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The Loophole is a journal for the publication of articles on drafting, legal, procedural and management issues relating to the preparation and enactment of legislation. It features articles presented at its bi-annual conferences. CALC members and others interested in legislative topics are also encouraged to submit articles for publication.

Submissions should be no more than 8,000 words (including footnotes) and be accompanied by an abstract of no more than 200 words. They should be formatted in MSWord or similar compatible word processing software.

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Editor's Notes

To those who are uninitiated to legislative drafting, it might seem like the driest and most boring of subjects, as exciting as watching paint dry. But members of CALC know otherwise. Lurking within the forms and practices that constitute this discipline are debates about a myriad of questions that only those who draft legislation ever encounter directly. This issue of the *Loophole* demonstrates this point amply by presenting an extensive commentary on one of the most innovative contributions to legislative drafting to be published in recent years. This issue is unusual in that it contains a single article commenting on a single book. But the book and the article span the field of legislative drafting and together demonstrate the scope for debate about the theory and practice of legislative drafting.

On one side is Professor Helen Xanthaki, Director of the International Post-graduate Law Program at the University of London, who published the 5th edition of Thornton's iconic *Legislative Drafting* and has followed it up with her own *Drafting Legislation: Art and Technology of Rules for Regulation* in 2015.

On the other side is Dr. Duncan Berry, legislative counsel emeritus and one of the founders of CALC. Dr. Berry's commentary canvasses the many drafting issues discussed in Professor Xanthaki's *Drafting Legislation*, concurring with her in some cases, but differing in many others. Together, they address a bounty of questions that could feed the planning of CALC conferences for years to come.

And for readers who are wondering about the papers presented at the conference and workshop earlier this year in Melbourne and Sydney, there is much to come in later issues of the *Loophole* this year and the next. As is often the case, the conference provides more food for thought to the speakers, who are now fine-tuning their presentations into papers for publication.

John Mark Keyes
Ottawa,
June, 2017

Professor Helen Xanthaki's *Drafting Legislation: A Practitioner's Perspective*

Duncan Berry¹



Abstract

*This article comments in detail on a recently published book by Professor Helen Xanthaki entitled *Drafting Legislation, Art and Technology of Rules for Regulation*. Her book discusses a wide range of issues that if not of fundamental importance to the work of legislative counsel, are of considerable interest to them. This article canvasses and comments on the author's views and suggestions on legislative drafting and provides a perspective informed by his many years of practice as legislative counsel.*

Introduction

This article comments on a recently published book entitled *Drafting Legislation, Art and Technology of Rules for Regulation*.² At the outset, I should point out that this is not, and is not intended to be, a conventional book review. The author, Professor Helen Xanthaki, discusses a large number of issues that if not of fundamental importance to what we do as legislative counsel, are of considerable interest to us. So I have not only canvassed and

¹Barrister (England & Wales; New Zealand; NSW, Tasmania and Hong Kong), SJD, MPP, LL.M, GDSM, LL.B; Consultant Parliamentary Counsel. The writer wishes to acknowledge the contributions made by Stephen Pye (Irish Office of Parliamentary Counsel) and Richard Barrett (Deputy Director-General, Irish Attorney General's Office) towards my comments on chapter 8 and for the constructive comments made by Bilika Simamba (legislative counsel in Cayman Islands).

² Bloomsbury Publishing: London, 2015.

commented on the author's views and suggestions on these issues, but have also added my own perspective on them.

Much scholarship and research has gone into writing this book. However, after reading it, I was left with mixed feelings. On the one hand, the author makes some very good points and suggestions for improving the quality of legislation, which I am sure will stimulate discussion among my fellow legislative counsel. On the other hand, I found much of the book overwritten³ and, in some instances, esoteric. I also believe that some legislative counsel may find it overly academic, with unnecessarily frequent references to the Greek philosophers, such as Aristotle. Also, it contains a number of errors and contradictions, which are pointed out below. Some of the prescriptions and views do not accord with certain established concepts or practices.

The book is divided into 20 chapters as follows:

1. Legislation as a means of regulation: effectiveness in legislative drafting.
2. Drafting instructions.
3. The legislative plan: designing a legislation solution.
4. Structure of a Bill.
5. Clarity, precision and unambiguity and the legislative sentence.
6. Plain language.
7. Preliminary provisions.
8. Principal provisions: the national, EU⁴ and international dimensions.
9. Final provisions.
10. Comparative legislative drafting.
11. Time in legislation.

³ For example, the first two sections of chapter 20 could have been combined and the argument made rather more succinctly.

⁴ Throughout this article, the acronyms 'EU', 'EEC' and 'UK' refer to the European Union, European Economic Community (now of course superseded by the EU) and the United Kingdom of Great Britain and Northern Ireland. Other acronyms and abbreviations to be found are 'IR' (Ireland); 'Cwlth' (Commonwealth of Australia); 'NSW' (New South Wales); 'Vic' (Victoria); 'NZ' (New Zealand); 'Can' (Canada); and 'Ken' (Kenya). Italicised words enclosed in brackets are words that I have supplied for completeness.

References to page numbers unaccompanied by a reference to a specific publication are references to pages in the author's book ('Drafting Legislation').

Secondary legislation can be variously described as 'delegated legislation', 'subsidiary legislation', 'subordinate legislation', 'statutory rules' and 'statutory instruments'. They all of course mean more or less the same thing. But since the author has used the term 'delegated legislation' throughout her book, I have also used that term when referring to secondary legislation (that is, legislation made by a rule-making body under the authority of primary legislation). When referring to primary legislation (that is legislation made by a legislature or other supreme law-making authority), I have used the terms 'statute' and 'Act' interchangeably.

12. Amending provisions.
13. Penal provisions.
14. Delegated legislation.
15. Drafting for consolidation v. drafting for codification.
16. Taxation legislation.
17. Extra-territorial legislation.
18. Statutory interpretation and legislative drafting.
19. Quality of legislation: post Lisbon and the role of Parliaments.
20. Legislative education and training.

I will now comment on each of these chapters in turn.

Chapter 1—Legislation as a means of regulation: effectiveness in legislative drafting

In this chapter, the author discusses the different forms that regulation takes. She acknowledges that alternative means of rule- or law-making in the form of soft law (which is sometimes referred to as tertiary legislation), and that legislation (be it primary or secondary) is the principal tool of governments to give effect to their policies, with those policies being translated into legislative texts. Those texts, she says, are rendered valid either by a legislature (primary legislation) or by some other authority to which a legislature has delegated the power to make rules (secondary legislation). Her starting point in the chapter is that legislative counsel pursue quality in regulation. To this end, the author outlines a four level hierarchy of goals for legislative counsel to pursue. They are in this order: (1) efficacy; (2) effectiveness; (3) efficiency, clarity, precision and unambiguity; and finally (4) simplicity/plain language and gender-neutral language.

The author envisages that the ultimate goal of regulation is efficacy, which she says is the extent to which regulators achieve their goal. She maintains that efficacy is often confused with effectiveness. But is it? I have consulted a number of thesauruses and the two words are given as synonyms. I have always understood that legislative counsel's main goal in drafting legislation is to ensure that as far as practicable the legislation is capable of attaining optimum legal effectiveness. In other words, the legislation has the capacity to attain the goals of the policy formulator (which in most cases will be the government of the day), assuming that all necessary and appropriate human and financial resources are allocated to the implementation of the legislation.⁵ Thus, I do agree with the author that efficacy (or effectiveness) is not a goal that can be achieved by legislative counsel alone. As she maintains, ‘a wonderful draft may be capable of producing the desired regulatory effects, but bad implementation and bad implementation may interfere with its actual results’. And I

⁵ See F. Bennion, *Statute Law*, 2nd ed. (Oyez Longman: London, 1983) at 39-40.

would certainly agree with the author that in the context of drafting legislation, effectiveness is “the ultimate measure of quality in legislation” (p. 6). The author cites with approval Mousmouti’s effectiveness test:⁶

‘effectiveness’ requires a legislative text that can—

- foresee the main projected outcomes and use them in the drafting and formulation process;
- state clearly its objectives and purpose;⁷ and
- provide for necessary means and enforcement measures.⁸

The author then goes on to discuss the means for achieving effectiveness. She cites two essential attributes. The first means is efficiency (by which she means the use of minimum costs to achieve maximum benefits of the legislative action). While I agree that efficiency is a significant factor in achieving effectiveness, for me the expression means using no more and no fewer words than are necessary for the legislation to achieve its policy goals. The second means is clarity, precision and unambiguity. While I agree that these three attributes are necessary for achieving effectiveness, I think that ‘precision’ encompasses ‘unambiguity’. However, I do not think these three attributes alone encompass ‘effectiveness’ in its entirety. For example, do they encompass ‘compatibility’, that is, ensuring that the relevant legislative text is compatible with all other legislative texts forming the *corpus juris*?

At the fourth level⁹ of her hierarchy, the author cites the use of plain language and gender-neutral language. I have been an enthusiastic advocate of the use of plain language in the drafting of legislation since at least the mid-1980s and probably even before that, but I have always been of the opinion that plain language (as the author appropriately defines the expression) is a means of promoting the readability and comprehensibility of legislation and thus its clarity. So for me, plain language is a means of helping to attain clarity.

Similarly, I have, also from the 1980s, been a strong supporter in the use of gender-neutral language in legislation and I believe its use is important from a socio-political point of view. However, from an effectiveness point of view the main value of gender-neutral language lies mainly in its contribution to the avoidance of ambiguity, and thus precision.¹⁰

⁶ M. Masmouti, “Operationalising Quality of Legislation through the Effectiveness Test” (2012), 6 *Legisprudence* 191 at 194.

⁷ But are these really different?

⁸ Masmouti mentions a fourth attribute, which is to ‘assess and evaluate real-life effectiveness in a consistent and timely manner’, but while I would agree that such assessment and evaluation are desirable (and arguably necessary), surely the assessment and evaluation will be undertaken outside the legislative text itself and after enactment: see the discussion below on chapter 19.

⁹ Which the author in fact cites as her third level.

¹⁰ This issue is discussed at length below.

The author then goes on to discuss the question of whether legislative drafting is an art or a science. She determines that legislative drafting, as a sub-discipline of law, is neither part of the arts nor part of the sciences and turns to Aristotle for a resolution of the issue. After an extensive discussion of the issue, she concludes that legislative drafting is a ‘phronetic’ process, which revolves around making decisions about how things should, and can, be done, and how to perform the task.¹¹ It is not theoretical knowledge because it is not only about what is true, but also about what would be good¹² in the circumstances. She maintains that it differs from technical knowledge in that it is concerned with evaluating and prescribing goals and setting¹³ the means to achieve them. The author argues that phronetic legislative drafting requires that legislative counsel select the most appropriate subjective choice for the solution of a given problem that they face at a given time. ‘In other words, drafting is prudence: just as a judge applies the most appropriate legal norm for the circumstances of the case, a drafter applies the most appropriate theoretical drafting principle for the circumstances of the concrete drafting issue that they are called to address’. Although I find the author’s approach to the issue plausible (if not compelling), I will leave it to my fellow legislative counsel to pronounce on its validity.

The author then proceeds to discuss the universality of “rules for regulation”. Having defined what she determines to be the main principles of drafting legislation (and thus the main parameters of legislative counsel’s task), the author considers it important to identify in which context these apply. I have to admit that I found this a little puzzling. I should have thought that the principles should apply to the drafting of *all* legislation. However, the author’s main focus here seems to be whether the principles are of universal application to the drafting of legislation in both ‘common law’ and ‘civil law’ jurisdictions. She concludes that there is relative universality of approaches to legislative drafting throughout Europe at least, with legislative counsel applying the same principles. However, without further analysis, she is unsure whether they apply them in exactly the same manner.

Finally, in this chapter, the author discusses whether legislative drafting manuals are of value. She concludes that, since legislative drafting is a phronetic discipline, such manuals help the user by identifying how the principles apply in resolving dilemmas and questions arising during the legislative drafting process. And not only do they allow the user to prioritise between ‘rules’ applicable in parallel, they establish criteria for the application of those ‘rules’ in making use of practical wisdom and professional experience. Having drafted

¹¹ According to Wikipedia, phronesis is a Greek word for a type of wisdom or intelligence. It is more specifically a type of wisdom relevant to practical things, requiring an ability to discern how or why to act virtuously and encourage practical virtue, excellence of character, in others. It is often translated as “practical wisdom”. Interestingly, I was unable to find definitions of the word in Chambers, Collins or Webster’s Dictionaries.

¹² Wouldn’t ‘appropriate’ have been preferable here?

¹³ And wouldn’t ‘prescribing’ have been a better word to use here?

legislation in 10 different jurisdictions, I have found such manuals extremely useful in identifying what are the local legislative drafting rules and standards.

Chapter 2—Drafting instructions

The author begins this chapter by revisiting Garth Thornton's¹⁴ five-stage drafting process: (1) understanding the proposal; (2) analysing the proposal; (3) designing the law; (4) composing and developing the draft; and (5) verifying the draft. The author then goes on to consider what are drafting instructions and what purposes they serve. The main purpose is to determine and delimit the contents of the proposed legislation. The author also lists a number of related purposes:

- they act as a key mechanism for the Government (in the form of the Cabinet or Cabinet Legislation Committee¹⁵) to prioritise or approve draft legislation;
- they provide an opportunity to enable other relevant government departments and agencies to be aware of how the proposed legislation might affect them;
- they provide an opportunity for the policy proponents (usually a Minister or Government department) to think through its proposals (and thus avoid producing something that is half-baked);
- in their final form they can be juxtaposed to the Government's authorisation of the policy in order to assess whether the draft legislation is likely to achieve what the Government has authorised.

While drafting instructions might serve all these related purposes in an ideal world, in my experience it would be rare for them to do so in fact.

The author then discusses what drafting instructions should contain. As well as specifying the proposal in detail, the instructions should also—

- outline the policy objectives of the legislative proposal;
- contain background information so that legislative counsel can understand the proposal in context;
- specify the nature of the problem; and
- outline the history or circumstances giving rise to the legislative proposal, including any relevant judicial decisions.

In my experience, many (if not most) legislative drafting offices would expect drafting instructions to provide this information. As the author states, the information provided in the drafting instructions is crucial to ensuring optimal effectiveness of the resulting legislation. In other words, legislation can only be as good as the drafting instructions. If the latter are

¹⁴ The chapter begins with an astonishing reference to 'Grant Thornton', which should surely have read 'Garth Thornton'!

¹⁵ Not all Governments take the form of Cabinets. For example, Hong Kong is administered by a Chief Executive who presides over an Executive Council.

defective, then so too will be the resulting legislation, unless the legislative counsel is experienced and astute enough to ascertain the true purpose of the instructions and then able to produce a workable draft.

In further elaborating on what good quality drafting instructions should contain, the author provides a detailed list. However, I have to say that in all my experience in drafting legislation I have never encountered drafting instructions that have conformed to this high standard. For example, I would be hard pressed to recall any circumstance in which I have received copies of legal opinions or expert evaluations or details of any administrative or judicial review considerations.

In discussing the quality of legislative drafting instructions, the author points out that the practice of providing instructions in the form of lay drafts is widespread in Commonwealth jurisdictions (although not in the United Kingdom nor I would add in Australia). For some reason it seems that many instructing officers prefer to provide lay drafts to proper drafting instructions in narrative form. Perhaps this is because they think (erroneously) that by doing so they speed up the process and possibly guide the drafter to the result they think they want to achieve. But as the author points out (p. 33), nothing could be further from the truth.

‘A bad lay draft can only start a gradually increasing friction between instructing officers and drafters, promoting a power game between offices and leading to dangerous products. ... Perhaps more importantly, the practice of lay drafts disregards and undermines the phronetic nature of legislative drafting as a discipline, whose principles, contextualism and idiosyncrasy can only be appreciated and unlocked by trained drafters... Drafters must be allowed to perform their task with a clear mind, uninfluenced by others even [as to] the most basic questions, such as the necessity of legislation for the achievement of policy goals, the appropriateness of the selected form of legislation, the structure of the legislative text and its composition. Any attempt to usurp part of this task and part of the drafter’s liberty to perform it unhindered can only harm the goal of the drafting team thus endangering the effectiveness of the [resulting] legislation’.

I entirely agree.¹⁶ Those legislative drafting offices that continue to accept drafting instructions in the form of lay drafts would be better served by publishing a manual for the preparation and submission of drafting instructions in narrative form and insisting that all future drafting instructions conform to the manual.¹⁷

Finally, the author provides a checklist for drafting instructions. While I agree that items 1 to 5¹⁸ are essential for good drafting instructions, I remain to be convinced as to the value to

¹⁶ Also see D. Elliott, “Getting Better Instructions for Legislative Drafting” (Unpublished paper presented at the Just Language Conference, 21 October 1992). Available at: www.davidelliott.ca/papers/getting.htm#8.

¹⁷ This process corresponds with the second of Thornton’s five stages in developing a piece of legislation. See H. Xanthaki. *Thornton’s Legislative Drafting*, 5th ed. (Bloomsbury Professional: Haywards Heath, 2013), at 151-156.

¹⁸ The following is a summary of items 1-5:

legislative counsel of items 6 to 9 (which involve undertaking cost/benefit analyses of the various options that might be available for achieving the policy objectives).¹⁹ Such analyses are surely for the policy formulators to carry out. Nevertheless, I would accept that a cost/benefit analysis (which is prepared in some advanced jurisdictions by other experts) could be of some relevance to the legislative counsel in that he or she also has a responsibility to advise whether the same result might be achieved by more efficient means.

Chapter 3: The legislative plan: Designing a legislative solution

In this chapter, the author discusses the merits of designing a legislative solution to achieve the policy objectives outlined in the relevant drafting instructions. Few legislative counsel (including myself) would disagree with the author's view that preparing a legislative plan is a good idea (and indeed is probably essential for the production of effective legislation). So how should legislative counsel approach this task?

After receiving the drafting instructions and reading, understanding and analysing them, the legislative counsel assigned to drafting the legislation should ideally embark on designing a plan that will facilitate the creation of a draft legislation that will give effect to the policy objectives. This is a good idea because it will help the counsel to ensure that all the provisions needed to achieve those objectives are covered and at the same time ensure that the Bill will be structured in a logical form that will promote accessibility, readability, comprehensibility and usability. The author identifies five advantages in preparing a legislative plan (pp. 41-44). In a nutshell, these are as follows:

- a legislative plan will help to ensure that the resulting legislation is consistent with what the policy formulators envisaged at the outset;
- a comprehensive legislative plan will identify all the elements of the proposed legislation;
- a comprehensive legislative plan will encourage the legislative counsel to analyse each of the elements separately and in turn and to devise an optimal legislative solution;
- by identifying all the elements of the proposed solution, the design will ensure that the legislative counsel fully examines all relevant evidence and facts;

-
1. What is the precise problem to be addressed?
 2. What is the scale and nature of the risk from the harm?
 3. What are the options for dealing with the problem?
 4. What is the likely impact of each option?
 5. What administrative mechanisms are needed?

¹⁹ The following is a summary of items 6-9:

6. What is the monetary value of the expected benefits?
7. What are the estimated costs of each option?
8. How cost effective is each option?
9. What issues of distributive fairness and public perception are relevant?

- the legislative plan will on the one hand allow the legislative counsel to arrive at a realistic time frame for the development of the project and on the other hand enable the legislative counsel to agree on the allocation of relevant tasks.

The author then focuses on the elements of what might form a legislative plan. She identifies the following elements:

- analysing the [relevant] existing law, including the need to make consequential amendments;
- analysing the need for the proposed legislation;²⁰
- analysing potential danger areas (including constitutionally related issues, legality related issues and issues relating to compliance with international or regional law);
- analysing the various policy options and the preferred legislative solution (including the selection of the preferred option and what might be the content of the design of the chosen legislative solution);
- analysing the practical implications of the proposed legislative proposal, including identifying possible judicial interpretation issues, and analysing the areas in which secondary legislation might be required to give full effect to the proposed legislation.

Chapter 4: Structure of a Bill

In this chapter, the author considers approaches to how a Bill might be structured. She revisits Lord Thring's five rules of drafting,²¹ which advocate prioritising legislative provisions in a logical order and for the most part endorses them. According to the first rule, provisions declaring the law "should be separated from, and take precedence over, provisions relating to the administration of the law". This is all very well in some cases, but what about those statutes that establish a statutory authority to perform a public function?

Thring's second rule is that simpler propositions should precede the more complex. But is this right? Shouldn't the main proposition be stated first, followed by the provisions that qualify it?

His third rule is that the principal provisions should be 'separated from' the subordinate ones. If this means that the principal provisions should precede the subordinate ones, then this is logical. However, in the case of legislative propositions that set out a procedure, then surely they should be structured according to their temporal order.

²⁰ On occasions, the Government or a Government member will insist on a legislative solution even though it is not strictly needed. Politicians are renowned for 'grandstanding' by promoting legislation (most of which will not be passed) just to promote their image.

²¹ Lord Thring, *Practical Legislation, The Composition and Language of Acts of Parliament and Business Documents*, 3rd ed. (Edinburgh: Luath Press, 2015) at 53-62.

According to the author, rule four is equally useful. Provisions creating exceptions, temporary provisions and provisions relating to the repeal of Acts should be separated from the other enactments and placed by themselves under separate headings. While it is normal, and indeed appropriate, that repeals should be treated in this way, surely exceptions are better located immediately after the propositions that they qualify? And while it may in some circumstances be appropriate to locate temporary provisions by themselves under separate headings, this is by no means always the case. For example, a short term introductory measure, such as a transitional provision relating to setting up a new licensing system, might be more appropriately located in or near the permanent measure to which it relates.

Finally, rule five is to the effect that procedure and matters of detail “should be set apart by themselves, and should not, except in exceptional circumstances, find any place in the body of the Act”. I would generally agree with this rule. Take for example a statute that establishes a statutory authority. It is surely appropriate to relegate to the Schedule the provisions relating to the members of the authority and to its internal operations. However, one wonders what circumstances Thring would have considered exceptional. Perhaps a statute solely devoted to criminal procedure would be considered exceptional.

The discussion of Thring’s rules is followed by a discussion of Bergeron’s.²² Bergeron focuses on the need for a rational order of provisions as a means of assisting users as to what constitutes a priority for the drafter and stresses the importance of giving precedence to provisions of a permanent nature over those that are expected to have a limited life. And if that priority is striving to attain optimum effectiveness of the legislation, one can have no quibble with this. In commenting on this, the author presumes that “the rationale of this is that amendments affect the text excessively when they refer to provisions at the beginning of the text”. But surely Bergeron was not directing his mind to amendments here.

Later, in discussing Bergeron’s mention of tables of provisions, the author makes the point that such a table is not part of the relevant statute but is included to make it easier to consult. While there is nothing exceptional about this, I question the author’s assertion that “Tables of contents or tables of arrangements²³ are becoming increasingly popular both as a means of offering a roadmap to the reader but also as a means of quality assurance in the structure at the verification stage of drafting” (p. 66). Even before I embarked on my legislative drafting career in 1965, such tables were already commonplace. Having said that, there is no doubt that a well-structured and informative table of contents is essential to enable users to navigate their way around a statute. And I would agree that, because a table of contents

²² R. Bergeron, *Rules of Legislative Drafting—Letters to Ukrainian Drafters*, Kiev, Department of Justice, Canada, and Ministry of Justice, Ukraine, 1999.

²³ This is a term I have always thought rather quaint.

provides an outline of a statute at a glance, it enables the drafter to readily identify any shortcomings in its structure.²⁴

The author goes on to cite (seemingly with approval) Bergeron's warning to drafters about the dangers of over-dividing the text of draft legislation. However, in my experience most statutes and subordinate legislation containing 20 provisions or more are readily divisible into at least three well defined Parts. Finally, before leaving the author's discussion of Bergeron's rules, I must confess being puzzled by her assertion that "Only codes and other major statutes are divided into chapters". What does she mean by this? In large British and Irish statutes²⁵ that are divided into Parts, the Parts will usually be subdivided into chapters, and in Australian statutes (Commonwealth and State) Parts are very often divided into 'Divisions' and 'Divisions' are sometimes further divided into 'Subdivisions'.²⁶

Discussions of 'headings', 'sections', marginal notes' and 'marginal references follow. Most primary and secondary legislation of any magnitude will be divided into Parts, Divisions (or in some jurisdictions Sub-Parts or Chapters), Subdivisions (possibly) and sections (or 'regulations', 'rules' or 'bylaws' in the case of secondary legislation) and it is not entirely clear which kinds of headings the author is discussing. But each of these divisions will normally have a 'heading' except in the diminishing number of jurisdictions that continue to use marginal notes for sections and provisions of subordinate legislation.²⁷ As section headings and marginal notes for sections and provisions of subordinate legislation are to all intents and purposes interchangeable, I think it would have been clearer to have dealt with them together and left the Part, Division and Subdivision headings to be discussed together.

In discussing marginal references, the author claims they are likely to confuse the lay reader. But if indeed that is the case, surely they should be presented in a way that will not confuse them! She mentions that marginal references are included to provide users with references to other legislation or to indicate the Part in which the relevant text occurs. In most cases, marginal references (not marginal notes proper) are used to indicate the chapter number of another Act that is being referred to. Surely that is helpful. But I must confess that I have never come across the second kind of marginal reference mentioned; in most cases this useful information is conveyed by means of running headers. That said, since the legislation of most jurisdictions no longer has margins, any sign posting information that used to be set out in margins should surely be now set out in footnotes?

²⁴ But it should be noted that by no means all legislative drafting offices provide informative and user friendly tables of contents for amending legislation.

²⁵ For example, the *Income Tax Act 1997* (IR) and the *Companies Act 2006* (UK)

²⁶ However, it should be noted that in Australian and perhaps some other jurisdictions, Chapters are a larger segment than Parts: see the *Corporations Act 2001* (Cwlth), where Parts are subsets of Chapters.

²⁷ For example, the individual regulations of 'regulations' or the individual rules of 'rules'.

The author's layered approach

The author has some radical ideas about the way a legislative text might be structured and questions whether the conventional approach²⁸ to structure is optimal. She says legislation is read by three main groups of users:

- lay people seeking information on their legal rights and duties;
- non-legal professionals who are looking for guidance on the performance of their professional duties under the legislation; and
- lawyers and judges concerned with interpreting and applying the legislation.

She goes on to advocate the structuring of legislation on the basis of these three categories, so that the provisions affecting each category will be set out in a discrete part of the legislation that focuses on the needs or wants of the audience concerned. This she calls ‘the layered approach’. She claims that the approach is revolutionary, as it shifts the criterion for legislative arrangement from the content and nature of provisions to the profile of the users and “because it offers a humanistic aura in drafting, making structure user-centred, and thus [not only] promoting a link between policy and effecting legislative text, but also enhancing the channel of communication between drafters and users” (pp. 77-78).

Although the layered approach merits further consideration, even the author has some reservations about it. In summary, these are as follows:

- that by presenting the bare regulatory message in the first part, lay people may be presented with a fragmented and incomplete message;
- what really distinguishes part 2 data from part 3 data;
- the approach promotes inherent fragmentation of data, thus requiring the use of explanatory notes to ensure the fluidity of information;
- the approach creates a dilemma as to whether direct amendments should be consigned to part 2 or part 3, because both the such amendments are relevant to both part 2 and the part 3 audiences.

