Newsletter

of the

Commonwealth Association of Legislative Counsel

March 2010

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Editor: Duncan Berry, c/- Office of the Parliamentary Counsel, Government Buildings, Upper Merrion Street, Dublin 2, Ireland.

In this issue—

CALC Conference and Meeting—Hyderabad 2011

The next CALC conference is to be held in Hyderabad, India from 9 to 11 February 2011. We urge all members to mark those dates in their diaries and make arrangements to go to Hyderabad, which is the conference capital of India. You will not only have a great learning experience but a great social and cultural experience. The conference immediately precedes the Commonwealth Law Conference, which begins of 6 February. This gives you the opportunity to attend both conferences without having to incur the cost of more than one air fare. So we look forward to meeting you in Hyderabad then.

The theme of the CALC conference is *Legislative Drafting: A Developing Discipline*. This theme, which addresses many aspects of legislative drafting and the role of legislative counsel, will provide CALC members with an opportunity to share ideas on the following issues:

- Legislative drafting: Art, science or discipline?
- Legislative counsel in developing countries
- Legislating across languages: The challenges of law-making in multi-lingual jurisdictions
- Role and efficacy of legislation
- Emerging trends in improving legislative drafting: Harnessing Information and communication technology
- The wavering line between policy development and legislative drafting
- Training and development of legislative counsel.

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

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

Council members are always keen to hear from members. Our contact details may be found on the CALC website (which is located at www.opc.gov.au/CALC). Please contact us if you have any particular ideas or suggestions to put forward.

Eamonn Moran, President; Duncan Berry, Secretary

March 2010

New CALC Members

On behalf of the CALC Council, I should like to welcome all those who have joined the Association since the publication of the last list of new CALC members. As a result, the Association's membership numbers have now passed the 1,000 mark (including associate members).

However, during the relevant period, four members resigned. They are Louise David-Lalonde, Ottawa, Canada; Ray Siebuhr of Queensland, Australia; Chris McPhail of Wellington, New Zealand; and Jacques Morin of Quebec, Canada. These members have all retired from legislative drafting. On behalf of the CALC Council, I wish them a long and happy retirement. Also during that period, Jan Sherriff, the former Deputy Parliamentary Counsel of Western Australia, died at the age of 77. His obituary appears elsewhere in this Newsletter.

The following is a list of those who have become members of CALC since 30 March 2009.

Full members

Name	*E-mail address)*	*Country and office, firm or institution*	*Primary postal address*
Michael Addison [5.10.2009]		Cyprus #AGLA' Office	HQSBAA, Block A, BFPO 53, Cyprus
Samantha Aglae [17.10.2009]		Seychelles #Attorney General's Chambers	P.O. Box 58 Mahe Seychelles
Lillian Andama [17.10.2009]		Uganda Ministry of Justice and Constitutional Affairs	P.O. Box 7183, Kampala Uganda
Victor Appeah [08.12.2009]		Bermuda Attorney General's Chambers	Church Street, Hamilton, Bermuda
Ronald Baird [5.10.2009]		Falkland Islands Attorney General's Chambers	Cable Cottage, Stanley, Falkland Islands F122 1ZZ
Matt Balfour, Matt [5.10.2009]		Australia Office of Legislative Drafting and Publishing	35 National Circuit Barton, ACT 2600
Faith Barton-Keene [12.11.2009]		Papua New Guinea Solicitor Generals Office	Box 59i, Waigani, NCD, Papua New Guinea
Bethea Christian [12.11.2009]		Cayman Islands	Box 907 GT, Grand Cayman KY1-1103

Ama Haywood-Dadzie [18.1.2010]		Ghana Ministry of Justice, Accra	P.O. Box MB 60
Jesse Jantjies [5.10.2009]		Republic of South Africa Civic Centre Legal Services, Legislation and Legal Research	20th Floor, Hertzog Boulevard Cape Town 8001
Lawrence Joseph [12.11.2009]		Grenada, W.I.	Joseph & Joseph Chambers, Lucas St., St. George's, Grenada, W.I.
Lawrence Kamugisha [5.10.2009]		Tanzania #East African Community Secretariat	PO Box 1096 Arusha, Tanzania
Deepthika Kulasena [18.01.2010]		Sri Lanka	Legal Draftsman's Department Superior Courts Complex, Colombo 12, Sri Lanka
Margaret Lashmann [12.11.2009]		Nigeria Legal Drafting Department	Federal Ministry of Justice Headquarters, F.C.T. Abuja Nigeria
Katy Le Roy [5.10.2009]		Nauru, Parliament of Nauru	Government Offices Yaren District Republic of Nauru
Esther Majambere, [08.12.2009]		Uganda Uganda Law Reform Commission	Kampala, Uganda, 12149
Doreen Muthaura [08.12.2009]		Kenya #State Law Office	Harambee Avenue, 40112, Nairobi 00100, Kenya
Steven Muleya [04.11.2009]		Republic of South Africa	40 Church Square, Pretoria, 0002
Senelisiwe Ngqotheni [26.2.2010]		Swaziland	PO Box 578 Mbabane, Swaziland
Mashaole Nkgapele [5.10.2009]		Republic of South Africa Department of Health	Private Bag X828 Pretoria 0001 Republic of South Africa
Corinna Novak [15.2.2010]		Australia, New South Wales Parliamentary Counsel's Office	GPO Box 4191 Sydney, NSW 2001 Australia
Motunlolu Onabolu [5.10.2009]		Nigeria Office of the Speaker House of Representatives	Abuja, FCT, Nigeria

Martine Padwell [8.12.2009]		Cyprus AGLA's Office	HQSBAA, BFPO 53, UK
Tara Partington [18.01.2010]		Canada, Ontario Office of Legislative Counsel	Room 3600, 99 Wellesley Street West, Toronto, Ontario, Canada, M7A 1A2
Dr. Patricia Prudent-Phillip [12.11.2009]		St. Kitts Nevis Legislative Drafting Office	Planning & Environmental Consultants, P.O. Box 123, Basseterre, St. Kitts Nevis
T.A.Y.M. Ranadana [18.1.2010]		Sri Lanka Legal Draftsman's Department	Ministry of Justice, Colombo 12, Sri Lanka
Pearl Richards-Xavier [18.1.2010]		Dominica Ministry of Legal Affairs	Attorney General's Chambers, Government Headquarters, Kennedy Avenue, Roseau Commonwealth of Dominica
Selladurai Selvakkunapalan [12.11.2009]		Sri Lanka Legal Draftsman's Department	P.O. Box 554, Colombo 12, Sri Lanka
Titabu Tabane, [17.10.2009]		Kiribati Office of the Attorney General	P.O. Box 62, Bairiki, Tarawa, Kiribati
Tebogo Tambale [26.2.2010]		Botswana Attorney General's Chambers	Private Bag 009 Gaborone
Daniel Tongov [5.10.2009]		Nigeria #Legislative Services Department	National Assembly Abuja
John Tuta [12.11.2009]		Kenya Ministry of Justice, National Cohesion and Constitutional Affairs	P.O. Box 56057, Nairobi, Kenya 00200

Associate members

Name	*E-mail address*	*4* *Country and office, firm or institution*	*5* *Primary postal address*
Saleh Khamis Ali Al Hinai, [12.11.2009]		Oman	
Ameer Ali, Noushad Ali Naseem [30.3.2009]		Malaysia CIC-QS Services	Suite F-10-10, Phileo Damansara 1 Off Jalan Damansara, Petaling Jaya, Malaysia

Monin Berio [12.11.2009]	_____	Puerto Rico	Ave. Magdalena 1309, Apt. M43 San Juan, Puerto Rico 00907
Vijay Bhatia [5.10.2009]	_____ _____	Hong Kong City University of Hong Kong	Department of English, City University of Hong Kong, 83, Tat Chee Avenue, Kowloon, Hong Kong
Selai Lewanitoga Bulamainawalu [4.11.2009]	_____ _____	Fiji Islands Office of the Solicitor General	Level 6, Suvavou House, P.O. Box 2213, Government Buildings, Suva
Anne Ellis [5.10.2009]	_____	Ireland Office of the Parliamentary Counsel to the Government	Government Buildings Upper Merrion Street Dublin 2
Raymond Gatera [12.11.2009]	_____ _____ _____	Rwanda #Ministry of Justice	Ministry Of Justice, PO Box 160 Kigali Rwanda 250
Kadija Kabba [08.12.2009]	_____ _____	Sierra Leone +Sisay of Associate	29 Soldier Street, Freetown, Sierra Leone
Ian Kavanagh [5.10.2009]	_____	Ireland Office of the Parliamentary Counsel to the Government	Attorney General's Office Government Buildings Upper Merrion Street Dublin 2
Claire Kennedy [11.2.2009]	_____	Ireland Department of Agriculture, Fisheries and Food	Agriculture House Kildare Street, Dublin 2
Margaret Kennedy [30.11.2009]	_____	Ireland Office of the Parliamentary Counsel to the Government	Attorney General's Office Government Buildings Upper Merrion Street Dublin 2
Ruth Kiriza [12.11.2009]	_____	Rwanda Ministry of Justice	Ministry Of Justice, PO Box 160 Kigali Rwanda 250
Jacinta McDonnell [30.11.2009]	_____	Ireland Office of the Parliamentary Counsel to the Government	Attorney General's Office Government Buildings Upper Merrion Street Dublin 2
Avril Murtagh [18.1.2010]	_____	Ireland Office of the Parliamentary Counsel to the Government	Government Buildings Upper Merrion Street Dublin 2
Angelina Radianska [8.12.2009]	_____ _____	United Kingdom, England	International Hall Lansdowne Terrace London

Mikasha Ramsaran		United Kingdom, England	
[8.12.2009]			
Fowzia Shah	Pakistan		Near State Bank, Islamabad, Pakistan
[12.11.2009]		Council of Islamic Ideology	00044

News from the regions

Recent developments in the Cayman Islands

The Cayman Islands have a new Constitution. By Proclamation No. 4 of 2009 issued by then Governor Stuart Jack, CVO, the Cayman Islands Constitution Order 2009, UKSI 1379, was brought into force with effect from 6 November, 2009. The 2009 Constitution replaces the Cayman Islands (Constitution) Order 1972 (S.I. 1972/1101). By mutual agreement between the Government of the Cayman Islands and the Government of the United Kingdom, the Cayman Government now has greater autonomy. Significantly, the 2009 Constitution has introduced a Bill of Rights. Before enactment, the Constitution was put to a referendum.

