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Contents

Editor's Notes

This issue of the *Loophole* is the second one devoted to papers presented at the CALC Conference in Hyderabad, India in February 2011. It begins with a paper from the opening session on the nature of legislative drafting and then presents papers from two further sessions devoted to the role and efficacy of legislation and legislative training and development.

Sandra Markman's paper on whether legislative drafting is an art, science or discipline turns on the continuing, and often urgent, need for legislative counsel. The starting point for addressing this need is an understanding of their role and the skills they are expected to bring to the drafting of these texts. Sandra suggests that all three lenses (art, science and discipline) are needed "to see the profession in all of its dimensions."

The next series of papers deal with the role and efficacy of legislation. **Doug Bellis** begins with a look at how bills are drafted at the federal level in the United States of America and the role that drafting plays in terms not only of the final text of legislation, but also the process for enacting that text. Paul Peralta also looks at the role and efficacy of legislation in terms democratic processes by focusing on Gibraltar's transition from colonial government to a representative democracy, highlighting legislative drafting as an "agent for change".

Ross Carter's paper shifts to the more technical aspects of legislative drafting, considering the role and efficacy of legislation in terms of "quality" assessed from five different perspectives: minister, legislator, legislative counsel, judge and user. **Sudha Rani** also looks at this theme from a functional perspective in India and contrasts legislation with customs, traditions and natural justice in terms of its efficiency in a democracy.

This issue concludes by returning to the need for legislative counsel. **Estelle Appiah's** paper considers efforts to meet this need through training and development of legislative counsel in Commonwealth Africa. It also deals with the challenges of attrition and concludes with ideas for collaboration with the developed Commonwealth in the training and development of legislative drafters

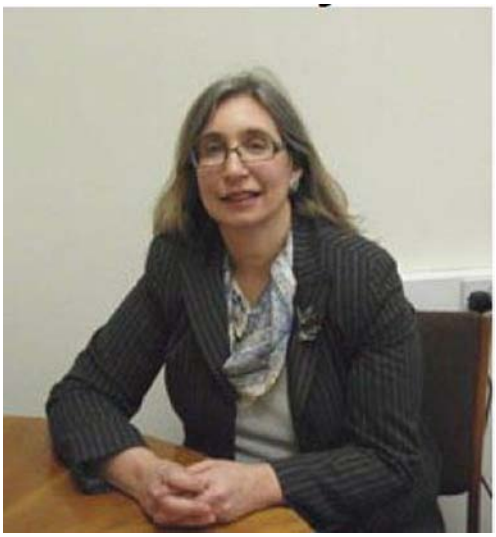
Thus, the written version of the Hyderabad Conference continues. Stay tuned for more.

John Mark Keyes

Ottawa, November 2011

Legislative Drafting: Art, Science or Discipline?

Sandra C. Markman[1]



Abstract:

The existence of a cadre of competent legislative counsel who provide expertise to Governments contributes to the protection of the rule of law. Identifying what is required of a competent legislative counsel is an important step in helping Governments recruit, train and retain capable people for law-drafting. This paper proposes a model of legislative drafting that recognizes the creative (artistic) and knowledge-based (scientific) aspects of the discipline.

Constructing a legally sound, coherent legislative document is not as simple as it seems.

- Commonwealth of Learning[2]

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[2] http://www.col.org/PROGSERV/SERVICES/LEGDRAFTING/Pages/default.aspx, accessed on 12 June 2011.

Why ask the question?

When I saw the call for papers for a panel for the 2011 CALC Conference to discuss whether drafting should be considered an Art, a Science or a Discipline, my first reaction was "Why would CALC want to have a panel on that?" I certainly had no interest in participating in a panel that was reminiscent of high school debating ("Resolved: that drafting is an Art, not a Science or a Discipline" replacing the most popular topic in my youth, "Resolved: that school dress codes are an infringement of our fundamental civil liberties.") Fortunately, my great faith in the wisdom of the organizers got me past that *Back to the Future* moment, and the more I considered what might usefully be said on this topic, the more the I realized that reflection on this topic can still offer us some useful insights.

As we move into the second decade of the 21st century, the major challenge facing the drafting profession is the effort to build sufficient drafting capacity to meet the rapidly increasing demand for legislative counsel. Governments around the world struggle to:

- recruit new legislative counsel who have a genuine aptitude for the work,
- train these new recruits and integrate them into their drafting offices,
- evaluate the performance of their legislative counsel, both recruits and veterans,
- improve the quality of the legislation produced

As many commentators have noted, none of these things can be done effectively unless we have a solid understanding of the range of skills and knowledge that good drafting actually requires.[3] In that context, what is useful about this particular debating question (art, science, or discipline) is that if we start by taking up some standard terminological definitions, it becomes obvious that these descriptions need not be seen as mutually exclusive pigeonholes:

> **Art:** The expression or application of creative skill and imagination.

[3] Dr. Helen Xanthaki's recent **Loophole** article is merely the latest in a long string of pieces that stress the multi-faceted nature of what legislative counsel do, and draw a connection between that richer vision of what drafting is and the structures in which legislative counsel should be trained: see H. Xanthaki, "Duncan Berry: A Visionary of training in legislative drafting" (2011) **The Loophole**, February 2011 (special issue) 18; S. Markman,, "Training of Legislative Counsel: Learning to draft without Nellie" (2010) **Comm. L.B**. v. 36, no. 1, p. 25; P. Quiggin, "Training and development of legislative *drafters* "(2007) **The Loophole**, July 2007 14; D. Berry, "Legislative drafting training in the Hong Kong Department of Justice" (2005) **The Loophole**, March 2005 13.

Science: A systematically organized body of knowledge on any subject.

Discipline: A branch of knowledge, especially one studied in higher education.[4]

If we begin to see these perspectives as complementary lenses, rather than as exclusionary boundaries, then each can be very useful in helping us to move beyond stereotype and caricature to a richer understanding of the diverse set of skills that good legislative counsel need. We can begin, in other words, to recognize the full extent of the art and the science in the discipline of drafting laws.

The art of drafting

Seeing drafting as an art has long been a popular perspective.[5] After all, who doesn't like to think of themself as an artist? But it is very easy to have too narrow a conception of what that art encompasses. If it is true that we are not merely scribes or translators,[6] it is equally the case that we are not simply hack poets, turning someone else's prose novel into narrative poetry. Our creativity is not confined to issues of word-choice, rhyme and meter. All too often, it seems to me, when experienced legislative counsel talk about drafting as an art, what they have in mind sounds more like a semi-skilled craft. That, I think, takes too narrow a view of the kind of creative imagination that good legislative counsel must have.

This is not to diminish the creative skill required by the crafting of instrument itself. A legislative counsel needs a very high level of technical invention to

- find clear, simple and precise language suitable for the intended audiences
- conform to the appropriate style for the particular instrument type
- establish the necessary harmony, both formal and substantive, between the new provisions and others, both within and outside the instrument being drafted

[4] All taken from the OED, because it had the definitions that best suited my argument. *See*: E.P. Aprill, "The Law of the Word: Dictionary Shopping in the Supreme Court" (1998) 30 **Ariz. St. L.J.** 275.

[5] Perhaps the best-known expression of that view, and certainly one of the most congenial, is Sir Geoffrey Bowman's well-known lecture, "The Art of Legislative Drafting" (2006) 7 **Eur. Jour. L. Ref.**

[6] Although I do remember meetings at which, after a long explanation in English about a complex point of law, including much wrangling over the precise terminology to use, my francophone colleague was asked to please "write that in French".

- ensure the equivalency of various language versions[7]

However, the modern legislative counsel's creative imagination is engaged well beyond the four corners of the drafting table. Always operating within the labyrinthine structures of the modern governmental bureaucracy, frequently taking instructions from multiple sources, and all too often charged to do more with less time and fewer resources, the art of the modern legislative counsel extends to

- understanding, clarifying and harmonizing policy (listening, questioning, explaining),
- conceiving a legislative scheme (instrument choice and structure),[8]
- working in a team (negotiation, conflict management),
- managing scarce resources (time, people).

This is why I think that although the artificial intelligence gurus have developed chess-playing programs that can match the play of world champions, no one has even made even the first tentative steps toward software that can actually draft laws (as opposed to intelligent systems that provide research and technical support to human legislative counsel).[9] Chess playing is an enormously creative activity, but that creativity is circumscribed within fairly narrow limits. The modern legislative counsel can only envy those who have a work environment with unchanging rules, clearly defined time limits, a narrow focus and only two participants.

In fact, even just to have a process with a fixed end-point is sometimes little more than an aspiration, as this somewhat over-elaborate paraphrase of Yogi Berra's famous exhortation[10] makes clear:

> [T]he elaboration of a policy proposal during the drafting process may produce a legislative scheme that covers a wider range of matters, or provides for more complex arrangements, than initially envisaged. In those

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[7] *See*: http://eur-lex.europa.eu/en/techleg/1.htm (accessed 12 June 2011).

[8] In this area, especially, the breadth of the context that legislative counsels are called upon to consider to ensure the workability and suitability of a legislative scheme can be quite daunting. *See,* for example: K. L Rosenbaum, *Legislative Drafting Guide: A Practitioner's View*, www.fao.org/legal/prs-ol/lpo64.pdf (accessed 12 June 2011), esp. at. 5-8.

[9] As Voermans, Fokkema and van Wijk have noted: "There are only very few of these [artificial intelligence] systems that have made it from the drawing board into the actual drafting offices or services and…most of them are only indirectly related to the legislative process as such." See "IT-Induced Redesign of the Legislative Cycle", (Paper presented at the 2011 CALC Conference, Hyderabad) at. 5.

[10] "It ain't over 'till it's over."

circumstances, further, second-level policy verifications may be appropriate after a draft is completed.[11]

The science of drafting

Seeing drafting as a science – "a systematically organized body of knowledge" – pushes us to recognize that the knowledge base a legislative counsel puts to use with every draft extends far beyond a list of drafting conventions. Producing workable legislation requires the application of at least three distinct knowledge sets:

- legal (constitutional, statutory, substantive, international),
- governmental and political (formal legislative process, Cabinet process, government policy),
- technical (drafting conventions, research methods and tools).

Traditionally, when we thought of the body of knowledge that a legislative counsel was obliged to master, it was only the last set, the technical aspect, that came to mind. Departmental counsel were seen as the members of the drafting team required to know the substantive legal context for the proposed legislation, and other public servants were responsible for managing the policy and process aspects of the drafting exercise. If that view ever accurately reflected the reality of the drafting process, it no longer corresponds to the actual division of labour amongst the members of the drafting team in any modern bureaucracy.

To begin with, the level of substantive legal knowledge required of legislative counsel should not be underestimated. In some jurisdictions, the complexity of the law in certain areas dictates that they specialize and acquire expertise in the substantive law (taxation springs to mind). However, even generalist legislative counsel must always understand enough of the state of the law as it stands before the proposed legislation to ensure that the legislative instrument being drafted actually effects the desired change in the law (assuming that that desired change has been elaborated – with the help of the legislative counsel using their arts and crafts skills). In the complex regulatory environment of the modern state, even a superficial familiarity with the substantive area may require considerable learning.

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[11] OECD, *Checklist on Law Drafting and Regulatory Management in Central and Eastern Europe* (1997), *Sigma Papers*, No. 15, OECD Publishing http://dx.doi.org/10.1787/5kml6g2zl0bw-en (accessed 12 June 2011) esp. at 13, 26.

In addition, all legislative counsel, whether specialists or generalists, must try to shape a legislative instrument to create a good "fit" with its surrounding legal context. This context starts, of course, with other statutes in the same subject area within the jurisdiction, but it reaches beyond that, not only to legislation on other subject-matters in the same jurisdiction, but also to legislation in other jurisdictions. The pressure for harmonization of legal regimes between nations requires legislative counsel to scan ever more distant legal horizons in their evaluation of the legal context for their work.

Finally, in an era when personnel – particularly senior personnel – in even the most stable government departments turn over on a regular basis, the legislative counsel often must also serve as the key resource on the nuts and bolts of the legislative process. They may be the only person on the drafting team with any real experience of the complex interaction between the Cabinet process, the formal legislative process and the underlying bureaucratic and political policy imperatives.

The discipline of drafting

Seeing drafting as a discipline – "a branch of knowledge…studied in higher education" – supplies a much-needed corrective for two great competing (but equally counter-productive) myths about the training of legislative counsel.[12]

The first myth is that drafting skills cannot really be taught in any formal way, and especially not in an academic setting. Drafting skills can be learned only by service in a long apprenticeship to experienced practitioners. In the more extreme versions of this view, experienced legislative counsel are sometimes described in terms better suited to priests in an ancient cult, slowly initiating their acolytes into the semi-mystical rites of the religion, than to modern professionals engaged in professional training.

The second myth is that the drafting skill-set is purely a subset of the skill-set that all lawyers are trained to have. Specialized training for legislative counsel, whether by long periods of apprenticeship or through dedicated academic programs, is simply a waste of time. When new legislative counsel are needed, they can simply be taken from other government departments or straight from the private sector, handed a precedent book, and set to work. In the more extreme versions of this view, legislative counsel begin to look more like assembly-line workers who can be

[12] See S. Markman, "Training of Legislative Counsel: Learning to draft without Nellie" (2010) **Comm. L.B**. v. 36, no. 1, p. 25 and the other articles cited above n. 1.

hired off the street than experts who have acquired a very distinctive combination of knowledge and abilities through a rigorous program of specialized professional training.

In different ways, each of these myths is a serious impediment to meeting the challenge of the world-wide drafting shortage. Those who deprecate the role of formal academic training effectively throw up their hands and tell the governments of the world: "Sorry. You'll just have to wait. The process can't be rushed." Those who see no real need for dedicated specialized training are equally unhelpful. They toss untrained neophytes into drafting offices and shrug off the howls from Parliamentarians, judges and counsel about the poor quality of legislation as unjustified quibbles. After all, the laws were drafted by lawyers. What else could have been done?

In fact, drafting skills can be studied and learned very successfully in a formal academic setting.[13] Indeed, much of what a legislative counsel needs to know about the work of the profession is best addressed in that environment. It is certainly true that no professional is ever fully functional without some period of hands-on experience in the field. However, a sound formal training program can give a new legislative counsel a solid professional foundation that allows those first months and years of on-the-job training to be put to use in honing skills and developing mature professional judgment, rather than in acquiring basic competencies and understanding.

Why ask the question? (Reprise)

The Rule of Law has always been a fundamental prerequisite to social and economic growth. The skills required to create coherent and effective laws have therefore always been in demand. However, in a global economy there is an even more acute need for capable legislative counsel to supply the legislative framework that allows societies to develop and prosper as their people wish.

Looking at drafting through all three of the lenses of Art, Science, and Discipline, instead of just any single one, allows us to see the profession in all of its dimensions. That fully rounded view of what we legislative counsel actually do, and how we do it, will help us develop more efficient and effective training

[13] By "drafting skills", I mean the full range of skills that legislative counsel use. The 2010-11 syllabus for the Advanced Diploma in Legislative Drafting offered at the Honourable Society of King's Inns in Dublin included a module on file management, legal analysis and synthesis, listening and questioning, conflict resolution, negotiation, team work, time management and attention to detail.

programs to meet the urgent need for competent legislative counsel all over the globe.

The Role and Efficacy of Legislative Drafting in the United States: An Update on the American Drafting Process

Douglass Bellis[1]

Abstract:

This paper considers how bills are drafted at the federal level in the United States of America and the role that drafting plays in terms not only of the final text of legislation, but also the process for enacting that text. The efficacy of drafting thus involves their role in bringing together the wide variety of often divergent ideas and interests that characterize highly politicized US legislative processes. The author offers his observations on how recent changes in these processes, particularly the changing role of non-drafting staff members, are affecting legislative drafting. He concludes with some observations on the influence that legislative drafting developments in other countries is having on US drafting.

The Dual Role of Drafting in the United States

Legislative drafting, at least in the United States at the Federal level, has two roles, and its efficacy must be judged in each of two very different contexts. Multiple

[1] Senior Counsel, Office of the Legislative Counsel, United States House of Representatives. The views I express here are my own individual views. They have no official significance whatsoever, either for the Office of which I am a part or for the views of any part of the United States Government.

drafts are used as tokens in the negotiating process at arriving at a consensus that can obtain a majority vote to pass in whatever body is then currently considering the measure. When at last the various drafts are molded into a final law, Federal judges, who are usually the ultimate arbiters of a draft's effect, analyze the end product as if it had emerged from a black box and are usually completely unaware of, and mostly uninterested in, the details of the political compromises that gave rise to its text. Their concern is to use the text to decide details of the case that is before them. These types of details quite likely received little or no attention during the hurly burley of the bill's consideration in Congress. What seems to a member of Congress like a huge political success may seem to the courts like an inexplicable hodgepodge. My comments today are directed toward how the drafting process in the United States fits into its political context and the extent to which it serves the practical public interest as well as the sometimes rather different political needs of politicians.

Like the classic Puritan, the legislative counsel must be in this world, that is the world of politics, and yet not of it, in order to be effective. The legislative counsel must also focus on the needs of the ultimate users of a text, mostly the judges but sometimes the public or others, in order to meet both the needs of the legislative counsel's immediate clients, the politicians, and the needs of the legislative counsel's ultimate clients, the public. So the legislative counsel is outside of the political process, and as scrupulously neutral as humanly possible, yet acutely aware of the political concerns of the politicians the legislative counsel works with. To participate in what one American lawyer and sometime participant in the work of Congress, Eric Redman, called the dance of legislation,[2] we as legislative counsel must hear the beat and know the steps even though we are neither the dancers nor even the musicians. Sometimes the dance is a minuet, at other times a tarantella. The dance is ever changing and so the focus of our attention must constantly change with it. In a way that is not shared by many other participants, we must also give some thought to what will happen when the dance is over. Who then will go home with whom?

What has happened since Dublin?

Perhaps a couple of decades ago at a conference on emerging trends in legislative drafting in Dublin, Ireland, I gave a talk on drafting in the United States Congress, which outlined how the somewhat unusual political framework of the United

[2] Eric Redman, *The Dance of Legislation* (University of Washington Press: 2000).

States created constraints on the drafting process in that country. Some here today might well have been in Dublin and heard that talk. The talk was subsequently memorialized as an article in the Statute Law Review.[3] Enough time has passed, and perhaps I have learned enough, now to present an appraisal of whether those trends actually did emerge, and to provide an update on the changes that have occurred in the American context since then.

The changes are mostly subtle ones, but cumulatively, the drafting experience at the Federal level in the United States is now rather different than it was in those days, though it may be on the cusp of another change, at least in the House of Representatives, which in the elections just past changed majority party. There has also been a continued, but slow, movement toward an internationalization of drafting norms. More legislative counsel, not only in the English speaking world, are becoming aware of, and perhaps providing a mutual influence on, one another's work.

The United States Congress is something of an anachronism

To set the context, let's look at what I think are some of the differences between the legislative framework in the United States and a generalized framework we can perhaps attribute in greater or lesser degree to most other countries. Of course the other countries are actually a rather diverse lot, but for our purposes we can say that, generally, they fit into two broad categories – which roughly correspond to the common law countries and the civil law countries. While quite different among themselves, as contrasted with the United States, these two types of countries, whichever legal tradition they may have, also have a number of striking similarities among themselves. You may wonder if such a comparison is just another purported example of an American exceptionalism that at root does not really exist. Perhaps, but it serves as a useful analytic tool, so we'll use it.

In both Commonwealth countries and civil law countries, what Americans call the executive branch of the government (which indeed in most places is called the government) has the primary legislative initiative in the country's parliamentary body. The policy development behind that initiative is typically done by the personnel of the country's ministries guided by the political decisions of the ministers. Once the policy is arrived at, separate drafting services usually have a central role in placing those policies into legislative language. These drafting services may even be attached to the civil service of the executive rather than to the

[3] (2001), 22 *Statute Law Review* 38-44.

parliament per se. In most cases, the parliament is not thought of as a body completely independent and isolated from all other parts of the governmental structure, as is the case in the United States.

The drafting service therefore may be under an attorney general or within a ministry of justice. It is primarily tasked with rendering the legislative proposals of the government (which for the moment I will use to mean what in the United States would be called the executive branch) into formal language for presentation to parliament. Once presented, it is quite likely that the proposals will pass into law, though perhaps with some modifications along the way, but usually not major modifications involving fundamental policy shifts.

The opposition in many parliaments does not formally present bills or have the legislative initiative. Its amendments, if offered, are rarely accepted, unless by previous agreement with the government. Individual members, often called back-benchers, even those of the majority party, have little hope of seeing any bills they introduce, sometimes called "private members bills", being enacted into law, unless those bills are taken up by the government and perhaps at that point redrafted or at least reviewed by the drafting service. They do not seem to be much involved as individuals in the amendment process, either.

In the United States the situation is far different. This is mostly owing to the fact that our Constitution is frozen in time, in the 18th, or perhaps in some respects in the 17th century. It is based on the English constitution as in effect during those centuries and as seen through the eyes of the French Enlightenment, especially the eyes of Montesquieu, and further filtered through the English Whig experience of those times. There the balance of power among the branches, each separated in function from the others, and their relative independence from each other were paramount. The withering power of the monarch in Britain during the late 18th and on into the 19th century gave rise to a new model for parliamentary systems, one which has strongly influenced later developments in countries other than the United States.

