]

1. Introduction

Establishment of the Office of the Queensland Parliamentary Counsel Office

The Office of the Queensland Parliamentary Counsel (the "Office") was established by Queensland's *Legislative Standards Act 1992*. The legislative scheme is considered unique in the Australian context. This paper considers issues arising from the manner in which the scheme operates.

The Legislative Standards Act imposes on the Office responsibility for ensuring that Queensland's statute book is of the highest standard. The expectations placed on the Office cover not only the drafting and publishing of the legislative program, but also demand a high level of consideration of policy matters.

Statutory role

The Office's statutory role has evolved to become a formal internal-control mechanism for ensuring that Government departmental officers are held accountable for their policy decisions made during the drafting process. In particular, they are required to have regard to fundamental legislative principles. The Office's role can thus be compared with those of the Auditor-General and the Ombudsman. The Office is nonetheless very much part of the executive arm of government.

2. The Office and FLPs: background

Fitzgerald report

The status of the Office is traceable directly to the "Commission of Inquiry into Possible Illegal Activities and Associated Police Conduct", established in 1987 and chaired by G.E. Fitzgerald. The Commission was established to consider police corruption and, subsequently, other forms of corruption within the Government. The resulting report is now famous as the "Fitzgerald Report".

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1 This paper was presented at the CALC meeting held in Malaysia in September 1999.

2 Senior Assistant Parliamentary Counsel, Queensland Office of Parliamentary Counsel. The views in this paper are the author's alone and do not reflect the views of the Queensland Parliamentary Counsel or members of the Office of Queensland Parliamentary Counsel. However, the author wishes to gratefully acknowledge help given to her by Deborah Clark-Dickson, who edited this paper and saved it from a "legislative drafting approach". The author wishes to acknowledge that, all errors are hers.

The catalyst for the subsequent review of the Office can be found in the following few words from the Fitzgerald Report —

> "The Parliamentary Counsel obviously should not tailor advice to political expediency or fail to point out fundamental errors in principle or obligation in any proposed course. The present role and functions of the Parliamentary Counsel should be reviewed (in the light of other matters identified in this report) to ensure its independence."[3]

EARC review

The suggested review was conducted in 1990-91 by an independent body, the Queensland Electoral and Administrative Review Commission ("EARC"). EARC's review resulted in a comprehensive report about the Office. The upshot was the enactment of the Legislative Standards Act.

The Act established the Office within the executive arm of the Government and introduced the concept of fundamental legislative principles. The purposes of the Act are —

- to ensure Queensland's legislation is of the highest standard,
- to provide an effective and efficient legislative drafting service, and
- to make Queensland legislation, and information relating to it, readily available in print and electronically.

Legislative Standards Act 1992, section 4

The Legislative Standards Act, section 4[4] defines fundamental legislative principles ("FLPs") as "those principles relating to legislation that underlie a parliamentary democracy based on the rule of law". The Act characterises and lists examples of FLPs, including —

- making rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review, and
- allowing the delegation of administrative power only in appropriate cases and to appropriate persons.

Although the statutory functions of the Office include the provision of advice about the application of FLPs to Ministers and Members of the Legislative Assembly, the Act does not provide any mechanism by which the Office should provide the advice or ensure compliance.

An administrative document, the Cabinet Handbook, establishes the mechanism by which the Office performs its functions. The handbook states that it is the Office's duty to provide advice about FLPs and to report to the Premier if proposed legislation —

- is not in accordance with the Cabinet Authority to Prepare a Bill, or

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3 See Fitzgerald Report: 140.

4 See Appendix

- is inconsistent with FLPs, or
- includes other provisions that should be drawn to the attention of Cabinet.

Review of draft legislation and advice about breaches

The Office provides advice to the instructing agency at various stages during the preparation of a Bill about the application of the FLPs, including alternative ways of achieving the objects of the proposed Act without breaching the FLPs. The Office also gives formal advice to the Premier on receiving a submission for Cabinet Authority to prepare a Bill. At a later stage, it provides further advice to the Premier when it receives a submission for the Cabinet authority to introduce a Bill. A particularly important function of the Office is to review decisions made by departmental officers who wish to include provisions in legislation that breach FLPs.

EARC's report described the approach as a "system of legislative scrutiny within government".[5] When the system was introduced, the then Parliamentary Counsel described the Office's role for FLPs as having "some special sensitivities".[6]

Issues arising from the scheme

The scheme produces the following issues:

1. What level of independence is necessary for the Parliamentary Counsel to discharge the duties of the Office under the Legislative Standards Act?
2. What are the implications for the appointment of the Parliamentary Counsel and arrangements for the termination of the appointment?
3. What relationship should exist between the Office as a formal internal-control mechanism for FLPs and a parliamentary committee whose role is a formal external-control mechanism?
4. What is the appropriate mechanism for the Office to go about giving its advice?

3. What level of independence is necessary?

What level of independence is necessary for the Parliamentary Counsel to discharge the duties of the Office under the Legislative Standards Act?

The Fitzgerald Report stated the Office should be independent[7] and EARC supported this view.[8]

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5 See EARC Report : 83.

6 See Leahy: 3.

7 See Fitzgerald Report: 140.

8 On page 67, item 6.24, EARC provided for certain matters about the office and then stated the matters or measures "would substantially and symbolically reinforce the independence of the OPC ...".

The enactment of the Legislative Standards Act *appeared* to grant independence to the Office. The Act established the Office as a separate statutory entity, with functions that included provision of advisory and drafting services to all Members of the Legislative Assembly.

In particular, the Legislative Standards Act provided for the Parliamentary Counsel to control the Office, subject to supervision by the relevant Minister. The Act also enabled the Office to be attached to a Government Department for the supply of necessary administrative support.

Financial arrangements limit independence

Although the Office is a statutory entity, it is associated with a Government Department so that the Office's financial arrangements are merged with those of the Department. Consequently, it does not have the full measure of independence of a truly independent agency. The absence of financial independence, especially as it relates to the resources available to the Office, has the potential to threaten the ability of the Office to fulfil its role under the Legislative Standards Act.

Also, modern public sector financial accountability, with its performance measures and purchased outputs, will tend to further centralise financial control and allow more Departmental influence in the operations of the Office. Accordingly, the Office will be drawn more deeply into the domain of the Government Department to which it is attached. If the Office were merely another office of the Public Service, this may be reasonable. However, clearly the Office was intended to be independent so it could provide independent advice about FLPs in proposed legislation.

A further reason why the Office was given independence was so that it could provide drafting and advisory services to all Members of the Legislative Assembly and not just to Ministers. The office regularly drafts amendments and Bills for the Opposition and private members. The Parliamentary Counsel is not required to, and does not, seek approval to draft private members' Bills.

The Office cannot be seen to be independent, and it may not be independent, until it controls its finances as if it were a Government Department.

4. Parliamentary counsel's appointment: implications

What are the implications for the appointment of the Parliamentary Counsel and arrangements for the termination of the appointment?

Governmental control over public service

Throughout the 1980s and 1990s, Australian Governments have sought to exercise greater control over their Public Services. This is especially true of the position at the interface of the public service

and the Minister, occupied by the "Departmental Head " or the "Chief Executive". The debate centres on the concepts of neutral competency and responsive competency.

Antagonists to these changes view them as part of the politicisation of the public service. Supporters view the changes as the politicians achieving a responsive Public Service.

Current arrangements and potential problems

Under the Legislative Standards Act, the Governor in Council appoints the Parliamentary Counsel for a period fixed on the appointment. The Act sets out grounds on which the Parliamentary Counsel's appointment can be terminated. Those grounds are limited to mental health problems, being convicted of an indictable offence, misconduct of a serious kind and absence from duty without leave. The appointment of the Parliamentary Counsel is made under the Act and not the Public Service regulations.[9]

In 1996, a new Public Service Act was enacted. It empowered the Governor in Council to terminate certain statutory appointments without giving reasons even though the issue of termination was dealt with in the Acts that established the particular statutory positions. This could have affected the Parliamentary Counsel. However, a regulation under the Public Service Act immunises the Parliamentary Counsel's appointment from this process.

Effects of change on independence of Parliamentary Counsel

Although this form of arbitrary dismissal may be part of the arrangements for other Government Departmental Heads, it is suggested that is inappropriate for the Parliamentary Counsel. The arrangement seriously erodes the Parliamentary Counsel's independence. This view reflects EARC's recommendation for fixed term appointments to ensure independence.[10]

The Parliamentary Counsel is required to provide drafting services and advisory services about FLPs to all Members of the Legislative Assembly. It is therefore essential that the position of the Parliamentary Counsel not become a political appointment.

Possible alternatives

One alternative is to place the Parliamentary Counsel on a contract that ends when the Government changes. However, this approach does not take account of the scarcity of potential candidates and could politicise the position of the Parliamentary Counsel. Accordingly, it may be appropriate to pursue a radically different approach from that adopted by EARC.

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9 The relevant provisions of the Legislative Standards Act are set out in the appendix. The grounds for terminating the appointment are set out in section 19 of that Act.

10 See EARC Report : 68

EARC was concerned to ensure no Minister participate in selecting the Parliamentary Counsel.[11] If the selection panel for the Office included the Premier and Leader of the official Opposition, the appointee would enjoy some level of support from both political sides. Similarly, the Scrutiny of Legislation Committee's chairperson should be a member of the selection panel.

I believe that the Legislative Standards Act should be amended to ensure that the appointment of the Parliamentary Counsel can be terminated only on the grounds for misconduct currently stated in the Act, and only after a recommendation from the Legislative Assembly.

5. Relationship between OPC and committee

What relationship should exist between the Office as a formal internal-control mechanism for FLPs and a Parliamentary committee whose role is a formal external-control mechanism?

Establishment of parliamentary scrutiny committee

EARC's report included a draft Bill proposing the establishment of both the Office and a parliamentary committee to consider FLPs.[12] EARC's expectation was that the committee would form a formal external-control mechanism for the FLPs and the Office would form a formal internal-control mechanism for them. However, when introduced, the Bill did not make provision for such a committee.

Three years later, the Scrutiny of Legislation Committee was established by Queensland's *Parliamentary Committees Act 1995* as a standing parliamentary committee. Its role is that of a formal external mechanism ensuring accountability of the Government to the Legislative Assembly, by providing advice to the Legislative Assembly about whether proposed legislation breaches the FLPs.

