THE LOOPHOLE

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Editorial Policies

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 and regional 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 MS Word or similar compatible word processing software.

Submissions and other correspondence about *The Loophole* should be addressed to —

John Mark Keyes, Editor in Chief, *The Loophole*

E-mail: calc.loophole@gmail.com

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Editor's Notes

This issue completes the publication of articles based on presentations at CALC's virtual conference in 2022. Although this conference had a greater attendance than that of any previous conference, it lacked the in-person opportunities to follow up with speakers and discuss their presentations after the conference sessions. The publication of these articles (like the publication of others in the previous issues) in some sense offers an opportunity to do so now.

The two articles that complete the 2022 conference publication are based on presentations at the Rules as Code session in Zone 1 (Asia, Australia and the Pacific) and Zone 2 (Africa and Europe). Matthew Waddington discusses a project at Jersey's Legislative Drafting Office to parse the logic and grammar of draft provisions so that legislative counsel can make the logical structure of their drafts machine-readable for use in "Rules as Code". In turn, Adrian Kelly discusses the development and use of algorithms in legislation ("digital law") and the need for transparency if algorithms are to become part of the law.

From the 2022 conference, we turn to the first in-person CALC conference held after the COVID era: the 2023 Europe Regional Conference in Cardiff, Wales. Both articles deal with questions of sovereignty. The first is the text of the speech the Right Reverend and Right Honourable Dr. Rowan Williams delivered about his work as the co-chair of the Independent Commission on the Constitutional Future of Wales and the complex questions facing the Commission. The second article is Lucy Marsh-Smith's account of the role of the sovereign in Crown dependencies, such as Jersey, and the challenges it has posed for law-making there.

Finally, this issue concludes with reviews of two books that deal extensively and authoritatively with subjects intimately connected to legislative drafting: the 6th edition of *Delegated Legislation in Australia* (by Dennis Pearce and Stephen Argument) and *Modern Statutory Interpretation: Framework, Principles and Practice* (by Jeffrey Barnes, Jacinta Dharmananda and Eamonn Moran).

Bonne lecture!

John Mark Keyes
Ottawa,
September, 2023

Jersey's project on parsing drafts for if-then structures for "Rules as Code"

Matthew Waddington[1]

Abstract

This article describes the work of a project at Jersey's Legislative Drafting Office to parse the logic and grammar of draft provisions so that legislative counsel can make the logical structure of their drafts machine-readable for use in "Rules as Code".

The article considers how legislative counsel can identify "if-then" structures in drafts, including those that do not use the word "if", such as "a person who drives …", definitions, obligations and prohibitions. It then looks at ways legislative counsel can flag those structures by applying coloured highlighting or markup to the original text or by minimal rewriting into a shadow version in a "controlled natural language".

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[1] Legislative Drafter, Lead for Computer-Readable Legislation Project, Legislative Drafting Office, States of Jersey.

Introduction – Jersey's project on "Rules as Code"

This article describes the work of the Computer-Readable Legislation Project at Jersey's Legislative Drafting Office. We are looking for ways that legislative counsel can parse the logic and grammar of draft provisions and apply markup (or write shadow versions), to make the logical structure of the draft machine-readable so that it can be used by computers as part of "Rules as Code" ("RaC").

RaC has been described elsewhere,[2] but for this article I will treat it as the idea that we could draft legislation with markup or coding to enable a computer to follow the logical structure of the draft. The version of RaC that we are looking at in Jersey is one informed by the perspective of legislative counsel. So it focuses on what can be done while new legislation is being drafted (as opposed to combing back over the statute book). It adopts a minimalist approach, capturing only the logical structure of our drafts rather than the meaning of

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[2] For introductions to RaC from the perspective of legislative counsel, see my articles in the *Loophole*, June 2019 and October 2021. The "Rules as Code Handbook" is a wiki that has general information about RaC from a non-drafting perspective, available at https://github.com/Rules-as-Code-League/RaC-Handbook/wiki/1-Introduction:-What-is-Rules-as-Code%3F. For a perspective from a lawyer-programmer (not a legislative counsel) see the paper presented to the ABA Techshow 2021 by Jason Morris, "Rules as Code: How Technology May change the Language in which Legislation is Written, and What it Might Mean for Lawyers of Tomorrow", available at https://s3.amazonaws.com/us.inevent.files.general/6773/68248/1ac865f1698619047027fd22eddbba6e057e990e.pdf. For the history and context see my draft chapter "Rules as Code: Drawing out the logic of legislation for drafters and computers", available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4299375.

undefined expressions, with the aim of being able to check and explain legislation rather than automate its enforcement.[3]

There has been a great deal of progress on RaC in recent years, but it has become very much focussed on the technical side of encoding legislation. Relatively little relates to RaC in drafting legislation, and Jersey's project aims to tackle that to avoid chasing false leads. If we are to add the legislative counsel into RaC, then a good starting point is the fact that when we are drafting something, we already understand the logical structures that we are trying to encapsulate in our draft. We build those structures through our definitions, if-then conditions, "must"/ "may"/ "must not" provisions, indented numbered paragraphing for "and" and "or" lists, and so on.

But very often that logic ends up being very complicated because our instructing officers need to have exceptions to exceptions to exceptions and want to ensure various cases are dealt with in appropriate ways with some degree of certainty. That makes it difficult to follow for the legislative counsel, for the instructing officer, and even more so for other lawyers. The result is also often impenetrable for members of the public.

A recent example is legislation for Covid-19, where governments wanted to fine-tune restrictions very frequently and at great speed, adding more exceptions as regimes were relaxed. The interaction of those exceptions was very difficult to keep track of, risking unspoken differences in understanding between legislative counsel and instructing officers. The following table of contents illustrates this difficulty.

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[3] For more on this minimalist version of RaC, avoiding the pitfalls and legal misunderstandings of over-ambitious approaches, see my note in La Trobe University's "Law in Context" journal, available at https://journals.latrobe.edu.au/index.php/law-in-context/article/view/134/214. For a balanced assessment of the legal issues thrown up by more ambitious versions of RaC, see Lisa Burton Crawford "Rules as code and the rule of law" [2023] *Public Law* 402-423.

COVID-19 (GATHERING CONTROL) (JERSEY) ORDER 2020

6 Gatherings in other locations

A person must not take part in a gathering of more than 10 people anywhere other than in a home, in the open air or in a workplace or construction site.

7 Exception: higher numbers permitted to gather at controlled events

(1) Despite any other gathering control requirement in this Order, a person may take part in a controlled gathering –

    (a) of no more than 40 people, in the case of a gathering that –

        (i) takes place entirely outside the Christmas period and in the open air, and

        (ii) would otherwise be limited by Article 4 to 20 people, or by Article 5 to 10 people; or

    (b) of no more than 20 people, in the case of a gathering that –

        (i) takes place either during the Christmas period (whether wholly or partly) or not in the open air, and

        (ii) would otherwise be limited by Article 5 or 6 to 10 people.

So the question we set ourselves in Jersey is whether legislative counsel themselves can flag the if-then logic of our drafts for a machine to show it to users – policy officers, legislators, courts, other lawyers and the public. The purpose is so that they can be guided to the correct questions that humans need to answer if they are to work out how legislation applies to a given scenario.

This article is just a progress report, and our starting point is very tech-light, looking at what can be rendered as "if-then", how legislative counsel can flag that, and whether doing so should involve marking up the original draft or producing a shadow version that is in English but is machine-readable.

We are not looking at computing issues like the best computer language or program for representing legislation in code. Instead we are working on how the co-drafting concept of RaC involves legislative counsel exposing the logical structure of rules during the drafting process (possibly after a similar policy exercise to produce instructions). That means the legislative counsel parsing each draft and applying markup, or making a shadow draft, to identify the relevant elements in the text. Legislative counsel need to consider what the logical elements of drafts are and how we can identify which words in a draft belong to

which elements (rather than the computing issues of how best to apply mark-up or how a program could ingest the mark-up).

The concept of "isomorphism" in RaC says code should follow the structure of the text and link chunks of code to chunks of text, to ease amendments and automated explanations (so the computer can say "this result is because section 3(2)(a) applies to your answers"). There is a tension between elegant code and elegant drafting. We want elegant drafting, so the question is whether mark-up (or shadow drafts, or both) can reconcile our freedom to express rules in the way that best suits human comprehension in each particular case with the ambition of capturing the logical structure in a way that computers can use.

Can legislative counsel flag our logic for machines?

There are 3 aspects to this question –

- Are the if-then structures really there in our drafts?
- Can legislative counsel agree on how to identify them?
- Can we find a way to flag them that we can cope with while drafting and that machines can use?

In this exercise we are looking to produce useful results by trying to keep the approach simple and familiar to legislative counsel. So we are not trying to capture numbers, dates, sequences or other clever computational things. Instead we are –

- just looking at "if-then", along with "and", "or" and "not";
- rendering "must / may / must not" as "if-then" instead of using deontic logic (which deals with obligations and permissions, but brings its own problems);
- later coming on to how cross-references work and should be represented.

An imaginary provision to parse – prohibition on selling alcohol

We are looking at real enacted legislation, and will look at draft legislation after that. But to start with we used a set of imaginary provisions designed to illustrate the issues. The point is to pick a small piece of legislation, where the drafting works in the way legislative counsel expect it to – we are not looking for problems. The examples need to be suitable for marking up as if-then-and-or-not, or recasting as a shadow draft, to show the "if-then" structures in them. The recast shadow draft would be in a version intended to be usable as machine-readable text, and the markup would be by coloured highlighting or by applying tags (such as those in html and xml that use angle brackets – "<" & ">") that a computer can read to identify the elements that we have flagged. Once the computer can do that, it can use the elements for several purposes (including probably some we will not think of, but developers will imagine) such as to reason about scenarios, or to just allow a human reader to make some descriptive text pop up.

One of the fictional examples we use is this (or a simplified version of this) –

"(1)   A person **must not** sell alcohol **if** –

    (a)   the person is a commercial operator; **and**

    (b)   a manager of the person –

        (i)   has an unspent conviction for fraud, **or**

        (ii)   is subject to an alcohol banning order.

(2)   In paragraph (1) –

"commercial operator" **means** a body corporate that engages in business for profit **but** is **not** a public house **or** a hotel;

"fraud" **includes** providing misleading information in relation to an application for a licence under an enactment."

Logical structure only

We are just trying to capture the logical structure of "if-then", "and/or" and "not" (with definitions and "must" rendered as "if-then"). We are not adding other interpretation or trying to capture the meaning of undefined terms.

(1)   A person must not sell alcohol, if –
    (a)   the person is a commercial operator; and
    (b)   the person has –
        (i)   an unspent conviction for fraud, or
        (ii)   an alcohol banning order.
(2)   "Commercial operator" means a body corporate that engages in business for profit but is not a public house or a hotel.

Abstracted -

(1)   B must not do C, if –
    (a)   B is a D; and
    (b)   B has –
        (i)   an E, or
        (ii)   an F.
(2)   "D" means a G that does H but is not a Z or an A.

So in this example we are not in any sense trying to capture what "person" means. The fact that it means a "legal person" as well as a "natural person" is of course a huge stumbling block for lay readers (and many lawyers). Equally we are not trying to capture what "alcohol" means. But we are trying to capture the fact that "commercial operator" has been defined. Paradoxically, definitions must always lead to introducing more undefined terms. For example in this case we have defined "commercial operator", but to do so we have

introduced the undefined expression "body corporate", "engages in business for profit", "public house" and "hotel". In our project we are not trying to capture the meaning of any of those terms, as we are just trying to capture the highlighted logical elements – "must not", "if", "and", "or", "means", "but", "not" and "includes".

We are also interested in whether we can capture the fact that the same undefined word has the same meaning each time, and possibly the fact that when we use "a person" followed by "the person" we are referring to the same person. These are things that we take for granted but that are not necessarily obvious to our lay readers (and need to be flagged for a computer to grasp them).

What are we aiming for?

It might help just to take a quick look at where we are trying to end up, and what the point is, before heading back to looking at the first steps. Our long term aim is to end up with a simple tool for legislative counsel to apply markup or coding while they draft, to pick out these logical components. The purpose behind that is to feed an app or program that enables the legislative counsel and policy officer to check the draft for consistency, to run example scenarios through it to check the results are as intended, to generate flow-charts, decision trees and visual aids, and so on (ensuring legislative counsel and instructor are not unwittingly reading the draft in conflicting ways). The aim would also be for external software providers to be able to feed what the legislative counsel produces into more sophisticated programs or apps that they produce which explain the law or automate some processes with human input. One example of those programs is "RegTech", which is mainly aimed at financial services, and we have been talking to the Jersey Financial Services Commission who had published plans to make their regulatory handbooks and codes of practice machine-readable over the period of our project.[4]

We have already used very crude ways of doing this, such as Excel which is available to everybody. The "if-then" logic available in Excel can be used to produce answers to

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[4] See Jersey Financial Services Commission, The RegTech Opportunity (2022), available as https://www.jerseyfsc.org/media/6082/the-regtech-opportunity.pdf . That ambition may be scaled back.

questions, where the questions just use the text of the law. We have encouraged other drafting offices to try it.[5] The following is an example of an Excel page:

Much more sophisticated is DataLex[6] from AustLII. It uses the text of the law to produce questions for the human user to answer (mostly with "yes" or "no"). The computer then gives answers to the human, by applying the logic of the legislation to the answers given by the human. The computer offers explanations as it goes along, giving the user the opportunity to query why a question is being asked, to test an answer on a "what if" basis, and to undo answers previously given. The computer displays a running tally of the facts that the human has given by answering the questions, the conclusions it has drawn, and the provisions of the legislation that it is using.

Another system that illustrates these ideas is Oracle Intelligent Advisor[7]. It originated in work on legislation, but has shifted into a tool for creating and running internal business rules. But it still demonstrates, as a commercially available product that has been in use for some time, that it is possible to have a rule-writing system that checks the if-then-and-or logical structure while the legislative counsel is writing, and can then run tests.

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Once our tech friends work out how to combine the authoring (as in Oracle) with the legislation-friendly questions and explanations (as in DataLex), then we should be able to reach the goal of the legislative drafting equivalent of a code-writer's IDE ("integrated development environment")[8] or "Jupyter notebooks for law" as described by James Grimmelmann in "Programming Languages and Law: A Research Agenda"[9]. Will future legislative counsel then wonder how we ever managed to draft anything that worked just using word processors like Word, in the same way that we now look back to the time before word processors and wonder how our predecessors ever managed to try out different versions when they could not manipulate text on the go?

What is parsing giving us so far?

We have taken on two students as interns, and one of their jobs has been to parse the original text of legislation in each of the imaginary and real examples that we have used in our project. Building on the work we had already done with Excel about producing questions, the interns are then using the parsing and questions in "QnA Markup Editor"[10], which is a free, web-based system on which non-coders can write interactive questionnaires. They are also similarly recasting the results for Mermaid Live Editor[11] (another free, web-based system for non-coders), which uses a set of writing conventions to enable users to

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8 See Wikipedia entry for Integrated development environment at https://en.wikipedia.org/wiki/Integrated_development_environment. The tweet pictured below is at https://twitter.com/grimmelm/status/1542244176552673281.

9 J. Grimmelmann, "Programming Languages and Law" (Cornell University Law School and Cornell Tech: New York, 2022), available at https://arxiv.org/pdf/2206.14879.pdf.

10 See http://www.qnamarkup.org/.

11 See https://mermaid.live/.

create and edit flowcharts on a live website. We suspect it should be possible to automate feeding "if-then" text into QnA and Mermaid. We are also looking at whether we can use generative Artificial Intelligence (such as ChatGPT and Bing Chat) to convert our text into those forms (with disappointing results so far).

I describe parsing in more detail below, but at its heart this involves identifying the if-then structures in provisions, extracting the wording that forms the conditions (the "if" part), and turning that into questions without changing the wording, by putting "Is it the case that" before the extract. We then extract the legal effect (the "then" part) and present it as a result by adding "It is the case that" or "It is not the case that", depending on the reader's answers to the questions on the conditions. So a provision in an imaginary s1(2) saying "A person must wear a seat belt if the person drives" gives us *Is it the case that* the person drives?" when we extract the condition and make it into a question. When we extract the legal effect ("A person must wear a seat belt"), we turn it into a pair of results from the computer. If the reader answers "yes" to the question then the computer gives "*It is the case that the* person must wear a seat belt", while "no" gives "*It is not the case that the* person must wear a seat belt".

We are looking at adapting this to "*s1(2) provides that* the person must …", and "*s1(2) does not provide that* the person must …", to cater for the approach we are taking of only looking at what the particular legislation does. In a draft we want to be consistent internally, so we want to ensure the relationship between the two provisions is clear when there is another provision that says that a person must wear a seat belt in a case in which s1(2) does not say so, or when another provision is an exception to s1(2) carving out a case in which the person does not have to wear a seat belt. But we are not normally implying that there is no other way, outside of this piece of legislation, in which a person could be legally obliged to wear a seat belt when this legislation does not require it (they could be contractually obliged, for instance). That has also led to us looking at what is the appropriate way to express the result when the conditions are not met. That might always be the equivalent of "*s1(2) does not provide that* the person must …", but we are looking at whether it is worth distinguishing the cases where "*s1(2) does not apply*" might be a better answer or whether there is no clear enough dividing line between the two.

We are also looking at interim conclusions as staging posts on the way to the final results (the conclusions that are the furthest that the provisions can take the reader without moving on to other provisions). Imagine our s1(2) was followed by "(3) For the purpose of this section, a belt is a "seat belt" if the belt meets the requirements in section 5.". Then "the belt counts as a seat belt" would be an interim conclusion (from the answer "yes" to the question "is it the case that the belt meets the requirements in section 5") on the way to a conclusion about whether the person must wear the belt. That allows us to apply the definition without simply substituting it for the defined term (which would then be lost, possibly changing how an English speaker reads the provision).

At first we left the extracted wording exactly as it was, so the result in the first example would be "It is the case that *a* person must wear a seat belt", rather than "*the* person". But that is misleading (it could refer to someone else other than the driver). So we were led to mark up the pairings of "a" and "the" in provisions, as in "*A* farmer must do X if *the* farmer does Y", or "If *a* farmer does Y, *the* farmer must do X". That is to flag the way we use those pairings to indicate that they refer to the same item (the same person or the same farmer), rather than just having the same meaning each time. [12] We will report on further progress as we make it.

Parsing

Statements can be parsed, both in natural languages and in logics. Legislative counsel parse English sentences to work out what is going on and check that they are properly constructed. Parsing in a natural language involves (at some level) identifying not only which words are verbs, nouns, adjectives, adverbs, pronouns and so on, but also (more importantly for us) how the words (and phrases and clauses) relate to each other. Parsing is a useful tool in computer coding too (and in logic).

This is the major element that legislative drafting offices can offer which is missing from other RaC work. We need to explore what we can parse and how, how we can mark up or set out that parsing, whether legislative counsel can do it consistently, and whether what we can achieve will be usable by developers of apps and programs.

We decided to start with the parsing first, using just our own resources, looking for two things –

- ways to make our drafts more machine-friendly without reducing human-readability (repeating connectors, adding provisions in Interpretation Acts, and so on); and
- ways to supplement our drafts with something machine-readable that is also human-readable, though harder for humans to read than the drafts.

We are interested in how legislative counsel can parse drafts, as part of the drafting process, to mark up the elements of the logical structure in a way that –

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[12] This also led us to looking at using an introductory question, where we pick out the terms used with both "a" and "the" (for example "person" and "seat belt"), to say "This provision does not apply to a scenario unless the scenario includes [a person] and [a seat belt]. Does your scenario include those?". We then have a rationale for using "the" in all our further questions and answers, even when the original text used "a". This will need more work, but it might be related to issues about what information scientists call an "ontology" (which can be used to create a "knowledge graph"), formally setting out the concepts used and their relationships to each other. Programmers working on Rules as Code often want to specify an ontology for the concepts used in the legislation, which can risk importing interpretations that are not present in (or at least not decided by) the legislation. We are looking at whether, in future drafts, we might cater for an ontology beyond what is in a definitions section, perhaps by drafting a schedule that says it is to be used in interpretation and gives a textual version of what is needed for an ontology that the programmers have designed.