Second United Kingdom Forum of Legislative Counsel

18 September 2009, Tŷ Hywel, Cardiff Bay, Wales

The second United Kingdom Forum of Legislative Counsel convened at Tŷ Hywel, Cardiff Bay on Friday 18 September 2009. The Forum convened in Cardiff by kind invitation of Carwyn Jones AM, then Counsel General to the Welsh Assembly Government, who has since been elected Leader of the Welsh Labour Party and appointed First Minister in succession to the Right Hon Rhodri Morgan AM. Carwyn Jones welcomed the delegates at the beginning of proceedings and outlined the constitutional developments which had taken place in Wales in the wake of the 2006 Government of Wales Act. Delegates were present from the Office of Parliamentary Counsel in London, the Office of Scottish Parliamentary Counsel in Edinburgh, the Offices of Legislative Counsel in Northern Ireland and Wales, as well as representatives from the Jersey, Guernsey and Gibraltar legislative drafting offices and the Office of the Parliamentary Counsel to the Government in Ireland. Legislative translators from the Welsh Assembly Government were also present as was a representative of the Legal Revisers from the Council of Ministers of the European Union in Brussels.

The forum examined three main issues: Bilingual Legislation; Challenges and Developments to Ways of Working; and Legislation Software. On the first of these themes, Mr Colin Robertson, from the Legal Revisers of the European Union gave a fascinating overview of the work of the legal revisers in ensuring the equivalence of legal texts across the 23 languages in which legislation is drafted within the European Union. He was followed by Alexandra Llewellyn, a trainee solicitor with the Welsh Assembly Government, who presented the findings of her work while a research officer at the Office of Welsh Legislative Counsel into the development of a qualification for legal translators in Wales. The qualification is likely to be offered by one or more of the Welsh universities in the next few years.

Following this session, the delegates enjoyed a buffet lunch before moving on to the second theme – Ways of Working. Papers were delivered by Lydia Clapinska and Elizabeth Gardiner of the Office of Parliamentary Counsel in London and by Andy Beattie of Scottish Parliamentary Counsel. This session was to make an interesting contrast with the closing session of the Forum when Paul Peralta (Gibraltar) presented the views from the Islands, with Megan Pullum (Guernsey), Pam Staley (Jersey) and David

Birmingham (Isle of Man) describing how the work of legislative drafting took place in their jurisdictions. Overall, there was considerable diversity of practice which was of interest to those attending.

The final main theme of the conference was legislative software, a session presented by Dafydd Eveleigh of the Welsh Assembly Government, who introduced a series of speakers presenting products they had on offer to assist in the task of legislative drafting. During the course of the day, there were also demonstrations of the products for the benefits of delegates with an opportunity to obtain information and raise questions about their use and effectiveness.

The Forum, as was the case in Edinburgh in April 2007, provided an enjoyable opportunity for those engaged in the work of legislative drafting to come together and discuss their mutual interests in a convivial and friendly atmosphere. At the end of the day, the delegates thanked those responsible for organising the forum for their hard work, with special thanks to Sara Dodd of the Office of the Welsh Legislative Counsel who had been responsible for organising the accommodation, meals and refreshments. The forum closed with a reception for delegates.

Workshop: "Drafting Evidence-based Legislation: the case of the health sector in the East African Community".

In 2007, the East African Community (EAC) Summit Meeting resolved to establish an EAC Health Commission to develop a legislative program to improve health care delivery systems throughout East Africa. In January this year, a workshop was held in Arusha, Tanzania to assist in moving this programme forward. The purposes of the workshop were—

- to engage EAC parliamentarians on the EALA committee dealing with health issues, members of the parliamentary committees of the five parliaments of EALA, legislative counsel and health experts in a self-reliant learning process of drafting and assessing *evidence-based legislation*, with specific reference to the health sector in EAC, and
- to empower participants to draft bills justified by relevant facts, logically organized in research reports.

At the workshop, participants learned how to translate policy into effectively implemented laws by using institutionalist legislative theory and methodology ('ILTAM'), as well as essential drafting techniques. One of workshop aims was to introduce ILTAM to EAC legislative counsel, parliamentarians and others.

Participants at the workshop were all from the EAC Partner States, which comprise Burundi, Kenya, Rwanda, Tanzania and Uganda. One of the organisers of the workshop was CALC Council member, Elizabeth Bakibinga-Gaswaga from Uganda.

Obituaries

Tom Willis—Former New South Wales Deputy Parliamentary Counsel[1]

Tom Willis died in December 2007 at the age of 91 years. He had a long period of service in the New South Wales public sector and in particular in the New South Wales Parliamentary Counsel's Office. Tom

[1] This note was prepared by Dennis Murphy QC, former Parliamentary Counsel of New South Wales.

joined the Office as long ago as the mid-1960s as Third Officer, when the Office was still called the Parliamentary Draftsman's Office and had a total staff complement of fewer than ten.

He was a sound lawyer with earlier legal experience in the government-owned Rural Bank and afterwards in the Crown Solicitor's Office. He acted as chief Parliamentary Counsel from time to time and retired as Deputy Parliamentary Counsel in 1977. After his retirement he was engaged as a legislative drafter with the Office for many years until his second retirement in 1994.

What is it about legislative drafters of old that they were such interesting characters as well as being sound drafters? You can only say that Tom loved and enjoyed life to the full. He had a huge and amiable personality and was remarkably even-tempered at all times. He was well liked by all he came into contact with. He had a large fund of stories from his life, which he enjoyed telling and re-telling in a very amusing way. In his youth he was quite an athlete especially as a swimmer. This assisted him in his major battle with cancer in mid-life, so much so that he made a complete recovery and regained his former robust health. He maintained an enviable joie de vivre and enjoyed good food and drink and good company. Indeed he contributed to the ambience of many a social event he attended.

Tom was a most able legislative drafter and made a large contribution to New South Wales legislation. He was a loyal member of the Office and a mentor to younger officers. He made legislative drafting seem an effortless process, and this was the product of his experience and expertise.

He prided himself on his penmanship and would often send beautifully handwritten drafts to departmental officers rather than wait for them to be typed. He did master computer technology later in his career though I am convinced he hankered for the more leisurely pace of earlier professional life.

He worked hard and played hard. And what an interesting and popular character he was. He is survived by his wife Joan and family, and of course by his colleagues who remember him with affection.

Jan Sherriff—Former Western Australia Deputy Parliamentary Counsel[2]

The legislative drafting fraternity will sadly miss one of its more distinguished members. Langdon Stentiford Sherriff (better known as Jan) died in Perth, Western Australia last July at the age of 77.

Jan served in the Western Australian Parliamentary Counsel's Office from 1970 until his retirement on 26 January 1996.

Most of his almost 25 years of service in the Office were as Deputy Parliamentary Counsel, and Jan enriched the Office with his vast legal and other knowledge.

Jan came to Western Australia from Africa, where he had developed a formidable knowledge of the law while moonlighting in other capacities.

Being a highly accomplished marksman as well as having the stature one would expect of the competitive rugby union player that he was, Jan acted on occasion as bodyguard to at least one African president.

Jan was also a sailing enthusiastic, who contributed significantly to that sport, as indeed he did to a seemingly endless list of other endeavours, with dog and horse breeding being among them. He was also something of a gourmet and enjoyed cooking.

However, while in Africa he met his match in the dynamic and highly accomplished woman, Alice, whom he

[2] This note was prepared by Walter Munyard, Parliamentary Counsel of Western Australia, and Greg Calcutt QC, his predecessor.

subsequently married. They formed a remarkable partnership that lasted until Alice passed away on 9 February 2008 aged 83.

Jan brought to his work a wealth of specialised as well as general knowledge in addition to his legal skills.

He drafted legislation on a wide range of matters, often matching his diverse areas of special interest.

Amidst the clutter on his desk one item could always be found: a treasured crystal ball that he had brought with him from Africa. All legislative counsel will understand just how often he needed to resort to this tool during his career!

Jan will live vividly in the memories of those of us who had the privilege of knowing him.

Editor's note: I met Jan at numerous conferences when the then Australian National Companies and Securities Scheme legislation was being drafted in Canberra and other major centres and we frequently dined together. He loved a verbal joust and was a great raconteur, frequently regaling me in his trademark gravely voice with stories from his days in southern Africa where, if my memory serves me correctly, he served as a special branch police officer.

Strict and absolute liability in creating offences: Some principles for legislative counsel

In a recent article published in the Statute Law Review[3], Kiron Reid examines the principles developed by case law for determining whether a criminal offence imposes strict or absolute liability, and considers the problems arising from the application of those principles in practice. The author evaluates the arguments raised by jurists about the types of offence that should and should not attract strict liability. He also compares the practice in France and Germany.

The author advocates a clearer framework on strict and absolute liability to be applied in legislative drafting. He believes that a clear framework is needed for the imposition of strict liability in creating and drafting criminal offences. For example, it is desirable that strict liability should not be imposed for offences punishable by imprisonment. If such punishments are to be imposed, he thinks that the legislative counsel should use a clear and consistent form of words to show that full *mens rea* is not required. When legislation dispenses with mens rea, he thinks there should normally be a due diligence defence available in respect of each relevant aspect of the offence, and where for policy reasons such a defence is not available this should be specified. When the defence is specified as not available, he believes that the Legislature should require the Government to indicate whether it has considered as an alternative placing a burden of proof on the defendant and, if this was rejected the reasons why.

The author goes on to suggest that more criminal offences should be largely replaced by regulatory penalties punishable by a fine but enforceable by the police and other agencies with fixed penalties, with court proceedings being available where there are aggravating features, the fixed penalty is not paid or the liability to the fixed penalty is disputed and any available administrative review is unsuccessful. This regime would be a suitable means of dealing with a range of minor offences for which only limited culpability need be proved. However, it requires guidelines, the effect of which should be evaluated, on the use of fixed penalties and penalty notices to ensure that the police and other enforcement officers comply with legal standards of proof. For example that the relevant *actus reus* is proved as well as a deliberate act. This may seem an absurdly low requirement but anecdotal evidence received by the author suggests that the police are issuing penalty notices where objectively the conduct complained of could not be

[3] Statute Law Review, 2008, 29(3), 173-194

proved. Hence, proof of actus reus is needed as a minimum safeguard.