Comparison of roles of SLC and OPC with regard to FLPs

By comparison, the Office is a public sector unit within the Government, consisting of a Parliamentary Counsel appointed under statute. Other officers are public servants appointed under the Public Service Act. The Office acts as a formal internal-control mechanism, ensuring accountability for departmental officers' decisions by providing advice to the Premier about whether a legislative

[11] See EARC Report: 67
[12] See EARC Report: 88

proposal breaches the FLPs or may be considered by the Scrutiny of Legislation Committee to breach the FLPs.[13]

Despite the complementary nature of the roles of the Scrutiny of Legislation Committee and the Office, there is no link between the two bodies. This is appropriate because of the need to preserve the independence of both. Moreover, it seems appropriate that the Committee should be responsible for the extent and content of the FLP's and that the Office should react to the Committee's comments on them.

This approach recognises that the Committee consists of elected Members Parliament, responsible for safeguarding and advancing the interests of Queenslanders. The Committee identifies issues in which protection is necessary or desirable. On the other hand, the Office's role is to draft legislation and advise on FLPs. The Office has no role in initiating their development. The Office must understand the common law and extrapolate from the Committee's comments about FLPs. For example, the Office may prepare proposed legislation with appeal rights limited to certain traditional legal grounds. On the other hand, the Committee may consider that an appeal should always be provided.

6. Appropriate advice mechanism

What is the appropriate mechanism for the Office to go about giving its advice?

Past process for parliamentary advice to Cabinet

EARC's recommendations were made at a time when the Parliamentary Counsel attended meetings of the Parliamentary Business and Legislation Committee ("PBLC"), held immediately before Cabinet meetings.[14] The Parliamentary Counsel attended PBLC in an advisory role, and was available to provide comments and further information on draft legislation. If a FLP issue had not been resolved between the Office and the relevant departmental officers, the Parliamentary Counsel could raise the matter at that time. The PBLC chair passed on the Parliamentary Counsel's advice to the Cabinet meeting that immediately followed the PBLC meeting.[15]

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[13] The complementary nature of the 2 entities was well expressed in the EARC report at page 85 -- in the course of the review into the OPC, it became apparent that any system of checks and balances in the making of legislation within Government could not be satisfactorily considered unless they were also related to the system of checks and balances operating in the parliamentary arena.

[14] See appendix F of EARC's report for the parliamentary counsel's drafting instructions to his officers about the Chair of PBLC's request for briefing notes for certain Bills--pages F 1 to F3.

[15] At a seminar about fundamental legislative principles in April 1993, the Honourable Mr T. Makenroth stated it was his duty as chair of the PBLC to convey to Cabinet any views expressed by the Attorney-General or parliamentary counsel in relation to possible breaches of fundamental legislative principles. (Makenroth : 7)

Subsequent changes in government have resulted in changes to this process. Currently, for each Bill, the drafter prepares a briefing note about any FLP breaches in the Bill. The Parliamentary Counsel settles the document, which is then sent to a central point in the Government Department where, if it is used, it must be combined with other advice presented to the Premier in a single briefing note. Accordingly, because the Office is attached to a Government Department, the Office's advice is captured in the channels of the departmental advice.

However, the Office briefing note is given to the instructing agency beforehand and is often then shown to the Minister responsible for the agency. The effect of this can be significant and may result in last minute changes to the proposed Bill. Also, a copy of each briefing note is given directly to the Leader of the House. It is thought this informs him of issues that may be of concern to the Scrutiny of Legislation Committee.

Limitations of current process

The initial process provided for direct and certain advice, and further information, about FLPs at a critical time in the Cabinet procedures. The current process is indirect and the advice is filtered. It is appropriate for Governments to decide on the processes adopted by them. One day, the Government may decide that the Office's independent advice should be given by circulating the Parliamentary Counsel's final memorandum about the FLPs to all members of Cabinet. The memorandum could be circulated conveniently with the final Cabinet submission for authority to introduce a Bill.

7. Conclusion

Since its establishment 7 years ago, the Office has undergone significant changes and achieved a variety of goals. It has gained a reputation as a highly professional office with dedicated hard-working drafting and legislation officers. However, the Office was established as an independent entity, which is able to provide independent advice to Ministers and Members of the Legislative Assembly about the application of fundamental legislative principles. The Office must provide that advice in relation to draft legislation even though the Office drafted it on the instructions of Departmental Officers. As such, the Office plays the part of a formal internal-control mechanism on the exercise of discretionary power by departmental officers so that their decisions can be readily understood by the Cabinet.

Appendix

Relevant Provisions of the Queensland Legislative Standards Act 1992

Purposes of Act

1. **(1)** The purposes of this Act include ensuring that –

(a) Queensland legislation is of the highest standard; and

(b) an effective and efficient legislative drafting service is provided for Queensland legislation; and

(c) Queensland legislation, and information relating to Queensland legislation, is readily available in both printed and electronic form.

(2) The purposes are primarily to be achieved by establishing the Office of the Queensland Parliamentary Counsel with the functions set out in section 7.

Meaning of "fundamental legislative principles"

2. **(1)** For the purposes of this Act, "fundamental legislative principles" are the principles relating to legislation that underlie a parliamentary democracy based on the rule of law.

(2) The principles include requiring that legislation has sufficient regard to –

(a) rights and liberties of individuals; and

(b) the institution of Parliament.

(3) Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation –

(a) makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review; and

(b) is consistent with principles of natural justice; and

(c) allows the delegation of administrative power only in appropriate cases and to appropriate persons; and

(d) does not reverse the onus of proof in criminal proceedings without adequate justification; and

(e) confers power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer; and

(f) provides appropriate protection against self-incrimination; and

(g) does not adversely affect rights and liberties, or impose obligations,

(h) does not confer immunity from proceeding or prosecution without adequate justification; and

(i) provides for the compulsory acquisition of property only with fair compensation; and

(j) has sufficient regard to Aboriginal tradition and Island custom; and

(k) is unambiguous and drafted in a sufficiently clear and precise way.

(4) Whether a Bill has sufficient regard to the institution of Parliament depends on whether, for example, the Bill –

(a) allows the delegation of legislative power only in appropriate cases and to appropriate persons; and

(b) sufficiently subjects the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly; and

(c) authorises the amendment of an Act only by another Act.

(5) **Whether subordinate legislation has sufficient regard to the institution of Parliament** depends on whether, for example, the subordinate legislation –

(a) is within the power that, under an Act or subordinate legislation (the "authorising law"), allows the subordinate legislation to be made; and

(b) is consistent with the purposes and intent of the authorising law; and

(c) contains only matter appropriate to subordinate legislation; and

(d) amends statutory instruments only; and

(e) allows the subdelegation of a power delegated by an Act only –

(i) in appropriate cases and to appropriate persons; and

(ii) if authorised by the Act itself.

The Parliamentary Counsel and Office

3. **(1)** There is to be a Queensland Parliamentary Counsel.

(2) An office called the Office of the Queensland Parliamentary Counsel is established.

(3) The Office consists of the Parliamentary Counsel and the staff of the Office.

Control of Office

4. **(1)** Subject to the Minister, the Parliamentary Counsel is to control the Office.

(2) Subsection (1) does not prevent the attachment of the Office to the Department for the purpose of ensuring that the Office is supplied with the administrative support services that it requires to carry out its functions effectively and efficiently.

Functions of Office

5. The functions of the Office are to –

(a) draft all Government Bills and, on request, proposed Bills for units of the public sector other than Departments; and

(b) draft, on request, Private Members' Bills; and

(c) draft all amendments of Bills for Ministers; and

(d) draft, on request, amendments of Bills for other Members; and

(e) draft all proposed subordinate legislation (other than exempt instruments); and

(f) draft, on request, other instruments for use in the Legislative Assembly (whether or not in relation to a Bill or amendment); and

(g) provide advice to Ministers and units of the public sector on –

(i) alternative ways of achieving policy objectives; and

(ii) the application of fundamental legislative principles;

in performing the Office's functions under paragraphs (a), (c), (e) and (f); and

(h) provide advice to Members on-

(i) alternative ways of achieving policy objectives; and

(ii) the application of fundamental legislative principles;

in performing the Office's functions under paragraphs (b), (d) and (f); and

(i) provide advice to the Governor in Council, Ministers and units of the public sector on the lawfulness of proposed subordinate legislation; and

(j) ensure the Queensland statute book is of the highest standard; and

(k) prepare -

(i) reprints of Queensland legislation; and

(ii) information relating to Queensland legislation; and

(1) make arrangements for the printing and publication of –

(i) Bills; and

(ii) Queensland legislation; and

(iii) information relating to Queensland legislation; and

(m) make arrangements for access, in electronic form, to –

(i) Bills presented to the Legislative Assembly; and

(ii) Queensland legislation; and

(iii) information relating to Queensland legislation; and

(n) perform any other function conferred on the Office under this or another Act; and

(o) perform functions incidental to a function under another paragraph of this section.

Appointment of Parliamentary Counsel

6. (1) The Parliamentary Counsel is to be appointed by the Governor in Council.

(2) A person is not eligible for appointment as Parliamentary Counsel unless the person is a barrister, solicitor, barrister and solicitor or legal practitioner of the High Court or the Supreme Court of the State, another State or a Territory of not less than 7 years standing.

(3) Subject to sections 18 and 19, the Parliamentary Counsel holds office for such term (not longer than 7 years) as is specified in the instrument of appointment, but is eligible for reappointment.

(4) The Parliamentary Counsel is to be appointed under this Act, and not under the Public Service Act 1996.

Termination of appointment

7. The Governor in Council may terminate the appointment of the Parliamentary Counsel if the Parliamentary Counsel –

(a) becomes a patient within the meaning of the *Mental Health Act 1974;* or

(b) is convicted of an indictable office (whether in Queensland or elsewhere); or

(c) is guilty of misconduct of a kind that could warrant dismissal from the public service if the Parliamentary Counsel were an officer of the public service; or

(d) is absent, without the Minister's leave and without reasonable excuse, for 14 consecutive days or 28 days in any year.

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Costing Drafting Services ¾ What Does a Drafting Office Really Do? [1]

Hilary Penfold [2]

Introduction

My basic proposition in this paper is that a good drafting office provides the Government with more than just draft legislation. The practical application of this arises, for instance, in any assessment of how much it costs the Government to have legislation produced through a drafting office rather than by contract drafters working independently. Any such assessment must recognise what a drafting office produces as well as legislation, and the real costs of all those products. I' m not talking about the other obvious products of many drafting offices, such as legislation publishing. What I' m talking about are the incidental products of the drafting work done in a drafting office.

Privatisation of drafting offices

At the moment, privatisation is not a big issue in Australia. However, it is an issue that has been bubbling along just under the surface for some years now, and every so often a proposal emerges in a half-hearted or half-baked way. The last time this emerged in Australia, incidentally, the proposal to open legislative drafting to the private sector was accompanied by a proposal to require my Office to charge for its services, but not to give Government Departments any supplementation for drafting services they had previously received free of charge. When some of the more influential Government Departments discovered the kind of money they would have to find for services they had not previously had to pay for, they were furious, and the proposal was quickly killed off with very little input required from us.