All of this was further adjusted by the experience of the early American statesmen in colonial legislatures, where, to say the least, English ministries had little effect on legislation, whatever may be said of their 18th century role in Britain. Also, there were no American ministries at that time. Members of the legislature, aided by the clerks, did their own drafting. The executive in general was not only theoretically distinct in derivation of power, but practically an alien intrusion. Such an executive was not influential, much less dispositive of legislation, much to the frustration of English, and later British, colonial governors in that part of North America that became the United States.

After independence, this situation might have changed, but our Constitution was a written one, so there is less room for informal change through custom than there would be in a country with an unwritten constitution. The method for amending the American Constitution is designed to be cumbersome and rarely used. That, combined with the somewhat anarchic political culture of the United States, has resulted in a perpetuation of the independence of the legislature in matters of legislation, indeed, of each house from the other as well. Consequently, each of the two houses of Congress has their own legislative counsel, imbedded within that house and responsible only to the house in which it resides.

The government, to the extent embodied in the executive (for in the United States the executive is only seen as a part of the government rather than the government itself – the independent Congress and even more independent court system are also considered co-equal parts of the government) is therefore an outsider when it comes to legislation. That is not to say the executive is without influence, though it is influence to persuade rather than direct, and it is, much like the influence of other outsiders, primarily political in nature. The executive does indeed have one formal means of persuasion, and that is through the threat of the veto. Yet the veto is a power only to prevent the passage of any bill at all, not to require the passage of one in the face of Congressional opposition. So it is simply an invitation to negotiations, negotiations that take place on the backdrop of public opinion and the proximity of the next Congressional or Presidential election. As the political weight of public opinion becomes known or changes, the language of draft bills also change, sometimes quite radically.

It is the two Houses themselves who keep custody of the various drafts and who supervise and implement those changes in draft language, now normally through their respective legislative counsel.

Late development of Offices of Legislative Counsel

As I mentioned in Dublin, the offices of legislative counsel did not exist until perhaps a century and a half after the adoption of the current American Constitution. They have no formal place in it. They were intended by their creator, a professor named Chamberlain, to be a slavish imitation of the British parliamentary counsel's office of that time,[4] so far as that might be possible. Consequently, the conceptual division between policy-making and "instructing" the legislative counsel was a founding premise. But that division came to be

[4] Approximately 1913 through 1919.

interpreted in practice very differently than it appears to me to be interpreted elsewhere, including in modern Britain itself.

Members of Congress, while in a loose sense often lawyers, actually come from all walks of life and few have ever practiced the sort of law that would equip them to be legislative counsel of Federal statutes. Moreover, most have little interest in drafting as an art, and less time to devote to the minutia of the legislative process. Their focus is on re-election, their own personal re-election, which does not much depend on their skill in drafting or policy development, or even their political party affiliation.

Each would-be member of Congress is elected individually and often makes a personal choice to run (in America they run, not stand) for office. They typically seek, as individuals who have decided to run, whichever party nomination they think more popular in their own district. The nomination is normally determined through a State-run party primary election among either the entire population of the district, or that portion of it that denoted a party preference for the party in question, rather than by party leaders. Therefore the members of Congress from a given political party, while for other reasons possibly having some semblance of a common ideology or views, actually are quite diverse. They see political party affiliation as a convenience for personal election and as a means of organizing the house of Congress to which they are elected (and so a means of possible further political advancement) rather than as fonts of policy and political ideas.

Incivil partisanship and gridlock?

Much has recently been made of the growing partisanship in the United States and the consequent gridlock in legislation. Last November's election, widely regarded (including by the President himself) as a repudiation of the President, has given the Republican Party the majority in the House of Representatives. The Senate majority, though smaller, is still in the hands of the Democratic Party, the party to which the President also belongs. To the extent that there was sometime of an ill-tempered gridlock between the political parties before, one might have expected it to increase with the new Congress.

As I mentioned in my Dublin talk many years ago, gridlock is not necessarily considered a bad thing by the public, nor it gridlock a stranger to the United States. There is in our country a long tradition of divided government, with one party controlling one or both houses of Congress, and another controlling the presidency. Perhaps oddly, the greater bargaining power the election gave to the Republicans may in fact ease the compromises needed to pass significant legislation rather than

exacerbate them. We saw a hint of this in the lame duck session of Congress after the election.

Of the two major parties, the Democratic Party has for the last century or so often been identified with a more direct and vigorous intervention by the Federal Government to influence economic developments and to provide more direct assistance to the poor. The Republican Party has during that same period often been identified with skepticism over the effectiveness of government intervention in social and economic policy and with support for the concerns of the business community. But individual members of each party can and do frequently depart from these generalizations. The formal machinery of a political party has little say in who will be the candidate of that party for election to Congress. So the candidate does not fear being dropped from the ballot because of a failure to hew to any party line.

Yet policy debate in Congress and on television talk shows may be shrill, and often filled with partisan invective. Much of that is a Kabuki show for the public aimed at influencing subsequent elections. It may not influence drafting as much as one would expect. This is because arrival at a sufficient consensus to achieve a majority usually requires at least some compromise with some members of the other political party (for there are historically only two political parties at any one time). That much was true when I spoke in Dublin, and still is.

It has become even truer in the Senate, where it now takes at least 60 of the 100 Senators to assure the passage of any measure because of the evolution of a Senate process, imbedded in its internal rules, called the filibuster. In recent years, the ease of invoking a filibuster, and the willingness to do so, have both increased markedly. Since it is rare for either of the major political parties to have as many as 60 sure votes to overcome a filibuster, a supermajority is pretty much required for all legislation. Add to this the power of each individual Senator to put a "hold" on many matters before the Senate, and you have some very complicated negotiations required, often on completely unrelated matter, in order to achieve any result.

In Dublin I noted, as I note here, that party affiliation is not in general as important in Congress as it would be in most parliaments in the world. There is one place where party identity is important, though. It is in the selection of the leaders of the houses and the chairs of that house's committees. The principal political officers of each house are elected by the members of that house. That normally means they are elected by the majority party. They will control which issues come up for legislative action in that house, but they will usually not drive the language, or even the policy that agenda will lead to. What does drive the language is where the rubber hits the road for the drafting of American legislation.

What really drives the language of bills

And what drives the language starts with the individual members of the two houses of Congress. Each member of Congress, whether a senator or representative, has their own quite distinct political philosophy and their own wish-list for legislation. Each has a co-equal formal, and indeed, practical right to introduce legislation. Each piece of introduced legislation has a reasonable chance of being enacted into law, either in the form in which the member introduced it, or more likely, when pieced together with the legislative ideas of enough other individual members sufficient to achieve an agreed upon bargain of legislation that can achieve a majority in the house or committee in which it is being considered.

Because legislation is result of the negotiations of individual members of each house based on their own personal preferences, there is a natural rhythm to the legislative process in the United States that probably differs from that in most countries. Each two years the entire House of Representatives and one-third of the Senate is up for election. Every two years, all the pending legislation that has not been enacted lapses, and the number of introduced measures returns to zero.

Each Senator and Representative introduces those bills that represent their own individual wish list at the beginning of the 2 year cycle (or at any time during it if they decide to support an idea they had not considered before). Consequently the legislative counsel must draft all these proposals, though most of them will not, in their original form at least, ever see the light of day. This is a particularly busy time for the legislative counsel, but is alleviated somewhat by the fact that many Senators and Representatives are re-elected, and most of what they will want is already in bill form in bills they introduced previously. So these may simply be reintroduced, with a few updates based on whether any laws they amend might have changed since their former introduction.

At this stage, the committees, acting through their chairs, also introduce bills that represent, for the most part, the policy views of the chairs involved. These bills have exactly the same status as others and probably equally little likelihood of being passed in the form in which they are introduced. But since the chair of a committee has a fair amount of influence in setting the agenda of that committee, the bills the chair introduces indicate what topics the committee is likely to deal with during that 2-year period.

Drafts as Tokens in the Negotiation Process

The introduced bills are used as tokens in an informal ongoing policy debate that takes place during negotiations among Senators and Representatives over legislative priorities. They, or parts of them, are constantly being redrafted as a part

of those negotiations, though these drafts normally have no formal status before either house. Needless to say, this greatly expands the workload of the legislative counsel.

When a chair feels that a sufficient consensus has arisen that a general policy the chair wants is likely to find a majority, the chair will set a "mark-up" for that bill. The mark-up is a formal committee meeting, usually open to the public and sometimes telecast, at which the bill will be read for amendment.

When a mark-up is scheduled, the minority party will immediately seek to amend the bill, either to undo its effect altogether, or to push it in the direction favoured by the minority. Even members of the majority party that have been unable to get their way in earlier negotiations will attempt to reopen issues by way of amendment, or add sometimes rather unrelated matters to the draft bill by proposing amendments in committee. These amendments are often circulated informally before the mark-up and often are in effect disposed of in those informal negotiations. Members will often offer amendments they know will be defeated in order to make a political point. Again, the legislative counsel must draft all these amendments, often on a close to real time basis, to facilitate the negotiations.

Thus the mark-ups can be quite fluid. The bill probably will emerge from the mark-up bearing little resemblance to the bill that entered it, unless the bill was already negotiated out in detail and in private by the various members of the committee before the chair decided to mark it up. Such a bill would probably be introduced in its finally negotiated form and so is non-controversial. Even in controversial bills, ongoing negotiations might well lead to an agreed text in the form a single amendment, an amendment that substitutes a complete new text embodying all the agreements that have been made elsewhere and combining pieces of earlier drafts.

Open meetings: boon for transparency or ineffective symbolism?

So the actual debate takes place behind closed doors and may not include all the committee members or any of the minority party members. This is a change since my talk in Dublin. Ironically the change is probably the result of requiring most mark-ups to be open to the public, something that happened about the time of my Dublin talk and of which the consequences then were not so clear. Many of the negotiations needed to get a majority in favour of a bill involve quite delicate political give and take, and do not lend themselves to open sessions. Consequently the Senators and Representatives simply confer privately. This is true both in regard to bills in committee and on the floor, and also in regard to bills between the two houses.

At the time of the Dublin meeting, the House and Senate normally dealt with different versions of the same bill at a conference between the two houses, in which a committee formed of members of both houses would propose a compromise disposition of the differences to their respective houses.

Now, the formal House-Senate conference seems to be falling into disuse. Instead the negotiations are increasingly done through staff intermediaries and not in person, and not as a single group at the meetings of the members at a conference. Ostensibly on behalf of the whole, the chair of a committee involved in the legislation in one house will negotiate with the chair of the parallel committee in the other. Sometimes the ranking minority members might be drawn into such negotiations, but not usually at their beginning. The presentation of *faits accomplis* to the minority, and indeed to other members of the majority, has led to frustration for all involved.

So the same trends affecting mark-ups are also affecting conferences. As I have mentioned, they greatly multiply the number of drafts being circulated at a given time, and greatly reduce the time that can be allotted to each. The end-product must also be produced hastily, while the agreement still holds.

As I mentioned, the negotiations at whatever stage do not always involve all the members of the committee in question, and so do not provide the airing for all views that used to occur in the closed mark-ups. The presentation of *faits accomplis* to the minority, and indeed to other members of the majority might explain some of lack of civility that is often noted and complained about currently. Senators and representatives have fewer and fewer opportunities to confront and discuss strongly held positions with those who do not hold them. Each side is left to doubt the motives of the other and does not hear what might have been convincing rationales either for changing their mind or at least for accommodating to some degree the views of the other side of the issue. This is a change since the Dublin meeting.

Effects on Drafting

This also makes the drafting quite hasty when a consensus seems to be arrived at, because the Senators and Representatives want to pass the bill while they are sure of a majority to do so, a majority that can easily be lost when public opinion or lobbying efforts change the political background on which it was based. As soon as outside interests become aware of losing their positions (and some almost always will) they will start up a relentless pressure on senators and representatives to reopen the issues involved and so change the draft further. This sometimes

contributes to a garbled or simply not fully thought-out policy. Legislative counsel may be reduced to document-assembly in place of legal analysis.

As in committees, the free offering of amendments on the floor of the House of Representative has declined. An "open rule" used to be the "normal" way in which a bill might be considered on the floor of the House. Such a rule allowed anyone to offer whatever amendments they might like. A legislative counsel always was on the floor during a debate on such a bill to draft amendments on the fly. Now the Rules Committee, the gatekeeper for the consideration of legislation on the floor of the House, rarely gives such open rules. Instead it considers in committee each proposed amendment a day or so in advance, and decides whether or not to allow it to be offered.

This in effect means that the majority party can prevent the minority party from offering its favoured scheme if the majority leadership fears enough of its members would vote for that amendment to allow it to pass. If an amendment is allowed, it may only be offered in the form presented to the Rules Committee. Most such amendments are not approved on the floor. While this process of vetting by the Rules Committee might be thought to be a help to legislative counsel by lessening the number of amendments, it is not. What it actually means is that all the proposed amendments (most of which will be rejected) must be drafted on short notice for presentation to the Rules Committee and without any certainty about the order in which those approved might be taken up or whether they might be adopted. Technical problems in execution and consistency of provisions can arise from this procedure.

Another unexpected consequence of this development relating to the Rules Committee is that many more bills and other measures are brought to the floor on suspension of the rules, a procedure that allows bypassing the Rules Committee but requires a 2/3 vote for passage and also does not allow for any amendments, other than those proposed by the offeror of the motion to suspend the rules. These amendments may not be very clear on the face of the document offered, but often are the result of negations of the sort already described. To the extent members of the House were not a part of those negations, if there were any (and in most cases where there were not), the possibility of this sort of amendment can inflame mutual distrust.

Judicial feedback: a means for improving the law

After the laws are passed, is there any means of seeing if they have worked and if the drafting is effective? In the United States, the ultimate test is litigation. Private parties in litigation among themselves and against the United States are constantly

testing and trying in some cases to evade the meaning of legislation. The courts, in trying to untangle these disputes, are a valuable feedback mechanism for testing how effective a given drafting method has been. But in the United States, there are so many Federal courts and so many judicial decisions that finding those of interest to legislative counsel, other than at the Supreme Court level, is hit and miss.

To address this point, some years ago, Congress and the Federal courts set up a system through which the relatively limited number of Federal appeals courts could send directly to Congress copies of their opinions in difficult cases where drafting issues seemed to be presented. For those interested in more details, Judge Katzmann, a prime mover in creating this program during his incarnation as a university professor, has described the program and its effects in his Yale Law Journal article.[5]

In essence, the various courts of appeals send copies of opinions they think may be of interest to Congress, mostly those where they are unsure of Congressional intent, to the Offices of the Legislative Counsels without further comment because of the separation of powers among our branches of government and the unseemliness of any appearance of one trying to influence the other outside the normal course of its constitutional duties. The Legislative Counsels read the opinions and then transmit them to the relevant committee staff-members for the majority and minority political party members of that committee. Sometimes these opinions result in later corrections or modifications of the law. In all cases, they help inform the legislative counsel of problem areas to be avoided in the future.

Summary of trends in the United States since Dublin.

Since Dublin, then, the informal process of legislative development, and consequently the number of different drafts and differing policy sources for drafts that will be seriously considered if only transiently, has greatly increased, but the formal process of legislation, in the form of mark-ups and floor action, has become much more rigidly controlled by the respective leaderships of the two houses. Members of Congress, whether representatives or senators, engage in direct negotiations far less frequently.

Negotiations on behalf of members by staffers occur among smaller, less formal, and less diverse groups. The role of non-drafting staff in the negotiations has been greatly increased, at the expense of the role of the members themselves. A staffer is

[5] Robert A. Katzmann & Russell R. Wheeler, "Interbranch Communication: A Note on Article III En Banc," 117 Yale L.J. Pocket Part 110 (2007), http://thepocketpart.org/2007/10/17/katzmannwheeler.html.

not as free to compromise as a member would be and a member, isolated from the actual conversation, is less likely to be persuaded by another member's views, or at least respect their sincerity. The overall result is that members are more disconnected from the legislative process and more likely to feel that their views are not being seriously considered. This contributes to incivility and intransigence. It may well play a larger role in any supposed gridlock than party differences.

The tendency to bundle legislation into large omnibus mega-bills has if anything increased since Dublin. It is easier to pass larger bills that have something for everyone, and that often are considered before there has been much time for all the members, not to mention the public, to study the many details. While giving the executive branch power to flesh out the details of legislation by rule-making can make large, sketchy legislation practical, it may also result in reduced power for Congress and less predictability results from bills that become laws.

An example of this that caused some excitement in the United States was the adoption in December 2011 of a rule to carry out the new healthcare legislation. The legislation had originally included a provision for the payment to a doctor for giving a terminal patient "end of life" counselling, including advice on how to create an advance order to the termination of treatment when the condition of the patient prevented obtaining the patient's views. This was attacked as allowing death committees and perhaps involuntary euthanasia. It was hastily withdrawn from the bill. But the final law, as drafted, left vague what sorts of things might be provided by rule, and the executive branch has now proposed by rule to provide those very same payments. Arguably the proponents of the bill intended precisely this result, though the opponents of the bill probably thought the bill in its final form did not allow for it. The haste in which mega-bills are considered may be conducive to this sort of result. Such results do not increase the level of trust among members of Congress, however.

There is some movement toward stemming the tide of these trends. Perhaps the House of Representatives will go back to having more bills under an open rule. But the overall trends, responding as they do the political imperatives of running for office in today's world, will be very hard to resist. If negotiations are the key to successful legislation and to avoiding gridlock, it may be necessary to find new ways to open participation in those negotiations to the senators and representatives. The legislative counsel will have to find new ways to increase their opportunity to understand and make consistent the end products of this participation.

What about the internationalization of drafting?

The other trend I spoke about in Ireland was not as parochial. That trend is one toward greater international attention to the art and science of drafting and the development of international norms for what constitutes effective drafting. There is as yet no internationally recognized paradigm for all legislative counsel to follow. But I would have been surprised to say the least had one emerged so soon.

What has happened, I think, is that legislative counsel are much more frequently exposed in some depth to the work of their counterparts in other parts of the world. About a year ago, and for the first time in the history of my Office, we hosted a member of the British Office of Parliamentary Counsel for several months. This year we expect to host a member of the South Korean Office of Legislative Counseling for a few months. While such formal exchanges have been common elsewhere for a long time, our Office is pleased now to be engaging in them. Members of our Office while in other countries in their personal capacities often visit our counterparts abroad. So we are at last, at least to some degree, joining the rest of the world.

Meanwhile, thanks to transnational organizations like the European Union, the United Nations Development Programme, the World Trade Organization, and the World Bank, legislative counsel throughout the world are engaging in both practical efforts to create sound transnational documents and in mutual training and discussions about drafting. This process must increasingly lead to mutual understanding of differing cultural and legal norms and to a greater consensus on how to accommodate them in drafting laws. Some countries, such as Canada, already draft their laws in more than one authoritative language. Their experience in doing surely must have much that is useful to all of us internationally.

Even given the diversities of the world linguistically and legally, I expect we will continue to see a consensus grow for the use of short and direct sentences in legislative drafting, using common words that make the intent clearly accessible to the law's intended audience, including the general public when dealing with matters that may be of concern to them as individuals. I expect that we will continue to see a trend away from multiple and complex subdivisioning of legal texts.

Future drafting trends: opportunities and possible surprises

We may however see some unexpected trends because of the growing use by courts, students, and the public, of computers to search and retrieve legal materials. Ironically, the attention we have formerly given to the organization of texts and to the interrelation of various laws may become less important. The computer does

not care what sorts of typeface or paragraphing we use, or whether rules touching upon related matters are close to each other in the law books. The use of diagrams, formulae, and even perhaps pictures, may increase. Perhaps we may even see the use of video. While much of the computer linking of laws with sources and other useful materials may continue to be a project for private enterprise, the possibilities computers give us suggest we should try to anticipate these developments and perhaps as legislative counsel participate in defining their appropriate parameters and pace.

At conferences such as this one, we have occasion to reflect on the possibilities for the future of legislative drafting and its impact on the growth the rule of law as a foundation for the greater security and prosperity of all the people on earth. Let us take a moment to celebrate them, and rededicate ourselves to achieving them.

Emerging from the Shadow – Legislative Drafting in Gibraltar

Paul Peralta[1]

Abstract:

The topic "the role and efficacy of legislation" is considered in the light of the drafting experience in Gibraltar (up to 2006) and in particular in the light of three key factors namely, drafting under a colonial constitution, membership of the European Union and the existence of a sovereignty claim.

Introduction

During the CALC conference in Hong Kong a number of delegates expressed an interest in legislative drafting in Gibraltar. This paper sets out the context in which drafting has been undertaken in Gibraltar, particularly in terms of the conference topic on the role and efficacy of legislation. It considers this from the perspective of drafting under a colonial framework up until the advent of our non-colonial 2006 Constitution.

