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

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

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Abstract:

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

Contents

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Some possible criteria by which to measure "high quality"

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Are we there yet? How will we know?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The recommended amendments related to—

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

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

- the availability of relevant enforcement provisions.

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

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

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

Conclusions

72 This paper draws the following conclusions:

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

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

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

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

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