Using the layered approach, the author goes on to restructure the *Succession to the Crown Act 2013*. The restructuring does seem to work quite well, but this is a short Act and results in only 11 sections.²⁹ I wonder how the approach would work with a very long Act. I recently drafted a new *Companies Act* that was divided into 42 Parts (many of which were subdivided into Divisions). The use of the layered approach would seem to require that each Part would need to be divided into three ‘subparts’. And what about those Parts that are

²⁸ For example, primary versus secondary regulatory messages; substantive versus administrative provisions; substantive provisions versus procedural ones.

²⁹ The existing Act comprises five sections and a Schedule of consequential amendments.

already subdivided into Divisions? The author seems to think that the application of the layered approach to long texts is feasible, but even she seems to have reservations.³⁰

Overall, I have reservations about the feasibility of the layered approach, particularly if, as seems likely, it results in the fragmentation of the legislative message. And I find it difficult to see how the approach could be effectively applied to amending legislation.

Chapter 5—Clarity, precision and unambiguity and the legislative sentence

In this chapter, the author discusses the need for clarity, precision and unambiguity in legislative sentences. She correctly points out that they promote and contribute to effectiveness. And they do so in three main ways, which in summary are as follows:

- Firstly, they render the law predictable, thus promoting accessibility of the relevant legislation of lay users. Clearly, to be predictable means that the legislation must be certain in its application.
- Secondly, clear legislative messages offer democratic governments the tool required to achieve ‘transformation’ by means of legislation.
- Thirdly, ‘clarity, precision and unambiguity offer officers of the law the opportunity to understand correctly and fully the law, and consequently to apply it appropriately.’ (This promotes the rule of law.)

But before considering ‘clarity, precision and unambiguity’ further, I would question whether they are separate concepts. ‘Precision’ and ‘unambiguity’ are surely components of ‘clarity’? Surely a document that is either imprecise or ambiguous (or both) is unclear?

The author goes on to discuss ambiguity and vagueness and demonstrates how they differ. She points out that vagueness imposes costs. Vagueness is of course the antithesis of precision. Desirable as precision is, vagueness (which as the author correctly points out is different from ambiguity) is for various reasons³¹ sometime unavoidable. But even when vagueness is unavoidable, the legislative counsel should provide a mechanism for resolution of the vagueness in a particular case, thus indirectly achieving a measure of precision.

In discussing ambiguity, the author then considers the different kinds of ambiguity.

Firstly, she considers semantic ambiguity, which as she points out arises when a word has more than one meaning. (The word ‘bank’ is an obvious example.) Important words that frequently give rise to ambiguity are the auxiliary verbs ‘may’ and ‘shall’ and the conjunctions ‘and’ and ‘or’. I agree with the author that ‘shall’ is one of the most dangerous ambiguous words because it can in one sense convey the future tense and in another impose an obligation. Moreover, confusion over the distinction is detrimental to the effective operation of the legislation concerned. Far better to use ‘must’ to create an obligation, since

³⁰ See p. 81.

³¹ Mentioned on pp. 87 and 88.

it is what non-lawyers would use. But she also suggests ‘it is the duty of’ and ‘is to’ as alternatives. However, why use a convoluted phrase when ‘must’ is adequate? And why use the soft ‘is to’ when ‘must’ is more emphatic and clear to lay users? At best, ‘is to’ should be reserved for the creation of non-justiciable obligations.

And I would agree that in amending legislation, if the auxiliary verb used to create obligations is ‘shall’ then ‘shall’ should be used to create obligations in the amending text.³² However, the author then proposes the use of the present tense as an alternative to ‘shall’, ‘must’ and the like ‘since legislation carries the context of a duty or obligation anyway’. I find the proposal quite extraordinary. How can the present tense possibly convey a sense of duty or obligation? She cites in support an article by Daniel Greenberg.³³ But after reading this article, I could find nothing in it that would support the use of the present tense in this way.³⁴ I also note that in the 5th edition of *Thornton’s Legislative Drafting* (which the author has edited) she uses the present tense in a number of the precedents that she has drafted for that edition.³⁵ For example, at page 325, in a draft provision providing for the dissolution of the Health and Safety Council, subsection (3) reads:

(3) The Minister lays before Parliament a copy of the report and statement without delay.

I cannot for a moment imagine an experienced, competent legislative counsel drafting this provision without using an appropriate auxiliary verb³⁶ to indicate that an obligation is being imposed. Surely this should read:

(3) The Minister must lay a copy of the report before Parliament without delay.

There follow useful discussions of words commonly found in legislation that have a potential to give rise to semantic ambiguity. These words include ‘unless’ and ‘except’; words indicating a scale (for example, ‘less than’ and ‘more than’); words conveying ranges of dates and numbers ('from', 'to', 'between', etc.); and the relative pronouns ‘that’ and ‘which’. As the author correctly points out, ‘that’ should be used to introduce words that restrict or limit the noun or noun clause that precede it. ‘Which’, in contrast, should be in parenthesis to explain or describe the noun or noun clause that precedes it. Regrettably, legislative counsel of legislative drafting offices of many common law countries and territories do not seem to recognise the distinction.³⁷

³² Unless of course the auxiliary verb ‘shall’ in the amended text is consequentially amended to ‘must’.

³³ D. Greenberg, “Nothing will come of nothing” (2010), 30 *New Law Journal* 1084.

³⁴ The article’s author has confirmed that he had never advanced and never would advance such a proposition.

³⁵ Above, n. 17

³⁶ Alternatively called modal verbs.

³⁷ For expanded explanations of the correct usage of ‘which’ and ‘that’ as relative pronouns and examples, see H.W. Fowler, *Dictionary of Modern English Usage*, Oxford (1965) and B. A. Garner, *Garner’s Dictionary of Legal Usage* (3rd Ed) Oxford: New York (1965) at 888.

The author also correctly points out that sometimes serial commas can result in ambiguity, which is why in some jurisdictions, such as New Zealand, legislative counsel insert a comma before the last noun or noun phrase in a list.³⁸

Secondly, the author discusses syntactic ambiguity,³⁹ which, as she correctly points out, arises from “the way in which the meaning of a sentence is influenced by the intended relationships between individual words and phrases used in the sentence, as distinct from the way in which the meaning of the sentence is influenced by the meaning of the individual words and phrases” (pp. 98–102). The discussion comprises two components: one deals with ‘the placement problem’ where, because of the order of the words in a sentence, it is not clear which word or phrase qualifies another word or phrase in the same sentence. My favourite (risible) example is one quoted by Thornton.⁴⁰ The other⁴¹ deals with noun modifiers (for example, the phrase ‘charitable and educational institutions’, which could mean institutions that are both charitable and educational *or* charitable institutions and educational institutions).

A further source of ambiguity can arise from poor punctuation. The author, correctly in my view, extols Thornton’s four rules on the use of punctuation: punctuate sparingly and with purpose; punctuate for structure and not for sound; be conventional; and be consistent. The importance of correct punctuation in legislation cannot be over emphasised. One only has to recall the case of Roger Casement, who, because of the ambiguous placement of a comma, was, despite the principle of statutory interpretation that an ambiguous statutory provision should be construed in favour of the accused, was convicted of treason under the *Treason Act* 1351 and sentenced to death by hanging. It is thus said that ‘Casement was hanged on a comma’. And many will recall Lynne Truss’s seminal work *Eats shoots and leaves*. The placement of a comma after ‘eats’ changes the meaning completely.

The chapter concludes with a discussion of gender neutral language (GNL). There is no doubt that in some circumstances the use of pronouns (whether ‘it’, ‘he’ or ‘she’) leads to ambiguity where there are two or more referents and that the use of GNL⁴² can assist in resolving that kind of ambiguity. However, in extolling the use of GNL, the author gives the impression of going beyond its use to resolve ambiguity. Moreover, I cannot support her advocacy of the use of ‘they’ as a singular pronoun; ‘they’ suffers from the same problem as the singular pronouns ‘it’, ‘he’ and ‘she’. It is potentially ambiguous.

³⁸ Sometimes called “the Oxford comma”.

³⁹ Syntactic ambiguity is also sometimes referred as ‘ambiguity at sentence level’ or ‘contextual ambiguity’.

⁴⁰ *Thornton’s Legislative Drafting*, 5th ed., above n. 17 at 28.

⁴¹ Also attributable to *Thornton’s Legislative Drafting*, 5th ed., ibid. at 26.

⁴² For example, repeating the noun, omitting the pronoun, converting the noun to verb form, and using the plural noun followed by the third person plural pronoun.

Chapter 6—Plain language

In this chapter, the author surveys ‘plain language’ in the context of communicating legislation. She begins by asking what plain language is and canvasses a number of definitions advanced by plain language advocates, such as Peter Butt, the late Robert Eagleson, Ginny Redish, Anthony Watson-Brown and the Law Reform commission of the Australian State of Victoria. But in the context of legislation, for me plain language is language that effectively communicates to users the legislative message intended to be conveyed by the policy-maker, with effective communication taking place when users share the same meaning as that encoded by the drafter.

But legislative counsel are at once confronted by a dilemma. Legislation almost invariably has a number of audiences ranging from erudite lawyers and judges at one end of the continuum to people who may be only semi-literate at the other.

The author rightly identifies two problems in lawyers trying to communicate legislation. One is that by and large law schools do not train their students to write legal documents (let alone legislation) in plain, readily understandable language.⁴³ The other is that legislative counsel worth their salt need to identify their audiences and to address the needs of those audiences in terms of communicating the law. As she correctly points out, “written text must speak to a diverse audience. And this difficulty is much more pronounced in legislation, where a single written text must speak to a diverse audience.” (p. 109) Legislative counsel do need to know their audiences. And certainly, the objectives of drafting legislation in plain language should include “coherence, comprehensiveness, consistency, clarity and care” (p. 112). However, I wonder whether ‘comprehensibility’ and ‘usability’ might be appropriately added to the list. Finally, in discussing the question of how ‘plain’ legislation needs to be, the author advocates that the level of plainness required is that of the least sophisticated audience. While I would agree that this should be the aim of legislative counsel, it may, because of factors beyond their control, be unattainable. They can only do their best, but it has to be acknowledged that this not likely to be enough.

Easy communication

As the author rightly points out, there are numerous tools at legislative counsel’s disposal in their quest to achieve their aim of communicating their legislation effectively. However, I have to take issue with her assertion that there is ‘a football game’ between effectiveness and plain language (p. 49). Surely plain language is a means of attaining effective legislation?⁴⁴

⁴³ One of my pet gripes is the continued failure of law schools in many (if not most) common law countries to teach courses on legal writing and legislation, although legal writing does seem to be taken more seriously in the United States.

⁴⁴ See D.E. Berry, *Designing Usable Legislative Texts*, SJD thesis lodged in the library of the University of Technology Sydney.

There follows a summary of the issues that inhibit the communication of legislative texts. These include:

- Long sentences;
- Weak verbs (such as ‘there is’, ‘there must’, and ‘it is the duty of’) and nominalisations (i.e. converting verb forms into nouns);
- Superfluous words (tautology);
- Jargon;
- Over defining terms;
- Using abstract words (in preference to concrete ones);
- Unreadable⁴⁵ design and layout.

Another obstacle the author might have included is overloading sentences with too many ideas and poor graphic design.

The author then canvasses some ‘best’ practices for ‘easy’ communication of legislation. These include a preference for the present tense over the use of the false future (‘shall have’, ‘shall be’ and the like). However, ever since I embarked on my legislative drafting career over 50 years ago, the present indicative or present continuous tenses have been preferred by competent legislative counsel well before the current debate on plain language in legislation began in 1985 (though some may argue that it began earlier). While I agree that the use of ‘shall’ and ‘must’ should be restricted to propositions creating duties or obligations, I strongly disagree with the author’s contention that it is legitimate for legislative counsel to attempt to create duties and obligations by using the present tense. This contention is quite untenable. To say (as the author does) that ‘The Commission consults …’ imposes an obligation on ‘the Commission’ to consult is quite frankly risible. She says ‘Legislation is compulsory; it introduces commands that must be complied with anyway’. This is nonsense. Yes, some legislation is compulsory in the sense that it creates duties and obligations that must be complied with, but by no means all legislation is compulsory. What about legislation that confers rights and freedoms, states principles, defines expressions or confers powers?⁴⁶

The author also states a preference for sentences to be expressed in positive as opposed to negative language. Few legislative counsel would disagree with that in general terms, but as the author concedes “a double negative does not necessarily mean a positive” (p. 125). Moreover, although research supports the view that users understand positive statements more readily than negative ones, it also supports the view that users understand double

⁴⁵ Does the author mean ‘poor’?

⁴⁶ If the author wanted to create an obligation without using an appropriate modal verb (such as ‘shall’ or ‘must’), she could have done so by declaring that ‘The Commission is responsible for [undertaking the activity in question].

negative sentences more readily than ones that contain a negative statement followed by a positive one and vice versa.⁴⁷

Concerns with plain language

In this part of the chapter, the author canvasses a number of concerns expressed by critics of plain language. In sum, these are—

- Plain language lowers the standards of good writing;
- Reduced intelligibility;
- Plain language can only be achieved if certainty is sacrificed; and
- Plain language leads to a loss of established meanings of words settled over centuries of judicial interpretation.

Taking these concerns in turn, to me there seems no reason why plain language should lower the standards of good writing. Although the author acknowledges that grammatical correctness can enhance the predictability of a text, thus promoting a common understanding of “the concept as communicated and received” (p. 125), she then implies that grammatical correctness may clash with clarity. But surely grammatical correctness and consistency promote clarity? So where is the clash? No examples are given so it is difficult to know what the author had in mind.

The author then proceeds to raise intelligibility as a concern. But surely improving intelligibility is one of the main aims of plain language proponents? The discussion begins with the statement that “plain language is often accused as an instigator of intelligibility for the lawyers and judges” (p. 126). So if it does, what is wrong with that? However, I would agree that legislation should be capable of being readily understood by various audiences comprising non-lawyers as well as by lawyers and judges and that the use of plain language techniques (and the consequent avoidance of legalese) will contribute to the attainment of that outcome.

The third concern that the author mentions is that expressing legislation in plain language may lead to a loss of precision and certainty and quotes an extract from Sir Ernest Gowers in his seminal work *The Complete Plain Words*. In that extract, Gowers says:

Legal drafting must therefore be unambiguous, precise, and largely conventional. If it is readily intelligible, so much the better; but it is by far more important that it should yield its meaning accurately than it should yield it on the first reading.⁴⁸

I am very familiar with this quotation, but I do not share Gowers’s seeming pessimism. I see no inconsistency between precision and unambiguity on the one hand and intelligibility on

⁴⁷ See Wright, P and Wilcox, P. “When two nos’ nearly make a yes: A study of conditional imperatives” in Processing of Visible Language (2), P.A. Kolers, M.F. Wrolstad and H. Bouma, eds. (New York, London: Plenum Press, 1980).

⁴⁸ E. Gowers, *The Complete Plain Words*, 3rd ed. (UK, HMSO, 1986) at 7.

the other. Legislative counsel worth their salt should be able to express legislative propositions intelligibly and, so far as necessary, precisely. Thus, I do not agree with the author’s suggestion that plain language may have to be sacrificed in the interests of clarity, precision and unambiguity.

The final concern identified by the author is the loss of meaning of words settled by judicial interpretation. I must say I have always thought that this concern is unfounded. There are very few terms of art that need to be retained, there being plain language equivalents for the rest. For example, see the *Civil Procedure Rules* 1998 (England & Wales), in which almost all of the old archaic, legalistic terms have been replaced by modern, plain language ones. I entirely agree with Peter Butt that “when the archaic terms render the statute foreign to the reader and therefore challenge its effectiveness, terms need to be changed irrespective of how established they are”.⁴⁹

While I would agree with the author that plain language has revolutionised legislative drafting by turning the attention of legislative counsel to wider audiences (audiences other than lawyers and judges) and that plain language is a tool to be used in the quest for clarity, precision and unambiguity, I am optimistic enough to believe that competent legislative counsel can craft their texts to ensure that there is no conflict in attaining those objectives.⁵⁰

Chapter 7: Preliminary provisions

The author lists the preliminary provisions of a statute or statutory rule⁵¹ as follows:

- Long title
- Preamble (if required)
- Enacting clause
- Short title
- Commencement
- Duration/expiry
- Application
- Purpose clause
- Definitions
- Interpretation.

This order follows that ordinarily used in Australian jurisdictions, New Zealand, Ireland and Hong Kong and at least some African jurisdictions. However, preambles are rare and mostly used for statutes that give effect to international treaties or conventions. Statutes containing

⁴⁹ P. Butt, “Modern Legal Drafting”, (2002), 23 *Statute Law Review* 12 at 15.

⁵⁰ Nevertheless, legislative counsel should take extreme care in using different words in attempting to convey the same meaning. But they should not be bound to use the judicially defined term if the same idea can be conveyed using different words. After all, often, especially when construing a statute, the meaning of a word or expression depends on the context.

⁵¹ For example, statutory regulations, rules and by-laws.

duration or expiry provisions are even rarer, with the possible exception of Tasmania.⁵² Statutes containing application provisions are not all that common either, since most statutes will usually apply to all persons and things within the relevant jurisdiction and will purport to operate extra-territorially only rarely. Purpose (or objects) clauses now appear routinely in most Australian statutes and in the statutes of many other common law jurisdictions. Definitions are usually set out under the heading ‘Interpretation’, though in many lengthy Australian statutes definitions are now to be found at the end of the statute concerned.

However, the author thinks it is now time for legislative counsel (or perhaps more appropriately, legislative drafting offices) to consider what needs to be placed in each part of an Act. She thinks the list above is too long, making the preliminary provisions user-unfriendly and proposes what she claims to be ‘plain language approach’.

The author begins her discourse by a criticism of the long title, which, as the late Sir William Dale has said, “describes the contents of the Act”.⁵³ She outlines three possibilities for dealing with long titles. These are—

- One is to leave the ‘long title’ intact, but to get rid of the vague catch-all phrase ‘and connected purposes’;
- Another is to replace the long title with an introductory text that sets out the main points of the legislation;
- And the third is to do away with long titles altogether (as for example has happened in the Australian State of Victoria).

The author thinks that the preliminary provisions of a statute (or Bill) should be reduced to—

- the introductory text;
- the enacting clause;
- the start date; and
- an application provision (but only if needed).

While I would agree that the author’s aim in reducing the preliminary provisions is laudable, I believe she goes too far. As I have said, I agree with getting rid of long titles in their present form, but I would opt for replacing long titles with an ‘overview’. Overviews have appeared in a number of Australian statutes in recent years and research conducted by the Australian Commonwealth Office of Parliamentary Counsel shows that users not only like them but find them helpful.

⁵² On the other hand, principal secondary legislation of Australian jurisdictions now automatically expires by statute after a specified period of time and has to be remade if it is to continue in operation.

⁵³ Sir W. Dale, “Legislative Drafting: A New Approach – Reviewing the Reviewers” (1981), 2 *Statute Law Review* 69 at 74. A long title does not, or at least should not, set out the purpose of the Act concerned, but at p. 134 the author quotes a statement to the contrary in a report by the New Zealand Law Commission’s report *The Format of Legislation* (1993), NZLC, R27 at 9.

As preambles are rare, but when used perform a useful function, I would retain these. And if retained, to locate them elsewhere than in the preliminary provisions seems to me to be inappropriate. However, I do agree with the author that in drafting preambles, legislative counsel should draft them in a way that helps users to easily understand the rationale for the legislation concerned.

As to enacting clauses, while I agree with the author that they should be retained, I would certainly draw the line at an enacting declaration that merely states ‘I assent’ followed by the signature of the Head of State. That the enacting statement is more than a formality is borne out by the US decisions in *Joiner v State*⁵⁴ and *State ex rel Gouge v Burrows, City Recorder*.⁵⁵ In the *Joiner* case, a Bill to amend an Act of the Georgia State Legislature failed to include an enacting formula. The question was whether the failure to include the enacting formula invalidated the purported amendment. The State Supreme Court held that “the amendment is a nullity and of no force and effect as law”. The Court said:

The purpose of an enacting clause is to establish the Act; to give it permanence, uniformity and certainty; to afford evidence of its legislative statutory nature, and to secure uniformity of identification and thus prevent inadvertence, possible mistake, and fraud.

In the *Burrows* case, the enacting provision omitted the words “the State of ...”. The Tennessee State Constitution stated that—

... the style of the laws of this State shall be, ‘Be it enacted by the General Assembly of the State of Tennessee ...

In proceedings to determine the validity of the Act, the Tennessee State Supreme Court held that—

The provisions we are here called upon to construe is in plain and ambiguous words. The meaning of it is clear and undisputable, and no ground for construction can be found. The language is: “The style of the State shall be ...” The word shall, as here used, is equivalent to “must”. We know of no case in which a provision of the constitution thus expressed has been held to be directory. We think this one clearly mandatory, and must be complied with by the Legislature in all legislation important and unimportant, enacted by it; otherwise it will be invalid.

Holdsworth⁵⁶ confirms that “The enacting clause is that part of a Statute which gives it jurisdictional identity and constitutional authority ...”

In many cases (with UK, Canadian, Australian, New Zealand statutes for example), the assent of the person assenting (for example, Queen Elizabeth II or a Governor General) is largely a formality and in any case only constitutes a part of the legislative process. I

⁵⁴ Supreme Court of Georgia, 1967. 223 Ga. 367; 155 S.E. 208.

⁵⁵ Supreme Court of Tennessee, 1907, 119 Tenn. 376; 104 S.W. 526.

⁵⁶ A History of English Law, (1909) Vol 11, at 366.

therefore believe that something like ‘Enacted by the Parliament of [...] as follows:’ is rather more appropriate.⁵⁷

The author then discusses the ‘short title’ of a statute or Bill. She would relegate this to the end of the document. But why? This is like saying that the title of a book and the name of the author can go to the end since the top of each page contains, alternately, the title and the name of the author. The short title rarely occupies more than a single line of text and, while it is true that the short title is repeated in the running heads to a statute, I consider it is convenient for users to find a statement of what the statute or Bill is called located immediately after the enacting words. One change I would make though is to drop the reference to ‘short’. If the long title is to be replaced by an introductory text or overview, the word becomes redundant, since there will only be one ‘title’.

There follows a discussion of ‘commencement provisions’, which of course specify, or at least provide for the determination of, the date (or sometimes dates) on which a Bill is to take effect (or if already enacted, took effect as a statute). The author says that the date is of crucial importance to users and this is most certainly true, since one has to comply with a statute only if it is in operation. The author asserts that the commencement provision forms part of the main regulatory message (an assertion with which I agree), then it follows that this information should appear at the very beginning of the Bill or statute, preferably immediately after the ‘title’.

As most of us will know, it is common for the commencement of Bills to be delegated to government ministers or other public officers. This means that when a Bill is enacted as a statute, its ‘start date or dates’ are not known. This means that when the starting date is fixed, there is nothing on the face of the statute to indicate when it took effect. But as we have already seen, this information is essential for users to know. As the author has suggested, there needs to be a mechanism for recording the actual starting date in an appropriate place in the statute. My proposal would be to provide for the commencement provision to be replaced by a statement specifying the date or dates on which the statute took effect. This can easily be done with electronic versions of statutes but poses logistical problems with their hard copy counterparts. Finally, I would agree with the author that users would probably find the expression ‘start date’ more readily comprehensible than the term currently in vogue, ‘commencement’.⁵⁸

The other provision that the author would retain in the Preliminary Provisions is an application provision. An application provision identifies to whom, to what and where a statute applies.⁵⁹ Clearly to whom, to what and where the legislation applies is crucial for

⁵⁷ See the statutes of Australia (including Australian States), New Zealand and Canada for example.

⁵⁸ See A. Bertlin, “What works best for the reader? A study on drafting and presenting legislation”, *The Loophole, May 2014 (2014.2) 25* at 45.

⁵⁹ The author includes ‘when’, but surely this will be addressed by the commencement or starting date provision.

users, so it is indeed appropriate for an application provision to be located in those provisions.

Not only does the author envisage that an objects or purpose provision should be excluded from the Preliminary Provisions, but she goes on to state that purpose clauses “have fallen from grace simply because declarations of general policy intent are not suitable for legislative texts” (p. 137). I profoundly disagree: not only are purpose or objects sections commonly found in very many statutes of Commonwealth countries,⁶⁰ but, apart from the fact that they are at risk of being hi-jacked by unscrupulous politicians, I see no reason why a statement of objects or purposes is unsuitable for legislative texts. Moreover, there seems to be no point in burying an objects or purposes provision in the nether regions of legislation when it contains information essential for users’ proper understanding of it.

As the author correctly points out, in most common law jurisdictions,⁶¹ definitions and interpretation are located in the Preliminary Provisions. However, in some jurisdictions, such as Australia, there has been a trend towards locating definitions in a dictionary (or glossary) at the very end of the relevant legislation (after the last section, if there are no Schedules, or after the last Schedule), although this is usually done only for long, bulky Acts. While I agree there is some merit in this approach, the question remains as to whether it is appropriate for all legislation, including short and medium sized texts.

While I would agree that the expression and layout of the Preliminary Provisions are important for users, I think the author overstates the case for relegating to the end of a statute some of the provisions that currently appear in the Preliminary Provisions. Apart from the introductory text or overview and definitions, most of the other provisions are short, so are unlikely to inhibit users from moving to the ‘main regulatory message’. In any case, users will rarely read a statute from beginning to end; they will look up the table of contents and go straight to the text that they believe will provide them with the answers they are seeking.

The author concludes the chapter by suggesting that the Preliminary Provisions should be included in the introductory text as separate sections, but, as she concedes, this would be appropriate only if the introductory text formed part of the statute.

Chapter 8: Principal provisions: The National, EU and International Dimension

Introductory comment

This chapter is divided into four sections dealing with discrete topics: principal provisions; the European Union (EU) dimension; the international dimension; and innovation. While the

⁶⁰ D.E. Berry, ‘Purpose sections: why they are a good idea for drafters and users’, *The Loophole, May 2011 (Issue No. 2 of 2011.2)* 49.

⁶¹ In a UK Act, for example, definitions are (and have perhaps always been) located in either the ultimate or penultimate section of the Act.

first of these topics naturally fits between chapters 7 and 9, which respectively deal with preliminary provisions and final provisions, the other two do not, and would have been better located before chapter 19 (Quality of legislation Post Lisbon) and before chapter 17 (Extra-territorial legislation). The fourth topic purports to deal with “innovation”, but does it?

The national dimension: principal provisions

In the first section, the author discusses how legislative counsel should proceed with drafting the principal provisions of a Bill. These comprise the substantive provisions and the administrative provisions. The first of Lord Thring’s rules states that “Provisions declaring the law should take precedence of [sic] provisions relating to the administration of the law”.⁶² As the author rightly points out, these provisions convey the regulatory message desired by the policy proponents (usually the Government) and are indeed of “crucial importance to the effectiveness of the legislative text”. However, like the author, I believe this dichotomy is too rigid. While substantive provisions tend to be of primary importance, administrative provisions can equally be of primary importance. Take a licensing statute for example: the basic proposition is that it is unlawful for a person to carry on a specified activity without being the holder of a current licence, but the administrative provisions relating to the issuing, holding, termination and suspension of the licence are arguably of almost equal importance. But as the author rightly points out, Lord Thring, somewhat unfortunately, uses the term “principal” to refer to primary provisions *excluding administrative provisions*” (emphasis added).