The drafting complement presently comprises 5 full-time legislative counsel. These are supplemented by external legislative counsel whom the Government engages for specific assignments. These may bolster the complement by some 3 or 4 persons

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at any given time. The community which legislative counsel serve consists of roughly 30,000 residents, about 7,000 frontier workers and several millions of tourists. Whilst compared to other jurisdictions this may seem to be a generous complement, as this paper develops the reasons for have such numbers will become clear.

Prior to launching into an examination of the drafting issues I feel obliged to set out at least some of Gibraltar's history, since it is crucial to understanding the development of drafting in this jurisdiction.

Geographical legacy.

For those that are not familiar with the territory, Gibraltar (or 'the Rock') is a limestone outcrop that lies at the southern tip of the Iberian Peninsula. Its dimensions are miniscule: 2½ x ¾ miles (1.875 square miles or roughly 6km^2).

Gibraltar is itself a peninsula, which at its northernmost end presents a defiant and imposing 1,300 foot cliff that tapers to a southern point projecting into the Strait of Gibraltar. Across the Strait, in Morocco, lies the mountain Jebel Musa, or the other Pillar of Hercules.

Early settlers

The earliest inhabitants were prehistoric, as evidenced by the Neanderthal remains that have been unearthed over the years. Interestingly, there is evidence to suggest that it may have been their last stand in Europe.[2] In 711, the Rock served as the landing point for the conquest, and ensuing 800 year Moorish occupation, of Spain. The Moors were the first modern humans to settle the Rock. Their legacy consists of various fortifications and associated infrastructure some of which remains to this day.

The Moorish occupation of Gibraltar was followed by a Spanish period of occupation. However, harsh conditions on the Rock meant that, whilst it was important as a fortress, it never really prospered as a Spanish city. Paradoxically, with Spanish controlled ports on either side of the Strait of Gibraltar, the Rock's strategic value declined and this was mirrored in the population that succumbed to the pressures, including disease and attacks by the Barbary pirates.

[2] C Finalyson, *The Humans Who Went Extinct* (Oxford University Press, New York: 2009).

Establishment of British Rule

By comparison to the 8 centuries of Moorish occupation, the Spanish occupation of Gibraltar was comparatively short-lived (1462-1704). In 1704 an Anglo-Dutch fleet captured Gibraltar in the War of the Spanish Succession. British title to Gibraltar was recognised by the Treaty of Utrecht of 1713, which formally ceded Gibraltar to the English crown in perpetuity. For the next 306 years a British flag has crowned the summit of "The Rock".

Perhaps one of the most distinguishing features between Gibraltar's history and that shared by other colonised territories is that there was no native population to colonise. The Spanish inhabitants, in expectation that the invading forces would be repulsed, migrated to a settlement in the Spanish hinterland and effectively gave the Anglo-Dutch forces vacant possession.

Although there was no subjugated population in the more traditional sense, the establishment of British rule on the Rock was for the majority of the ensuing years dominated by a British military presence. In common with other small possessions, society was organised according to the strict hierarchy of the period. In Gibraltar military figures dominated and civilians were subservient to their needs.

The early days of British rule must have been harsh. Arable land was virtually non-existent and fresh water in limited supply. Sanitation was poor and several epidemics afflicted the population. That said, a fair number of civilians settled in Gibraltar. These consisted of a number of expatriates from the Motherland and other Mediterranean cultures (principally Genoese, Maltese and Sephardic Jews) who saw opportunities for commerce. In time the Gibraltarian identity would be forged from these peoples.

Drafting under a Colonial Regime

Given Gibraltar as a fortress and a garrison town and the other realities of 18th century life, it is not unexpected to that legislation would have been the preserve of London and the Governor. Invariably its purpose was to promote and serve the interests of the British crown, and military.

Rather unsurprisingly therefore, a copy of Gibraltar's laws (both primary and subsidiary) dating back to 1898 is a rather slender single volume. Its contents, even less surprisingly, concern themselves with matters such as the conditions regulating the import and export of goods such as coal and oil.

Although inroads were made to increase civilian representation in the decision-making process, the 1940's and events arising from the Second World War proved to be a defining time for the Gibraltarians as a people. The entire non-combatant population was evacuated in 1941 to make way for the wholesale militarisation of

Gibraltar as part of the wider war effort. The despatch of women, children and those too old to serve in uniform to places like London, Northern Ireland, Madeira and Jamaica for the duration of WW II almost spelt the end of the Gibraltarian.

After the cessation of hostilities, the repatriation of the exiled civilian community was opposed by certain military figures who saw Gibraltar as simply a military fortress and the civilian population as a nuisance. Fortunately this kind of thinking was from very early on being challenged by events on the ground. In 1942 some men who had remained to defend the Rock from a possible Nazi invasion formed the first Gibraltarian political party: the Association for the Advancement of Civil Rights. Under the leadership of the late Joshua Hassan (later Sir) they mounted pressure on the authorities, eventually achieving the repatriation of all families by 1951. As the party grew in strength and popularity, its objectives turned towards securing more rights and equal rights for the Gibraltarians.

Legislation in the 1950's was enacted by the Legislative Council,[3] having taken over from the City Council. The Legislative Council comprised the Governor, 3 ex-officio members, 5 elected members and 2 nominated members. For the currency of its life (1950-1969), it represented a further step in the increasing democratic accountability of the executive, but fell short of a fully democratic institution.

The 1960s

The 1960's opened a new chapter of Gibraltar's history and the events from that decade have repercussions that are felt to this day. They saw the question of Gibraltar's future as a British colony come under fire internationally. The Spanish government lobbied successfully in the United Nations for resolutions that effectively called for the denial of the right of self-determination to the inhabitants.[4] The thrust of the Spanish argument was that that the inalienable right to self-determination was not an absolute right (notwithstanding its guarantee under the Charter). In their view it is in fact alienable in cases where there is a claim for the restoration of the territorial integrity of a state, i.e. Spain.[5]

The mood that had ushered in pro-independence movements across many colonies and newly independent states was also running contrary to the mood prevalent in

[3] Under the auspices of the 1950 Constitution.

[4] "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;" Chapter I Article 1(2), Charter of the United Nations.

[5] Resolution 1515 (XVth assembly) 14.12.1960, Resolution 2353(XXII assembly) 19.12.1967, Resolution 2429 (XIII) 18.12.1968.

Gibraltar at the time. From the 1940's an increasing number of colonies were clamouring for and gaining their independence, but what Gibraltarians wanted were closer relations with the Motherland, albeit on a more modern and less colonial basis. Because the Gibraltarians in a sense colonised the British, and not vice versa, it is perhaps understandable that the solution sought by colonised peoples around the globe (independence) was not what the majority of the Gibraltarians sought. They strove for recognition as a people entitled to determine their future, but the international community was not prepared to sanction this. The effect of setting itself apart from the mainstream was effective stagnation in terms of advancement at the highest of international levels.

The 1960's also represented a turbulent time in terms of relations with Gibraltar's neighbour and claimant, the Kingdom of Spain. The fascist dictator General Francisco Franco pursued an aggressive foreign policy in an attempt to get the British Crown to give Gibraltar back to Spain. The resistance of the people of Gibraltar to his overtures (which included both harassment and the offer of Spanish citizenship) led to the imposition of an economic blockade which involved the withdrawal of the Spanish labour force, the cutting of telephone communications, closure of the land frontier and the suspension of all air and maritime links.

Having endured 14 military sieges in its British history, this 15th siege was dubbed "the economic siege" and marked an unabashed attempt to strangle the Gibraltarian economy with a view to capitulation and reversion to Spain. The economic siege survived the death of the dictator and continued until Spain's accession to the European Economic Community forced her to open the land border in 1982, although initially only to pedestrians. Vehicular access was not permitted until 1985. Air links were not restored until 2006 and a ferry service between the two ports in the Bay of Gibraltar in 2009.

It must be noted that to this day, and despite being a member of the European Union and NATO, Spain both overtly and covertly pursues her claim. It is pursued in all manner of fora from the sporting to the cultural and political. Although it has sometimes succeeded, there have been notable exceptions, usually when Gibraltar is given a fair hearing.[6]

[6] It has succeeded in blocking Gibraltar's membership of FIFA in the face of a ruling in Gibraltar's favour by the Committee of Arbitration for Sport, has blocked the membership of the Gibraltar Socialist Labour Party (political party) to Socialist International, but it has failed to stop the Gibraltar Kennel Club from becoming a full member of the international federation, to name but 3 instances.

The 1969 Constitution

In 1969 Gibraltar was granted a further constitution,[7] which some have described as the sort that were granted to colonies prior to independence. The Constitution was prefaced by a preamble which contained the following:

> Her Majesty's Government will never enter into arrangements under which the people of Gibraltar would pass under the sovereignty of another state against their freely and democratically expressed wishes.

This was regarded as guarantee against any sell-out and recognition of Gibraltarian's right to determine their future, albeit subject to what HMG considered to be certain limitations.

The 1969 Constitution provided for a unicameral parliamentary system in the form of the House of Assembly ("the House"). The House consisted of a Speaker, two *ex-officio* members (the Financial and Development Secretary and the Attorney General) and 15 elected members. The Parliament was empowered to promulgate legislation for "the peace, order and good government of Gibraltar". An important limitation in the 1969 Constitution resided in the disallowance power that was exercisable by a Secretary of State in Her Majesty's Government.[8] I do not have knowledge this power actually being used.

Under section 45 of the 1969 Constitution, the executive authority of the Government of Gibraltar vested "*in the Governor on behalf of Her Majesty*". The executive powers were further defined (curtailed) by the constitution. These limitations found expression in the term "defined domestic matters".[9] Competence over non-defined matters, defence, law and order and foreign affairs were reserved for the Governor.[10] This meant that Ministers' responsibilities were in practice

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[7] http://www.gibraltarlaws.gov.gi/articles/1969-00R.pdf

[8] Section "37. (1) Any law to which the Governor has given his assent may be disallowed by Her Majesty through a Secretary of State."

[9] Defined domestic matters

55. (1) For the purposes of this Constitution "defined domestic matters" means such matters as may from time to time be specified, by directions in writing, by the Governor, acting in accordance with instructions given by Her Majesty through a Secretary of State.

(2) Any question whether any matter is a defined domestic matter for the purposes of this Constitution shall be determined by the Governor, acting in his discretion, and the determination of the Governor therein shall not be enquired into in any court of law.

10 These are more fully set out in the despatch by the Foreign Secretary Michael Stewart to the Governor Sir Varyl Begg , G.C.B., D.S.O., D.S.C. of 23 May 1969:

limited to those assigned to them by the Governor, after consultation with the Chief Minister.[11]

At this juncture I would recall that legislative counsel are public servants and that whilst it would have been normal for the responsibility for the civil service to be considered to be a purely domestic matter, the despatch by the Foreign Secretary to the Governor provided that "administrative responsibility for the public service generally should remain within the direct responsibility of the Governor." This created a rather bizarre and, at least in theoretical terms, complicated arrangement, namely:

> Civil servants will work to the Deputy Governor in respect of matters which remain within the direct responsibility of the Governor. In respect of defined domestic matters, which are the responsibility of Ministers, the civil servants concerned will work direct to the Ministers responsible. But when and where matters arise which overlap or appear to overlap both fields, there will need to be direct contact between the civil servants concerned and the Deputy Governor.[12]

I shall return to this point later on.

The product of the 15 member House of Assembly resulted in a Government consisting of 8 members and 7 in opposition. The numerical superiority translates into overwhelming power and a Government that could always deliver on its legislative programme.

This small detail had significant implications for the drafting of legislation as it meant that, whilst Parliament had the ability to scrutinise Bills, it was essentially

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> The Governor will retain direct responsibility for all matters primarily concerned with external affairs, defence and internal security, including the police, and for such matters as, by reason of their close connection with these matters, would most appropriately be placed under the day-to-day control of the Deputy Governor, the Attorney-General or the Financial and Development Secretary. Since everything which is not a defined domestic matter automatically remains within the Governor's direct responsibility, it is unnecessary and undesirable to attempt an exhaustive definition of all matters retained by the Governor... http://www.gibraltarlaws.gov.gi/articles/1969-00R.pdf

[11] Assignment of business

48. (1) The Governor, acting after consultation with the Chief Minister, may, by directions in writing, charge any member of the Council of Ministers with responsibility for any business of the Government of Gibraltar (including the administration of any department of government) relating to any defined domestic matter."

[12] Paragraph 7 of the Despatch, above n.10.

unable to block any legislation that carried the Government's favour. This fact both liberated and constrained legislative counsel.

On the positive side the legislative counsel is not exposed to the danger of having legislation blocked by a dissenting majority. Amongst other things this frees the legislative counsel to pursue drafting directions that may not otherwise be available, so long as the Bill carries the Government's blessing.

There are of course downsides which will occur whenever there is a feeling of infallibility.

European Union

Gibraltar has been a part of the European Union (formerly the European Economic Community) since 1 January 1973, having acceded at the same time as the United Kingdom by virtue of it being a European territory for whose external relations a Member State is responsible: see Article 299(4) of the Treaty.[13] As explained, Gibraltar did not accede as a sovereign state in its own right and therefore it is not a "Member State" of the now styled European Union. Gibraltar's laws, however, have to comply with the obligations stemming from the EU as though it were a Member State because Gibraltar's legislature has responsibility for giving effect to EU obligations.

The Constitutional effects of the accession to the EU are reflected in the redistribution of responsibilities. The UK's *European Communities Act 1972* provides:

> (6) A law passed by the legislature of any of the Channel Islands or of the Isle of Man, or a colonial Law (within the meaning of the *Colonial Laws Validity Act 1865*) passed or made for Gibraltar, if expressed to be passed or made in the implementation of the Treaties and of the obligations of the United Kingdom thereunder, shall not be void or inoperative by reason of any inconsistency with or repugnancy to an Act of Parliament...

This carved a niche out of the position in the 1969 Constitution given that the Foreign Secretary's despatch had clearly stated that "The Governor will retain direct responsibility for all matters primarily concerned with external affairs"

[13] It is also a part of the European Economic Area (EEA) viz Article 126(1) of the Agreement of the European Economic Area that sets out the territorial application of the Agreement and states that "The Agreement shall apply to the territories to which the Treaty establishing the European Economic Community is applied, and under the conditions laid down in that Treaty."

(unless you subscribe to the view that membership meant that EU obligations were now internal affairs).

At this juncture it may be appropriate to take stock and summarise the legislative landscape. Drafting of legislation was undertaken

(a) on the basis of the 1969 Constitution-

(i) having to have regard to the powers vested in the Governor;

(ii) having to have regard to the powers vested in the Government (defined domestic matters);

(iii) having to have regard to both (i) and (ii) where there was an overlap in responsibilities;

(b) for the purposes of complying with EU law; and

(c) having regard to the Spanish claim for Gibraltar.

Role and Efficacy of Legislation – A Question of Perspective

If I may pause for a moment and revert to the title and context of this paper "The role and efficacy of legislation", we begin to see the complexity of the proposition.

The role of legislation can be said to be to govern the land in accordance with the provisions in (and limitations of) the 1969 constitution. It could also be said that a concurrent role is that of transposing EU obligations in the manner required by the EU and having regard to the constitutional obligations. It could also be argued that the role of legislation is to promote or in appropriate cases, safeguard, Gibraltar and its citizens from the possibility of any advancement of the Spanish claim.

Even if these 3 considerations were to be the only ones that needed to be borne in mind, any test of the efficacy or otherwise of legislation might depend on your position on these issues. In the ordinary course this question would not arise given that in a sovereign state the test must be whether the public interest is served (even if defining public interest is then subject to interpretation issues).

If one applies the test from the perspective of the United Kingdom, the legislation ought to provide for the continuance of the exercise of power in the terms of and subject to the limitations of the 1969 Constitution. This would require legislation to give effect to EU law and in all other regards respect the division of the responsibilities.

From the perspective of the Gibraltarian the role of legislation is more than merely prescribing a workable and fair legal order. Under the cloud of a colonial mind-set,

which the 1969 constitution still provided, the expectation of the Gibraltarian was that of constitutional advancement.

This could have left legislative counsel in something of a predicament save for the fact that the lines between defined domestic and non-defined (and therefore Governor's responsibility) were not always clear cut. This was even more so when there was an EU dimension. As stated earlier the legislative counsel had pretty much free reign as to how to approach drafting legislation and therefore had the opportunity to draft legislation that leant towards localising powers.

If one considers the foregoing to be the role, what then is the test for the efficacy or otherwise, of the legislation? As was the case when we considered the role of legislation, your stand point is also crucial when determining whether legislation is effective.

From a UK point of view, legislation could be regarded as effective if it did not give rise to any constitutional difficulties. Perhaps the ultimate test for this being whether a Secretary of State felt obliged to exercise powers of disallowance available under section 37 of the 1969 Constitution. Of course that is answering the question from a "big picture" stance. At a lower level one would presumably have regarded legislation as effective if it meant that Gibraltar was ticking over with everyone knowing their respective positions in the pecking order and toeing the line. From an EU perspective, the efficacy or otherwise was easily measured by virtue of the number of EU measures transposed into domestic law, and the number of infractions at any given time.[14] Given that infractions against Gibraltar are instituted against the Member State (the UK being the Member State with responsibility for Gibraltar), the fewer infractions that related to Gibraltar the more efficacious the legislation may have been considered to be.

The test from the Gibraltarian viewpoint is more complex. The test could be said to include any or all of these ingredients:

> (a) whether the legislation has advanced if not at least preserved the standing of Gibraltarians vis-a-vis the Constitutional relationship with the UK;

[14] Under EU law an infraction is a legal process whereby steps are taken against a Member State for failing to abide by treaty obligations. Infractions mainly arise in the context of a Member State failing to transpose a Directive or for the incorrect transposition of such a measure. The process can lead to the imposition of fines against the Member State.

(b) whether it left any lacunae that could be exploited against Gibraltar (whether these materialised in the context of our bilateral relationship with the UK or in any other international respect);

(c) whether the legislation (by act or omission) could give the Spanish any advantage over Gibraltar;

(d) whether the legislation allowed for "Gibraltar plc" to comply with EU law and to compete with others on a level playing field.

In considering point (a), legislation that was drafted in a manner that could have advanced the colonial relationship would have been considered not to have been a success. Whilst it is clear that any overtly colonial legislation would have not been sponsored by the government of the day, and thus left to the governor to promulgate under his residual powers, the more dangerous legislation that the legislative counsel had to guard against was that which had effects that could have been interpreted or operated in a colonial manner (i.e. colonialism by stealth). This in effect meant that care had to be taken to ensure that powers were not only properly but also effectively allocated to the intended recipient.

Point (b) may sound trite, but in a number of areas there have been instances where Gibraltar's capacity has been questioned in international fora. Indeed for a number of years Gibraltar was labouring against the description by certain detractors (mainly in the Spanish political classes and media) as a haven for corruption and money laundering. In order to combat such accusations, the role of the legislative counsel was to produce legislation that could stand up to unbiased international scrutiny, such as the International Monetary Fund.

As regards legislation that may allow space for the entertainment of the Spanish claim to Gibraltar, point (c), it should be recorded that Spain has been (and remains) a major player in the EU. That body promulgated legislation via organs in which Gibraltar had no direct representation. There have been instances where the transposition of EU legislation made the legislative counsel look beyond the text before him/her and consider the wider political and economic context in which s/he was drafting in. To this day these issues are very much alive.[15]

[15] An example of this a live issue today can be seen in the Government of Gibraltar's claim against the EU where it is seeking the annulment of a decision that recognises the Spanish designation under (EU law) of a nature conservation site which is partly in Gibraltar's Territorial waters. For further info see Government of Gibraltar press release: http ://www.gibraltar.gov.gi/latest_news/press_releases/2009/91-2009.pdf.

In considering point (d), legislation would be considered to have achieved its purpose if it was drafted in a manner that insulated "Gibraltar plc" from the potentially grave implications (generally of an economic nature) that transposing EU legislation could have brought about. Gibraltar was not able to influence the decision-making process at the European level, and because EU legislation was the product of negotiations by Member States, their compromises and the ensuing legislation did not have regard to the physical and economic limitations that applied in Gibraltar. The effectiveness in such cases was measured by the extent to which a legislative counsel produced legislation that was acceptable to Brussels (i.e. did not result in infraction proceedings) and which did not place impossible burdens on either the Government (in both a political and economic sense) or the business community. For legislation to have succeeded in the light of such goals, the legislative counsel needed not only a good understanding of the law and drafting but also an element of political savvy.

The 2006 Constitution

The 1969 Constitution was repealed following negotiations between the governments of Gibraltar and the United Kingdom, which culminated in the 2006 Constitution. Given that there was no desire for independence, it could be said that the 2006 Constitution represents the maximum level of self-government possible whilst retaining British sovereignty.

The Constitution modernises certain aspects of the constitutional relationship between the British Crown and the Gibraltarians.

The legislature has been redefined so that pursuant to section 24 it consists of "Her Majesty and the Gibraltar Parliament". The composition has also changed both numerically and in substance. It is configured on the basis of a 10-7 split between government and opposition. Whilst at present the numerical advantage and its attendant benefits and pitfalls is preserved, Parliament now has the ability to change its composition, and it remains to be seen whether the number will increase and whether back-benchers or independents will be participating in future parliamentary debates.

