It's Just Your Imagination – Some Thoughts on the Role of Parliamentary Counsel in Ensuring Practicability of Legislative Instruments

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Introduction

Although we legislative drafters do not have primary responsibility for the efficiency and effectiveness of the legislation we are asked to write, we should always be conscious of the workability of what we create. The drafter's role is not merely to translate drafting instructions into legislative language, but also to produce a legislative instrument that is "fit for purpose".

A drafter cannot maintain that instruments drafted are complete if they do not clearly "defin[e]…the obligations of the regulated target group … and [deal with]… the feasibility for these individual addressees of the legislation to spontaneously comply with their obligations as defined".[2]

This paper deals with three areas where drafters are especially well-placed to identify (and help resolve) workability issues: commencement provisions, transitional provisions and penal sanctions.

Commencement provisions

The policy development process typically does not focus much on the issue of when and how legislation is to come into effect. If the question of "when" comes up at all, the most common response is "yesterday", and if anyone thinks of how the new law is to come into force, "in the usual way" would probably be the leading answer.

Once government has finally come to a decision that a policy is to be implemented in a formal and binding way through legislation, it typically wants instructing officials to instruct, advisory counsel to advise and legislative counsel to draft as quickly as possible so that a Bill can be presented to the legislature immediately, if not sooner. Then, at a politically opportune time, the Bill can be passed, the government can announce that a new law has come into force and "Bingo!", another problem is solved.

The result is that during the planning and drafting stages, (and indeed during the piloting of the Bill through the legislature) the members of the drafting project team are often so caught up with producing an instrument

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[2] European Union Network for the Implementation and Enforcement of Environmental Law/Network of the Heads of Environmental Protection Agencies, *Checklist to assess practicability and enforceability of legislation*, March 2010 http://impel.eu/wp-content/uploads/2010/04/IMPEL-and-NEPA-Better-Regulation-Checklist-FINAL.pdf (accessed on 19 December 2010).

that will, once in force, deal adequately with the policy issue that they lose sight of the practical obstacles to commencing the Act. The drafter therefore has a special responsibility to raise the practical issues around commencement.

One of the most important considerations is whether the primary legislation needs secondary legislation to complete it. Members of a drafting project team must understand the scope of the delegated legislation required to complete the legislative scheme, not only to ensure that there are sufficient powers in the Bill to allow all of the required secondary legislation to be made, but also to plan for drafting of those secondary instruments (whether they are to be drafted by the drafter of the Bill or someone else). Not having the secondary legislation ready is one of the most common reasons not to have an Act commenced as soon as it made.

Beyond the legislation itself, a number of practical administrative questions must be considered. Will forms, guidelines and other non-legally-binding documents be required for the legislation to be effective? Will there have to be personnel in place to deal with requests from people seeking to understand the new legislative scheme, or to apply for benefits under it? Are trained Government officials required to enforce the new scheme?

These practical questions are often not even conceived of by the members of the drafting team (who might be working on their first legislative file), let alone addressed by them. Drafters should be prepared to discuss these issues with the instructing officials and offer guidance as necessary.

The drafters' legal and practical expertise is also particularly valuable in understanding how to commence provisions and advising on the drafting of commencement orders.

A recent High Court case in Ireland[3] highlighted a situation that careful commencement drafting and planning could have avoided. A new scheme for assessment of persons with disabilities was enacted and the enabling provision allowed for phased-in commencement so that the relevant part of the Act was to "come into operation on such day or days as, by order or orders made by the Minister…may be fixed therefor either generally or with reference to persons of different ages…"[4] The commencement order stated that "The 1st June 2007 is hereby fixed as the day on which [the relevant provision] comes into operation in relation to persons under 5 years of age."[5]

The High Court was faced with conflicting views as to whether this order meant that applications could be made on behalf of children who were under the age of 5 years on 1 June 2007 (*i.e.*, that the right was frozen and the only people who could apply for an assessment were people born between 2002 and 2007) or that applications could be made, after 1 June 2007, on behalf of children who were under the age of 5 when the applications were made. Ultimately, it decided that "The right to an assessment of needs under s. 9 applies to all children under 5 as of 1 June 2007 and, thereafter, to all children under 5."

If the question had been thoroughly canvassed when the commencement order was being drafted, the desired policy could have been clarified and the commencement order drafted accordingly.

[3] Health Service Executive v Dykes et al, [2009] IEHC 540.
[4] s 1(3) of the Disability Act 2005 (No 14 of 2005).
[5] Disability Act 2005 (Commencement) Order 2007 (S.I. No 234/2007).