While, as the author correctly maintains, substantive provisions state rights, powers, privileges, and immunities of persons to be benefited or regulated, I am not convinced that saying these provisions are drafted only “as prescriptions, prohibitions, regulations or combinations of the above” accurately reflects the reality of the task faced by legislative counsel. And while I would generally agree with what the author has to say about substantive provisions and what they tell the user, and that the obligations imposed on those to whom the legislative text is directed (which surely would include the obligation not to contravene) requires clarity, precision and unambiguity of that text so that its message is accessible to the users, I strongly reject the author’s contention that the use of imperatives within the text “is superfluous and repeating ‘must’⁶³ is not necessary”. I similarly reject the author’s suggestion (p. 151) that is appropriate to use the phrase “The Minister appoints

⁶² See above n. 21 at 53.

⁶³ And presumably “must not” in the context of a prohibition.

[someone]”⁶⁴ to impose an obligation on the relevant Minister to make an appointment. Likewise, “The Minister consults⁶⁵ the Board of Directors, and may appoint a Deputy”.

The EU dimension: national implementing measures

EU legislation needs to be implemented to have effect in the 28⁶⁶ EU Member States. Most EU legislation comprises Regulations, Directives and Decisions. Generally speaking, Regulations have direct effect in the Member States, though they usually need to be supplemented to harmonise with the law of each Member State and to prescribe enforcement measures for the enforcement of the Regulations within that State. Directives, on the other hand, invariably need to be transposed. As the author rightly points out, the drafter’s autonomy is constrained.

Firstly, the dynamism of the *acquis communautaire*⁶⁷ means that “every new legal instrument, every new judgement of the European Courts, every international agreement signed by the EU is added to the body of rights and obligations that form part of the *acquis* that Member States must receive into their national order.

Secondly, EU legislation differs from the form of domestic and international measures, which “renders the understanding of their legal value, their degree of bindingness and the depth (sic) of their enforcement requirements a somewhat complex task”.

Thirdly, the terms used in EU instruments tend to have “an idiosyncratic meaning”.⁶⁸ They may have different meanings from those used for similar terms in the legislation of EU Member States. This issue is well highlighted by the UK Supreme Court decision in *Assange v. the Swedish Prosecution Authority*.⁶⁹ In that case, the Supreme Court decided that the head of WikiLeaks, Julian Assange, could be extradited to Sweden in connection with allegations of sexual assault and rape. However, the appeal did not deal with the

⁶⁴ Which should surely read “must appoint” or “shall appoint”.

⁶⁵ Which should surely read “must consult” or “must consult”.

⁶⁶ Soon to be 27 after the United Kingdom leaves the EU in 2019.

⁶⁷ The *acquis communautaire* is the body of common rights and obligations that is binding on all the EU member states. It comprises—

the content, principles and political objectives of the European Treaties;
legislation adopted pursuant to those Treaties and the case law of the European Court of Justice;
declarations and resolutions adopted by the EU;
instruments under the Common Foreign and Security Policy of the EU; and
international agreements concluded by the EU and those entered into by the member states among themselves within the sphere of the EU’s activities.

Thus it includes all treaties, all EU legislation valid today, all EU Court verdicts, all types of decisions arising from the Foreign and Security Policy and Justice and Home Affairs provisions of the Treaties, as well as so-called soft law: see http://europa.eu/legislation_summaries/glossary/community_law_en.htm.

⁶⁸ Which is not a term that I would have used. Surely ‘different’ would have been more appropriate.

⁶⁹ [2012] UKSC 22. The author does not mention this case in her book.

substance of these allegations and the question for the Supreme Court was whether a European Arrest Warrant (EAW) could validly be issued by a public prosecutor. The answer turned on a narrow point of law: whether a public prosecutor was a ‘judicial authority’ within the meaning of Part I of the *Extradition Act 2003* [UK]. By a majority of 5 to 2, the Court decided that a public prosecutor was a “judicial authority” within the meaning of the Act and, accordingly, the EAW had been lawfully issued.

In undertaking a detailed examination of the development of the relevant EU Framework Decision, Lord Phillips noted that an earlier draft of that Decision stated expressly that public prosecutors were judicial authorities, but that this statement had been removed in the final draft. He found that this change was not intended to restrict the meaning of the words and relied on the following reasons in support:

- that to restrict the power to issue EAWs to a judge would have been a radical change and one which would have been stated expressly;
- that the issue of an EAW was subject to an antecedent process with significant safeguards;
- that the reason for the change was to widen the meaning of the words to encompass the range of issuing procedures in Member States; and
- that the requirement in Article 6.3 of the Framework Decision to identify the “competent judicial authority” makes more sense in light of a broad meaning of those words.⁷⁰

On the one hand, Lords Walker and Brown found these reasons less compelling and Lord Dyson did not find them persuasive. On the other hand, Lord Kerr relied on the fact that removing prosecutors from the meaning of judicial authority would be a “radical change” that would have required “substantial adjustment to administrative practices”.⁷¹ The majority relied substantially on the operation of Article 31.3(b) of the *Vienna Convention on the Law of Treaties*, which allows courts to take into account “subsequent practice” in the application of a Framework Decision, so long as it “establishes the agreement of the parties regarding its interpretation”.⁷²

Having established that a public prosecutor was a judicial authority within the meaning of the Framework Decision, the Court asked whether it was obliged to give the words the same meaning in the *Extradition Act 2003*. Two rules of statutory interpretation suggested this might be the case:

- the rule deriving from the decision of the Court of Justice of the European Union in *Pupino*⁷³ that national courts must interpret national law “as far as possible in

⁷⁰ Ibid. at paras. 60-66.

⁷¹ Ibid. at para. 104.

⁷² Ibid. at para. 130.

⁷³ *Criminal proceedings against Pupino* (Case C-105/03) [2006] QB 83.

- light of the wording and purpose of a framework decision in order to attain the objectives it pursues”; and
- the domestic rule of statutory interpretation that, when the legislature legislates to give effect to an international law obligation, it is presumed to do so in full.

The Court held that the rule in *Pupino* had no application for the reasons explained by Lord Mance. In sum, rulings of the Court of Justice of the EU bind the UK only because of section 2 of the *European Communities Act 1972*.⁷⁴ The scope of section 2 is strictly defined by section 1, which does not include the Framework Decision. This is a fascinating constitutional point, which has apparently been overlooked in previous case law.

Since the domestic rule undoubtedly applied, the UK Parliament was presumed to have intended that the expression “judicial authority” in the *Extradition Act 2003* bore the same meaning as in the Framework Decision so as to give effect to the obligations under the Framework Decision in full. As Lord Kerr pointed out, legislating inconsistently with the Framework Decision “would effectively preclude extradition” from some EU Member States.

This case is particularly interesting because, had a UK or Irish court been called on to interpret the term “judicial authority” in a purely domestic statute without definition, I have little doubt that it would have been interpreted to mean ‘a judge, magistrate or tribunal’, because in most common law jurisdictions a prosecutor is not seen to be exercising judicial authority *per se*.

Author’s analysis of national implementing measures

Implementation of EU legislation by Member States: Choice of form

I do not think that the question of choosing the type of national implementing legislative measure is as complicated as the author suggests. As already mentioned, EU Regulations are generally self-enforcing in that they have direct application to Member States. As for Directives and other kinds of EU instruments, there is a choice, but in my experience most of them in the UK and in Ireland are implemented by transposition regulations made under section 2 of the *European Communities Act 1972* (UK) and section 2 of the *European Communities Act 1972* (Ire).

Generally speaking, transposition will take the form of an amendment to a statute only when there is existing statute law governing an issue that is also the subject of a European Directive. But I would agree that the final decision as to the means for transposing EU Directives rests on the Member State concerned. Nevertheless, as the author maintains, the

⁷⁴ The position in Ireland is identical.

principle of autonomy is constrained by the norms of subsidiarity,⁷⁵ proportionality,⁷⁶ adequacy,⁷⁷ synergy⁷⁸ and adaptability.⁷⁹ These principles will of course be unfamiliar to legislative counsel who are not involved in drafting EU legislation or its implementation and thus may be no more than of passing interest to them. It is nevertheless noteworthy that the *Joint Practical Guide*,⁸⁰ mentions only the principles of subsidiarity and proportionality, which makes one question the extent to which the other three principles are significant.

The author's analysis of national implementing measures for EU legislation appears to merge a range of different situations, which might have been clearer if they had been dealt with separately. The first is the commitment to transpose the EU *acquis communautaire* in a particular area that is imposed on an accession state or on a state in an association agreement. The complexities and difficulties of this task when EU law is so dynamic are well set out. Non-Member States may have to absorb part of the *acquis* but until membership they are doing so on the international plane.

The second situation confronting legislative counsel arises when it is necessary to transpose a particular instrument. The Member State is obliged by EU law to ensure transposition of the provisions of a Regulation or Directive into its domestic legal framework. Accepting that the Member State legislative counsel might think that some specific obligation does not need formal transposition (because it is covered automatically by the binding nature of EU Regulations or might have been dealt with administratively because of the more fluid requirements of a particularly Directive), the assumption of the EU Commission will be that the Member State must be able to identify a legally binding form of legislative text that

⁷⁵ In areas in which the European Union does not have exclusive competence, the principle of subsidiarity is laid down in the Treaty on European Union (Article 5(3) and Protocol (No 2) on the application of the principles of subsidiarity and proportionality), which state that it is preferable for action to be taken by the EU rather than the Member States. This principle seeks to safeguard the ability of the Member States to take decisions and action and authorises intervention by the Union when the objectives of an action cannot be sufficiently achieved by the Member States, but can be better achieved at Union level, "by reason of the scale and effects of the proposed action".

⁷⁶ This principle guarantees that the level of regulation selected by a Member State reflects the effect or aim to be achieved and does not go beyond what is necessary in order to achieve the objectives pursued, in accordance with Article 5(4) of the Treaty on European Union.

⁷⁷ According to the author (at p. 136), the principle of adequacy balances the principles of subsidiarity and proportionality. She adds that 'regulatory adequacy' requires that the chosen means is capable of achieving the effect pursued, whereas legislative adequacy is intended to ensure that the chosen form of achieving that effect.

⁷⁸ The author maintains that the principle of synergy is designed to promote a holistic approach to the relevant legal system: see p. 136, where the author elaborates on 'regulatory synergy' and 'legislative synergy'.

⁷⁹ According to the author, the principle of adaptability requires flexibility in choosing the appropriate legislative instrument for implementing the particular EU measure. At p. 136, the author elaborates further, but I find this elaboration difficult to fathom.

⁸⁰ [Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of European Union legislation](#), Print ISBN 978-92-79-49121-4 doi:10.2880/89965 KB-02-13-228-EN-C; PDF ISBN 978-92-79-49084-2 doi:10.2880/5575 KB-02-13-228-EN-N. Also see [Legislative Drafting – A Commission Manual](#).

effects the transposition. The volume of texts to be transposed means that this will almost invariably be done by secondary legislation.⁸¹ As a result, Member States have devised different forms of secondary delegation. But even then Member States still have the option of choosing between using secondary legislation or primary legislation. When a member State does choose the secondary legislation route, it has to ensure that the secondary legislation conforms to its parent primary statute while at the same time complying with the relevant EU obligation.

The author suggests that as a matter of EU law national authorities can only transpose through legislation when other forms of regulation are not efficient. This, however, is a matter of policy choice rather than law.

The author usefully points out a movement towards EU expectations for Member State legislative drafting approaches to legal instruments that transpose or reflect EU legislation. This may lead to a position in which norms derived from EU obligations are drafted and presented in a more standardised EU style while leaving those areas not based on EU obligations to follow a more traditional domestic drafting style.

The author goes on to say, "Last but not least, judgments of the European Courts, and especially persistent case law, is [sic⁸²] binding on EU Member States and must be included in national implementing measures" (p. 162). While EU case law has to be taken into account in implementing EU law, it is certainly not the case that the text employed in implementing the measure by a Member State will necessarily provide for the effect of a particular judgment. By way of analogy, when a domestic statute is restated or consolidated, it is not necessarily the case that the accretion of case law about what the originally enacted provision means has to be incorporated in the restated or consolidated text. Indeed, when the EU restates or recasts a particular Directive, it rarely, if ever, alters text to take account of an interpretation given by the European Court of Justice to provisions of the original Directive.

The choice of form

The author also argues that "As for the technical side of drafting, EU legislation must be clear, unambiguous and simple ..." (p. 166). However, as someone who has been responsible for transposing a significant number of EU Directives into Irish law, I found the quality of many of the Directives to be poor to the extent that in some instances it was difficult (if not impossible) to make sense of a particular provision.⁸³

⁸¹ This is certainly the case in Ireland.

⁸² This should surely read "are".

⁸³ For example, see Directive 2004/18/EC of The European Parliament and of the Council of 31 March 2004 on the co-ordination of procedures for the award of public works contracts, public supply contracts and public service contracts. This Directive was repealed by Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement.

One thing that has become particularly apparent in the last 6 or 7 years is that extremely lengthy preambles and recitals are being included in some of the larger Directives. A single recital can often stretch three-quarters of a page and constitute dense text more redolent of Victorian legislation (minus archaic terms, admittedly) than of an emanation of an institution supposedly legislating for 21st century conditions. The presence of such lengthy recitals gives lie to the assertion that their presence is purely to provide the legal basis for making the Directive. I suspect that the inclusion of some recitals is for political reasons in the sense that that Member State is to draw comfort from the possibility of the European Court of Justice interpreting the Directive in light of that particular recital. Even when qualified majority voting applies, trying to get 28 Member States to agree on a text can be very difficult. The fact that securing such an agreement can result in a poorly worded Directive will necessarily exacerbate the technical drafting difficulties faced by Member State legislative counsel in transposing the Directive into domestic law.

The author sets out the requirements for good drafting and law making by EU institutions (pp. 166-167). She does not, however, place before the reader the well voiced concerns that the guidelines and recommendations promulgated by the EU concerning drafting at the EU institutional level are not, in many cases, being observed in practice. She also writes that effective implementation of Directives “excludes the use of the 'copy out technique'....” (p. 169). If “copy out” was indeed available to the legislative counsel of a Member State who was not sure what exactly a particular provision in a Directive meant (which can be quite often), adoption of this approach would at least exclude the possibility. However, in my experience it is rarely possible (if at all) to simply “copy out” a Directive. A Directive is a law that speaks to all 28 Member States and leaves each Member State to give effect to the Directive as domestic law vis-à-vis each of the other 27 Member States. And so, as I see it, the transposed law is viewing the contents of the Directive from a different perspective than the European Commission. But by using "domestically tailored" wording to transpose a Directive, the drafter of the implementing legislation has to accept the risk possibility that the European Court of Justice may later rule that that the opaque wording of the Directive has been incorrectly transposed. However, with most (if not all) Directives, I see no other option.

The international dimension: implementing international agreements

The third section of the chapter concludes with a discussion of the implementation of international agreements as domestic law. The most common international agreements are either treaties or conventions. Article 11 of the Vienna Convention on the Law of Treaties prescribes how the consent of a State to be bound by a treaty or convention can be expressed. That consent can be expressed by signature, exchange of instruments constituting a treaty or convention, ratification, acceptance, approval or accession, or by any other means if so agreed. But as the author observes, this is not the end of the matter. In some States (so-called monist States), a treaty or convention takes effect as soon as the State has expressed

its consent. However, even then, the State may need to enact supplementary legislation to enable the treaty or convention to be given full effect within the State.⁸⁴ In other States (so-called dualist States), a two-step process is required, with a treaty or convention signed by or on behalf of a State not taking effect as domestic law until it is ratified by the State's legislature. Most common law countries, such as the UK, Ireland, Australia and New Zealand are 'dualist States'.

The author then proceeds to discuss and identify the methods by which States may give effect to international treaties and conventions (presumably dualist States). Four methods are listed as follows:

- national implementing legislation does not refer to the treaty or convention, except to state that the legislative purpose is to give effect to the treaty or convention as law in the enacting State;⁸⁵
- national implementing legislation refers to the treaty or convention and includes a separate substantive provision that gives effect to the treaty or convention as law in the enacting State;⁸⁶
- national implementing legislation sets out the treaty or convention in a schedule to the legislation for information purposes only;⁸⁷
- national implementing legislation sets out the treaty or convention in a schedule to the legislation and includes a separate substantive provision that gives effect to the treaty or convention (or part of it) as law in the enacting State.⁸⁸

The author advocates using the relevant treaty or convention as drafting instructions for the implementing legislation and, in drafting that legislation, following the five-stage process outlined in *Thornton's Legislative Drafting*.⁸⁹ And she uses Thornton's precepts to outline how implementing legislation might be drafted (p. 173).

Rightly in my view, she points out that treaties and conventions may have similar dangers to lay drafts and so the drafter must avoid the temptation to simply copy what is there. She also stresses the need for the drafter to be aware that the treaty or convention was created for

⁸⁴ For example, the provisions of a treaty or convention may be expressed in vague or aspirational terms, so that they are not self-executing and thus need to be fleshed out in order to be fully effective at the State level. Moreover, if the treaty or convention does not prescribe mechanisms for enforcement of the provisions of the treaty or convention, supplementary legislation may be needed to fill the gap.

⁸⁵ I have been unable to find a statute that adopts this approach. But it would surely be rare for a State to adopt this approach without at least stating that the purpose of the statute is to give effect to the relevant treaty or convention.

⁸⁶ Examples of statutes that adopt this approach are the *European Communities Act 1972* (Ire) and the *International Interests in Mobile Equipment (Cape Town Convention) Act 2013* (Cwlth).

⁸⁷ Examples of statutes that adopt this approach are the *Anti-Personnel Mines Convention Act 1998* (Cwlth), the *Containment of Nuclear Weapons Act 2003* (Ire) and the *International Criminal Court Act 2006* (Ire).

⁸⁸ Examples of statutes that adopt this approach are the *Trusts (Hague Convention) Act 1991* (Cwlth) and the *Choice of Court (Hague Convention) Act 2015* (Ire).

⁸⁹ Above n. 17, chapters 7 and 8.

purposes of a different and wider environment than the drafter's own jurisdiction. The author also stresses the importance of the drafter aiming to ensure national effectiveness in implementing the relevant treaty or convention. So I was taken aback to find her contemplating the possibility of drafting legislation "to avoid effective compliance in practice" (p. 172), which must surely be anathema to any self-respecting legislative counsel. While there may be States that are sufficiently disingenuous to want to pretend to implement a treaty or convention without actually doing so in practice, surely the correct approach for such States is not to sign the treaty or convention in the first place. Furthermore, adopting a treaty or convention with no intention to fully implement it seems to me to fly in the face of Article 16 of the Vienna Convention on Treaties.⁹⁰

The author concludes this section by a discussion of how legislative counsel might draft legislation that will effectively implement a treaty or convention. She cites four options:

- do nothing;
- prepare legislation incorporating the treaty or convention wholly⁹¹ or partially⁹²
- prepare legislation that contains the necessary powers to comply with the obligations arising under the treaty or convention without necessarily incorporating it in the legislation;
- prepare delegated legislation to provide for the incorporation of a number of treaties or conventions.

I will now deal with these options in turn. Firstly, while I agree that it is possible that there may be cases where a State may not need to enact legislation for the implementation of a treaty or convention because it already has in place legislation that achieves the purpose of the treaty or convention, this is extremely rare and is not a situation that I have encountered personally.

Secondly, I am not convinced that the second, third and fourth options cover all possibilities. For example, a statute may give effect to a treaty or convention by prescribing offences and other enforcement measures without expressly giving the treaty or convention the force of law in the enacting jurisdiction. For example, the *Antarctic Act 1960* (NZ) confers jurisdiction on the courts of New Zealand to deal with offences committed in the Ross

⁹⁰ Article 16 reads as follows:

Article 18—*Obligation not to defeat the object and purpose of a treaty prior to its entry into force*
A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:
(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or
(b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

⁹¹ For example, the *Diplomatic Privileges Act 1964* (UK), which accords the force of law to the Vienna Convention on Diplomatic Relations in the UK.

⁹² For example, the *Human Rights Act 1998* (UK).

Dependency and certain other parts of Antarctica, and to restrict the jurisdiction of the courts in respect of acts or omissions in Antarctica of certain nationals of other countries, without expressly declaring the Antarctic Treaty to have the force of law in New Zealand. Also see the *Antarctic Marine Living Resources Act 1981* (NZ), which gives effect to the Convention on the Conservation of Antarctic Marine Living Resources without expressly declaring that Convention to have the force of law in New Zealand.⁹³ Yet another statute that adopts a similar approach is the *Anti-Personnel Mines Convention Act 1998* (Cwlth), which implements the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction in Australia. Moreover, I am not convinced that these three options square with the four methods listed by the author (p. 171).

Thirdly, the fourth option is problematic. Surely such delegated legislation would be dependent on the enactment of primary legislation that expressly enables the incorporation of treaties or conventions into the law of the enacting State. If that is the case, why not use the primary legislation to incorporate the treaties or conventions in the first place?

Nevertheless, as the author maintains, the composition of national implementing legislation indeed requires special attention and diverse treatment. In that context, she suggests a number of useful factors for legislative counsel to take into account in drafting the legislation, including structuring “the national law by use of best practices in [legislative] drafting.” (p. 174)

Innovation

This brief section reiterates what the author has stated elsewhere in her book about effectiveness, the doctrine of phronetic legislative drafting, and international legislative drafting texts (which I assume are synonymous with treaties, conventions and other international agreements), so I am not sure why it was necessary to include it in the book. Furthermore, after reading this section, I was unable to connect the contents with the heading. I was also puzzled by the last sentence of the section, which reads: “Departing from primary legislation for the purposes of domestication or regional or international instruments may be justified constitutionally, but it is completely unforgiveable from a legislative quality pointed of view”. My question is ‘in what way is such a departure unforgiveable from a legislative quality point of view?’

Miscellaneous point

Finally, in commenting on this chapter, I would question the appropriateness of the following sentences:

- “Treaties are international agreements to legal bindingness between states.” (p. 169);

⁹³ Schedule 1 contains a copy of the Treaty.

- “But treaties infer the dangers of any lay draft.” (p. 171).

Chapter 9: Final Provisions

Introduction

In this chapter, the author advocates that a statute’s final (or closing) provisions should comprise the following:

- Savings provisions
- Transitional provisions
- Repeals and consequential amendments
- Purpose/objective provisions
- Start/end provisions
- Short title (if necessary)
- Schedules
- Definitions/interpretation⁹⁴
- Other Schedules.

Savings and transitional provisions

As to savings and transitional provisions, it is common for these to be placed in a single Schedule (which may be divided into Parts) headed ‘Savings and transitional provisions’. Since savings and transitional provisions are normally set in the chronological order of the provisions of the statute that is being repealed, I would see no reason to depart from this. This Schedule is usually supported by a section that gives effect to it. This section will normally be the penultimate section of the new statute. This practice seems to be sound and I would see no reason to depart from it.

Repeals

Repeals will normally be placed in the last section of a statute, unless there are so many of them as to warrant them being placed in a separate Schedule. As for consequential amendments, they too will normally be placed in a separate Schedule or, if not, in a separate stand-alone statute that contains only consequential amendments. Again, this seems to be a sound practice to which no change is warranted.

In her discussion of repeals of enactments, the author, rightly in my view, says that, in drafting a new piece of legislation, it is the legislative counsel’s duty to identify which legislative texts are affected by the new one and to make the appropriate repeals or consequential amendments. Failing to fulfil this duty means that legislative counsel will be

⁹⁴ At least one experienced legislative counsel considers locating definitions at the end of a legislative text inappropriate. See B. Simamba, ‘The placing and other handling of definitions’, (2006), 26 Statute Law Review.

introducing an unintended repeal by implication or overlaps and inconsistent terminology, all of which will result in confusion.

In identifying the circumstances in which legislation should be repealed, the author quotes Teasdale, who identifies as many as eight different cases, all of which on reflection appear to be valid and should, in the appropriate case, be addressed by legislative counsel. This list should prove helpful.

As the author correctly points out, there has been a long-standing debate about the need to repeal amending legislation. As I have always maintained, amending legislation comprising textual (or ‘direct’) amendments merges with the amended text as soon as it takes effect and so becomes spent. So technically it is not really necessary to repeal (or revoke in the case of secondary legislation) the amending legislation. However, for the sake of keeping the statute book ‘tidy’ many legislative drafting offices formally repeal that legislation and I see nothing wrong with doing that. But not all legislative drafting offices share this view and I recall having quite a heated discussion with a former UK First Parliamentary Counsel who surprisingly took the opposite view.

On a related issue, the author asks what should be the position when a principal Act is repealed before an Act amending it has taken effect. In such a case, I agree with the author that, although not strictly necessary to repeal the amending Act, it is, for the sake of clarity, desirable to formally repeal it along with the principal Act. At least one Australian jurisdiction provides for the automatic repeal of an amending Act on the day after its enactment.⁹⁵ I commend this section for adoption by other Commonwealth jurisdictions.

Location of short title (if any, objects and start provisions

With regard to the fourth, fifth and sixth items, the author advocates the placement of the purposes or objects section, the start/end provisions (if any) and the short title at the end of a statute. I can see nothing to be gained by this. The reader of a statute wants to know what it is called (though I admit this will be clear from the headings to the statute), its purpose or object and its starting date (and its ending date if it is subject to a ‘sunset’ clause). Although I appreciate that in some jurisdictions the short title and starting provisions are located at the end of a statute, this surely makes this basic information difficult for readers to find. Likewise, the purpose or objects section, which contains information essential for informing the reader what the statute aims to achieve.

⁹⁵ See section 30C of the Interpretation Act 1987 (NSW). Subsections (2) and (3) provide:

- (2) An amending Act is repealed on the day after all of its provisions have commenced (except as provided by subsection (3)).
- (3) If an amending Act commences before the date of assent, the amending Act is repealed on the day after the date of assent.

Schedules (if any) are traditionally located at the end of a statute and the author seems to acknowledge the appropriateness of this. However, she advocates locating the definitions of terms (or interpretation provisions) in a Schedule of a statute. I can see some merit in this if there is a large number of them, but only if they are placed in the very last Schedule or in a dictionary or glossary located at the very end of the statute, thus making them relatively easy for readers to find.⁹⁶

Purpose/objects provisions

Returning to ‘purpose’ or ‘objects’ provisions,⁹⁷ I entirely agree with the author that they not only offer the reader an insight into the reasoning of the policy formulators, thus enhancing comprehension, but most importantly also state what the relevant statute intends to achieve.⁹⁸ Her enthusiasm for ‘purpose provisions’ in this chapter comes as a surprise bearing in mind her lukewarm attitude towards them in chapter 4 (p. 69). As the author points out (p. 186), the value of purpose/objects provisions has become sullied due to the propensity of some politicians to hi-jack them in order make emotive political statements that should have no place in statutes.

Equally unfortunately, politicians have been known to use the short title of a Bill to make a political grandstanding statement.⁹⁹ Since politicians generally have the last word in determining a Bill’s contents, other than protesting against this kind of abuse, there is not a lot more that legislative counsel can do to prevent it. Nonetheless, legislative counsel should do everything within their power to discourage this kind of abuse of the statute book.