- works for legislative counsel, ensuring the extra work has enough reward;
- works for legislators, in deciding whether to enact one of our drafts;
- but also works for developers, so that they can use our markup as their raw material for their programs and apps.

Once we have a way of representing parsed legislative text we will use that as an illustration of what we mean. We will use it (with pointers to logic programming[13]) to try to help local tech firms and our international collaborators to see –

- what they would need from us to enable them to develop something of their own for us (a checker-&-illustrator app); and
- (if different) what they would need from us if they want to use our product to develop programs for third parties (such as apps for answering questions or illustrating alternatives, or programs for automating processes).

The first question is what we are parsing for.

- Many in this field have tried to capture the maximum number of elements, and some have gone for the most computable (numbers and dates). Instead, we started from the ground up by seeing if we can just capture the basic logical elements of "if-then".
- We have also looked at capturing the logical elements of "and", "or" and "not". But even there we are not trying to capture every last instance of those connectors – only those the legislative counsel thinks useful (just as in our drafts we do not use indented numbered paragraphs for every case of "and" or "or").
- So we are not trying to capture numbers (or more/less than, equal to, etc) or dates (or before, on, after, during, and so on). If developers want those for their apps/programs then they can add their own code in for themselves (just as they will add in other elements for their application).

To summarise the parsing exercise described in the following sections –

- We try to parse drafts for if-then structures using a 3-part relationship between conditions, "if" or "if-and-only-if", and legal effects (which result when the conditions hold).
- We also try to parse those structures where drafts do not expressly use "if", such as "A person who drives" or "A person driving" instead of "If a person drives".

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[13] Most computer programmers use programming languages that are "procedural". Logic programming languages take a different approach and their declarative nature is more suited to legislation. The most well-known logic programming language is Prolog, invented by Professor Robert Kowalski who has an interest in legislation (see notes below) and used Prolog on the *British Nationality Act 1981* in the 1980's. Jason Morris has used other logic programming languages, including Flora-2 and s(CASP) - see his paper "Constraint answer set programming as a tool to improve legislative drafting: a rules as code experiment" in Proceedings of 18th ICAIL (2021: ACM, New York), available at https://dl.acm.org/doi/10.1145/3462757.3466084 (preprint available at https://cclaw.smu.edu.sg/projects-papers/constraint-answer-set-programming-tool-improve-legislative-drafting).

- We try treating definitions as equivalent to "If-and-only-if some thing/act is Y, then it counts as X for the purposes of this Act".
- We look at not-quite-Coodean "must" cases, such as "The notice must contain the following information" or "The appeal must be lodged within 14 days".
- We parse Coodean legislative sentences to pick out the 3-part relationship between the subject (a person), the "must", "must not" or "may" conjunction, and the act or omission (the one that is required, prohibited or permitted).
- But then we also try to parse "must" as if-then. That means treating "A person must do X" as equivalent to "If a person does not do X, the person counts as in breach of this provision". That leads on to "If a person is in breach of this provision, the person [commits an offence] / [is liable to judicial review] / [has not made a valid application/appeal] / [has not served a valid notice]", or some other more or less explicit consequence that is weighty enough to call for using "must".

If-then structure in our drafts

The basic logical element in drafts is "if X then Y", or "if-and-only-if X then Y". That involves a 3-part relationship between the X element that is the condition(s), the conjunction element that is either "if" or "if-and-only-if", and the Y element that is the consequence(s), which is a statement of the resulting legal position.

- That structure is often expressed using "if" in our drafts, as in "If a person drives, the person must wear a seat belt". There the conjunction element is "if" (not "if-and-only-if" because passengers might also have to belt up), the condition element is "a person drives", and the consequence element is "the person must wear a seat belt".
- We tend not to use "then" to introduce the consequence element, partly because its time-related meaning could confuse readers into thinking the consequence only starts after the conditions stop, and partly just because we want to save words.
- Sometimes we put the consequence element first, as in "A person must wear a seat belt if the person drives" (and sometimes, as here, we do not use a comma or other punctuation to separate the elements). The legal effect is the same regardless of the order of the elements.
- But sometimes we leave the "if" unstated, although the legal effect and the logical structure is the same, where the legislative counsel decides human comprehension would be better served in the particular case by drafting the same provision in a different way. Common alternatives are "A person who drives must wear a seat belt" and "A person driving must wear a seat belt". All these versions have the same legal effect and the same logical structure.
- Other elements can be treated as if-then even though they are not normally expressed that way in drafts. The most important is definitions. In express definitions we use either "means" or "includes", carefully distinguishing between

them. But we also use implied definitions such as "…a person who drives (a "driver")…", where we rely on the reader to work out whether this is a case of "means" or "includes". The logical structure of definitions can be represented by treating "In this Act "X" means Y" as being equivalent to "If (and only if) some thing or act is Y then it counts as X for the purposes of this Act".

A particular logical structure that we classically rely on is the Coodean legislative sentence, now using "must", "must not" or "may". That again involves a 3-part relationship, this time between the element that is the person on whom the obligation or prohibition or discretion (or power or right, and so on) is imposed, the conjunction element that is one of "must", "must not" and "may", and the element that is the act that the person must, must not or may do. Going back to the original example the relevant part is just "the person must wear a seat belt" (not the if condition "If a person drives"), and the elements are respectively "the person", "must" and "wear a seat belt".

Alternative ways in which we can draft if-then provisions

We are looking into whether the legislative counsel can consistently parse each draft and apply markup (or write a twin draft) to identify the relevant elements of the draft. For now we are not looking at the computing issues of how best to apply markup or how a program could ingest the markup. Instead we are looking at the drafting issues of what the logical elements of our drafts are and how we can identify, in the text we produce, which words belong to which elements.

One of the things that we would want to emphasise we are not trying to do is put legislative counsel in any kind of a straitjacket. We are saying that legislative counsel should be able to continue drafting in the way that best suits the English-reader, the human reader of English text, for that particular draft. But there are many varying ways in which you can say "if a driver carries a passenger, the driver must do something or other" (ensure the passenger is belted, or drive slower, or whatever it might be). So you can say "a driver *who* carries a passenger", or "a driver *carrying* a passenger", or you can have "this paragraph applies … that paragraph applies …". We do not want to stop legislative counsel using those. But we are fairly convinced that they are all logically and legally equivalent to "if … then …".

Legislative counsel like to feel that every word in a draft is carefully chosen, and those engaged in interpreting legislation properly will often say something similar. That is true when it comes to our insistence on not using different words when the same meaning is intended (and avoiding using the same word for different meanings at different points in the text). But we might have oversold the point, giving the impression that any other wording would have had a different effect (or at least would have been open to different interpretations). Partly the problem is that lawyers who are not legislative counsel see only the final version, and that means they can miss out on understanding that the drafting process involves trying multiple versions out before settling on one. Tech folk also tend to

assume that we write out each draft provision in one go, and do not appreciate how much we use word-processing programs to shuffle, re-arrange and try out different structures. Partly that is because we might not capture the rule we want at the first attempt, and partly it can be because we think of better words for the substantive concepts. But often the juggling is just about trying out different ways to structure the provision using the same substantive terms. We discard some of those versions because they do not achieve the right legal effect, but we discard most of them because they produce syntactic ambiguities, difficulties in cross-referencing, over-long phrasing, or other presentational problems. The point about these versions is that we believe they would all have the same legal effect, which is related to their all having the same logical effect, and we are picking between them on some other basis.

We do not want to see RaC leading to standardisation of wording that serves only the computer and makes it harder for the human reader to follow the legislation. Most work on RaC so far has dealt with already enacted legislation, which means overlooking the legislative counsel's perspective of having many logically and legally equivalent ways to express the same rule. For instance, if the drafting instructions say: "We want it to be made compulsory for all drivers to wear seat belts", the legislative counsel has several choices about how to put that. The legislative counsel aims to choose the one that will best serve human readers' understanding, particularly given the context and structure of the rest of the draft.

For example, while drafting we might try out any or all of these structures to capture the if-then relationship that if a driver carries a passenger, then the driver must do something –

"If a driver carries a passenger, the driver must ..."
"A driver must ... if the driver carries a passenger"
"A driver who carries a passenger must ..."
"A driver carrying a passenger must ..."

In a more complex case we might also try out other structures which still have the same effect, such as –

"(1) If paragraph (2) applies, a driver must ... (2) This paragraph applies if the driver carries a passenger."
"(1) If this paragraph applies, a driver must ... (2) Paragraph (1) applies if the driver carries a passenger."
"(1) Paragraph (2) applies if a driver carries a passenger.

(2) The driver must …"

"(1) If the condition in paragraph (2) is met, a driver must …   (2) The condition is that the driver carries a passenger."

"(1) A relevant driver must …   (2) In paragraph (1) 'relevant driver' means a driver who carries a passenger."

Yellow for conditions ("antecedent" in logic terms, for "if" as "material implication")

Blue for legal effect ("consequent" in logic terms, for "if" as "material implication")

Green for if (but not only if)

Dark Green for if & only if (abbreviated to "iff").

Is there a real difference in logic or legal effect between these different versions of "if-then"? We are taking this question to legislative counsel across CALC, starting with the Europe region meeting in Cardiff, and also at the meetings planned for 2023 in Australia and Kenya.

The legislative counsel would be using "driver", "carries/carrying" and "passenger" in all of these versions, probably because they are using those same terms elsewhere in the draft for the same meanings, whether defined or not. So the exercise of testing the alternatives is not about that. Instead, it is about how we structure the expression to achieve the same legal and logical effect, and the choice is made according to factors such as –

- whether we might need to add more conditions (aside from carrying a passenger), or break the condition into sub-paragraphs, which we might only realise after we have tried the simpler structure,
- how long and complex the "…" element is, and whether we need to break it into sub-paragraphs (and what happens if we need to break both that element and the conditions into sub-paragraphs),
- whether and how we are going to refer back to the driver, passenger or both later in the sentence or elsewhere in the draft, and
- whether we need to mirror the structure of another provision, where there was a particular reason for going with one of these types of structure.

That means that, when we rephrase the logical elements and structure, but not the substantive terms, we are keeping the same legal effect in the drafting. If we turn to coding or marking up a draft then we might need to rephrase the logical elements, but again not change the substantive terms, so that we can give an if-then rendering or some other machine-readable rendering. But, just as with the original drafting, in rephrasing the logical elements we are not necessarily "interpreting" the provision in ways that usurp the function

of the courts. Of course, if we make explicit something that we had left implicit then there is the possibility that a court could disagree with us about what was implicit. But we would not have left it implicit in the first place if we thought a court would do that. We do not try to protect ourselves against courts by spelling everything out explicitly because we know they can still come to different interpretations if they are determined (driven for instance by a duty in human rights legislation to interpret a statute so that it complies with human rights, as interpreted and applied by the judge). We want our readers to be able to get to the point of what the statute is saying without having to wade through unnecessary explicit statements of what could have been left implicit by reliance on common sense and natural usage of English.

Can we keep all those text options but pick out the common logic by treating all/most of legislation as if-then statements – "if these conditions are met, then this legal effect applies"?

Can we render all these examples as "if-then"? We would not be expecting legislative counsel to draft the text in that way, as we should keep picking whichever version suits human readability best in a given case. If we continue to draft in the various different phrasings set out above, it looks to us as if Commonwealth legislative counsel should be able to accept that the underlying logic is just "*if* these conditions are met, *then* this legal effect applies" in each one.

"If-then" provisions have 3 elements –

- Condition – that must be met for the effect to apply ("a person drives");
- Effect – the legal result when the conditions are met ("the person must wear a belt");
- Connector – there are 2 types –

  - IF – for "if but not only if", to allow other routes to the effect (such as passengers having to wear belts), or
  - IFF – for "if and only if" – when there is nothing else that produces the legal effect (for legislation that did not require belts in any other circumstances).

Legislative counsel normally do not use "then" after "if". We are not sure whether that is just to use fewer words or is intended to avoid confusion with the time meaning of "then". But those who use "where" for "if" seem untroubled by any risk of confusion with the place meaning of "where". Longer provisions are harder to read if we do not mark the start of the effect with "then". Markup or a shadow draft would have the virtue of flagging the start of the "then" element clearly.

But if most provisions can be rendered as "if-then", does that capture most of what frustrates legislative counsel, policy officers and other readers when we try to untangle the often complex structures we are asked to build? What can be parsed as if-then?

"If-then" statements can be more or less explicit, but there seems to be no logical or legal difference between each of the phrasings set out above for "if a person drives".

Definitions parsed as if-then

"If-then" is not only applicable to the kinds of legislative proposition that use "if", or directly imply it. We can also parse definitions as "if-then" statements –

- Effectively a definition that uses "means" is saying "if (and only if) something meets this definition, it *counts as* this defined term". A thing counts if it meets the definition, and does not count otherwise.
- For a definition that instead uses "includes", the difference is just in the type of "if". This one is "if, but not only if", as in "if (but not only if) something meets this definition, it *counts as* this defined term". A thing counts if it meets the definition, but another thing might also count even if it does not meet the definition.

The effect of this is that –

"For the purposes of this Act 'X' means Y"

can be re-cast as –

"If-and-only-if a thing/act is Y, then it *counts as* X [/ it *is* X] for the purposes of this Act".

and that –

"For the purposes of this Act 'X' includes Y"

can be re-cast as –

"If, but not only if, a thing/act is Y, then it *counts as* X [/ it *is* X] for the purposes of this Act".

Implicit definitions parsed as if-then

Definitions can also be left implicit, as in the method using brackets and quotation marks –

"(1) A person who drives (a "driver") must wear a belt.

(2) A driver must not permit a child to ride unbelted."

Remembering that "who" is a drafting alternative to "if", but with the same logical and legal result, there seems to be no logical or legal difference between this and an explicit "means" definition. It is just a question of the legislative counsel's having chosen the most convenient way to do the same job. So this can still be rendered with an explicit "if-then" – it equates to "means" rather than "includes", so it needs "if-&-only-if" –

"(1) If, and only if, a person drives, then the person is a driver. A driver must wear a belt.

(2) A driver must not permit a child to ride unbelted."

This would split the original provision into two sentences for paragraph (1). But the provision could also be recast to remove the defined term completely and replace it with the definition –

"(1) If, and only if, a person drives, then the person must wear a belt.

(2) If, and only if, a person drives, then the person must not permit a child to ride unbelted."

That of course would be a hefty rewrite and there would be a need to cater for having lost the definition provision altogether. I mention cross-references below, and that is probably the way to ensure we keep the definition provision but also enable it to feed into the provisions where the defined term is used.

Odd must/must-not parsed as if-then

Between Coodean (normative) provisions and definition (constitutive) provisions, there is some grey area, particularly with odd "must" cases. These are often characterised by their use of the passive voice even though legislative counsel normally prefer active voice, and by the subject's not being a person (but there is an implied active subject behind the scenes who is a person) –

- expressly – "the appeal must *be* submitt*ed* [within the time-limit]" – where the appellant is the active subject;
- impliedly – "the notice must contain [certain information]" – where the notice-giver is the active subject.

We can recast these as "if-then" provisions by reference to the normative or Coodean provisions that they lead on to.

- What matters about the notice is just that if a person is served with it then they must do something – and they would not have to do it otherwise.
- What matters about the appeal is just whether the court or tribunal must (or may) entertain it.
- If notice or appeal does not do what it "must", then the purported notice or appeal is just waste-paper with no legal effect. But it probably is not a crime to give a defective notice, so the only consequence of not meeting this "must" is the failure of the notice or appeal to have the legal effect that it should.

So we can parse these as just more conditions for the legal effect, which is contained in the later provision imposing a duty or prohibition on the notice recipient or the court or tribunal. That gives –

> "if an officer serves a notice on a person, and the notice contains the information [and complies with whatever other conditions], then the person must remove the nuisance",

and in the appeal example –

> "if a party submits an appeal, and does so within 14 days of the decision [and complies with whatever other conditions], then the court/tribunal must hear the appeal".

Coodean must/must-not parsed as if-then

The classic Coodean normative provision is an explicit "if-then" statement – "if these conditions are met, [then] this person must [/ must not / may] do this act". According to Coode the "elements of every legislative expression" are the "legal subject" and the "legal action", linked by the "copula" (in his day "shall") and possibly preceded by the "case" and "conditions". We would be interested to know whether any legislative counsel reckon there is still any legal or logical significance in Coode's distinction between "case" and "condition". Many legislative counsel like "where" as an alternative to "if", but it is not clear if that is for ease of reading or some Coodean or other essential logical or legal reason.

It looks as if it will also be useful to parse classic Coodean normative "must" and "must not" provisions in a similar way, by reference to their consequences. That avoids the problems of deontic logic [14] and keeps us just using "if-then" instead of trying to set up special markup for different types of obligation, permission, prohibition, sanction, offence and so on. So "if a person does X, the person must do Y" can be parsed as "if-then" without the "must" by treating it as equivalent to "if a person does X, and the person does *not* do Y, then the person counts as in breach of this provision".

- Commonwealth legislative counsel should always be satisfied that they have ensured there is a clear enough consequence for non-compliance, even if it does not need to be stated expressly. Commonly when we impose a "must"/"must not" on a public body, we will rely just on administrative law to fill in the blanks on consequences of non-compliance.
- That might be hooked into a subsequent provision that says, "A person who contravenes that provision commits an offence and is liable to a fine", which could in turn be rendered as "If a person is in breach of that provision, then the person commits an offence and is liable to a fine". Otherwise it might be left dangling, such as where the consequences of breach are being left to administrative law in the case of a duty or prohibition imposed on a public body.
- This has the advantage that it works even where a "must" provision has no conditions, and therefore could not be rendered as "if-then" otherwise, such as

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[14] The inspiration for this approach is Professor Kowalski's "Logical English" (available at https://www.researchgate.net/publication/345770048_Logical_English), which uses if-then logic for obligations (instead of deontic logic, which is designed specifically for obligations but introduces its own difficulties). For Professor Kowalski's work generally, see https://www.doc.ic.ac.uk/~rak/.

"the regulator must publish its enforcement strategy". That would be rendered as "if the regulator does not publish its enforcement strategy, then the regulator is in breach of this provision". That can then be used to link the chains of "if-then" provisions together to reach conclusions about the effect of the provision.

- There might be a problem if this meant we lost any reference to "must" altogether. But, as explained above, we are looking at using interim conclusions to build towards final ones. So this example would give – computer "Is it the case that the person does X?"; human "Yes"; computer "It is the case that this provision means the person must do Y. Does the person do Y?"; human "No"; computer "The person counts as in breach of this provision.". In that way the human sees the word "must" and that colours their interpretation of the surrounding questions (so we are not expecting the logical version to determine whether "must" in this particular context carries a connotation of a moral duty or some prudential advice or just a constitutive requirement).

Other elements harder to parse as if-then

"May" is more fiddly.

- Sometimes a "may" is just an exception to a "must" or "must not" elsewhere. That can be rendered as a part of the "if" conditions for the "must" or "must not" to apply.
- Other times it is a Hohfeldian power to change someone's legal status, as in "an officer may serve an enforcement notice", or "a person aggrieved by a refusal may appeal". As with the grey area "must" cases, it seems sensible to parse these as just being conditions building up to the later "must". That gives "if an officer serves an enforcement notice [and the notice contains the information], the person served must remove the nuisance", and "if a person is aggrieved by a refusal, and the person submits an appeal [and does so within 14 days], then the court/tribunal must hear the appeal".

Cross-references are also an issue, particularly for exceptions, for example where Article 3 says "A person who drives must wear a belt" but Article 9 says "Despite Article 3, a disabled person may drive without wearing a belt".