However, the issue hasn' t gone away completely for us, and it may emerge at any time for other drafting offices. In such circumstances, it is useful to have a conceptual framework from which to advise any the Government that does raise the issue.

Analysis of what a drafting office does

To explain why my office came up with an analysis of what a drafting office really does, I need to start with a brief description of the Australian Government' s approach to budgeting and accounting for Government funds.

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1 This article was presented as a paper at the CALC meeting held in Malaysia in September 1999.

2 First Parliamentary Counsel, Office of Parliamentary Counsel, Canberra, Australia. Paper prepared for meeting of Commonwealth Association of Legislative Counsel, Kuala Lumpur, September 1999

Program budgeting

For many years the Australian Government has used an approach called program budgeting to identify where Government money is going, and to provide a basis for assessing performance against aims. Program budgeting was unexciting, but was vaguely understandable. For some years, the Office of Parliamentary Counsel's program objective was as follows:

> To enable the Government to carry out its legislative program, and (subject to the Government's priorities) to assist Private Members with their legislative requirements, by drafting Bills and amendments to Bills and supplying them to the Parliament.

Unexciting, certainly, but on its face not a bad description of what a drafting office does.

Accrual budgeting and accounting

Several years ago, the Australian Government decided to adopt accrual accounting. They were very proud of themselves, especially because they claimed to be only the third Government in the world to do so (after Iceland and another country I can't remember).

Many of the rest of us were somewhat underwhelmed. We were even less whelmed when we discovered that we would have to develop a new set of performance information to replace our program objectives.

For the purposes of accrual accounting, we had to identify the outcomes and outputs of the Office. I have read a lot of material produced by our Department of Finance about outcomes and outputs and how you recognise one when you see it, and I still don't claim to understand either of the concepts. However, for present purposes, the following rough definitions will probably do:

- An organisation's ***outcomes*** are the things that the Government hopes to achieve through the existence of the organisation.

- An organisation's ***outputs*** are the things it produces or does to further the outcomes.

What, then, are the outcomes of a drafting office? What does a Government hope to achieve through the existence of a drafting office? It is easy enough to identify the purposes of our draft Bills individually. For instance, with one Bill the Government wishes to raise more taxes, with another it wishes to prohibit certain behaviour, with another it wishes to establish a new court system.

However, these are not outcomes for a drafting office. For a start, they are not in fact outcomes, even for the purposes of the sponsoring Departments, as you will see when we look at Attachment A. More significantly, perhaps, it was not acceptable for us simply to pinch other people's outcomes. One reason for this was that, like all the best competition entries, outcomes apparently have to be

expressed in 25 words or less. 200 or so different "outcomes", representing the 200 or so Bills we draft each year, wouldn't have fitted in.

In due course, we agreed on an outcome with the Department of Finance. I won't go into the painful process that took us from the first draft outcome to the final one, but here they are. The first draft outcome was as follows:

- The Government receives timely and effective draft legislation (Bills, parliamentary amendments and exposure drafts) to implement its policy. Acts passed by the Parliament are effective to implement Government policy.

- The statute book is internally consistent, and evidences a standard approach to drafting and formatting. The individual Acts constituting the statute book are of a uniformly high standard but are appropriately adapted to their particular subject matters and purposes.

Our final outcome was—

Parliamentary democracy and an effective statute book.

To ensure that you don't laugh too hard about this outcome, I'd like briefly to point out some of the outcomes devised by other Government agencies (see Attachment A).

There may well be an interesting discussion to be had on how much a drafting office contributes to parliamentary democracy, but that is for another time. What I really want to talk about now is what we discovered when we were forced, having come up with this outcome, to look carefully at what our outputs really were (see Attachment B).

Output group 1, **legislation**, is fairly obvious. Bills and parliamentary amendments are a clear, tangible product of a drafting office.

Output group 2, **program and project management,** is not quite so obvious. However, wherever legislative drafting resources are scarce, the management of those drafting resources to ensure that they are directed at projects that are of the highest importance to the Government as a whole (rather than to individual Ministers or senior public servants) is nearly as important as having the drafting resources in the first place. I also believe that any given level of drafting resources can be much more productive if carefully managed.

Management of individual projects is also important where drafting resources are scarce. It may be even more important where other resources (most commonly time) are scarce. Proper project

management may be the deciding factor in whether a draft Bill can be produced within particular deadlines or not.

Some of our clients, of course, are very good project managers themselves. Many of them, however, appreciate the project management contribution of an experienced drafter. In my Office at least, drafters routinely have a better understanding than our clients of the executive and parliamentary processes for dealing with legislation, and tend to be particularly good at the critical path aspects of project management (for instance, which tasks have to be completed before which other tasks can be started, and how can tasks be scheduled and progressed to ensure minimum elapsed time for a project?).

Legislative drafting capability (output group 3) may not be an obvious output or product of a drafting office. Logic might suggest (the Department of Finance certainly did) that it is more in the nature of an input or a resource than something that is actually produced by a drafting office. However, there are a couple of reasons why we maintain that legislative drafting capability in some form or another may be a significant output of a drafting office.

Certainly, drafting skills are one of the resources required to produce draft legislation (along with, say, a desk and a typewriter or computer and a printing press). Production of each individual draft Bill absorbs drafting resources. However, in a drafting office that employs inexperienced people with a view to training them as legislative drafters, and does so by enabling them to work with trained and experienced legislative drafters, each individual draft Bill not only absorbs drafting resources but also generates new drafting skills. Over a series of drafting projects, extra resources are created.

A draft Bill can be produced so as to absorb drafting resources without generating new ones, or so as to generate drafting resources as well as absorbing them. A drafting office can choose which way to work. If the drafting office chooses to work in a way that generates new drafting resources, it is illogical to dismiss those resulting training resources as a cost of the individual Bills involved; rather, they are a new resource produced by the activity. We classify the generation of drafting resources as a longer-term activity covered under the output called "legislative drafting capability".

Also under this output we include activities like our Legislation Process courses. Like drafter training, these courses absorb resources, but they also expand the skills base of our instructors and potential instructors. In this way they expand the public service's capacity to respond to the Government's demands for legislation.

Standardisation and quality control of legislation (output group 4) are other products of a drafting office that may not be immediately obvious.

One area in which this is significant is the printing and electronic publishing of draft legislation.

In the old days, say 20 years ago, my office had very little day to day responsibility for the formatting of its legislation. Draft legislation produced in the office was typeset by the Australian Government Printer, according to standard formats, to the limited extent that these existed, and otherwise more or less at the discretion of individual typesetters. There was no such thing as an electronic version of a Bill.

When Bills first started to be typeset using computers, in the Government Printer's office, the electronic texts were clumsy and lost their formatting when converted to any other use.

Nowadays we produce all our Bills in electronic camera-ready form. Standard electronic formats are maintained throughout the Office. This ensures that Bills all look the same, but it also allows for the use of a range of macros at various stages during a Bill's production (e.g. for such things as renumbering and for a range of quality checks when the Bill is being finalised).

This standardisation in turn simplifies matters for staff of the two Houses of our Parliament, who produce subsequent copies of Bills as they move through the parliamentary processes. It also simplifies the processes of printing copies of Acts when they are passed, and converting the electronic text of Acts into a variety of other electronic forms (e.g. for loading onto the Internet).

A range of other aspects of draft Bills and Acts are also standard across the statute book, with clear benefits for frequent users of legislation (e.g. approaches to definitions, numbering systems, etc).

Another aspect of this output is liaison and coordination. Increasingly, legislative projects seem to impact on legislation administered by agencies other than the sponsoring agency, or on other current legislative projects. Sometimes it is only the drafters who recognise these impacts, and often it is the drafters who have to work with their drafter colleagues, or with officers of other agencies, to make sense of the interaction between the various legislative projects.

Costing outputs

This analysis of what a drafting office actually does becomes more informative when you start applying it to real figures so as to cost the several outputs that have been identified. I should mention that, while we spent several months arguing about our outcomes and outputs, the actual costing was done in a couple of days when our Department of Finance suddenly reversed its previous advice that small agencies at least didn't have to cost their outputs individually. In that time, inevitably, we missed some subtleties. I will mention them where relevant.

Whole Office budget attributed to drafters

We started with the assumption that the whole costs of running the Office should be attributed to the work of the drafters, since they produce our core work. Using the basic salaries of the drafters to represent their proportionate costs to the office, we worked out a figure for the proportion of the office's total costs attributable to each drafter. The full cost of a drafter came out at about 2.7 times the cash salary.

There are a number of refinements possible here. For instance, we should have taken account of the other aspects of a senior drafter's salary package, which would make the senior drafters proportionately more expensive than their assistants. There are several costs that could have been directly attributed to particular outputs — for instance, our external printing costs belong entirely to output 1, while the costs of our editorial assistant could have been attributed directly to outputs 1 and 4.

How do drafters spend their time?

Having established a cost for each drafter, we then made a rough assessment of how much of a drafter's time and effort is applied to each of the 4 outputs. The attached table shows this assessment. Again, obviously, it lacks subtlety.

- Some of the assistant drafters get involved in project management.
- A brand new assistant drafter might spend far more than 30% of his or her time and effort learning rather than producing, and a more experienced assistant drafter might handle substantial parts of particular projects without receiving any identifiable training in the course of the particular project.
- There are many drafting projects for which 10% standardisation and quality control would be an overestimate, and others where the need to work within a particular legislative context imposes a major burden on the drafter.
- Some senior drafters would spend more than 3 days a year on development work, others not even that in some years.

Overall, though, I think these figures represent a pretty good picture of the allocation of time and effort in my office.

What use can we make of this analysis?

Finally, is there anything useful we can draw from this analysis?

You might be suspecting that if I find this information interesting it could only be because I'm a closet or frustrated statistician, and you'd be partly right. However, I think there are uses to which this analysis can be put in different circumstances.

Reviewing the operations of a drafting office

First, it may be useful in general to recognise that, conceptually and practically, the work of producing draft legislation can be broken down into several elements. This may help to analyse how a particular drafting office works, and whether changes are desirable. For instance:

- The head of a drafting office can consider whether he or she is better occupied in personally producing a significant volume of draft legislation, or in strategic management of the office's other drafting resources (e.g. by constituting special teams to deal with tasks involving tight deadlines and ensuring that the workload is spread as evenly as possible).
- Senior members of a drafting office can consider whether the productivity they can achieve working by themselves without training responsibilities might eventually be outweighed by the productivity contributed by an assistant drafter who has been well trained.