Forthcoming conferences

Legislative drafting conference in Ottawa, Canada, September 2010

The next CIAJ Legislative Drafting Conference will be held in Ottawa, Canada from 13-14 September 2010 under the theme Re-imaging the Law: Legislative Drafting Redefined. The conference will focus on what it means to be a legislative counsel today and how the evolving legal concepts of a diverse community are redefining both legislative drafting and the world at large.

Those entrusted with the preparing draft legislation are more than a precious commodity. They bring not only specialized knowledge and understanding to their creation, but must also integrate the new and broader concepts that define communities and countries:

- What are the responsibilities of legislative counsel?
- What are the evolving issues that must be considered and integrated into legislation?
- What impact is this having on redefining the legislative profile of countries and their governmental components?

Particular topics will include the value of legislative drafting, its professional and ethical dimensions, legislative harmonization and the cultural and linguistic aspects of drafting, particularly in relation to aboriginal communities.

The conference will also include workshops dealing with practical drafting issues in the English and French languages. Conference participants can expect to come away with a better understanding of the true value and make-up of legislative counsel and how legislation is being changed in broad terms.

Full information about the conference is expected to become available in April on the CIAJ website at: http://www.ciaj-icaj.ca/

CALC—African regional conference

The first CALC Africa Regional Conference will be held in Abuja, Nigeria from 7-8 April 2010. It will present an opportunity for legislative counsel to share ideas, challenges and network and learn new things about drafting legislation. The theme of the Conference is “Toward Uniformity of Legislation in the Commonwealth” and will embrace a myriad of legislative drafting topics such as anticorruption, transformation of treaties, clarity of language and emerging trends in legislative drafting.

Prince Adetokunbo Kayode, Minister for Justice and Attorney General of Nigeria, Betty Mould-Iddrisu, Minister for Justice and Attorney General of Ghana and Abdul Serry-Kamal, Minister for Justice and Attorney General, Sierra Leone, will open the conference and Justice V.C.R.A.C. Crabbe, Statute Law Revision Commissioner in Ghana, will deliver the key note address “Legislative Drafting, a developing Discipline”.

Clarity 2010—Lisbon, Portugal

Portugues Claro (the Portuguese chapter of Clarity International) is hosting Clarity's fourth biennial international conference in Lisbon, Portugal, 12-14 October 2010. Portugues Claro is assembling plain language specialists and legal experts from around the world to exchange experiences and new ideas about promoting clear communication in the public and private sectors. You can register your interest at www.clarity2010.com/home.html.

Book note—New book on legislation

The Legislative Process: A Handbook for Public Officials

Author: Bilika Simamba[4]

People are generally aware that legislation is introduced through Bills that are sent to the legislature, usually by the executive, and then passed into law. Few, however, are familiar with the processes that precede the submission of a Bill to the legislature. In fact, what eventually comes to the legislature is the product of long, often laborious processes, which go on for weeks, months and even years. To ensure that the civil servants and others who may be involved in shaping proposals are able to candidly express their views on policies that are being developed and refined, the deliberations on the executive side of government traditionally take place in secrecy. Mainly for that reason, the processes are not well known to the general public and even to some activists who

[4] Bilika Simamba was trained as a legislative drafter in Britain and Canada. Since then he has drafted legislation full-time for over two decades in four jurisdictions in the Commonwealth and has also undertaken short-term consultancies. His articles on legislative drafting and in selected areas of substantive law have appeared in leading journals in the United Kingdom, Germany, South Africa, Zambia and elsewhere. He has worked as a long-term consultant for the Commonwealth Fund for Technical Cooperation, fielded to the Caribbean, and on two World Bank technical assistance projects in Africa. He has also taught legal drafting at the International Development Law Institute in Rome, Italy. Bilika has been a member of the CALC Council since 2007.

lobby for or against legislation.

This book, written by a lawyer who has long experience participating in these processes, gives rare insight into how legislative proposals are conceived, developed and finally written into the law. It also contains easy-to-understand technical information that explains the significance of certain features of statutes. Further, it deals with other matters that follow after enactment including publication, entry into force, application and much more.

A full review of this book will appear in the next issue of *The Loophole*.

Notes on cases of interest to legislative counsel

Statutory interpretation if the European Court of Justice—Sturgeon v. Condor Flugdienst GmbH, Bock v. Air France SA [5]

John Moloney [6]

European Commission Regulation 261/2004 provides for specified assistance and compensation to be given to airline passengers whose fights are delayed or cancelled in other than extraordinary circumstances.

In the instant case, the Sturgeon family and Mr Bock and his partner were delayed for in excess of 21 hours after their scheduled time of arrival and sought compensation under Article 5 of Regulation (EC) 261/2004, which deals with cancellation of flights. Air France argued that the relevant flights were delayed rather than cancelled and that as a consequence compensation was not payable. The airline claimed that technical problems with the aircraft constituted extraordinary circumstances.

The German and Austrian Courts before which the proceedings were brought initially respectively posed preliminary questions for answer by the European Court of Justice.

The Court noted that the term “delay” is not defined in the Regulation but its meaning could be gleaned by looking at the context in which it is used in the Regulation; thus, a flight is delayed if it adheres to its original planning other than in respect of scheduled times of departure and arrival. If the flight otherwise adheres to its original plan, it is delayed and this does not give rise to cancellation.

Compensation is provided for in the event of cancellation by Article 5(1) of the Regulation. In interpreting a provision of Community law the Court will look not only at the wording of the provision but also at its context; account must be taken of the reasons for adopting a particular measure. The Court will treat similar cases alike and will treat cases differently only if to do so can be justified using objective criteria. The objective of the Regulation is to provide a high level of consumer protection. The loss (e.g. time) suffered by a passenger whose flight is cancelled or delayed is similar in nature. This means that compensation cannot be ruled out in cases of delay even if not explicitly provided for in the Regulation. If passengers whose flights were delayed did not enjoy a right to compensation, they would without any objective justification be treated worse than those whose flights were cancelled. This would offend against

[5] European Court of Justice; joined cases C- 402/07 and C-432/07. Fourth Chamber (K. Lenaerts (president of the Third Chamber acting as president)), R.Silva de Lapuerta, E. Juhasz, G. Arestis and J. Maslenovsky (rapporteur) judges).

[6] Department of Agriculture and Fisheries (Legal Section), Dublin, Ireland.

the principle of equal treatment.

The Court dismissed Air France's contention that technical difficulties involving the flightworthiness of its aircraft or the illness of crew members constituted "extraordinary circumstances" as these events could be reasonably foreseen and were not outside the airline's control.

In giving its decision that compensation was payable in the event of delay as well as in the event of cancellation, the Court gave guidance as to the level of compensation payable, noting that it could be reduced.

Do communications between parliamentary counsel and their 'clients' attract legal professional privilege?

Duncan Berry [7]

In the recent case of *State of New South Wales v Betfair Pty Ltd* [2009] FCAFC 160, the main question was whether or not certain communications between parliamentary counsel attracted public interest immunity and legal professional privilege. The facts were as follows. The respondents, Betfair Pty Ltd ('Betfair') had challenged the conditions imposed on certain approvals granted to it by Racing NSW and Harness Racing NSW in consequence of amendments to the *Racing Administration Act 1998* (NSW) and the *Racing Administration Amendment (Publication of Race Fields) Regulation* 2008 (NSW). The amendments authorised Racing NSW and Harness Racing NSW to grant approval, subject to conditions, to the use of field information. Betfair alleged that conditions imposed on the approvals granted to it by these two bodies, which require it to pay 1.5% of turnover, were unlawfully protectionist and discriminatory in breach of the guarantee of free trade in section 92 of the Commonwealth of Australia Constitution. According to Betfair, the turnover conditions are discriminatory against an inter-State trader (Betfair) and protectionist in favour of an intra-State trader (TAB Limited). Betfair did not challenge the amendments to the legislative scheme enabling the conditions to be imposed. But instead, it challenged the lawfulness of the conditions actually imposed.

The case at first instance

At first instance, the judge outlined the circumstances relating to the creation of the documents in question. He found that Racing NSW and Harness Racing NSW had possession, custody or control of all of those documents. Those bodies were regularly consulted by the NSW Office of Liquor, Gaming and Racing ('OLGR'), which is an office within the NSW Department of Communities and advises the NSW Government on racing and wagering policy and policy implementation.

OLGR consulted racing bodies in NSW with respect to the amendments to the *Racing Administration Act 1998* (NSW) and the *Racing Administration Amendment (Publication of Race Fields) Regulation 2008* (NSW). These were the amendments leading to the grant of the approvals subject to the conditions that were challenged by the respondents. The relevant consultative process involved the establishment of a working group, the purpose of which was to assist OLGR in developing legislative drafting instructions for the Parliamentary Counsel's Office, which is a separate office within the NSW Department of Premier and Cabinet and is responsible for drafting NSW legislation.

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[7] Secretary of CALC; Editor of *The Loophole* and CALC Newsletter; Consultant Parliamentary Counsel, Office of the Parliamentary Counsel to the Irish Government.

The communication that established the working group stated that meetings of the group were "confidential in accordance with the protocol that applies to developing legislation generally" and this statement was reiterated on a number of occasions.

The State of New South Wales intervened in the proceedings at first instance, claiming public interest immunity and legal professional privilege over documents that Racing NSW and Harness Racing NSW had discovered. However, this claim was rejected.

The appeal

At the hearing by the Full Court of the Federal Court of Australia, the State sought to challenge the primary judge's determination that instructions by the executive government of New South Wales to parliamentary counsel for the State were not instructions to provide legal advice, and that the provision of draft legislation to the executive government by parliamentary counsel pursuant to instructions of the executive government did not constitute the provision of legal advice.

In relation to its argument regarding legal professional privilege, the State identified five categories of documents in dispute (noting that some documents fell into more than one category). These categories were as follows:

(1) drafting instructions by OLGR to parliamentary counsel (and drafts of those drafting instructions);

(2) draft regulations and draft Bills;

(3) e-mailed communications made for the purpose of formulating instructions to parliamentary counsel;

(4) part of a report prepared by the Chief Executive of Racing NSW for the Board of Racing NSW summarising information in category 2;

(5) advice from the State Crown Solicitor's Office.