- There is a temptation to roll up cross-referenced items into one big "if-then" provision. In the example you could roll the two Articles into one representation as "If a person drives and the person is not a disabled person, then the person must wear a belt".
- But there is an advantage in RaC in keeping the coding parallel to the structure of the draft ("isomorphic"), to aid checking, amendment and explanation. That is difficult to do while keeping close to the provisions. We could try representing the example as "3- If a person drives and Article 9 does not apply, the person must

wear a belt. 9- This Article applies if a person is a disabled person. If this Article applies, the person may drive without wearing a belt". But that is still an odd fit for the actual provisions and relies on an additional concept of provisions applying, which was not expressly mentioned in the draft.

At this stage in our project we just want to identify how these work as "if-then" provisions, without worrying about how to capture the cross-referencing and exceptions in markup or controlled natural language. All the tech solutions being developed seem to have solutions to this issue, so it seems safe to assume we can cross that bridge when we come to it. Even in our work with a tool as ordinary as Excel, we have been able to use references to cells that contain results to feed those results into further questions and generate further results.

Some other types of provision do not look easy, and are possibly unsuitable, to be rendered as "if-then". In particular, there are provisions that are effective by operation of law, such as "The XYZ Law is repealed" and "The Office of ABC is established". The project will consider these later, but has not reached them yet. For now we note that one approach might be to recognise that there are two implied "if" conditions for every legislative provision.

- One is that the provision is in force. The provision applies to a scenario only if the date of the scenario is between the coming into force and the amendment or repeal of the provision.
- The other is related to the fact that the legislation states only the position under the law of the relevant jurisdiction[15], and each jurisdiction has its own rules of construction about cases occurring outside its territory. The commonest rule is that the legislation impliedly applies anywhere inside the jurisdiction's territory (or at least on the land surface), and that express provision is needed for the legislation to have extra-territorial application. For parsing a provision as an "if" statement, the provision applies to a scenario only if the scenario occurs in a way that meets these implied or express rules.

Markup by coloured highlighting

We look at how to parse the provisions to see the "if-then" elements in them, but then we also want to find an easy, drafter-friendly way to flag what we have parsed. One way is to use markup of the actual text and another is to recast the text in a controlled natural language ("CNL", explained further below). Starting with the markup, there are 2 obvious ways to handle it –

- one is by coloured highlighting,

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[15] So far we have not seen much sign of computational law projects taking seriously the point that something done in the USA may be both permitted under US law and prohibited under UK law, for instance. This seems important given that extra-territorial application is often given to the most serious crimes but also to offences against financial services legislation, which is an area in which there is a strong interest in computational law and "regtech".

- the other is by applying tags.

What would be the easiest, most natural and user-friendly way to try to pick out the logical structure in the text? At first sight it might be to ask legislative counsel to mark up the actual draft text with different coloured highlighting to show the different "if-then" elements in the text. A simple example of a legislative proposition would be "if a person drives the person must wear a belt". We need to pick colours for the different elements, perhaps using colours that combine to give the in-between colour for the "if"/ "iff" connector.

- The legislative counsel could pick out "a person drives", which is the condition. It is the element between the "if" and the "then", if we drafted using "if … then …". We might mark that in yellow.
- The next element to colour is "the person must wear a belt", which is the effect or the conclusions. We might mark that in blue.
- Finally the link between these 2 elements is that this is an "if (but not only if)" proposition, which we mark in light green. We would need to distinguish it from an "if and only if", which we might mark in dark green.

For example:

- ==Yellow== for conditions ("antecedent" in logic terms, for "if" as "material implication")
- ==Blue== for legal effect ("consequent" in logic terms, for "if" as "material implication")
- ==Green== for if (but not only if)
- ==Dark Green== for iff, if & only if.

That is easy enough with –

"==If== ==a person drives==, ==the person must wear a belt=="

or

"==A person must wear a belt== ==if== ==the person drives==".

The trouble is that marking with colour becomes difficult as soon as you leave the "if" wording. So we end up colouring one word with two colours, which could get confusing, when the same if-then is expressed in the draft as –

"A ==person== ==who== ==drives== ==must wear a belt==", (treating)

or, even worse, as –

"A ==person== ==driving== ==must wear a belt==".

In the first of these, we treat the "who" as standing for "if", but we double-colour the "person" because it is part of both the condition and the effect, even though this phrasing

uses the word only once. In the second example "driving" is also double coloured because here it is the "ing" that stands for the "if".

As with the CNL approach, the point is to see whether we can mark up in a way that does as little violence as possible to the normal drafted text – in this no words are moved or change at all (at least until we meet a single-letter word that needs to be double-coloured). In particular there is then no risk of a court being asked to reconcile 2 different texts. Then there is the question of whether legislative counsel might find this easier to produce and deal with than having to write 2 texts, and whether instructing officers and legislators would find it easier or harder to deal with this coloured marking. An ideal mark-up language would enable us to tag each set of 3 that belong to each other, identifying each set separately from other sets in the same draft. That cannot readily be done with colours, but see the notes on markup tagging later in this article.

Highlighting definitions parsed as if-then

We can try simple colour markup again for "if-then" elements in definitions. Turning back to our imaginary example about selling alcohol, we see it defines "commercial operator" and also "fraud". The "fraud" definition uses "includes", so the "if" would be highlighted in the light green, in that this is not the only kind of fraud. The "commercial operator" definition uses "means", so it would be highlighted in the dark green (of "if and only if" or "iff"), because this is the only thing that counts as a commercial operator. Applying this approach to the imaginary example gives –

(1)   A person must not sell alcohol, if –

    (a)   the person is a commercial operator; **and**

    (b)   the person has –

        (i)   an unspent conviction for fraud, **or**

        (ii)   an alcohol banning order.

(2)   In paragraph (1) –

"commercial operator" means a body corporate that engages in business for profit but is not a public house or a hotel;

"fraud" includes providing, whether intentionally or not, misleading information in relation to an application for a licence under an enactment.

That would be using the colours for definitions in the same way as ordinary "if-then" provisions –

- Yellow for definition, as equivalent of conditions
- Blue for defined term, as equivalent of effect
- Green for "includes", as IF – other things can count as fraud
- Dark green for "means", as IFF – no other way to count as a commercial operator

But perhaps this needs 2 more colours, to flag the fact that "means" and "includes" are parsed slightly differently from simple "iff" and "if". We might need to distinguish that "means" and "includes" are parsed as "iff/if *an X is* [definition], then *the X is* [defined term]". So these work as ordinary "if-then" provisions only if we add a little element of "X-is" (or "X counts as").

Highlighting implicit definitions parsed as if-then

I described above the "if-then" rendering of implicit definitions like "a person who drives (a "driver") must …". Using colour for these is fiddly, but with the yellow-green-blue scheme it could be, for example –

"(1) ==A person who drives (a== =="driver")== must … ."

The brackets and quotation marks are given the dark green colour because it is their use that conventionally signals this type of definition. But that will be a nuisance (and some readers might already see that we are heading for more trouble if we try to add colour for the "A person who drives must" element).

Highlighting the odd must/must-not, parsed as if-then

I described above the cases that are not really the Coodean classic provisions about a person's duty, such as –

- "the appeal must be submitted within the time-limit in paragraph (3)", or
- "the enforcement notice must contain the following information".

If we parse these, as described above, as additional conditions for a later legal effect, and use the highlighting for "if-then" –

"a notice **must** contain the following information"

becomes –

"==IF== ==a nuisance officer serves a notice on a person,==

==AND the notice contains the information [& whatever other conditions],==

==THEN the person must remove the nuisance=="

and –

"an appeal **must be** submit**ted** within 14 days of the decision"

becomes –

"==IFF== ==a party submits an appeal,==

==AND does so within 14 days of the decision [& whatever other conditions],==

==THEN the court/ tribunal must hear the appeal=="

Sharp-eyed readers will notice that I am using capitalised IF, IFF, AND and THEN for the logical elements here (as well as the colouring) – this is discussed more in the later section on CNL for shadow drafts.

Highlighting for Coodean must/must-not parsed as if-then

Turning to the classic provision "If a person does X, the person must do Y", when parsed as "if-then" (as described above), we can apply the coloured highlighting to it as –

"IF a person does X,

AND the person does not do Y,

THEN the person is in breach of this provision"

Commonwealth legislative counsel will want to ensure there are clear consequences for breaching a provision, so this might be followed by "A person who contravenes that provision commits an offence and is liable to a fine". When parsed as "if-then" (as described above), we can apply the coloured highlighting to this as –

"IF a person is in breach of that provision,

THEN the person commits an offence and is liable to a fine".

Adding AND/OR/NOT to If-then

Another aspect of our drafts that interacts with & complicates the "if-then" element is our use of the other key logical elements – "and", "or" and "not". A particular problem is that "and/ or/ not" elements nest and overlap, both with each other and with "if-then" elements. Over the decades legislative counsel have developed sophisticated ways of using paragraphing and indenting to show what is covered by "and" and what is covered by "or" in our drafts. Turning back to the alcohol example, that is why paragraph (1) ends up in sub-sub-paragraphs –

"(1)   A person must not sell alcohol, if –

(a)   the person is a commercial operator; **and**

(b)   the person has –

(i)   an unspent conviction for fraud, **or**

(ii)   an alcohol banning order.

We can use colour highlighting for "and" and "or", but this nesting cause issues for it (and even for markup with tagging – see below). But we are not trying to code everything, just what is useful in untangling the "if-then" structures. So there is no need to mark up every single use of "and", "or" and "not", just as legislative counsel already make decisions about whether to break out into paragraphs for and/or lists, and sometimes decide not to do so.

Using colour starts to get even more complicated when, as well as mixing "and" and "or", we mix "if-then" with the "and" and "or". We reach the limits of usability of colour highlighting by that point. Let us turn back to the alcohol example –

> (1) A person must not sell alcohol, if –
> (a) the person is a commercial operator; **and**
> (b) the person has –
> (i) an unspent conviction for fraud, **or**
> (ii) an alcohol banning order.
> (2) In paragraph (1) –
> "commercial operator" means a body corporate that engages in business for profit but is not a public house or a hotel;
> "fraud" includes providing, whether intentionally or not, misleading information in relation to an application for a licence under an enactment.

The "and" element might be given coloured highlighting like this –

> (1) A person must not sell alcohol, if –
>
> (a) the person is a commercial operator; **and**
>
> (b) the person has –
>
> (i) an unspent conviction for fraud, **or**
>
> (ii) an alcohol banning order.

The trouble here is whether the introductory words should also be marked up, to show they are the context into which we are fitting the pair of phrases linked by "and".

But colour markup reaches an apparent end of the road when we turn to trying to capture the "or" nested inside the "and". As legislative counsel know, this nesting is why we have these sublevels of paragraphing with different types of numbering, to avoid any ambiguity about the scope of the "and" and the "or".

But reproducing that with colour-coded highlighting seems an impossible task. If we mark up the "or" elements in shades of grey we have –

> (b) the person has –
>
> (i) an unspent conviction for fraud, **or**
>
> (ii) an alcohol banning order.

We need a different colour (the darker shade of grey here) to reflect the fact that "the person has" forms part of both elements that are connected by "or". As legislative counsel, we are used to reading 1(b)(ii) as "the person has … an alcohol banning order", but some lawyers and probably many non-lawyers struggle with that. By identifying the shared element, the markup enables a yes/no question to be formed for 1(b)(ii) as "*Is it the case that* the person has an alcohol banning order?", using the original wording and applying a strict (computer-friendly) approach.

There are difficulties with coloured highlighting if we then try to fit this "or" colouring into the shades of purple for "and". The best we can imagine is –

(1) A person must not sell alcohol, if –

(a) the person is a commercial operator; and

(b) the person has –

(i) an unspent conviction for fraud, **or**

(ii) an alcohol banning order.

But that is putting far too much of a burden on the purple at the start of (b) and on the full stop at the end (and it would break down where there is further subdivision).

Markup by tags

All is not lost just because colour coding is not necessarily the ideal answer. There are other ways of applying markup to text. One of the most obvious is "mouse-over".
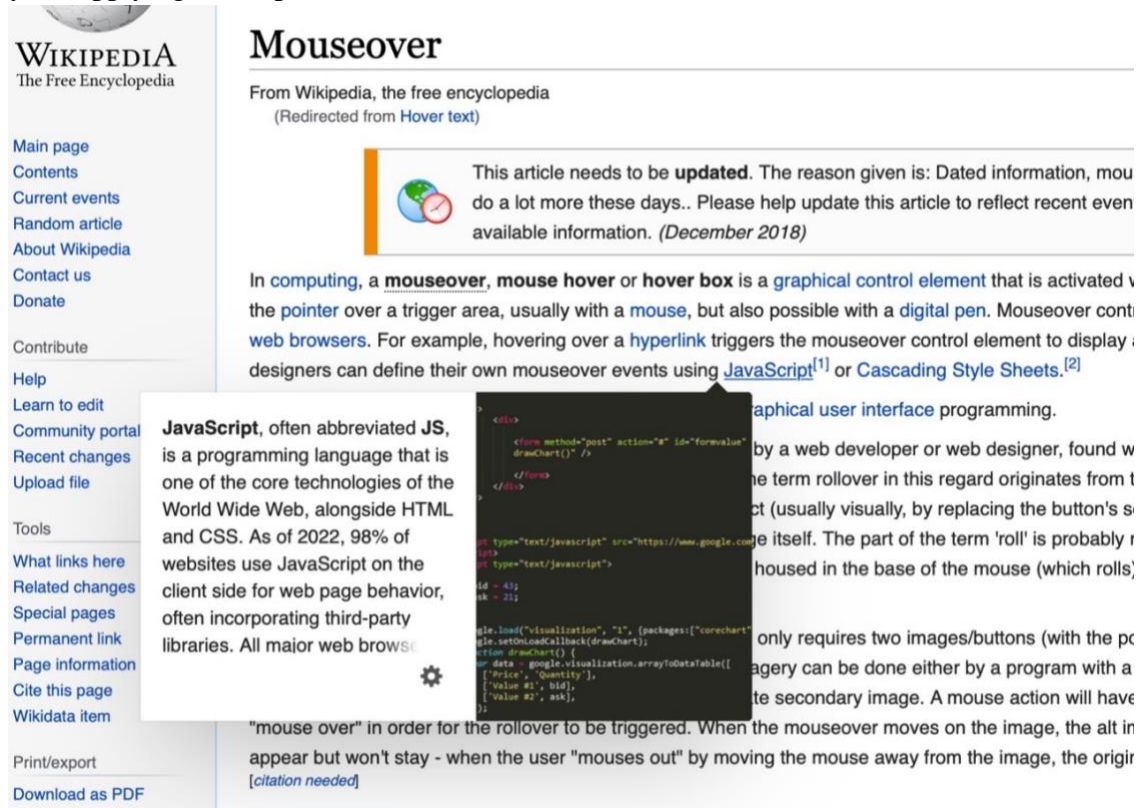
When you roll the mouse over a highlighted term, something pops up. Legislative counsel will be used to the idea that hyperlinked words in web-pages do not show the actual linked page but are all flagged in the same way in their bowser (often in blue or underlined). Users of Wikipedia will be familiar with the idea that if you roll the mouse over a term that has its own Wikipedia entry, it will pop up a little thumbnail of the linked Wikipedia entry.

The same principle could be used to flag the if-then status of particular phrases in the draft. The idea would be to make it equally easy for legislative counsel to select a word or phrase with a mouse and pick from a drop-down list, to tag the word or phrase as one of the logical elements in the if-then-and-or-not parsing. The label given to the tagged word would not be obvious to the reader, but there would be some flag to alert the reader that there was a label that could be made to pop up.

Drafting offices have experimented with using markup tags to make definitions pop up in this way. You roll the mouse over the defined term and up pops the definition. That is an obvious thing that that could be done more widely, but it is also an illustration of what we mean by markup that flags some status of a piece of text.
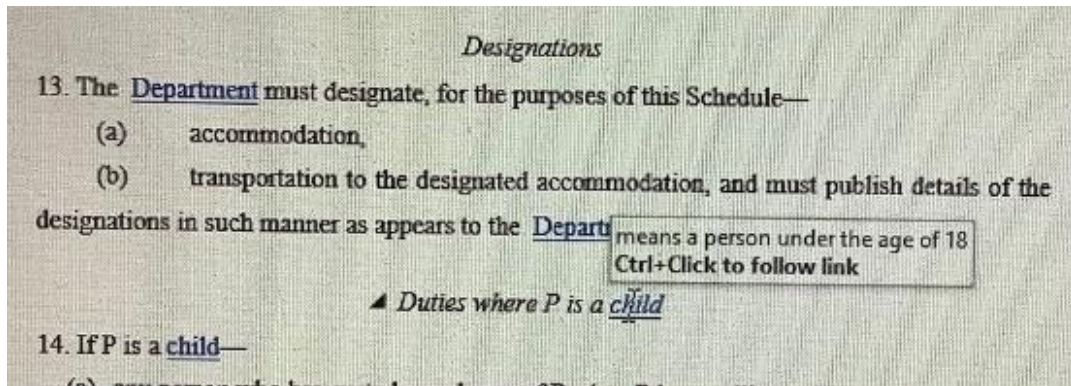
Markup tags might well be the best way forward. Many or most legislative counsel are already used to applying styles in Word or their own drafting software. Many drafting offices are already using drafting tools that have XML, which is very much designed to be able to tag the text. That means they produce their drafts in XML form, instead of using a word processor like Word to produce ".doc" files. Both html (for websites) and xml (in the more sophisticated drafting tools) use angle brackets – "<" & ">" – around the word or phrase to embed code that does not show when the document is read as text but does flag that there is descriptive text that can be made to pop up.

LegalRuleML[16] is built on markup tags and already has tagging for "if" and "then", as illustrated here. The older RuleML might be more suited to just capturing if-then structures, or it might make sense to come up with a dedicated markup system.

```
<lrml:PrescriptiveStatement key="freelancer">
  <ruleml:Rule closure="universal" key=":freelancer-template">
    <ruleml:if>
      <ruleml:Atom keyref=":atom-earned"/>
    </ruleml:if>
    <ruleml:then>
      <lrml:Obligation keyref="#obl-paybenefit"/>
    </ruleml:then>
  </ruleml:Rule>
</lrml:PrescriptiveStatement>
```

But there are also problems with using these systems for the markup discussed here. A significant problem is where different forms of tagging need to overlap. That is also a problem where coloured highlighting needs to overlap, perhaps unless green is used for the overlap of yellow and blue, and so on – see above.

- HTML (which web pages use) allows overlapping tags. So " just bold, <i> bold italic, and just italic </i>" will work happily on a webpage, with the overlap applying both formats together.
- But that does not work so easily, or at all, with XML, which is also more complex to set up.
- LegalRuleML already has "if-then markup", but it too does not like overlapping markup. RuleML is more basic, but is less well documented for our purposes.

So we expect to face some challenges in using these tags, but we are encouraged by the fact that legislative counsel in many offices are already using XML systems that involve tagging.

Controlled natural language – a shadow draft

The alternative – to having just the text with some markup on it – is the legislative counsel producing a second text, a shadow text, which is machine readable (or at least the logical structure is machine readable, not the undefined terms). The point is that legislative counsel are now very disciplined in how we use English in modern Commonwealth drafting. We have that rigour and that discipline almost to the point of being what the tech people would call a "controlled natural language" or CNL. A CNL is English (or another natural language) that is computer-readable because certain rules have been followed. If legislative counsel produce a shadow CNL version of the draft, our assumption is that it will not be enacted or authoritative. So it will have a similar status to Explanatory Notes, as something produced

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[16] See Oasis, LegalRuleML Core Specification V1.0 OASIS Standard published (8 September 2021), available at https://www.oasis-open.org/2021/09/08/legalruleml-core-specification-v1-0-oasis-standard-published/.

by the drafting office or the person promoting the legislation, but purely as a guide with no legislative force.

It is perhaps difficult to believe that this would be possible, but in fact there are already some systems that can do this. In fact they do more than the minimum, in that what we are talking about at this stage is just the legislative counsel capturing the "if-then" and "and-or-not" structures in the draft, not anything more – so that greatly reduces the training the legislative counsel would need and the time spent by the legislative counsel on the recasting of the draft into a minimalist CNL version.