The analysis also raises interesting issues for jurisdictions in which legislative drafting is done in separate drafting groups within each policy Department.

Cost of Government drafters v. private drafters

Secondly, this analysis suggests that legislative drafting done within a Government drafting office is even cheaper than it might appear, and therefore, in general, even better value compared to the offerings of the private sector.

There are many ways of comparing the costs of private and Government drafters — for these purposes one set of comparisons is enough. In my office, the average total cost of a senior drafter is less than $1300 per day — including salary, "hidden" costs such as superannuation and accommodation and even more hidden costs such as a share of the costs of support staff and printing. For that cost, the office gets at least an 8 hour day, which will include, on average, around 6 hours

drafting and 2 hours on other outputs, mainly training and quality control work. From time to time, the Office also gets evening or weekend work from that drafter at no extra cost.

For $1300 paid to a private sector contract drafter, the Office gets —

- anywhere from 3 hours up to 5 or 6 hours drafting work (if we've organised a retainer based on a guaranteed amount of work);
- no training of less experienced drafters;
- no contribution to development work;
- not as much quality control and standardisation;
- and not even any printing!

In other words, the contract drafter is clearly getting paid more for less.

Private drafters don't produce all the outputs

Thirdly, and perhaps more importantly than the raw costs issue, the use of private sector contract drafters precludes the Government obtaining most of the outputs of a drafting office except the legislation itself.

It is not a matter of the Government having to pay more for these other outputs such as training, maintenance of legislative drafting capability or across-the-board quality control of legislation. The problem is that if a centralised drafting office is disbanded, these outputs become virtually unobtainable at any cost.

For instance, if drafting work is contracted out across the private sector, how do you apply across-the-board standards? Who does the quality control? Which private sector organisations will go to the trouble and expense of training new drafters on the off chance that they will keep getting Government drafting work? After all, the demand for legislative drafting, while substantial, is not unlimited, and there's not much you can do to expand your client base or develop a new one if your main client takes its business elsewhere.

Of course, many of these issues could be addressed by selling off the Government drafting office as a going concern, with a future monopoly on Government drafting work — but it's hard to see what would be achieved by this except possible ideological gratification.

What this means is that a Government decision to dispense with a drafting office may be far more substantial than just a decision to pay more for its legislative drafting in pursuit of ideological goals. It should also be recognised by the Government as a decision to do without:

- centralised management of drafting resources;
- a lot of project management expertise;
- training of new legislative drafters; and
- standardisation and centralised quality control of legislation.

Conclusion

In summary, then, being forced to consider the outputs of my office led us to articulate that a drafting office produces a lot more than individual pieces of draft legislation. This analysis may be useful in various contexts in which the operation or future of a drafting office is being considered.

Attachment A
Selected outcomes for other Australian Government agencies

Agency	Outcome
Human Rights and Equal Opportunity Commission	An Australian society in which the human rights of all are respected and promoted.
Australian Federal Police	Criminal activity is deterred in areas impacting on the Commonwealth's interests.
Department of Finance and Administration	• Sustainable Government finances • Improved and more efficient Government • Efficiently functioning Parliament
Great Barrier Reef Marine Park Authority	Protection, wise use, understanding and enjoyment of the Great Barrier Reef
Department of Defence	The prevention or defeat of armed force against Australia or its interests

Attachment B

Office of Parliamentary Counsel ¾ Outcome

Parliamentary democracy and an effective statute book

Outputs

Output group	*Outputs*
1 Legislation	1.1 Draft Bills (including supply copies) for introduction into the Parliament
	1.2 Draft Bills (including bulk copies) for other public or limited exposure
	1.3 Parliamentary amendments (including bulk copies)
2 Program and project management	2.1 Management of Government' s legislation program (drafting aspects)
	2.2 Management of individual legislative projects
3 Legislative drafting capability	3.1 Advice on legislative projects
	3.2 Training of legislative drafters
	3.3 Training of instructors
	3.4 Maintenance of knowledge base
4 Standardisation and quality control of legislation	4.1 Standardised drafting and formatting practices and techniques
	4.2 Centralised editorial and general quality control
	4.3 Liaison across portfolios/subject matters
	4.4 Drafting for readability/usability

Attachment C

Cost of outputs

Output	Proportion of drafters' time (% of time of each drafter at level OR total days for drafters at level)				Proportion of total costs (%)
	First Parliamentary Counsel (% of time)	Senior drafter	Assistant drafter Grade 3	Assistant drafter Grade 1 or 2	
1. Legislation	All time not attributed to other outputs				67
2. Program and project management	50%	5%			6
3. Legislative drafting capability					17
• Training of drafters		15%	15%	30%	
• Training of instructors		15 days	12 days	3 days	
• Development work/ documentation of techniques/ maintenance of knowledge base	20%	3 days			
4. Standardisation and quality control of legislation	10%	10%	10%	10%	10

Cabinet Directive on Law-making

In March 1999, the Privy Council of the Government of Canada issued a Cabinet directive on law-making. At the CALC meeting held at Petalang Jaya, Malaysia, in September 1999, the First Legislative Counsel of Canada, Lionel Levert, gave an exposition on the directive. The following is the text of the Directive, which was circulated to CALC members at that meeting.

1. Introduction

The making of law is arguably the most important activity of government. This Directive describes the framework for this activity and the principles that govern it. It is of the utmost importance that Departments embarking on law-making initiatives plan and manage them in accordance with this Directive and the supporting documents issued by the Clerk of the Privy Council.

This Directive replaces the Directive entitled *The Preparation of Legislation*, approved by the Cabinet on April 16, 1981. Its main objectives are to:

- ensure that the Cabinet has the information and other support it needs to make sound decisions about proposed laws,
- outline the relationship between Acts and regulations and ensure that they are viewed as products of a continuous process of making law,
- ensure that proposed laws are properly drafted in both official languages and that they respect both the common law and civil law legal systems,
- make it clear that law-making initiatives can be very complex and must be properly planned and managed, and
- ensure that Government officials who are involved in law-making activities understand their roles and have the knowledge and skills they need to perform their roles effectively.

This Directive sets out principles and general directions on how these objectives are to be met.

2. Fundamentals of the Government's Law-making Activity

Constitutional Considerations

The *Constitution Act, 1867*, distributes the legislative powers of Canada between the Parliament of Canada and the legislatures of the provinces (Part VI, sections 91 to 95). The

legislatures of the territories exercise legislative authority through delegation from the Parliament of Canada.

Canada's system of responsible parliamentary government is based on the rule of law. This means that laws must be made in conformity with the Constitution. The Crown retains very few regulatory powers that are not subject to the legislative or law-making process. For example, regulations governing the issuance of passports or medals and honors are still made under the royal prerogative.

Parliament may delegate regulatory authority to Cabinet (the Governor in Council), a person (such as a Minister of the Crown) or a body (such as the Atomic Energy Control Board). However, this authority remains subject to the will of Parliament and regulations made under this delegated authority are referred to as subordinate legislation.

Law-making authority in Canada is subject to a number of constraints. Parliament and the provincial legislatures are limited by the constitutional distribution of powers. They are further constrained in their law-making powers by the *Canadian Charter of Rights and Freedoms*, by the existing Aboriginal and treaty rights recognized and affirmed by section 35 of the *Constitution Act, 1982*, and by certain other constitutional provisions, such as the language rights and obligations that apply to Québec and Manitoba.

Parliament consists of three elements: the Crown, the Senate and the House of Commons. Parliament makes laws in the form of statutes or "Acts". All three elements must assent to a bill (draft Act) for it to become law. The assent of the Crown is always the last stage of the law-making process.

All money bills must, according to the *Constitution Act, 1867,* originate in the House of Commons:

> 53. Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons.

Money bills are to be introduced by a Minister of the Crown. Non-money bills may originate in the Senate.

The Cabinet, which consists of the Prime Minister and the other Ministers of the Crown, plays a significant role in Parliament's law-making activity, both collectively by approving bills for introduction in Parliament, and individually by sponsoring bills through the stages of the parliamentary process. Cabinet Ministers are in turn supported by the officials who work in Government Departments.

Deciding whether a law is needed

Making a new law, whether by obtaining Parliament's assent to a bill or by making regulations, is just one of several ways of achieving governmental policy objectives. Others include agreements and guidelines or, more generally, programs for providing services, benefits, or information. In addition, a law may include many different kinds of provisions, ranging from simple prohibitions through a wide variety of regulatory requirements such as licensing or compliance monitoring. Law should be used only when it is the most appropriate. When a legislative proposal is made to the Cabinet, it is up to the sponsoring Minister to show that this principle has been met, and there are no other ways to achieve the policy objectives effectively.

The decision to address a matter through a bill or regulation is made by Cabinet on the basis of information developed by a Minister's Departmental officials. The information must be accurate, timely and complete. To provide it, a Department should:

- analyse the matter and its alternative solutions,
- engage in consultation with those who have an interest in the matter, including other Departments that may be affected by the proposed solution,
- analyse the impact of the proposed solution, and
- analyse the resources that the proposed solution would require, including those needed to implement or enforce it.

In the case of a bill, the principal means for conveying this information is a Memorandum to Cabinet, which a minister must present to obtain Cabinet approval for the bill to be drafted by the Legislation Section of the Department of Justice.

When a legislative initiative is being considered, and where it is appropriate and consistent with legislative drafting principles, related matters should be combined in one bill, rather than being divided among several bills on similar subjects. A single bill allows parliamentarians to make the most effective and efficient use of their time for debate and study in committee.

Finally, caution should be taken when considering whether to include a "sunset" or expiration provision in a bill, or a provision for mandatory review of the Act within a particular time or by a particular committee. Alternatives to these provisions should be fully explored before proposing to include them in a bill.

Relationship between Acts and Regulations

Although Acts and regulations are made separately, they are linked in several ways:

- Parliament creates Acts and through them authorises regulations,
- a regulation must strictly conform to the limits established by the Act that authorises it, and
- most legislative schemes depend on regulations to make them work, so an Act and the regulations should be developed together to ensure a good match.

When developing a proposal for a bill that will authorise regulations, Departments should carefully consider:

- who is to have authority to make the regulations,
- which matters are to be dealt with in the bill, and
- which matters are to be dealt with in the regulations.