The State argued that the relationship between it and parliamentary counsel was one of client and lawyer, and that the communications in question were confidential. It also submitted that the dominant purpose of these communications was the obtaining or giving of draft legislation by parliamentary counsel to the executive government, which ordinarily involved the seeking and giving of legal advice. The State contended that "[t]he distinguishing work of parliamentary counsel is the application of legal skill and knowledge to the question of what the client might or might not be able (prudently) to do to achieve the policy objective" as previously determined by the Minister's department. According to the State, this required parliamentary counsel to advise—

(1) how a policy might be achieved by legislation; and

(2) whether the drafted instrument conforms to the policy objective, or does so subject to variations or exceptions; and

(3) whether the drafted instrument can legally and validly be made.

Each of these tasks was, so it submitted, interrelated. The State also contended that legislative drafting depended on—

> "… a knowledge and understanding of relevant principles of construction, of the form and structure of primary and secondary legislation, of the ultra vires doctrine and other potential grounds for impugning the validity of delegated legislation, of legal skills in achieving plain English drafting, and of the relevance and operation of the *Interpretation Act 1987* (NSW)".

Role of parliamentary counsel

In contending that the relationship between it and parliamentary counsel was that of client and lawyer, the State relied on the decision in *Waterford v Commonwealth* (1987) 163 CLR 54, 60-2 (per Mason and Wilson JJ.). If advice were sought of and given by parliamentary counsel in relation to the drafting and preparation of draft legislation, this would qualify for legal advice privilege.[8]

The Full Court considered that, in preparing draft legislation, either in the form of a Bill or a regulation, parliamentary counsel do not merely type or format the legislation. Rather, they apply legal skill and knowledge to give written expression to the policy underlying the proposed legislation. Parliamentary counsel would be expected, and perhaps under a duty, to advise upon the legality or effectiveness of the legislation being sought by the instructors. In the case of subordinate legislation, if regarded as beyond power, parliamentary counsel would presumably advise of this view. Similarly, the Court thought if a Bill was considered unconstitutional, or inconsistent with an existing Act of Parliament, this would be a matter on which parliamentary counsel would be expected to advise, even where the only express instruction was to draft the legislation.

Even when no problem of this kind arises, the Court considered that parliamentary counsel, in drafting the legislation and presenting the draft to the government agency, was in effect advising that the draft legislation is in accordance with the instructions given and giving legal effect to those instructions. Although the draft legislation itself is not legal advice, the communication in providing the draft legislation contains implicitly the advice of parliamentary counsel endorsing the draft legislation as being effective and valid.

The conclusions of the Court

The Court felt that it was impossible to disentangle the creation of the draft legislation and the giving of advice in these circumstances. According to the Court, it was not a matter of there being multiple concurrent purposes. However, if there were purposes of equal weight, neither would be dominant and in that case a claim for privilege would fail. But in the instance case, there was is only one purpose, which was to obtain the advice of parliamentary counsel, with the communicating of that advice being given in the form of draft legislation.

The Court found, therefore, that the purpose of a government agency giving instructions to parliamentary counsel is to obtain effective and valid draft legislation that is in accord with the instructions. The provision of draft legislation without more necessarily involved parliamentary counsel implicitly advising that the draft legislation provided was effective and valid.

This conclusion did not, however, necessarily determine the outcome of the appeal. There were two further issues to be considered. The first is what counsel called “the Pratt point”, which arises in the following way. In *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 136 FCR 357, a Full Court of the Federal Court held that legal professional privilege extended to a confidential communication prepared by a third party (regardless of the third party’s relationship with the client) and provided to the client, *so long as the communication was prepared and made with the dominant purpose of its being used by the client to make the necessary communication with the client’s legal adviser to obtain legal advice*.[9] The communication in that case was an accountant’s report prepared at the client’s direction, and it was held to be privileged if prepared with the dominant purpose of its being, or being part of, the client’s communication to its lawyers to obtain legal advice.

The respondents claimed that the ruling in the Pratt Holdings case did not extend to the communications from OLGR to members of the working group before the involvement of parliamentary counsel because

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8 See *Three Rivers District Council v Governor and Company of the Bank of England (No 6)* [2005] 1 AC 610 at 652 and *Workcover Authority (NSW) v Law Society of New South Wales* (2006) 65 NSWLR 502 at 521.

9 Emphasis added.

"the Pratt Holdings extension does not cover communications to third parties authored by the client (the State), but only communications authored by the third party".

The respondents also contended that the evidence indicated that drafts of drafting instructions were given to the working group "to obtain input … from the members of the working group", rather than to obtain legal advice. Moreover, the respondents contended that the State had failed to establish that the various responsive communications by members of the working group to OLGR were made with the dominant purpose of providing legal advice, as opposed to providing their views on the matters in issue or "lobbying" the OLGR.

In response, the State contended that the confidential communications made in the course of formulating drafting instructions in consultation with the Working Group were not materially different from the communications that were the subject of the ruling in *Pratt Holdings*.

In the Court's view, the formulation of appropriate instructions to parliamentary counsel was virtually indispensable if the State was to obtain effective legal advice from that quarter. It considered that the public interest that it does so was self-evidently high. Given the complexity of many matters attracting legislative action, the Court thought that it was to be reasonably expected that the difficulty of preparing such instructions in many situations would be greatly increased without the assistance of informed third parties.

The Court went on to say that, in deciding whether the function of the third party was the relevant function of enabling the client to obtain legal advice, a court will consider not only the client's stated purpose in having the communication created, but also the client's conduct.

Examination of the documents involved in the appeal showed that the preparation and formulation of the drafting instructions to be provided to parliamentary counsel was essentially an iterative process involving both the OLGR and members of the working group. Each successive draft of the drafting instructions provided to the Working Group was a step along the way towards finalising the drafting instructions that were ultimately given to parliamentary counsel and on which parliamentary counsel was to act in drafting the new regulations. Successive drafts were the product of the responses from members of the working group and OLGR designed to move closer towards agreement on a final version of the drafting instructions. This process gave the OLGR and the Working Group members a more or less equal opportunity to contribute to working out consensually the final instructions to be given to Parliamentary Counsel and on which Parliamentary Counsel was to act

The Court found that the consultative process adopted by the State on this occasion was very different from the situation where the State publishes an exposure draft of proposed legislation, and invites public comment. In the process at issue in this case, the Court found that OLGR and members of the Working Group were essentially working together consensually, under a regime of confidentiality, to formulate and finalise the drafting instructions that OLGR was to provide to parliamentary counsel in order for it to obtain appropriate regulations. The Court concluded that the communications were made for the dominant purpose of the State, as represented by OLGR, seeking and obtaining legal advice from parliamentary counsel. It therefore rejected the respondent's claim that the dominant purpose test was not met.

The respondents also sought to distinguish the facts in *Pratt Holdings* from the present case on the basis that they concerned only communications prepared by third parties that were provided to the client for what was said to be the dominant purpose of seeking and obtaining legal advice. Thus, claimed the respondents, the ruling in *Pratt Holdings* did not apply to the situation where communications were being made by the client to members of the Working Group. However, for the purposes of legal professional privilege, the Court felt that there could be no sensible distinction between e-mailed communications emanating from OLGR and sent to the members of the Working Group and emailed communications from Working Group members to OLGR. According to the Court, the rationale for legal professional privilege as

outlined in *Pratt Holdings* would not support such an artificial distinction. Provided a communication was made with the dominant purpose of the client seeking or obtaining legal advice, the Court saw no reason why privilege should not protect communications between the client and third parties whose knowledge was desirable or necessary for the client to obtain the legal advice that the client desires, as in the instant case. Accordingly, the Court rejected the respondent's submissions as to the inapplicability of *Pratt Holdings*.

Did the State waive the privilege?

The respondents had also contended that, even if legal profession privilege did attach to the relevant communications, the State had waived the privilege. The respondent's case on waiver focussed on—

(1) an alleged failure on the part of the State to impose a use restraint on the communications that the State made to the Working Group; and

(2) the use to which one member of the Working Group, Racing NSW, allegedly put these communications, or part of them.

The respondents submitted that the State placed no use restraint on the Working Group's use of the communications flowing between it and the Working Group. However, the respondent's case depended on the proposition that the failure of the State to impose a use restraint resulted in unfairness to Betfair.

On the other hand, the State contended that the respondent's waiver case was ill-founded because—

> A person who would be otherwise entitled to the protection of legal professional privilege in respect of a communication may, at common law, lose that protection by virtue of some act of waiver. In the instance case, the issue for determination was whether the State had done an act of waiver, with the result that it lost the protection that it would otherwise have enjoyed. The test for waiver, formulated by the High Court in *Mann v Carnell* (1999) 201 CLR 1, was one of inconsistency. According to the majority in *Mann* 201 CLR at 13—
>
> > Waiver may be express or implied. Disputes as to implied waiver usually arise from the need to decide whether particular conduct is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect. *What brings about the waiver is the inconsistency, which the courts, where necessary informed by considerations of fairness, perceive between the conduct of the client and maintenance of the confidentiality; not some overriding principle of fairness operating at large.* (Emphasis added)

However, the respondents had not shown that the State, as the privilege holder, had failed to do anything inconsistent with the maintenance of the privilege.[10] As the Court pointed out, the onus was on the respondents to establish the waiver. In this regard, the Court found that there was scant evidence as to the extent to which the Board of Racing NSW "used" otherwise privileged communications passing between OLGR and the Working Group. There was even less evidence concerning the decision apparently made by Racing NSW to grant Betfair approval subject to the condition under challenge in the principal proceeding.

Secondly, as to the making of a resolution on the 1.5% of turnover fee, the Court found that it could not have taken effect. At that stage, there was no *Racing Administration Amendment (Publication of Race Fields) Regulation* containing the relevant subclause, or any equivalent regulation. Indeed, there might never have been any such regulation. The Court thus concluded that there was no basis at that stage on which the resolution could be given effect. Therefore, the respondent's characterisation of the resolution as "a decision to impose a particular fee condition" lacked legal (and indeed evidential) foundation. The Court doubted whether the Board's alleged use of privileged communications was indeed a "use" in any

[10] See *Commissioner of Taxation v Rio Tinto Ltd* (2006) 151 FCR 341 at 354.

real sense.