AustLII's DataLex[17] system has a CNL called "yscript", which a human can read (and does not look drastically different from our drafts). But it is also readable by computers using DataLex. They have also developed "ylegis" as a "pre-processor". It attempts (with more or less success) to take the actual text of legislation and convert it into the yscript version, for human checking.

```
RULE Community Gaming Regulation 2020 Regulation 14 – Trade promotion
gaming activities PROVIDES
the gaming activity is a permitted trade promotion gaming activity under
regulation 14 ONLY IF
    the gaming activity is a "trade promotion gaming activity" under the
    regulation 3 definition AND
    regulation 14(a) is satisfied AND
    regulation 14(b) is satisfied AND
    regulation 14(c) is satisfied

RULE Community Gaming Regulation 2020 Regulation 14(a) PROVIDES
regulation 14(a) is satisfied ONLY IF
    an entry or other fee is not charged to participate in the gaming
    activity

RULE Community Gaming Regulation 2020 Regulation 14(b) PROVIDES
regulation 14(b) is satisfied ONLY IF
    written consent has been obtained to the conduct of the gaming
    activity from a person who is authorised by the business benefiting
    from the gaming activity to provide that consent
```

The Oracle Intelligent Advisor system, mentioned above, allows users to draft rules in English, using indenting similar to that used by legislative counsel.

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[17] See https://datalex.org/

Professor Bob Kowalski's "Logical English"[18] is being developed as a general computer language, but is inspired by the discipline of the language we use in drafting.

> **It is permitted that** a party gives a notice to another party at a time T2
> **if** an Event of Default occurs with respect to the other party at time T1
> **and** the Event of Default is continuing at T2
> **and** the notice specifies that the Event of Default occurs at T1
> **and** the notice designates that an Early Termination Date occurs
> in respect of each outstanding Transaction at a time T3
> **and** T2 ≤ T3 ≤ T2 + 20 days
> **and it is not the case that** the Schedule specifies that Automatic Early Termination applies to the other party for the Event of Default.

There is also the L4 system being developed at the Singapore Management University's Centre for Computational Law.[19] One aspect of that system uses natural language but arranges it in cross-shaped or tee-shaped grids, as shown here. They also have a broader ambition to make natural language and coded versions of legislation (and contracts) from the same base, able to translate the code automatically into English or other natural languages – I am much more dubious about that but it does not take away from what they are doing with their cross-shaped or tee-shaped grids.

There are Two Kinds of Basic Rules

A **prescriptive**, or **regulative**, rule is + shaped:

EVERY	Person
MAY	**park**
UNTIL	12 midnight
WHEN	it is an Off-Peak Day

A **constitutive** rule is ⊤ shaped:

	☐	It is an Off-Peak Day
MEANS	☐	it is a weekend
OR	☐	it is a public holiday

We claim that all legislative and contract text can be normalized to rules of this form – and to me

None of these has yet reached the point of having a system that can fully reliably read the English text of our drafts. But our project is experimenting with ways in which we could potentially rewrite a draft so that it becomes computer-readable.

In the example below we are using block capitals for the "if" or "if and only if", the "and", the "not", the "or" and the "then", and then using the indenting that is familiar to legislative counsel to distinguish the "and" elements from the "or" elements. Looking at the alcohol example, and rendering of "must", discussed above – "the person must not sell alcohol"

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[18] See Kowalski, Dávila, Sator and Calejo "Logical English for Law and Education" in Warren, Dahl, Eiter, Hermenegildo, Kowalski and Rossi (eds) *Prolog: The Next 50 Years* (2023: Springer: Heidelberg, 2023); also available at https://www.doc.ic.ac.uk/~rak/papers/Logical English for Law and Education .pdf.

[19] See https://cclaw.smu.edu.sg/about.

becomes "if the person does sell alcohol, then the person is in breach of this provision". But apart from that last twist, all the rest of the text is taken straight from the original draft, without rewording. In that, we are looking at using a very simple, minimal CNL to bridge the gap between the language of ordinary drafts and the controlled natural languages of "yscript" in AustLII's DataLex, or of Professor Kowalski's "Logical English", or Oracle's Intelligent Advisor.

<table>
<tr><td>

(1)   A person must not sell alcohol, if –
(a)   the person is a *commercial operator*; and
(b)   the person has –
    (i)   an unspent conviction for *fraud*, or
    (ii)   an alcohol banning order.
(2)   In paragraph (1) –
"*commercial operator*" means a body corporate that engages in business for profit but is not a public house or a hotel;
"*fraud*" includes providing (whether intentionally or not) misleading information in relation to an application for a licence under an enactment.

</td><td>

IF-&-ONLY-IF
   the person is *a* body corporate
   AND
   the person engages in business for profit
   AND
   NOT *the* person is a public house
   AND
   NOT *the* person is a hotel
   AND
      the person has an unspent conviction for fraud
      OR
      the person has an unspent conviction for providing (whether intentionally or not) misleading information in relation to an application for a licence under an enactment
      OR
      the person has an alcohol banning order
   AND
   the person ~~must not~~does sell alcohol
THEN *the* person is in breach of this provision

</td></tr>
</table>

You will see we have rendered the "must not" with "if-then", and we have also replaced the defined terms with their definitions. But the most important point in many ways is that the shadow version preserves large chunks of the text of the draft exactly (greyed out in the box), except the logical elements and the defined terms.

Shadow draft, but not twice the work

We are hoping that producing a shadow draft will not turn out to involve the legislative counsel in twice the work. It sounds as if it might, but it should be relatively easy if we set it up in a way that is familiar to legislative counsel, and that is just re-using the text they have already written. It will inevitably still take a little longer to write the shadow version, but it will mean that the legislative counsel can then use it to check that everything is working correctly, so it will save time further down the line by avoiding getting the draft wrong.

If the draft ends up very convoluted once the legislative counsel has turned it into this shadow draft, then that might well be a sign that there is a problem with the original draft. This example is from 20 years ago, from a time when people used to like compressed drafting. The trouble with that compression is that the reader can get lost in the exceptions, the exceptions to the exceptions, and the layering of provisions. In this example the provisions about cartridges not exceeding certain diameters are exceptions to an exception,

and the use of "otherwise" and references to contravening also flag complex layering. Most significantly, what should probably have been 3 offences has been packed into one.

> (1) A person commits an offence if the person –
>   (a) has in the person's possession, or purchases or acquires, a firearm to which this Article applies without holding a valid firearm certificate, or otherwise than in accordance with that certificate;
>   (b) has in the person's possession, or purchases or acquires any ammunition to which this Article applies without holding a valid firearm certificate, or otherwise than in accordance with that certificate; or
>   (c) contravenes or fails to comply with any condition subject to which a firearm certificate is held by the person.
> (2) This Article applies to –
>   (a) all firearms except –
>   (i) flare guns, and
>   (ii) any air weapon of a type declared by Order of the Minister under Article 57 not to be specially dangerous;
>   (b) ammunition for a firearm except –
>   (i) cartridges containing 5 or more shot, none of which exceeds .23 of an inch in diameter,
>   (ii) ammunition for a flare gun or an air weapon, and
>   (iii) blank cartridges not exceeding one inch in diameter measured immediately in front of the rim or cannelure of the base of the cartridge.

On the next page is an attempt at rendering that in a shadow version. Having to work through and unpack all the layering leads to a version that goes beyond the level of indenting that we would normally be happy with in drafting. That seems to us to be an indication that this is possibly too compressed for a human reader, as well as very compressed for the machine to read.

```
IFF
        the person has in the person's possession, or purchases or acquires, a firearm
        AND
        NOT the firearm is a flare gun
        AND
        NOT the firearm is an air weapon of a type declared by Order of the Minister under Article 57 not to
        be specially dangerous
        AND
                NOT the person is holding a valid firearm certificate
                OR
                        the person is holding a valid firearm certificate
                        AND
                        NOT the person [has in the person's possession, or purchases or acquires, the
                        firearm] in accordance with the certificate
OR
        the person has in the person's possession, or purchases or acquires, ammunition for a firearm
        AND
        NOT
                the ammunition is cartridges
                AND
                the cartridges contain 5 or more shot
                AND
                NOT any of the shot exceeds .23 of an inch in diameter
        AND
        NOT the ammunition is for a flare gun
        AND
        NOT the ammunition is for an air weapon
        AND
        NOT
                the ammunition is blank cartridges
                AND
                the cartridges exceed one inch in diameter measured immediately in front of the rim or
                cannelure of the base of the cartridge.
        AND
                NOT the person is holding a valid firearm certificate
                OR
                        the person is holding a valid firearm certificate
                        AND
                        NOT the person [has in the person's possession, or purchases or acquires, the
                        ammunition] in accordance with the certificate
OR
        the person holds a firearm certificate
        AND
        the firearm certificate is subject to a condition
        AND
        NOT the person complies with the condition.
THEN    the person commits an offence
```

To recap –

- There are many options to consider in setting up a notation system for the controlled natural language version.
- But there are not too many, given it is only capturing "if-then" and "and/or/not", so it does not need to be as complex as a full controlled natural language.
- It needs to be reliably usable by legislative counsel, so it should be as simple as possible and use conventions familiar to legislative counsel.

- The illustrations in this article use indenting to pick out the OR sets from the AND sets, in the same way as our drafts do (but without numbering).
- It uses separate lines so each non-logical element can be turned into a "yes/no" question just by adding "Is it the case that" in front of it, so that the non-logical text of the draft can be preserved and used to build questions for a human to answer –

  – "*Is it the case that* the person has an unspent conviction for fraud?" Yes/No

The recasting for the "if-then" might not be into pseudo-code as such, given that pseudo-code is something that is not machine-readable, but our demonstrations so far are effectively pseudo-code because we do not yet have a system that can read them automatically. If we end up using DataLex yscript or Logical English or the like, then the shadow text will be able to be automatically processed. Otherwise, it should be easily convertible manually into a usable logic programming language (or otherwise it will help us understand why that conversion is not easy). The recasting is easy if the draft is "If a person drives, the person must wear a belt" and the shadow version is something like "**IF** a person drives, **THEN** the person must wear a belt". But it is harder when the same "if-then" is expressed in the draft as "A person must wear a belt if the person drives", in that the shadow needs to reverse the order or perhaps use the odd-looking "*THEN* a person must wear a belt **IF** the person drives" (or have a rule that the part of a sentence before the IF is the "then" element). Our project aims to test how little violence we can do to the normal drafted text, and how easy it might be for future legislative counsel to produce a usable shadow version alongside their regular drafts. But our main focus currently is on using markup, to avoid rewriting.

Various alternative parsed versions recast with If-then structure –

Here are some illustrative versions of some or all parts of the alcohol example, turned into a shadow draft using some of the different options set out above.

Example 1 – keeping the definitions separate from the main provisions, as in the legislation:

IF *the* person is a commercial operator AND (*the* person has an unspent conviction for fraud OR *the* person has an alcohol banning order)

THEN *the* person must not sell alcohol.

IF-&-ONLY-IF X-IS (*a* body corporate that engages in business for profit) AND (NOT is a public house) AND (NOT is a hotel)

THEN X-IS *a* commercial operator

IF X-IS providing misleading information in relation to an application for a licence under an enactment

THEN X-IS fraud

IF-&-ONLY-IF *the* person is a commercial operator AND (*the* person has an unspent conviction for fraud OR *the* person has an alcohol banning order) AND *the* person ~~must not~~ does sell alcohol

THEN *the* person is in breach of this provision

Example 2 – weaving the definitions in, with coloured brackets to show scope of connectors:

IF-&-ONLY-IF (*the* person is (*a* body corporate that engages in business for profit *but* is *not* (a public house *or* a hotel))) AND (*the* person has an unspent conviction for fraud OR *the* person has an unspent conviction for providing misleading information in relation to an application for a licence under an enactment OR *the* person has an alcohol banning order) AND *the* person ~~must not~~ does sell alcohol

THEN *the* person is in breach of this provision

Example 3 – weaving the definitions in, but using paragraphing and indenting:

IF-&-ONLY-IF

> *a* person is *a* body corporate
>
> AND
>
> *the* person engages in business for profit
>
> AND
>
> NOT *the* person is a public house
>
> AND
>
> NOT *the* person is a hotel
>
> AND
>
>> *the* person has an unspent conviction for fraud
>>
>> OR
>>
>> *the* person has an unspent conviction for providing misleading information in relation to an application for a licence under an enactment
>>
>> OR
>>
>> *the* person has an alcohol banning order
>
> AND
>
>> *the* person ~~must not~~ does sell alcohol
>
> THEN *the* person is in breach of this provision

Conclusion

This article is a progress report, with plenty of loose ends still. It is important to bear in mind that the goal is to find a system that legislative counsel find easy enough to use to do the markup (or shadow drafting) while they are producing a draft, so that the logical structure of the draft can be checked as the drafting goes along. In the longer term we would hope this will contribute to inspiring developers to come up with an editor system that is like those available to coders. That would mean we have a user-friendly way of helping the legislative counsel to do the markup (or make the shadow draft), while immediately flagging up for the legislative counsel any questions about whether their syntax is working. Tagging text will be familiar to those legislative counsel who work in offices that use XML drafting systems (including offices in the UK, Australia and New Zealand). We currently see the most likely way forward as being just to make a bit more use of the functionality that XML drafting systems offer, which should not demand too much of the legislative counsel who are already using those systems. But we are also interested in markup that could be applied by offices that do not have any real prospect of being able to move from word-processors to XML editors in the foreseeable future. Meanwhile, inspired by the interest sparked by ChatGPT, we are looking at ways in which generative artificial intelligence might help with parsing and marking up drafts, answering questions about existing legislation and giving better answers to questions about marked up legislation.

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Evolution of Digital Law

Adrian Kelly[1]

Abstract

This article discusses the development and use of algorithms in legislation ("digital law") and their impact on legislative drafting. It argues that greater transparency about the nature and implications of algorithms is necessary to determine their accuracy in achieving public goals, and that without transparency and accuracy they can have no public law status. In turn, without public law status, digital law is just a delivery method for legislative content. Algorithmic black boxes are the antithesis of good law and good legal governance.

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[1] LLB, barrister and solicitor of the High Court of New Zealand.

Outline

Why should legislative drafters be concerned with digital law? If we think about the three reasons for the existence of digital law (service delivery, service delivery, service delivery), we have to wonder if digital law should be on our radar at all, as drafters. Digital law is an issue for citizens, lawmakers, and administrators wanting efficient and effective law. Traditionally, drafters' contributions to that process stop with "good clear plain language drafting". But who is (or should be) responsible for digital law? Is it effective or efficient anyway!?! And, if it is solely the preserve of service delivery, then does our job as drafters finish once we do our "good drafting"?

Personally, if I care enough about my legislative product content-wise, I will care deeply about its effective and efficient use. And if my product is **law**, rather than **legal text**, then I will care about digital law, and about its evolution, regardless of its evolutionary context being service delivery.

My personal opinion is that there are two drivers for the evolution of digital law. I think it is helpful to think of digital law as "authoritative algorithms", to help us consider those two evolutionary drivers in terms of the current "Rules as Code" movement.

The first evolutionary driver is a growing understanding of what legal algorithms are, what they can do, and how they are implemented, based on advances and evolution in technology. The second evolutionary driver is acceptance of algorithms per se as a method of **social control, status, and/or entitlement**.

Generally speaking, the first driver is concerned with the development and evolution of the techniques and technologies of legal algorithms per se, and these are quite well known. There are a number of platforms available, including open-source rules engines. It is the second driver that is the subject of this paper. The annex to this paper is a technical description of features for a digital law platform, such features being hard-won from two Proofs of Concept and focussed on the development and evolution of the techniques and technologies of legal algorithms.

That second evolutionary driver, "acceptance of legal algorithms" is less of a technological matter as compared to the first, although it is also bound up with acceptance of technology generally. Nevertheless, there are additional specific facets involved in acceptance of legal authoritative algorithms.

I propose a three-tiered approach, leading back to the first driver. In other words, evolution of digital law is inescapably technology driven. In the final analysis, it is how you implement "Rules as Code" that determines its acceptance in a particular use case for the delivery of the law.

The three tiers are evaluative in nature. They are the dimensions that I think determine acceptance of digital law, and therefore, are crucial to its evolution:

- public law status,
- general technology uptake,
- implement use cases transparently.

As a common thread, trust of institutions runs through all three tiers.

A conclusion is put forward in light of the analysis, that until there are trustworthy institutions that adopt digital law, the evolution of rules as code is in the direction of service delivery, not public law status. There is no need to recognise digital law as actual law, but rather review its existence as a matter of utility. That utility is driven by how good digital law is in terms of transparency, in my opinion. In other words, the dimension "implement use cases transparently" is actually the alpha and omega of "Rules as Code"

The conclusion is followed by an Annex containing a brief discussion of a **transparent** system of digital law based on the New Zealand pre-COVID **Better Rules – Better Outcomes** project, and recent "Rules as Code" projects in Europe and the UK.

Public Law Status

The public law status of digital law in terms of evolution is rather chicken and egg, especially in jurisdictions with unwritten constitutions.

H.L.A. Hart made the timelessly valid point that "all that succeeds is success" in the context of what is recognized as law.[2]

As there is more acceptance by citizens, lawmakers, and administrators, then the public law status changes too, or, in more formal terms at least, there is a growing demand for the evolution of public law to accommodate the evolution of digital law.

Nevertheless, in the formal sense of recognition, there are issues of separation of powers that need to be addressed. By way of example, in New Zealand, the Commissioner of Inland Revenue may issue computer-generated assessments of citizens' liabilities. Certainly, that is within the authority delegated to the Commissioner, who is able to sub-delegate administrative functions to computer programmers and other service delivery staff, to get the constitutionally charged outcome of the delegation (i.e. the execution of the "assessment of tax" function).

The Commissioner's use of computer-generated assessments need not be done under a specific legal authority, other than the unwritten constitutional delegation to the executive (the Crown in NZ) which is responsible to Parliament, and also subject to the judiciary.

However, at some point, the means, as well as the outcome, can and should come under scrutiny. The means to the outcome in the case of automation is very important. And at that

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[2] HLA Hart, *The Concept of Law*, 2nd ed. (Oxford University Press: Oxford, 1997) at 153.

point, without transparency as to means, scrutiny is difficult, and legitimate constitutional issues arise.

To explain: in the case of the Commissioner, the delegation of "assessment" to an automated process raises the issue of human intervention, derived from the interpretative issue of (human) intentionality inherent in the word "assessment". Can a computer "assess"? But we can see that a transparent automated process is just an extension, via a tool, of the Commissioner's intention to assess. And here we have to be very clear, and the Commissioner has to be very clear, about what set of cases are allowed to be subject to automated assessment. Intention to use automation in a clearly and transparently defined set of cases acts as intentionality which can be transferred to the tool use (automation) and thus to the outcome of the tool or means. In other words, if we are transparent about the use of our tool (**and that tool itself is transparent**), then we can see that the outcome is our intended outcome.

Without a human-defined set of cases for the tool (intentionally set boundaries), we cannot ascribe intentionality to the automation. And the automation itself must be transparent to human understanding for anything to be ascribed to it.

In other words, the Commissioner's addition and subtraction algorithm for generating an assessment (which is quite transparent of itself) has to be accompanied by rules as to when it will be used and what data is acceptable, and those use and data rules must be transparent, and human-derived. Or at least human-sanctioned. We cannot have an automation determining when an automation's outcome is validly invoked!

This accords with the notion that we would never trust a computer to actually generate legal outcomes without human input. "Robot overlords" is for science fiction only. "Human in the loop" seems to be an absolute pre-condition of digital law, even if the "human in the loop" is a conscious (and transparent) rule-based delegation to automation. You need to have rules about the automated rules. So, the automated rules must be written in such a way as to allow human-understandable and human-generated rules to cogently apply to those automated rules.

The question is how do we make the "human in the loop" apparent to scrutiny? Without exposure to scrutiny, evolution as part of our public law is nigh on impossible. It is simply unacceptable to have anything other than an unbroken chain of trust from lawmaker to outcome under any non-tyrannical system of law.