Ordinarily, the Governor in Council is authorised to make regulations. A rationale for departures from this practice needs to be provided in the relevant Memorandum to Cabinet. Matters of fundamental importance should be dealt with in the bill so that parliamentarians have a chance to consider and debate them. The bill should establish a framework that limits the scope of regulation-making powers to matters that are best left to subordinate law-making delegates and processes. The following principles should also be observed:

- The power to make regulations must not be drafted in unnecessarily wide terms.
- Certain regulation-making powers are not to be drafted, unless the Memorandum to the Cabinet specifically requests drafting authority for the power and contains reasons justifying the power that is sought. In particular, specific drafting authority is required for powers that:
    - substantially affect personal rights and liberties,
    - involve important matters of policy or principle,
    - amend or add to the enabling Act or other Acts,
    - exclude the ordinary jurisdiction of the Courts,
    - make regulations having a retroactive effect,
    - subdelegate regulation-making authority,
    - impose a charge on the public revenue or on the public, other than fees for services, or
    - set penalties for serious offences.

Acts and regulations are interdependent and should be developed in conjunction with one another. Regulations may be drafted at the same time as the authorising bill or after, depending on the situation. However, if regulations are an important part of a new legislative scheme, it may be helpful to begin developing draft regulations or at least a summary of the regulations at the same time as the bill to ensure consistency with the framework being

established in the bill. When regulations are developed under an existing Act, care must be taken to ensure that they fall within the authority granted by that Act.

Importance of bilingual and bijural drafting

The *Constitution Act, 1867* requires federal laws to be enacted in both official languages and makes both versions equally authentic. It is therefore of primary importance that bills and regulations be prepared in both official languages. It is not acceptable for one version to be a mere translation of the other. For this reason, sponsoring Departments and agencies must ensure that they have the capability to develop policy, consult, and instruct legislative drafters in both official languages. Both versions of legislation must convey their intended meaning in clear and accurate language.

It is equally important that bills and regulations respect both the common law and civil law legal systems since both systems operate in Canada and federal laws apply throughout the country. When concepts pertaining to these legal systems are used, they must be expressed in both languages and in ways that fit into both systems.

Planning and managing law-making activity

The Government's law-making activity is to be planned and managed on three levels:

- centrally for the Government as a whole,
- Departmentally, and
- on a project basis.

At the first level, there is a government-wide process to co-ordinate and set priorities among proposals for bills from different Departments. The Minister responsible for the Government's legislative program is the Leader of the Government in the House of Commons, who is also a Minister of State. For the public service, the Privy Council Office supports the Leader of the Government in the House of Commons in this activity. In addition, a committee of Cabinet, called the Special Committee of Council, and then full Cabinet review issues requiring decisions by Cabinet as a whole. For example, the Leader of the Government in the House of Commons seeks delegated authority from Cabinet for the introduction of Government bills.

In the case of regulations, Departments and regulation-making agencies must plan their regulatory agendas for coming years and prepare reports on planning and priorities. In the fall, they must also prepare performance reports. These reports are to be tabled in the House of Commons as part of the Estimates and referred to the appropriate committees of that House.

At the second, Departmental level, each Department manages the legislative proposals in its areas of responsibility. It must ensure that it has allocated the resources necessary to carry its proposals through each stage in the law-making process, plan for such things as consultation, and ensure that it has the capacity to formulate policy and instruct legislative drafters in both official languages. Finally, it must also plan and allocate resources for the implementation of new laws.

At the third, project level, Departments must plan their law-making activities as they relate to particular bills or regulations. These activities are to be managed as projects with tools for determining what resources are needed, what tasks must be performed and what time frames are appropriate.

3. Preparation of the Government's Legislative Program

Planning the Legislative Program

Planning the Government's legislative program begins up to one year before the opening of the session of Parliament in which the various legislative items are to be introduced. Experience has shown that the planning and preparation process should be spread over the whole year, as opposed to a short period immediately before a session. This stems in part from the established procedure for the approval of individual bills. This procedure involves three separate steps:

- Cabinet approval of the policy is sought,
- if Cabinet approves, the bill is drafted, which in many cases proves to be a lengthy and difficult process in itself, and
- approval of the Minister of State and Leader of the Government in the House of Commons is sought for introduction of the bill.

As part of the Prime Minister's June 1997 changes to the Cabinet decision-making system, the Special Committee of Council was given new responsibilities as a ministerial forum at the Cabinet committee level for discussing the Government's overall legislative planning and for specific legislative issues requiring decisions by Cabinet.

The Minister of State and Leader of the Government in the House of Commons is responsible for the Government's legislative program in the House of Commons including examining in detail all draft bills.

Accordingly, Departments and agencies whose Ministers are bringing forward legislative proposals are urged to keep in close contact with the Legislation and House Planning Secretariat of the Privy Council Office, which provides support to the Leader of the Government in the House of Commons and to the Special Committee of Council. In particular, it is important to inform them of any significant changes in the timing of Ministers' plans to bring bills forward.

Request for Legislative Proposals

Immediately after the Speech from the Throne at the opening of each session of Parliament, the Assistant Secretary to the Cabinet (Legislation and House Planning) will write to all Deputy Ministers and some Agency heads asking them to submit a list of the legislation that their Minister plans to propose to Cabinet for introduction in the next session. Subsequently, this legislative "call letter" will be sent twice a year (June and November) in order to deal with new or changing priorities.

The response to the request for legislative proposals should be submitted to the Assistant Secretary to the Cabinet within one month after receiving the request, or by a date specified in the request.

Review by Cabinet

The proposals are prioritised by the Leader of the Government in the House of Commons and a tentative outline of the legislative program for the next sitting, together with the assignment of priorities for the various proposals, are reviewed by the Special Committee of Council. The Leader of the Government in the House of Commons normally advises the Special Committee of Council and the full Cabinet of the updated legislative program twice a year.

4. Preparation of Government Bills

Cabinet Approval of Policy

As soon as is feasible after Cabinet has determined that a bill is to be introduced as part of its legislative program, the responsible Department should arrange for the submission of a Memorandum to the Cabinet (MC) seeking policy approval and an authorisation for the Legislation Section of the Department of Justice to draft the bill. The MC is to be prepared in accordance with supplementary documents issued by the Clerk of the Privy Council and is to be submitted to the appropriate policy committee of Cabinet and then to Cabinet. It should be submitted far enough in advance of the projected date for introducing the bill to allow sufficient time to draft it.

An MC should address the type of public consultation, if any, that the sponsoring Minister has held or expects to hold and should specify whether the Minister intends to consult on the basis of the draft bill. By tradition, draft bills have been treated with strict confidence before they are introduced in Parliament. However, in keeping with the Government's commitment to openness and consultation, sponsoring Ministers may wish to consult on the basis of draft bills. This consultation is intended to ensure that bills take into account the views of those concerned and it must not pre-empt Parliament's role in passing bills. Also, there may be cases where it would not be appropriate to do so for reasons such as the risk of giving the consulted party an unfair economic advantage. So, if a draft bill is intended to be used in consultation before it is tabled in Parliament, the MC should state that intention and ask for the Cabinet's agreement. In the case of a draft bill involving changes to the machinery of government, the approval to consult should generally be sought in a letter to the Prime Minister from the sponsoring Minister.

Drafting instructions should be annexed to the MC. However, they should not be in the form of a draft bill. Their purpose is to facilitate a policy discussion of a legislative proposal and to provide a framework for drafting a bill. Except in very rare instances, drafting instructions in the form of proposed draft legislation are not helpful. Substantial time may be required to assemble the relevant material required as part of drafting instructions. The policy discussion at this stage will make it possible to develop reasonable estimates of the time likely to be required for drafting the legislation. These estimates are essential to planning and managing the Government's legislative agenda.

Drafting Bills

It is essential that both the Legislation and House Planning Secretariat and the Secretariat to the appropriate policy Committee of Cabinet be informed by the sponsoring Department as to any significant departures from the approach to the bill agreed to by Cabinet.

As stated above, both language versions of legislation are equally authentic and must respect the bijural nature of Canada's legal system. Draft legislation must be prepared in both official languages and sponsoring Departments must ensure that they have the capability:

- to instruct in both languages,
- to respond to technical questioning from drafting officers in either language and relating to each legal system, and
- to critically evaluate drafts in both languages.

It is not sufficient for a drafting officer and the instructing officer to reach full agreement on the technical adequacy of one language version of a draft bill. Both versions must meet the

same standard of technical adequacy in the eyes of those qualified to critically evaluate them and the legislation must be capable of operating in both legal systems. This requirement can be particularly onerous when a legislative proposal is based on a precedent from another jurisdiction where legislation and related information, often of a very technical nature, is available in one language only. In such circumstances, it may be necessary to build into the planning and drafting process a significant time factor to allow for the development, testing and finalisation of appropriate terminology for both versions.

Another important consideration relates to the drafting of preambles and purpose clauses. Preambles can often provide important background information needed for a clear understanding of the bill, or to explain matters that support its constitutionality. However, when a bill amends existing legislation, the preamble is normally excluded from consolidated versions of the legislation. In order to ensure public awareness of, and access to, background information for an amending bill, a purpose clause may be considered as an alternative because it can be integrated into the consolidated legislation. Both preambles and purpose clauses must be carefully reviewed by the Department of Justice for appropriate language and content.

Review of Bills by the Leader of the Government in the House of Commons

Once a bill has been drafted and approved by the responsible Minister, the Legislation Section of the Department of Justice will arrange for its printing and for copies to be sent to the Legislation and House Planning Secretariat (L&HP) before the bill is reviewed by the Leader of the Government in the House of Commons.

At this stage the sponsoring Department:

- prepares material for use in explaining the bill to Parliamentarians and members of the public or for distribution,
- prepares a draft statement to be used by the Minister when the bill is referred to Committee,
- submits a revised and updated communication plan if the original attached to the MC is no longer appropriate.

The Leader of the Government in the House of Commons reviews the bill and its consistency with relevant Cabinet decisions. The Leader reports to Cabinet on this review and seeks delegated authority to arrange for introduction of the bill in either the House of Commons or the Senate.

Following Cabinet approval, L&HP submits the bill in its final form to the Prime Minister or the Leader of the Government in the House of Commons for signature, together with the royal recommendation in the case of bills that require expenditure. The preparation of royal recommendations is the responsibility of L&HP.

5. Parliamentary Processes and Amendments

Introduction and readings

Government bills are usually introduced by the sponsoring Minister. They proceed through three readings in both the Senate and the House of Commons and are studied by committees of each House. Detailed information on these proceedings can be found by consulting publications such as the *Précis of Procedure*, published by the House of Commons, and in *The Senate Today* and *Rules of the Senate of Canada*, published by the Senate.

The timing and place of introduction are decided either by the Cabinet on the recommendation of the Leader of the Government in the House of Commons, or by the Leader of the Government in the House of Commons under authority delegated by Cabinet.