However, I do believe there is considerable merit in the author’s suggestion that objectives, specified in measurable and concrete terms, could be a valuable tool in helping to determine whether, over a period of time, the legislation has contributed to attaining those objectives. Most recent principal New South Wales statutes contain a provision directing the Minister responsible for administering the legislation to conduct a review of the statute concerned. However, my inquiries have not revealed any instances of any such post-enactment reviews having been conducted, let alone any conclusions. Recent New Zealand principal statutes contain similar review provisions and I have been reliably informed by a senior member of the New Zealand Parliamentary Counsel Office that not only are reviews conducted, but they also acted on.

If such reviews could be based on tangible measurable and concrete criteria that could assist in determining the extent to which regulatory objectives had been achieved over time, they could be a really valuable tool for policy formulators to assess whether those objectives had

⁹⁶ This is the practice in most Australian jurisdictions.

⁹⁷ Which terms are, as I previously maintained, interchangeable: see above n. 60.

⁹⁸ See Renton “Interpretation of Legislation” (1982), 3 *Statute Law Review* 7 at 10.

⁹⁹ See for example the Australian goods and services tax legislation enacted in 2000,

been substantially achieved. If they had, then the legislation could continue, perhaps with minor tweaking amendments. If instead a review showed that the legislation had not been successful in achieving those objectives, the policy formulators could either consider substantial amendments to the legislation or adopt a radically different approach in an attempt to achieve those objectives.

The author has also suggested that new principal statutes could generally be subject to sunset clauses, so that the legislature would be forced to review those statutes before their expiry to determine whether they should continue, with or without amendment, or be allowed to expire because they were not achieving their original policy objectives.

Compared with the review provisions contained in new principal statutes, sunset clauses would surely guarantee that those statutes were in fact reviewed to determine the extent to which they were effective in terms of achieving their stated objectives.

Start, end and duration provisions

In most legal jurisdictions, start (better known as commencement) provisions appear at the beginning of a statute or statutory instrument, but there are notable exceptions, such as Canada and the UK (where they appear at the end). If a ‘start’ provision is relatively simple, then there is a good case for locating it immediately after the beginning of the document. However, many modern statutes and statutory instruments have complex staggered start dates. In such cases, the detailed start provision must be placed in a Schedule at the end of the document. But it should not be forgotten that, if the power to fix the starting dates for the various provisions of the document is delegated to some public officer or authority, it is imperative that the provision containing the delegation becomes operative immediately on assent or first publication.¹⁰⁰

This section also contains an interesting discussion extolling the benefits of ‘sunset’ provisions and the circumstances in which their use is appropriate. Although, the author claims that sunset provisions are necessary in five distinct cases, she only lists four! One wonders therefore what the fifth one was meant to be?

As to whether expired sunset provisions need to be repealed, I agree with the author that this is not legally necessary. However, in the interests of keeping the statute book tidy, it is, as with spent amending statutes, desirable to repeal them.

Short title

As the author states, short titles, not only provides the heading to statute or other legislative document, but also provides a means by which to index and cite the document. However, I

¹⁰⁰ Depending on the practice in the legal jurisdiction concerned.

do not share the author’s view that it is time to get rid of the short title and simply rely on the heading stated at the top of the document.

Some legislative jurisdictions, such as those in the United Kingdom, locate the short title at the end of the document and I must confess that I have never understood why this is the practice. Can you imagine any other kinds of texts that have their title placed at the end?

However, I entirely agree that, irrespective of where the short title is located, it should express the name by which the document is to be known, without resort to political sloganeering and that the title should be short, relevant and distinctive so that it cannot be confused with the titles of other legislative documents.

However, I was surprised to learn that “the short title is drafted at the very end of the drafting process” (p. 191). This is certainly not consistent with my experience, though it is not unheard of to modify the short title late in the drafting process.

Schedules

Finally, in this chapter, there follows a useful discussion of Schedules and I share the author’s view that Schedules can make a significant contribution to the coherency of legislation by allowing matters of principle and major substance to appear uncluttered by detail in the main body of the legislation, leaving matters of secondary or incidental detail to be relegated to Schedules.

As the author points out, Schedules generally cannot stand on their own without being supported by a provision of the main part of the text. However, the New South Wales *Interpretation Act 1987* now contains a section¹⁰¹ rendering supporting provisions redundant.

It is difficult to disagree with the author that consistency of design is advisable in drafting Schedules and that matter should only be assembled in a Schedule if it has some cohering and unifying feature.

Rather oddly, in this section the author discusses definitions. Although some Australian jurisdictions list definitions in a Schedule located at the end of long statutes and statutory instruments, this practice tends to be the exception rather than the rule. But that apart, the discussion on definitions is generally uncontroversial and is consistent with the precepts advocated by Thornton¹⁰² and Driedger.¹⁰³ And I strongly agree with her assertion that definitions should not be used to introduce substantive laws (which is a not uncommon

¹⁰¹ See section 30C, which reads as follows:

A schedule to an Act or instrument has effect according to its tenor when it comes into force, whether or not the Act or instrument declares that the schedule has effect.

¹⁰² See *Thornton’s Legislative Drafting*, 5th ed., above n. 17 at 170-173 ('Ten practical rules for drafting definitions').

¹⁰³ See E.A. Driedger, *The Composition of Legislation—Legislative Forms and Precedents* (Department of Justice: Ottawa, 1976) at 45-47.

mistake perpetrated by some legislative counsel) and the desirability to add some brief signposting information in the case of referential definitions that cross refer to another enactment. And of course, most legislative counsel would agree that the phrase ‘means and includes’ and ‘includes only’ are contradictory.

The author concludes with a brief discussion of other kinds of Schedules, namely ‘Keeling Schedules’ and ‘Jamaica Schedules’. As to Keeling Schedules (which restate the amended section and show the amendments as incorporated into the text), I have encountered them fairly rarely. On balance, I am inclined to the view that, although this kind of information is valuable to readers and parliamentarians at the pre-enactment stage, it is better located in explanatory material annexed to the proposed legislation.¹⁰⁴

As the author points out, Jamaica Schedules aim to facilitate readers’ awareness of the status of the timeline of a statute or statutory instrument. A Jamaica Schedule starts life by specifying the original start date or dates and is then updated on each occasion the statute or statutory instrument is amended. The use of such a Schedule makes the whole history of the statute or statutory instrument readily available to users and, so long as the updated text is quickly available to the public, notes to commencement orders and notices would be redundant, thus enabling users to find the chronology of statutes and statutory instruments in a single document. There seems much to be said for this.

Chapter 10—Comparative legislative drafting

In this chapter, the author compares the common law and civil law approaches to drafting legislation. According to her, students of legislation have been seeing a worldwide move towards universalism in accepting that the quality of legislation is a goal that not only might be promoted but even perhaps achieved through “the phronetic application of universally applicable rules” (p. 199). But she does concede that there will continue to be variations (sometime idiosyncratic) between legislative jurisdictions.

Because the European Union comprises some countries that follow the common law tradition and others that follow the civil law tradition, and because the two courts adjudicating disputes have judges from both traditions, there has been a convergence between common law and civil law approaches to legislative drafting. As the author maintains, what legislative counsel strive for in drafting legislation is quality and, I would agree with her, that what constitutes quality in this context is effectiveness, or the “ability of the legislative product [*sic*] to produce the desired regulatory results, if synergy of all actors in the policy process actually occurs” (p. 211). In elaborating the point, the author argues that this common conception of what constitutes quality extends beyond the common law/civil law divide and has led to

¹⁰⁴ See Sir Geoffrey Bowman, Select Committee on Constitution (UK), Examination of Witness, Questions, pp 340-59 (23 June 2004)

a hierarchy of legislative drafting values that aim at clarity, precision and unambiguity as means of promoting effectiveness, as well as gender neutral and plain language as tools for the achievement of clarity, precision and unambiguity (p. 211).

However, she accepts that, despite a seemingly universal view that quality of legislation is the ultimate aim, this will not lead to standardisation in legislative drafting. Thus, she says (and I would agree), standardisation is impossible given phronetic legislative drafting, “where subjective choices based on theoretical awareness and practical empirical know-how constitute the backbone of legislative drafting as a task” (p. 211). Nonetheless, the author concludes, rather hyperbolically, that “the hatchet between civil and common law drafting is buried” (p. 212). She ends by claiming that academics and professionals (presumably legislative counsel) can now look for “best practices, for possible solutions, for legal transplants”. Rather bizarrely, she concludes the chapter by claiming that “this would require the demolition of the last obstacle: *legislative racism*”.¹⁰⁵

Chapter 11—Time in legislation

As the author recognises, addressing the time element is crucial for the effective operation of legislation. Too often drafters of legislation (and indeed of other legal documents) fail to recognise that such a document is to be construed at the time when it is to be applied not at the time when it was drafted. Regrettably, they erroneously assume that the words ‘shall’ and ‘shall not’ put the enacting or operative verb into the future tense. But in a statute that directs or prohibits certain action, they fail to understand that ‘shall’ (or its counterpart ‘shall not’) functions as a modal verb and not as a temporal one. Consequently, its use denotes (or should denote) an obligation to act (or, in the case of ‘shall not’, a command not to act). Hence, they wrongly often attempt to express circumstances that are to precede the operation of a legislative provision in the future or future perfect tense. The upshot is that they write poor sentences such as ”If any person shall give notice in the prescribed form, he may appeal to the High Court” rather than ”A person may appeal to the High Court by lodging a notice in the prescribed form.” Thus, when drafting a statute (or any other legal document having continuing legal effect) as constantly speaking, legislative counsel will not go astray if they—

- use the present tense to express all facts and conditions that are to be contemporaneous with the legal action; and
- use the present perfect tense to express all facts and conditions needed to express conditions precedent to the legal action.

As the author observes, failure to follow these simple propositions will create confusion for both the drafter and readers.

¹⁰⁵ Surely ‘racism’ is totally inappropriate here. Would not ‘chauvinism’ been more apt? Also see the preface to *Thornton’s Legislative Drafting* 5th ed., above n. 17, where the author also uses this rather unfortunate term.

The author goes on to point out that even if the varied notions of the past, present and future were themselves complex enough, the starting point for some time references can also differ. Most legislation is prospective, and thus encompasses four aspects of time as its starting point:

- the time when the legislation is drafted;
- the time of passing (enactment) the legislation;
- the time when the legislation comes into operation; and
- the time when the legislation is used (applied or construed).

However, it is often necessary to give a legislative provision effect by reference to what has occurred in the past, in which case there are five aspects of time as starting points: the ones just mentioned and a past time or event to which the provision refers.

The chapter continues with a discussion of prospective provisions, legalising provisions,¹⁰⁶ retrospective legislation and retroactive legislation. As the author demonstrates, most legislation is designed to have prospective effect. This feature itself poses difficulties for legislative counsel, since they cannot foresee every conceivable situation to which the legislation could apply. Legalising (or validating) provisions are provisions that change the law retroactively so that acts that might have been invalid or unlawful at the time they were done are validated or rendered lawful.

As a general rule, retroactive legislation is considered undesirable because citizens are expected to comply with the law as it is at the time of their actions. As the author points out, this is not only unfair to citizens who try to comply with the law but is also unsettling to the legal system, as certainty in the law is seriously damaged when the law is changed after the event. Nevertheless, there are circumstances in which it is in the public interest to change the law retroactively, such as when the change cures a defect in the law that was not foreseen or to retroactively confer a benefit on members of the public in circumstances in which they would have been unfairly deprived of the benefit.¹⁰⁷

Whereas retroactive legislation changes the past legal effect of a past situation, retrospective legislation changes the future legal effect of a past situation (or even a continuing situation). Retroactive legislation is generally considered more objectionable since it involves changing the past as well as the future effects of a past situation. In contrast, retrospective legislation is less objectionable because it involves changes for the future only, which of course means that citizens can still prospectively organise their affairs so as to comply with the law.

The chapter concludes with a discussion of the role of the drafter and legalising provisions. The author points out that retrospective provisions and, in particular, retroactive provisions, are danger areas for legislative counsel, since they may result in unconstitutionality,

¹⁰⁶ Often referred to as ‘validating’ provisions: see *Thornton’s Legislative Drafting*, 5th ed., chapter 14, above n. 17 at 369-376.

¹⁰⁷ For example, a backdated increase in a superannuation benefits.

illegality or unfairness, or prejudice the rule of law or certainty in the law. And I would certainly agree that legislative counsel should ensure that retrospectivity and retroactivity is expressed with precision and certainty so that ambiguity is avoided. She concludes by suggesting that, if retroactivity or retrospectivity involves an exclusion from an enactment, then an application provision may be best for the purpose. On the other hand, in the case of a retrospective exemption from an enactment, a savings provision may be suitable. However, the author's suggestion that "substantive application provisions are confusing for the reader and the message of exemption from the law is best carried where it is most obvious: in the short title" (p. 221) is decidedly odd. Firstly, I do not see why an application provision is confusing to readers and, secondly, it is difficult to see the justification for cluttering the 'short title' with what may well be a relatively minor exemption or exclusion.

Another rather odd statement appears earlier in the chapter where she writes

... laws that change pre-existing obligations prospectively are prospective statutes: reference to the event that gives rise to the law from the moment of enactment onwards is a classic example of a prospective law (p. 217).

I have no quibble about that, but she goes on to say

Here time does not come into play, as the regulated are aware of the future consequences of their pre-existing obligations and have a choice whether to comply or not.

But is this true? Surely the choice is whether to comply with the new obligation or to cease the activity to which the activity relates. This is demonstrated by the example provided by the author:

... the imposition of a new obligation to register with the police guns is a prospective provision with new consequences can opt to undertake by continuing to hold a licence or not.

Surely the choice is between holding a licence (and registering the gun) and surrendering the gun.

Chapter 12—Amending provisions

Introduction

In this chapter, the author discusses the drafting of provisions that amend the existing law.¹⁰⁸

After dealing with some initial considerations, the author proceeds to distinguish between express and implied amendments. Most amending legislation is 'express' and is mostly

¹⁰⁸ As the author points out (p. 223), in one sense all statutes can be said to be amending in that they all affect the fabric of the law, whether or not it is statute law. But in this chapter, 'amending provisions' generally refer to the amendment of statute law (including subsidiary legislation).

(in the 21st century at least) effected by direct (or textual) amendment. Implied amendment is rare. It arises when a new statutory provision is inconsistent with another (usually earlier) one. To the extent that it exists, it is an indicator of sloppy drafting, because it leaves the position unclear. It also means that the legislative counsel has failed to complete his or her task properly. And so resolving the inconsistency becomes a matter of statutory interpretation for the judiciary to determine.¹⁰⁹

In concluding the discussion, the author asserts that leaving the judiciary to resolve inconsistencies between conflicting provisions “is a clear transfer of the task and power to legislate from the legislature to the judiciary” and goes on to say, “so implied amendments are a breach of the principle of separation of powers” (p. 225). But is this really the case? The main function of the judiciary is to resolve disputes involving differing interpretations of the law. Surely resolving disputes over the application of inconsistent provisions is simply a facet of this.

Comparison of direct and indirect amendments

The author then discusses direct and indirect amendments.¹¹⁰ She begins the discussion with some examples of amendments that are of a direct (or textual) nature. She states that direct amendments may consist of “repeals, alterations, substitutions, incorporations or a mixture of the above”, but I think that the classification could be reduced to “deletions (repeals or omissions), substitutions and insertions”. The example the author takes from the *Family Procedure Rules 2010* provides an illustration of all three (deletion, substitution and insertion); it also demonstrates the use of the imperative approach to amendment commonly used in Australian jurisdictions, as opposed to the narrative approach used by in many other Commonwealth jurisdictions.

Later, the author claims that direct amendment offers increased clarity and precision. While direct amendments do indeed offer precision, one of the criticisms of them has been that they tend to be unclear in themselves, which is why comprehensive explanatory notes are needed to explain and thus clarify them. But at the end of the day, direct amendments are much to be preferred over indirect ones because they enable the amended statute to be reproduced¹¹¹ as a coherent and cohesive whole. The author appears to recognise this because she later goes on to say “direct amendments are in a format that supports later consolidation” (p. 228).¹¹²

¹⁰⁹ There are of course canons or rules of construction that enable judges to address this problem, for example, ‘a later statute will normally prevail over an earlier inconsistent one’ and ‘the particular overrides the general’ (either in the same statute or in two or more statutes).

¹¹⁰ Both of which of course are ‘express amendments’.

¹¹¹ Or perhaps more aptly ‘reprinted’?

¹¹² I assume consolidation covers reprints and restatements, which are normally carried out by the relevant legislative drafting office in some jurisdictions. If that is so, then the clause “since they instruct the consolidating officer on the steps to be taken for the achievement of the task” needs to be read with

Direct amendments

In former times, it was more common to effect direct amendments by simply making the minimum changes needed to give effect to the policy. One of the reasons for this approach was, as the author mentions, a desire to ensure that the legislature only debated the amendments *per se* and not the text surrounding them, partly because it was perceived to save parliamentary time and partly because it supposedly precluded legislators from re-raising issues that were perceived to have been settled when the legislation was originally enacted (or amended). However, I believe this is a furphy. On no occasion during my 50-year legislative drafting career has replacing the whole provision affected (for example, section or subsection) as opposed to making the minimum possible amendments (which of course makes it more difficult for legislators and others to understand the effect of the amendments) posed any kind of problem, political or otherwise.¹¹³ In fact in some jurisdictions, it is standard practice now to automatically generate the whole of the amended text while showing the amendment in that text itself.¹¹⁴ Moreover, as the author points out, clarity is enhanced.

The author goes on to extol the virtues of Keeling Schedules, which demonstrates what an amended provision will look like post-amendment. I agree with the author that there is merit in using Keeling Schedules for amending legislation and it is puzzling that they are not used more often. As the author points out, this tool combines the precision sought by legislative counsel with the clarity desired by lay users.

Next, the author discusses techniques for effecting direct amendments. Firstly, the short title of amending legislation should identify

- the legislation being amended,
- the fact that the function is to amend that legislation,
- the main focus of the amendments, and
- the year of enactment.

And if the amending legislation is not the first amendment for the year, the short title should indicate that that is the case by adding, for example, ‘(No. 2)’ or ‘(No. 3)’. I agree that this is best practice; and I strongly agree that what the author calls ‘mosaic laws’ are not best practice (by ‘mosaic laws’, the author is referring to amending legislation that amends other pieces of legislation that deal with disparate, unrelated topics). As a general rule, amending legislation should be contained in a single document that is limited to the principal

circumspection. But in any case, one of the main advantages of direct amendments is that they render the task of consolidation, reprinting or restating a purely mechanical one for the officer who has to undertake the task.

¹¹³ At p. 229, the author provides an example of repealing and replacing the whole of an existing provision rather than making the minimum amendments to it. (See section 9 of the *Clergy Discipline (Amendment) Measure 2013 (UK)*)

¹¹⁴ For example, Tasmania.

legislation that is being amended. Otherwise, users are liable to be confused. This practice, if followed, makes it easier for users to locate amending legislation in indexes, etc.

I also agree with the author that, just as the short title of amending legislation helps users, a shortening definition in the legislation can enable the drafter to avoid tedious repetition of the short title of the amended legislation in the text of the amending legislation (for example, ‘In this Act, ‘principal Act’ means the *Town and Country Planning Act 2015*’).

In discussing approaches to drafting amendments, the author says “Direct amendments can be constructed narratively, or in a table” (p. 232). Although true in a way, the comparison is not apt. What she should have said is that direct amendments can be constructed narratively or imperatively,¹¹⁵ since a table can be used for either approach. Nevertheless, I do agree that setting out amendments in tabular form is helpful to users, because amendments expressed in that form present “all amendments … in a compact and structured form that facilitates clarity and intelligibility”. Similarly (and for the same reasons), I strongly agree with the author’s assertion that reference to the provision being amended should be located as close to the beginning of the amending text as possible.¹¹⁶

In her discussion of direct amendments, the author raises a number of other peripheral issues, which I will mention and comment on briefly:

- The author asserts (p. 233) that references to the provisions being amended should be expressed in their ‘short form’ (for example, ‘Section 36(1)(b)(i) of the principal Act is amended …’) rather than the long form (for example, ‘Paragraph (b) of subsection (1) of section 36 of the principal Act is amended …’). Most Commonwealth legislative drafting offices adopt this approach. However, some¹¹⁷ use a variation of this approach. Instead of citing the largest unit being amended (for example, Section 36(1)(b)(i) …), they cite the smallest (for example, Subparagraph 36(1)(b)(ii) …). My personal preference is for the former approach.
- The author also asserts that “it is best to avoid multiple instructions for amending a single sentence” (p. 233), but in all my experience I have never encountered any such instructions. In any case, this is a drafting issue for legislative counsel to resolve.
- The author comments on the importance of punctuation in amending legislation. There is no doubt that care is needed to ensure that the appropriate punctuation is made in the amendment, otherwise the meaning of the amended provision could be detrimentally affected, with the result that clarity (and thus effectiveness) is

¹¹⁵ The following is an example of an amendment drafted using the imperative voice: ‘In section 5 of the principal Act, delete “Registrar” and substitute “Commissioner”. (Alternatively. ‘In section 5 of the principal Act, for “Registrar” substitute “Commissioner”.)

¹¹⁶ For example, ‘In section 44 of the principal Act, after “goat”, insert “sheep”, rather than ‘Insert “sheep” after “goat” in section 44 of the principal Act’. The former is surely clearer and more precise than the latter.

¹¹⁷ For example, the Australian Office of Parliamentary Counsel.

lost. The position is similar with grammar: it is most important that the grammar in the amendment is consistent with that of the text being amended, so as to ensure that the amended provision is coherent, clear and effective.

- One issue that has caused some controversy over the years is whether to make the language and style of an amendment consistent with that of the provision being amended. Most legislative counsel will rely on the ‘Roman rule’, which requires that the amendment should in all respects reflect the language and style of the text being amended. While I generally agree with this position, legislative counsel can often make modest improvements in amending text even when the language and style of the legislation being amended is full of jargon, archaisms, Latinisms and other forms of legalese. For example, it would be inappropriate to use the gender neutral ‘he or she’ in legislation that is full of gender-specific references to ‘he’, unless of course those references are consequentially amended to make them all gender-neutral. Surely the answer to this conundrum is to issue a restatement or reprint of the amended legislation so that its language and style reflects best current plain language practice.
- Another issue that the author comments on is the use of plain language in the amending text. Many legislative drafting offices have already simplified the language used for this purpose. For example, compare the succinct

In section 5(1)(b) of the principal Act, delete “Registrar” and substitute “Commissioner”.

as opposed to the following old and more convoluted approach:

Paragraph (b) of subsection (1) of section 5 of the principal Act is hereby amended by deleting therefrom the word “Registrar” and by inserting instead the word “Commissioner”.

Surely the former version is preferable and indeed clearer than the latter version.¹¹⁸

- Finally, the author considers the question whether, if amendments to principal legislation are not within the scope of its long title, the long title should be amended to reflect the changes effected by the amendments. Apart from one legislative drafting office¹¹⁹ I am aware of, it is standard practice to amend the principal legislation to reflect such changes (which is consistent with what the author advocates). A similar approach is generally adopted (and advocated) for purpose or objects sections of primary legislation in cases where amendments to the legislation are inconsistent with those sections. However, as the author suggests, if the changes made by the amendments are very significant,

¹¹⁸ In relation to the example given at the top of p. 236, would it not be preferable to have expressed this as follows: Section 26 of the principal Act is amended by inserting “, if the Director so certifies,” after “calendar year”. This would avoid having two double quote marks running side by side and would arguably be clearer to users.

¹¹⁹ The Irish Office of Parliamentary Counsel to the Government.

consideration should be given to repealing and re-enacting the principal legislation.

Indirect amendments

After stating, correctly, that direct amendments are the most common form of amendments in Commonwealth jurisdictions, the author goes on to state that there are circumstances where they can be counter-productive. For example, “when general amendments are being made to a large number of statutes, the regulatory message is best conveyed by a holistic regulation on the issue in abstract” (p. 236). While accepting that on rare occasions, such amendments may be unavoidable, they should only be used as a very last resort and then only on the basis that the relevant legislation will be quickly tidied up by statute law revision legislation.¹²⁰

The author then claims that “indirect amendments are clean and clear in such clean and clear circumstances”. Again, I strongly disagree. This is followed by a statement that indirect amendments are expressed by two means: “either indirect referential amendments: or by comprehensive repeal and re-enactment”. But surely the latter are direct amendments. She then cites the following extract from the UK *Representation of the People (England Wales) (Description of Electoral Registers and Amendment) Regulation 2013* as an example of an indirect amendment:

Revocations

2. The instruments listed in column 1 of Schedule 2 to these Regulations (which have the references in column 2) are revoked to the extent specified in column 3 of that Schedule.

But that is surely a direct amendment.

Later the author claims that “Indirect referential amendments are also useful where all occurrences in a legislative provision are to be amended” (p. 237). Take the following example of a referential amendment. It is decided to amend the *Magistrates Courts Act* to change the name of the Court to ‘District Court’ and the title ‘Magistrate’ to ‘District Court Judge’. The Act contains so many references to ‘Magistrate’ and ‘Magistrates Court’ that the counsel drafting the amending Bill decides to effect the amendments referentially by providing that reference in the Act to a Magistrates Court is to be read as a reference to a District Court and that a reference in the Act to a Magistrate is to be read as a reference to District Court Judge. Although the amendments may be legally effective, they communicate the legislative message poorly. This is because the original text is left unaltered and thus liable to confuse or, worse still, mislead users of the Act. The best that can be done for users

¹²⁰ I note however that the author later concedes that when she says “Ideally, the … indirect amendments ‘has to be escorted’ at a later stage by direct amendments …” (p. 236).

is to provide them with some kind of explanatory note indicating the intended effect of the amendments, which is hardly satisfactory. While more time consuming, surely it would not difficult for the counsel to make these amendments textually (and thus directly).

The author then quotes an example purporting to be an indirect amendment, citing the following extract from regulation 2 of the UK *Solvent Emissions (Scotland) Regulations 2010* as an indirect amendment:

- (c) in paragraph (2), in the definitions of “adhesive”, “coating”, “ink”, and “manufacturing of coating preparations, varnishes, inks and adhesives” for “preparation” and “preparations” wherever they occur (including in the expression defined) substitute “mixture” and “mixtures” respectively.

But surely this is a direct amendment of the definitions quoted above.

Later, the author appears to backtrack when she says:

But indirect amendments lack the surgical precision of direct amendments: they can therefore carry¹²¹ vagueness or ambiguity, which in turn creates confusion to the user and ultimately ineffectiveness via haphazard application. Moreover, they are not in a format appropriate for facilitating later consolidation. (p. 237)

I strongly agree with these statements, but they do appear to be inconsistent with what she has averred earlier in this section.

In the next paragraph, the author once again falls into error when she maintains that comprehensive repeal and re-enactment is “the second type of indirect amendment”. Surely a ‘repeal and re-enactment’ of a legislative text can only be effected by direct (or textual) amendment. She also maintains that the major disadvantage of repeal and re-enactment is that “when undertaken properly” it costs dearly. But why? Surely when amendments are many and complex, repeal and re-enactment is a cheaper option. She further claims that, although it enables a fresh start to be made, it opens the ground for parliamentary scrutiny and debate on provisions that it does not aim to change. But as I have argued earlier in this commentary, this is a furphy in that parliamentary debate on such provisions occurs only rarely if at all. Moreover, it overlooks the fact that many jurisdictions have legislation that authorises restatements of legislation. This legislation allows the restated legislation to be ‘fast-tracked’ through the legislature without debate if accompanied by a certificate certifying that the restatement makes no substantive changes to the law.