As regards the executive section 44 of the 2006 Constitution states

> The executive authority of Gibraltar shall vest in Her Majesty; and, save as otherwise provided in this Constitution, that authority may be exercised by the Government of Gibraltar...

Overall the position has moved on from the Governor being responsible for all matters save for those which were defined to the Governor being responsible only

for those matters which are expressly allocated and defined and the Government having responsibility for everything else.

By way of side-note, one of the more interesting aspects of the 2006 Constitution is that for the first time Gibraltar has a Minister for Justice. Since the present incumbent took office, the Government has embarked on the wholesale reform of a number of important areas where the legislation had remained virtually static since the 1960s. Reforms have meant the wholesale drafting of family law and procedure, the criminal law and the revision of criminal procedure (amongst others).

Conclusions

From legislative counsel's perspective, the 2006 Constitution has removed some of the ambiguities to which the 1969 Constitution, as read with the Foreign Secretary's despatch, gave rise. To the extent that those ambiguities have now been removed, I believe that it is appropriate to regard drafting as truly having come out from under a colonial cloud.

What is also evident is that drafting played a role as an agent for change. It was a role that arguably favoured the Gibraltarians over the colonial power. Although I do not know whether the same was true in the now independent former colonies, the reality is that the legislative process was an avenue for social progress. To the extent that it achieved in making changes, albeit subtle ones, in the relationship between the colonial power and the citizens in Gibraltar, it discharged an important, even if small, role. In my opinion that is a legitimate role of legislation and I consider myself fortunate to have been drafting in that period.

Turning to the future, it remains to be seen what legislative practices arise from the new constitution. The nature of the relationship has changed but since Gibraltar has not gained independence, legislative drafting will always have to be informed by the constitutional relationship it finds itself in.

"High-quality" Legislation – (How) Can Legislative Counsel Facilitate It?

5 views of "quality" (Minister, Legislator, Judge, Legislative Counsel, Users)

Ross Carter[1]

Abstract:

This article discusses "high-quality" legislation; what it means (including in 5 New Zealand examples where "quality" was assessed from 5 different points of view), whether it can be measured objectively, and how legislative counsel can and do facilitate it.

Contents

[1] Parliamentary Counsel, New Zealand Parliamentary Counsel Office.

Introduction: critics are familiar, but an asset, to legislative counsel

Critics of legislative drafting are familiar but, if justified, an asset to legislative counsel. To substantiate that (some may think) rather unsurprising proposition, I set out 4 quotations (even though some may think that my doing so is a rather odd way to begin this article). Lord Thring in the Introduction to the 2nd edition of his book *Practical Legislation* says

> It may be well to warn [legislative counsel], that in [their] case virtue will, for the most part, be its own reward, and that after all the pains that have been bestowed on the preparation of a Bill, every Lycurgus and Solon sitting on the back benches will denounce it as a crude and undigested measure, a monument of ignorance and stupidity. Moreover, when the Bill has become law, it will have to run the gauntlet of the judicial bench, whose ermined dignitaries delight in pointing out the shortcomings of the legislature in approving such an imperfect performance.[2]

2 *Practical Legislation*, 2nd ed. (London: 1902) at 9. Lord Thring's life and work are discussed by Ilbert, *Legislative Methods and Forms* (1901) ch 5; Engle (1983) 4(2) Stat LR 7; McGill (1990) vol 63 issue 150 *Historical Research* 110; Donaldson in Finnie and others (eds), *Edinburgh Essays in Public Law* (1991) 99; Engle (1996) 16 Parliaments, Estates and Representation 193; Samuels (2003) 24(1) Stat LR 91; and (2007) 28(1) Stat LR iii. See also http://www.cabinetoffice.gov.uk/parliamentarycounsel/history.aspx and Page [2009] PL 790.

Ancient Greeks are inexact proxies for modern legislators. And ermine (weasels' winter white furs) may be long gone from robes of today's judges.[3] Professor Crabbe in the Introduction to *Understanding Statutes* says

> [T]hose who criticise [Legislative Counsel] regarding the language of an Act of Parliament, often do not realise the constant criticism to which Counsel themselves subject their drafts of a Bill. 'Animals are such agreeable friends – they ask no questions, they pass no criticism.' said George Eliot.[4] . . . Criticism, whether in good faith or bad faith, is an asset to [Legislative Counsel] and is accepted as having been made in good faith, whatever the source. It is considered as an attempt to improve the quality of the Bill. . . . There are two aspects to be dealt with here: the quality of the drafting and the soundness of the proposed law. To this may be added a third aspect: how well will the resultant Act work in practice. Criticism helps the [Legislative Counsel] to recognise where there is an ambiguity, where the wording has deviated from the substance, where clarity has been sacrificed to simplicity, where verbosity has detracted from the beauty of expression.[5]

The following examples suggest that today's legislative counsel continue to attract criticism for their legislative drafting:

> The Act and the regulations are in the modern style. No attempt has been made to articulate with any precision what the legislation intends. Different words are used to give expression to the one concept and any continuity in terminology is avoided as is any consistency in the treatment of the concept. Instead one finds disjointed platitudes set forth with almost banal generality. In this wilderness of words two factors appear to indicate that it is within the power of Transport Administration to renew registration retrospectively after the effluxion of a period of registration. It would have been relatively straightforward to express the notion simply and clearly but any requirement of intellectual discipline is avoided by

3 The Abstract to Geyh's (2010) *Indiana Legal Studies Research Paper* No 165 says that "According to a Renaissance myth, the ermine would rather die than soil its pristine, white coat. English and later American judges would adopt the ermine as a symbol of the judiciary's purity and commitment to the rule of law."

4 George Eliot (Mary Anne (Mary Ann, Marian) Evans), *Scenes of Clerical Life* (1858) Ch 7.

5 V.C.R.A.C Crabbe, *Understanding Statutes* (Cavendish Publishing Ltd, London, 1994) at 6.

> the modern parliamentary draftsmen for whom freedom of expression is to be prized above comprehension.[6]
>
> …
>
> Hell is a fair description of the problem of statutory interpretation caused by [UK] transitional provisions introduced when 'custody plus' [(mandatory rehabilitation for very short term prisoners by coupling time spent in custody with a release period under licence)] had to be put on hold because the resources needed to implement the scheme did not exist . . . The draft[er] has been too economical with his [or her] language to make his [or her] intention readily apparent.[7]

"High quality" can't be defined categorically, but is still meaningful

"Quality", in Professor Crabbe's remarks above, has at least these 3 aspects, namely the quality of the proposed law's: (1) expression or form; (2) content or substance; and (3) practical operation. Achieving those, and other, aspects of "quality" depends, of course, on the processes followed to develop, consult on, refine, enact, and review the proposed law.

"Quality" is, in part, a hotly-contested idea. The New Zealand Government on 1 April 2009 set up a Taskforce to assess a Regulatory Responsibility Bill being promoted by Minister for Regulatory Reform, the Hon Rodney Hide MP, leader of the ACT (Association of Consumers and Taxpayers) Party whose 5 MPs support the National-Party-led Government. Consideration of the Bill was part of the National-ACT Confidence and Supply Agreement. The Taskforce reported on 30

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[6] *FAI General Insurance Co Ltd v Spannagle and Others* (2000) QSC 002 at [21] and [22] per Chesterman J.

7 *R (Noone) v Governor of HMP Drake Hall* [2010] UKSC 30 (30 June 2010) at [1] and [32] per Lord Phillips. See also [87] per Lord Judge: "It is outrageous that so much intellectual effort, as well as public time and resources, have had to be expended in order to discover a route through the legislative morass"; *Secretary of State for Work & Pensions v Deane* [2010] EWCA Civ 699 (23 June 2010) URL: http://www.bailii.org/ew/cases/EWCA/Civ/2010/699.html at [1] per Ward LJ: "You might think that it would not be difficult to determine whether someone was receiving full-time education; but you would be wrong if you had to decide the question with reference to section 70 of the Social Security Contributions and Benefits Act 1992 ('the Act') and Regulation 5 of the Social Security (Invalid Care Allowance) Regulations 1976 ('the Regulations')."; *Secretary of State for Work & Pensions v Morina & Anor* [2007] EWCA Civ 749 (23 July 2007) URL: http://www.bailii.org/ew/cases/EWCA/Civ/2007/749.html at [1] per Maurice Kay LJ: "In the field of social security, primary and secondary legislation are notoriously labyrinthine. Sometimes the substantive entitlement to a statutory benefit is clothed in complexity and can only be determined after an interpretive journey that few are equipped to travel."

September 2009.[8] Its report included a revised Bill whose purpose (as stated in its clause 3) was—

> to improve the quality of Acts of Parliament and other kinds of legislation by—
>
> > (a) specifying principles of responsible regulation that are to apply to new legislation and, over time, to all legislation; and
> >
> > (b) requiring those proposing new legislation to state whether the legislation is compatible with those principles and, if not, the reasons for the incompatibility; and
> >
> > (c) granting courts the power to declare legislation to be incompatible with those principles.

The revised Bill attracted much criticism.[9] Law Commissioner George Tanner QC, for example, said that—

> The Bill would force a seismic shift away from the purposive approach to interpretation. It is not the function of courts to pass judgment about the integrity and quality of legislation. Instead of interpreting legislation as part of the process of resolving disputes, the courts would now have to evaluate it. . . . The Bill falls short of complying with many of its own principles. Its use of open-textured language leads to uncertainty of meaning. It attempts to define good law making by reference to a set of simple principles: in doing so it obscures the complexities inherent in them and creates the same lack of clarity and uncertainty that it seeks to prevent. Legislating is a complex business. The Bill suggests it is not. The Bill suffers from an acute lack of problem definition and does not properly identify and assess workable alternatives. Without massive additional resources, it would be impossible to make all existing legislation compliant with the principles in the Bill within ten years: the time frame is unrealistic and unachievable. The Bill is a disproportionate and inappropriate response to the issue it seeks to redress. The Bill overlaps with existing legislation, restating provisions of

[8] http://www.treasury.govt.nz/economy/regulation/rrb/taskforcereport.

[9] See, for example, Chen 11 December 2009 *NZ Lawyer* 10: http://www.nzlawyermagazine.co.nz/CurrentIssue/Issue127/127F1/tabid/2089/Default.aspx. See also Ekins [2010] NZLJ 25 and [2010] NZLJ 127, and Huang [2010] NZLJ 91.

current statutes in subtly different ways, and in doing so risks creating uncertainty and confusion. [10]

The Minister for Regulatory Reform on 28 June 2010 sought public submissions on stated questions[11] related to the Bill, including: "Do you agree that the quality of legislation (Acts, statutory regulations, tertiary legislation) in New Zealand is often not as good as it could or should be? If so, what do you see as the main problems with quality, and the main causes of those problems? If not, please explain the reasons for your view."

"This question", the New Zealand Law Society said on 30 August 2010,—

highlights the central problem with the . . . process . . . – problem definition. In this sense the [Bill] is failing to meet its own standards for policy development. The 'quality of legislation' could refer to a number of possible problems with legislation, and thus implicate a number of possible causes. In discussions of the [Bill] and the quality of legislation it is often not clear what particular aspect of quality is being referred to, and indeed this can be a moving target. As a result participants in the debate run the real risk of talking past each other. For example, a reference to poor quality legislation could be implying:

- Poor legislative drafting
- Poor regulatory design, resulting in poor implementation of an otherwise sound policy choice (for example, unintended consequences)
- Poor policy choice (e.g. poor problem definition, poor selection of policy response, costs exceeding benefits, poor prioritisation of limited government resources)
- That higher level constitutional principles have been offended – human rights, property rights, socio-economic rights or principles, etc.[12]

The Bill was revised after the consultation, renamed the Regulatory Standards Bill, and introduced to Parliament on 15 March 2011. On 5 July 2011, it was read a first time and referred to the Commerce Committee, who called for submissions on it

[10] Tanner (May 2010) 6(2) Policy Quarterly 21, 31 and 32.

[11] http://www.treasury.govt.nz/economy/regulation/rrb/rrb-questions-jun10.pdf.

[12] http://www.lawsociety.org.nz/__data/assets/pdf_file/0007/28186/questions-arising-from-regulatory-responsibility-bill.pdf. For other NZLS submissions on the Regulatory Responsibility Bill, see the following links:
http://www.lawsociety.org.nz/__data/assets/pdf_file/0013/1039/RegulatoryResponsibilityBill.pdf
http://www.lawsociety.org.nz/__data/assets/pdf_file/0013/1084/RegResponsibilityBillSupp.pdf

due on or before 18 August 2011. The Committee's report on it is due on or before 20 October 2011.[13]

An exhaustive definition of "high-quality" legislation is thus unachievable. An irreducible element of beauty is (inescapably) in the beholder's eye. Even in terms of form, views differ between advocates of a simple, purely functional, "classical style" of legislative drafting, and those who see merit in explanatory provisions in current, "plain language" legislative drafting.[14]

But the goal of legislative "high quality" is, as critics' comments show, far from meaningless. Indeed, one purpose, stated in clause 3(g), of the Legislation Bill (162—2)[15] before New Zealand's Parliament is

> to replace the *Statutes Drafting and Compilation Act 1920* with modern legislation that continues the Parliamentary Counsel Office as a separate statutory office and facilitates the drafting and publishing of *high-quality legislation*.

That purpose envisages the Bill itself, which continues and states the functions of the PCO, as facilitating "high-quality" New Zealand legislation.

The purposes of the *Legislative Standards Act 1992* (Qld) similarly include ensuring that "Queensland legislation is of the highest standard" (s 3(1)(a)). The purposes of that Act are "primarily to be achieved by establishing the Office of the Queensland Parliamentary Counsel [OQPC] with the functions set out in section 7" (s 3(2)). Those functions include providing advice on the application of fundamental

[13] The Bill's text and related information are available at: http://www.treasury.govt.nz/economy/regulation/rrb/. Its progress is at http://www.parliament.nz/en-NZ/PB/Legislation/Bills/8/2/0/00DBHOH_BILL10563_1-Regulatory-Standards-Bill.htm

[14] Compare Orpwood http://www.pcc.gov.au/pccconf/papers/2-Michael-Orpwood.pdf; Bennion (Aug 2007) 16 Com L 61; and Editorial (2010) 31(3) Stat LR iii ("legislative explanatory text is best avoided") with Carter and Green (2007) 28(1) Stat LR 1 and Adler (Aug 2008) *The Loophole* 15. A Justice of the High Court of Australia has said that "constraints inherent in the 'plain English' prose now considered essential and appropriate to statutory drafting can themselves become an accidental source of ambiguity, more particularly where what is involved is rewriting a statute which had formerly been well understood as a result of judicial exegesis.": Crennan J, "Statutes and the contemporary search for meaning", Statute Law Society paper, 1 February 2010: http://www.hcourt.gov.au/speeches/crennanj/crennanj1feb10.pdf. See also R. Carter (2011) 32(2) Stat LR 86.

[15] http://202.86.97.100/bill/government/2010/0162/latest/versions.aspx. As to how the Bill would alter New Zealand's law on subordinate legislation, see Ross Carter, *Regulations and Other Subordinate Legislative Instruments: Drafting, Publication, Interpretation and Disallowance* (Occasional Paper No 20, New Zealand Centre for Public Law, Wellington, 2010), available at: http://www.victoria.ac.nz/nzcpl/OccPapers.aspx.

legislative principles and ensuring the Queensland statute book is of the highest standard (s 7(g)(ii), (h)(ii), and (j)).[16]

Some possible criteria by which to measure "high quality"

Whether legislation, once drafted, is of "high quality" can be (and is) assessed using criteria that include whether and to what extent that legislation is—

- politically effective (effectual in addressing political objectives);
- socially effective (effectual in addressing social objectives);
- legally effective (effectual in addressing legal issues, if any);[17]
- economically effective (operating as efficiently as is practicable);
- authorised or valid (intra vires or 'constitutional');
- consistent with (or effectual in overriding) identified basic principles;
- sound in substance (a well-thought-out, full, and harmonious scheme);
- clear, simple, and well-integrated with other laws;
- consistent with current legislative drafting styles and best-practices;
- produced in time and efficiently (without using excessive resources);
- produced smoothly (consistent with legal professional obligations,[18] service standards, and maintenance and enhancement of relationships).

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[16] See Dawn Ray, "Queensland's OPC and [its] Responsibility for Fundamental Legislative Principles" (June 2000) *The Loophole* 26 and Parker (1993) 2(2) Griffith Law Review 122 who at 146 concludes that "The main advantage of the Act is that the Government has set down in statutory form a policy on 'high quality legislation'.": http://www.austlii.edu.au/au/journals/GriffLawRw/1993/10.pdf. As to the validity of legislation inconsistent with "FLPs", see, for example, *Bell v Beattie* [2003] QSC 333: http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/qld/QSC/2003/333.

[17] On "nothing" legislation, see Greenberg: http://legislativedrafters.blogspot.com/2010/09/increasing-scourge-of-nonsense.html.

[18] See John Mark Keyes suggests that the lawyer-client relationship involves "an element of trust and dependence on the part of the client that requires legal professionals to take responsibility for the quality of the services they provide. *Caveat emptor* has no place in the provision of legal services.": (Oct 2009) *The Loophole* 25, 41. See also *State of New South Wales v Betfair Pty Ltd* [2009] FCAFC 160 (12 November 2009) at [21] and [22] per Kenny, Stone, and Middleton JJ .The Legislation Bill (162—2) in cl 58B ensures drafts of legislation prepared by or on behalf of the PCO "are subject to legal professional privilege" (compare *Three Rivers District Council v Governor & Company of Bank of England* [2004] UKHL 48 at [41] per Lord Scott, and Legislative Standards Act 1992 (Qld) s 9A(2)). The purpose of lawyers' professional duties in tort is not to achieve excellence, merely to maintain *minimum* standards. Civil liability in respect of drafting or revision of legislation is raised in or by *Manga v A-G* [2000] 2 NZLR 65 (HC) at [140] per Hammond J; Blake, Pointing, and Sinnamon (2007) 28(3) Stat LR 218; and *Budgell v BC* [2007] BCSC 991 http://courts.gov.bc.ca/jdb-txt/sc/07/09/2007bcsc0991.htm.

Some questions related to trying to measure objectively legislation's quality

The debate about quality and its measurement involves many arguable questions, most if not all of which are loaded with contestable assumptions about proper notions of quality with related implications for the proper role of legislative counsel. Trying to measure objectively legislation's quality therefore raises such arguable questions, and prompts such tentative and so, for the reader, tantalising but unsatisfactory, answers, as—

> Q: is the substance of the proposal (in a democratic society a public goal established via democratic processes) a given, or only a starting point? (A: a legislative counsel must understand a proposal, and will try to improve it, but may restrict the advice she or he gives to drafting implications of a given goal.[19])
>
> Q: can high-quality legislation implement a given but defective goal? (A: yes, it can be of high technical drafting quality even if it has policy or political defects.[20])
>
> Q: what weight is to be given to the legislation applying and operating to achieve its expected outcomes without litigation[21] or amendment? (A: some weight, but these factors alone don't ensure "high-quality".)

See also the speech of New Zealand's Attorney-General on 3 September 2010 Hon Christopher Finlayson, http://www.beehive.govt.nz/speech/speech+2010+plain+english+awards.

[19] "Complex ideas are sometimes inescapable in law. Taxation legislation and statutes of limitations are prime examples of complexity. Yet simpler expressions can often be secured by analysing more closely the concepts that are at stake.": Kirby *Clarity 62* (November 2009) 58, 59. See also n. **Error! Bookmark not defined.** below, and *X v Australian Prudential Regulation Authority* [2007] HCA 4 at [71] per Kirby J (older compressed styles of legislative expression may give rise to confusion and ambiguity).

[20] An example might be the *Land Transport (Enforcement Powers) Amendment Act 2009*, which empowered local authorities to make bylaws to control street racing and "cruising" by "boy racers". The Act was enacted without technical changes that were suggested in a submission by New Zealand's Legislation Advisory Committee, as noted in paras [51] to [53] of its *Annual Report 2009*: http://www2.justice.govt.nz/lac/pubs/2009/LAC-Annual-Report-2009.pdf.

[21] "A draftsman rarely gets credit for a good draft. He is often blamed for a bad one. The reason perhaps is that a good draft never comes up before a court.": S.K. Hiranandani, "Legislative Drafting: An Indian View" (1964) 27 MLR 1, 7–8. A New Zealand Act that has given rise to comparatively little litigation, and only minor amendment, is the *Official Information Act 1982* (NZ). Daniel Greenberg on 3 November 2010 suggested to the Constitutional Affairs Committee of the National Assembly for Wales that, "if a statute gets to the courts, you have already failed because, by that time, you will have

Q: does durability show quality, or just absence of political interest? (A: it may show quality, as in the *Sale of Goods Act 1908* (NZ).[22])

Q: how are clarity and simplicity to be measured and balanced (by scrutiny, review, document-design research, or user testing[23])? (A: in all those ways, and more.)