Thirdly, the State ensured that communications passing between OLGR and the Working Group were made within a clear regime of confidentiality. However, the Court considered, in circumstances like the present case, there was no good reason to require the State to stipulate a use restraint as the condition of maintaining legal professional privilege. Indeed, it was unclear how such a requirement might be formulated. Certainly, the respondent had not formulated what it said the use requirement should have been in the present case. And in the circumstances of a case like this, the Court felt that it could be difficult for the State to formulate a requirement of the kind for which the respondent contended in advance of setting up a consultative body such as the Working Group. In any event, the Court considered that the confidentiality regime imposed by the State implicitly contained relevant use restraints for the protection of the confidentiality at the heart of the privilege.

The Court concluded that, in the circumstances of the case, the State had not acted inconsistently with the maintenance of the confidentiality that the privilege was designed to protect by not imposing a use restraint beyond that implicit in the confidentiality regime imposed by it. The Court thus rejected the respondent's submission that the State had by its acts or omissions waived the legal professional privilege that it otherwise held in the documents the subject of the appeal.

Comment

Apart from the decision of the Full Court itself, which perhaps is not too surprising, that Court's analysis of the role of parliamentary counsel is particularly interesting. It is indeed rare for a court to discuss this issue. Regrettably the perception of many lay people of what parliamentary counsel do is that they dot 'i's and crossing 't's, so it is gratifying to find that the Full Court of the Federal Court of Australia accord appropriate recognition to what parliamentary counsel actually do, i.e. that in preparing draft legislation, they do not merely type or format it, but rather apply legal skill and knowledge to give written expression to the policy underlying the proposed legislation.

Ignorance of the law is no excuse, but what if you can't access it?

Duncan Berry

We are all[11] aware of the maxim "ignorance of the law is no excuse" and that everyone is presumed to know the law that governs their acts or omissions. But people can only know what that law is if they can readily find it. With the advent of the UK *Statute Law Database*, one would have expected that in 21st century Britain, it would not be too difficult to find out what the law is on a given point. However, as the recent decision in *R v. Chambers* [12] illustrates, the position is still far from satisfactory. This case involved an order confiscating the profits made by Chambers from fraudulent conduct in respect of which he had been previously convicted. However, just before the Court of Appeal was about to hear an appeal against an earlier decision making a confiscation order against the appellant (Chambers), it was discovered that the regulations under which the order was to be made had been revoked as long ago as 2001.[13] None of the lawyers involved in the case, nor the judge who made the original decision, nor the three appeal judges had previously been aware that the regulations were no longer valid. At the hearing of the appeal, Toulson LJ, who gave the judgement of the Court of Appeal, was highly critical of the failure to make the law accessible to all. In giving judgement in the case, he had this to say:

11 At least those of us who are lawyers are!

12 All England Official Transcripts (1997-2008).

13 The Regulations in question were the *Excise Goods Regulations 1992*. In 2001, these Regulations were revoked and replaced by the *Tobacco Product Regulations 2001*, which are materially different from the 1992 Regulations.

> "This case also provides an example of a wider problem. It is a maxim that ignorance of the law is no excuse, but *it is profoundly unsatisfactory if the law itself is not practically accessible*. To a worryingly large extent, statutory law is not practically accessible today, even to the courts whose constitutional duty it is to interpret and enforce it. There are four principal reasons:
>
> > First, the majority of legislation is secondary legislation.
> > Secondly, the volume of legislation has increased very greatly over the last 40 years. The Law Commission's Report on Post-Legislative Scrutiny, (2006) Law Com 302, gave some figures in Appendix C. In 2005, there were 2868 pages of new Public General Acts and approximately 13,000 pages of new Statutory Instruments, making a total well in excess of 15,000 pages (which is equivalent to over 300 pages a week) excluding European Directives and European Regulations, which were responsible for over 5,000 additional pages of legislation.
> > Thirdly, on many subjects the legislation cannot be found in a single place, but in a patchwork of primary and secondary legislation.
> > Fourthly, there is no comprehensive statute law database with hyperlinks which would enable an intelligent person, by using a search engine, to find out all the legislation on a particular topic. This means that the courts are in many cases unable to discover what the law is, or was at the date with which the court is concerned, and are entirely dependent on the parties for being able to inform them what were the relevant statutory provisions which the court has to apply. This lamentable state of affairs has been raised by responsible bodies on many occasions, including the House of Lords Committee on the *Merits of Secondary Legislation*.

As Tolson LJ concludes, it is indeed a serious state of affairs when the relevant legislation is not accessible, the Government's own public information website (OPSI) is incomplete and the prosecution unintentionally misleads the court as to the relevant Regulations in force. Although the problem in the Chambers case arose in an excise context, it is indeed part of a wider problem of substantial constitutional importance.

Quinlivan v. O'Dea

A case with some characteristics similar to Chambers arose last year in Ireland. In June last year, Maurice Quinlivan stood as a Sinn Fein[14] candidate for election to the Limerick City Council in Ireland. Quinlivan alleged that the then Minister for Defence, Willie O'Dea, had made allegedly defamatory remarks about Quinlivan, claiming that O'Dea had made comments linking him to a brothel that had operated from an apartment owned by his brother, Nessan Quinlivan. Quinlivan applied for an injunction against O'Dea to prevent the repetition of the remarks. In doing so, he purported to rely on section 11 of the *Prevention of Electoral Abuses Act 1923* (Ire). Subsection (5) of the section provided as follows:

> Any person who shall make or publish any such false statement as is mentioned in this section may be restrained by injunction from any repetition of such false statement or any false statement of a similar character in relation to such candidate, and for the purpose of granting an interim injunction prima facie proof of the falsity of the statement shall be sufficient.

At the hearing of the application, Cooke J refused to grant the injunction pending the hearing of Quinlivan's main defamation action against O'Dea. In refusing the application, the judge said the court did not want to interfere with freedom of speech in an election campaign.

However, neither the judge nor counsel for the parties to the proceedings noticed that the 1923 Act had

[14] An Irish political party.

been repealed in 1992! In contrast to Chambers, information of the repeal was available at www.irishstatutebook.ie. According to a local legal expert[15], it is not the responsibility of the judge to find out whether a relevant statute is in force but counsel who are involved in the proceedings.

The curious case of the perfectly clear scheme

Sandra Markman [16]

The background

A recent High Court case in Ireland[17] highlights the importance of legislative counsel challenging instructing counsel when asked to create legislative schemes, particularly ones that that may prove to be unnecessarily complicated. Unless we vigilantly perform this challenging function, judges may feel justified, or even obliged, to rewrite even the clearest of legislative provisions, leaving basic principles of law as collateral damage.

Most jurisdictions espouse some form of the modern approach to interpretation: the court is to look at the plain meaning of the words to find the intention of the legislature[18] unless the Court decides (formally or by implication) that the result would be absurd (sometimes referred to as resolving ambiguities or clarifying the obscure).[19] The difficulty with that very clear basic principle is, of course, that absurdity is not an absolute value, but has different meanings to different people in different contexts.

When a person's life or liberty are at stake (as with a capital offence, imprisonment, or deportation), it may not strike anyone as absurd to require a government Minister or official to correct an obvious improper delegation of authority to a subordinate official before proceeding. However, when what is at stake is the efficient collection of government statistics, a court may see things in a very different light.

The Dunnes Stores case demonstrates what can happen to even the clearest statutory scheme when the practical inconvenience of enforcing the scheme precisely as written strikes a court as disproportionate to the benefit of strict adherence to principle.

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15 John O'Dowd, lecturer at the School of Law at the University College Dublin.

16 Consultant Parliamentary Counsel in the Office of Parliamentary Counsel to the Irish Government.

17 *Dunnes Stores v. The Central Statistics Office and the Minister for State at the Department on An Taoiseach,* case 2007 No 1664 J.R. of 17 December 2009 (under appeal as of 21st February 2010)

18 See for example section12 of the *Interpretation Act* (Canada) R.S., 1985, c. I-21:

> Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

19 See for example section5 of the Interpretation Act (Ireland), No. 23 of 2005:

> **5.**—(1) In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction)—
>
> (*a*) that is obscure or ambiguous, or
>
> (*b*) that on a literal interpretation would be absurd or would fail to reflect the plain intention of—
>
> (i) in the case of an Act to which paragraph (a) of the definition of "Act" in *section 2* (1) relates, the Oireachtas, or
>
> (ii) in the case of an Act to which *paragraph (b)* of that definition relates, the parliament concerned,
>
> the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole.

Legislative context

The Irish *Statistics Act 1993*[20] provides a mechanism for the Government to collect and compile the statistics it requires for various purposes.

- Section 23[21] generally permits the Director General (a senior civil servant in the Central Statistics Office) to create forms for the collection of information and to fix deadlines for the filing of those forms.
- Section 24 provides that persons may provide information voluntarily if invited to do so by the Director General or an officer of statistics.
- Section 25(1)[22] empowers the relevant minister to make orders requiring persons and undertakings to submit statistics, including in the orders the frequency with which the information is to be provided.
- Section 26(1)[23] permits the Director General to deliver a notice to a person to whom an order under section 25(1) applies essentially asking them to provide information by a particular date.
- Section 36 creates an offence of not providing information when required to do so under section 26.

The Statistics (Balance of Payments and Financial Accounts) Order 2005[24] was made under section 25(1). Article 6 of the Order provides that "[I]nformation … shall be provided, when requested by the Director General, monthly, quarterly, half yearly or annually."

The summons to Dunnes Stores

Acting under the authority of the Act and the Order, the Director General sent a notice to Dunnes Stores requiring it to provide the information quarterly. Dunnes Stores does its accounts annually and refused to submit statistical returns on a quarterly basis. Summonses were therefore issued against Dunnes Stores

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20 No 21 of 1993

21 23.—The Director General may prepare forms, questionnaires and other records for the collection of information under this Act and the instructions necessary for their proper completion, and specify the date or period within which these completed forms, questionnaires and other records or the required information should be returned to the Central Statistics Office.

22 25.—(1) The Taoiseach may prescribe by order a requirement on persons and undertakings to provide information under this Act, specifying, in particular—

(*a*) the general nature of the information required;

(*b*) the frequency with which it is to be provided;

(*c*) the persons or undertakings, or classes of persons or undertakings, required to provide it.