Amalgamating indirect referential amendments with direct textual amendment

Despite the author’s claim that indirect referential amendments can be amalgamated with direct textual amendments, this occurs rarely if at all. Personally, I have no recollection of ever encountering a mixture of different types of amendments in the same provision. She

¹²¹ Surely the author means ‘convey’ here?

cites the following extract from regulation 5 of the UK *Appointment of Consultants (Amendment) Regulations (Northern Ireland) 2013*, but once again she falls into error, since both amendments are direct.

Consequential amendments

The author correctly emphasises the importance of consequential amendments, which of course are necessitated when other legislation (other than that being primarily amended or consolidated (repealed and re-enacted)) is affected. She rightly avers that such amendments are very common and cause a real headache for legislative counsel. This was certainly true in the past, but the task has been immensely eased since the advent of electronic legislative data bases, which are relatively easy to search. However, having said that, she suggests that the task of searching for provisions that need to be consequently amended should be that of the instructing officer. Although this may be the ideal, in my own experience, this does not happen: it is always the legislative counsel who undertakes this task (or if there is a drafting team, one of the junior members of the legislative drafting team).

Implied repeals

The chapter concludes with a brief discussion of implied repeals. I am not sure why this topic warrants separate treatment since the considerations affecting them are the same as those applying to implied amendments. Even the author acknowledges this when she states: “Implied repeals are a form of implied amendment.” (p. 240) However, she does go on to state that “their only difference is that implied amendments imply the intent to change the law, whereas implied repeals imply an intent to destroy the prior law.” Firstly, I do not see how ‘intent’ affects the situation, since both implied amendments and implied repeals are the result of oversight and not intent. Secondly, impliedly repealing an existing law is surely just a form of change to that law.

Chapter 13—Penal provisions

Introduction

While this topic certainly warrants separate discussion, I am not sure why it is necessary to revisit the topics of ‘drafting instructions’ and the ‘legislative plan’¹²² specifically in relation to penal provisions. The general considerations for preparing drafting instructions and for devising the legislative plan for drafting legislation are surely no different for that part of the legislation that may involve the creation of offences and their related penalties?

¹²² Respectively discussed in chapters 2 and 3 of the book.

The author begins her discussion of this topic by pointing out that penal provisions convey nuances of legal meaning through centuries of statutory interpretation and judicial application: understanding the concepts and identifying their precise meaning within the context of the specific criminal statute is a triumph not just for any user but even for the most learned of criminal lawyers.

But at the same time these complex concepts need to be conveyed to those affected in the simplest of manners... (p. 242)

It should also be borne in mind of course that ‘ignorance of the law is no excuse’ and that the need for precision is paramount given the potential consequences for citizens. However, I am not convinced that the answer is for one substantive criminal code to be drafted for lay users and another procedural criminal procedural code to be drafted for ‘professionals’, as advocated by Robinson.¹²³ The author suggests that her layered approach can be adopted here,¹²⁴ but I am not so sure that this is the answer either. It seems to me that there is nothing inherently complex about criminal procedure. Surely its existing complexities can be rationalised and simplified, so that criminal procedure is set out in a plain language form that is capable of being understood by at least moderately well-educated non-lawyers. For an example of what can be achieved, see the *Civil Procedure Act 1997* (UK), and in particular the *Civil Procedure Rules* set out in Schedule 1 to that Act. Those Rules are expressed in plain language that can surely be understood by moderately well-educated non-lawyers.¹²⁵

The parts of a penal provision

As the author points out, an offence has two basic elements: the words creating the offence and the sanction for contravention or non-compliance. She then says that “the offence includes objective and subjective elements” (p. 246).¹²⁶ The objective part is the conduct (presumably a contravention or non-compliance). In contrast, the subjective part is the what she refers to as the “thinking” part of the conduct constituting the *actus reus* of the offence. I agree with the author that offences may divided into three classes: those where *mens rea* is a pre-requisite; those where it is not; and those where ‘proof’ of absence of fault is not a defence (strict liability offences according to her). However, some commentators (including myself) would classify the second category as strict liability or reverse onus offences and the third category as absolute liability offences. She says that *mens rea* is “introduced” (surely “established”) by the adverbs “intentionally”, “knowingly” or “recklessly”. This is fine for

¹²³ P.H. Robinson, ‘Making criminal codes functional: A code of conduct and a code of adjudication’ (1996), 86 *Journal of Criminal Law and Criminology* 304.

¹²⁴ See my commentary above in chapter 4.

¹²⁵ The fact that I use civil procedure rules as an example makes no difference, since civil procedure is not inherently more complex than criminal procedure.

¹²⁶ Which should presumably extend to non-compliance with an obligation.

offences involving general intent, but does not address those where specific intent is required for a particular element of the *actus reus*.¹²⁷ Nor does it deal with offences that make negligence an element.

Later, in discussing sanctions, the author mentions that “the primary sanction can be a discharge, a community sentence, a fine or a prison sentence”. However, it is unusual for a community sentence to be the primary sanction and unheard of for it to be “a discharge”. The latter are surely “supplementary sanctions”. Although the author accepts that setting out the offence and sanction in a single legislative sentence may suffice, I would certainly agree that setting out each of the elements in separate subsections will enhance clarity by drawing the user’s attention to each part of ‘the regulatory message’:

- the prohibited conduct;
- that breach of the prohibition is an offence; and
- the sanction for the offence.¹²⁸

Rules of construction for offence provisions

The author begins this section with the following proposition: “Penal provisions are no different from other types of substantive provisions: *the rules are the same.*” (p. 247) While I would agree that the rules *should* be the same, in some jurisdictions that is not the case. For example, see section 5 of the *Interpretation Act 2005* (IR), which specifically excepts penal provisions from the general rules of interpretation applying to other kinds of provisions.

The author suggests that in some instances it might be possible for penal provisions to make use of additional visual aids and I do agree that¹²⁹ such aids might be useful, for example in relation to certain road traffic offences.

Expressing the conduct

I found the first sentence of this section confusing. It reads:

Despite using the example of section 5 of the *Mobile Homes (Wales) Act 2013* as a model for best practice from the point of view of listing the elements of the penal provision, the same section is the source of bad practice with reference to subsection (1) and the expression of the conduct. (p. 248)

But why is it bad practice? As long as the content is expressed clearly, precisely and unambiguously, what is the problem? The author goes on to say: “... the drafter chooses to use the ‘directive method’, which *introduces* the offence by ‘must not’. Unfortunately, this

¹²⁷ For example, “A person who lodges an application knowing it to be false or misleading commits an offence.”

¹²⁸ The author cites section 5 of the UK *Mobile Homes (Wales) Act 2013* as an example.

¹²⁹ Bearing mind that ‘a picture is worth a 1000 words’!

is a deficient method of expressing the conduct as it fails to declare the prohibition.” But surely the phrase ‘must not’ declares the prohibition? While it is perfectly true that the two subsections could have been merged, I see nothing wrong with using the declaratory approach so long as it is used consistently throughout the legislative document concerned.

The author then suggests that the two subsections could have been merged into one by using “It is an offence to” or “Whoever ... commits an offence.” Both are considered poor drafting practice: the first because it does not specify the actor and the second because ‘whoever’ is considered antiquated. If the drafter is using the declaratory approach, the better approach is to say “A person who does X commits an offence.”

In the following paragraph, the author purports to give an example of a penal provision drafted using the declaratory approach. As an example, she cites section 8 of the *Mesothelioma Act 2014* (UK). But surely this is an example of the directory approach.

Another puzzling statement in the same paragraph is that “This [*the use of the declaratory method*] is an express compliance with the principle of *nullum crimen, nulla poena sine lege*”, the implication being that a penal provision expressed using the directory approach is not in compliance with principle. But surely the contrary is true.

Next, the author discusses the use of the conditional approach, which uses a conditional clause as part of the formulation of the penal provision.¹³⁰ She says that a penal provision using this approach “can become complicated”, but no explanation is given of the complication. The main disadvantage of this approach is that it requires the reference to the actor (person) to be repeated; the advantage is that it obviates the need for a sandwich clause that is inherent in the use of the declaratory approach.¹³¹ Nevertheless, I would agree that the declaratory approach is the best of the three approaches.

Sanctions

There follows a discussion of sanctions for offences. The discussion is generally sound and I entirely agree with the author’s criticism of minimum penalties on the ground that they limit

¹³⁰ The following exemplifies the conditional approach:

- A person commits an offence if the person—
(a); or
(b); or
(c)

¹³¹ For example:

- A person who—
(a); or
(b); or
(c),
commits an offence.

Paragraphs (a)-(c) are ‘sandwiched’ between the opening and closing words.

a judge's discretion in a particular case. And because it is not possible for legislative counsel to foresee the circumstances surrounding the commission of an offence that the counsel has drafted, it is entirely appropriate that the judge be allowed a wide discretion with respect to imposing a penalty on an offender.

Special circumstances

The author begins this section by dealing with the liability of directors and other officers of a corporate body for the unlawful acts and omissions of the body that constitute offences. She cites as an example section 13 of the *Transparency of Lobbying, Non-Campaigning and Trade Union Administration Act 2014* (UK). Unfortunately, subsection (1) of the section is erroneously formatted. It reads:

- (1) Where an offence under this Part is committed by a body corporate and is proved—
- (a) to have been committed with the consent or connivance of a director, manager, secretary or other similar officer, or
 - (b) to be attributable to any neglect on the part of any such individual, the individual as well as the body corporate is guilty of the offence and is liable to be proceeded against and punished accordingly.

whereas it should read—

- (1) Where an offence under this Part is committed by a body corporate and is proved—
- (a) to have been committed with the consent or connivance of a director, manager, secretary or other similar officer, or
 - (b) to be attributable to any neglect on the part of any such individual, the individual as well as the body corporate is guilty of the offence and is liable to be proceeded against and punished accordingly.

Regrettably, this kind of ranging error is all too common and is attributable to the ignorance of printers and clerks as to legislative drafting conventions on the one hand and to poor quality control on the other. The *Companies Act 2015* (Ken) contained approximately 200 errors of this nature despite the fact that the Companies Bill as sent to the Government Printer contained no such errors.

The author then moves to discussing increased sanctions for second and subsequent contraventions¹³² of the same offence. One of the errors common with respect to increased sanctions for “second and subsequent” offences is that is not always made clear whether the “second or subsequent” offence has to be identical or substantially similar to the earlier offence. She then discusses so-called ‘continuing offences’. Regrettably, many of those found on Commonwealth statute books are defective because they have not been subjected to a comprehensive reality check. Comparing the two examples provided by the author is instructive.¹³³

Defences

A discussion of defences to prosecutions for offences follows. The author cites seven examples to be found in—

- section 29 of the *Landfill Tax (Scotland) Act 2014*,
- section 99 of the *Children and Young Persons Act 1933* (UK),
- section 34 of the *Marine Act (Northern Ireland) Act 2013* (UK),
- section 4 of the *Mobile Homes Act 2013* (UK),
- section 12 of the *Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014* (UK),
- section 4 of the *Defamation Act 2013* (UK), and
- section 33 of the *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (UK).

However, the inclusion of section 34 of the *Marine Act (Northern Ireland) Act 2013* is questionable since the onus is surely on the prosecution to prove that the act concerned was not within the specified exceptions. And, surely it was inappropriate to include in a chapter devoted to penal provisions a defence to proceedings under the *Defamation Act 2013* (UK), which of course deals with civil matters.

Special considerations

The chapter concludes with a discussion of drafting considerations for procedural issues relating to the prosecution of an offence. These relate to—

- which courts have jurisdiction to hear prosecutions for the offence;

¹³² For this purpose, a contravention includes a failure to comply with an obligation. The interpretation legislation of some jurisdictions cover this. The *Interpretation and General Clauses Ordinance* (HK) is one example.

¹³³ The author cites section 106 of the *Wireless Telegraphy Act 2006* (UK) and section 33 of the *Forestry Act (Northern Ireland) 2010* as examples. I query whether the latter works. For example, if the primary offence is constituted by failing to do an act by a specified time or within a specified period, doesn't the offender have to be convicted of that offence and then, if the act is not done subsequently, be charged with a separate offence of failing to do the act after conviction? This is because the first offence is a ‘one-off’ and can only be committed once, since the relevant date has passed.

- the time limit for bringing prosecutions for the offence;
- whether extra-territorial jurisdiction is claimed in respect of the offence;
- on whom the onus of proof lies in relation to the commission of the offence; and
- what evidence is needed in order to prove the commission of the offence.

These are all issues that the drafter of new or amending legislation should consider when drafting new offences for the purposes of that legislation.

The first issue is normally straightforward. Unless the offence is particularly serious, controversial or complex, jurisdiction is given to a magistrate or a local court.

The second issue is normally taken care of by the general law on criminal procedure, but a longer period may be warranted on policy grounds. The main difficulty here is establishing the date from which time begins to run. For example, the act or omission constituting the offence may not be discovered until after the time limit has expired.

The third issue relates to extra-territoriality (which the author discusses in detail in chapter 17). Unless it is intended to give a court of the relevant country or territory jurisdiction to try an offence constituted by an act or omission alleged to have been done or committed outside the territorial limits of that country or territory, it is presumed that the court only has jurisdiction to try the offence if it is alleged that the act or omission constituting the offence was done or committed within those limits.

The fourth issue, relating to onus of proof, is more problematic. Normally, the onus of proof lies on the prosecution, certainly with respect to the *actus reus*.¹³⁴ However, as we have seen, many statutes that create offences contain provisions expressly providing the accused with a defence that requires the accused to disprove intent, knowledge or some other element of the offence. At one time, it was generally accepted that the onus was on the accused to establish such a defence "on a balance of probabilities"¹³⁵. However, in the United Kingdom¹³⁶ the position has, since the enactment of the *Human Rights Act 1998*, become less clear. Since that Act, such provisions are open to challenge on the basis of their possible incompatibility with the presumption of innocence guaranteed by Article 6(2) of the *European Convention*

¹³⁴ To secure a conviction in a criminal case, the prosecution must prove its case beyond all reasonable doubt. But it is not always clear what that means. In some cases (mostly the more serious criminal offences), the prosecution has to prove both the commission of the *actus reus* and *mens rea*. In others (offences of strict liability), it has to prove the commission of the *actus reus* and rebut any evidence given in respect of a defence provided to the accused by law. In yet others (offences of absolute liability), all it has to do is to prove commission of the *actus reus*.

¹³⁵ In modern law, the burden and standard of proof remain as laid down in the case of *Woolmington v. The DPP* [1935] AC 462, [1935] UKHL 1. In that case, Viscount Sankey referred to certain exceptions to where the onus of proof lay. One was the common law defence of insanity where the defendant bears the burden of proof. When the defence has the burden of proof, the standard of proof is the lower standard of "on a balance of probabilities." A further exception is where a statute places a burden on the defence.

¹³⁶ The *Human Rights Act* (IR) contains a similar provision, so the position is likely to be similar to that in the United Kingdom.

on Human Rights, which provides that: “Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.”

Two UK cases in 2000 and 2001¹³⁷ suggested that the courts would, in accordance with section 3 of the 1998 Act, interpret all reverse burdens of proof as mere evidential burdens, at least for those offences having an identified culpability and severe maximum penalties. However, the waters were muddied 2 years later when the House of Lords¹³⁸ gave judgement in the case of *R v Johnstone*,¹³⁹ which involved a serious trademark infringement punishable by a substantial term of imprisonment. In giving judgement, their Lordships stressed the need to defer to the will of Parliament and cautioned against any ready finding that an imposition of a reverse burden was a disproportionate response by Parliament to the social mischief proscribed by the offence. Their Lordships reasoned that, since Article 6(2) did not stand alone and was subsumed in the guarantee of fair trial provided by Article 6 as a whole, a provision reversing the burden of proof was not necessarily inconsistent with holding a fair trial.

The tension between the approaches adopted in *Kebilene* and *Lambert* on the one hand and in *Johnstone* on the other is patently obvious. Two years later the Court of Appeal¹⁴⁰ sought to resolve the uncertainty by favouring the approach taken in *Johnstone*. However, the Court of Appeal cannot at a stroke disregard a recent decision of the House of Lords without cogent justification. The House of Lords soon had the opportunity to resolve the apparent inconsistency in *Sheldrake v. DPP; A-G's Reference (No. 4 of 2002)*.¹⁴¹

Unfortunately, clarity was not achieved by the decision in this case. Their Lordships opined that *Lambert* is not to be disregarded and continues to be authority that courts should not give undue deference to the fact that the legislature has, in creating an offence, considered it appropriate to provide a defence that places the “burden of proof” on the accused. However, the crucial issue is whether reversing the burden of proof is compatible with a fair trial. If it is not, it should be read down as a mere evidential burden by applying section 3 of the 1998 Act to ensure that the presumption of innocence is paramount. In *Sheldrake*, their Lordships concluded that that provisions reversing the burden of proof do not necessarily preclude the holding of a fair trial and that whether or not such provisions offend Article 6 requires a proportionality assessment. In carrying out such an assessment, the court should balance, on the one hand, society’s interest in the effective suppression of the mischief with which the offence is concerned and, on the other hand, the accused’s right to a fair trial. In balancing these two competing interests, the court should take into account—

¹³⁷ *R v Kebilene* [2000] 2 AC 326 and *R v Lambert* [2001] UKHL 37.

¹³⁸ Now the Supreme Court.

¹³⁹ [2003] UKHL 37.

¹⁴⁰ In the case of *A-G's Reference (No. 1 of 2004)* [2004] EWCA Crim 1025.

¹⁴¹ [2004] UKHL 43.

- the severity of the offence in terms of sentence,
- ease of proof for one party or the other in relation to the matter covered by the reverse burden, and
- whether the matter to be proved or disproved is related to a definitional element of the offence or to a defence.

Another factor is the nature of the offence in terms of the difficulty of proving it without placing an evidentiary burden on the accused.

Taking these factors into account, the court needs to determine whether the provision concerned is a fair and proportionate legislative response, in the circumstances of contemporary society, to the mischief to which the offence relates. Unfortunately, this approach does not really give the courts (or anyone else for that matter) clear guidance as to how offence provisions imposing the burden of proof on the accused should be interpreted.¹⁴²

This creates a dilemma for legislative counsel when drafting offence provisions that purport to impose some level burden on the accused. If the decisions in *Kebilene* and *Lambert* hold sway, it is clearly no longer appropriate for UK legislative counsel to use a phrase like “It is a defence for the accused to prove on a balance of probabilities that …” If these two cases were to prevail, it would not be too difficult to devise a form of words that would conform to the House of Lords view of Article 6(2). But the uncertainty created by *Johnstone* and *Sheldrake* now place legislative counsel in an impossible position. While the factors mentioned above might provide guidance to a court in a doubtful case, they do not help to decide how to address the task of drafting a reverse burden provision.

The fifth and last issue is a rather cursory discussion of some of the kinds of evidence that can be adduced to sustain a conviction for a particular offence. The author asks whether a basic level of proof¹⁴³ is acceptable or is certified evidence¹⁴⁴ required. In addition to certificate evidence, other kinds of evidence (which she does not mention) include statutory presumptions and assumptions. These are another means of shifting proof of elements of an offence from the prosecution to the defence. Almost invariably certificate evidence, presumptions and assumptions in penal provisions are rebuttable by the accused.¹⁴⁵ To provide that such evidence is conclusive¹⁴⁶ would clearly be inimical to providing an accused with a fair trial.

¹⁴² See remarks of Professor Andrew Ashworth [2005] Crim LR at 219.

¹⁴³ I am not clear what the author means by ‘a basic level of proof’.

¹⁴⁴ Surely certificate evidence or evidence by certificate.

¹⁴⁵ For an example, see section 77(2) of the *Terrorism Act 2000* (UK), which the author cites at p. 255 in her discussion of reverse onus offences. However, the question remains: what does the accused have to establish to rebut the certificate evidence, presumption or assumption?

¹⁴⁶ As the author conjectures at p. 235. There are legislative provisions providing for a certificate to be ‘conclusive evidence of its contents’, but these do not to my knowledge relate to criminal proceedings. An

Another kind of provision designed to shift the burden from the prosecution to the defence is an averment provision: this is along the lines of ‘If the prosecution avers that the accused did X, X is taken to be proved in the absence of evidence to the contrary’. This kind of provision was once fairly common in Australian federal statutes but I suspect that this practice may have now been abandoned, and if it has, rightly so, since surely it unfairly and unreasonably tips the scales against the accused.

Chapter 14—Delegated legislation

Introduction

In this chapter, the author discusses ‘delegated legislation’ and the role of legislative counsel in drafting it.¹⁴⁷ This is fine as long as the term is used only in relation to legislation made by a specified authority to whom the legislature has delegated power to make legislation (usually regulations, rules or bylaws) within prescribed parameters.¹⁴⁸ But there is no doubt that the term is not wide enough to encompass legislation made by the executive under the royal prerogative or some other constitutional authority that does not involve the legislature.

While I agree with the author that ‘phronetic legislative drafting’ of the delegated text differs little from the task of drafting primary legislation, I was somewhat puzzled by her reference to ‘phronetic nomography’ in the context of drafting legislation. And it is most certainly true that legislation made by the executive under a delegated authority is a departure from the constitutional order (by which I take her to mean ‘the doctrine of separation of powers’). However, the practice is so well entrenched in Commonwealth/common law jurisdictions that there is little likelihood that it will be overturned at this juncture despite the concern of some constitutional purists.¹⁴⁹

I was rather surprised at the author’s criticism of clause 65 of the UK *Deregulation Bill 2014* (subsequently enacted as section 112 of the *Deregulation Act 2015* (UK)). Bearing in mind that a section (a statute even) is meant to be read as a whole, I thought her comments were generally unfair. Each of the subsections is concise and for the most part clear (dealing with the separate elements comprising the whole), though I puzzled over the use in subsection (2)(a) of both ‘transitional’ and ‘transitory’ and the use of ‘revokes’ in the context of primary legislation. Despite the author’s concerns, I think the section contains

example of a conclusive certificate that comes to mind is a certificate of incorporation issued to a company. In any case, there are cases that hold that there is always an implicit exception in relation to fraud, mistake or misrepresentation.

¹⁴⁷ Although I use the term ‘legislative counsel’ here, in some Commonwealth and other jurisdictions, this kind of legislation is drafted by lawyers and even laypersons who are not professional legislative counsel.

¹⁴⁸ Though I see nothing wrong with the terms ‘subordinate legislation’ and ‘subsidiary legislation’ and even ‘statutory rules’, which I have always regarded (as I believe do my fellow legislative counsel) as being synonymous with ‘delegated legislation’.

¹⁴⁹ See author’s footnotes at p. 258.

sufficient safeguards to quieten the constitutional critics. She claims that the enabling clause (now section) transfers legislative power to the Secretary of State “without any delimitation of this power”. But surely it is clear that only legislative amendments, repeals and revocations of a consequential nature are permitted, not to mention the Parliamentary control prescribed by subsections (3) and (4) of the section.

The role of the drafter in delegated legislation

The author begins this section with a discussion of the role of legislative counsel in drafting, firstly, the provision delimiting the extent of the legislative power that is delegated and, secondly, the delegated legislation itself. In drafting the empowering provision, legislative counsel has to be wary of not making the provision wider than it needs to be in order to achieve the purposes of the delegated legislation while at the same time ensuring that it covers all the heads that need to be covered in terms of supplementing the parent legislation to ensure that it can attain full effectiveness.

In some jurisdictions, the UK for example, the practice is for delegated legislation to be drafted by lawyers in government Ministries and departments, but in others, the Australian Commonwealth, States and Territories and New Zealand, for example, the practice is for it to be drafted in a dedicated legislative drafting office, and to that extent is treated no differently from the drafting of primary legislation. Like the author, I maintain that the latter approach is the best practice, because not only is it more likely to produce a consistent standard and style, but it is also likely to result in better legislation overall.

I also agree with the author that delegated legislation is no less important than its parent legislation. If defective legislation detrimentally affects members of the public, it is surely immaterial whether it is primary or delegated. However, the author suggests that, because delegated legislation (or at least some delegated legislation) is extremely technical, it is more appropriate for departmental legal officers to draft the legislation on the grounds that “they have the awareness of the law and the substantive law skills to cope with the challenge.” (p. 261) She argues that attempts to transfer this technical know-how to legislative counsel, although possible, would require time, which, according to her, is one reason why the power to make the legislation was delegated. She concludes that the optimal solution is to provide departmental lawyers with the requisite legislative drafting skills by training (presumably both ‘on’ and ‘off’ the job).

Although the author’s solution is no doubt feasible, I do not agree that it is optimal. In my experience spanning over 50 years, the best delegated legislation is drafted by legislative counsel in dedicated legislative drafting offices working with lawyers and other experts from the specialised departments.¹⁵⁰ I believe the argument about the time needed to transfer

¹⁵⁰ Moreover, as some legislative drafting manuals (such as those to be found in Canada) state, a drafter who is not part of the specialised department can approach such legislation more objectively, which is of course more conducive to balanced legislation.

technical know-how is unfounded. This is because all competent legislative counsel are expected to acquire the relevant technical know-how irrespective of whether the legislation is delegated or primary and irrespective of the extent to which the subject-matter of the legislation is technical or complex.

Use of delegated legislation

In principle I agree with the author that there is little that delegated legislation cannot do, because the power to delegate is only constrained by limitations imposed on the legislative power, which may be constitutional or political. But in practice, it is extraordinarily rare for primary legislation to be a mere skeleton for the making of delegated legislation. And I agree with the author that there is a need to ensure that legislators have the opportunity to debate and scrutinise proposed laws involving important public policy, even when the executive might be tempted to use delegated legislation to avoid that debate and scrutiny. And it is perhaps not going too far to suggest that it is a constitutional convention that important issues such as those involving the creation of criminal offences, the imposition of taxes and the conferring of appeal rights, not to mention the establishment of public institutions, should be legislated only by primary legislation.

The author then asks what is it that delegated legislation can do. She lists five different functions as follows:

- The first is to advance the purposes of the parent legislation by giving it full effect. (I would say ‘by supplementing it’ or ‘filling in the gaps’). I agree with the author that the delegation power should not be too general, since otherwise the rule of law principle prohibiting delegated legislation that “merely passes on its enabling powers or a substantial element of them” is breached.¹⁵¹
- The second is to incorporate technical or detailed provisions (often referred to by legislative counsel as ‘machinery provisions’) required for the implementation of the parent legislation. But note that speed and flexibility are lost if an affirmative resolution is required in order to give effect to the delegated legislation. As the author points out, delegated legislation is useful when it is necessary to alter levels of fees and other amounts of money (p. 264).
- The third is to make administrative arrangements for the implementation of the parent legislation.¹⁵² However, I do not see this differs much from the first function.
- The fourth is to bring the parent legislation into operation. The author cites section 45 of the *Transparency of Lobbying, Non-party Campaigning and Trade Union Administration Act 2014* (UK), which provides for the bringing into

¹⁵¹ See J.M. Keyes, “From delegatus to the duty to make law” (1987), 33 *McGill University Law Review* 49 at 88.