Notice of introduction in the House of Commons is given to the Clerk of that House by the Assistant Secretary to the Cabinet (Legislation and House Planning) only when instructed to do so by the Leader of the Government in the House of Commons. When introduction is in the Senate, the timing of introduction is decided by the Leader of the Government in the House of Commons in consultation with the Leader of the Government in the Senate. In both cases, the Assistant Secretary informs the sponsoring Minister of the timing of introduction.

Timing of the Second Reading debate, Report Stage, and Third Reading in the House of Commons is the responsibility of the Leader of the Government in the House of Commons. The timing of the stages of debate in the Senate is the responsibility of the Leader of the Government in the Senate.

During a committee's consideration of a bill, whether in the House of Commons or the Senate, the sponsoring Minister or the Parliamentary Secretary attends the committee meetings to assist the deliberations by ensuring that the Government's position is expressed. This is of particular importance in situations where amendments to the bill may be proposed.

Amendments

If the sponsoring Minister wishes to move or accept an amendment after introducing a bill, the following procedure should be followed before the amendment is moved:

- amendments that are merely technical may be agreed to by the sponsoring Minister with no need for Cabinet approval,
- amendments that have an impact on the policy approved by Cabinet or that raise policy considerations not previously considered by Cabinet are subject to the same procedure as the initial proposal, namely, the submission of an MC for consideration by the original policy Committee of Cabinet and approval by the Cabinet.
- urgent major amendments need not follow the full procedure referred to above, but may be approved by the Prime Minister and the Chair of the relevant policy committee of Cabinet together with other interested Ministers.

All amendments moved or accepted by the Government must be drafted or reviewed by the Legislation Section of the Department of Justice.

Royal Assent

The final stage in the enactment of a bill by Parliament is royal assent. The timing of royal assent ceremonies is arranged by the Leader of the Government in the House of Commons in consultation with the Leader of the Government in the Senate.

6. Coming into force

An Act has the force of law upon royal assent, unless it provides otherwise. Quite frequently, an Act provides that it, or any of its provisions, comes into force on a day or days to be fixed by order of the Governor in Council. These orders are prepared by officials in the Department that administers the Act and are submitted to the Special Committee of Council by the responsible Minister. If approved, they are sent to the Governor General for signature and published in the *Canada Gazette*. Draft orders should be submitted for approval well in advance of the day or days that they propose for provisions to come into force.

7. Regulation-making

The main elements of the regulation-making process are established by the *Statutory Instruments Act.* They include requirements that:

- draft regulations be examined by the Clerk of the Privy Council in consultation with the Deputy Minister of Justice,
- regulations be transmitted to the Clerk of the Privy Council to be registered and published in the *Canada Gazette*,

- regulations be referred to the Standing Joint Committee of the Senate and the House of Commons for the Scrutiny of Regulations.

These elements are supplemented by the analytical and procedural requirements of the Government's Regulatory Policy.

8. Conclusion

This Directive sets out the objectives and expectations of the Cabinet in relation to law-making activities of the Government. Departmental officials involved in these activities are expected to be aware of the Directive and to follow the instructions it contains. They are also expected to use the supplementary documents that the Clerk of the Privy Council may issue to provide detailed guidance on planning and managing the development of legislation to ensure that the Cabinet's objectives and expectations are met.

Audience Analysis in the Legislative Drafting Process [1]

Duncan Berry [2]

Abstract: *The concept of " audience " is a broad one. Legislation has many and varied audiences. This article argues that, if the needs of those audiences are to be met, legislative counsel or perhaps more accurately legislative drafting offices need to focus on those audiences more than they have in the past. One way this might be achieved, is by carrying analyses of those audiences and their needs. Three approaches to the carrying out of audience analyses are suggested.*

Introduction

One of the major criticisms levelled at legislative counsel is that their products are writer-based and not audience-focused. In other words, legislative documents are written in a way that is most expedient from the point of view of the legislative counsel without any serious regard for the needs and demands of end-users. A few examples of the kind of drafting techniques that irk readers are—

- applying legislative provisions to a circumstance when the provisions were designed for another circumstance[3],
- excessively long legislative sentences, and
- "skilfully" compressed text[4].

Although by using these techniques legislative counsel undoubtedly save time and effort, this is at the expense of their audiences who as a result have to spend much more of their time and effort in trying to fathom the effect of the legislation.

It is axiomatic that by enacting legislation, the legislature is imposing rules that tell members of society what they can do and what they cannot do and what their rights, duties and obligations are both as regards both society as a whole and as regards other specified members of society. Legislation can only be effective if it is effectively communicated to those readers whom it purports to affect. So in order to communicate legislative documents effectively, legislative counsel need to understand how readers might think and feel as they interact with documents. They must anticipate what their readers need and expect. But there remain theoretical and practical problems in making

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1 This article was presented as a paper at the CALC meeting held in Malaysia in September 1999.

2 Consultant Legislative Counsel, Hong Kong Department of Justice.

3 Bennion (1990: 221) describes this legislative drafting technique as "as-if-ism" or pretending that something is so when it is not.

4 See Renton (1975: chapter VI]) and Bennion (1990: 217-219) for examples of "skilfully" compressed text.

connections between audience analysis and textual choice, in linking what readers may need or expect from the text with authors who can make use of those analyses to improve the design of the text.

Errors made in drafting a legislative document may have immediate and direct results. For example, an error in a statute conferring social security benefits may deny people of a benefit to which they would otherwise have been entitled, while an ambiguity in a conveyancing statute may cause litigation and delay the transfer of residential property. In contrast to some private legal documents whose users may consist only of lawyers, a statute may significantly affect the personal and business conduct of large numbers of people. If those people cannot understand the statute, they will not be able to use it effectively. Furthermore, an unclear, imprecise statute will not only confuse those governed by it, but will also generate costly and time-consuming litigation to interpret it. I therefore believe it is essential that legislative counsel should anticipate who will read, interpret, implement and be affected by the statutes and other legislative documents drafted by them.

Identifying audiences

Audience is a broad concept. In order to understand audiences, legislative counsel must first ascertain who will read their legislation and how they will use it. Audiences include all persons who are ever likely to read the legislation. These readers may vary widely, so it is necessary to identify the specific characteristics of the various audiences in order to make the legislation accessible to readers. Similarly, legislative must identify how their audiences will use the legislation.

Most legislation will usually function differently for different audiences. Understanding the multiple functions that legislation performs will help legislative counsel to understand the audiences and make their products more accessible to all readers.

Legislative counsel can identify the audiences if they think of all who will potentially read the legislation or whose activities it will control. When those audiences have been identified, the legislation's relationship to its readers should be considered. An audience may be friendly, that is, share interests similar to the policy formulators, or hostile, that is, have interests that conflict or potentially conflict with those of the policy formulators.

Another factor to consider in identifying the audience is its education and experience. The readers of a legislative document will normally include —

- the lawyers who advise on or who may litigate disputes about the meaning of the document; and
- the judges who may be called on to interpret the document.

Other audiences will include non-lawyers —

- those whose job it is to administer and implement the legislation; and

- the public whose conduct a statute may control and their advisers who may be members of other professions, such as accountancy and engineering.

But whatever the audiences, it should be remembered that their abilities to read and understand the document are likely to differ markedly. In other words, a legislative document that might be relatively easy for judges to read and understand may not be so easy for other users to read and understand.

Finding out about audiences

Kathryn Schriver (1997) has done some useful research into how authors can find out about their audiences. I believe much of this research could be relevant to the way legislative counsel approach legislative drafting. Hopefully, it will help to bring about a more audience-focused approach to legislative drafting rather than the author-focused approach that tends to prevail even now.

So what can Schriver help us to find out about our audiences? She identifies three distinct visions of how authors may analyse their audiences. The first view focuses on classifying audiences by identifying their features. She calls this approach *classification-driven audience analysis.* The second view emphasises the powers of self-reflection and personal experience to imagine an audience. She calls this approach *intuition-driven audience analysis.* The third view focuses on gathering feedback from the real audience to find out how the readers actually interact with the text. She calls this approach *feedback-driven audience analysis.* (Schriver, 1997: 154)

(1) Classification-driven audience analysis

Classification-driven audience analysis provides authors with methods for creating profiles of their anticipated readership, often called the "target audience". Authors begin their analysis by brainstorming about the audience and by cataloguing audience demographics (e.g. age, sex, income and educational level) or by psychographics (e.g., values, lifestyles, attitudes, personality traits or work habits). These audience profiles are then used to classify the audience into groups, for example, non-technical or technical, general or specialised, novice or expert.

A strength of classification-driven models is that they prompt authors to think about the needs and expectations of different groups for their documents.

The weakness of classification-driven models is that they encourage a rather narrow and static view of readers. They tend to lead authors to focus on the similarities within user groups and to ignore their diversity. A key feature of classification-driven models is that they "fossilise the reader" as a static compilation of demographics and psychographics that authors somehow

"keep in mind" as they compose. This tendency to stereotype readers may lead the authors to draw faulty inferences about audiences' needs.

(2) Intuition-driven audience analysis

The intuition-driven model of audience analysis is one in which authors *imagine* the audience and draw on their internal representation of the audience as a guide to composing and designing the text. In using this model, authors look inward to "visualise the audience" or to "listen to their inner voice" as they compose. The image of the audience[5] that emerges from this careful introspection can take various shapes, such as —

- a wholly fictitious reader with no correspondence to any real person, or
- a constructed reader, based at least in part on memories of real people, or
- an imagined ideal reader, that is the reader who the author most wants to read his or her text.

The intuition-driven model operates by using a mental construct of imagined readers rather than of actual readers (even though the imagined readers could be based on memories of real people). In other words, when authors imagine their readers, they may think not of actual people but of people who have a composite of human characteristics (e.g. a reader who is curious, intelligent, technically minded or critical). Or they may think of people whom they have met before and who could be like the intended audience.

With a presentation of their imagined reader in mind, authors choose words and graphics to invite the audience to engage with the text. They rely on the semantic and syntactic resources of language to provide cues for readers, cues that not only encourage the audience to read, but also help to define the role that authors wish the audience to adopt in responding to the text (Ede and Lunsford, 1984: 155-171). A key feature in the success of using the intuition-driven model of audience analysis lies in the author's ability to keep the internal representation or mental sketch[6] of audience in mind during composing and to draw on it to create ideas that connect with and motivate their imagined readers.

The literature from the writing and graphic design communities that speaks to the intuitive model stresses the communicator's personal creativity in invoking a reader through textual cues and conventions. The literature is quite vague about how authors actually do this. For example, much of the literature on graphic design treats human intuition as "an inexplicable personal trait". (See Schriver, 1996: 158.) The strength of intuitive models is that they

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5 There are many terms that have been used to portray the user that may be constructed —"implied user", "invoked user", "fictionalised user", "created user", "audience invoked", "imagined user", or "ideal user."