23 26.—(1) The Director General or an officer of statistics may, pursuant to a requirement made under section 25 of this Act, direct by the delivery of a notice any person—

(a) to complete and return a form, questionnaire or other record in accordance with any instructions contained therein or otherwise communicated to him,

(b) to answer questions asked of him by officers of statistics,

(c) to supply any record, copy of or extract from any record,

by a specified date or within a specified period.

24 S.I. No. 125 of 2005

for alleged breaches of the Order (and its predecessor) for failure to provide the information "in response to directions from the Director General made pursuant to section 26 of the Act of 1993". [25]

Competing arguments

In the High Court, Dunnes Stores argued that the Order of 2005—or at least the part of it which purports to require persons and undertakings to provide information quarterly—was ultra vires as an impermissible sub-delegation: that instead of the Minister specifying the frequency for the provision of information he purported to permit the Director General to determine that frequency.

The Central Statistics Office argued that the Act must be read as a whole and it would be anomalous for the legislature to give the Director General the power under sections 23 and 26 of the Act to determine the timing of the completion and return of forms but not allow the Director General to determine the frequency of the particular forms required under the Order.

The Judge's decision

The High Court held that reading the *Statistics Act 1993* as a whole, it would be "wholly disruptive of the statutory scheme and clearly not contemplated in the primary legislation" to suggest that "in individual cases the responsibility of deciding the appropriate time period for the provision of information rested with the Minister" (p 17 of the judgment).

The relevant provision, according to the judge, "mandates the fixing of a regime or menu of time periods for the provision of the information which can be requested under the legislative scheme."

The judge suggested that this sort of day-to-day running of the Central Statistics Office should properly belong to the Director General, leaving the broader issues of what sorts of statistics are to be collected to the Minister. The Court concluded that this is what the legislature must have intended, and therefore refused to strike down the Order, despite the very clear words of the statute.

The Court thought that the reference in Article 6 of the Order to "when requested by the Director General" "is merely a reference to a request by the Director General under s 26(1) of the Act of 1993, which, of course is the statutory foundation of the power of the Director General…to make a legally binding request or demand for relevant information as prescribed in the Order of 2005", even though section 26 does not, on the face of it, give the Director General the power to initiate a request or demand, but merely to deliver a notice directing persons to do things prescribed by the Minister's Order.

Although the judge concluded that having the Minister specify the frequency with which information is to be provided was not contemplated by the Act (p. 18), the judgment did not attempt to reconcile that conclusion with the explicit wording of section 25(1)(b).

A lesson to be learned

The judge's reasoning in this case underscores the importance not only of writing the law as requested, but also of challenging instructions when they create unnecessarily complex schemes.

In Dunnes Stores, the defaulting undertaking was saying to the judge that the Order was technically deficient because it contained an improper delegation of legislative authority. The legislature delegated the power to specify deadlines to the Minister. The Minister could not sub-delegate that power, as the Order purported to do by allowing the deadline to be the one that the Director General requested. On the plain words of the statute, that argument is entirely convincing to a legislative counsel.

[25] Dunnes Stores, case 2007 No 1664 J.R. of 17 December 2009, p .3

However, clarity of expression is not the only value and the Courts' primary goal is to deliver sensible solutions to the problems that come before them. In the real world, what would have happened if the judge had decided that the Order offended the rule against sub-delegation? The likely outcome would have been immediate relief for Dunnes Stores from the summons and its filing obligation, followed by a revised Ministerial Order specifying a quarterly filing deadline, a new notice from the Director General, and compliance by Dunnes Stores.

In short, upholding an important fundamental principle of the law would, in this case, have had no practical impact except to impose some inconvenience on the machinery of government and delay, slightly, its efficient functioning.

It is not that the legislative scheme was unworkable in theory. The Minister's initial Order could have included a filing deadline, such as "information must be provided quarterly" rather than (with respect to the judge's contrary view) improperly delegating that power to the Director General. However, as the facts of the Dunnes Stores case show, those charged with administering the scheme found it hard to keep within the boundaries of legislative and administrative authority that, to a legislative counsel, seem quite clearly demarcated in the primary legislation.

As a result, by the time the interpretation question reached the Court, the judge was faced with a choice between—

- upholding a distinction in the authority of the Minister and the Director General that had no obvious practical benefit (certainly, none was ever proposed to the Court) and was clearly not easy to administer; and
- doing some violence to the plain wording of a statute authorising the collection of statistics.

Had a life hung in the balance, rather than the delivery of a quarterly statistical report on retail sales, there might have been a different result.

It is impossible to ensure that readers of legislation will never misconstrue legislative provisions. However, legislative counsel can contribute to reducing the frequency with which this occurs by helping policy-makers remember that clarity of expression and internal coherence is sometimes not enough to ensure that provisions survive the scrutiny of judges whose decisions must reflect practical, as well as legal considerations. If we do that, we will succeed in our goal of helping Governments maximise their chances of having their policy correctly implemented.

New research tool

Online Legal and Legislative Information Databases: The Global Legal Information Network

Introducing the Global Legal Information Network

The Global Legal Information Network (GLIN) of the Law Library of Congress, United States of America is a public searchable online database of official texts of laws, regulations, judicial decisions, and other complementary legal sources contributed by governmental agencies and international organizations.

GLIN members contribute the full texts of their published documents to the database in their original

languages. Each document is accompanied by a summary in English and, in many cases in additional languages, plus subject terms selected from the multilingual index to GLIN. All summaries are available to the public, and public access to full texts is also available to most contributing jurisdictions currently totalling 35.

GLIN in detail

GLIN is a cooperative, not-for-profit federation of government agencies or their designees that contribute national legal information to the GLIN database. It is a reflection of similar needs shared by government organizations around the world for a lawmaking process based upon knowledge of the laws and regulations of other jurisdictions. GLIN's mission is to acquire, store and provide timely access to this body of critical research and reference material. GLIN members (governmental agencies and international organizations) contribute original-language, officially published, full text documents in electronic format.

The GLIN database contains statutes, regulations, and related legal materials that originate from countries in the Americas, Europe, Africa, and Asia. The information contributed to GLIN must come from official sources, it must be current, and it must be complete.

The data are stored on a server at the Library of Congress in Washington, D.C. and all participating GLIN member nations access this information via the Internet. A distributed network is envisioned and at a later date, the database will reside on servers in other member nations as well as the Law Library of Congress.

While numerous national and regional legal databases have been developed by organizations other than GLIN, these databases serve primarily local uses, whereas GLIN is designed to enable international access and comparative legal research based on a common search method.

The standards for selecting the texts, analyzing them, producing summaries, assigning index terms, and the testing and selection of applicable hardware and software have been developed originally as an international initiative and contribution of the Law Library of Congress.

Agencies and institutions such as the World Bank have provided and continue to support various aspects of the project. GLIN member stations are encouraged to participate in further research and development activities.

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GLIN contains the following categories of legal documents for jurisdictions spanning the globe:

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- Judicial Decisions
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Requirements

Subscription to Membership

There is no fee to either join GLIN or maintain membership, and most countries set up their GLIN stations from existing resources. However the government will be required to sign the GLIN Charter, signifying the country's or organisation's commitment to meet its obligations under the charter.

Establishing a national GLIN station

There is need to develop a national GLIN station which should co-ordinate the activities of GLIN nationwide. The national GLIN station should have a manager, a technical person for Information Technology and a legal and legislative analyst who co-ordinates the efforts of all the other subordinate teams in participating governmental and non-governmental institutions. The manager/director of the national GLIN station is required to attend the annual GLIN Director's meeting at the Law Library of Congress therefore this has to be budgeted for and finances allocated.

Technical requirements

The stations have to be equipped with at least one large capacity computer connected to the Internet and with the indicated version of Adobe Reader as well as a scanner.

Training

Members of the national GLIN station have to receive training, initially at the Law Library of Congress. The costs of training have to be met by the government or designated organization. Given the costs involved, plans are underway to develop an online training programme so that this can be done in the participating country's station.

Benefits for Participating Jurisdictions

There are many benefits of GLIN that range from making the laws and legal information of participating jurisdictions available to its citizens as well as b3ing able to access similar information from other jurisdictions.

For detailed information on GLIN, visit the Help Centre and Frequently Asked Questions areas at http://www.glin.gov/.

Full circle: Whose law is it really?[26]

John Wilson [27]

Squeak, squeak – do you hear the sound of a guinea pig in pain? That's rather how I feel, being asked to give the first CALC Conference lunchtime talk. But I have only myself to blame as I did ask the Council to find space for me to reminisce about my life as a legislative counsel in the context of the theme of the Conference – "Whose law is it?" Or, as I prefer, "Whose law is it really?"

Speakers during mealtimes always face the problem - how to catch the attention of people preoccupied with food and talking to their neighbours? Readers in monastic refectories no doubt had an easier time of it – at least in establishments where the rule of silence prevailed. So what can I do to catch your attention? Shall I stand on my head or tell funny stories?

Over the years, Duncan Berry has published in *The Loophole* a few light-hearted poems and articles of mine about aspects of law drafting. One was about getting drafting instructions in Fiji; another about the *Very Model of a Mod Attorney General* here in Hong Kong. As a result, I believe I have a bit of a reputation as a kind of unpaid Court Jester for CALC. (The items are also on my website and have attracted some attention and even generated some drafting work over the years.)

So, how to be light-hearted without being frivolous in this august assembly? Well, I chose as my theme "Full Circle" which, as many of you know, was the title of a book by Michael Palin. It described a journey he made round the world for the BBC. He meant it literally: I mean it in a more figurative sense, although coming back to Hong Kong after 30 years does complete a circle for me.

I couldn't resist asking to speak here in Hong Kong, where I spent the longest time in my professional career (15 years in all from 1983.) The Law Drafting Division then had legislative counsel from many parts of the Commonwealth, and from Ireland, and the range of work was very wide. It was here that the inaugural meeting of CALC took place back in October 1983 and legislative counsel like Gerry Nazareth, George Engle and Walter Iles were involved. In Hong Kong, I had the privilege of dealing with many legal

[26] CALC Conference, April 2009, Hong Kong. This talk was given on 3 April 2009 during the conference lunch break.