¹⁵² As an example, the author cites section 21 of the *Energy Act 2013* (UK).

operation of the various provisions of that Act.¹⁵³ This is a very carefully crafted commencement provision, which does not fall into the common trap that, in the case of statutes that are intended to be brought into operation by means of a power delegated to a Minister or other public officer, fail to bring into operation on the date of enactment the section conferring the power. One problem on this issue that the author does not mention is the position of a statute that needs the exercise of a delegated power to bring it into operation but the power is not exercised.¹⁵⁴ So what if the power is not exercised? It seems that the statute is left in limbo as ‘a law in waiting’. This problem has been overcome in Australia by prescribing a default provision. This can operate in one of two ways. The first is by providing that if the delegated commencement power is not exercised within (say) one year, the uncommenced provisions are automatically brought into operation. The second is by providing the opposite, which is that, if the uncommenced provisions are not brought into operation by time of the expiry of the prescribed period, the statute is automatically repealed.

- The fifth is to amend the parent legislation. However, this is controversial and is not allowed in some jurisdictions because of constitutional constraints. And, as the author mentions, delegating to the executive the power to amend primary legislation¹⁵⁵ by means of a delegated power is considered “to blur the hierarchy of norms”. Nevertheless, as the author points out, it is not uncommon in the UK (and indeed some other Commonwealth jurisdictions) for a statute to confer such a power, albeit subject to specified constraints.¹⁵⁶ As an example of best practice, the author cites section 2 of the *Local Audit and Accountability Act 2014* (UK).

A related aspect not touched on by the author is primary legislation that confers a power on the executive to suspend the operation of specified provisions of the legislation in specified circumstances or to exempt specified persons or classes of persons from the operation of

¹⁵³ The most common reason for delaying bringing a statute into operation is to allow time to enable regulations and other delegated legislation to be drafted and promulgated.

¹⁵⁴ For example, see *R v Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] 2 AC 513. In that case, the *Criminal Justice Act 1988* (UK) was to introduce a statutory scheme for criminal injuries compensation with several sections coming into law (by statutory instrument) on a date of the Home Secretary's choosing. However, the UK Government, rather than implementing this legislation, amended a non-statutory tariff based scheme under the Royal Prerogative. It was held that there was no enforceable duty in the Home Secretary to bring the legislation into force at any particular time. The Home Secretary was held to have the discretion to implement the legislation when he felt it was appropriate and to compel the Home Secretary to act would be to interfere with the legislative process. However, it would be an abuse of power to not implement the legislation as the Home Secretary was under a duty to keep the question of when the legislation should be implemented under review. There are also some Canadian cases saying the same.

¹⁵⁵ These provisions are often called ‘Henry VIII clauses’, because of the propensity of the English monarch, Henry VIII, to reserve to himself an overriding power to amend legislation that did not conform to his wishes.

¹⁵⁶ Such as necessity, specificity of purpose (such as amending a list of names in a Schedule) and procedural safeguards (such as providing that an amendment does not take effect until approved by a resolution of both Houses of Parliament).

specified provisions of the legislation.¹⁵⁷ The conferring of such powers is surely as reprehensible as Henry VIII clauses?

Validity of delegated legislation

As the author points out, it is the enabling section in the parent legislation that legitimises the departure from the doctrine of separation of powers that is inherent in allowing the executive to legislate. This section circumscribes the parameters within which the delegate may legislate. Any provision of the delegated legislation that does not fall squarely within those parameters is liable to be struck down in a judicial review. Also, any delegated legislation that is not made in accordance with the conditions that are a requisite to its making are similarly liable to be struck down.¹⁵⁸ And if subdelegation of the delegated power is envisaged, the drafter of the enabling section must specifically provide for this to counteract the principle that the delegate can only subdelegate with express authority.

As the author correctly points out, if the legislation containing the enabling section has been repealed, delegated legislation purporting to emanate from it “will suffer a serious procedural defect”. But why so circumlocutious? Surely it would be a nullity? However, I was puzzled by the statement immediately following, which says: “Similarly, primary legislation authorising the delegation must not be amended at the time of exercise of the power”. But why not? As long as the delegated legislation is consistent with the enabling section as amended, it will surely be valid.

Construction of enabling section and delegated text

The author correctly identifies the two levels of consideration: drafting the enabling section and drafting the delegated legislation enabled by it. She maintains that

There is little doubt that effectiveness of the enabling clause directs the drafter to clarity, precision and unambiguity of—

- the precise power transferred;
- the time within which the power is to be exercised;
- the person to whom the power is transferred;
- the manner in which the transfer is to be exercised; and
- any discretion to make use of the power or not. (p. 270)

¹⁵⁷ A later English monarch, James II, seemingly had a propensity for suspending statutes or granting exemptions from their operation, which led to his overthrow in 1688. So perhaps we could call such provisions ‘James II clauses’.

¹⁵⁸ For example, if the power to make the delegated legislation purports to be exercised by the wrong person or office holder, or outside prescribed time limits, or without having undergone the prescribed consultation or consent requirements. Other prerequisites may relate to printing and publication, laying before the legislature, and subjection to a positive or negative resolution procedure in the legislature.

While I would generally agree with this view and the comment that the conditions (if any) attached to the enabling power must be expressly and precisely prescribed,¹⁵⁹ I question the statement that “brevity bows down to precision”. Surely precision (and indeed clarity for that matter) always trump brevity.

However, I strongly agree with the author that the title accorded to delegated legislation must be “informative and distinctive not just for administrative reasons but for the users of the delegated instrument.” (p. 270) The choice of informative words for the title is essential to enable users to ascertain whether it is the document that they are searching for. It is therefore essential that the title makes a reference to the parent legislation so that the nexus between it and the delegated legislation is clear. The danger with titles to delegated legislation is that they often tend to be long, but at the end of the day what title assists users the most should be paramount.

The author discusses preambles to delegated legislation, but although not unheard of they are extremely rare.¹⁶⁰ As to the enacting’ formula, she cites that used in the *Further Education Loans (Amendment) Regulations 2014* as a best practice and certainly the formula used is clear and succinct (in contrast the pompous language used to make the *2014 (No. 311) A31 Trunk Road (Cadnam-Verwood Interchange) (Temporary Restriction and Prohibition) Order 2014*).¹⁶¹

Later, the author mentions purpose clauses in the context of delegated legislation. She declares that “Few delegated instruments present purpose clauses” (p. 272). But not even few. This is for the reason that she states: delegated legislation will be governed by the purposes or objects of its parent legislation. But surely ‘always’ and not just sometimes or even mostly? For the same reason, there should be little need for definitions in delegated legislation, since the definition of a term in the parent legislation should flow through to the delegated legislation. Likewise, as the author maintains, if the parent legislation is expressed to bind the ‘Crown’ or the ‘State’ then this too will flow through to the delegated legislation.

The creation of offences also demands a specific head of power with specified limits on the maximum penalties that may be imposed. However, it should be noted that the interpretation legislation of many Commonwealth jurisdictions contains specific authority for the creation of offences in delegated legislation and for imposition of maximum penalties for such offences.

The author then discusses commencement provisions for delegated legislation. Because the power to fix the commencement date for delegated legislation cannot generally be sub-delegated, these are normally fixed dates or dates determined by reference to the date on

¹⁵⁹ The word the author uses here is ‘introduced’. This is surely not the appropriate verb for this context.

¹⁶⁰ Contrast EU Directives and Regulations, which invariably have long and detailed preambles.

¹⁶¹ Which begins ‘NOW THEREFORE, the Secretary of State, in exercise ...’ Surely this title could have been expressed more succinctly without loss of clarity. For example, why mention 2014 twice?

which the legislation is made or published.¹⁶² Delegated legislation may be made to come into operation retrospectively, but *only if* specifically authorised by the parent legislation.¹⁶³

The author concludes by mentioning the need for the delegate's signature, title (presumably that of the delegate), and the date (presumably of execution) to appear at the end of the operative part of the document and that, in the UK, explanatory notes are added at the foot of the delegated legislation directing users to the parent legislation and assisting them with an understanding of the document's 'detailed and technical' provisions. But it is not only in the UK that explanatory notes appear at the foot of the delegated legislation: it is conventional to include such notes at the end of the delegated legislation of most, if not all, other Commonwealth jurisdictions.¹⁶⁴ However, the quality of these notes tends to vary, with some being comprehensive but others being so brief as to be of little value.

Chapter 15: Drafting for consolidation v. Drafting for codification

Despite the heading, this chapter covers not only consolidations and codifications but also rewrites, restatements, reprints and revisions.¹⁶⁵ In the past, the problem of maintaining a coherent statute book was largely attributable to the theory that statutes should be self-sufficient.¹⁶⁶ Had statutes been amended textually from the early days of making laws legislatively, the difficulty faced by users in trying to ascertain what the current law is on a particular topic would have been largely avoided. Fortunately, but belatedly, this self-sufficiency view has in most jurisdictions been abandoned. A statute amended textually (or directly) is easy to consolidate. It is possible to produce within a matter of hours of the enactment of a statute amending a principal statute¹⁶⁷ an up-to-date version of it by simply reprinting the principal statute with the amendments incorporated.¹⁶⁸ So a true consolidation is needed only when the related statutes do not comprise a principal statute and statutes that textually amend it.

Unfortunately, the terms codification, consolidation, rewrite, restatement, reprint and revision do not have a fixed meaning and many of them overlap to some extent. For example, what is the distinction between a restatement and a rewrite? Nevertheless,

¹⁶² This is unless the default provision usually found in the local *Interpretation Act* is relied on, in which case there will be no commencement provision.

¹⁶³ But see judgement of Keith J in the Hong Kong decision in *Association of Expatriate Civil Servants of Hong Kong v. the Chief Executive of HKSAR* [1998] HKCFI 556; [1998] 1 HKLRD 615; [1998] 2 HKC 138; HCAL 90/1997 (3 April 1998). Surely this decision is wrong.

¹⁶⁴ In some jurisdictions, it is mandatory to include an explanatory note at the end of delegated legislation.

¹⁶⁵ The chapter also talks about repeals, but I am not sure why, bearing in mind that the chapter discusses various mechanisms for re-expressing existing statute law. But perhaps the author has in mind repealing obsolete laws as a form of statute law revision.

¹⁶⁶ The so-called 'four corners doctrine'.

¹⁶⁷ By 'principal statute', I mean a statute that at the time of enactment purported to express the law on a particular topic more or less exhaustively.

¹⁶⁸ And this is what happens in all Australian jurisdictions.

irrespective of the term used, there is no doubt that clarity is, as the author asserts, enhanced by codifying, consolidating, rewriting, reporting or rewriting a statute or related statutes that have been amended.

But the situation is confusing, with the term codification alone having at least three different meanings.¹⁶⁹ These are as follows:

- a compilation of existing statutes,
- a systematic consolidation of statutory law;
- a revision of the whole law, statutory and case law, reducing its principles to a clear and compact statement,

(with each presumably relating to a particular subject-matter). For me, a codification of law occurs only in the third sense, the first two being merely consolidations. According to the author, a codification mainly aims to “create a unique document in the field of law to which it refers, which encompasses legislative regulation as interpreted by the courts” (p. 279). She says that, in order to achieve this goal, legislative counsel need to undertake a quadruple task, comprising—

- weeding out obsolete provisions, as well as possible unconstitutional provisions and provisions incompatible with international law and international obligations¹⁷⁰;
- identifying and resolving any inconsistencies in relevant existing legislation;
- identifying and supplementing any lacunae in the existing law;
- putting into effect any textual and consequential amendments.

But is this a true consolidation? I think a document limited to this task would be no more than a consolidation, revision or rewrite. She goes on to suggest that a codification has three functions: simplification; systemisation; and reform. I believe this would be a true codification only if the simplification, systemisation and reform results in a document that comprehensively states the law on a discrete subject-matter, such as crime, evidence, succession or family law.

As the author rightly recognises, getting true consolidations is not only extraordinarily time consuming but also imposes considerable demands on resources, since it requires extensive research to identify the relevant case law and then synthesise it so that it can be amalgamated with the relevant statute law. And as the author points out, a particular difficulty with a codification is that by the time it is concluded, the dynamic and ever-changing nature of the relevant law may already have moved forward. For these reasons, codifications are rarely attempted. But it does not require a true consolidation to update the

¹⁶⁹ See B.A. Garner, *Garner's Dictionary of Legal Usage*, 3rd ed. (Oxford University Press: New York, 2009) at 167.

¹⁷⁰ The author also mentions ‘repealed provisions’. But how can that be? Why is it necessary ‘to weed out’ repealed provisions?

existing law on a topic. This can be achieved with the support of an *Acts Restatement Act*, a *Statute Law Revision Act*¹⁷¹ or even an *Acts Reprinting Act* if it specifically authorises specific kinds of update, such as simplifying cross-references and converting gender specific references into gender neutral ones.¹⁷²

In contrast to a codification (which purports to be exhaustive in restating the whole of the law on a particular topic), a consolidation is rather less ambitious in what it seeks to achieve. The author identifies a number of differing views as to precisely what constitutes a consolidation (p. 282). However, I think Garner's definition is as good as any.¹⁷³ He defines a consolidating statute as one that collects the legislative provisions on a particular topic and embodies them in a single statute, often with minor amendments and drafting improvements. Courts generally presume that a consolidating statute leaves prior case law intact, in contrast to a codifying statute, which generally supersedes prior case law.

For me, consolidations are valuable when some of the collected legislative provisions consist of indirect amendments to a principal statute, since, as I have already mentioned, if they consist of direct amendments, the 'consolidation' can just as easily be achieved by reprinting the principal statute with the amendments incorporated. As the author points out, modernisation can be achieved in a consolidation by restating the consolidated texts in gender neutral language, eliminating obsolete provisions and incorporating the substance of amending provisions, while at the same time providing users with clarity. Because no change in the substance of the law is involved, it is usual for the legislature to provide a fast-tracking procedure to process a consolidation Bill.

The author maintains that consolidation involves a lengthy process in its research plan, with the actual drafting being disproportionate to its research (p. 281). However, surely this is only true if the consolidated text involves bringing together one or more principal statutes together with all legislation that indirectly amends those statutes.

In considering the advantages of codifications and consolidations, a codification is clearly preferable from the point of view of users, but as already mentioned, they are extremely time consuming and costly to produce. And so a cost-benefit analysis would be warranted before embarking on a true codification. But a consolidation of legislation comprising one or more principal statutes and one or more statutes indirectly amending those statutes is always desirable, since it is less costly and time consuming to compile but nevertheless still helps users. However, it should be stressed that once effected, the consolidated text should only be

¹⁷¹ For example, see the *Statute Law Revision Act 1996* (BC). Also see sections 28-31 of the *Legislation Act 2012* (NZ), which authorises the preparation and enactment of revision Bills for New Zealand.

¹⁷² For example, see sections 24-27 of the *Legislation Act 2012* (NZ), which authorises the Chief Parliamentary Counsel to make certain kinds of stylistic amendments when reprinting New Zealand Acts.

¹⁷³ See Garner, above n. 173 at 207-208.

amended in the future by textual (direct) amending legislation, so as to enable the amended text to be updated quickly and inexpensively by reprinting or restating it.

The author concludes the chapter with a brief discussion of diverse models in the EU. The terms used for bringing together related EU texts differ from those used in the UK, for example, and, as the author points out, this is confusing for those unfamiliar with EU legislation. However, the EU terms do have their UK counterparts: ‘recasting’ is equivalent to a UK ‘consolidation’ in the UK and an EU consolidation is equivalent to a UK restatement. But I certainly agree with the author that the diversity of meanings attributed to the same terms is confusing to legislative counsel and statute users not only in the UK but in other EU common law jurisdictions.

Chapter 16: taxation legislation¹⁷⁴

The author begins by maintaining that drafting taxation legislation presents big challenges to legislative counsel. There are at least three main reasons for this. One is that it is usually government policy to try to ensure vertical and horizontal equity in the taxation system (particularly income tax), which means fixing the tax at graduated levels and prescribing exemptions and relief to mitigate the effects of the tax on people who are less well off; the second is that, since most people do not like paying tax and will therefore exploit any means (often illegitimate) to avoid paying it,¹⁷⁵ the proponents of taxation legislation aided by legislative counsel seek to devise detailed legislative means to close off all possible identifiable loopholes; and the third is the propensity of governments to try to achieve secondary policy objectives by means of the taxation system.

The author revisits the stages of the drafting process as expounded by Thornton, discussing them this time in relation specifically to taxation. Although for the reasons mentioned, taxation legislation tends to be more complex than some other kinds of legislation, I am not convinced that it should be approached any differently from other kinds of complex legislation, such that pertaining to copyright for example.

The author quotes (seemingly with approval) the principles of UK taxation policy, which are as follows:

- taxes should be efficient and support growth;
- taxes should be certain and predictable;
- taxes should be simple and easy to comply with; and
- the tax system should be fair, reward work, support aspiration and ask the most from those who can most afford it.

¹⁷⁴ For the purposes of my discussion of this chapter, it may be assumed that the terms ‘tax’ and ‘taxation’ include the imposition of a levy or duty.

¹⁷⁵ For example, consider the introduction of a window tax in the 19th century to raise additional revenue to enable the British Government to fight the Napoleonic Wars. Property owners immediately moved to minimise their tax liability by blocking off many of the windows in their properties.

Although I would certainly agree that taxes should be efficient (presumably in the sense that they are relatively easy and not costly to collect), the main function of taxation is surely to provide the exchequer with funds to enable the government of the day to provide its citizens with public services.

Further, how can taxation per se support growth? Surely the aim should be to inhibit growth as little as possible, which is hardly the same thing. Yes, taxation should be as certain, predictable, simple and easy to comply with as possible. But I am not convinced of the super-goal of creating a ‘fair, rewarding and inspiring’ legal system. Fair, yes, but to whom? Fair in that all people pay the same rate of tax, fair in that people pay graduated levels of tax according to their wealth or income, or fair according to people’s status? And is it ‘fair’ to grant exemptions to certain classes of people? But ‘rewarding’ and ‘inspiring’ used in relation to tax? These terms seem to me to be almost risible when used in this context.

Later, the author asks: “What makes a taxation law a good one?” (p. 293) She answers by quoting Thuronyi, who identifies the following criteria:¹⁷⁶

- understandability¹⁷⁷ (making the relevant law easier to read and follow);
- organisation (internal organisation of the law¹⁷⁸ and its co-ordination¹⁷⁹ with other tax laws);
- effectiveness (the law’s ability to enable the desired policy to be implemented);
- integration (consistency¹⁸⁰ of the law with the legal system and drafting style of the country concerned).

And I too would generally agree that these criteria are appropriate, but having said that, is it not true that (subject to removing the word ‘tax’) they are equally applicable to all legislation? I am also not sure I agree with the author’s assertion that the criteria of success of taxation legislation are “economic growth, cost efficiency of the measures, and indicators showing citizens’ initiatives encouraged through taxation legislation.” (p. 291) In some cases, it may be true that economic growth may be promoted by means of taxation relief, but surely that is despite, rather than because of, the legislation itself. It is true that the cost efficiency of the tax measures is very important, if not crucial. For a tax to be efficient, the costs of collection and compliance should be as low as possible. Moreover, it should be difficult to avoid. But it is difficult to see what indicators might show what citizens’

¹⁷⁶ V. Thuronyi, “Drafting Tax Legislation” in *Tax Law and Drafting*, vol. 1 (International Monetary Fund, 1996) at 1-2.

¹⁷⁷ My personal preference here would be for the word ‘comprehensibility’.

¹⁷⁸ Coherence and cohesiveness?

¹⁷⁹ In terms of its relationship with other tax laws?

¹⁸⁰ Compatibility of the law with the rest of the laws of the legal system?

initiatives are encouraged through taxation legislation, with the possible exception of initiatives designed to avoid payment of the tax.

The author maintains that taxation policy (and presumably too the law emanating from it) is by definition complicated (p. 293). And later, she claims that complexity is the inherent weakness of legislation and particularly so in the case of taxation legislation. But is this inevitably and inherently always the case? For example, many countries have now introduced a plastic-bag tax, the objects of which are twofold: one is to raise money to address environmental issues arising from the excessive use of plastic bags to pack groceries and other goods at retail outlets; the other is to encourage purchasers of such goods to avoid the tax by bringing their own reusable bags to carry away their purchases. By and large, the legislation I have seen is relatively simple, occupying no more than half a dozen B5 pages at most.

In devising a Bill to impose a tax on the supply of plastic bags for the packaging of goods purchased at retail outlets, a legislative counsel has to ask (and answer) a number of basic questions. These are:

- What is to be taxed?
- Who is to pay the tax?
- Who has responsibility for collecting it and for recovering it if it is not paid when due?
- When is the tax payable?
- Where does the tax apply (at what locations is it to be paid or collected)?
- How is the tax collected if not paid and how is payment enforced?
- And lastly, why (for what purposes) is the tax being imposed?

Other cases come to mind in which the tax¹⁸¹ legislation is relatively strained.

It almost goes without saying that legislation (including of course taxation legislation) must be understandable (or comprehensible) if it is to be effective. To quote the author's mantra, it must be clear, precise and unambiguous.

In discussing the complexity of taxation legislation, the author canvasses various mechanisms for identifying its sources. As she mentions, it is not an easy task to accurately assess tax simplification "and its mirror image, complexity". However, the UK Office of Tax Simplification has made two stabs at doing so. The first attempt listed seven distinct indicators. The second attempt reduced this to three as follows:

¹⁸¹ For the purposes of this discussion, I equate levies as equivalent to and having the same attributes of taxes.

1. Policy complexity

- (a) the number of exemptions and the number of tax reliefs;
- (b) the number of Finance Acts with changes (since 2000);

2. Legislative complexity

- (a) application of the Gunning-Fog Readability Index;
- (b) the number of pages of legislation;

3. Operational complexity

- (a) the complexity of HMRC (the UK tax collecting authority) guidelines; and
- (b) the complexity of the requirements for completing a tax return (i.e. the difficulty involved in gathering necessary for taxpayers to complete their tax returns).¹⁸²

Although the first item will largely dictate the extent of the tax statute's complexity, it is the second item where legislative counsel can have a direct effect on the extent to how complicated the statute will be. The third item will largely be under the control of the administrator of the taxation system concerned, which in the UK is of course HMRC.

While the number of pages might be an indicator, one would have thought that the number of words would be a more reliable one. However, I certainly agree with the author's view that length *per se* is not always a reliable determiner of complexity. A short, condensed text may well be more complex than a longer one that consists of short sentences.¹⁸³ The Gunning-Fog Index purports to 'measure the readability' of a document.¹⁸⁴ However, as with other similar formulas, the Index has been criticised on the ground that it is not a precise measuring instrument. Although its advocates acknowledge this criticism, they still argue that the Index is a useful screening device. I would also agree with the view that complexity cannot always be addressed by trying to simplify the drafting of the legislation: if the policy is complex, then the resultant legislation will inevitably be complex too. In my opinion,

¹⁸² See Office of Tax Simplification Complexity Index, available at <https://www.gov.uk/government/publications/office-of-tax-simplification-complexity-index>.

¹⁸³ See OTS, 'Review of Tax Reliefs: Interim Report' (Dec, 2010) www.hm-treasury.gov.uk/d/ots_review_reliefs_interim_report.pdf. Also see D.E. Berry, "Legislative drafting: Could our statutes be simpler?" (1987), 8 Statute Law Review 92.

¹⁸⁴ Apart from the Gunning-Fog Index, there are others. Probably the best-known readability formula is the so-called Flesch Test, which was developed in the late 1940s by Rudolph Flesch, a Viennese born American lawyer. The Flesch readability formula applies a 100-point scale to determine the readability of a document. The higher the score, the easier it is supposed to be to read the document.

usability testing would offer a more effective mechanism for identifying and reducing complexity.

However, I do agree with the author that an objectives or purpose clause with concrete measurable criteria for determining effectiveness would not only convey the concrete policy goals but would also serve as criteria for carrying out pre- and post-enactment review.

It is worth noting that some studies quoted by the author suggest that simplified tax legislation leads to a positive response (presumably in terms of more effective compliance) from users of the legislation.¹⁸⁵

The author then proceeds to deal with the initial design of taxation legislation, but I am not convinced that a legislative counsel's approach is or should be any different from his or her approach to drafting other kinds of legislation. She also thinks that her layered approach towards drafting taxation legislation might yield positive benefits, but I should like to see a draft taxation Bill that adopts this approach before becoming convinced as to its potential effectiveness.

In discussing the drafting of taxation legislation, the author rightly highlights the difficulty of providing complex taxation legislation with a satisfactory numbering system, bearing in mind the frequency with which such legislation is amended. As a solution to the difficulty, she cites the possibility of leaving gaps in the section numbering that contemplate being filled by the insertion of new sections later.¹⁸⁶ But as she points out, such systems are of questionable value (p. 176).

Definitions in taxation legislation can be problematic too and were one of the issues focussed on by the UK Tax Law Rewrite Project. According to the UK Office of Tax Simplification, the elements of a good taxation definition are

- clarity;
- focus on essential features;
- the use of an existing definition where possible; avoidance of circularity;
- avoidance of figurative or obscure language; and
- being affirmative rather than negative.

True, but aren't these elements relevant to definitions in all kinds of legislation?

The next aspect of taxation legislation discussed by the author is 'verification', which, according to her, involves both internal and external aspects, with internal scrutiny being carried out by legislative counsel and the instructing officials and external scrutiny by other stakeholders. As with other legislation, legislative counsel and the instructing officials need

¹⁸⁵ See R. Woellner and others, "Can simplified legal drafting reduce the psychological costs of tax compliance? An Australian perspective" (2007), 6 *British Tax Law Review* 717.

¹⁸⁶ For an example of how this system works, see the *Income Tax Assessment Act 1997* (Cwlth). Also the US *Internal Revenue Code*.

to carry out reality checks to ascertain whether the text is likely to produce the desired policy outcomes. In particular, they need to ensure that the implementation, enforcement, and adjudication mechanisms are ‘fair, consistent, transparent and non-discriminatory’. Yes, I agree, but again, don’t these features apply to all legislation and not just tax legislation?

The author concludes the chapter by asking whether codification or consolidation is ‘fertile as a tool for clarity’. Changes in taxation legislation are so frequent and voluminous, I venture to suggest that codification would be very difficult if not impossible to achieve without huge human and financial resources being allocated to achieving and maintaining it. On the other hand, codification in today’s era of computerisation is perfectly feasible as long as all amendments to the principal taxation statute are effected textually.

Chapter 17: Extra-territorial legislation

Introduction

This chapter contains a comprehensive review and analysis of issues surrounding extra-territorial legislation. This topic is largely governed by International Law. By far the majority of a State’s legislation applies only within its territorial boundaries, leaving probably less than 5 percent having extra-territorial ramifications. So it is a topic that will only rarely impinge on legislative counsel’s time. Nevertheless, a legislative counsel should have the capacity to draft such legislation when called on to do so, and this chapter undoubtedly makes a useful contribution in this regard.

Perhaps the first point to make is that there exists a presumption against extra-territoriality. So that if it is intended that a particular statute should operate outside the legislating State’s boundaries, it should expressly say so. One interesting aspect of extra-territoriality highlighted by the author is that the extra-territorial operation of the common law seems to be widely accepted (p. 305).