Valid input cannot be decided arbitrarily (or opaquely) by a tyrant or by a tyrant's machine.

Can digital law be made transparent enough that it can at least be scrutinised effectively, and thus have at least some chance of evolving? Can digital law be written in such a way that it is amenable to being the subject of human-centric and human-understandable rules, and thus have at least some chance of evolving? I think the answer is yes, and I discuss it further below, under the third dimension (*Implement use cases transparently*). I think the evolution

is happening, under (hopefully) watchful eyes, in quite subtle ways, as we use algorithms more and more to automate our lives, ranging from coffee makers to driverless cars. We have to be vigilant to ensure that the scrutiny occurs, not just for the sake of the evolution of digital law, but as part of good constitutional practice.

General Technology Uptake

As touched on above, we use algorithms more and more to automate our lives. We have to be aware, though, that not everyone has access to the same level of technology. Not everyone has a cellphone. Some people have argued that public libraries were a pre-condition (or at least a co-requisite) for widening the democratic franchise from educated propertied classes to all people regardless of class or education, by allowing the possibility of both education in and dissemination of law for those who could not otherwise afford it. State schooling is another example. My point is, though, that there is some historical justification for public digital networks as pre-conditions (or at least a co-requisites) for the evolution of digital law.

What public digital networks look like now and will in the future is hard to know. Digital Information kiosks are now museum pieces. And most information is via unofficial channels and peer to peer. I would bet (if I were a gambler) that more information about the law is transferred on social media between account holders in a single day in America than is transferred between all lawyers and clients in New Zealand in a single year. Public digital networks may, in fact, be privately owned and operated infrastructure now and in the future.

Implement Use Cases Transparently

For evolutionary reasons, all implementations must have accuracy and transparency as their objectives. Machine-consumable algorithmic rules that are accurate and transparent provide certainty to clients for governance and assurance purposes and also protect end users of the algorithms. Without accuracy and transparency there is no realistic path to recognition or uptake.

The "Rules as Code" methodology and movement has emerged as a process to create and engage with digital rulemaking. At its most basic, "Rules as Code" is a granular agile project management methodology focussed on

- creating a transparent algorithmic law representation, centred on decision tree diagramming and structured languages;
- secure, cloud-based production platforms, allowing iteration, testing, access, and maintenance.

Conclusion

For digital law, without transparency there is no accuracy, and without transparency and accuracy there is no public law status. Without public law status, digital law is always just a service delivery method, for (statutory) legal services.

No institutions embrace digital law, so without that trust, digital law is interstitial in terms of fulfilling a useful function (but how useful?) within the legal system with status.

In my opinion it is of no real use in a democratic setting unless it evolves with total transparency. Algorithmic black boxes are the antithesis of good law and good governance within the legal system.

To this end, what follows is a brief description of a system of digital law that is evolved from the New Zealand pre-COVID **Better Rules – Better Outcomes** project, and recent "Rules as Code" projects in Europe and the UK, and that is itself fit for evolution (in the service delivery context) within the legal system.

Annex

Digital law: Creating an algorithmic law representation

The process for creating an algorithmic law representation has been used with the United Kingdom's Department of Welfare and Pensions (for Universal Credit entitlements),[3] and with the Banca d'Italia (for Parte IV, Titolo 5, Circolare n. 285 del Banca d'Italia, 17 Dicembre 2013, translated as "Guidelines on business continuity for market infrastructures"[4] to create prototype rules as code systems.

In practice, the New Zealand Government's Rules as Code methodology from the **Better Rules – Better Outcomes initiative** is used, with built-in assurance and governance processes, and granular, agile, project management. It is crucial to have accuracy and transparency built into the decision-tree diagramming and structured language production. The initiative uses the following figure to illustrate this:

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[3] See Human Rights Watch, "UK: Automated Benefits System Failing People in Need", September 29, 2020, available at https://www.hrw.org/news/2020/09/29/uk-automated-benefits-system-failing-people-need and R. Mears & S. Howes, "You Reap What you Code: Universal credit, digitalisation and the rule of law" (Child Poverty Action Group: London, 2023), available at https://cpag.org.uk/sites/default/files/files/policypost/You_Reap_What_You_Code.pdf.

[4] See https://www.bancaditalia.it/compiti/sispaga-mercati/codise/Guidelines_business_continuity_market_infrastructures.pdf?language_id=1.

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Fig 2. Creating an algorithmic law representation
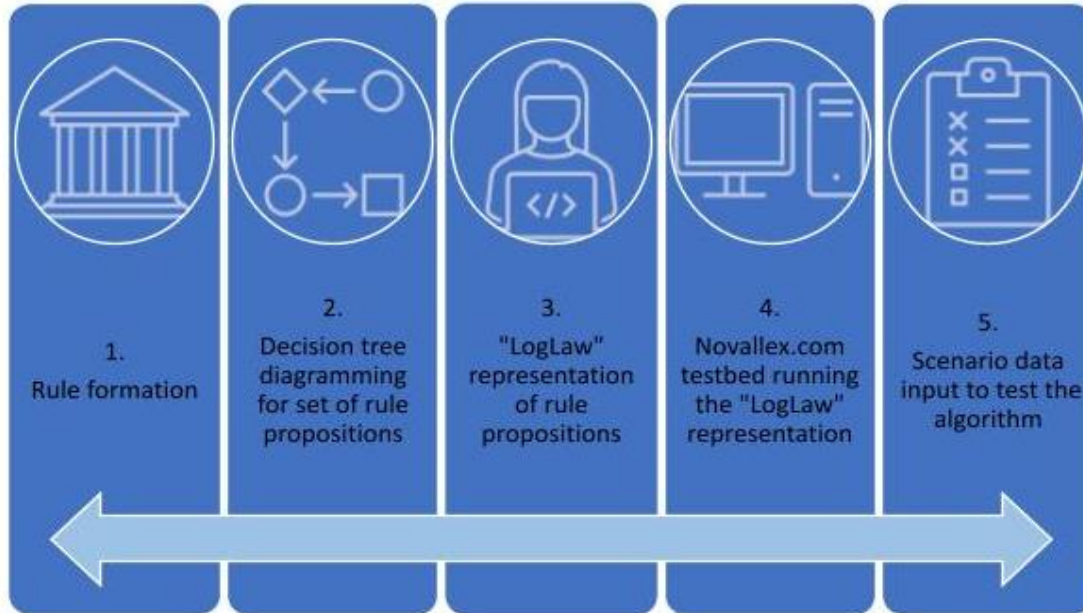
Each step is transparent. And transparently linked to the previous step, iteratively, right to left and left to right. Automation is used in conjunction with human assurance and governance.

The process is designed for creating accurate algorithmic law representations that can be put into production accurately, transparently, and efficiently.

LogLaw or a similarly structured (or "glue") language is an important step in the process. LogLaw and other "glue" languages perform the function of *transparently* bridging the gap between 'normal' representations of the law and executable digital representations of the law ("Rules as Code").

As concluded above, transparency is the handmaiden of accuracy, and transparency and accuracy are the traits needed for evolving digital law. More than that, as intimated in the analysis above, the usefulness of a digital law implementation is predicated – in a democratic setting – on its transparency.

More about structured and "glue" languages

By breaking down complexity methodically, LogLaw and other similar "glue" languages facilitate algorithmic transparency, by enabling piece-wise testing and verification, layer by legal meaning layer.

In the broadest sense of reporting, LogLaw and other similar languages describe and then report on the outcome of algorithms constructed from legal rules and regulations (legal algorithms). It all works with rule propositions.

In a narrow conceptual sense, the "glue" languages allow reporting on legal facts.

Legal rules are defined by their propositional content. What that content is is a matter of interpretation in difficult cases. In most (simple) cases, though, we can further define the truth conditions for the propositional content of legal rules in plain language without recourse to "interpretation". Truth conditions for legal rules can usefully be categorised as matters of legal fact and matters of actual fact. Matters of legal fact are the outcomes of legal rules, and matters of actual fact are self-explanatory. A legal fact is, in effect, a legal outcome. So, **you are liable for a penalty of $100**, or **you may decide if person Z has refugee status**, or **you must file form IR 3 before 1 January 2023**, or **you are entitled to X,** are all legal facts. And LogLaw and other glue languages implement reporting on the existence or non-existence of those facts.

The way that LogLaw does this is by, first, defining the truth conditions for a legal fact or facts. So, there might be a range of legal facts with a range of related truth conditions:

> **You are entitled to X** *if A and B are both true*;

> **You are entitled to Y** *if A is true and B is not true*.

There could be a range of truth conditions for one legal fact:

> **You are liable for a penalty of $100** *if A is true*;

> **You are liable for a penalty of $100** *if B is true*.

In this case, two things are noteworthy. The existence or non-existence of a legal fact can be a truth condition for another legal fact. LogLaw is therefore necessarily modular. So a set of truth conditions and a resultant report of a legal fact form a module, and that legal fact (i.e. its report of existence or non-existence) can be used in a truth condition for another legal outcome.

The second noteworthy thing is that it is helpful for users to know why they have a particular outcome. So, while LogLaw reports an outcome for the truth conditions, LogLaw, as a matter of implementation, also provides the means to transparently report why, in terms of truth conditions, the relevant legal fact exists or does not exist (for example, why you are or are not liable for a penalty of $100, in terms of the truth conditions for that legal fact or outcome).

In other words, in addition to a report on legal facts, LogLaw implementations provide for reporting on why that report is made. This enables transparency, a central tenet of any algorithmic law system.

The second way that LogLaw implements reporting on the existence or non-existence of legal facts or outcomes is by providing a logical interface, for inputting the data for running the truth conditions.

The logical interface is derived from the truth conditions using a simple set of rules, and can utilise the lingua franca of World Wide Web interfacing and data interchange, JavaScript Object Notation, for batch inputting of data to run the truth conditions.

In summary, what LogLaw and other glue languages do is define a rule set, which in computer language terms requires a description of its interface, and reporting of its outcomes (in addition to the algorithm itself). For the evolution of digital law, this has to be done within a transparent framework, in terms of both outcome and how that outcome is arrived at, and, indeed, interface, too.

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Law and sovereignty: questions of definition

The Rt Revd and Rt Hon Dr Rowan Williams[1]
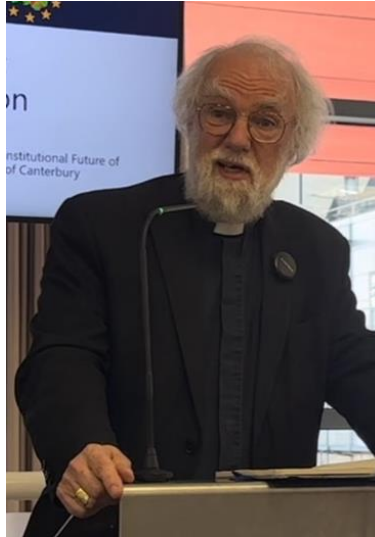
Abstract

This article is a transcript of the keynote address by Dr Williams to the CALC Europe Regional Conference held in Cardiff / Caerdydd on 25 May 2023.

Introduction

Dylan Hughes, First Legislative Counsel, Welsh Government:

I am extremely grateful to our next speaker for agreeing to join us today. Diolch yn fawr iawn i chi [Many thanks to you]. I hope I am not betraying a confidence when I say that Dr. Williams told me that he is going to be outside his comfort zone coming here today. Now as a polyglot, a former Cambridge University academic, former Archbishop of Wales, and the first person in modern times to become Archbishop of Canterbury from outside the Church of England, I would imagine that Dr. Williams has quite a large comfort zone. So I think we should take that as a compliment.

Dr. Williams' latest role is as co-chair, along with Professor Laura McAllister, of the Independent Commission on the Constitutional future of Wales. and he is going to talk today about law and sovereignty, questions of definition. Diolch yn fawr. [Thank you very much].

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[1] Co-Chair of the Independent Commission on the Constitutional Future of Wales, former Archbishop of Wales and Archbishop of Canterbury.

Keynote Address

The Rt Rev and Rt Hon Dr Rowan Williams:

Diolch yn fawr iawn Dylan. [Many thanks Dylan]

Well thank you very much for the invitation. I was not exaggerating when I say that this is rather out of my comfort zone and why exactly I should have been asked to address you is not completely clear to me. However, it is an opportunity for me to think out loud for a few minutes about one of the issues that has been coming up fairly regularly in the work of our Commission. If you will bear with me, I will say a little bit about that Commission and its work and then move on to one specific aspect of that work which relates to the legal system and see if I can think of any connections with the work that you are doing as we go on.

The Commission, of which I have the honor to be the co-chair, is the Independent Commission on the Constitutional Future of Wales. We have been charged by the Welsh Government to outline what sort of options there might be in the immediate future for developments in devolved government in Wales.

Broadly speaking, where we have got to so far is the three rather obvious options.

1. We can reinforce and enhance the existing devolution settlement.

2. We can move explicitly towards a more federal model for the whole United Kingdom.

3. We can consider political independence.

When I say "we can", I mean of course "we can't". "We" being Wales in this instance, given that decisions are finally made here by Westminster. And so you can understand perhaps that as soon as we have begun to raise these questions, the issue arises of what exactly parliamentary sovereignty means in the United Kingdom, as it currently exists, and how flexible that notion is. Hence my title about questions of definition.

One of the first questions we get asked in the work of the Commission quite often, usually by not entirely sympathetic observers, is about parliamentary sovereignty. At present, the devolution settlement is, so to speak, at the goodwill of the government in Westminster. Powers are devolved in the sense that they are delegated. Some powers are reserved and defined as such. Some are operationally devolved, but of course all of them capable of being reserved again or withdrawn given that the Westminster Parliament remains the sovereign legislature of the United Kingdom, as it stands.

The options we are outlining are in a sense, I won't say fantasies because they are not, they are all achievable in various ways, but they are, let's call them, "thought experiments". What might it look like if rather more powers were devolved and what should those powers be? How would the United Kingdom look if it were conceived more as a federal union than it is at present? And most radically of course, what would be the implications, political,

financial and social, of total political independence where the sovereignty question is most acute.

Now it's been said that Wales is a country known not only for rugby, cakes, coal mining and choral singing, but also for political commissions. We have had quite a lot of them in recent years and their effect has not always been dramatically visible. But one Commission which reported just a few years ago, which had particularly strong and particularly focused recommendations, was a Commission chaired by Lord Thomas of Cwmgïedd. John Thomas is the former Lord Chief Justice of the United Kingdom and much more importantly like myself a native of Ystradgynlais in the Swansea valley. We grew up on opposite sides of the road, in Ystradgynlais, which I think must be probably a first in British history, an Archbishop and a Lord Chief Justice having their formative years in the same place.

Lord Thomas' Commission made a very powerful, very detailed case for the further devolution of the justice system in Wales. It did so on a variety of grounds. One was, very practically, that we were still lagging behind in the training and equipping of legal professionals fluent in the Welsh language. We were still lagging behind in the provisions made for the giving of evidence in Welsh in the courts, and similar questions.

But behind that is a rather larger question, which I remember Lord Thomas flagging up very strongly for us when he spoke to our Commission in one of our evidence sessions some months ago. Since devolution, there is a growing body of Welsh law, that is not only laws made in Westminster relevant to Wales, but the enactments of the Senedd here in Cardiff. How do we guarantee that in the future there will be an adequate professional background for lawyers and legal professionals of all kinds functioning within Wales, given that this is a body of law advancing quite rapidly and still perhaps unrecognised by many legal professionals on the other side of the border as a coherent body of legislation?

But behind that is a question which in some ways is even more interesting. In the 16th century Wales was, of course, united with England politically. The old complex medieval scheme of a balance between the native Princes and the Marcher Lords (and the East India Company and the Raj as you might say) was wiped away and the legal systems of Wales and England were incorporated, or at least so it seemed. In practice a certain amount of legislation peculiar to Wales, and a certain amount of provision in statute peculiar to Wales, continued. But it became much more marked in the 19th century.

For a variety of reasons, by the last couple of decades of the 19th century Wales had become a country far more self-conscious about its political, cultural and linguistic identity. The non-conformist Protestant churches in Wales were strongly resisting the legal monopoly of the Church of England in Wales, the Anglican Church, my own church in Wales. The position of the language was being reinforced by the development of cultural festivals and cultural practices of all sorts, the beginnings of the National Eisteddfod of Wales, and the

aspirations of many communities to a more legally secure educational system were becoming very much more marked.

The effects of the combination of those aspirations and those marks of a newly-sharpened sense of identity can be seen in a number of pieces of legislation passed in the last two decades of the 19th century. For example, in 1889, the Welsh Intermediate Education Act, the first piece of British legislation which in effect legally mandated universal secondary education. And that was a direct result of pressure from aspiring communities in Wales. The regional variation of licensing laws for Wales, that is to say the closure of pubs on Sundays, was a result of something of the same aspirational, if faintly unrealistic, sense of national identity which was being pushed by some religious groups at the time.

The point I want to make here is that passing legislation peculiar to Wales, in this quite broad-brush way in terms of education and other cultural practices, amounted to a recognition in Westminster that Wales, whatever the strict constitutional position of Wales, was a polity of some sort. That is, it was a national community, which had some claim to define its own needs. And once you've granted that, that Wales is a polity of a real kind with a coherent agenda, then of course you have a little bit of a difficulty in going on taking it for granted indefinitely that the specific self-defined needs of that polity should be administered from Westminster. You might say that that 19th century legislation has already sold the pass from a point of view of a very strong unitary view of sovereignty.

All of that was what was behind the suggestions of Lord Thomas's Commission for the devolution of the justice system, which would of course involve the devolution of probation services, the prison estate and to a significant extent legal training and qualification as well. This would bring Wales more into line with what is the case in Scotland and even to a large extent in Northern Ireland. And we have in our Commission more than once raised our eyebrows and sighed a little over the idea of Welsh exceptionalism. That is to say what is taken for granted in Scotland and Northern Ireland is still something for which we have to argue in Wales. Wales is the outlier in constitutional terms.

Lord Thomas noted that when his Commission reported there was something of a deafening silence from the political establishment in Westminster. And he has said, with some force, that he is still waiting for a detailed response to the criticisms he has made of the present workings of the system and to the specific suggestions made for the future.

We are ourselves in the Commission attempting to get some clearer messages from Westminster, and elsewhere, about what the case is against Lord Thomas' proposals. But to speak of the Thomas Commission is really simply to note that part of the Commission's work inevitably brings us up against a certain view of sovereignty, what I would call a unified, even metaphysical, account of parliamentary sovereignty.

We have all heard in recent years quite a lot of discussion, not very well informed, about sovereignty. And of course the familiar debates around Brexit brought that issue into focus

for many people repeatedly. We were "recovering our sovereignty" by leaving the European Union, so we were repeatedly told. The problem is, I suspect, that there is a confusion in here somewhere, hence my title about questions of definition, a confusion over what we mean by sovereignty. And I speak here with great trepidation because I am speaking to people who know what they would be talking about in a way that I don't.

Let me suggest at least that there is a confusion between what you might call a pragmatic definition of sovereignty and an ideological one. A pragmatic definition of sovereignty is a fixed, indeed a statutory agreement, about where the final court of appeal lies. Who has the last word in a legal debate? And there is a somewhat more ideological view of sovereignty which depends on the idea that, for these purposes, the United Kingdom is a self-defining entity in which political powers derive directly from a single source.

That latter view has of course become harder and harder to defend in strict terms in the last few decades. Developments in international law, the development of the international criminal court, a whole range of highly complex international agreements to do not only with armed conflict but also for example with the law of the seas. All of these things have required sovereign nations to bind themselves, in more and more complex, and more and more sophisticated ways, to one another's concerns.

Sovereignty as an absolute, as something which is simply a reflection of, you might say, the God-given integrity of a state, has become something much more to be negotiated in systems of realistic and mutually beneficial tradeoffs. Within any such system, or any part of such system, the need for clarity about where the final word lies is obvious. To say that for certain purposes it lies beyond one sovereign jurisdiction is not to subordinate the entire jurisdiction of one country to another, or to some fancy international entity of world government. It is simply to recognise that the only way of settling dispute in that kind of context is by mutual, binding agreement between sovereign entities, which will of course qualify that sovereign liberty in certain ways.