[27] Consultant legislative counsel. John Wilson is a consultant legislative counsel who is now based in the United Kingdom. A law graduate of Oxford University, he first practised as a common law Barrister in Birmingham. In 1976 he went to the Solomon Islands as Crown Counsel, then to Tuvalu as Attorney General. In 1979 he went to Montserrat, also as Attorney General. In 1983 he went to the Law Drafting Division in Hong Kong where he became head of the Localisation & Adaptation of Laws Unit. He returned to the Pacific in 1997 to do law drafting work for Tuvalu and for Fiji (First Parliamentary Counsel.) He also returned to the West Indies as Legal Draftsman for Grenada. He did a further 2 year stint in Hong Kong from 2002.

Since 2004 he has been based in Kettering, England, as a consultant legislative counsel and has been working mostly for Pacific island jurisdictions and Gibraltar. He has been a member of CALC since it was established in 1983. His contact details are: johnfwilson@btopenwotld.com or www.lawdrafting.co.uk

aspects of the handover, or reversion, to Chinese sovereignty in the run-up to 1997. I also made many lifelong friends – including several colleagues in the Law Drafting Division whom I am delighted to see here as Associate Members of CALC. In Hong Kong, the Law Drafting Division has always had a rather sedate reputation. I vividly recall Max Lucas, the then Hong Kong Director of Prosecutions, walking along the corridor of the Division calling out 'Bring out your dead'.[28]

Return to the United Kingdom

So – What other Full Circles can I identify? One is the fact that I am now living in the United Kingdom after an absence of nearly 30 years. It is a good place to locate as a law drafting consultant, but it was a shock to find how many rules and regulations have been generated by political correctness and health and safety requirements. Of course people should be free from danger at work as far as possible, but it is a bit much when a risk assessment is needed on a budgerigar for an old people's home; or Police Community Support Officers stand by while a child drowns because they are not qualified as life-savers. It seems the law now requires the biscuits at a fundraising coffee morning to be checked for nuts allergy; and every church must have a certified person to change a light bulb.

Some of these rules probably emanate from insurance requirements, but many seem to come from regulations made in the Ministries. At least we can't blame the Office of Parliamentary Counsel in Whitehall for regulations, as they don't draft them – not like legislative counsel in the jurisdictions I have worked in.

By contrast, the casualness of official life in Britain is quite startling. I was looking up an Order in Council the other day [the *Police & Criminal Evidence Act* (Application to *Customs & Revenue) Order 2007*] and found it was signed by Dave Watts and Steve McCabe – 'Two of the Lords Commissioners of Her Majesty's Treasury'. Are 'Dave' and 'Steve' the names on their birth certificates, and are their signatures valid, I wonder? (I must admit that my former boss and head of the International Law Division here in HK was 'Fred' Burrows - but that was on his birth certificate.)

Another full circle for me is going back to the Inner Temple in London to do research for the work I am now doing for Gibraltar. It is one of the pleasures for a legislative counsel who is a Barrister - as I know many of you are – to be able to retain links with the Bar without being caught up in concerns over legal aid and contingency fees and pupillages and tenancies. It also helps in obtaining consultancy work to be able to show a Bar qualification, though one cannot claim to be practising without a practising certificate.[29]

I have done two full circles of the globe in my drafting work over the years – from the Pacific to the West Indies to Hong Kong twice around. I call it 'Working in 3 hemispheres'. My motto is: 'Have pen, will travel'.

My first contract overseas, in 1976, was in the British Solomon Islands Protectorate, as it then was. I just missed working under Gerry Nazareth, who had been Attorney General came to Hong Kong as its Law Draftsman.

In 1977 I moved on to Tuvalu, formerly the Ellice Islands, as Attorney General and helped it become an independent country of 8,000 people. That's about the same population as a large housing estate here in Hong Kong. I drafted Tuvalu's citizenship laws, fisheries laws and other laws needed to establish sovereignty in a legal sense. I even prosecuted a Taiwanese fishing vessel under my Fisheries Act, but that's another story.

In 1979 I went to Monstserrat, again as AG, and did prosecution and advisory work as well as law drafting.

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[28] I was a contemporary of Max Lucas in the Hong Kong Attorney General's Chambers and recall his derogatory description of the Law Drafting Division as "the land of the living dead": Ed.

[29] John Wilson, in an aside, has suggested that a possible topic for a future CALC Conference might be "The legislative counsel's relationship with the legal profession".

Montserrat was, and still is, a British overseas territory (or half of one, since the volcanic eruption of 1997.) It was the rather bruising encounters in prosecution work that made me decide to specialise in law drafting, and I was glad to be accepted in the Law Drafting Division by Gerry Nazareth here in 1983.

Since leaving Hong Kong in 2004 I have worked from home in the United Kingdom as a consultant for small independent jurisdictions and I have been fortunate to be able to continue travelling to the Pacific.[30]

Drafting in Gibraltar

Now my main drafting work is for Gibraltar and that really does bring me Full Circle in professional terms. As most of you know, Gibraltar is a small peninsula on the southern tip of Spain. It has been a British possession since 1704 and is still a British Overseas territory. (We don't say 'colony' any more, or even 'Dependent Territory.') Its new constitution, adopted in 2006, is similar to the pre-independence constitutions of Solomon Islands and Tuvalu that I first encountered when I went overseas so

this makes another Full Circle for me.

For Gibraltar I am doing a complete rewrite of the Criminal Code, both on offences and procedure and it is proving to be one of the most stimulating and worthwhile drafting projects I have undertaken. I am glad to see that Paul Peralta, who heads the Legislation Support Unit in Gibraltar, is here and can vouch for the fact that it is quite a challenge.

When I worked for Hong Kong it was of course still a British overseas territory. Now that I am working again for a British overseas territory I find I am using the experience that I gained in Hong Kong not only in drafting but in three related areas of law. As I mentioned earlier, much of my time here was taken up with legal work connected with the reversion to Chinese sovereignty. The 'One Country, Two Systems' concept had to be given legal flesh and I was closely involved in three aspects of that –

- implementation of international obligations relating to Hong Kong;
- localisation or repatriation of English laws that applied to HK, but which would cease to apply in 1997;
- adaptation of the HK statute book to become the statute book of the HK SAR, in line with the Basic Law of the SAR.

For example, what is the appropriate term to replace 'the Crown' when a territory does not have a Head of State itself but its laws are separate from those of the mother country which does? The then Law Draftsman Jim Findlay, whom many of you will remember, suggested replacing 'Crown' by 'Hat'. The problem has still not been entirely solved – there are some pink 'Adaptation of Laws' files in the Law Draftsman's room to this day, I believe.

Each of these tasks is also required in Gibraltar, where European Council directives apply and need to be implemented locally; where some English laws continue to apply by their own force or by the English Law (Application) Act; and where the 2006 Constitution transferred most of the legal functions of the Governor to Ministers.

Paul Peralta and his colleagues in the LSU are mainly responsible for drafting legislation to implement EU Directives and they have the difficult task of deciding whether to follow United Kingdom practice or to devise new legislative solutions.

The adaptation of laws has been achieved by the Gibraltar Laws (General Amendment) Act which was passed in 2008.

The localisation of laws for Gibraltar has still to be done, and I have been asked to take on that work. The

[30] My model Biosecurity Bill for the Pacific islands was the subject of the drafting Master-class in Nairobi in 2007.

English Law (Application) Act is similar to the Application of English Laws Act here in Hong Kong and other former British territories. The task will be to enact local versions of those English laws that are still relevant and required, while not severing the constitutional links with Britain entirely. I will be relying quite a lot on the research that I did for Hong Kong, assuming I can lay hands on the material among the heaps of papers in my office.

So - Whose law is it?

Does the phrase mean: Who makes the law?

Or for whom is it written? Or, who is protected by it?

The question 'For whom is the law written?' involves drafting style on which we have heard much and will hear more at this Conference. I prefer to consider the question – Who really makes the law?

Is the law what is contained in Privy Council Orders? Perhaps it is made by our informal friends Dave and Steve, having a chat and jotting things down on an envelope.

Do local authorities make the law? I ask this because in the United Kingdom it is apparently left to local authorities to decide on the definition of a 'religion' for purposes of exemption from Council tax. In the House of Lords in February 2009 Baroness Andrews said - "it is for local authorities to reach a view on whether the exemption applies in any particular case and for the courts to interpret the meaning of the term in the context of any cases which may come before them." That seems rather a cynical surrender of the legislative power, to local authorities (which might each take a different view) or the courts (which will only decide on the basis of expensive litigation.)

So is the law made by Judges? I am not thinking so much of case-law (though in the jurisdictions I have worked for English case law has far less relevance and significance than statute law.) What I have in mind is the United Kingdom *Criminal Procedure Rules 2005* made by the Criminal Procedure Rule Committee under section 69 of the *Courts Act 2003*. There are significant provisions in the CPR, for example on giving notice of intention to call an expert witness, and on the anonymity of defendants in Attorney General's references. Is it satisfactory that such provisions should be made by the judges, rather than by Parliament itself?

I am also thinking of the Sentencing Guidelines issued by the United Kingdom Sentencing Guidelines Council. What is their status as laws in Britain and therefore in all those jurisdictions that look to Britain for guidance on sentencing matters?

Sources of law

Let me share a few more thought s on the sources of criminal law. In many small Commonwealth jurisdictions the criminal law is contained in outdated codes based on the Stephens or Macaulay codes of the 19th century and rarely updated. Fiji, for example, has been so preoccupied with coups and their aftermath since 1987 that it has not had chance to update its criminal offences and procedure. (Currently, Fiji does not have Acts of Parliament but Promulgations by the President acting under prerogative powers.)

In Gibraltar the new criminal law will continue largely to follow the Acts of the British Parliament. But it is difficult to keep track when there are so many changes in British criminal law. On criminal procedure, the *Police and Criminal Evidence Act 1984* ('PACE') began the torrent of legislation. The *Crime and Disorder Act 1998* (what a great title!) was followed by the *Powers of Criminal Courts (Sentencing) Act 2000*, the Criminal Justice & Courts Services Act of the same year, the *Criminal Justice Act 2003,* the *Police and Justice Act 2006*, the *Youth Rehabilitation and Criminal Justice Act 2008* and the *Criminal Justice & Immigration Act* also of 2008. There is in fact at least one new Act on criminal procedure every year; criminal law has become a political football and every Home Secretary has to have a new Act.