In considering the topic of extra-territoriality, it is, as the author points out, necessary to identify and analyse what it actually involves. The first category is the application of domestic legislation of a State to its citizens or residents regulating their conduct beyond its boundaries. Examples include criminal offences committed by them while abroad and their being taxed on their world-wide income.

The second category is the regulation of the conduct of foreign nationals under the laws of a State with which they have no connection, either by citizenship or residency. A common example of this is the application of the criminal laws of a State to foreign nationals when they are travelling on ships or aircraft registered in that State. But there are many other examples, most of which originate from obligations and powers arising from international treaties or conventions. Examples of legislation derived from such treaties and conventions include legislation implementing the UN Convention against Torture, the Council of Europe Convention against Trafficking in Human Beings, the Convention on the Prevention and

Punishment of the Crime of Genocide, and the UN Convention against Transnational Crime. Such legislation provides for the prosecution of perpetrators of violations of those Conventions who happen to be within the legislating State's jurisdiction, irrespective of where the violations occurred. As the author points out, the first kind of extra-territorial legislation is justified by the close connection of the persons affected with the legislating State (citizenship or residency). Other legislation falling within this category is that regulating conduct that is committed partly within the legislating State and partly within another State. For example, people who are within in a foreign State may perpetrate a fraud in the legislative State by telephone, email or some other electronic means against a citizen or resident of the legislating State.

The second category is justified by the universal condemnation by the States that are signatories to those conventions of the conduct concerned and by the reciprocal nature of the resulting legislation enacted by the legislatures of those States.

A third category is legislation regulating the conduct of foreign nationals outside the legislating State where there is no international convention or treaty or reciprocal arrangement between that State and the State of which the foreign nationals concerned are citizens or residents. With such legislation, there will inevitably be a clash when the legislating State wants to enforce its legislation against those foreign nationals. And of course, enacting such legislation without any intention to enforce or implement it is an exercise in futility and so, as the author maintains, is 'bad regulation' (p. 306).

Theory of Extra-territoriality: realism, liberalism and beyond

According to the author, the realists see as impossible legislating beyond the borders of the enacting State. At the other end of the continuum, the 'liberals' focus primarily on state-society relations, with universality and internationality being their main concern (p. 307). However, interesting as the discussion is, legislative counsel will be focussing on whether the legislative proposal can be effective in terms of practicality and enforceability. In this context, the author cites the following dictum from the judgement of Judge Learned Hand in the *ALCOA* case,¹⁸⁷ where he interpreted 'effect' as 'an effect to national commerce', so that a State's extra-territorial legislation can be imposed on conduct that was intended to and did have an effect on national [US] commerce. The US *Third Restatement of American Foreign Relations Law* affirmed that a State may prescribe law in regard to extra-territorial conduct that has and is intended to have a *substantial* effect within the State's territory or is directed against certain State interests, as long as the exercise is *not unreasonable*.¹⁸⁸ However, as the author points out, while the effects test may be necessary to counteract evils such as

¹⁸⁷ See 148 F 2d 416 (2nd Circuit 1945); and *US v. Aluminum Company of America (ALCOA)* 148 F.2d 416 (2nd Cir) 1945.

¹⁸⁸ Emphasis added. Note that the criterion now extends beyond the national commerce of the legislating State.

international money laundering, a unilateral application of the effects test is inherently undemocratic, since it provides a source of sovereignty *without*¹⁸⁹ the consent of those who are regulated (p. 309).

Extra-territoriality in practice

The author is correct to point out that, in the absence of international agreement, the claim to exercise extra-territorial jurisdiction can be subject to legal and practical problems. Firstly, state sovereignty will frequently nullify the extra-territorial effect of legislation purporting to apply to foreign nationals outside the legislating State. Secondly, the application of the legislation will meet “unsurpassable practical difficulties in collection of evidence, in prosecution, and ultimately in bringing persons affected by it within the [*relevant*] jurisdiction for the purposes of trial or even punishment” (p. 311). In the absence of an international, or at least a bilateral, agreement, it is likely that legislation governing the conduct of foreign nationals outside the legislating State will be applied only to those foreign nationals who happen to visit, or have some sort of nexus¹⁹⁰ with, that State or another State with which the legislating State has some kind of extradition agreement, or to foreign companies that own assets, or trade, in the legislating State. The obstacles to dealing with the conduct of citizens and residents of the legislating State committed outside its boundaries are less problematic, if only because they have a close connection with that State.

As the author suggests, legislative counsel’s role is more likely to be that of a legal adviser¹⁹¹ rather than as a drafter *per se*.¹⁹²

Blocking legislation

In answer to the question, is there anything that a State’s legislative counsel can do to defend that State’s statute book from another State’s attempt to unilaterally extend its legal jurisdiction so that it impinges on that State’s sovereignty, the author concludes that there is. She lists a number of options that can be adopted. In summary, these are as follows:

- The first is to prepare legislation that prohibits giving evidence (including documentary evidence) in legal proceedings held in the foreign State concerned, or of foreign States generally, except in accordance with an international treaty or convention or a bilateral agreement.

¹⁸⁹ I have substituted ‘without’ for the author’s use of ‘to’ which surely cannot be correct.

¹⁹⁰ For example, the foreign national might own property in the legislating State.

¹⁹¹ Including providing constitutional and legislative advice.

¹⁹² But it should be emphasised that legislative counsel is always also a legal adviser. I think in this case there will more legal advice than legal writing.

- The second is to prepare legislation that aims to block or prevent the enforcement of a judgement of that foreign State, or of foreign States generally, except in accordance with a treaty, convention or agreement.
- The third is to prepare legislation prohibiting compliance with orders of courts and other authorities of that foreign State or of foreign States generally, except in accordance with such a treaty, convention or agreement.
- The fourth is to block compliance by prohibiting compliance with foreign extra-territorial legislation.
- The fifth is to prepare ‘claw-back’ legislation that allows an entity that is the subject of a foreign judgement executed against its foreign assets to obtain a judgement for an equivalent amount against those assets (if any) of the foreign judgement creditor that are located in the legislating State.

Alternatives to blocking legislation

The author identifies a number of alternatives to using blocking legislation. As she correctly points out, in resolving political, social and economic issues, legislation should normally be the last resort (or least should not be resorted to without exploring alternative possible solutions). One alternative is for a government to affirm that territory and nationality are two traditional bases of national jurisdictional competence in international law. She identifies exceptions regulated by jurisdictional conflict rules in international law, which are applied on the basis of the doctrines of effect, reasonableness and comity. Effect allows any State to impose liabilities for conduct undertaken outside its boundaries so long as they affect its territory;¹⁹³ reasonableness qualifies effects with a balancing requirement for reasonableness; and comity is “a pragmatic principle of reciprocal expectation”.

Other alternatives mentioned to blocking legislation mentioned by the author are diplomatic measures and international consultation, negotiations and agreements.

Rules on extra-territorial legislation

The author concludes the chapter by summarising the rules on extra-territorial legislation as follows:

- a State can regulate the conduct of citizens and residents even when they are temporarily outside the State’s jurisdiction;
- offences committed on board ships or aircraft are normally regulated by the State where the ships or aircraft are registered;
- a State can regulate the conduct of non-citizens and non-residents so long as it affects that State and the conduct is a criminal offence in the State where it occurred.

¹⁹³ However, extra-territorial legislation should not contradict the local law of the place where the offence was committed.

Finally, I would agree that extra-territoriality is a contentious topic and that extra-territorial legislation is a departure from the norm that legislation applies only within the legislating State and should be used only in recognised constitutional circumstances. And yes, it is a responsibility of legislative counsel to question—

- whether it is necessary;
- its constitutionality; and
- its appropriateness when compared with other possible alternatives.

Chapter 18: Statutory interpretation

Introduction

In contrast with the topic discussed in chapter 17, legislative counsel should *always* be concerned with how their draft legislation might be interpreted, not only by judges and magistrates but also by others who may be affected by it. So the importance of statutory interpretation for legislative counsel should not be underestimated. It is therefore surprising that not all texts on legislative drafting deal with this topic. One example of a text that does not is *Thornton's Legislative Drafting* (the 5th edition of which is edited by the author).

The chapter begins with a discussion about whether there is a distinction between statutory interpretation and statutory construction. Some think there is no distinction; others think there is. Perhaps there is a distinction, but assuming there is, I do not think it is of major concern to legislative counsel, who nevertheless should be extremely concerned about how users engage with and apply legislation that they draft.

Interestingly, the author defines statutory interpretation as “the clarification of diseased [defective?] legislative provisions, namely the clarification of ambiguous, vague or incomplete provisions” (p. 318). For me, a statute falls to be interpreted by a court when a dispute arises as to the meaning¹⁹⁴ of any of its provisions and the dispute can be resolved only by means of adjudication by a court.

The author claims that “Statutory interpretation seems irrelevant to the drafter.” (p. 319) But that could, in the case of inexperienced legislative counsel, be because they have not put their minds to its significance. I must confess that when I embarked on my legislative drafting career in 1965, I did not consider how it might be relevant to my task of drafting a Bill or regulation. As far as I can recall, none of my mentors pointed out its significance.¹⁹⁵ Nevertheless, it was not too long afterwards that the importance of the ‘rules’ of statutory interpretation registered with me. Indeed, just as drafting styles have influenced statutory

¹⁹⁴ Which could be attributable to ambiguity, vagueness or incompleteness.

¹⁹⁵ Which is one reason why I am such a strong advocate of ‘off-the-job’ legislative drafting training courses. (See the discussion on chapter 20)

interpretation as determined by the judges, judicial approaches have influenced drafting styles.

As the author maintains, although an accurate prediction of future interpretation of a statutory provision cannot guarantee legislative quality, it may well avert problems arising from its text before “any set of facts has been presented for its application” (p. 319). But, as she says, it cannot avert problems of uncertain application.

Current techniques of statutory interpretation in the UK

The author begins this section with a review of approaches to statutory interpretation in the United Kingdom and in doing so briefly discusses the literal approach; the mischief rule; the golden rule; and the purposive approach. The discussion more or less treads familiar ground, but there is an interesting review of the effects of section 3 of the *Human Rights Act 1998* (UK). Although this allows exemptions from the doctrine of precedent, it is nevertheless still limited by the ordinary meaning of words.¹⁹⁶ So it seems there are clear limits and restrictions inherent in the UK system of statutory interpretation whose “legal value and consequent application in practice remains unaffected and continues to qualify all rules of statutory interpretation, *including purposive interpretation.*” (p. 323; emphasis added).

The author goes on to point out that, even under the exceptional circumstances relating to section 3 of the HRA, that section can only be used in order to clarify vague or ambiguous legislation or to supplement a statutory provision in the case of a *casus omissus*. She also points out that UK judges are still bound by common law presumptions and maxims.¹⁹⁷ Nevertheless, she believes that the approach of UK judges to statutory interpretation has changed over the past few years. She opines that statutory interpretation extends along “a spectrum of judicial interpretation ranging from strict literalism at one end to broadly based purposive construction at the other end”¹⁹⁸. She believes (rightly I think) that the change is at least to some extent attributable to the influence of regional legal *globalisation* with particular reference to the teleological interpretation approach taken by European courts. From my close connection with Ireland during the first decade of this century, I can fairly say that Irish judges have also followed this trend. Moreover, it should be noted that if a purposive interpretation facilitates compliance with EU Directives and Regulations, it will prevail even if it departs from the strict and literal construction of the words of the used by the legislature.¹⁹⁹

¹⁹⁶ See article on this topic by Lady Justice Mary Arden: “The Interpretation of UK Domestic Legislation in the light of the European Convention on Human Rights” (2004), 25 *Statute Law Review* 165, at 177-178.

¹⁹⁷ Which I have always referred to as ‘canons of construction’.

¹⁹⁸ Quoting Hon JJ Spigelman, “The intolerable wrestle: Developments in Statutory Interpretation”, (2010) 84 ALJ 822.

¹⁹⁹ In support, the author cites *Litster v Forth Dry Dock* [1990] 1 AC 546, at p. 559. It is interesting to compare this with the Canadian, Australian and New Zealand approaches discussed below.

Although the courts of many Commonwealth countries tend to follow the approaches to statutory interpretation adopted by UK judges, there should be added to the list ‘the modern principle’, which has been cited and relied on in numerous decisions of Canadian courts. The application of ‘the modern principle’ was recently affirmed in the Ontario Court of Appeal decision in *Rooney v. ArcelorMittal S.A.*²⁰⁰ In the course of his judgement, Hourigan JA quoted the following passage from Elmer Driedger, *Construction of Statutes*.²⁰¹

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Later, in the same judgement, the learned judge asked: “But to fully appreciate the significance of this statement, we have to ask: ‘modern’ compared to what?” After discussing the ‘plain meaning rule’ and its subsequent modification by the ‘golden rule’, he commented as follows:

The modern principle takes a more holistic view. As Iacobucci J. explained in *Rizzo Shoes*,²⁰² at para. 21, the modern principle “recognizes that statutory interpretation cannot be founded on the wording of the legislation alone.

Sullivan²⁰³ expands on this idea, at §2.18:

Today, as the modern principle indicates, legislative intent, textual meaning and legal norms are all legitimate concerns of interpreters and each has a role to play in every interpretive effort.

The learned judge then went on to stress the importance that the guidance that *Rizzo Shoes* provides in circumstances where the plain meaning of a provision appears to conflict with its underlying statutory purpose.

It seems to me that adoption of the ‘modern principle’ is certainly preferable to the mish-mash of rules that preceded it. It is sophisticated, clear and comprehensive and, as already mentioned, has been followed in numerous Canadian cases. So for what my view is worth I would commend its adoption by the courts of other Commonwealth countries. Perhaps it should even be enshrined by statute.

Other Commonwealth countries have provided statutory guidance to the interpretation of legislation. Typical is section 15AA of the *Acts Interpretation Act 1901* (Cwlth), which reads as follows:

²⁰⁰ [2016] ONCA 630, which cited the decision in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27. That case provides both general guidance on the proper approach to statutory interpretation and specific guidance on how to apply that approach where the plain meaning of a provision appears to conflict with its underlying statutory purpose.

²⁰¹ 2nd ed. (Toronto: Butterworths, 1983) at 87.

²⁰² *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27

²⁰³ R. Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (LexisNexis Canada Inc.: Markham, 2014).

15AA. Interpretation best achieving Act's purpose or object

In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation.²⁰⁴

So, as in Canada, it seems that an interpretation of a provision of a statute that achieves an object or purpose of the statute will prevail over an inconsistent literal interpretation of the provision even if it is ‘plain’ (clear and unambiguous). The *Interpretation Act 2000* (NZ) contains a similar provision, as does the *Interpretation Act 2005* (IR), albeit in a qualified form.²⁰⁵

The drafters' duty

The author rightly points out in my view that knowledge of the ‘rules’ of statutory interpretation can produce (or at least help to produce) an effective legislative text by allowing legislative counsel an insight in the manner in which the text will be received by users (including of course judges).²⁰⁶ In other words, these ‘rules’ should assist legislative counsel in their efforts to identify what message users are likely to elicit when decoding the text. There is little doubt in my mind that knowledge of these ‘rules’ is an aid that can facilitate the detection and consequent avoidance of pitfalls that might result in ineffective legislation.

Presumptions and maxims

The author here discusses the various ‘rules’ of statutory interpretation. These comprise ‘presumptions’ and ‘maxims’. Again, the discussion largely treads fairly familiar ground, but I think it might have been better to have based it on the discussion by Ruth Sullivan in her 6th edition of *Construction of Statutes*, which seems to me rather more comprehensive.²⁰⁷

I was somewhat surprised to learn though that maxims differ from presumptions in that they are irrebuttable (p. 330). This assertion is surely questionable. Among the maxims listed by

²⁰⁴ Section 15AA, as originally enacted was expressed in absolute terms, (that a construction that will promote the purpose of an Act is to be preferred to one that will not). However, it did not address the situation where there is a choice between two or more constructions that would promote Parliament’s purpose. The limited nature of the section was confirmed by three High Court judges in a case on the corresponding provision (section 35) in the Interpretation of Legislation Act 1984 (Vic): see *Chugg v Pacific Dunlop Pty Ltd* (1990) 95 ALR 481 at 489, per Dawson, Toohey and Gaudron JJ. The section was therefore amended to provide that a court is to prefer the construction of an Act that will ‘best achieve’ the purpose or object of the Act.

²⁰⁵ For a reason that escapes me, the relevant section does not extend to the interpretation of fiscal and penal legislation.

²⁰⁶ Although this is correct, it does seem to contradict what the author stated earlier in the chapter.

²⁰⁷ Sullivan, above n. 203.

the author are the associated words (*noscitur a sociis*) rule,²⁰⁸ the limited class (*eiusdem generis*) rule²⁰⁹ and the implied exclusion (*expressio unius est exclusio alterius*) rule.²¹⁰ But there is no doubt these maxims can be rebutted. In the case of the associated words rule, although words must always be read in context, determining the impact of a particular context must always be exercised on a case by case basis, *taking into account all relevant sources of legislative meaning*. As Prowse JA stated in the Alberta (Canada) Court of Appeal decision in *R v Two Young Men*,

When general and specific words are associated together, and they are capable of analogous meaning, the general words should be restricted in their more specific analogous meaning, *noscitur a sociis*, except where doing so would be contrary to the clear intention of the statute as a whole.²¹¹

Similarly, the application of the limited class rule is also rebuttable. This ‘rule’ is not a rule of law, but merely an application of the contextual principle, which may serve as a starting point for analysis but should not be considered conclusive.²¹²

And likewise, in the case of the implied exclusion rule, there are a number of ways to rebut the implied exclusion of things not mentioned. One is to offer an alternative explanation of why the text expressly mentioned some things but was silent with respect to others.

Moreover, express reference to something might be necessary or appropriate in one context but inappropriate in another.²¹³

In mentioning that maxims are often interchangeable with presumptions, the author claims that “the maxim of retrospectivity is qualified by the presumption of retrospective operation” (p. 330). This claim seems to be not only confusing but questionable. Firstly, I doubt that there is a ‘maxim of retrospectivity’ *per se*. But there is a ‘presumption against retroactive application of legislation’, which is rebuttable by express words or by necessary implication. With some exceptions, making law to have an effect different from what it was when it was enacted is a serious violation of the rule of law, so the presumption is not so easy to rebut.²¹⁴ Secondly, it should be noted that there is no presumption against applying prospective legislation so as to change the future effects to a situation existing at the time the legislation took effect, unless it interferes with vested rights, such as if the effect of applying

²⁰⁸ The meaning of a doubtful word must be sought from the meaning of the words attached or associated with it.

²⁰⁹ General words following particular or specific words are to be construed as being of the same class as the particular or specific words.

²¹⁰ The express mention of one thing suggests the exclusion of others.

²¹¹ [1979] A.J. No. 555, 101 DLR (3rd) 598 at 608. And see the discussion in *Sullivan*, above n. 203 at 233.

²¹² See dictum of Duff JA in *Johnston v Canadian Credit Men’s Trust Association* [1931] SCJ 81; [1932] SCR 219, at 220 (SCC). Also see *Sullivan*, ibid. at 245.

²¹³ See the discussion and cited cases in *Sullivan*, above n. 203 at 255-257.

²¹⁴ See dicta of Dickson J in *Gustavson Drilling* (1964) Ltd v. MNR [1975] SCJ No. 116 271 (SCC).

the legislation would deprive a person of a future benefit or advantage to which the person was entitled when the legislation took effect.²¹⁵

As the author points out, the ‘rules’ of interpretation are the common law equivalent of ‘general principles’ in civil law, but they are not codified (p. 329). An attempt was made to codify these ‘rules’ by the New Zealand Law Commission but was unsuccessful. The author also quotes Michael Zander²¹⁶ as doubting that a similar attempt would be successful in the UK. However, many of the ‘rules’ conflict and so surely it would be beneficial, and not beyond the skill of a competent legislative drafting team, to eradicate those presumptions and maxims that no longer serve any useful purpose and perhaps to create a hierarchy of presumptions and maxims to help decide which should prevail in a circumstance in which they conflict.

Also noted among presumptions listed by the author was a reference to ‘a presumption of conclusive evidence’, but unless I have misunderstood her, surely this belongs to the law of evidence rather than statutory interpretation.

Drafting and statutory interpretation

In this section, the author to some extent traverses territory that she explored earlier in the chapter. As she rightly maintains, the ‘rules’ of statutory interpretation do not exist to absolve legislative counsel from responsibility for drafting a clear, precise and unambiguous text, but they can help them to formulate a pre-legislative conception of how users will decode that text and elicit meaning from it.

As Paul Salembier points out,²¹⁷ the unique style of legislative texts owes much to the fact that it is destined to be interpreted in accordance with the ‘rules’ of statutory interpretation and is therefore assumed to have been drafted with those ‘rules’ in mind.²¹⁸ The ‘rules’ that seem to have the most impact on legislative drafting are—

- the presumption of consistent expression;
- the presumption against tautology; and
- the implied exclusion (or *expressio unius*) rule.²¹⁹

There is little doubt that these (and other) ‘rules’ of interpretation have an impact on legislative style. And because legislative counsel are expected to draft with the ‘rules’ of statutory interpretation in mind when they produce a legislative text, they are implicitly

²¹⁵ And even if it does exist, it is easily rebuttable.

²¹⁶ *The law-making process*, (Butterworths: London, 2009) at 170.

²¹⁷ P. Salembier, *Legal and Legislative Drafting* (LexisNexis Canada: Markham, 2009) at 6-10.

²¹⁸ R. Sullivan, *Statutory Interpretation*, 2nd ed. (Irwin Law: Concord, 2008) at 166.

²¹⁹ I would add the limited class (or *eiusdem generis*) rule.

assuring the colleagues in the legislative drafting team and the policy formulators that the text will operate effectively when those ‘rules’ are factored in.

The author concludes the chapter by asking the question of whether legislative counsel need to repeat in the legislative texts for the benefit of lay users information concerning well-established interpretation conventions and provisions that can be found in the statutes interpretation legislation of the country concerned (p. 331). As she points out, the dilemma is between repetition and resulting wordiness on the one hand and the bare legislative text on the other. It may well be that, without the additional information, lay users will not be able to access, read, understand and use the text effectively. I agree with the author that attempting to repeat the ‘rules’ of interpretation within the text would be both futile and a waste of resources. I believe the best compromise is to leave the bare legislative text intact but also to provide signing-posting notes for the benefit of lay users to enable them to locate the information they need in order for them to be able to effectively access, read, understand and use that text. Moreover, other sign-posting information, such the gist of cross-referenced provisions will benefit professional users as well as lay users.

Chapter 19: Quality of legislation post-Lisbon and the role of Parliaments

Introduction

The topic of post-enactment monitoring and evaluation of legislative quality (in terms of effectiveness) has not, as far as I am aware, received much attention by writers on legislation and legislative drafting. So the author is to be commended for bringing this seemingly important topic into the legislative drafting forum.

Recently, efforts have been made to monitor the effectiveness of legislation after it has been in operation for some time, say 5 years. In fact, for at least 20 years, all new principal statutes enacted in New South Wales have contained a section requiring the Minister responsible for administering the statute to conduct a review of its effectiveness after it has been in operation for 5 years. However, my inquiries failed to discover any evidence of any such review having been conducted, which of course makes one ask whether such sections are any more than window dressing.

And of course, as a last resort, reviews of effectiveness are from time to time undertaken by the law commissions and law reform commissions of various Commonwealth and common law jurisdictions. But these reviews are undertaken on an *ad hoc*, rather than systematic, basis and often tend to address issues concerning so-called ‘lawyers’ law’ (such as the law of succession).

Nevertheless, as the author maintains, good legislation and good regulation feed into each other and place the quality issue within ‘effectiveness’.

The EU's regulatory framework for legislative quality

The first attempt to try to improve the quality of legislation within what was then the EEC took place in 1992 as a consequence of the Sutherland Report.²²⁰ That report established five criteria in order for a legislative measure (for example, a Directive or Regulation) to achieve legislative quality. These are—

- the need for regulatory action;
- the choice of the most effective course of action (whether by legislation or by an alternative means);
- proportionality of the measure to achieve the desired regulatory results;
- consistency of the proposed measure with existing measures; and
- wide consultation at the preparatory stage.

The following year the EEC Council clarified these concepts by means of a non-binding resolution on legislative quality. This resolution called for—

- clear, simple and unambiguous wording;
- the terms to be used consistently throughout the measure;
- the use of effective and consistent structure;
- compliance with the role of the preamble as a means for justifying the measure;
- a clear determination of the rights and obligations arising under the measure;
- a clear expression of date on which the measure is to come into force; and
- consistency (compatibility?) with other legislative measures.

Conversely, practices to be discouraged by the resolution included—

- the use of unnecessary abbreviations;
- the use of EEC jargon;
- imprecise references to other texts;
- too many cross-references;
- political statements having no legislative character;
- pointless repetition of existing legislation;
- inconsistencies with existing legislation;
- in the case of amending legislation, the practice of effecting an amendment by an autonomous (stand-alone) provision that cannot be directly incorporated into the amended text.

Later, in 1995 and 1996, the EEC Commission reports on *Better Lawmaking* identified the aims of the EEC's legislative policy. These included: legislative quality, consistency and openness in the drafting process, a carefully planned and co-ordinated legislative process and a thorough monitoring and evaluation of the legislation. As a concomitant, the need for Member States to ensure the legislative quality of implementing (transposing) measures was

²²⁰ "The internal market after 1992: Meeting the challenge", Report to the EEC Commission by the High Level Group on the operation of the internal market SEC/92/2044.

rightly consider crucial. Even if the quality of EEC legislation was optimal in terms of quality, it would be for nought if the regulations or other measures designed to give effect to that legislation did not match that quality. In contrast, the quality of implementing regulations or other measures of Member States is never likely to be good unless the parent EEC/EU legislation is not of high quality.²²¹ A further development identified by the author is the EEC Commission's SLIM (Simpler Legislation for the Internal Market) initiative, which aimed to simplify both the legislation of the EEC and also the transposing legislation of Member States.

According to the author, the culmination of rules for legislative quality came with the 1998 institutional agreement on common guidelines for the quality of drafting of EEC legislation. In sum, these were—

- EEC legislation must be clear, simple, precise, concise and with homogeneous content;
- drafting must be appropriate to the type of act²²² concerned, and to the audience to whom it is addressed;
- terminology must be internally consistent;
- the standard structure (title; preamble; enacting formula; and appendixes (where appropriate) is to apply;
- the title should offer a full indication of the subject-matter;
- citations should set out the legal basis of the legislation;
- recitals should set out concise reasons for the main provisions without paraphrasing or reproducing them;²²³
- only clauses (articles?) of a normative nature should be included;
- internal and external cross references should be kept to a minimum; and
- dates of transposition or enforcement should be clearly specified in the day/month/year format.

²²¹ During my time with the Irish Office of Parliamentary Counsel, I was called on to undertake many transpositions of EU Directives. I particularly recall having to come to grips with the Public Procurement Directive (see below). One particular article of the Directive was so opaque that neither I nor any of the senior advisory counsel I consulted could elicit any meaning from it. The upshot was that the regulation purporting to transpose the article ended up being a fudge. (See Directive 2004/18/EC of The European Parliament and of the Council of 31 March 2004 on the co-ordination of procedures for the award of public works contracts, public supply contracts and public service contracts. Note that this Directive was repealed by Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement.)