6 Berkenkotter (1981: 388-399) explores this issue in an interesting case study of the thinking that underlies the work of a professional editors.

capture, in ways that other models do not, the phenomenon that skilled communicators are good at "doing things with words and pictures" that get the audience's attention and keep it and that good communicators are sensitive to visual and verbal rhetorical moves that resonate with readers[7]. The limitation of intuitive models is that they lead authors not to question the adequacy of their own judgements about readers. These models do not encourage authors to check their imagined reader against a real reader. Nor do they help communicators to differentiate ideas that will actually resonate with readers from those that will fall flat (or that resonate only for themselves or their audiences). The only test of effectiveness is the author's subjective view of the reader.

(3) Feedback-driven audience analysis

Feedback-driven audience analysis provides a view of real readers engaged in the process of interpreting texts. Studies of those readers show in considerable detail how audiences come to texts with knowledge, needs, values and expectations that dramatically influence how they interpret what they read. The image of the audience that emerges from feedback-driven methods is of people who engage with documents in order to understand, access, and use them for pragmatic purposes.

According to Schriver (1997: 160), the literature about feedback-driven audience analysis comes from two broad research traditions. One is from disciplines that focus on how people read and interpret text, such as reading comprehension, cognitive psychology, psycholinguistics, discourse analysis and linguistics. Researchers who have focused more on how people read and interpret texts in particular contexts (e.g. professional, institutional, organisational and technological) have developed a second tradition. Researchers in areas such as rhetoric, document design, technical communication, human factors, ergonomics, organisational behaviour, cultural studies, sociology, anthropology and the rhetoric of science have provided a view of people as they interpret messages directed at them (whether spoken, on paper or on a screen). Researchers in these fields suggest that authors need to catch readers in the act of interpretation by listening to them as they use prose and graphics and everyday situations (van der Meij, 1994: 201-210).

Professional communicators who employ feedback-driven audience analysis begin by thinking about ways to bring the audience into the design process in order to draw on their ideas to guide invention. A working assumption in using feedback-driven methods is that the audience should be part of the document design process as early and as often as possible during planning and revising. A second assumption is that as one elicits feedback from the

[7] For example, Meggs (1992) describes the nature of graphic resonance. He says that graphic designers bring a resonance to visual communication through the interaction of the connotative, that is, colour, shape, texture, and the interrelations between forms in space.

audience, one is considerate, unobtrusive and honest[8]. Feedback-driven approaches stress listening as carefully and as empathetically as possible, taking care not to assume the stance of judge or critic. It is regarded as important that readers who provide authors with feedback should be made aware that it is the text or the technology (rather than the readers' intelligence, reading ability or skill in using technology) that is under evaluation.

Comparison of the three approaches

The key difference between intuition-driven models and feedback-driven models lies in how images of readers are constructed and on where ideas about readers come from. Intuitive models of readers spring from the author's imagination, whereas feedback-based models are derived from representations of real people. Seeing an audience engage with prose or graphics allows authors to construct a mental representation of readers that can be applied during the composition and design process.

A strength of feedback-driven models is they tend to involve real people reading and comprehending than would be the case if other models were used and this provides the author a much better picture of the target audience. Feedback-driven models allow authors to get a detailed view of how particular people interpret and interact with sentences, paragraphs, illustrations, diagrams, and so on. Watching people read provides first hand insight into what makes documents easy (or hard) to understand. Listening to readers also alerts authors to the differences among readers and to differences between readers and themselves.

The classification-driven and intuition-driven models tend to ignore the very real fact that what people take away from a text depends on their process of interpretation — processes which may differ from those of the document designer.

A weakness of feedback-driven models is that like the other models, there is still a gap between forming an image of the audience and taking action based on that image. Feedback-driven methods can provide communicators with a veritable mountain of date to sort through. Not all of it is relevant and not all of it will lead to improvement in the text.

Which of the approaches (if any) should legislative counsel adopt?

Although some of the literature argues implicitly or explicitly for one model or another, they are not necessarily inconsistent. Instead, each of them can be used according to the demands of the rhetorical

[8] Document designers rightly worry about the influence of their presence on the reader's interpretation.

situation. According to Schriver (1997: 162), experience also provides insight about how to use these models interactively — that is, moving back and forth, for example, between imagining and observing the reader, allowing a model of the real reader to anchor the reader imagined, while at the same time calling on the author' s personal creativity and intuition to help make design moves that resonate. There seems to be no reason why legislative counsel should not follow the same path and use each of these models interactively to find out about the various audiences that will need or wish to use the legislative documents that they have drafted. I envisage that an analysis of audiences of proposed legislation would be carried at a fairly earlier stage in the drafting process.

There are considerable differences among the three approaches to audience analysis, but they do have one thing in common. Audience analysis should include a comparison of the author and the audience and an assessment of their respective knowledge, values and beliefs about the subject matter. A comparative analysis can put legislative counsel in a more informed position to make visual and verbal decisions that may bridge the gap between themselves and their audience. Young, Becker, and Pike (1970) put it this way:

> The writer frequently takes too much for granted, assuming that merely by speaking his mind he can change the reader's. If he fails, however, to utilise available bridges or to create new ones, his writing will not be effective. Thus it is not enough that bridges exist; they must be used.

Conclusion

By exploring differences between themselves and their audience, legislative counsel can become more reflective about the biases that can be created by knowledge and values. Such an awareness can make them more considerate of readers' perspectives, allowing them to generate ideas about how to address the differences between them and their readers. Nevertheless, legislative counsel and their audiences live in such different worlds that the gaps between them are not likely to be bridged easily.

Because a legislative document may affect so many people, anticipating who will use and read it is an important prerequisite to legislative drafting. So legislative counsel should try to think of all the possible audiences whose members are likely to read the document. For each legislative document, they need to ask the following questions —

- What audiences are affected?
- What is the purpose for which each audience will use the legislation?
- Is the audience's interest(s) friendly or hostile to those of the Government?
- How long will an audience use the document — short-term or long-term?
- What is the audience's educational background and experience?

The answers to these questions will present the broadest possible view of the future effect of the document.

I appreciate that pressures to produce a draft legislative document in an often very limited time frame may preclude legislative counsel from conducting an audience analysis. However, this is not always the case and so I would urge an audience analysis to be carried out whenever time permits. Even when time does not permit, legislative counsel should at least devote at least some time on focusing on the needs of their audiences. And it could well be that the results of an audience analysis carried out for an earlier piece of legislation having similar audiences may be of assistance.

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Sir William Dale, KCMG

Helen Xanthaki [1]

A distinguished member of CALC, Sir William Dale, KCMG, died on 8 February at the age of 93. Sir William was a distinguished lawyer with a long record of Government service. He maintained a close association with the London Institute of Advanced Legal Studies (" IALS ") and was Director of Studies of the Government Legal Advisers Course from 1976 until his retirement last year.

Back in 1964, when legal adviser to the Commonwealth Relations Office, he came up with the idea of creating what he described as ' a kind of school in London' to provide courses of training for lawyers in a number of newly independent (or soon to be independent) countries. Harold Macmillan had recently announced that the ' wind of change' was blowing through Africa, and a number of Britain' s former colonies were having to face up to the fact that once members of the Colonial Legal Service returned home there was no-one on whom they could call to provide them with legal advice and assistance. Sir William devised a course covering a number of areas, particularly in the fields of international law and legislation, and this was held at Marlborough House from 6 October 1964 until 5 March 1995. The Ministry of Overseas Development, which also provided most of the finance through the British Council, took responsibility for administration and accommodation.

It was soon clear that what came to be called the Government Legal Advisers Course had identified a real need, with around 20 students attending each year from a long list of countries. The first Director of Studies was Sir Edgar Unsworth, a former Chief Justice of Nyasaland, and the Chief Lecturer in Law (subsequently Director) was Sir James Fawcett, who had been on the legal staff of the Foreign Office and later became President of the European Commission on Human Rights.

In 1980, Sir William carried out an extensive study of the legislation of civil law countries such as France, Germany and Sweden to see whether he could find a style of legislative drafting that was simpler than that used in the UK. This resulted in the publication of *Legislative drafting: a new approach* (Butterworths, 1977). At the time of its publication, his book was the subject of considerable controversy among legislative counsel. However, in hindsight it may be fairly claimed that, along with other factors, Sir William's ideas have produced a change in the attitudes of legislative counsel, which has led to a clearer and simpler style of legislative drafting.

Sir William' s association with the IALS is one aspect of a long and interesting career. He left Hymers College, Hull in 1924 at the age of 18 to become an articled clerk with a local solicitors' firm and went on to work for a firm of English lawyers in what was then Palestine. On returning to Britain he

[1] Assistant Director of the Institute of Advanced Legal Studies.

subsequently embarked on a career in the Government legal service which included being legal adviser, United Kingdom of Libya (1951-53), and legal adviser, Ministry of Education (1954-61). He was knighted in 1964 for his services as legal adviser to the Commonwealth Office.

An accomplished musician – his *Who's Who* entry lists his recreation as being ' music (except Wagner)' – Sir William was the author of a number of books including *Law of the Parish Church* (1932, 7 th ed 1998) and his autobiography, *Time Past, Time Present* (1994). He is survived by his wife, Gloria, and daughter Rosemary.

Freon bullets — You must be joking?

Recently the Oklahoma legislature passed a Bill outlawing "freon" coated bullets. Perhaps they were worried about shooting a hole through the ozone layer! It seems that the members of the legislature were unaware that freon, being a gas, would tend to evaporate awfully quickly, if applied to a bullet! That is of course unless you happen to live in the Antarctic.

One John Stolz, a Texan, was working for the Oklahoma State Legislature at the time. He was also a member of a local gun club so presumably knew a lot about bullets. While working for that legislature's legislative issues committee, he pointed out to some of the legislators that freon was a gas. However, by then the Bill had gone through the committee. Apparently the drafter had confused freon and teflon! Despite having the error pointed out to them, a majority of the Oklahoma Legislature voted for the Bill and the Governor of the State signed it into law.

According to Mr Stolz, the collective IQ of any session of the Oklahoma legislature is less than that of a tree toad. He said it was good to get back to Texas!

John Finnemore ¾ Wise Counsel of Legislative Reform

***Jan Wade*[1]**

I first met John Finemore nearly 30 years ago when, as a nervous youngish lawyer, I was interviewed for a junior position in the Victorian Office of the Parliamentary Draftsman (now Parliamentary Counsel).