As a result of the passion to legislate, the key textbooks, Archbold and Blackstone, have to be reissued every year, with supplements during the course of the year – all prohibitively expensive. Yet despite the amount of detailed legislation enacted very year, there are dozens of court cases explaining the law. I note that access to the laws is one of the themes of this Conference. But another question is - How many laws does a country need? Tuvalu, for example, has only 3 volumes of statutes.

The fact is that the written laws of small or developing countries do need to be supplemented by reference to the laws of bigger countries. But an interesting statistic mentioned in Counsel Magazine recently is that in India, two-thirds of the laws on the statute book i.e. inherited from the British Parliament, are never used.

When I mention the British Parliament I mean of course the English Parliament, as distinct from the Scottish Parliament. The *Criminal Procedure (Scotland) Act 2005* is not the precedent being followed by Gibraltar, except in an important respect in relation to the retention of DNA samples etc. (See the judgment of the European Court of Human Rights in the case of *S & Marper v. UK*, December 2008.)

This leads to the question - Is the law really the law of the European Court and Commission? Are EC Directives going to impinge increasingly on the role of Parliament? Topics such as separation of juveniles; life sentence recommendations to be by the jury; reasons for decisions to be given by juries (a principle that Westminster has not followed so far) are all affected by decisions of organs of the European Union. I cannot embark on a discussion of this topic now, but it is an important one for legislative counsel working with jurisdictions in Europe.[31]

Conclusions

Turning back to my work in Gibraltar, I must say it is nice to be dealing again with local issues of a small jurisdiction.

- There are only 2 police stations and only one Magistrates' Court.
- The Parliament sits infrequently, and the Court of Appeal only sits twice a year.
- There are some rather special features of the criminal law (see Annex).
- One is a prohibition on the Rock Apes (Barbary Macaques) to come down from the Upper Rock.
- Another is an offence of keeping carrier pigeons which probably dates back to the Great Siege of 1769.
- There is also a prohibition on camping on Crown land.
- There is an interesting rule of evidence about Spanish police officers not being allowed to give evidence by their superiors (see Annex).
- There are also interesting questions for the constitutional lawyers among you: Is an assault on the Governor treason? Does the rule about statutes not binding the Crown mean they do not bind the Government?

These things all affect how one drafts laws for Gibraltar (or any small jurisdiction.) Although following United Kingdom precedent, the laws we are drafting will be the laws of the people of Gibraltar, enacted by their own Parliament. Working in a small jurisdiction provides an opportunity for the legislative counsel to do some creative drafting.

- We have codified some parts of the criminal law that are elsewhere left to common law, such as a definition of seditious intention and the offence of kidnapping.
- We will be adding some duties to the Judicial Committee of the Privy Council e.g. AGs

[31] Another topic for a future CALC Conference perhaps.

references and appeals on sentence.

- We are looking at the possibility of a law to provide for lay assessors to hear trials of complex fraud and other financial crimes.
- We plan to adopt the *Criminal Offences (Anonymity of Witnesses) Act 2008* but without the sunset clause, so there will be no need to renew it each year.

This all takes me back to Tuvalu and the Pacific islands where the legislative counsel is relied on to use his or her initiative to find original solutions. It is Full Circle for me also in working with a small team and helping to make policy decisions on the run. As regards the role of the legislative counsel in formulating policy generally, see my earlier contributions to CALC. My conclusion is still, that in many significant ways *it is the legislative counsel who makes the law***.**

Lily Tomlin once said "I always wanted to be somebody; now I wish I had been more specific." I might not have been 'somebody' in a wig with a title; but I have no regrets at having gravitated towards law drafting. I have enjoyed, and indeed am still enjoying, being a legislative counsel and I thank the Council for indulging me in this few minutes of reminiscence. I hope it has not put everyone off the idea of a lunchtime address (or even off their lunch.) Squeak, squeak!

ANNEX - LAWS OF GIBRALTAR

Criminal Offences Act 1960—Importing and keeping carrier pigeons, etc.

46. (1) No person shall import or keep in Gibraltar any carrier pigeons or any pigeons which the Governor may consider capable of being used for the purpose of conveying intelligence, without the permission in writing of the Governor and under such conditions as may be prescribed in such permission.

Prohibition of camping on Crown land—165B

(1) No person shall camp on Crown land except–

(a) persons authorised to use the places specified in Schedule 3, within the limits of their authorisation; or

(b) with the previous permission in writing of the Director:

Provided that nothing in this section shall apply to the use of any portion of the seashore under and in accordance with a permit issued by the Minister under rule 3 of the Seashore Rules.

Feeding of Rock apes

271. A person who encourages the rock apes to come down from the Upper Rock or who, not being a person authorised by the Minister with responsibility for tourism, feeds them at any place is guilty of an offence and is liable on summary conviction to a fine up to level 3 on the standard scale.

Criminal Procedure Act 1961—First-hand hearsay

94. …

(5) The requirements of subsection (2)(b)(ii) or 3(b) of this section shall be deemed not to have been satisfied if the failure to secure the attendance of the person who made the statement or the failure of that person to give oral evidence as the case may be is principally due to the fact that the person making the statement is directly or indirectly subject to superior instructions to the effect that he should not attend before the Court in Gibraltar or give oral evidence before it by virtue of that superior authority's non

recognition of Her Majesty's courts in Gibraltar or any other political reason.

Legislative drafting style: Regulations from Nauru

The follow are Regulations from the Pacific Island of Nauru. To most of us today, these Regulations will appear both puritanical and draconian.

Native Administration

THE ISLAND OF NAURU
32

Administration Order No. 7 of 1933

REGULATION UNDER NATIVE ADMINISTRATION ORDINANCE 1922.

Movement of Natives

The Chief of a District is given authority to order any person male or female under the age of 21 to remain in his or her District between the hours of 6 p.m. and 5.30 a.m.

Action taken under this Order is to be reported in writing to the Head Chief. The Head Chief will report all cases to the Administrator weekly.

A Chief of a District may also apply to the Head Chief for authority to order any person male or female between the ages of 21 and 25 to remain in his or her District between the hours of 6 p.m. and 5.30 a.m.

Any Native Failing to comply with the order of the Chief of his or her District will for the first offence be liable to a fine up to the limit that can be inflicted by a Chief, that is a fine of £1.

Any subsequent breaches render the offender liable to be charged before the District Court of Nauru.

Given at Administration Head-quarters, Nauru, this twenty-second day of July, 1933.

R.C. GARSIA, Administrator.

THE ISLAND OF NAURU

Administration Order No. 1 of 1936.

[32] Published in *Gazette* No. 30 of 22nd July, 1933.

REGULATIONS UNDER THE NATIVE ADMINISTRATION ORDINANCE 1922 — TO CONTROL NATIVE DANCING ON NAURU

The Regulations may be cited as the Native Dancing Regulations 1936 and shall come into operation forthwith.

1. No Native shall be forced to dance.

2. Dancing shall take place only in the District Meeting Houses, Domaneab, or other places authorized by the Administrator in writing which authority may be withdrawn at any time and is strictly prohibited in other places.

3. Dancing is allowed only on Wednesdays, Saturdays and Public Holidays of a non-religious character.

4. (a) Dancing before 6 p.m. and after 9.30 p.m. is prohibited.

(b) At 9.30 p.m. on dancing days the District Constable shall sound his conch shell (down) beside the Meeting House and the dance shall cease.

5. No dancing shall take place in darkness. All males attending a District Dance shall carry lamps (not electric torches). Any man attending the Dance without a lamp shall be sent home with all his womenfolk. This applies to spectators as well as dancer.

6. No girl under the age of 18 years shall, unless accompanied by her parent or guardian, approach the District Meeting House or Domaneab. The parents or guardian of girls who are negligent shall be deemed to have committed an offence.

7. Anything of an indecent nature is forbidden including indecent words, gestures, or movements of the body. Songs which appear on first sight to be clean, but which convey an indecent meaning are also prohibited.

8. Any person who acts in an indecent manner as described in section 7 shall be deemed to have committed an offence. Any Chief or District Constable who is negligent in preventing indecent dancing or in charging offenders under this section shall be deemed to have committed an offence.

9. Any person desiring to bring evidence of an offensive dance shall do so through the Chief of the District. The Chief and the District Constable shall diligently inquire in the truth of such evidence and shall within three days after hearing of such evidence report to the Administrator.

10. Mixed Dancing (male and female) is strictly forbidden.

11. Dancing rehearsals are allowed in private houses on Mondays and Thursdays from 6 p.m. to 9 p.m. provided the number of persons does not exceed four. It is an offence to chant in a loud voice at such rehearsals.

12. Any person doing anything forbidden by these Regulations shall be deemed to have committed an offence. A person who is deemed to have committed an offence under these Regulations shall be liable to

a fine of 10s. or imprisonment for not more than one month or both. A Chief may, with the approval of the Administrator, suspend the dance in any District for any period, on account of the offence of any individual.

13. Chiefs and District Constables who are weak or negligent in the enforcement of these Regulations shall be deemed to have committed an offence under these Regulations and shall be liable to a fine of 10s. and the authority granted to dance in that District may be withdrawn.

Dated at Administration Head-quarters, Nauru, this fourth day of July, 1936.

RUPERT C. GARSIA, Administrator.

Commonwealth Association of Legislative Counsel

MEMBERSHIP APPLICATION FORM

The Secretary, Commonwealth Association of Legislative Counsel,
3 Caddell, The Links, Station Road, Portmarnock, County Dublin, Ireland..

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

(signed) …….. Applicant

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

Please specify—

(a) the name and address of your place of employment……..
……..……
……Post code ……

(b) your home address ……..……
……. Post code ……

(c) your office telephone no. [§] …….... your home telephone no.[§] ….……....

(d) your office fax no. [§]……

(e) your office e-mail address……...

(f) your personal e-mail address ……..

I *have no objection to having/do not wish to have** my home address and telephone number being included in the publication list of members. [**Delete the words that you do not want to apply to you.*]

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§ Please include your country and area codes.
Instead of sending the completed form by post, you can send it by e-mail if you wish. The e-mail address is dr_duncan_berry@yahoo.co.uk.