Now that – again I'm relying on some of the discussion with Lord Thomas – that has been around, as you can imagine, very strongly, in our discussions within the Commission. And we know that when we report, finally, all being well in December of this year, to the Welsh Government, when our report will we hope enter into the DNA of political discussion in Wales and more widely – and we do hope so, although we are not entirely holding our breath.

When that happens, people will say of course "there are issues here about sovereignty". And I think it behoves us in that context to be reasonably clear in what we write about the challenges we do and don't wish to put to the sovereignty of the Westminster Parliament. We are, I think, taking for granted in a lot of what we write, that the capacity for self-limiting ordinance from the Westminster Parliament is greater than so far has been taken for granted.

Many people have suggested to us, including the present First Minister, that there are two or three fairly straightforward pieces of self-limiting enactment, which if Westminster were to consider them, would entrench the devolved settlement very much more securely than is presently the case. That is to say, would make for us a settlement which did not simply depend on the goodwill of Westminster.

And we would argue that on the basis that the history that I have outlined, not least in the late 19th century, does suggest Wales regards itself as a polity that is in some sense a coherent regional community with sufficient social, legal, ethical and political consensus (not about particular issues, but about its own identity) to justify a high degree of operational independence statutory guaranteed at the highest level by Westminster.

Some people have said to us that we should be thinking, in the work of the Commission, about the possibility of a minimum set of recommendations, that this would be the least that could be done to secure the settlement more firmly and more permanently. Whether we will phrase it in those terms, frankly I don't know at the moment. I think we have to do a great deal of discerning and unpicking before we commit ourselves there.

But it is fair to say, that the way in which our discussions are going within the Commission, is moving us towards a reasonably strong statement that the present settlement is unhelpfully insecure, insufficiently anchored statutorily, and most importantly capable of being reinforced in a way which does not simply tear up the relationship between Westminster and Cardiff Bay but which grants a great deal more to what I call the recognition of the polity of Wales, as Wales.

Exactly how we unpick the identity of Wales as Wales is a very complex question, but it is not unique to Wales. Right across the world there are instances of "national communities" held together by a mixture of ethnic, linguistic, political and traditional factors. It is not that we are exceptional in that respect but that will need more work.

So, moving towards not a conclusion but at least a breathing space, what I'm saying that I see emerging from the work of the Commission is a set of fresh legal enactments which will allow us to plan more securely for the future, to attend in a more granular way to the needs and concerns emerging from local community of Wales. To be reasonably certain that the provision of education, health, welfare benefits, the administration of the immigration system and the administration of the law, that all these within Wales have a degree of mutual coherence and integrity that will help the more efficient, and frankly more cost-effective, delivery of these things.

I said that Wales has Commissions coming out of its connected ears, and so it has. And one of the challenges we have had is: is there anything different about this Commission? Now once we have said it is of course much better than all the others, the more substantial answer is that we have attempted from the word go to conduct grassroots consultations on all the major areas of social pressure and social stress that we have identified. We have

commissioned primary new research on opinions and attitudes. We have also partnered with a wide range of local community organisations, representing those whose voices are not normally heard in these discussions, to find out where the pressure points are in the current settlement.

In our interim report published just before last Christmas we devoted a whole chapter to spelling out ten areas where the present system was under pressure, which led us to the conclusion that the present system, unaddressed and unreformed, was not really sustainable or justifiable. So we have rolled the pitch a little for making some challenges to, what seem to us, lazy assumptions about sovereignty and the need to preserve a particular model of how Westminster relates to the rest of the UK. Just how far that goes remains to be seen.

You will all know much better than I that the legislative patterns which we find in federal states are as diverse as the interior diversity of each state or more so. Looking at federal systems from Germany to the United States, to a number of other cases, we are looking at apples and oranges, extremely hard to compare. What it means to say "a United Kingdom should be more federally organized" is by no means clear but we would like to see that discussion unfolding just a little, just as we would like to see the possibility of confederal models explored a little bit further in relation to whatever degree of independence Wales might aspire to.

At the root of our discussions is that paradox I began with. Westminster law has, since at least the 1880s, quite conspicuously believed it right to legislate for Wales as a unit – and for the needs and aspirations of the Welsh people as a kind of political unit. If that is the case then, arguably, the logical implication is that Westminster should think of a more systematic renunciation of certain of its powers to a representative Welsh body. We have seen that the Senedd already operates on that basis. But how far can that go without stronger, more robust, self-limitation at Westminster? That is the question we want to put.

So for the Commission, I suppose the two questions we have at the forefront of our minds are very practically and within the fairly near future, what is possible in terms of the self-limiting decisions of Parliament under the present scheme? How far can a statutory entrenchment of devolution go beyond what we have, and at what point does that spill over into something much more like a federal arrangement?

And of course the subset of questions there is: is it possible to reimagine the United Kingdom itself in a more federal way? And does that mean simply recognising fuller powers for the National Assemblies in Belfast or Edinburgh, or more radically, does it involve an exploration of some of the aspirations we have been hearing about for more regionalised government within England itself? How does Westminster sovereignty look against the pattern, that many speak about, of super mayoralties being one of the major elements in an administrative, legislative system in the future? We have spoken to Andy Burnham, and one or two other people representing that world, and have heard some very striking and perhaps rather utopian aspirations about what might be possible in radically regionalising English

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government. And again, we want to ask at what point does that become something more like federalism? But we are also aware that English regions seldom have quite the robust sense of the self-contained polity that we have in Wales. And one of the things we have to keep working at is what is the difference there.

We are also conscious that a federal system, with England, Scotland, Wales and Northern Ireland, is somewhat vulnerable to political developments in Edinburgh and Belfast, of which we are all very well aware. And the prospect of Wales being left alone with England is, with due respect to England, not necessarily one that enthuses the majority of the Welsh people. It has been compared unkindly to a married couple left alone when the children have gone off to university. But when we are talking about a partnership with a massive disproportion in population, resource, tax base and so forth, we clearly have a problem. And that is one of the things which makes the federal option a lot more complicated than we would like it to be. But I mention it simply as one of the things we continue to discuss.

So our second fundamental question is what view of sovereignty emerges as we think through these slightly more federalising options? How far can one go in thinking through the self-limitation of the sovereign Parliament in Westminster without creating political panic on the subject? Is it possible to think of collaborative models of sovereignty, mutual definitions of where final authority lies, without a complete breaking up of the UK as such? That requires a great deal of work on what sort of protocols about shared and negotiated authority emerge, on what kinds of agreement about where appeal and final appeal lies. Issues on which we as a Commission have no expertise at all and no party pre-positions, but which we think are worth feeding in to the wider discussion about the constitutional political future of the United Kingdom.

Thank you very much for your patience in listening to this survey of what we are up to and some of the questions which we are raising. I hope that it won't be either laughably naive or totally incomprehensible to this audience and that it may suggest some points for discussion and even occasionally for feeding back to colleagues in the next door offices in due course. But please wish us well with the Commission and watch this space.

Diolch yn fawr iawn [Thank you very much].

Dylan Hughes:

Diolch yn fawr iawn Dr. Williams [Thank you very much Dr. Williams].

Royal Assent in the Crown Dependencies: is there a need for change?

Lucy Marsh-Smith[1]

Abstract

This paper was produced as background to a presentation given at the CALC Europe conference in Cardiff on 25th May 2023 in response to one from Simon Hodgett, Crown Advocate and Legislative Counsel at the Law Officers of the Crown in Guernsey. It considers the current system for granting Royal Assent in the three Crown Dependencies in the light of the recent proposals for changing the system in Guernsey.[2] Interest in the matter stems from the time it takes to obtain Royal Assent in Jersey, Guernsey and the Isle of Man when compared to other Commonwealth jurisdictions. The paper considers improvements to the system and work-arounds from the Jersey perspective, considers the Guernsey proposals and examines the procedures and time taken across the three jurisdictions.

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[1] Currently Principal Legislative Drafter for Jersey and previously Chief Legislative Drafter for the Isle of Man 2008-13. Thanks go particularly to Advocate Matthew Berry of the Law Officers' Department in Jersey who provided a lot of the content of this paper. Also to Jayne Hubble from the Attorney General's Chambers in the Isle of Man for some of the information relating to the Isle of Man and Advocate Eloise Layzell of the Legislative Drafting Office, Jersey for her research and compilation of the section on time taken to gain Royal Assent in the 3 jurisdictions over the past 10 years. The views expressed in this article are the author's own.

[2] The States of Deliberation of the Island of Guernsey, Policy and Resources Committee "The Grant of Royal Assent to Projets de Loi, Counsellors of State and Other Constitutional Matters" P.2023/20.

Royal Assent in Jersey

The procedure for enacting primary legislation in Jersey is that "Laws" (or "Lois", when in the French language) are adopted, on a Proposition known as a Projet de Loi, by the States Assembly. The draft Law, together with the Law Officers' Royal Assent Memorandum, is then forwarded by the States Greffe to the Lieutenant-Governor's Office to be sent with a covering letter to the Lord Chancellor at the UK Ministry of Justice ("MoJ").[3] The Memorandum sets out the purpose of the draft Law and the Law Officers' belief that it complies with international obligations. The MoJ subsequently informs the Privy Council Office when its own checks have been completed and advises whether the Law should be submitted to His Majesty in Council for Royal Assent.

The Crown Dependencies are possessions of the Crown in the sense of the monarch, rather than in the sense of the UK Government. Unlike the British Overseas Territories and other jurisdictions who retain the King as Head of State, in Jersey and Guernsey, there is currently no local representative to assent to legislation. The King is the Governor, though there is a Lieutenant Governor in each Island who has delegated authority to grant Royal Assent in the Isle of Man. To expedite the process, copies of the draft law and the Law Officers' Royal Assent Memorandum are now sent directly from the Lieutenant-Governor's Office to the Privy Council Office.

The Law is considered by a single Committee for the Affairs of Jersey and Guernsey that advises His Majesty whether Royal Assent should be granted. Following the grant of Royal

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[3] Up until 1997 the Home Office was the UK Government Department responsible for the 3 Crown Dependencies ("CDs"), namely the 2 Bailiwicks of Jersey and Guernsey (the Channel Islands) and the Isle of Man. Responsibility then moved to the Lord Chancellor's Department which became the MoJ in 2007. The Foreign Office has never had responsibility for the CDs as is the case with the British Overseas Territories. The constitutional relationship is different and stems from the position of the sovereign regarding the Islands. The Channel Islands were part of the Duchy of Normandy before the Norman Conquest of 1066 and the Isle of Man became a possession of George III under the Act of Revestment of 1765 when the feudal rights of the Dukes of Atholl were bought and revested in the King. The fact that the links with the monarch have such a different historical basis, along with the fact that the Channel Islands were occupied during World War 2 whereas the Isle of Man was used as an internment camp, probably does a lot to explain the very different enthusiasm for the monarch in the Channel Islands and the Isle of Man (the Union flag is rarely seen in the latter save on Government House).

Assent, the Clerk of the Privy Council signs the Order in Council which is then transmitted via official channels for registration by the Royal Court at which point it becomes a Law.[4]

The process in Guernsey is similar with the additional need for legislation applying to Alderney or Sark to be registered there. This process means that it is usual for a considerable amount of time to elapse between legislation being passed by the local legislature and its enactment.

The requirement for Jersey primary legislation to have Royal Assent before it is given effect goes back a long time, well before the States Assembly was established in place of the Royal Court as the primary law-making body in the Code of 1771.[5] This Order in Council also codified the requirement to seek Royal Assent for primary legislation, that the only legislature in Jersey was now to be the States Assembly and that permanent Laws (i.e. primary legislation other than Triennial Regulations which are explained shortly) had to be adopted by the whole Assembly and sanctioned by the Sovereign before they became part of Jersey's Code of Laws.

The Code of 1771 provides, in particular, the following (in translation from the French):

> And His Majesty Doth hereby order that no Laws or Ordinances whatsoever, which may be made provisionally or in view of being afterwards assented to by His Majesty in Council, Shall be passed but by the whole Assembly of the States of the said Island; and with respect to provisional Laws and Ordinances so passed by them that none shall be put or remain in force for any time longer than three years but that the same, upon its being represented by the States to His Majesty, that such Laws and Ordinances are found by experience to be useful and expedient to be continued, Shall, having first obtained His Majesty's Royal Assent, and not until then, be inserted and become part of the Code of Political Laws of the said Island;[6]

This aspect of the Code, along with the requirement that all Acts, Orders or Warrants, including Orders in Council sanctioning legislation, must first be registered by the Royal Court before they can be of effect in Jersey, was also part of an earlier Order in Council of 1679.[7]

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[4] See *Legislation (Jersey) Law 2021*, Article 2(1).

[5] Code of 1771 (jerseylaw.je). It is so called but it is in fact an Order in Council dated 28th March 1771. All Jersey and Guernsey Laws are Orders in Council but are usually just known as Laws, or in this case, the Code of 1771.

[6] The 250th anniversary of the Code of 1771, sadly celebrated during Covid restrictions, led to an alternative to the more usual celebrations, the author coming up with new words to a short familiar Gilbert and Sullivan song to accompany pictures of the Code old and new which can be viewed here: (339) Ode to the Code of 1771 - YouTube.

[7] It referred to all "Ordres, Warrants ou Lettres de quelque nature qu'ils soient", but was of substantially the same effect. See also Pallot "[A]ucuns Ordres, Warrants, ou Lettres de quelque nature qu'ils soient" JGLR Feb 2014

Alternative powers to legislate: Jersey and Guernsey compared

The position in Guernsey was a little different. Our sister Bailiwick relies on its *L'Approbation des Lois* of 1583,[8] which was adopted by an Order in Council dated 27th October 1583[9] and which drew on Guillaume Terrien's commentary on the customary law, the "Grand Coutumier", of Normandy. This has led to Guernsey's making a greater continued use of defined customary powers to enact a wide base of laws. Today, it is understood that this approach has made way to a far greater emphasis on Ordinance-making powers under framework or enabling Laws. Guernsey's powers to make ordinances are wider in that they are not time limited but narrower in that they all relate to specific subjects and essentially allow the States of Deliberation to make new statutory schemes within defined subject matter limits. The powers Jersey has to make provisional Laws and Ordinances are now known as Triennial Regulations as the power limits their duration to a maximum of 3 years. Both Bailiwicks are constrained in that neither Jersey's Triennial Regulations nor Guernsey's Ordinances may affect Laws that have been granted Royal Assent, nor may they affect customary law, impose taxation or deal with international matters.[10]

An Order in Council of 1884 provided that Triennial Regulations in Jersey may be made and then renewed for successive periods of three years for an indefinite period.[11] But it also provided that the Regulations should relate only to subjects of a "*municipal*" or "*administrative*" nature, should not infringe on the Royal prerogative and should not be "*repugnant*" to the political or fundamental laws of Jersey. So, the power to make Triennial Regulations could be seen as broader than Guernsey's ordinance making powers, but in practice, because Triennial Regulations cannot override established laws (but can supplement them), the field in which they can be used has been increasingly limited by Laws.

However, Jersey has found the power to make Triennial Regulations very useful when there is a need to act quickly in an area not currently legislated upon.[12] The aim is, or should be, to allow them to lapse when the need has gone or for them to be replaced by primary legislation (which could consist of powers to enable the making of secondary legislation) during the 3-year period. Despite this, there have been occasions when they have been

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[8] See also Gordon Dawes "A brief history of Guernsey Law", JLR Feb 2006, paras 35-39

[9] Darryl Ogier, *The Government and Law of Guernsey,* (States of Guernsey: St. Peter Port, 2005).

[10] See *Jersey Fishermen's Association Ltd and others v States of Guernsey* [2007] UKPC 30.

[11] Règlements Provisoires (jerseylaw.je).

[12] Current examples (there are only 3 in total) include the Limited Partnerships (Continuance) (Jersey) Regulations 2023 and the Community Costs Bonus (Jersey) Regulations 2020 for which an alternative solution is planned.

renewed a number of times despite drafters' pleas to make a permanent arrangement if the need is long-term.[13]

It is fair to say that Jersey has traditionally made less use of skeletal enabling Laws where virtually all the detail is left to secondary legislation than has Guernsey. One of the earliest examples of Jersey taking an enabling approach was with regard to the regulation of public roads. In that context, first an Order in Council and then primary legislation has provided Jersey with the ability to regulate roads through secondary legislation.[14] However, the pandemic led Jersey to take that approach to give maximum flexibility as the need for the various types of provisions and restrictions unfolded.[15]

Another matter affecting the use of primary legislation requiring Royal Asset was Brexit. Due to the urgency, diversity and volume of new legislation that would need to be adopted, Jersey enacted secondary legislative powers to prepare for Brexit and to implement its new trading relationships. These powers were added to the already extensive powers set out in the *European Union Legislation (Implementation) (Jersey) Law 2014*,[16] which was amended in 2018 to provide a broad set of powers to implement the Government's approach to Brexit.[17]

Though it has for some time been common for Jersey Laws to confer powers on the Assembly or a Minister to make subordinate legislation, save in a few cases mentioned above, those powers are usually limited to facilitating the implementation of new primary legislation that has received Royal Assent (putting flesh on the bones of the primary legislation). The powers mentioned above differ in that they enable the entire corpus of a new substantive legislative proposal to be implemented in secondary legislation. This is reflected in the powers themselves, which state expressly that, with some limits, they can be used to make provision that might otherwise be made by primary legislation.[18]

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[13] What are currently the Unlawful Public Entertainments (Jersey) Regulations 2022 are a re-enactment of provisions that have been renewed many times.

[14] See Article 93 of the *Licensing (Jersey) Law 1974*, Article 92 of the *Road Traffic (Jersey) Law 1956* and Article 46(6) of the *Motor Traffic (Jersey) Law 1935* which confirm powers in 2 separate Orders in Council in their respective areas to enact secondary legislation amending primary legislation to a very substantial degree.

[15] We began with a set of Triennial Regulations, the *Covid-19 (Screening, Assessment and Isolation) (Jersey) Regulations 2020*, but the passing of the *Covid-19 (Enabling Provisions) (Jersey) Law 2020* (which contained a sunset clause but which was renewed several times) enabled the Assembly to make various Regulations containing powers for a Minister to make Orders on various matters relating to the pandemic.

[16] These amount to full powers to implement EU legislation, whether or not it is directly applicable to Jersey pursuant to Protocol 3 and the Withdrawal Agreement. The powers persist after the Brexit process is completed and enable the States Assembly to make permanent legislation without Royal sanction in a wide range of areas where there is relevant EU Law.

[17] *European Union (Repeal and Amendment) (Jersey) Law 2018*.

[18] See for example Article 2(2) of the Covid-19 (Enabling Provisions) (Jersey) Law 2020 and Article 2(4)(c) of the European Union Legislation (Implementation) (Jersey) Law 2014.

The advantage of the recent expansion of the enabling Law approach in Jersey is that, once enacted, the States Assembly cannot only make the subordinate legislation itself, but more importantly can remake or amend the legislation without the need for, and the delays inherent in, the Royal Assent process. In addition, as Regulations do not need to be registered by the Royal Court before they come into force, they can come into force on the day after they are made by the Assembly if that is required.

These advantages are achieved without necessarily reducing scrutiny in the Assembly, as Regulations must, subject to the Assembly suspending standing orders to allow for truncated lodging (as occurred both with Brexit and during the pandemic), be lodged six weeks in advance of being debated. This is the same lodging period as applies to a draft Law. Regulations are also debated by the Assembly in essentially the same way as a draft Law by Jersey's legislature. This is not subordinate legislation made merely by the executive.