Transitional provisions

The members of a drafting project team are even less likely to think about the necessity or desirability of transitional provisions. A new legislative scheme should not trample on acquired rights or legitimate expectations but, as G. C. Thornton writes:

> Instructing officers are notoriously inadequate in the area of savings and transitional provisions, perhaps because they tend to be preoccupied with how a new scheme will operate in the future rather than the mechanics of the transition from the present to the future state of affairs.[6]

Sometimes the issue to be clarified is as simple as stating that an application to a body replaced in new legislation by another body continues with the new body and does not need to start over. Sometimes there is an issue about licences issued or registration completed under a former regime and how they are to be treated under the new system being enacted. Sometimes a government body is being closed down and provision must be made for the employees to be transferred elsewhere, for contracts to continue in the name of another body to which functions are being transferred, or to a Minister or Government Department, for legal proceedings to continue, *etc*.

Sometimes the matter is more complicated, as was the recent case where a question was certified as a matter of exceptional public importance and sent for direction to the Supreme Court of Ireland[7]. Legislation that amended the European Arrest Warrant Act 2003[8] removed the necessity for a European arrest warrant to provide that the person sought for extradition had fled the requesting state before commencing or completing sentence for the offence for which the extradition was being requested. The question for the Supreme Court was whether the removal of this condition could apply to permit the extradition of a person, without proof that he had fled, when the European arrest warrant was issued *before* the amendment but the hearing was taking place *after* the repeal of the requirement to prove that the person had fled.

Whatever the issue, it is unlikely that anybody other than the drafters will even recognize that the issue exists. It therefore falls to Parliamentary Counsel to encourage the other members of the drafting team to focus on how to move smoothly from the existing legal situation to the new regime.

Penal sanctions

As Paul Delnoy writes:

> Generally, the legislature—whatever the content of the norm it adopts—wants it to be effective and efficient, "effective" meaning that the norm produces effects, that it does not become a dead letter, and "efficient" in the sense that the norm should produce the desired effects, should not have perverse effects and should so guide conduct as to achieve the desired objective.[9]

There is no point in criminalizing behaviour if the sentencing regime in the legislative instrument does not deter people from engaging in the proscribed behaviour and enable judges to punish those who nevertheless do engage in it.

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[6] G.C. Thornton, *Legislative Drafting*, 4th edition, p 438.
[7] Minister for Justice, Equality and Law Reform v Jastrzebski [2010] IEHC 202.
[8] No 45 of 2003.
[9] The role of legislative drafters in determining the content of norms: http://www.justice.gc.ca/eng/pi/icg-gci/norm/index.html (accessed on 19 December 2010).

There are certainly studies that show that mandatory minimum sentences sometimes have the opposite effect from the "be tough on crime" deterrence they seek. Juries will not convict where they know that the effect would be a sentence they consider too harsh[10].

A recent report highlights an extreme example. An Arizona law required judges to impose mandatory consecutive sentences on persons convicted of possession of child pornography for each item possessed. This apparently resulted in a person being sentenced to 10 years for each of 20 items, or a total of 200 years. The report goes on to suggest that this would be a significantly more serious penalty than the penalty for actually molesting a child.[11]

I am not suggesting that legislative counsel can be experts on every area of the law. However, drafters do have a role to play in testing the policy. No one doubts that drafters should be asking questions such as: "Are you comfortable that your desired manner of expression differs from that currently used in the statute book in this jurisdiction to an extent that resourceful counsel could exploit to their clients' advantage?" What I am suggesting is that the value that drafters can add extends to raising questions of the desirability of the route chosen by instructing officials.

Conclusion

Drafters cannot be—and should not be—the guarantors of the soundness of the policy of the legislative instruments that they draft. But Parliamentary Counsel do have a responsibility to challenge assumptions and point out pitfalls in the way they are uniquely placed to do.

Tobias Dorsey suggests that without this support to policy there would not be a failure to communicate (which most people expect drafters to guard against) but rather a "failure to imagine" (which, I would suggest, is also an area where drafters' expertise could be put to good use).

The problem is not on the page and is invisible to the naked eye. The words look fine, but the thinking behind them is less than thorough. A failure to imagine cannot be cured by editing after the fact; it can be cured only by thinking through the policy.[12]

Helping governments think though their policy so that it can be communicated clearly to produce a workable and enforceable legislative instrument is the goal for every Parliamentary Counsel. Making full use of our imaginations is an essential element of our contributions to that end.

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[10] http://www.policyalternatives.ca/publications/commentary/harpers-tough-crime-bills-costly-counterproductive
[11] http://www.eastvalleytribune.com/arizona/article_63e63880-07d2-11e0-8ce7-001cc4c002e0.html
[12] http://www.scribd.com/doc/19277090/Legislative-Drafters-Deskbook-A-Practical-Guide-by-Tobias-Dorsey