Q: do political and "practical constraints" limit the quality achievable? (A: yes, but they can also be not inconsistent with quality.)

Q: is "quality" mainly or only elimination of obvious defects or errors? (A: no, but it is at least that.)

Q: who measures quality (responsible Ministers, official instructors, other legislative counsel, groups of experts, users, courts, etc) and how?[24] (A: all of those people in a range of different ways; quality matters to them all, even if it affects each of them in different ways.)

Why legislative counsel's contribution is critical to "high-quality" legislation

Legislative counsel can't claim all the credit for high-quality legislation. Equally they aren't solely to blame for legislation considered defective. Inputs don't always result in outputs. Effort doesn't always produce a good result. Legislating is a complex business in which many factors affect outcomes.

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already driven the litigants, who may not have known what they were obliged to do, to all the expense and trouble of litigation.": see para [29] of the transcript at: http://www.assemblywales.org/bus-home/bus-committees/bus-committees-perm-leg/bus-committees-legislation-dissolved/bus-committees-third-sleg-home/bus-committees-third-sleg-agendas-2.htm?act=dis&id=202921&ds=12/2010 and also http://www.assemblywales.org/ca_1_-_berwin_leighton_paisner.pdf

[22] On keeping the statute book across space and time, see Janet Erasmus (January 2010) Issue 1 *The Loophole* at 7−25: http://www.opc.gov.au/calc/docs/Loophole_Jan10.pdf.

[23] Duncan Berry, "Techniques for evaluating draft legislation" (March 1997) *The Loophole* page 31 "advocates selective usability testing of draft legislation and canvasses various methods by which testing might be carried out": http://www.opc.gov.au/calc/docs/LoopholeMarch1997.pdf.

[24] The New Zealand PCO's achievement of specified quality and timeliness standards for its "Law Drafting Services" output class is measured by the surveyed satisfaction of the Attorney-General, of instructing departments and agencies, and of parliamentary select committees—achievement of quantity standards and financial performance for that output class is also reported on annually: *Report of the Parliamentary Counsel Office for year ended 30 June 2010* (2010) AJHR A.9, pages 42–44: http://www.pco.parliament.govt.nz/annual-reports/.

Legislative counsel are required to work within definite parameters. They translate the Government's policy into legislation consistent with its deadlines[25] and other instructions. Counsel can question and advise, but must not insist. They must be critical and candid, but also deferential and diplomatic. They inform, but don't make, decisions on content and process.

But high-quality legislative advice *does* result in high-quality legislation. That consequence is no less real just because it can sometimes be indirect. Legislative counsel's contribution is not determinative but is, even so, critical.

Very few problems are regarded by citizens and their governments as unable to be solved by legislative means. As Sir Alexander Turner said, "The belief is widely held, that there is no human situation so bad but that legislation properly designed will effectively be able to cure it." [26] And all legislation is, quite properly, expected (but rarely seen) to be perfect.

As Lord Thring said (probably not at face value) in 1875,—

> Everybody is a reformer. Every woman can say, and everyman write, how a scheme could easily be framed by which one small volume, or at most a few small volumes, should comprise, in a form intelligible to all, the wrongs of man, the rights of woman, the mode in which those wrongs should be redressed, and those rights enforced. Opinions differ as to why the world is deprived of a thing so easily attained. The House of Lords blames the House of Commons, the House of Commons makes an onslaught on the obstructiveness of the Lords; the Judges, with characteristic impartiality, denounce both Houses equally. On one point alone Lords, Commons and Judges are agreed, namely on the incompetence of the officials entrusted with the drafting of Acts of Parliament.[27]

Professor Driedger has said, "The perfect bill has never been written. It never will be." But he also acknowledges that the quality of draft legislation "depends in large

[25] "[A]nalysts who take advantage of the hindsight conferred by the opportunity to reflect in detail on legislative language in the context of a particular problem can often see that a different form of words might have been clearer.": *Australian Competition and Consumer Commission v Channel Seven Brisbane Pty Limited* [2009] HCA 19 (30 April 2009) at [117] per Hayne J. Urgency and continuous redesign reduce opportunities for reflection and improvement. How Governments' expectations are balanced with legislative counsel's (sometimes conflicting) aspirations as to quality is discussed by Colin Wilson (January 2009) Issue 1 *The Loophole* at 21−27: http://www.opc.gov.au/calc/docs/Loophole_Jan09.pdf.

[26] Sir Alexander Turner (1980) 10(3) VUWLR 209, 209.

[27] Pamphlet on *Simplification of the Law* (1875), page 1, quoted by Sir George Engle (1983) 4(2) Stat LR 7, 8.

measure" on the legislative counsel's contribution.[28] Indeed, a New Zealand Law Commission President (and former Prime Minister) suggests, "The professional expertise of Parliamentary Counsel is the essential quality control that is required in the production of statute law."[29] Legislative counsel's functions (in their role as counsel, rather than wordsmiths), as Stephen Laws suggests, include "being advocates for the protection of the integrity of the statute book", and "to ensure that there is no debasement of the currency of the means by which Parliament communicates with the courts".[30] As a former New Zealand Prime Minister and Attorney-General, David Lange, observed in Auckland in 1990: "The quality of [legislative counsel's] work bears a direct relationship to the quality of the democratic society in which and for which [our] work is done."[31] Legislative counsel can (indeed must) advise independently[32] and in cogent (sometimes very strong or unpalatable) terms. Advice protective of the statute book's integrity, or otherwise within legislative counsel's unique expertise, is particularly likely to be followed.

What can legislative counsel do to facilitate "high-quality" legislation?

Ways that legislative counsel can facilitate "high-quality" legislation include—

- helping analyse and define the problems a draft addresses; by probing supposed mischiefs so as to ensure they are real and well understood;
- helping identify and evaluate possible solutions via, say, creative discussion or considering overseas law reform proposals or legislation;
- optimising legislative design (including structure) and presentation;[33]

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[28] Professor Elmer A Driedger QC, *The Composition of Legislation*,2nd ed, (Ottawa: 1976), xx.

[29] Sir Geoffrey Palmer, foreword to New Zealand Law Commission Report107, 2009: http://www.lawcom.govt.nz/ProjectReport.aspx?ProjectID=141.

[30] Stephen Laws (August 2008) *The Loophole* 39 at 43: http://www.opc.gov.au/calc/docs/calc_loophole_August2008.pdf.

[31] Rt Hon David Lange, Attorney-General for New Zealand, CALC Conference, Auckland, 16 April 1990: *The Loophole* (vol 1, issue 3, 1990) at 4: http://www.opc.gov.au/calc/docs/Loophole-Nov1990vol3iss1.pdf.

[32] "Every lawyer who provides regulated services must, in the course of his or her practice, , comply with the following fundamental obligations: . . . the obligation to be independent in providing regulated services to his or her clients:": *Lawyers and Conveyancers Act 2006* (NZ) s 4(b).

[33] "An appropriate legislative structure for the Bill as a whole . . . is concerned not only with the overall arrangement of what may be a large and complex body of material, but also with the internal organisation of each particular clause or schedule; and it is not too much to say that design, in this sense, is the essence of a well-drafted Bill.": Engle (1983) 4(2) Stat LR 7, 14 and 15. In 1999 the New Zealand Court of Appeal said approvingly of amendments made by a 1998 Act, "we consider that the legislation follows a natural sequence.": *Tyler v A-G* [2000] 1 NZLR 211 (CA), [27], per Richardson P. Judgment writing and the concision and clarity of reasons for judgment as a source of law is an interesting contrast.

- creating, analysing, and refining (improving demonstrably) drafts, including by advising on legislative design choices and techniques;
- advising on legislative procedural options and their consequences.

Concentrating too much on form (style, format, consistency) may lead to impaired functionality (substance, meaning, operation). Legislative counsel are understandably preoccupied with consistency, clarity, and simplicity, but also have important responsibilities in the area of policy and principle. Legislative counsel cannot worship solely, or perhaps even mainly, at the altar of form. That is because substance is equally critical to achieving "quality".

Routine and technical aspects of drafting are no less critical to quality just because they may be not widely understood or appreciated. Examples of these aspects include consequential amendments, consequential repeals or revocations, savings provisions, and transitional provisions. Legislative counsel know that attention and time needs to be devoted to these aspects of projects because they an indispensable component of complete and high-quality advice. As legislative counsel know only too well, "seeing life steadily, and seeing it whole"[34] often suggests improvements to other, more 'high-profile' aspects of a project.

But disasters must be averted as well as triumphs achieved. Legislative counsel must sometimes ask such questions as: "What is reasonably achievable in the circumstances? "How good or bad could the legislation proposed turn out?" "How, in the circumstances, can I best optimise my contribution to quality?" Legislative counsel must of course also devote some of their time and attention to overcoming opponents' resistance and seeking collaborators' help.

Are we there yet? How will we know?

In the preparation of drafts, querying of instructions can clarify and enhance new legislation. As Stephen Argument affirmed in Hong Kong in April 2009:

See, for example, Kirby (1990) 64 ALJ 691; Groves and Smyth [2004] Fed LR 11 (http://www.austlii.edu.au/au/journals/FedLRev/2004/11.html); Naida Haxton *Clarity 57* (May 2007) 28 (http://www.clarity-international.net/journals/57.pdf).

[34] Matthew Arnold, *To a Friend* (1849). This quote is a favourite of a great New Zealand law teacher and public practice lawyer: International Court of Justice Judge Sir Kenneth Keith: http://www.icj-cij.org/court/?p1=1&p2=2&p3=1&judge=157.

> legislative counsel are in fact the first bulwark in legislative scrutiny . . . legislative counsel . . . both refer to . . . [a parliamentary or Executive legislative scrutiny] committee and rely upon it for authority in advising client agencies that legislation might offend the legislative scrutiny principles that the various [parliamentary or Executive legislative scrutiny] committees seek to uphold.[35]

Legislative counsel in performing their statutory or other duties advise on and apply fundamental legislative principles.

Co-drafting (in pairs or larger teams), and drafting with formal peer review,[36] can certainly enhance quality, especially if they are informed by reasoned, consistent, regularly-reviewed, and fully-documented drafting practices.

Discussions within and outside drafting offices can also be very helpful. Cooperative schemes give special opportunities to learn from one another—one recent Australasian example is the *Trans-Tasman Proceedings Acts 2010*.

Review and comments by instructors also often result in improvements. The New Zealand PCO's *Statement of Intent for 1 July 2010 to 30 June 2015* indicates that its operating intentions for that 5-year period include—

> to improve the quality of legislation and to make the drafting process more efficient by developing a seminar programme for instructing departments and agencies. . . [that is] also expect[ed] . . . to result in improved capability within instructing departments and agencies.[37]

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[35] Argument, "Legislative counsel and pre-legislative scrutiny" (January 2010) Issue 1 *The Loophole* 61 at 61, 62. In New Zealand, of particular importance in this connection are the principles documented and applied by the Legislation Advisory Committee (LAC) (see http://www2.justice.govt.nz/lac/) and Regulations Review Committee (RRC) (see http://www.parliament.nz/en-NZ/PB/SC/Documents/Reports/Default.htm?search=1782826190 and http://www.victoria.ac.nz/NZCPL/RegsRev/Index.aspx).

[36] Garth Cecil Thornton QC says "I believe that every completed legislative draft requires and deserves consideration by a second legislative counsel. Not many offices have the resources to work in pairs but there are obvious advantages. I have never enjoyed that luxury but I have instituted and found beneficial a practice of nominating for each project a second legislative counsel as 'reader' with the responsibility of reading carefully and critically a completed draft and commenting on it to the legislative counsel. Such a 'reader' need not be a more senior or experienced person – merely a second pair of watchful eyes.":
http://www.law.tulane.edu/uploadedFiles/Institutes_and_Centers/International_Legislative_Drafting_Institute/Garth%20Reflections%20Full%20Text.pdf.

[37](2010) Appendices to the Journals of the House of Representatives (AJHR) A.9 SOI page 11, available at http://www.pco.parliament.govt.nz/assets/Uploads/pdf/soi2010-2015.pdf

The UK Hansard Society on 14 December 2010 published a report called *Making Better Law*, which

> examines the process of law making, and how greater expert involvement would improve final outcomes. The report recommends improvements in consultation and engagement in policy development, utilising and reforming scrutiny models and processes, and challenging the government to change its approach to the operation of the legislative process.[38]

Quality is also enhanced by help from experts in drafting software, legislative editing, jurilinguistics, law,[39] hard-copy printing, or electronic publication.

Exposure drafts, and other forms of pre-legislative scrutiny can help, for example, scrutiny by Executive or parliamentary scrutiny committees and law reform bodies. Clients must of course waive relevant legal advice privilege.

New Zealand's Legislation Advisory Committee (LAC) was established by the Minister of Justice in February 1986.[40] The LAC's objective is to promote good quality legislation. It does that mainly by publishing guidelines for lawyers and policy advisers involved in designing developing, and drafting legislation, by scrutinising Bills before Parliament, by advising and assisting in particular cases, and by education. The LAC is not concerned with legislation's policy objectives; its focus is more on good legislative practice and public law issues. It can provide guidance to those engaged in the challenging task of producing effective, principled, and clear legislation and can also identify problems with proposed legislation and suggest solutions.

In 2010, the LAC met 8 times. It considered 50 Bills, and took the following actions: presented 9 submissions to select committees; wrote 7 letters to ministers or officials; discussed 4 Bills with officials; and raised drafting issues on several Bills. Issues relating to 22 other Bills were discussed but no action was taken other than comments on drafting points. There were 8 Bills where no issues arose. Changes were made to a number of Bills as a result of the LAC's involvement, both before

[38] *Hansard Society eNewsletter – 20 November 2010,* available at the following Internet site: http://www.hansardsociety.org.uk/blogs/enewsletters/archive/2011/01/31/hansard-society-enewsletter-november-2010.aspx.

[39] Janet Erasmus and Ann McLean discuss briefly British Columbia experience (up to the mid-1990s) with "Confidential review of draft legislation by members of the private bar" in (March 1997) *The Loophole* 48: http://www.opc.gov.au/calc/docs/Article_ErasmusMcLean_ConfidentialReview_1996.pdf.

[40] On the LAC, *see* Laking (NZLC PP8, 1988) p 85; Keith (1990) 1 PLR 290; Iles (1992) 13 Stat LR 11; Trendle (1994) 17(3) *Public Sector* 26; Palmer (2007) 15 Waikato LR 12; and Tanner *Turning Policy into Legislation Conference Paper* 3 July 2008.

introduction and at select committee stage. The LAC in 2010 also engaged in updating, promotional, and educational activities (including an October 2010 seminar for policy and legal advisers[41]) related to its legislative *Guidelines*.

Pre-legislative scrutiny itself may even become politically significant. UK shadow Justice Secretary Jack Straw, for example, on 13 September 2010 reportedly argued that—

> a fixed-term parliaments bill . . . has been rushed out without any opportunity for proper scrutiny . . . As a consequence, the bill is deeply flawed and will need substantial revision. It is astonishing that, contrary to all previous commitments, the government has abandoned any semblance of pre-legislative scrutiny on such fundamental constitutional legislation, tearing up election and post-election pledges before the ink on them is dry.[42]

However, if exposure drafts result in scarce drafting resources being devoted to more drafts based on changing policies, then what should be consulted on is perhaps not exposure draft *legislation*, but instead exposure draft *policy documents*.

Legislative procedures (even those for subordinate legislation) often involve consultation and scrutiny designed to identify and bring about improvements. Sometimes it is forgotten that legislative processes succeed even when they result in decisions that proposed legislation *not* be enacted. One reasonably distinctive feature of the New Zealand Parliament's legislative process for Bills is consideration by select committees of members of Parliament. An example of this consideration is discussed below. Most Bills in New Zealand are considered in detail by a select committee and most select committee consideration involves receiving and considering public submissions on Bills, whether from individuals, interest groups (for example, the New Zealand Council of Women), or specialist organisations or bodies such as the New Zealand Law Society[43] and the LAC, which routinely comment on Bills.

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[41] The October 2010 LAC seminar presentations are available at: http://www2.justice.govt.nz/lac/seminar.html.

[42] Haroon Siddique, "Government accused of 'abuse of power' after cancelling 2011 Queen's speech", http://www.guardian.co.uk/politics/2010/sep/13/government-cancels-2011-queens-speech. In a television interview on 11 November 2010, outgoing Law Commission President Sir Geoffrey Palmer suggested increasing the term of New Zealand Parliament from 3 to 4 years, and extending its sitting hours, would enhance the quality of New Zealand legislation: http://tvnz.co.nz/the-court-report/court-report-s2010-e17-video-3890553.

[43] "[T]he reality of the matter is that the society's legislation committee plays a major public service role as a law reformer in terms of contributing to law reform. The famous American jurist Learned Hand once told law students at Yale that it is the Bar that makes the statutes. But, more than that, we all depend on lawyers to help shape the law, both through

Post-enactment scrutiny involves review (perhaps contemplated by law[44]) after a period of operation, and in other ways free of the pressures of the legislative programmes and processes by which a draft was first enacted.

Formal revision also provides real, if limited, opportunities to improve quality. The Legislation Bill (162—2) before New Zealand's Parliament provides (in subpart 3 of Part 2) for a 3-yearly programme of revision of Acts. It also establishes a certification committee to vet revision Bills. But revision Bill improvements will necessarily be mainly formal because revision Bills generally must not change the effect of the law except to—

> make minor amendments to clarify Parliament's intent, or reconcile inconsistencies between provisions; or
>
> update any monetary amount (other than an amount specified for the purpose of jurisdiction or an offence or penalty), having regard to inflation (Consumers Price Index movements over the relevant period), or provide for the amount to be prescribed by Order in Council.[45]

Other ways of "keeping the statute book up to date"[46] (for example, Statutes Amendment Bills or Statute Law Revision Bills, Repeal Bills, Consolidations, Substantive Revisions, Codifications) also offer similar opportunities to improve quality. Those opportunities have considerable costs, but considerable benefits.

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statutes and through judicial decisions, and it is fair to say that the New Zealand Law Society has made a huge contribution to this bill.": Hon Christopher Finlayson, third reading of Evidence Bill: NZPD 23 November 2006, page 6804: http://www.parliament.nz/en-NZ/PB/Debates/Debates/9/9/2/48HansD_20061123_00000845-Evidence-Bill-Third-Reading.htm

[44] The *Law Commission Act 1985* (NZ) s 3 provides that "The purpose of this Act is to promote the systematic review, reform, and development of the law of New Zealand." Other New Zealand provisions contemplating reviews include the *State-Owned Enterprises Act 1986* s 31; Privacy Act 1993 s 26; *Climate Change Response Act 2002* s 160; *Prostitution Reform Act 2003* s 42; *Building Act 2004* s 451; *Evidence Act 2006* s 202; *Crimes (Substituted Section 59) Amendment Act 2007* s 7; *Summary Proceedings Amendment Act (No 2) 2008* s 19; *Walking Access Act 2008* s 80. See also the Legislation Bill (162—2) cl 35. In December 2007 the Regulations Review Committee recommended that statutory provision be made for a 'sunset' regime applicable to all statutory regulations: (2007) AJHR I.16L. The 7 March 2008 Government Response to that recommendation was that more work was required, including on such a system's resource implications, before decisions on a 'sunsetting' system.

[45] Legislation Bill (162—2) cl 31(2)(i) and (j) and (3). But *see also* cl 33A, available at http://202.86.97.100/bill/government/2010/0162/latest/DLM2997666.html.

[46] See, for example, Dr Duncan Berry (March 2010) 36(1) Com Law Bull 79.

New Zealand's Minister, and Ministry, of Consumer Affairs are currently considering a revision and consolidation of consumer law enactments.[47]

Quality of legislation may also be maintained or enhanced by institutions and programmes of action for that purpose. Legal Revisers of the Legal Service of the European Commission bear primary responsibility within the Commission for the quality of drafting of European Community legislation. Interinstitutional agreements on quality of EC legislation require legislative counsel training, and cooperation and collaboration between EC Member States and departments responsible for ensuring drafting quality.

The agreements are implemented by seminars on quality of legislation.[48] At a congress in June 2010 in Lisbon, Portugal, the International Association of Legislation (IAL) (a voluntary charitable association) invited participants (including Professor Voermans) to discuss principles and means to achieve 'quality' in legislation.[49] Professor Helen Xanthaki's paper at that conference was entitled: "Quality of legislation: an achievable universal concept or a utopian pursuit?" "Quality", it concludes, arises in essence from the universal, and demonstrably achievable, criterion of "effectiveness", and is therefore "far from utopian".[50]

We work in different legislative environments, but face similar challenges and share a common legal heritage. We can learn a great deal from our own, and from others', experiences as specialised and professional legal advisers, including by

[47] http://www.consumeraffairs.govt.nz/legislation-policy/policy-development/consumer-law-reform. The New Zealand Law Society on 6 August 2010 said "The Society supports the inclusion of modern principles-based purpose statements. ... Such an approach is consistent with section 5(1) of the *Interpretation Act 1999* and reflects a modern approach to legislative drafting."