From a democratic perspective, there are significant benefits to this approach in the context of a rapidly developing situation like that occasioned by the Covid-19 pandemic. Together with swift action by the States Greffe to amend standing orders, the introduction of regulation-making powers to address Covid-19 seems to have enabled the States Assembly to remain more fully engaged in the legislative process to address the implications of Covid than neighbouring jurisdictions that have relied wholly or mainly on executive powers to address emergencies.[19]

A potential disadvantage of this approach is that subordinate legislation is vulnerable to being struck down by the Royal Court on an application for judicial review or due to its incompatibility with the European Convention on Human Rights. Though there is no practical example of this, theoretically this has the potential to frustrate the Assembly's intentions, whereas a Law or Triennial Regulations can only be the subject of a declaration of incompatibility,[20] leaving the Assembly to determine whether remedial action is required. Moreover, Regulations are not subject to the requirement for the Minister lodging the proposition to make a statement of compatibility with the European Court of Human Rights (ECHR).[21] While advice is still regularly sought from the Law Officers' Department on the

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[19] In Guernsey, almost all of the legislation for Covid-19 was adopted pursuant to its Civil Contingencies (Bailiwick of Guernsey) Law 2012, by regulations of the Civil Contingencies Authority. The Authority is composed of members of the Government and has wide ranging regulation-making powers to address the emergency. These regulations are subject to a form of retrospective approval by the Assembly but appear not to be subject to the same level of scrutiny as Regulations in Jersey. The UK Government has legislated extensively using negative resolution statutory instruments using powers in public health legislation with little direct parliamentary oversight. It is also notable that the States Assembly in Jersey remained fully functioning with all Members being able to play a full part in the proceedings remotely right from the beginning of the pandemic.

[20] The definition of "principal legislation" in Article 1(1) of the *Human Rights (Jersey) Law 2000* covers Orders in Council, Laws and Triennial Regulations. By virtue of Articles 4(2) and 5 of that Law, the validity of a principal law cannot be questioned on the basis of its compatibility with Convention rights, though it can be the subject of a declaration of incompatibility.

[21] Article 16 of the Human Rights (Jersey) Law 2000.

human rights compatibility of proposals for Regulations, this advice will not generally be published in the same way that human rights notes are in a Projet de Loi. This may give rise to a perception that the shift to the enactment of Regulations gives rise to greater risks of ECHR infringements being introduced.

Reforms in the Royal Assent process

Returning to the Royal Assent process, it has not remained static. In the late 20th century and first years of the 21st, concerns developed in the Crown Dependencies (the "CDs") that the approach taken in London to our legislation was both cumbersome and inappropriate. The MoJ, seemingly not fully understanding the constitutional position of the CDs and the UK Government's role in dealing with them, would send the draft legislation to whichever Government department held that policy area for their views[22] (where it would sit sometimes for many months) when the content was purely the domestic province of the particular jurisdiction. It was eventually accepted that the UK's concerns were limited to being satisfied that

- CD legislation did not lead to the UK being at risk of breach of an international obligation[23] (including the European Convention on Human Rights), and
- the UK should be able to rely on a Royal Assent Memorandum from the Attorney General of the CD in question that the draft legislation is suitably compliant.

There was no need for the duplication of effort with lawyers at both ends scrutinising the draft legislation to the same end, as pointed out by the House of Commons Justice Committee.[24] Accordingly, in response to the recommendations of that Select Committee, in 2010 the Channel Islands each increased the resources devoted to reporting on draft Laws sent for Royal Assent through the submission of enhanced Royal Assent Memoranda by their respective Law Officers' Departments. This led to a reduction in the level of scrutiny by MoJ and UK Government lawyers (at a time when spending cuts made this a welcome move at their end) before recommending that the Laws be presented to the Privy Council for Royal Assent. The net effect of these changes was to substantially reduce the time taken

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[22] The worst example, quoted in Richard Whitehead and Steven Meikeljohn, "*Coming up to speed with Royal Assent*", JGLR October 2013 p 363*,* was from 2011 when a short Law concerning the Jersey Law Society failed to return from the Privy Council for many months, and it became known that the draft Law had inappropriately been forwarded by the MoJ to the English Law Society and the Department for Business, Innovation and Skills for their comments.

[23] In practice international obligations are extended to those Crown Dependencies as have consented to extension and have confirmed to the UK Government that the obligation is one that each Crown Dependency has or is prepared to implement.

[24] See the House of Commons Justice Committee (UK), Tenth Report of Session 2013-14, accessed at [/ (publishing.service.gov.uk)](publishing.service.gov.uk)

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from the point of submission of primary legislation by the Law Officers to the MoJ to the grant of Royal Assent.[25]

These reforms have been helpful to both the UK Government and the Crown Dependencies.[26] In Jersey, the average time for the grant of Royal Assent has continued to fall from six months to an average of around 85 days.[27] Further, as has been demonstrated in the context of Covid-19, where it is absolutely necessary to fast track the grant of Royal Assent for Jersey legislation, it is possible to do so within 10 days.[28]

Given the inherent constraints on the present process, such as the infrequency of Privy Council meetings, there is limited scope for further improvement to the process within its existing constitutional mechanisms. The strictures of the Privy Council timetable mean that, while the average time for receipt of Royal Assent has come down, there continue to be delays when seeking Royal Assent in the summer and mid-winter[29].

Another constraint on the process is that the Royal Court in Jersey will usually require the paper copy of the Order in Council, as sealed by the Privy Council, to work its way back through the official channels for registration by the Court. The Royal Court has been willing to waive this requirement in exceptional cases and register a copy transmitted electronically,[30] but it is common for a Law to be registered by the Royal Court 10 days after it has received Royal Assent.

Royal Assent given by the Lieutenant-Governor?

As is currently proposed for Guernsey, one option for reform to this system might be to allow the Lieutenant-Governor the power to grant Royal Asset on behalf of His Majesty as happens in the Isle of Man.

The Lieutenant-Governor's power to grant Royal Assent in the Isle of Man stems from an Order in Council, namely the *Royal Assent to Legislation and Sodor and Man Diocesan*

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[25] Above n. 22.

[26] Above n. 24. The report noted that the new process had been welcomed by the Crown Dependencies and had assisted the UK Government by easing pressure on resources.

[27] This is the average for the 5-year period 2018-2022.

[28] The *Covid-19 (Enabling Provisions) (Jersey) Law 2020* was passed by the States Assembly on 27th March 2020 and registered by the Royal Court on 7th April 2020, having been received back from the Privy Council with Royal Assent on 2nd April.

[29] There are usually no Privy Council meetings in August, September or January with the result that for a Law to come into force before 1st October it will usually be necessary to lodge it by the end of March and debate it in May so that it can reach a Privy Council meeting in July. The timetable is strict so a small delay will result in the draft Law going to the next meeting. There are further constraints on sittings at the time of UK General Elections.

[30] The Royal Court registered an electronic copy of the Order in Council approving the *Covid-19 (Enabling Provisions) (Jersey) Law 2020* in view of the circumstances.

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Synod Measures (Isle of Man) Order 2022,[31] replacing the Order of 1981. The Lieutenant-Governor's power to grant Royal Assent, in the case of legislation, is subject to Article 4 of the Order which states:

> The Lieutenant-Governor shall reserve, for the signification of His Majesty's pleasure, any Bill that the Lieutenant-Governor considers should be so reserved or is directed to reserve by the Lord Chancellor. The Lieutenant-Governor shall, additionally, consult the Lord Chancellor about the reservation of any Bill which, in the opinion of the Lieutenant-Governor –
>
> > (a) deals wholly or partly with defence, international relations, nationality and citizenship, the powers and remuneration of the Lieutenant-Governor, or the constitutional relationship between the United Kingdom of Great Britain and Northern Ireland, and the Isle of Man; or
> >
> > (b) affects the Royal Prerogative of the Rights of His Majesty in right of His private capacity.

Article 5 then states that the Lieutenant-Governor, before assenting to any Bill, must be satisfied that the Lord Chancellor has decided not to give a direction to the Lieutenant-Governor under Article 4.

In practice, after passing through the legislature, a Manx Bill goes to a "Royal Assent Committee" consisting of the Chief Minister, the Attorney General and the Chief Secretary who certify that it is fit to be considered for Royal Assent and who advise His Excellency on the question of reservation of Royal Assent.[32] Manx Bills are submitted to the MoJ in a similar manner to Channel Islands draft legislation with the Lieutenant-Governor's recommendation as to whether Royal Assent should be reserved for the King in Council or granted in accordance with the Order. The Lord Chancellor has the power, when the legislation relates to the reserved matters, to direct that it goes to the Privy Council.

Bills that are reserved are sent for Royal Assent at a meeting of the Privy Council in the same way as Channel Islands Laws are presently. The extent of these reservations, as can be seen, is extensive and in any event open to a discretion for the UK Government to require reservation in any case, though in practice only 5 (or 3.5%) of Manx Bills over the past 10 years have gone to the Privy Council for Royal Assent.[33]

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[31] [2022-11-09 306(25) Royal Assent to Legislation and Sodor and Man Diocesan Synod Measures (Isle of Man) Order 2022 (gov.im)](#).

[32] See Lucy Marsh-Smith, para 23 of the "Production of Legislation in the Crown Dependencies", JGLR February 2010, para 23.

[33] Of the 144 Manx Acts passed between 2012 and 2022 only 5 had Royal Assent granted by the Queen in Council. They were the *Freedom of Information Act 2015*, the *Law Officers Act 2014*, the *Treasure Act 2017*, the *Marriage and Civil Partnership (Amendment) Act 2016* and the *Freedom of Information (Amendment) Act 2018*.

In the House of Commons Justice Committee 'Update' Report in 2013, it was noted that the MoJ had invited the Bailiwicks to consider introducing a similar arrangement to that made for the Isle of Man.[34] This is now the option being pursued by Guernsey as set out in detail in P.2023/20.[35]

On 24th May 2023, having considered P.2023/20 and the Policy Letter of the Policy & Resources Committee contained in it, the States of Deliberation in Guernsey resolved:[36]

> 1. To agree that Royal Assent for Projets de Loi approved by a Bailiwick legislature may be granted by His Excellency the Lieutenant-Governor of the Bailiwick, on behalf of the King-in-Council (as set out in Section 7 of the Policy Letter).

> 2. To direct the Policy & Resources Committee to liaise with the Lieutenant-Governor, the Bailiff, the Ministry of Justice and the authorities in Alderney and Sark on the practical and legislative arrangements that will be required to give effect to Proposition 1 and to authorise the Committee to agree to those arrangements on behalf of the States.

> 3. To signify their agreement to the substance of the proposed Order in Council required to implement Proposition 1, for the purposes of Article 72A of the Reform (Guernsey) Law, 1948, as amended.

> 4. In Resolution 1 of Article XV of Billet d'État No. I of 2016, relating to the Policy Letter entitled "Proposal to Achieve Greater Autonomy in the Legislative Process and International Affairs for Guernsey", to delete the words "the granting of Royal Sanction;".

> 5. To acknowledge that the Counsellors of State Act 2022, regarding the addition of further Counsellors of State, has effect in Guernsey (and the whole Bailiwick of Guernsey) by necessary implication.

> 6. To signify their agreement to the substance of the Counsellors of State Act 2022 insofar as it has effect in Guernsey by necessary implication, for the purposes of Article 72A of the Reform (Guernsey) Law, 1948, as amended.

> 7. To note the contents of the remainder of the Policy Letter.

> 8. To direct the Policy & Resources Committee to liaise with relevant parties, including the Lieutenant-Governor, the Ministry of Justice and the Government of Jersey in order to explore the viability of the Bailiwicks of Guernsey and Jersey having

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[34] Above n. 26 at paras 28 and 29, including quotes from relevant UK Government officials confirming that it would be willing to make a change similar to that made for the Isle of Man.

[35] Above n. 2.

[36] See 24th May 2023: Resolutions concerning Billet d'État No VII at page 5. **Error! Bookmark not defined.**

membership of the Privy Council and in due course representation on its Committee for the Affairs of Jersey and Guernsey.[37]

The Policy Letter contained in P.2023/20 builds on the recommendations of Guernsey's then Constitutional Investigation Committee (CIC), the recommendations of which were approved by the States in 2016. Following dissolution of the CIC the Policy and Resources Committee took over responsibility for progressing the matter. The Policy Letter states that the proposed alternative Royal Assent process

> ... should result in faster processing of legislation, would not be reliant on existing schedules for Privy Council meetings, and would also underline the Bailiwick's domestic legislative autonomy and international identity.

This assertion is based on the Lieutenant-Governor being locally resident so that the full legislative process would be completed on-island. There was also a desire to develop Guernsey's autonomy in accordance with the international identity framework agreed between Guernsey and the UK in 2008.[38] However, the CIC recommendation that there would merely be a 6-week period for the MoJ to intervene on certain grounds, subject to which the Lieutenant-Governor would grant Royal Assent, is not now being pursued on the grounds that there might be uncertainty and the fact that it is not supported by MoJ who are exploring with Guernsey a modified version of the Isle of Man process. There would need to be a fresh Order in Council to allow for the procedure now being proposed.[39]

The intention is that after a Projet has been approved by the relevant legislature(s) within the Bailiwick, the explanatory memorandum accompanying the Projet would also include the Law Officers' advice whether the Lieutenant-Governor must consult the Lord Chancellor on the grant of Royal Assent. The Lieutenant-Governor would then consider that advice and decide whether to reserve the Projet to the Privy Council or whether Royal Assent can be granted using the powers under a new Order in Council. The new Order would contain reserved matters like those reserved for the Privy Council in the Isle of Man. After the Lieutenant-Governor has decided whether or not to reserve the Projet to the Privy Council, both it and the accompanying documents would be submitted in the normal way to the MoJ to review the Projet on behalf of the Lord Chancellor. If the Lieutenant-Governor does not reserve the Projet and the Lord Chancellor agrees that Royal Assent may be given, the Lieutenant-Governor would then be able to grant Royal Assent to the Projet by signing a document called a "Signification of Royal Assent". Any Projet reserved for the grant of Royal Assent by the Privy Council would follow the current process. Whichever way Royal

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[37] Item 8 was added by amendment. Because a large proportion of Privy Councillors are UK politicians, including Channel Islanders may have wider constitutional implications that may not be desirable for the Bailiwicks.

[38] Framework for developing the international identity of Guernsey, signed 18th December 2008 accessed at CP29.1 (gov.gg). Further consideration of this aspect is outside the scope of this paper.

[39] The current provision is the Royal Assent to Legislation and Petitions (Bailiwick of Guernsey) Order 2022.

Assent was granted, all Projets would continue to be registered in the Royal Court along with the Signification document where the Lieutenant-Governor has given Royal Assent.

To date the Government of Jersey has not indicated that it wishes to make a similar change. Before considering whether there would indeed be much time saved in adopting this arrangement, there are concerns that might be raised in Jersey's case.

The first concern relates to the order of precedence between the Bailiff and Lieutenant-Governor, whereby the former takes precedence in the civilian affairs of the Island and the latter in military affairs. This was established in the 17th century and is arguably reflective of the development of Jersey's autonomy and privileges.[40] Giving the Lieutenant-Governor an enhanced role in the civilian matter of the legislative process, particularly one where decisions should be made as to the proper constitutional route for legislation to be grant Royal Assent, might tend to involve the Lieutenant-Governor in political matters.

The second concern, which may be more difficult to resolve, arises from the Isle of Man's experience of introducing similar reforms and the problematic nature of its process as a precedent. The controls in the Isle of Man on the power of the Lieutenant-Governor, including the need to convene a local Royal Assent Committee and to consult the UK Government on the need to reserve Royal Assent, have resulted in the delegation of authority arguably becoming a backwards constitutional step. This process may have increased both the time taken for Manx legislation to obtain Royal Assent and the role of UK Government lawyers and officials in the conclusion of the legislative process compared with the process in the Channel Islands.[41]

The imposition of similar restrictions to those in the Isle of Man on the extent of any new power for the Lieutenant-Governors of the Channel Islands to grant Royal Assent would arguably turn reforms of this nature into a regressive step. A greater level of scrutiny by the UK Government on legislation affecting areas such as defence, immigration and citizenship and international relations might have the effect of reversing the change in approach following the Justice Committee Report and even raise the issue of the extent to which the UK has the right to legislate for Jersey on matters of international relations.

Some statistics

When assessing the potential to save time by altering the mechanism for obtaining the grant of Royal Assent it is helpful to have an accurate picture of the current position in the CDs. In Jersey the average time for a Law to obtain Royal Assent after it is adopted by the States Assembly significantly dropped between 2012 and 2013 as a direct result of the change of procedure at the MoJ and the increase in resources devoted to the Royal Assent process by

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[40] See *The King is dead, long live the King!* Miscellany JGLR, 2015.

[41] Marsh-Smith, above n. 32.

the Law Officers' Department following the Select Committee recommendations. The average for the 10-year period 2013-2022 is 90 days.
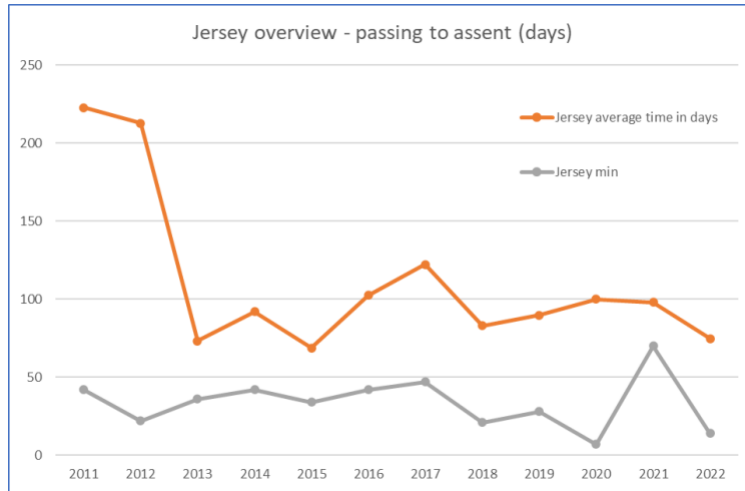
Over the last 10 years, when compared with the Isle of Man and Guernsey, Jersey's legislation takes the least amount of time with Guernsey's taking the longest. However, there has been a substantial drop in the time it takes between the date a Projet de Loi is approved by the States of Deliberation of Guernsey, Chief Pleas of the Island of Sark or the States of the Island of Alderney and the grant of Royal Assent following the change of procedure.[42] The Isle of Man's average time between completion of passage through the Branches of Tynwald and receipt of Royal Assent has slowly crept up since 2015. 2022 was an exception, but only two Bills received Royal Assent that year.

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[42] For Laws applicable to the entire Bailiwick of Guernsey the date of the last approval of its application to its jurisdiction by any of the three parliaments was taken as the starting point for calculating the length of time until Royal Assent was granted.

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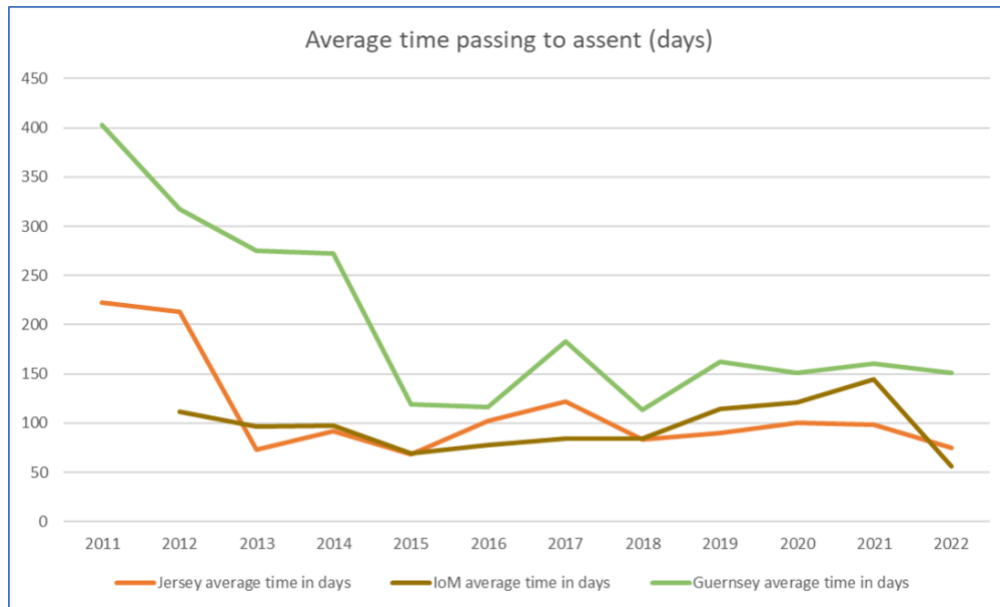
The average for each Crown Dependency for the five-year period 2018-2022 is 85 days for Jersey, 119 days for the Isle of Man and 151 days for Guernsey.