²²² I must confess that I am not clear what 'act' means in this context.

²²³ The author also quotes the phrase 'of the enacting terms' but I found them confusing and I wondered if she meant 'enacted terms', because for me the expression 'enacting terms' means the words used to give the legislation legal effect.

There were yet further initiatives in 2002²²⁴ and 2003.²²⁵ The former focussed on accountability, effectiveness and proportionality as the main elements of better law making. In contrast, the latter focussed only on—

- improving inter-institutional co-ordination and transparency;
- providing a framework for alternative kinds of regulatory instruments;
- increasing the use of impact statements; and
- simplification of EU law.

The author rightly asks what exactly are the elements of legislative quality in the EU context? To answer the question, she quotes the 1998 EEC Commission Staff Working Paper entitled “*Making Single Market Rules more effective, quality in implementation and enforcement*”²²⁶. This identifies the need to clarify the need for, purpose and quality content of legislation; observes that clear and simple legislation helps businesses and citizens to comply with the law without excessive burdens; the need to facilitate enforcement; and the need to address complaints of excessive ‘red tape’ (which may actually lead to claims for damages). Seemingly, this is achieved by legislation that is easy to transpose and apply and takes account of interested parties. This may all seem very laudable but it is questionable whether it has amount to much. And, one may legitimately ask ‘what constitutes legislation (Directives and Regulations) that is easy to transpose?

To someone who has been involved in legislative drafting for a long time, like myself, most (if not all) of these guidelines appear to be just common sense and, as far as Australian legislation goes, commonplace. I therefore wonder why there have been so many reports in the European arena on the topic of legislative quality, yet, relatively speaking, so little achieved. Perhaps one reason is that the various initiatives are non-binding and thus not enforceable. Another may be the stifling inertia of European bureaucracy.

The Post-Lisbon Smart Regulation Initiative

The author proceeds to discuss initiatives to improve EU legislation taken after the Treaty of Lisbon.²²⁷ The author, rightly in my opinion, expresses concern that the EU has, to some extent at least, moved from the issue of legislative quality towards focussing solely on the issues of administrative burdens, legislative scrutiny, reducing the number of legislative

²²⁴ See the EEC Commission, ‘European Governance: Better Law Making’ (Communication) CM/2002/0275 final,

²²⁵ See ‘Parliament, Council and Commission Interinstitutional Agreement of 16 December 2003 on Better Law-Making’. [2003] OJ C/321/01.

²²⁶ COM [1998] 296.

²²⁷ The Treaty of Lisbon is an international agreement that amends the two *treaties* that form the constitutional basis of the EU. It was signed by the EU Member States on 13 December 2007, and entered into force on 1 December 2009. It amends the *Maastricht Treaty* (1993), known in updated form as the *Treaty on European Union* (2007) or TEU, and the *Treaty of Rome* (1957), known in its updated form as the *Treaty on the Functioning of the European Union* (2007) or TFEU.

instruments, and emphasising the shared responsibility of the EU and its Member States. The author then mentions the most recent EU initiative in the field: The Smart Regulation Agenda.²²⁸ This focussed on the three following issues:

- Smart Regulation being about the whole policy cycle, which touches on the design of a piece of legislation, its implementation, enforcement, evaluation and revision;
- Smart Regulation being a shared responsibility of the EU and its Member States;
- the views of users of regulation having a key role to play in Smart Regulation, since consultation is an element of democracy.

Fine sentiments indeed and, as the author points out, the Agenda is revolutionary. This initiative seemingly has resulted in some developments, such as a requirement for the production of impact statements and stakeholder consultation and, according to the author, seems to have resulted in some reduction in ‘red tape’. However, the author has a number of concerns and reservations. As she maintains, simplification of EU legislation is not just a matter of “streamlining legislation and reducing administrative burdens” (p. 341). She questions the failure to address some other aspects of simplification, such as the complexity of policies; the complexity of the selected means of regulation; the complexity of the choice of drafting style; the complexity of enforcement methods; and the complexity of pre- and post-legislative scrutiny—all pertinent and insightful questions. And as she further points out, although *ex post facto* evaluation of the legislation for effectiveness and efficiency²²⁹ is admirable in theory, it is questionable whether it can be achieved simply by fitness checks and general policy evaluations. She also questions how effectiveness can be addressed.²³⁰ Although she poses a number of solutions, the answer is not clear. Yet a further question posed by the author is how will evaluation take place at the Member State level. ‘Smart Regulation’ says nothing about this. Nor does it define efficiency or how it is proposed to calculate it.

Although the author believes that the improvement of the implementation record is another worthy aspect of Smart Regulation, she asks how this is to be achieved. Other questions she poses are whether clear guidance should be provided as to what complete transposition for Member States means. Having had personal involvement in transposing EU Directives for application as part of Irish law, I can say that transposition is not (as some public officials seem to think) just a matter of regurgitating the text of the European Directive, but has to

²²⁸ See EU Commission ‘Smart Regulation in the European Union’ (Communication) COM (2010) 543.

²²⁹ See The Evaluation Partnership, ‘Evaluation of the Commission’s Impact Assessment System Final Report 2007’, which is quoted at p. 342, fn. 52.

²³⁰ Measured?

implement their provisions *seriatim* and ensure that the text appropriately reflects their content *vis a vis* the other Member States and of course the European Commission.²³¹

She also asks, legitimately I think, whether there should be a centralised legislative drafting office in each Member State for transposing EU legislation as part of that State's domestic law. Although there seems not to be such an office in the UK,²³² in Ireland, for example, this work is undertaken by parliamentary counsel employed in the Office of Parliamentary Counsel for the Government. And I believe that Gibraltar has a specific legislative drafting office dedicated to transposing EU legislation for that jurisdiction. There may well be others.

Finally, the author asks who would disagree with the call for “the best possible legislation”? She attempts to show how this might be achievable by suggesting a range of possible solutions, each of which seems to me to have merit.²³³ The author expresses concern that the transfer of focus in the EU since the Treaty of Lisbon to holistic regulatory quality leaves legislative quality only as an aim (and it is hard to disagree with her) and that one cannot seriously attain regulatory quality without regard to legislative quality in those cases in which legislation is the appropriate regulatory means of implementation.²³⁴ And she is even more concerned about the ‘2020 Agenda for Europe’, where apparently ‘Better Regulation’ and ‘Smart Regulation’ are ignored altogether (p. 345). Of more concern is that the EU has apparently pursued a policy of growth and competitiveness while ignoring legislative quality, which from a legislative counsel’s perspective is surely not good news. The author believes that the challenge for the EU and its Member States is to go back to ‘Better Regulation’ and ‘Smart Regulation’ and assess their success from the point of view of EU citizens, using the Treaty of Lisbon’s citizenship concept as a focus (thus transferring the focus from businesses to people). She concludes this section, by declaring that, although it is a daunting task, the considerable work needed to make EU regulation palatable must nevertheless be done. From my own experience with implementing EU legislation, I can only endorse the author’s concerns.

The UK approach to regulatory quality

The author then proceeds to discuss developments in the UK designed to achieve improvements in legislative quality. As the author maintains, there is little doubt that the UK (the Office of Parliamentary Counsel, in particular) has been very active in the field of

²³¹ I think it is fair to say that an EU Directive acts as a form of drafting instructions for those legislative counsel charged with implementing its provisions.

²³² Certainly, the UK Office of Parliamentary Counsel does not undertake this work.

²³³ See p. 344.

²³⁴ Attention is directed to H. Xanthaki, ‘Implementation of EU Legislation’, Oral Evidence, Public Hearing at the Legal Affairs Committee of the European Parliament ‘Better Regulation’ Hearing (Brussels, 21 June 2011).

regulatory reform. A recent review of the OECD²³⁵ commended the UK in its regulatory reforms, noting—

- the effective balance between policy breadth and the stock and flow of regulation;
- the depth and breadth of ex ante impact assessment exercises before regulation;
- the effective risk-based enforcement of regulation; and
- the extensive application of the EU’s better regulation initiatives.²³⁶

On the other hand, the OECD believes that there is—

- a need for the UK to reinforce initiatives for citizens and public sector workers as a means of balancing the use of business as the main policy actors;
- a need to apply in practice even more the existing excellent transparency and consultation processes; and
- the need to develop a longer-term strategy of regulation.

My own perception about the quality of UK primary legislation is that it has improved immensely since the early 1990s, with long turgid, often impenetrable prose being replaced by clear, succinct and much shorter and more intelligible text. I well recall the former First Parliamentary Counsel, Christopher Jenkins, proudly handing me a copy of the then new *UK Arbitration Act* for me look at. And, yes it was like ‘a breath of fresh air’ compared with what was then to be found in *Halsbury’s Statutes of England*. The reforms introduced by Christopher Jenkins, and that have been since built on by his successors, Geoffrey Bowman and Stephen Laws, are to be applauded.

Modern Parliaments and legislative quality

The chapter concludes with a section on the role of legislatures in enhancing the quality of legislation that comes before them for consideration, processing and legitimising. Since not only all primary legislation but also much delegated legislation comes before a legislature, the legislature, through its committees, is in a unique position to scrutinise the text, not only as regards policy but also as regards quality at the pre-enactment stage. But of course, to perform that function, the members of the legislature (or the relevant committee) and their support staff have to fully understand what quality means. As the author maintains, effectiveness is the key criterion for determining legislative quality. But legislation can only be effective if it is effectively communicated to those audiences that will be affected by it and, for me, this means that

- it must be accessible, both externally and internally;
- it must be readable (for example, short sentences, familiar words, etc.);
- it must be comprehensible (for example, user-friendly syntax); and

²³⁵ The Organisation for Economic Co-operation and Development.

²³⁶ See www.oecd.org/dateoecd/61/60/44912018.pdf.

- it must be useable, in that it must be reasonably capable of being applied to the circumstances of those whom it affects).

According to the author, legislatures should check for the following principles in striving for legislative quality:²³⁷

- Preliminary provisions:
 - Title: brief, accurate, relevant, unique and distinctive;
 - Preamble: exclusively legal provisions on legal basis and legislative process;²³⁸
 - Enacting clause: according to house style;
 - Commencement: clear date;²³⁹
 - *Objectives* provision: measurable criteria for post-enactment scrutiny;
- Substantive provisions:
 - Wording: *should be* clear, concise and unambiguous;
 - Content: *should be* within the scope of the constitution *law/legislation*²⁴⁰; *are the objectives achievable by means foreseen*;²⁴¹ is there a post-legislative *enactment* scrutiny provision or ‘sunset’ clause?²⁴²
- Final provisions:
 - Saving and transitional provisions: consider placing them in a Schedule if they are long;
 - Repeals²⁴³ and consequential amendments: consider placing them in an annex if the repeals and consequential amendments are numerous and can be conveniently presented in a tabular form;²⁴⁴

²³⁷ Words in italics are either words that I have inserted because they appear to be missing or words that I have substituted for words that I considered to be inappropriate.

²³⁸ I am not at all clear what this means. Does it mean that a preamble should be limited to the legal reasons for the legislation? And one wonders why there should be a reference to the legislative process in a preamble.

²³⁹ If the author means a specific date, this is often not possible. I would therefore add: ‘or a date that can be determined by a clear point of reference’.

²⁴⁰ Presumably the italicised word refers to delegated legislation, but if so, this not made clear;

²⁴¹ I am not clear what ‘foreseen’ means in this context. Does the phrase mean ‘achievable by the means specified in the text of the legislation?’

²⁴² See comment below.

²⁴³ Note that the author appears to have inadvertently separated ‘repeals’ from ‘consequential amendments’. I suspect she intended the words qualifying ‘consequential amendments’ also to qualify ‘repeals’.

²⁴⁴ Why not a Schedule? See item relating to ‘savings and transitional provisions’ above. Moreover, why should consideration as to whether repeals and, in particular, consequential amendments be placed in a Schedule or Annex depend on whether they are ‘numerous and can be conveniently presented in a tabular form’? For me, all consequential amendments should be located in a Schedule to the relevant legislation or, perhaps even better, in a separate piece of legislation.

– Annexes.²⁴⁵

With the several qualifications set out in my footnotes, this checklist is indeed useful for legislatures. But, having said that, the legislatures of many Commonwealth countries already conform to most if not all of these principles (so far as they are valid). However, I want to single out one of them for comment and elaboration: sunset clauses.

In Australia, all principal subordinate (delegated) legislation contains a sunset clause. Subordinate legislation statutes enacted by the Australian Commonwealth and States currently provide for principal subordinate legislation (regulations, rules and bylaws) to expire after it has been in operation for a period varying between 5 and 10 years. This means that for it to continue in operation, it has to be reviewed and subjected to regulatory impact statements, on which members of the public are allowed to comment. From my personal observation, I believe that these provisions have resulted in a significant improvement in Australian subordinate legislation. So if this process can bring about an improvement in the quality of subordinate legislation, then why could it not do so in relation to primary legislation? If the answer to my question is ‘yes’, then I suggest that consideration be given to making all principal primary legislation expire after a specific expiry date of, say, 10 or 15 years. This would mean that its operation and effectiveness (in terms of measurable objectives) would have to be reviewed before the expiry date if it is to continue in operation, either with or without amendments. Admittedly, such a change would impose increased demands on the resources of legislative drafting offices, government policy units and legislatures, but I believe the outcome would justify the extra expenditure of the money, time and effort involved.

The author concludes this section by asserting a direct link between the quality of legislation on the one hand and certainty of the law, and ultimately the rule of law and human rights on the other. And, yes, since legislative quality is synonymous with attaining legal effectiveness, legislatures surely do have a responsibility to consider legislative quality when debating draft legislation. And so I agree with the author that legislators should indeed become aware of what is meant by legislative effectiveness and become involved in how to go about helping to achieve it.

Chapter 20: Legislative education and training

Education and training

The author concludes her book with a discussion about the role of education and training in legislative drafting. She begins by remarking on what she describes as “the eternal debate between those, mainly older, traditionalists who profess that [legislative] drafting can only

²⁴⁵ And again why ‘annexes’ when the author uses ‘Schedule’ in relation to saving and transitional provisions?

be learnt ‘on the job’ and those innovationists²⁴⁶ who recommend a combination of formal and ‘on the job’ training”, which she maintains “remains lively”. Which of these is more appropriate, she asserts, depends on whether legislative drafting is an art or a science. If it is the former, then according to the author the first view is correct, but if it is the latter, then the second view should prevail. But does it really matter whether some perceive legislative drafting as an art and others perceive it as a science? I would view the issue quite differently. The first question I would ask is what are the attributes of an effective legislative counsel? In answer to that I would say one who has the knowledge, skills and experience to produce effective, high quality legislation.

Let me now consider what sort of knowledge is required. Firstly, a good overall knowledge of the law of the legal jurisdiction concerned (public law in particular). Secondly, a first-rate working knowledge and understanding of the language in which the legislation of that jurisdiction is written. Thirdly, a wide-ranging knowledge of all aspects of legislative drafting, including the various topics discussed in this book and others such as legislative drafting error and its causes, and State immunity.

Next, what sort of skills are required? Firstly, competency in applying the knowledge and understanding of the relevant language so to be able to write legislation that those audiences at whom the legislation is directed can access, read, understand and use it to apply it to matters and circumstances that affect them. Secondly, the ability to apply their knowledge of legislative drafting and legislative drafting techniques in a way that will contribute to the production of legislation that is likely to achieve the legal and political objectives of those (usually a government) seeking to attain those objectives. Thirdly, analytical skills: it is essential that legislative counsel are able to critically examine legislative proposals and drafting instructions to understand their short and long-term ramifications and to be able to point out possible pitfalls that are likely to prejudice the effectiveness of legislation.

Finally, how much experience is required? I would answer the time needed to be able draft all kinds of legislation, that is, from drafting a Bill establishing a statutory corporation at one end of the spectrum of complexity to drafting one imposing a complex taxation regime at the other. The time needed will of course vary, since some legislative counsel may acquire the necessary knowledge and skills more quickly than others. Moreover, some legislative counsel may, during their early years, be exposed to a wider variety of legislation than others. But received wisdom suggests that a period of 5 to 7 years is necessary for a novice counsel to acquire the necessary drafting skills and to enable sufficient exposure to all kinds of legislation and thus to become an effective legislative counsel.

So how are the requisite knowledge, skills and experience to be acquired? At the entry level, a lawyer embarking on a legislative drafting career will be expected to already have a comprehensive knowledge of the relevant law (although that knowledge should I believe be

²⁴⁶ Including myself, though I am not sure I would describe myself as ‘an innovationist’.

constantly upgraded through continuing legal education programs, which of course will be ‘off-the-job’). Such a lawyer will also be expected to have a well-formed working knowledge of the relevant language (including grammar and syntax), which will usually be English in most Commonwealth jurisdictions, together with a good vocabulary and the capacity to write in a clear, precise and unambiguous manner. Such a lawyer will also be expected to already have good analytical skills, which should have been tested by means of aptitude tests before the lawyer was chosen to embark on a legislative drafting career.

After entry, a novice legislative counsel will normally be placed under the supervision of an experienced senior legislative counsel who will be expected to mentor the junior by transmitting his or her knowledge of legislative drafting and the skills pertaining to it.²⁴⁷ But because the experience of even senior counsel is invariably limited and so can only achieve so much, this ‘on-the-job’ training needs to be supplemented by other training by means of structured legislative drafting ‘off-the-job’ training programs, such as those provided by the University of Ottawa, Athabasca University, the University of the West Indies, Public Administration International (PAI),²⁴⁸ the Institute of Advanced Legal Education²⁴⁹ and the Kenya School of Law. And in some instances, since legislative drafting is an extremely sophisticated form of writing, further training (which would almost invariably be conducted ‘off-the-job’) to hone a novice legislative counsel’s writing skills.

Returning to the author’s discussion of this topic, after deciding that legislative drafting is neither pure science nor pure art, she asks what is it and to find an answer she resorts to Aristotle and concludes that ‘law’ and ‘legislative drafting’ are classical examples of ‘phronesis’, which are “liberal disciplines with loose but prevalent rules and conventions whose correct application comes through knowledge and experience” (p. 356). She defines legislative drafting as “akin to practical wisdom that comes from an intimate familiarity with contingencies and uncertainties of various forms of social practice embedded in complex social settings” and ‘phronesis’ as “practical wisdom that responds to nuance and a sense of the concrete, outstripping abstract or general theories of what is right.” Frankly, I found this resort to Aristotle somewhat abstruse. I must confess that, until I read her book, I had never heard of the term ‘phronesis’²⁵⁰ and I suspect that I would not be alone in that regard.

Nevertheless, I believe that in the end the author and I come to the same conclusion, which is whatever methods will contribute to bringing a novice legislative counsel to the point at which he or she acquires the ability to independently write legislation that is effective in achieving the desired policy objectives: in sum, on-the-job training by experienced mentors and formal ‘off-the-job’ training by trainers who are both knowledgeable about legislative

²⁴⁷ These include policy analysis with a view to ensuring that the policy is feasible, avoiding unintended consequences and offering legislative solutions to conundrums.

²⁴⁸ Located in London.

²⁴⁹ Also located in London.

²⁵⁰ Or of the words that are cognate with it.

drafting issues and have the skills and techniques to address the various problems that arise or are likely to arise during the legislative drafting process. I believe it is particularly important for junior legislative counsel employed in small and medium sized legislative drafting offices to undertake a formal legislative drafting training course at the outset of their legislative drafting careers. On the other hand, a large legislative drafting office, such as the Canadian Legislative Services Branch of the federal Department of Justice, may well be able to sustain a more or less permanent training unit to provide continuous formal training on legislative drafting issues.

Training versus mentoring on the job

Here the author continues her discussion of the theme developed in the previous section. The title suggests that ‘mentoring training on-the-job’ and ‘formal training off-the-job’ are two alternatives. If this is indeed the case, I would unhesitatingly reject it. There is surely room for both. But the author goes on to acknowledge that experience in legislative drafting can flourish through mentoring by an experienced, open and didactic²⁵¹ senior legislative counsel. And while I would generally agree that legislative counsel can learn more from each other than from manuals (which presumably includes text books on legislative drafting), I do believe that manuals and text books on legislative drafting have a role to play in the training of legislative counsel.

I recall that not too long after I embarked on my legislative drafting career in what was then the New Zealand Law Drafting Office,²⁵² during a period when the Parliament was in recess, I decided to visit the Office library to see what literature on legislative drafting was available. I found only two books: one by Reed Dickerson²⁵³ and the other by Sir Alison Russell²⁵⁴ and read them both. One ‘gem’ that I gleaned from Russell’s book was the problem of ‘less than-more than’ and the undistributed middle. The point is obvious but it had not occurred to me before because it had not cropped up in any of the legislation that I had drafted up until then and so understandably my mentor at that time, Denzil Ward,²⁵⁵ would not have seen the need to bring it to my attention. There were no formal legislative drafting training courses in those days, but if there had been and I had been able to attend one, I am sure I would have become aware of it and other pitfalls liable to cause novice counsel to fall into error. So it was then that I formed that the view that formal legislative drafting training courses would not only be desirable but also necessary.

So I do agree with the author that pure mentoring is not enough. This is because, by isolating experience as a sole skill for legislative counsel, one ignores the second element of

²⁵¹ I am not at all convinced of the appropriateness of ‘didactic’ in this context.

²⁵² Now the New Zealand Parliamentary Counsel Office.

²⁵³ F. Reed Dickerson, *Legislative Drafting* (Little, Brown: Boston, 1954).

²⁵⁴ Sir Allison. Russell, *Legislative Drafting and Forms*, (Butterworths: London, 1937).

²⁵⁵ CMG, Former Law Draftsman, New Zealand Law Drafting Office, and latterly Counsel to that Office.

a legislative counsel's task, which is 'knowledge and understanding'. And so I wholeheartedly agree that these elements need to be explored through 'formal classroom' training offered in postgraduate academic programs that are prepared under the aegis of reputable postgraduate educational institutions. And, yes, it is formal training that allows legislative counsel to understand the concept of quality legislation fully; to understand what choices legislative drafting entails; to identify what virtues and values legislative counsel should have in pursuit of their task; and the criteria for deciding how these choices are to be made.

Given the nature of legislative drafting, and the skills required, a legislative counsel should probably not be regarded as being fully trained without having undertaken, not only lengthy practical hands-on experience, but also formal academic instruction that comprehensively encompasses legislative drafting issues. The author lists a number of topics relating to attaining quality and effectiveness in legislative drafting (p. 359) and I would not disagree with their appropriateness for inclusion in a legislative drafting training program. And I would certainly agree with the inclusion of—

- an explanation of the role of legislative counsel in the policy formulation and development process, in the drafting process itself (of course); and in the legislative process;
- the main theoretical principles involved in drafting legislation; and
- setting those principles in a hierarchy.

Clinical education and training in legislative drafting

In this section, the author canvasses the possibility of establishing legislative drafting clinics at which clients can receive *pro bono* legislative drafting services provided by trainee legislative counsel. The first question I would ask is who would be the clients for these services? Most legislation by far is sought by governments, though in many Commonwealth countries members of the legislature can and often do introduce private members Bills into the legislature. But in both cases, professional legislative drafting offices are invariably available to provide the requisite legislative drafting services. There might be scope in providing local authorities and statutory authorities (such as port and airport authorities) with legislative drafting services for the drafting of their by-laws or statutory rules.

But even if there is a demand from some other source, one would be concerned about the quality of legislation prepared by trainees otherwise under the close supervision of

competent and experienced legislative counsel. And as the author maintains, it is ‘impossible’²⁵⁶ to serve a client’s requirements with ineffective draft laws.

National versus universal training for legislative counsel

The author begins this section by asking the question whether legislative drafting training must definitely relate to the ‘national eccentricities’ of the jurisdiction that a trainee will ultimately serve, or are there universal values in legislative drafting that can be promoted and explored in institutions outside that jurisdiction? After reviewing what the author has to say on this question, I have concluded that, although many jurisdictions have their local idiosyncrasies, effectiveness, being synonymous with legislative quality, is indeed universal and so those involved in legislative drafting in different jurisdictions can, as the author suggests, learn from each other. In passing, as a legislative counsel who has drafted legislation in ten different jurisdictions, I did not find many differences between them and, with respect to those differences that did exist, I had no difficulty in coming to terms with them.

And I would tend to agree with the author that transferability of laws between jurisdictions can often be desirable in this era of integrative legal globalisation. As she points out, transnational problems (such as those involving human trafficking, money-laundering, organised crime and terrorism) demand transnational solutions.

She concludes by saying that, if it is true that the barriers between common and civil law are demolished, what might explain the remaining diversity that exists between jurisdictions are the factors that influence the subjective choices involved in producing legislation in each of the jurisdictions? In responding to this question, she mentions the nature of the local legal system is just one of the influencing factors.

However, at the end of the day, the factors that overshadow diversity are the universality of—

- the quality of legislation;
- the virtues that contribute to the attainment of quality; and
- the hierarchical classification of those virtues.

So, one has to conclude that there is indeed scope for universal training of legislative counsel if only because universal values overshadow those that might suggest that those promoting diversity should prevail.

²⁵⁶ I would have used ‘inappropriate’ rather than ‘impossible’.

Author's conclusion

I have to confess to being somewhat puzzled by the author's conclusion, which forms part of chapter 20, yet appears on one reading at least to relate to the whole of the book's contents.

Be that as it may, the author concludes her book by re-iterating that legislative drafting is a phronetic discipline, by which she means that it requires legislative counsel select the most appropriate subjective choice for solving the problems they are faced with at any given time. And in order to complete this task adequately, a legislative counsel needs to have two distinct sets of skills; firstly, an awareness and understanding of theoretical legislative drafting principles, their purpose, their application and the expected results from their use; and secondly, experience in applying legislative drafting principles in concrete cases that arise within the jurisdiction where the counsel is engaged. And in commenting on this, I too reiterate my agreement that formal training 'off-the-job' can make a very significant (if not essential) contribution to a legislative counsel acquiring the first set of skills, and that being mentored by a competent and experienced senior legislative who has good communication skills can help a novice legislative counsel acquire the second set of skills.

My concluding comments

Since the book covers almost all aspects of legislative drafting, I felt compelled to write a long commentary and critique. The book contains many observations, proposals and suggestions with which I whole-heartedly agree (such as those on pre- and post-enactment evaluation of effectiveness and legislative drafting training, for example). It contains others about which I am more sceptical (such as her proposal for the adoption of a layered approach to the drafting of legislation). And it contains others with which I profoundly disagree (such as the author's assertion that the present simple tense can replace the use of modal verbs to create obligations and prohibitions). I also have serious reservations about her chapter on amending legislation. And although I wholeheartedly support the use of gender-neutral language in legislative documents, I think the author overstates its importance in contributing to legislative effectiveness.

Some topics that I think the author might have covered, or covered in more depth, are:

- drafting error and its causes;
- the difficulties encountered by statute users in accessing, reading, understanding and using legislative documents;
- usability testing for pre- and post-enactment evaluation of effectiveness;
- the use of means other than prose to express legislative propositions; and
- the issue of State immunity.

To end on a positive note, however, the book will serve a very important purpose if it stimulates debate among legislative counsel and others who are concerned with producing effective legislation. I have little doubt that it will achieve this.