[48] http://ec.europa.eu/dgs/legal_service/legal_reviser_en.htm#law. See also William Robinson, "Quality of European Union Legislation", *Newsletter of the Commonwealth Association of Legislative Counsel* (November 2010) pages 16 and 17: "I suggest that a group of suitably-qualified, independent persons look at all aspects of EU legislation to consider what problems it poses, whether it could be improved and, if so, how. . . . Ideally the outcome should be structures that bring a lasting improvement to EU legislation and perhaps even a system that is capable of healing itself in future."

[49] http://www.ial-online.org/ and http://www.fd.unl.pt/Anexos/PreliminaryProgramme/Programme.pdf. See also Xanthaki, "Drafting Manuals and Quality in Legislation: Positive Contribution Towards Certainty in the Law or Impediment to the Necessity for Dynamism of Rules?" (2010) 4(2) *Legisprudence* 111 (unequivocal principles of quality can be formulated if we take into account the primary aim of regulation to be efficacious. But these values and ends cannot be captured in hard and fast rules. Legislation is neither a science, nor an art, Xanthaki argues, but an activity somewhere in between, which requires the Aristotelian virtue of phronesis, a "practical wisdom" resulting from a combination of intuition and experience).

[50] Helen Xanthaki, "Quality of legislation: an achievable universal concept or a utopian pursuit?" in Luzius Mader and Marta Travares de Almeida (eds), *Quality of Legislation; Principles and Instruments; Proceedings of the Ninth Congress of the International Association of Legislation (IAL) in Lisbon, June 24th-25th, 2010* (Nomos, Baden-Baden, 6 July 2011).

cross-border schemes or model laws, exchanges or secondments, and conferences. Legislative counsel have always had much to gain from experiences in and with other nations and vocations.

That is shown by the career of John Curnin, New Zealand's first specialist professional "Law Draftsman" in New Zealand's Crown Law Office. He drafted Bills before being appointed to that office, effective 1 July 1877. Curnin's father worked in India for the East India Company. Curnin was sent to be England to be educated. In 1849 he graduated BA at University College, London. Called to the English Bar in 1853, to the New Zealand Bar in 1858, and to the New South Wales Bar in 1866, he served as Clerk of New Zealand's Legislative Council (Upper House) from 4 March 1861 to 12 September 1865, after having been Assistant Clerk to New Zealand's House of Representatives.[51]

Minister's view of quality: convert Amendment Bill into clearer Bill for new Act

The Weathertight Homes Resolution Services Amendment Bill was introduced into New Zealand's Parliament on 23 August 2006. The Bill amended a principal Act that was enacted in 2002 and provided an alternative process (meant to be more flexible and cost-effective than courts' processes) for resolving claims for relief in respect of "leaky buildings".[52] The amendments included changes intended to enhance the WHRS claims-resolution process (assessment of claims, mediation, and adjudication by a Tribunal), including its application, cost-effectiveness, and

[51] Curnin died in Wellington on 7 August 1904 aged 73—having retired as Law Draftsman in 1895. His appointment as Law Draftsman is notified at New Zealand Gazette (1877) No 78 (Sept 13) page 933. His appointment as Clerk of the Legislative Council is notified at New Zealand Gazette (1861) No 15 (March 21) page 78, and see also (1862 Session I) AJHR D—No 19, papers No 1 to No 4 (http://www.atojs.natlib.govt.nz/cgi-bin/atojs?a=d&d=AJHR1862-I.2.1.5.22&e=-------10--1------0--). At the 1851 England Census, Curnin gave his birthplace as Surrey, England. That seems consistent with his father's employment. His father returned to England in 1829 (after having been from 1823 to 1829 the East India Company's Astronomer in Bombay) but went back to India in 1833 to take up the position of Assistant Assay Master at the East India Company's Mint in Calcutta. Compare the career in New Zealand, Africa (Tanzania), Hong Kong, and Australia of New Zealander Garth Cecil Thornton QC. http://www.law.tulane.edu/uploadedFiles/Institutes_and_Centers/International_Legislative_Drafting_Institute/Garth%20Reflections%20Full%20Text.pdf.

[52] On New Zealand's "leaky home [syndrome] problem", and the inadequacy of litigation as a solution to it, see *Sunset Terraces* [2010] NZCA 64 at [133] per Baragwanath J, [135] per William Young P, and [206] per Arnold J. The North Shore City Council failed to persuade the Supreme Court that the Court of appeal's decision was erroneous: [2010] NZSC 158 (17 December 2010). See also the *Weathertight Homes Resolution Services (Remedies) Amendment Act 2007*: http://www.parliament.nz/en-NZ/PB/Legislation/Bills/e/2/c/00DBHOH_BILL7941_1-Weathertight-Homes-Resolution-Services-Remedies.htm
http://www.legislation.govt.nz/act/public/2007/0033/latest/DLM967850.html
and the Weathertight Homes Resolution Services (Financial Assistance Package) Amendment Bill 2010 now before Parliament (http://www.legislation.govt.nz/bill/government/2010/0258/latest/DLM3389704.html).

swiftness. The amendments were very extensive. The 2002 principal Act was 35 pages. Few aspects of it were unaffected by the 2006 Amendment Bill (55 pages).

The LAC spoke to the Department of Building and Housing about the fact that the Amendment Bill proposed to make fundamental changes to the original Act. In the LAC's view it would be more appropriate to completely re-enact the provision. The LAC wrote to, and appeared before, the Select Committee that was considering the Bill, making the same point.[53]

The Minister in charge of the Bill, and the select committee considering it, agreed with the point. The select committee's report included these remarks:

> Amendment bill converted into bill for new Act
>
> The changes made by this bill to the principal Act are so substantial that we consider it would be better to replace the principal Act entirely. The principal Act is a small and coherent statute, but the amendments proposed in the bill are so extensive that there is a risk that the principal Act will lose its coherence. Accordingly, we recommend that the drafting of the bill be altered in order to make the legislation more accessible. This would mean amending the title of the bill, omitting clauses 3–39, and inserting new clauses that include all elements of the bill and the principal Act. These new clauses would repeal and replace the principal Act. This is an unusual procedure which would rarely be justified. However in this case the scope of the amending bill is so broad that it encompasses every aspect of the Act.[54]

A possible moral for this example: Ministers, and also other parliamentarians, are often prepared to support drafting initiatives conducive to "high-quality". But that is a rather unremarkable conclusion. A better moral might be simply that the LAC enjoys considerable success in helping parliamentarians achieve quality outcomes,

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[53] See para [31(h)] of the LAC's 2006 Annual Report: http://www2.justice.govt.nz/lac/pubs/2006/2006-annual-report.html#7.

[54] See the select committee's Report, pages 1 and 2: http://www.parliament.nz/NR/rdonlyres/B4AC77DF-DF85-442B-B595-A0D36DF9367A/166443/DBHOH_BILL_7452_WeathertightHomesResolutionService.pdf. The Bill's "conversion" was done so speedily that the Minister later expressed surprise that it was achievable in time. This episode shows participants in a legislative process for a Bill can cooperate to make the end product—an Act—more of what (if not everything that) they would like it to be, and that, contrary to the point of Lord Thring's comparison of Bills to "the razors mentioned by the [18th century] poet" and satirist John Wolcot (pen-name "Peter Pindar"), it is not *always* impossible to get through Parliament an amendment Bill that repeals all the existing law on the topic and re-enacts it with the desired amendments": Engle (1983) 4(2) Stat LR 7 and 8.

not least because the LAC's independence and stature means that parliamentarians respect its technical advice.

Legislator's view of quality: Executive confirming or frustrating Parliament's will

The *Copyright (New Technologies) Amendment Act 2008* (NZ) got Royal assent, and thus became law, on 11 April 2008. This Amendment Act (except section 19(2)) was to come into force on an appointed date or dates. Section 53 of the Act amended the *Copyright Act 1994* (NZ) by inserting a new heading and new sections 92A to 92F on Internet service provider (ISP) liability in respect of copyright infringements by users of an Internet service. New section 92A required an ISP to adopt and reasonably implement a policy for terminating accounts of repeat infringers.

An order (SR 2008/351) made on 29 September 2008 aimed to bring new section 92A into force on 28 February 2009. SR 2008/411 corrected technical errors in and replaced that order, but did not change its commencement dates. But a change of Government, and controversy, resulted in deferral of the entry into force of, and consideration of possible ways to amend, new section 92A.[55] The replacement order was thus amended to defer new s 92A's commencement until 27 March 2010 (*see* SR 2009/15) and then indefinitely by SR 2009/51 (*Copyright (New Technologies) Amendment Act 2008 Commencement Amendment Order (No 2) 2009*), the explanatory note to which advised that:

> A review of new section 92A of the *Copyright Act 1994* is required before it comes into force to determine if it should be amended or replaced. If it is amended, a new commencement order will be made to bring the amended section into force.

The Regulations Review Committee's (RRC's) 15 February 2010 Report on its Investigation into SR 2009/51 says:

> "there are policy concerns about the implications of commencing section 92A. Good law-making practice suggests that the legislation should be returned to the House of Representatives for decision as to its disposal. The Executive should not act to frustrate Parliament's will by delaying commencement of section 92A of the Copyright Act 1994 for reasons

[55] See, for example, "Controversial internet law on hold – Key", *New Zealand Herald*, 23 February 2008: http://www.nzherald.co.nz/technology/news/article.cfm?c_id=5&objectid=10558256 and Hon Simon Power, Minister of Commerce, "Government to amend Section 92A": http://www.beehive.govt.nz/release/government+amend+section+92a A Working Group released a Proposal Document for comment by 7 August 2009: http://www.med.govt.nz/upload/68683/proposal-document.pdf

> unforeseen at the time it was delegated the power to commence the legislation. . . . [the RRC recommends] that reconsideration of section 92A of the Copyright Act 1994 be returned to Parliament, in line with good lawmaking practice."[56]

A Government Copyright (Infringing File Sharing) Amendment Bill was introduced on 23 February 2010. The Bill proposes to repeal new section 92A, and to insert new sections 122A to 122R, which provide for detection, warning, and enforcement notices in respect of infringing file sharing, and empower a tribunal to award compensation. The Commerce Committee's report (presented on 3 November 2010) on the Bill recommended that it be passed with various recommended amendments. One recommended amendment is a new section 122PA, which a majority of the committee thinks a "workable compromise" on the issue of suspension of an Internet account:

> The bill's provisions allowing for Internet suspension would be retained, with modifications, but would not be brought into effect immediately. If evidence indicated that notices alone (and the remedy through the Copyright Tribunal) were not having the desired deterrent effect, the suspension provisions could be activated by Order in Council.[57]

A possible moral for this example: "policy concerns" in enacted legislation, and unforeseen earlier, may arise after it is enacted and incline the Executive to defer its commencement, and promote legislation to amend it, in a way that legislators may see as the Executive frustrating the will of the (or an earlier) Parliament in enacting

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[56] http://www.parliament.nz/NR/rdonlyres/3C7E0A58-C3F1-431B-87DF-6CAD8DBD50A9/128310/DBSCH_SCR_4626_InvestigationintotheCopyrightNewTec.pdf.
Gobbi (2010) 31(3) Stat LR 153, 187–195 argues a commencement section's special character is for the Interpretation Act 1999 s 4(1)(b) a context requiring the meaning that the presumptions in ss 15 (power to amend or revoke) and 16 (exercise of powers and duties more than once) of that Act *do not* enable the Governor-General in Council to amend or revoke a commencement order before the date it appoints (as done or purportedly done in New Zealand in 2004, and twice in 2009). Gobbi argues the Act should be amended to make it clear commencement orders may be amended or revoked only if the empowering Act so provides.

[57] http://www.parliament.nz/en-NZ/PB/SC/Documents/Reports/8/3/6/49DBSCH_SCR4901_1-Copyright-Infringing-File-Sharing-Amendment-Bill.htm. A pundit opined pessimistically that the Bill "has had a lengthy and contentious legislative history and still, it seems, is not quite right (and given its moving target, never could be).": Pepperell [2010] 33 TCL 43, 1. The Committee observed that "We found that the bill raised complex issues around the challenges faced by rights holders in an environment of rapidly-developing technologies, which are changing consumer expectations and behaviours." When Parliament adjourned for the year at the end of 2010, the Bill was awaiting second reading.

it and delegating power to bring it into force.[58] However, as the Commerce Committee's recommended amendments show, sometimes deferred (and conditional) activation of amendments by Order in Council is envisaged expressly by at least some parliamentarians.

Judge's view of quality: did Parliament follow unsound legislative practice?

The *Medicines Act 1981* (NZ) prohibits and makes an offence, if done by a person in the course of a business carried on by that person, the following:

- unlicensed sales of medicines by wholesale (s 17(1)(b) and (2));
- unauthorised sales by retail or other distributions of medicines (s 18).

But the prohibitions are overridden by exemptions in other sections of the Act, and also by permissions conferred by regulations made under it. One such exemption is in s 33(b) ("Exemptions in respect of procuring and exporting medicines"), which (with emphasis) says "Any person may export, in the course or for the purpose of sale, any medicine that, at the time when it is exported, might lawfully be sold by a pharmacist to a person in New Zealand, *whether pursuant to a prescription or otherwise*." That exemption applies "Notwithstanding sections 17 to 24 of [the] Act or anything in any licence, but subject to the other provisions of [the] Act and to any regulations made under [the] Act". So both the offences and

[58] For discussion of the principles relating to commencement by Order in Council see Chapter 14G of the *Regulations Review Committee Digest*: http://www.victoria.ac.nz/NZCPL/RegsRev/chapter14.aspx. In *R v Secretary of State for the Home Department, ex parte Fire Brigades Union and others* [1995] 2 All ER 244 at 274 (HL), Lord Nicholls of Birkenhead said:

> although the purpose of the commencement day provision is to facilitate bringing legislation into effect, the width of the discretion given to the minister ought not to be rigidly or narrowly confined. The common form commencement day provision is applicable to all manner of legislation and it falls to be applied in widely differing circumstances. The range of unexpected happenings is infinite. In the course of drafting the necessary regulations, a serious flaw in the statute might come to light. An economic crisis might arise. The government might consider it was no longer practicable, or politic, to seek to raise or appropriate the money needed to implement the legislation for the time being. In considering whether the moment has come to appoint a day, as a matter of law the minister must be able to take such matters into account. Of particular relevance for present purposes, as a matter of law the minister must be entitled to take financial considerations into account when considering whether to exercise his power and appoint a day. It goes without saying that the minister will be answerable to Parliament for his decision, but that is an altogether different matter.

See also *New Zealand Maori Council v Attorney-General* [1996] 3 NZLR 140 at 165 (NZCA) per Richardson P, and Gault, McKay, Henry, Keith and Blanchard JJ. Provisions effecting commencement by a default date are increasingly used as, for example, in the Criminal Procedure (Reform and Modernisation) Bill 243-1 (2010), cl 2(2) and (3): http://www.legislation.govt.nz/bill/government/2010/0243/latest/DLM3359962.html.

exemptions to them are modifiable by regulations that are made under, but that override, the Act.

The exemption was modified (restricted) by the *Medicines Regulations 1984* r 44C (as inserted on 3 November 2000 by SR 2000/220 r 11), which states:

> 44C No export of prescription medicines for retail sale without New Zealand prescription
>
> (1) No person may export a prescription medicine in the course or for the purpose of retail sale, otherwise than under a prescription given by a practitioner, a registered midwife, or a designated prescriber.
>
> (2) The meaning of retail sale in subclause (1) must be determined by reference to section 5(2) of the Act.
>
> (3) Subclause (1) is intended to limit the sale and supply of prescription medicines pursuant to section 33(b) of the Act.

A business group (individuals and bodies corporate) in New Zealand created various internet websites, through which orders could be placed for medicines. The customers would pay by credit card. The money so paid eventually found its way into a bank account of 1 of the bodies corporate. An order received would be processed by or in behalf of 1 of the individuals from their base in Hamilton. Individual orders would be combined and sent as a bulk order to an Auckland pharmacy wholesaler, which was licensed and able, lawfully, to export medicines on a wholesale basis. That New Zealand licensed wholesaler would then ship the medicines to a Fijian company which, having received the medicines from New Zealand, would then dispatch them to the customers who had ordered them. The New Zealand licensed wholesaler would then invoice the business group for the medicines.

When the scheme came to the Ministry of Health's attention, the business group was charged with and convicted of 128 charges of breaching the *Medicines Act 1981.* An appeal against the convictions failed, but leave was granted for a second appeal. That appeal mainly failed, but succeeded in so far as charges under s 17 of unlicensed export sales of medicines *by wholesale* were held to be covered and made lawful by the s 33(b) export defence, because that defence was not, on the facts, limited or removed by regulation 44C, which relates only to export in or for *retail sale*: *R v Standard 304 Ltd* (CA 16/2008, CA16/2008, 18 Dec 2008).

But in a closing "note on reg 44C", a Court of Appeal Judge, Chambers J said (at [44]):

> we have real concerns about the methodology Parliament and the Executive have utilised in this case. It is not sound legislative practice for Parliament to create a broad exemption (or defence) while at the same time reserving to the Executive the power to circumscribe that exemption (or defence).[59]

A possible moral for this example: Parliament's enacting a legislative scheme in 1981 that gives the Executive flexibility to modify in 2000 and by subordinate legislation the scope of offences punishable by large fines may in 2008 be regarded as unsound in principle by the Judiciary. Judicial discomfort with Henry VIII clauses is commonplace.[60]

Legislative counsel's view of quality: some black letter law reform takes enormous time and effort

The *Limitation Act 1950* (NZ) (the 1950 Act) is based mainly on the 1936 fifth report of the English Law Revision Committee, *Statutes of Limitation* (Cmnd 5334). That report reviewed an English statute of 1623 (21 Jas I, c 16) and made recommendations reflected in the *Limitation Act 1939* (UK). As New Zealand's Attorney-General has noted, the United Kingdom's limitation rules have been described as a "ghastly network of unreformed legal fossils . . . impervious to natural understanding and intelligence".[61]

There are difficulties with the substance and drafting of the 1950 Act. One is limitation periods running against claimants before they ought reasonably to know facts necessary to make their civil claims ("reasonable discoverability"). Others relate to overlapping or omitted categories of claims. The 1950 Act has, as a result, been the subject of no less than 3 Law Commission reports. Two of those reports have recommended that it be replaced with a new Act:

> *Limitation Defences in Civil Proceedings* (NZLC R6, 1988) recommended the 1950 Act be replaced with a new Act of wide application.
>
> *Tidying the Limitation Act* (NZLC R61, 2000) noted that general reform had not proceeded, and that the problems of the existing law had worsened since

[59] Techniques of this kind continue to be used. See, for example, clause 83 of the Financial Markets (Regulators and KiwiSaver) Bill 211-1 (2010), http://www.legislation.govt.nz/bill/government/2010/0211/latest/DLM3231023.html.

[60] The extensive writing on Henry VIII clauses is encapsulated in J M Keyes *Executive Legislation* (2nd ed, Lexis Nexis, Canada, 2010) at 110−111 and 362−365.

[61] Hon Christopher Finlayson, Attorney-General for New Zealand, Second reading speech on Limitation Bill (24 (calendar 25) August 2010): http://www.parliament.nz/en-NZ/PB/Legislation/Bills/9/2/4/00DBHOH_BILL9236_1-Limitation-Bill.htm. The "ghastly network" description is that of Prime and Scanlan (2009) 30(2) Stat LR 140 at 144.

> 1988. It therefore confined its recommendations to urgently needed changes expressed as proposed amendments to the 1950 Act.
>
> *Limitation Defences in Civil Claims: Update Report for the Law Commission* (NZLC MP16, 2007) recommended that the 1950 Act be replaced with a new Act that would apply to specified claims and help to make limitation law more accessible.

In December 2007 an exposure draft Bill based on Law Commission recommendations was published for comment. Submissions on it raised significant issues. The Commission responded by convening a working group of key submitters and stakeholders to review the exposure draft and identify and address technical issues. The working group's review resulted in the proposed new rules being restructured, refined, and made simpler and clearer.

On 2 June 2009 the Attorney-General[62] introduced a Bill embodying the Law Commission's recommendations based on this further work. Money claims were generally dealt with in one Part of the Bill, and certain specified non-money claims separately in another. General provisions cover minority, incapacity, acknowledgement or part-payment, and fraud. The Bill conferred on the court a discretion to provide relief in respect of time-barred child sexual abuse claims, and one to extend periods in cases of incapacity (for example, incapacity arising at or towards the end of a limitation period). The current law was both simplified and clarified in the Bill.