John had been chief parliamentary draftsman of Victoria for a couple of years before I joined the office, but had already made his mark not only as a superlative draftsman and a brilliant lawyer but also as someone who was counsellor and confidant to premiers and ministers. He did very much more than just translate departmental instructions into Acts of Parliament.

At a time when married women in the Victorian Public Service could not have a permanent job and were paid less than a man occupying a similar position, he was years ahead of his time. He employed women lawyers when they were banned in the Crown Solicitor's Office and unknown in other parts of the Public Service.

For all of us who worked under him, women and men, he was not only our boss, he became our mentor, friend and wise counsellor. He was generous with his knowledge and one could not work in that office without being aware of his complete professionalism and his understanding of our legal system and the Westminster system of government.

As a parliamentary draftsman he had an ability without peer in Australia. He could take exceedingly complex matters, reduce them to core issues and prepare clear, succinct legislation. He had a superb grasp of language and an unbelievable capacity to look at proposals from a totally different perspective, resulting more often than not in miraculous solutions to what had seemed insoluble problems. He was using plain English in his drafting 20 years before academics coined the term.

His years working for Sir Henry Bolte and Sir Arthur Rylah, who both placed very great reliance on John's advice, were years dominated by economic growth and the legislation that flowed from that. During the premierships of Rupert Hamer and Lindsay Thompson a new dimension was added. Legislation to deal with such matters as the environment, conservation and equal opportunity — in many cases pioneering legislation — came on to the agenda as the Government and Parliament met the demand for more sophisticated social objectives.

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1 Jan Wade was the Victorian Attorney-General from October 1992-October 1999

During his time as Parliamentary Counsel of Victoria, John was responsible for the drafting of more than 4600 Bills. Much of this legislation is still on the statute book. His work and influence were not limited to Victoria. He was closely involved in some of the most significant legal reforms in Australia. Rylah, as Victorian Attorney-General, spearheaded the then pioneering task of introducing uniform companies legislation throughout Australia. In 1961, John drafted the Uniform Companies Act, which remained in force throughout Australia until the national companies and securities legislation came into operation in the early 1980s.

Whether it was the introduction of uniform payroll tax, legislating to provide the basis for using Australia's first big oil and gas discoveries in Bass Strait or overcoming the problems caused by the High Court decision that State criminal law did not apply in Commonwealth places such as airports and post offices — John was always there and the Commonwealth and other States looked to him for answers.

These Australia-wide issues led to his increasing interest in the future of the Australian Constitution. He became the chief executive officer of the Australian Constitutional Convention in 1972 and was principally responsible for the success of its first plenary session in that year. The *Australian Law Journal* in 1984 said that, "He had acquired an almost unrivalled knowledge of every corner, dark or otherwise, of the field of Australian constitutional law."

What was it that made him so outstanding? He was a first-class lawyer, and a lateral thinker. He was also extremely diligent in everything he did, and very quick. While others were working out what the problem was, he had come from another direction and had a detailed answer. He complemented his outstanding legal skills with a great humanity — a real caring for and understanding of people. He would reject legal answers that did not produce a fair result. He always understood the need for legislation to work without imposing unnecessary burdens on those who had to comply with it. Above all he was driven by high principles of what was right and what was just, and his understanding of those concepts was in turn driven by his firm commitment to the principles of Catholicism.

He was also enormous fun to work with. He had a huge capacity for creating a sense of great adventure in dealing with what to others would be a major crisis and bringing all his staff along with him — committed and excited about the road they were on. Working for John meant you always got up in the morning looking forward to going to work and if it took until midnight or 2 am to finish the job, you worked through and enjoyed it.

When he reached 60 the public service record described him as retired. He left his job as chief parliamentary counsel, collected his pension and then proceeded to work as hard as ever on some of

the most important and interesting work he has done. His commitment to constitutional reform continued with his involvement with the Centre for Comparative Constitutional Studies at Melbourne University, where he was also a longstanding member of the law faculty. He continued to draft legislation as a consultant to Departments and other organisations, for example, restructuring universities to meet the realities of various amalgamations.

He was a valued member of my Attorney-General's appointments committee. The committee interviews applicants for positions as magistrates and tribunal members and assesses their qualifications and experience. His ability to assess an applicant for legal ability and common sense is unsurpassed.

John was a mentor, friend and a very significant role model, who stands tall among those who have led the Public Service in Victoria, although so often he gave the credit for his work to ministers and politicians. Victorians owe much to him.

Eight children, 21 grandchildren and one great-grandchild survive him.

John Charles Finemore — Former Chief Parliamentary Counsel of Victoria
Born Melbourne, 19 March 1924 — died Melbourne, 8 March 1996, aged 71

Some less familiar law quotations

- A multitude of laws in a country is like a great number of physicians, a sign of weakness and malady — Voltaire.

- When the state is most corrupt, then the laws are most multiplied — Tacitus.

- Law never does anything constructive. We have had enough of legislators promising to do that which laws can not do — Henry Ford

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Colonel Henrique Alberto de Barros Botelho, MBE, ED 1906-1999

Jamie Scott [1]

"The death on 1 October 1999 of Henry Botelho at the age of 93 removed a major player in a long and significant part of Hong Kong's history — the once prominent local Portuguese community", so wrote Jason Wordie in the 3 October 1999 issue of the *South China Morning Post*.

Henry was, at the time of his final retirement in 1989 from the Hong Kong Government at the age of 84, Hong Kong's oldest civil servant. For a 40 year period from 1949, he served as Commissioner for Law Revision, producing 8 Revised Editions of the Laws of Hong Kong during that period. Always the pragmatist, Henry grouped primary legislation into "Chapters" on cognate subjects, together with subsidiary legislation, in the 1950 Edition so as to produce an extremely user-friendly set of Laws.

Under his supervision, in a what was a common law jurisdiction first, a loose-leaf system was introduced in the 1960's making it possible whenever primary legislation or subsidiary legislation was extensively amended, for an up-to-date booklet containing both, to be published and substituted for the previous edition of the particular Chapter concerned.

Ever gracious and unassuming, Henry in each of his 8 Revised Editions always paid tribute to the work of his clerical staff. The following passage from his 1964 Revised Edition is typical:

> "The clerical work fell on the shoulders of Mr. CHIU Yu-wing, as clerk in charge of law revision, and Miss Therese LEUNG Wai-bun, and I wish to record an acknowledgement of the excellent work performed by them. Mr. LEE Tak-chuen and Mr. Yusuff RUMJAHN had, with some assistance, the responsibility of checking proofs. To them thanks are also due for the care with which they performed an exacting task.".

As a member of the local Portuguese community, Henry's life and times encompassed most of Hong Kong's growth and development during the past century. His family had been in Macau since the 1500s. When the British fleet first dropped anchor and raised the Union Jack at Possession Point on a blustery morning in 1841, among the first people ashore were clerical staff from British trading companies in Macau. For generations, it was this community, once numbering 20,000, who were Hong Kong's only truly local people.

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[1] Senior Assistant Law Draftsman, Department of Justice, Hong Kong. The author worked with Henry Botelho from 1974 until Henry's retirement in 1989 from what was then the Hong Kong Government Legal Department.

In his early years Henry was a jockey and in 1919, at the tender age of 13, witness to the world's greatest sporting disaster when over 600 people perished in a fire in the spectator stands at Happy Valley Race Course.

His legal training began when he became an articled clerk to his father's friend, solicitor Leo D'Almada e Castro Snr, in the mid-1920s, when this was the only way to obtain legal training. In due course, he became a solicitor and partner in the firm, practising until the Pacific War broke out in 1941.

He left private practice after the war and joined the Hong Kong Government, one of the first locals to be employed on expatriate terms. He specialised in law drafting, eventually being appointed in 1949, to his long and illustrious career as Commissioner of Law Revision.

In 1924, he joined the Hong Kong Volunteer Defence Corps. He often said that if he had his time over again he would spend it in the military. The community's loyalty to the British was reflected in the fact that the Portuguese Volunteers were kept interned in prisoner-of-war camps throughout the war, in spite of their families being classified as neutrals. When a rumour did the rounds in the PoW camp that Portuguese Volunteers might be released, he told his junior officers that if ordered to leave prison by the Japanese he would refuse to go. He was brutally interrogated by the Japanese after being implicated in resistance activities at Argyle Street Officers' Camp. In spite of this experience he refused to harbour hatred for the Japanese.

Immediately after the Japanese surrender he went to Macau on a secret mission to the British Consul, travelling in a small boat with Dr (later Sir Albert) Rodrigues and another Portuguese. After nearly being shipwrecked, they finally got ashore and the message was delivered. When Jason Wordie asked him what the message was, he replied 'A secret one!', still tight-lipped after half a century. He continued in the Volunteers after the war, eventually being appointed Honorary Colonel.

Henry laid the foundation stone of Club Lusitano in Duddell Street and was closely involved and a life member of all of Hong Kong's oldest clubs — Lusitano, Craigengower, Club de Recreio, Victoria Recreation and the Jockey Club.

Today, after wholesale emigration in the 1950's and 1960's, less than 500 ethnic Portuguese remain in Hong Kong. Henry chose not to leave and remained in close contact with his colleagues in law in the Government until his death.

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The Drafter's Tool Box
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A LAW IF NECESSARY, BUT NOT NECESSARILY A LAW
This session will be divided into two parts. The first will be a general overview of instruments that Governments have for addressing policy issues. These include legal instruments, such as statutes, regulations and contracts, as well as economic instruments, such as taxes or grants, and information-based instruments, such as practice guides and educational programs. The second part will concentrate on the legislative basis needed for policy instruments that must be founded on statutes. Attention will be focused on particular approaches to policy implementation, such as concepts of self-regulation in relation to various professions or commercial activities.
Speakers: Professor Alexandre Fluckiger, University of Geneva, Mr. Morris Rosenberg, Deputy Minister of Justice (Canada), Professor Pierre Issalys, Faculty of Law, Laval University, Ms. Margot Priest, Consultant, Regulatory Consulting Group Inc.

THE DEMISE OF THE 19th CENTURY STATUTE BOOK
This session will explore the impact that trends like globalization, electronic document production and the development of new governance instruments might have on traditional conceptions of legislation and the traditional "statute book". It will then consider the impact of these trends on the evolving relationship between the legislature and the courts. Developing an understanding of this relationship and a practice that strikes the right balance between tradition and visionary change is likely to be one of the major challenges of the coming years.
Moderators: Ms. Laura Hopkins, Legislative Counsel, Ministry of the Attorney General of Ontario
Professor Ruth Sullivan, Faculty of Law (Common Law Section) University of Ottawa, presently on secondment at Legislation Section, Department of Justice (Canada)
Speaker: Professor Roderick A . MacDonald, President of the Canada Law Commission

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