On 4 August 2009 moving the Bill's first reading the Attorney-General said:

> The 1950 Act is creaky and outmoded. It is fair to say that it is in an advanced state of legislative putrefaction. It drew on a 1939 English statute that was repealed many years ago. The 1950 Act does not adequately define

[62] The Attorney-General was, as an Opposition MP and shadow Attorney-General, on the Law Commission's working group to review the December 2007 exposure draft. (During the Bill's Third reading debate on 24 (calendar 25) August 2010, the Attorney said that "The then Minister of Justice gave permission for me to be on that working group—I thought that was very sporting of [Hon] Annette [King]—and this further work [by the working group] resulted in some significant restructuring and refinement of the bill before its introduction in 2009.") The Attorney was also, while in April 1998 a partner in the litigation department of the law firm Bell Gully, a co-presenter (with Peter McKenzie QC) of a New Zealand Law Society Seminar on "Time and limitation". The introduction to the Seminar Paper records that the Seminar was initially deferred pending the enactment of a new Limitation Act based on the Law Commission's work on limitation law reform, but eventually proceeded on the basis that "there appears to be little prospect that there will be new limitation legislation this side of the [new] Millenium". The Attorney-General's foreword to *Limitation – the new regime* (NZLS Seminar Paper) says (at 1) that "It is unacceptable that law reform on this significant area of the law should have taken over 23 years to achieve."

> very important concepts. In some cases its rules can be unfair, because people may be time-barred from gaining relief before they are even aware they have a claim. These flaws have led to a complex maze of case law in this area, and the Supreme Court has stated 'The surgery now required is beyond the proper province of the courts.'[63] This bill addresses these concerns by both improving and simplifying the general limitation rules.[64]

The Bill was referred to the Justice and Electoral Committee, which heard submissions on the Bill and reported it back to the House on 5 July 2010, recommending that it be passed with amendment. As well as various more minor technical improvements, the Committee recommended:

- extending a discretion to allow relief in respect of a time-barred claim for sexual abuse of a minor so that it was also available for time-barred claims for certain non-sexual abuse of a minor;
- adding a discretion to allow relief in respect of a time-barred claim for personal injury caused by a gradual process, disease, and infection (being relief other than the claimant's entitlements in respect of the injury under New Zealand's no-fault accident compensation scheme);
- amending the *Limitation Act 1950* in its application to claims in respect of acts or omissions before the Bill was to commence (on 1 January 2011) by adding a new 15-year longstop period of limitation to ensure that "reasonable discoverability"[65] does not make defendants liable

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[63] In *Murray v Morel & Co Ltd* [2007] 3 NZLR 721 (NZSC), Tipping J said (at [76]): "Piecemeal attempts by the Courts to cure the difficulties with the present outdated legislation have already created their own difficulties and have produced a distinct lack of harmony in the area being addressed. The surgery now required is beyond the proper province of the Courts."

[64] http://www.parliament.nz/en-NZ/PB/Legislation/Bills/9/2/4/00DBHOH_BILL9236_1-Limitation-Bill.htm.

[65] The Committee's commentary says the longstop period for the Limitation Act 1950 in its application to existing claims "would not limit or affect the classes or existing actions to which reasonable discoverability applies now or may apply in the future". In *White v A-G* [2010] NZCA 139 at [104] Ellen France J said that: "the Limitation Bill [2009 (33-1), cl 16] introduced into the House of Representatives last year treats sexual abuse of a minor as in its own class for limitation purposes. We see that as a strong pointer against extension of reasonable discoverability to cases other than sexual abuse or the *Searle* impossibility situation." Beck [2010] NZLJ 257 at 260 says "The dangers of relying on a Bill in its early stages are amply illustrated . . . the Bill was amended in the Select Committee stage to cover physical as well as sexual abuse. . . . one of [its] principal purposes . . . was to introduce a general doctrine of reasonable discoverability . . . The support which the Court of Appeal found in [it] therefore requires selective reading . . .". See also [2010] NZSC 69, Beck "The new law of limitation" [2010] NZLJ 337, and Hough 12 November 2010 *NZLawyer* pages 18 and 19: "Unfortunately, the new Act merely recasts the law in this area and still leaves plenty of room for limitation litigation."

> indefinitely, and also by adding discretions (like those in the Bill) to allow relief in respect of time-barred claims.

The Bill had its remaining second reading, committee of the whole House, and third reading stages on 25 and 26 August 2010 (in an extension of the sitting day 24 August 2010 achieved by the House according urgency to business), and then got Royal assent (and thus became law) on 7 September 2010. It came into force on 1 January 2011.

Achieving this reform has, on any view, been a protracted and excruciatingly difficult exercise,[66] even with the help of very powerful leaders and thinkers. Justice Michael Kirby has suggested,—

> If you read . . . Limitation statutes, you will see how complicated are the concepts. As a consequence, the expression is also complicated. Some concepts in law are quite complicated . . . This leads to legislative expressions which are very detailed and complicated. Sometimes it is difficult to reduce the concepts to simple expression.[67]

A possible moral for this example: reform of "black-letter"[68] limitation law required enormous time and effort[69] from a team of dedicated contributors, including legislative counsel, but as the Attorney-General said during the Third reading debate on 24 (calendar 25) August 2010, "[t]he Bill is a major achievement in ensuring that the rules are fairer and easier to understand and apply."
The Attorney-General has since added that, while it is "a Bill only a litigation

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[66] "It has been a long and tortuous journey to reform the limitation law of New Zealand", President of the Law Commission Sir Geoffrey Palmer said in releasing the exposure draft Bill for comment on 14 December 2007: http://www.lawcom.govt.nz/UploadFiles/Publications/Publication_69_379_PR%20LIM%20CP01.pdf. Sir Geoffrey was, as Minister of Justice on 1 October 1986, also responsible for the request on that date to the Law Commission to review the Limitation Act 1950. That request later resulted in the Commission's 1988 report (NZLC R6, 1988). Sir Geoffrey has said more recently that the Commission's work on limitation was "very technical and difficult" but a very important piece of the law: *LawTalk 762* 15 November 2010 at pages 12 and 13.

[67] Interview with O'Brien *Clarity 57* (May 2007) 9, 10: http://www.clarity-international.net/journals/57.pdf. See also footnote 17 of this paper.

[68] "'This is a banner day for black letter law,' Attorney-General Christopher Finlayson said after the third reading of the Limitation Bill.": 26 August 2010 media statement, http://www.beehive.govt.nz/release/limitation+bill+passed.

[69] Other 'epic' law reforms involving enormous time and effort have produced the *Property Law Act 2007* (arising from a review that started around 1990), the *Evidence Act 2006* (arising from a Ministerial reference in 1989), and the Criminal Procedure (Reform and Modernisation) Bill 243-1 (2010) (some of which arises from a Ministerial reference in 1989). See pages 7 to 9 and 11 of (NZLC R21, 1991): http://www.lawcom.govt.nz/sites/default/files/publications/1991/06/Annual_Report_1990-1991.pdf.

lawyer could love, … it represents a significant step forward for those who have to work at the coalface of the law".[70]

Users' view of quality: "The time is out of joint",[71] but who was born to set it right?

A main aim of the *Human Assisted Reproductive Technology Act 2004* (NZ) was to ban the cloning of humans for reproductive purposes. The Act resulted from a member's Bill introduced in 1996, and that became law in 2004. The member in charge of the Bill, Dianne Yates, in the debate on the Bill's third reading, on 10 November 2004, explained that—

> The bill has taken 8 years to get to this stage. The original bill and subsequent amendments have been influenced by the UK *Human Fertilisation and Embryology Act 1990*,[72] by predominantly Canadian and Australian legislation and reports, by international debate and bioethics conferences, and by the public submissions to the select committee. Even after that process this bill poses as many problems as it answers.

As enacted the Act (in s 10, which came into force on 22 November 2004) prohibited the keeping, and made it an offence to keep, a human in vitro gamete, or a human in vitro embryo (being an embryo whose development has been suspended), that has been stored for more than 10 years (or a longer storage period approved by a statutory ethics committee).

New Zealand's Minister of Justice, the Hon Simon Power, explained on 8 December 2009 that—

> the Government has received legal advice[73] that indicates that . . . the 10-year limit starts from when a gamete or embryo was stored. This means that

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[70] *LawTalk 763,* 29 November 2010 at 17.

[71] "The time is out of joint: O cursed spite, that ever I was born to set it right!" Shakespeare, *Hamlet* (1599–1602), Act 1, sc 5.

[72] Amendments effective on 1 October 2009 to the *Human Fertilisation and Embryology Act 1990* (UK) changed the UK statutory storage period for embryos from 5 to 10 years. Alongside the 1990 UK Act as amended, *the Human Fertilisation and Embryology (Statutory Storage Period for Embryos and Gametes) Regulations 2009* (SI 2009 No 1582) made it possible to extend storage of gametes and embryos for a maximum of 55 years if certain conditions are met. UK fertility centres need to check every 10 years that the patient or gamete provider still meets these conditions: http://www.hfea.gov.uk/5354.html. On "cross-generation" donation ("scrambling the generations"), see, eg, http://www.bionews.org.uk/page_50318.asp.

[73] Dr Paul Hutchinson, Chairperson of the Health Committee, said during the Bill's second reading debate on 7 September 2010: "I understand that it was the media—the good old media—that had made inquiries of the Ministry of Justice as to whether some of the clinics, even though they were acting in good faith, were illegally storing embryos and gametes."

> even if storage occurred before the Act commenced in 2004, the 10-year limit is to be calculated from the date of storage. . . . As in vitro fertilisation treatment has been in use in New Zealand for the past two decades, a sizable number of gametes or embryos in New Zealand have now been stored for more than 10 years. Fertility clinics acting in good faith may have therefore unknowingly breached the Act by storing gametes and embryos for longer than the applicable period. Unless section 10 is amended, fertility clinics may be required to destroy such gametes and embryos, with a devastating impact on the lives of those people who supplied them.

Section 10 was therefore to be amended. The Human Assisted Reproductive Technology (Storage) Amendment Bill was introduced on 24 November 2009, and read a first time and referred to the Health Committee on 8 December 2009. The Committee reported the Bill back on 8 June 2010, recommending that it be passed with amendments.

The recommended amendments related to—

- gametes and embryos being able to be stored for disposal, and disposed of, for 6 months after the 10-year storage limit and any extensions to it;
- approvals for storage of gametes that are used to create embryos that are then stored applying to storage of those embryos;
- the significance of storage outside New Zealand;
- the roles of the statutory ("advisory" and "ethics") committees;

The *Sunday Star Times*, 28 June 2009, page 1 included a story by Deidre Mussen on "The Making of a Miracle Baby". The story related to "an Auckland baby who was a frozen embryo for nearly 16 years before being donated by her genetic parents to an infertile couple." The story included the following statements: "Freezing embryos for longer than 10 years is banned unless an exemption is gained. Any exemption is likely to cover only embryos frozen after the law came into force in 2005. Most countries ban freezing embryos longer than 10 years - in America, the limit is 10 years; in the UK, it's five years." An earlier story by Deidre Mussen ("The Gift of Life", *Sunday Star Times*, 3 August 2008, page 4) said "health authorities . . . still debate the implications of the *Human Assisted Reproductive Technology Act*, which bans keeping embryos frozen longer than 10 years unless an exemption is gained. It is likely it covers only embryos frozen after the law came into force in July 2005, but a final ruling is awaited." See also this page: http://www.beehive.govt.nz/release/parliament+clarifies+storage+time+limit+human+gametes+and+embryos ("Mr Power said the *Human and Reproductive Technology (Storage) Amendment Act* was needed after a legal opinion questioned the common understanding of the 2004 legislation.").

- the availability of relevant enforcement provisions.

The Bill was read a second time on 7 September 2010 and was reported by committee of the whole House (without amendment) on 16 September 2010. It was passed on 13 October 2010, and got Royal assent on 15 October 2010.

The Act appears to give commendable clarity to users (fertility industry participants and donors of gametes and embryos). But the legislation does not make clear the kinds and extent of extended storage of gametes and embryos regarded as ethically appropriate.[74] The legislation leaves those matters for determination by the statutory ethics committee, acting in accordance with advice given and guidelines issued by the statutory advisory committee.

A possible moral for this example: technical legislative defects can take time to emerge and, once apparent, can be hard to fix,[75] even if the field of activity regulated is so dynamic and evolving that the legislation is mainly procedural.

Conclusions

72 This paper draws the following conclusions:

- critics and criticism of legislation are an asset to legislative counsel;
- 'high-quality' can't be defined categorically, but is still meaningful—because quality of form, substance, and operation is clearly discernible even if it can't be defined exhaustively or measured without subjectivity;
- legislative counsel's contribution is critical to high-quality legislation;
- a range of processes and techniques exists to help ensure quality;

[74] An article by Bankowski and others in (October 2005) 84(4) *Fertility and Sterility* 823 (the Official Journal of the American Society for Reproductive Medicine) concluded that "We currently lack a thorough understanding of the numerous social implications of cryopreservation.": http://www.fertstert.org/article/S0015-0282(05)01425-1/abstract. "Cryopreservation" is a noun that the *OED online* defines as "The process of storing cells, tissue, etc., at very low temperatures (typically around -200°C) in order to maintain their viability." Notably the 228th Report of the Law Commission of India is on the "Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy": http://lawcommissionofindia.nic.in/reports/reports216onwards.htm.

[75] "Difficulties in error correction inevitably increase the pressure on governments and their advisers and legislative counsels to get legislation right in the first place. That is not a bad thing. It is a very good thing.": G E Tanner QC, "Drafting the law: a boring job?": WDLS Seminar, 3 April 2006 at [26] and [27]: http://www2.justice.govt.nz/lac/pubs/2006/drafting-the-law.html#1. "Drafting offices are traditionally backroom operations, about which the public has, until recently, known very little. The only time we tend to hit the headlines is when there is supposedly a drafting error, or when difficulties are encountered in trying to implement measures to improve access to legislation.": Geoff Lawn [2004] UTSLREV 4: http://www.austlii.edu.au/au/journals/UTSLRev/2004/4.html.

- quality is, inescapably, affected by the assessor's point of view;
- high-quality legislation can be, and is, facilitated by legislative counsel, even if "in [their] case virtue will, for the most part,[76] be its own reward"!

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[76] Occasionally legislative counsel get apparently well-deserved praise. Southern jurist Sir John Salmond, appointed in 1907 Counsel to the Law Drafting Office, drafted the Bill for the New Zealand Society of Accountants Act 1908. The Act's enactment and its text were reported and repeated in an article in the Incorporated Accountants' Journal (London), and a 1908 New Zealand newspaper report notes Salmond's contribution to the Act and, in particular, his "ripe judgment and active assistance" and his having "taken great pains to assist in turning out a measure clear, equitable, and workable": Evening Post, Volume LXXVI, Issue 143, 16 December 1908, page 6: http://paperspast.natlib.govt.nz. For the Act's text in full see the following link: http://www.nzlii.org/nz/legis/hist_act/nzsoaa19088ev1908n211437/.
Garth Cecil Thornton QC has said that "Competent law drafters tend to stick with it as a career. Some might think this surprising because generally speaking it is work that generates no fame, no public profile or acclaim, no wealth, and on occasion unfair criticism. To those who take to it however, the work is interesting, challenging and satisfying. It is also creative and positive.":
http://www.law.tulane.edu/uploadedFiles/Institutes_and_Centers/International_Legislative_Drafting_Institute/Garth%20Reflections%20Full%20Text.pdf
Excellence in the public practice of law by New Zealand parliamentary counsel is recognised by "the established practice of occasionally appointing . . . parliamentary counsel as Queen's Counsel": Hon Nathan Guy, Associate Minister of Justice, 13 October 2010 First reading debate on Lawyers and Conveyancers Amendment Bill (120—1):
http://www.parliament.nz/en-NZ/PB/Debates/Debates/1/c/c/49HansD_20101013_00001237-Lawyers-and-Conveyancers-Amendment-Bill.htm

The Role and Efficacy of Legislation

Sudha Rani [1]

Abstract:

This article considers the role of law in society and contrasts legislation with customs, traditions and natural justice in terms of its efficiency in a democracy. Written laws should provide certainty, solidarity and stability in the society. Legislative counsel have a crucial role in the whole exercise of legislation and its making, particularly in terms of making it a most efficient legal document.

Introduction

One of the most efficient public documents is legislation, the law made by a competent Legislature. Being the most appropriate way of communication between the elected and the elector, it ought to be efficient too. While electors choose to elect acceptable candidates as their representatives, they reasonably expect in return

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effective legislation that governs the elector's conduct. Brevity, clarity and precision play a very important role, while reducing the commands of the Legislature, by way of legislative drafts.

Being the prime source of law, legislation and the legislative counsel who writes it assume unprecedented importance in the modern civil society. Legal history reveals that law in its evolution came in the form of natural justice and developed and enriched by its customs and traditions. It is intriguing to determine which came first: customs for protecting human rights or principles of natural justice for protecting them. Nonetheless, it is very obvious and acceptable to all that the law in the form of legislation came into existence and gave definitive expression to principles of natural justice. It binds the people of a civilised State for their governance and is made on their behalf by the sovereign.

Historically, the law in India passed through stages of Shruti (by listening) and Smriti (by remembering) to the development of the written laws.

Manusmriti is generally known in English as the Laws of Manu. Manu was the author who laid down the rules for the King, the State and the Judicial Procedure relevant to ancient India. Manusmriti, which is in the ancient Indian language namely, Sanskrit, is the discourse by Manu, the ancestor of rishis or saints. It is the utterance of 'the laws for the mankind' and is the ancient source of rules to govern the conduct of human beings. According to Indian mythology, Manusmriti is regarded as the words directly passed on from 'The Bhrahma', God Almighty. There are numerous commentaries written by many, as the original version of Manusmriti was only by oral pronouncements. The competent Legislature here is the Almighty. According to German philosopher Friedrich Nietzsche, Manusmriti is as an "incomparably more intellectual and superior work".[2]

Natural justice

The principles of natural justice are the dictate of reason and conscience existing in the human beings and the customs and traditions developed by long and constant observance in the society. The courts recognise the principles of natural justice in forms of customs and traditions when the written law is not available and they develop the principle of natural justice as the law known as equity and good conscience. The written laws should provide certainty, solidarity and stability in the society and leave little scope of interpretation to the courts in comparison to the application of new principles of equity by courts. The effect of legislation has a far-

[2] Friedrich Nietzche, *The Antichrist* (1888), 56.

reaching consequence. As observed by L.H Fuller, "the strength of law lies in public acceptance".

The role of law in governing the civilised society is very efficacious in comparison to customs and traditions as well as principles of natural justice. The nomadic and primitive societies were governed by their customs and traditions. Civilised societies always consider providing law to their people in the form of legislation considering mainly, its efficacy and utility. Hence, while translating the policy, a legislative counsel needs to check if the directive is in consonance with the principles of natural justice. His job is not just transcription or typing but to uncover pitfalls that might trap the Government as well as the Legislature if these principles are ignored or escape his attention.

Judges

The purpose of judgement by application of law is to secure justice. When the general public thinks of the law as just and fair, it is a high mark of confidence in the judiciary.

Written Law acts as a protection for Judges themselves. No judge who applies it can be accused of partiality. For the law does and ought to embody the collective wisdom. A judge who has to reach his conclusion without the guidance of law puts his personal reputation and the confidence of public at stake. This is one of the major roles the law plays while guiding Judges. However, there are several instances of judges complaining that it is difficult to understand a certain provision or to know the mind of the Legislature. Legislative counsel has, therefore, a responsibility to put things in a straightforward and understandable manner. If the legislative counsel does not explain the subject matter simply, he or she probably does not understand it as well. Leaving certain details to the judges to interpret is an injustice the justice seeker. The legislative counsel, while transforming the policy into legislation, has to foresee what the policy makers have failed to see.

Citizens

The law instructs the citizens how to behave justly. This, you may say, is a simplistic statement. Ordinary people do not need to read the law to know how to behave. They generally behave well because they are brought up in a society to accept the same standards of conduct as those that form the basis of the law. The persons who regulate their activities by the law are more likely to be on the right side of it and usually never take advantage of loopholes, if any.

A well-drafted piece of legislation will always come to the rescue of the individuals it is addressed to. It would save an ordinary citizen from untold misery. Citizens

sometimes have to pay for the actions of the legislative counsel. For this reason, legislation-making attracts the most serious attention of the people at large. Clarity is important for effective communication between the body that pronounces the law and the audience. For this reason alone, statutes will definitely continue to dominate in terms of their importance among all other written documents in our society. Efficiency of a Legislature is invariably reflected upon the official pronouncement that it makes by way of legislation, which is written by the legislative counsel.

Lawyers

If there were no law, there would be no lawyers to consult. However, the existence of law helps lawyers provide a solution to legal problems. The lawyers may in the course of their work enormously reduce the number of cases going to court if the legislation diminishes the areas of uncertainty. Legislation should enhance the possibility of a settlement, which, when negotiated by lawyers, is always the best solution to a dispute. Moreover, a great deal of the administration of justice is simply harmonising, ensuring rights, and making adjustment in accordance with law.

Sometimes, lawyers who bank upon legal provisions for the benefit of their clients find it difficult to present the case due to the ambiguous nature of a legal provision. The administrator of the legal provision is also sometimes in a fix as to how to apply it on a certain occasion.

In any democratic country, developed, semi-developed or developing, the Government is the respondent in most law suits. The reason, sadly, is that all legislation is either drafted by the Government counsel or touched by them by way of vetting or otherwise. A great chunk of Government money could be saved by a Government counsel, especially a legislative counsel, who applies their knowledge and expertise in drafting or rendering proper advice leaving no room for ambiguity in the language of law they resort to.

Litigants

A perplexed citizen, sometimes a litigant, approaches a court expecting the final determination of their rights in their favour. The citizen expects rights to be adjudged in accordance with the law or its appropriate interpretation. When the law is vague and has the effect of no law or unclear law or an inapplicable law, it results in miscarriage of justice.

If a law is in existence, the citizen expects a determination on the basis of it; and if the existing law does not make out what it ought to, the litigant loses faith in the

machinery involved in the process, including the person who wrote the law. Litigant expects a judge to decide with the help of the law, to apply the law, and to blend law and facts that result in justice. The expectation of the litigant is justice, which is possible only with the existence of clear law. Sometimes, legally meaningless phraseologies and archaic expressions add insult to the already injured user of the law.

Reasonableness and rationality

A reasonable law abiding citizen is one who uses reason sensibly and arrives at fair and moderate results. What is reasonable and unreasonable is laid down by the law. Law here, very effectively guides the citizen to arrive at reasonableness. If we think that, a decision has been reached without reasoning at all, purely emotional or impulsive, we say that it is irrational. If we think that the reasoning power is applied wrongly, has failed to detect what is relevant, we use the word unreasonable. The act has to be caught by the spirit of the words and to be within their scope as well as within their reasonable meaning. There have been many examples of legislation that judges have shaped to their purposes. They did this by ruling on question of facts and question of law.

Injustice

Legislation as discussed is that which advances the policy of the Government, throws some light on injustice. There is a difference between a good citizen as an individual and in the society to which he or she belongs. The good citizen practises justice as a virtue for its own sake. The State, which is the administrative organ of the society, has till recently been regarded as provider of justice through legislation. Nevertheless, when our legal system was in a developmental stage, what motivated the State was maintenance of order.

If three good citizens in three different parts of the country reach in a matter of domestic justice three different decisions because they apply three different principles for the determination of the responsibility or the assessment of compensation, the probability is that none of the three individuals involved will know anything about the other two cases. Because there will be no comparison, there will be no sense of injustice. Each individual will, if accepting that he or she has been treated fairly and reasonably as an individual, be satisfied with the result. Even if there is a comparison, it does not give rise to a sense of injustice. That must depend on whether the individuals think of themselves as belonging to the same group, i.e., as being members of the same society. If they do not, the unsuccessful would shrug it off, thus, if English, Indian, and a German judge deliver three

different judgements on the same set of facts because each judge applies a different principle, no one is upset; each judge is right according to their own wisdom.

Therefore, we allow that each community may have its own ideas of what is just. As we reach out towards a world community, we begin to formulate general principles, which we say all communities should adopt. Subject to that and in the application of the general principles, we accept that the results may differ. However, within as single community, they must be the same and this can be ensured only by the existence of the legislation that caters to the society in general.

Legislative Counsel

To enhance the efficacy of legislation, the legislative counsel needs to be alert to the dangers of negligence, oversight and overzealousness. The utility or harmfulness of a legislative counsel often times becomes known a long time after the legislation he or she prepared starts rolling out. Then, sometimes the legislative counsel would have moved on to a different assignment or retired.

Legislative counsel contributes to maximising the efficacy of legislation by providing their expertise to make available every scientific tool for the best pronouncement of Legislature.

Legislative drafts were believed to be drafted for lawyers and judges once upon a time. In the modern democratic legislative process, a legislative provision is people-oriented. The idea is to serve the masses by extending legislative benefits to them in the most palatable manner. Every legislative Counsel should strive to achieve this.

As correction or improvement of a statute entails cumbersome procedural hurdles, legislative communication needs to be prepared with utmost care and caution unlike many other documents. Statute making is not merely a transcription or translation of administrative or executive guidelines, but is the command of legislative intent. Legislation-making is a mixture of vision, mission and craft. Legislative counsel are master artisans whose handicrafts are applied to bring out a workable proposition considering the background of a problem and foreseeing the ramifications of the legislative action. Efficacy always presupposes precision, brevity and clarity.

To conclude, legislative counsel have the most crucial role in the whole exercise of legislation and its making, particularly in terms of making it a most efficient legal document. It is said, “if the law is good, praise the person who brought it and if it is bad, condemn the legislative counsel”. Nevertheless, let us continue to strive to make the best.

Training and Development of Legislative Counsel in Commonwealth Africa – the Way Forward

Estelle Appiah[1]

Abstract:

The dearth of legislative counsel in Commonwealth Africa has posed cause for concern for the Rule of Law for some time. This article focuses on the training programme for legislative drafters in Commonwealth Africa over the last five years. It considers the scope of the training and explores the development of legislative counsel as they multi-task in their role in policy formulation, as legal advisers, in peer review mechanisms, as Parliamentary Counsel, as legal advisers and as legislative drafters.

The article also deals with the challenges of attrition and provides recommendations for the retention of legislative counsel. It concludes with ideas for collaboration with the developed Commonwealth in the training and development of legislative drafters.

Introduction

The rule of law is the *sine qua non* for good governance and development. It is trite that without the rule of law social transformation is in jeopardy.

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The concept of "Good Governance" comprises four elements:

> (1) Governance by rule: decision-makers decide, not pursuant to the decision-makers intuition or passing fancy, but according to agreed-upon norms grounded in reason and experience.
>
> (2) Accountability: decision-makers justify their decisions publicly subjecting their decisions to review by recognised higher authority.
>
> (3) Transparency: officials conduct government business openly so that the public and particularly the press, can learn about and debate its details.
>
> (4) Participation: persons affected by a potential decision – the stakeholders – have the maximum feasible opportunity to make inputs and otherwise take part in governmental decisions.[2]

Good governance requires the exercise of political powers through rules, rules that are transparent and create accountable and participatory decision-making procedures.[3]

The absence of rule by law causes government decisions to become arbitrary and leads to the failure of public officials to seek the welfare of the majority and rather seek their personal interests. Accountability, transparency and participation are minimised. This leads to dissatisfaction and may cause unrest, instability and security problems.

It is the role of the legislative counsel to transform policy into law after the Cabinet has approved the policy for a Bill.

"Legislative drafting is a discipline. It requires continuous training and experience. It demands hours and hours of concentrated intellectual labour."[4]

Legislative counsel are required to write with clarity, precision and consistency so that the will of the executive as translated by the Legislature promotes democracy and enhances the wellbeing of society in an orderly environment. It is the responsibility of the legislative counsel to ensure that legislation is drafted in such a way that government officials conduct government business without ambiguity

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2 Ann Seidman, Robert B. Seidman and Nalin Abeysekere , *Legislative Drafting for Democratic Social Change. A Manual for Drafters(*Kluwer Law Interntional, London*: 2000)* at.8

3 Seidman et al. above n. 2 at 343.

4 V.C.R.A.C. Crabbe, "Teaching Legislative Drafting: The Commonwealth Experience" (1998), 19 Statute Law Review 113.

and abuse of power and the public complies with the law for a just and orderly society.

It is therefore the role of the legislative counsel to facilitate the rule of law by drafting good laws that promote democracy, good governance and avoid tyranny. The question is: how do legislative counsel achieve maximum efficiency to draft laws that ensure that all persons, irrespective of their position, rank or status in society are subject to the law?

"Absence of clarity is destructive of the rule of law."[5]

To reach a level where laws can be drafted with clarity, the legislative counsel must be well trained to draft legislation that is precise and consistent. Aristotle has stated that the "rule of law is preferable to that of any individual" and further states:

> It is more proper that law should govern than anyone of the citizens: upon the same principle, if it is advantageous to place the supreme power in some particular persons, they should be appointed to be only guardians and servants of the law.[6]

The law must transform society. Government officials must have prescriptive roles. The discretionary power of a Minister and others in decision-making roles should be curtailed to avoid corruption. This requires the ingenious use of language and, in the context of the law, particular use of language and syntax to craft a legislative sentence that will succinctly convey the meaning of the law in such a way that those for whom it is intended will understand it and those duty bound to implement it will not misinterpret it.

Justice V.C.R.A.C. Crabbe states the qualities of parliamentary counsel who draft legislation:

> It is a discipline in itself. Its practitioners must have a facility in the use of the language of legislative instruments. Experience in legal practice is desirable. So is an interest in drafting, a mastery of the use of the relevant language, a systematic mind and orderliness in the formation of thoughts, the ability to pay meticulous attention to detail and to work with accuracy under pressure.[7]

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[5] Lord Diplock, *Merkur Island Shipping Corp. v.Laughton* [1983] 2 AC 570 at 612.

[6] Aristotle Politics 3.16.

[7] V.C.R.A.C Crabbe, "The Ethics of Legislative Drafting", Commonwealth Law Bulletin 18 March, 2010 at 13.

Other qualities necessary are an ability to work with colleagues and others skilled in other disciplines as well as rigid self-criticism.

One method used to train a legislative counsel is the system of apprenticeship. Although this may be an effective method of learning, it is not the swiftest and in African Commonwealth jurisdictions the absence of legislative drafting mentors makes this form of training impracticable. Senior legislative counsel are generally overwhelmed with their own work and therefore do not have sufficient time to teach on the job.

Background to Training of African Commonwealth Legislative Counsel

The genesis of training for legislative counsel can be traced to the early 1970's and to the first Secretary-General of the Commonwealth, Arnold Smith. He noted that the Secretariat's primary function was to provide information about legislation in Commonwealth countries, including through the "launching of an ambitious publication, the Commonwealth Law Bulletin."[8] Smith went on to note that "another logical advance was to inaugurate a series of training courses for Parliamentary draftsmen".[9]

In response to an appeal made by Commonwealth Law Ministers at their meeting in London in January 1973, the Commonwealth Secretariat conceived the Legislative Drafting Scheme.

The initial training course was organised in 1974. These courses were regionally based and the course for Africa was organised in Accra, Ghana in 1974. Other courses were subsequently organised by the Commonwealth Secretariat in Nairobi, Harare and Cave Hill in Barbados for participants from the different regions of the Commonwealth. Subsequently, the course was institutionalised in Barbados at the University of the West Indies (UWI) as the Commonwealth Training Centre. In 1986, the Secretariat institutionalised its ad hoc legislative drafting programme by concentrating its efforts on the drafting programme established by UWI in, Barbados. The programme was designed to train Parliamentary Counsel from across the Commonwealth.

As of October 1992, UWI delivered the programme entirely as a university course but with funding from the Commonwealth Fund for Technical Co-operation (CFTC) to support a certain minimum number of participants as it had done over

[8] Arnold Smith and Clyde Sanger, *Stitches in Time: The Commonwealth in World Politics* (General Publishing: 1981) at 120.

[9] Ibid. at 121.

the years. Some participants were also funded from other sources. From 1974 to 1993 a total of 445 participants had undergone training, a vast number of them funded by the CFTC. At first there were three levels, a certificate, advanced diploma and the LLM degree in Legislative Drafting. The certificate level was subsequently phased out in 1993.

There have been other training courses in Africa but this presentation will focus on training organised by the Commonwealth Secretariat for African Commonwealth jurisdictions to address the dearth of legislative counsel in the African Commonwealth.

At their meeting in Saint Vincent and the Grenadines in 2002, Law Ministers recognised that there were problems in the delivery of service by legislative counsel. It was acknowledged that shorter courses in the subject were required to avoid long periods of absence from the offices of legislative counsel for training. Consequent to that mandate, the Secretariat established a 12-week short course at the Ghana School of Law in Accra in January 2006 for the Africa region. In 2003 a Commonwealth Curriculum developed by Professor Patchett with a focus on short-term training and practical drafting exercises was adopted.

In 2005, Law Ministers meeting in Accra were pleased to note that a 12-week course had been devised in accordance with the Commonwealth Curriculum and was being initially offered in Ghana in conjunction with the Ghana School of Law with strong support from the Government of Ghana through the Ministry of Justice. This course was offered to the legislative drafting offices of all the 17 African Commonwealth countries following a workshop to determine the way forward for the training of African legislative counsel. The first course was held at the Ghana School of Law in 2006 for 12 weeks. It has been held annually since then.

Nature of the Course

To quote Justice V.C.R.A.C. Crabbe, the Course Director in his 2008 report of the third Course,

> Legislative Drafting demands hours and hours of concentrated intellectual labour. The training afforded by the Course is not to make a participant a glorified amanuensis. The skills are learnt over a period of time. And a Course of the present nature can only impart the very essential rudiments of the art – and science as it is sometimes called of Legislative Drafting.

The Course comprises four elements: lectures, discussions, exercises and tutorials. Theory is combined with knowledge of the practical skills needed for legislative drafting. The lecturers deal with the theory. The discussion periods at class level deal with the theory and the practice.

Exercises are demanded of the participants for them to put into practice what they have imbibed from the lectures and the discussions. The tutorials on a group level or one-on-one give the participants the opportunity to assess how far they think and plan before putting pen to paper as well as their ability to identify the policy behind the need for legislation and express that policy as a law in a clear, cogent and concise manner.

The tutorials enable the participant's particular problems with legislative drafting to be dealt with. The lectures, the discussions and the tutorials take as much as two hours, depending on the topic and the needs of the participant.

Course Content

The Course has since its inception used the syllabus agreed on by the Commonwealth Secretariat as developed by Professor Patchett. Over the years some new topics have been added. These are: managing a legislative drafting office, drafting for the rule of law and drafting defensively against corruption. In response to a request from the heads of legislative drafting offices in Africa, the syllabus will be reviewed this year to include more topics that are of current interest globally.

Guest Lecture Series

Since the inception of the course, there has been a guest lecture series. The guest lecturers have come from academia, Parliament, civil society, the judiciary and law publishing among others. Their topics have ranged from constitutionalism, lobbying, statutory interpretation, Parliament, law as a tool for development to the transformation of treaties and the journalistic style of legislative drafting. The idea has been to provide the participants with background information to be able to think "outside the box" to deal with their role as legal advisers, active contributors to peer review mechanisms and as parliamentary counsel.

The statistics of participation in the Commonwealth Legislative Drafting Course for African jurisdictions from 2006-2010 are as follows:

2006	
Total No. of Participants	22
Females	15
Males	7
Countries Represented	14
2007	
Total No. of Participants	27
Females	17
Males	10
Countries Represented	11
2008	
Total No. of Participants	25
Females	14
Males	11
Countries Represented	15
2009	
Total No. of Participants	25
Females	14
Males	11
Countries Represented	14

2010	
Total No. of Participants	34
Females	22
Males	12
Countries Represented	15

Meetings of Heads of Legislative Drafting Offices of African Commonwealth jurisdictions

The first meeting of heads of legislative drafting offices of African Commonwealth jurisdictions took place in 2008 to review the courses run from 2006-2008. The meeting focused on the future of the course and the need to sustain it, attrition rates of legislative counsels and networking, among others.

The second meeting of heads of drafting offices of Africa Commonwealth jurisdictions took place in Mauritius in November 2010. The communiqué from that meeting is attached as Appendix 1. The meeting focused on an overview of the course, its assessment and evaluation, improving the terms and conditions of staff of legislative drafting offices and co-operation with other Commonwealth legislative drafting offices. The next meeting is scheduled for 2012 in Namibia.

Challenges to Legislative Drafting in Commonwealth Africa

The attrition of legislative counsel continues to pose a serious problem to African Commonwealth jurisdictions. Two other fundamental challenges impact severely on the capacity of drafting offices to be self-sufficient: how to attract lawyers to legislative drafting and how to retain them. The inescapable conclusion to be drawn from the continued shortage of legislative counsel, is that trained legislative counsel are not staying in drafting offices and not enough lawyers are being recruited to replace them. Many young people embarking on a legal career are not aware of legislative drafting as a specialty. To that end, it is necessary for legislative drafting to be taught in law schools, as is the case with the Ghana School of Law.

There is a lack of awareness among law graduates of legislative drafting as a viable career option. The visibility of legislative counsel is low and there is a negative image and diminished status of the discipline, although it has to be said that there is growing awareness of their role and importance.

Drafting offices are short staffed. Some of the factors which contribute to legislative counsel leaving their jobs are lack of the appropriate recognition of the value of their role. Others are the lack of properly structured offices and a career path for legislative counsel. Under-resourced offices, poor remuneration and other terms and conditions of service are also a factor as is isolation in the performance of their work. Legislative counsel are also overworked as they are required to multitask and carry out duties other than drafting.

At the 2008 Commonwealth Law Ministers Meeting, the following strategies were endorsed to address the challenges of the attrition rate of legislative counsels.

Institutional Strengthening

- The development of structures within a drafting/legal office that create an enabling environment for the development of legislative drafting expertise and a clear career path for legislative counsels;
- Drafting offices being adequately resourced.

Recruitment of Legislative counsel

- Introducing legislative drafting as a component of the law degree course, or where the training already exists, its strengthening and expansion to a distinct course at degree level;
- Promoting and effectively marketing legislative drafting as a career to attract lawyers (this could involve the re-profiling of legislative drafting as a viable career option);
- Developing flexible recruitment strategies to attract experienced lawyers to legislative drafting.

Capacity building

- Developing or enhancing in-house training and mentoring;
- Training of trainers courses for senior legislative counsel to enable them develop and undertake in-house training for junior staff;
- Developing legislative drafting and style manuals and guidelines on the legislative process;
- Training government officials and instructing officers on legislative processes and policy development and the development of adequate drafting instructions;
- Effecting placements and attachments of legislative counsel from developing countries in the drafting offices of developed countries;

- Effecting secondments of experienced legislative counsel to drafting offices in developing countries, especially small jurisdictions, with the primary objective of facilitating and delivering in-house training and advising on institutional strengthening;
- Creating networks of legislative counsel to facilitate the exchange of expertise, problems and experiences;
- Introducing computer technology and the use of templates.

Retention of Legislative counsel

- Reforming the structure of drafting offices and improving the work environment;
- Improving terms and conditions of service;
- Raising the profile of legislative counsel.

Assistance of the Commonwealth Secretariat

The Commonwealth Secretariat helped implement the strategy for African Commonwealth jurisdiction by

- supporting the 2008 and 2010 African Heads of Legislative Drafting Offices meetings and the establishment of a network between African legislative drafting offices.
- developing the legislative drafting manual for African Commonwealth jurisdictions;
- continuing the advanced legislative drafting course for the Africa region; and
- convening a side meeting on legislative drafting at the October 2010 Senior Officials of Law Ministries meeting in London.

Conclusion

The Commonwealth Secretariat remains committed to assisting African Commonwealth jurisdictions to develop their capacity in legislative drafting and thereby advance the rule of law and good governance. It is in discussion with the Ministry of Justice in Ghana to institutionalise the Course at the Ghana School of Law. However, due to the fact that its resources are limited and there are competing priorities, continued assistance will be determined by the availability of financial resources, relevance, effectiveness, and the contributory effort to the

maintenance of sustainable capacity in legislative drafting by improving the conditions of service of legislative counsel.

It is the view of the Commonwealth Secretariat that there must be a shared commitment to building capacity in legislative drafting by the Commonwealth Secretariat and African Commonwealth jurisdictions. Governments must make real their aim to make legislative drafting an attractive proposition to potential recruits as well as to existing staff through the provision of remuneration and terms and conditions of service which reflect the vital importance of legislative drafting.

The good drafting of legislation is the cornerstone of the rule of law and entwined with constitutionalism and the good governance. It is essential that means be found to continually motivate legislative counsel to give of their best and this can be done by refresher courses, the attendance at conferences to share ideas such as the CALC conferences and by collaboration with the developed Commonwealth to have internship programmes.

The legislative drafting training programme for the African Commonwealth has been highly successful and may I conclude with an appeal to the developed Commonwealth to reach out to the developing countries of the African Commonwealth by arranging attachments to enable young legislative counsel to hone their skills.

To quote Confucius,

> If language is not correct, then what is said is not what is meant: if what is said is not what is meant, then what ought to be done remains undone.[10]

The training of Parliamentary Counsel to draft legislation in Africa aims to ensure that the language is used is correctly and that good laws nurture democracy. It is not only important, but also crucial that legislative counsel are given appropriate training and support to enable them perform creditably.

References

(1) Commonwealth Law Bulletin, Volume 36, No. 1, March 2010.

(2) Maxwell Opoku-Agyemang, *Constitutional Law and History of Ghana* (Admax Law Series).

(3) Ann Seidman. Robert B. Seidman and Nalin Abeysekere, *Legislative Drafting for Social Change, A Manual for Drafters*.

[10] Quoted by Ernest Gowers, *The Complete Plain words* (Pelican Books, London: 1983 reprinrt) at 159.

(4) Overview of the Commonwealth Secretariat Support to Commonwealth Countries in the field of legislative drafting, Meeting of Senior Officials of Commonwealth Law Ministries, Marlborough House London 18-20 October, 2010 SOLM (10) 6.

(5) Statute Law Review Volume 19 Number 2, 1998.

(6) Akbar Khan, Director Legal and Constitutional Affairs Division, Speech at the CALC Africa Region Conference, Abuja, Nigeria 7-8 April, 2010.

(7) Bilika H. Simamba, *The Legislative Process, A handbook for Public Officials*.