Analysis

Part of the reason for the time taken for Manx Bills to gain Royal Assent is their procedures for enacting legislation. Unlike the Channel Islands, Manx Bills pass through both Branches of Tynwald (the lower Branch being the House of Keys and the upper Branch being the Legislative Council) following a procedure very similar to that taking place in Westminster. This usually takes several weeks or months. In Jersey it is usual for draft Laws to be debated in one sitting so that this stage is normally completed in a day. Guernsey operates differently but still with a very short stage for consideration of the draft Law, the principal debate taking place on a departmental report (known as a States Report) and not on the draft legislation itself.[43]

Then even after a Manx Bill is ready for Royal Assent, there is a further stage which can result in a delay not dissimilar to that occasioned by the need to await a sitting of the Privy Council. Before a Bill can receive Royal Assent from the Lieutenant-Governor, it must be signed by all the Members of Tynwald at a sitting of Tynwald.[44] The Isle of Man legislature is tricameral. The Court of Tynwald consists of the 2 Branches of Tynwald mentioned

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[43] For the process of passing Guernsey legislation, see Darryl Ogier, *The Government and Law of Guernsey,* (States of Guernsey: St. Peter Port, 2005) at 39–42 and Gordon Dawes, *The Laws of Guernsey*, (Hart Publishing: Oxford, 2003) at 30–32.

[44] It is possible for this to happen before the Bill goes to the MoJ and this will happen when a General Election is imminent to prevent the Bill falling. However, up until the signing there is the possibility of making minor corrections that have come to light before the Bill is passed to London, something that cannot happen with Channel Islands Laws.

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above sitting together. This happens only once a month in term time so there are no sittings in August or September, which can result in the same period of delay affecting the other Islands when the Privy Council is not sitting. Once signed the Bill is taken by taxi to Government House for Royal Assent and it becomes an Act when announced in Tynwald, usually very shortly afterwards. Of course, if delegated Royal Assent were to come to the Channel Islands the procedures adopted may well avoid the delays inherent in the Manx system but there is nothing to be gleaned from the Isle of Man experience that gives confidence that the change would speed up the granting of Royal Assent.[45]

The change since 2012 in the way the MoJ handles draft legislation from the CDs has significantly reduced the waiting time for the grant of Royal Assent. Meanwhile the need for urgent law changes in Jersey has been adequately met by using either Triennial Regulations or by the Royal Assent stage being expedited. In addition, where expediency has demanded it, the UK has not objected to the use of enabling legislation that includes wide powers for secondary legislation to effectively take the place of a Law. Rather than risk a change that may have constitutional concerns or upset the delicate balance in the extent of scrutiny from the UK, Jersey is content for the status quo to remain. It is still the case that Jersey is significantly quicker to obtain Royal Assent for its legislation than either Guernsey or the Isle of Man.

Conclusion

This paper has considered current procedures for the grant of Royal Assent in the three Crown Dependencies, including the reforms of a decade or so ago which eliminated some of the delays. It has examined possible work-arounds to reduce the need for primary legislation before examining the merits or otherwise of delegating Royal Assent to the Lieutenant-Governor, comparing the current system in the Isle of Man with Guernsey's recent proposals. Statistics relating to the time taken from passing of legislation by local legislatures to its assent by the King may go in part to explain why Jersey currently has no inclination to follow Guernsey in changing the system.

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[45] At the CALC conference Simon Hodgett said that one reason why Guernsey legislation may take longer is because individuals may petition against the Projet. We also wondered whether the time taken to prepare the necessary Memorandum and other work by the Law Officers in Guernsey may take longer than in Jersey.

Book Review

Delegated Legislation in Australia, 6th ed.

by Dennis Pearce and Stephen Argument, published by Lexis Nexis Australia: 2023

Reviewed by Paul O'Brien[1]

In his review of the 4th edition of *Delegated Legislation in Australia*, John Mark Keyes began by observing that "Delegated legislation is one of the most unjustly neglected subjects to be found in law and government".[2] This sentiment is echoed in the preface to the recently published 6th edition of the book, where the authors observe that "the use of, and controls exercised over, [delegated legislative] instruments have largely passed unexamined".

Delegated Legislation in Australia fills this gap admirably[3] and this 6th edition substantially expands the material covered in the 4th edition (2012) and 5th edition (2017). There have been a number of significant developments since the 5th edition that are addressed, not least being the emergence of, and legislative response to, the COVID-19 pandemic.

The 6th edition is structured similarly to the 2 previous editions. It begins with a useful overview of the topics covered in the book and a brief discussion of the themes developed in later chapters. Of interest to me is the discussion of whether the traditional justifications for the use of delegated legislation are still valid. There is also a comparative discussion of recent "skeleton bills" in the UK. These are so-called because they leave most matters to be addressed in delegated legislation or, in other words, they contain "powers rather than policy".[4] However, the authors note that this does not appear to be a burning issue in Australia in recent years.

There is also an interesting discussion in Chapter 1 about quasi-legislation. This term refers to instruments authorised to be made under a statute that do not fall into the established categories of delegated legislation such as regulations or rules. Quasi-legislation includes codes of practice, guidelines, circulars and practice directions. The emergence and proliferation of quasi-legislation is of concern for a number of reasons, including its availability, the uncertainty of its legal status, the lack of parliamentary scrutiny and the variable quality of drafting, as quasi-legislation is not generally drafted or settled by legislative drafting offices. Following this discussion, however, the remainder of the book concentrates on the more traditional forms of delegated legislation.

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1 Principal Parliamentary Counsel, Office of the Chief Parliamentary Counsel, Victoria, Australia

2 The Loophole (Issue no. 3 of 2012), November 2012, p 55.

3 One other publication in this field worth mentioning is *Executive Legislation* by John Mark Keyes, written from a Canadian perspective. The 3rd edition was reviewed in The Loophole, March 2023, pp 53-56.

4 As described in a 2021 paper by the UK Hansard Society entitled "Delegated legislation: the problems with the process—Introducing the Hansard Society's Delegated Legislation Review", available at https://www.hansardsociety.org.uk/publications/reports/delegated-legislation-the-problems-with-the-process.

Chapter 2 outlines the procedures for the making, publication and commencement of delegated legislation. The chapter is helpfully arranged so as to describe each of the 9 Australian jurisdictions'[5] procedures separately, although the authors note the relative uniformity among jurisdictions.

Chapters 3 to 10 deal with parliamentary scrutiny of delegated legislation. Chapter 3, like Chapter 2, outlines the arrangements for parliamentary scrutiny separately for each jurisdiction. Each jurisdiction uses parliamentary committees for the purpose of scrutiny, either a specific-purpose committee set up to scrutinise delegated legislation (or in some cases also to scrutinise bills) or one or more committees that have a wider portfolio or policy focus, depending on the subject matter of the delegated legislation. There have been a number of developments in this area since the previous edition of the book, which are noted in Chapter 3, such as the establishment or renaming of parliamentary committees or the transfer of scrutiny functions between committees.

Chapters 4 to 10 set out various "scrutiny principles", being principles against which the various parliaments or their committees scrutinise delegated legislation. These principles are generally set out in the terms of reference of the relevant committee in the standing orders of the parliament or in legislation[6], and include whether the delegated legislation is made in accordance with (or within the powers of) the statute authorising it to be made, whether the delegated legislation provides for administrative decisions that are not subject to merits review and, more recently, scrutiny in relation to human rights. As explained in Chapter 10, only 4 Australian jurisdictions have scrutiny expressly on the basis of human rights,[7] although aspects of human rights underly the scrutiny principles in all Australian jurisdictions.[8]

Chapter 11 provides concluding comments and a useful summary of the first half of the book. This Chapter describes many of the developments that have occurred since the previous edition. There is a useful description of developments in the use and scrutiny of delegated legislation in response to the COVID-19 pandemic, both in Australia and elsewhere. There is also a description of the UK Hansard Society's delegated legislation review, which was underway as this edition went to print. In further developments since

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5 The Commonwealth, the 6 States, the Australian Capital Territory and the Northern Territory.

6 In Victoria, for instance, see section 21(1) of the *Subordinate Legislation Act 1994*.

7 The Commonwealth, Australian Capital Territory, Queensland and Victoria. The latter 3 have human rights legislation and the Commonwealth, while not having legislation conferring human rights as such, has legislation requiring parliamentary scrutiny of both primary and delegated legislation for compatibility with human rights.

8 For example, the scrutiny principle that delegated legislation not trespass unduly on personal rights and liberties.

then, that Society has published a working paper on its proposals for a new system for delegated legislation, which makes for interesting reading.[9]

One section I found particularly interesting in Chapter 11 is headed "The Unseen Influence of Legislative Scrutiny Committees".[10] This concerns the influence that scrutiny committees' comments have on legislative drafters and others who prepare delegated legislation. It has certainly been my experience, in both drafting delegated legislation and advising departmental officers who draft it, to take into account previous comments made by the Victorian parliamentary committee that scrutinises delegated legislation.[11]

The second half of *Delegated Legislation in Australia* covers judicial review of delegated legislation. Chapter 12 gives a general introduction to the topic, and the remaining chapters cover particular attributes and grounds of review. These range from non-compliance with formal requirements, inconsistency with the authorising statute and other common grounds of judicial review such as unreasonableness, improper purpose, sub-delegation of legislative power and retrospectivity. There is also the issue that I recall from law school many years ago of whether a power to regulate includes a power to prohibit.[12] Although the authors note that judicial review of delegated legislation has not seen any great change in principle since the previous edition, there have been a number of significant decisions since then that are discussed in this edition.[13]

Chapter 30 deals with the interpretation of delegated legislation and contains an interesting section on "interpretation having regard to the drafter of the instrument and the circumstances of its drafting". The authors' thesis is that courts take into account who is drafting the instrument and the circumstances in which it is drafted, in determining how it should be interpreted. This is illustrated with reference to emergency legislation in response to the COVID-19 pandemic and the authors refer in particular to the *Borrowdale* case in New Zealand.[14]

The material covered by *Delegated Legislation in Australia* should be of interest to legislative counsel and others who are responsible for drafting, settling, advising on, scrutinising or otherwise working with delegated legislation. As mentioned earlier, the 6th edition substantially expands on previous editions (it is over 100 pages longer than the 5th edition) and comprehensively deals with all aspects of the making, publication, scrutiny and

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9 Hansard Society, "Proposals for a New System for Delegated Legislation: A Working Paper", 6 February 2023, available at www.hansardsociety.org.uk/publications/reports/proposals-for-a-new-system-for-delegated-legislation-a-working-paper.

10 At [11.21].

11 The Scrutiny of Acts and Regulations Committee, which regularly publishes reports on issues relating to primary and delegated legislation. See: www.parliament.vic.gov.au/sarc/publications.

12 See Chapter 15.

13 The book includes case law up to 30 June 2022.

14 Borrowdale v Director-General of Health [2020] NZHC 2090. See also the note on this case in the CALC Newsletter (November 2021) at pp38-40.

interpretation of delegated legislation. Although the book primarily deals with Australian jurisdictions it contains many examples and discussion of the situation and developments in other jurisdictions. For these reasons the 6th edition of *Delegated Legislation in Australia* can be highly recommended.

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Book Review

Modern Statutory Interpretation: Framework, Principles and Practice

By Jeffrey Barnes, Jacinta Dharmananda and Eamonn Moran
Published by Cambridge University Press, 2023

Reviewed by Nick Horn[1]

Introduction

Statutory interpretation is sometimes depicted as an alchemical art known only to the occupants of judicial chambers; similarly legislative process and legislative drafting can seem mysterious to legal practitioners and students. The authors of this new text provide welcome guidance in these dark places.

The work offers a comprehensive, up-to-date and accessible treatment of its subject, in a form equally suitable as a teaching text and a practice guide. It breaks new ground in focusing on interpretation as a process for determining the meaning of statutes rather than just as a set of fixed rules.

While its scope is restricted to Australian jurisdictions, *Modern Statutory Interpretation* has much to offer for drafters working outside Australia. It is notable for its clear exposition of the current state of understanding of interpretation law across the Commonwealth. Just as significantly, it stands out for its integration of a discussion of legislative drafting and law-making process into the mainstream treatment of statutory interpretation. The explicit recognition of the connection between the origins of legislation (in drafting and parliamentary process) and its outcomes in interpretation is a particularly welcome aspect of the text from a drafter's perspective.

Interpretation for practitioners and students

The structure and general approach of the text under review reflects its authors' backgrounds in teaching and in drafting practice. Jeffrey Barnes and Jacinta Dharmananda are two of Australia's leading academics and teachers in the field, and Eamonn Moran, a scholar of legislation in his own right, has been Chief Parliamentary Counsel in Victoria, and Law Draftsman in the Department of Justice of Hong Kong, as well as holding other distinguished appointments.[2]

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[1] Senior Consultant Parliamentary Counsel, Office of Parliamentary Counsel, Australia

[2] This natural association of drafting with scholarship on interpretation (and also with teaching), is also evident in the authorship of interpretation texts in Canada (Elmer Driedger and Ruth Sullivan, *Construction of Statutes*), New Zealand (Ross Carter, *Burrows and Carter Statute Law in New Zealand*) and the UK (Francis Bennion, original author of *Bennion on Statutory Interpretation*). Dennis Pearce, the author of *Statutory Interpretation in Australia*, was a drafter with the Commonwealth Office of Parliamentary Counsel for 5 years early in his career; similarly, Jeffrey Barnes started his own career with the NSW Parliamentary Counsel's Office.

The authors' backgrounds strongly inform the structure and focus of this new Australian work.[3] The work is based on the principle that "Statutory interpretation is a many-faceted thing. It is a substantive body of law and a process involving a set of skills" (p 3). Accordingly, unlike most other accounts of statutory interpretation, the principles of "the law" of statutory interpretation are communicated in the form of a practical guide for both students and other legislative users to develop and maintain such skills to navigate through the thickets of statute, and through the inherent uncertainty of interpretation.

The overall structure of the work moves logically through the topics covered by a well-designed tertiary course in legislation and statutory interpretation.[4] The broad theory is sketched out clearly (in Parts I and II), followed by a practical introduction to legislation and legislative drafting (in Part III). From there, the focus steadily narrows, starting with a consideration of legislative text and history, and legislation of general application, with a notable emphasis on Interpretation Acts (in Parts IV, V and VI), moving on to legal contexts outside legislation (in Part VII) and then (in Part VIII) a comprehensive treatment of specific issues and presumptions from the conventional "law" of statutory interpretation—ending with a useful section bringing together interpretative issues specific to delegated legislation (a topic all too often ignored in commentary on legislation and interpretation).

This practical presentation of the topic also informs the presentation of the text at the micro-level. Topics are broken down into discrete sections, each headed with its own miniature summary. For example, the statement quoted above ("Statutory interpretation is a many-faceted thing. It is a substantive body of law and a process involving a set of skills") describing the nature of statutory interpretation (appearing at the head of the Overview to Chapter 1) is broken down into two detailed sections, the first headed "1.2 Statutory interpretation is a substantive body of law" (p 3), and the second headed "1.3 Statutory interpretation is a process involving a specific set of skills" (p 5). In addition, the text is interspersed regularly with concise instructive examples (generally case studies) set out in boxes illustrating the principles concerned. Thus the user of the text is introduced to a principle in summary form, the principle is discussed in some detail and then its operation is illustrated in practice.

Such an approach is systematically followed throughout (perhaps in the sections for which Barnes is the lead author more than the others), and creates a satisfying sense for the reader of a continuous unfolding of the subject, explaining each aspect carefully before moving on to the next. It might be regarded as overly pedantic in a work of original research, but in a text for practitioners and students this structure offers a welcome, well-lit pathway

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[3] John Mark Keyes notes likewise in a recent review in the *Loophole* of Sullivan's latest edition of Elmer Driedger's text *Construction of Statutes* that Driedger's teaching background strongly influences the approach of the Canadian text (*Loophole*, March 2023, No. 1 of 2023, p 57).

[4] As one would expect. Barnes and Dharmananda are two of the co-authors (with Jeffrey Goldsworthy) of the *Council of Australian Law Deans Good Practice Guide to Teaching Statutory Interpretation* (CALD, 2015).

throughout. The text is amply supported by Tables of Contents, indexes of Cases and Statutes, a comprehensive Bibliography, an excellent Glossary (thumbnail sketches of key concepts, with useful cross-references), and a general Index of topics. Overall, this highly structured approach is well geared to provide valuable assistance for the busy legislative drafter requiring rapid access to the treatment of a particular detailed topic, particularly in a weighty volume running to 700 pages.

The text is practically oriented throughout: it offers a hands-on "how to" approach to interpretation, in particular in Chapter 9 (Practical techniques). Each step of the process of statutory interpretation is methodically covered, together with the skills needed to undertake that step. This will be an invaluable aid for the student first undertaking the subject; and there is much to learn here also for seasoned legislative drafters and other practitioners.

Theory of interpretation

Australian drafters will be well aware of the allusion in the title of *Modern Statutory Interpretation* to the "modern" common law approach to interpretation expounded in *CIC Insurance Ltd v Bankstown Football Club Ltd.*[5] (context is to be considered first and in its widest sense), and the subsequent mantra of "text, context, purpose".[6] As the authors demonstrate, this broad approach has displaced the conventional approach to statutory interpretation based on the "literal rule", the "golden rule" and the "mischief rule" ([2.8], p 33). The authors set out a convincing case for the evolution of context as an underlying guiding factor, with text and purpose being subsidiary aspects of context.[7]

Strong features of the text are its clear, yet nuanced, exposition of that deceptively simple 3-word mantra; its productive use of the tri-partite concept as a broad framework for structure and discussion; and the treatment of the interaction between the common law of interpretation and corresponding principles in Australian Interpretation Acts (see Chapters 2, 4, 6 and 7).

The lodestars of my own thinking about this topic have been the work of Ruth Sullivan in bringing together the worlds of drafting and interpretation, and the pioneering socio-legal teaching text of William Twining and David Miers, *How to Do Things With Rules*.[8] All these writers clearly demonstrate the inadequacy of approaching statutory interpretation as just another body of law, and instead focus on interpretation as a *process by which meaning is produced*, dependent on the shifting context in which sources (or conditions) of doubt

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[5] (1997) 187 CLR 309; [1997] HCA 2.

[6] For a fascinating discussion of similar developments in Canada, see Keyes' review of Sullivan's text cited above.

[7] Barnes, the lead author of Chapter 7 (context), makes the argument more fully in "Contextualism: 'The Modern Approach to Statutory Interpretation'" (2018) 41(4), *University of New South Wales Law Journal* 1083.

8 5th ed., Cambridge University Press 2010.

occur, whether as a result of drafting, parliamentary proceedings, administration or enforcement of the law, or administrative or judicial review.

It is heartening to recognise this focus as one of the foundations of the text.[9] Not only is this the case in the discussion in Chapter 14 (which sets out the basic approach to sources of doubt), but it pervades the discussion of text, context and purpose throughout. It might be summarised in the following broad strokes (in my own words):

(a) In interpreting a statutory text, words do not have a meaning in isolation from each other and from other texts and discourses (nor does meaning inhere in the text).

(b) Sources of doubt about alternative readings arise in particular contexts in which legislation is used.

(c) Purpose (as extrapolated from the text and its context) must ultimately be tested against the application of the law in particular circumstances.[10]

I have a few reservations. The law of statutory interpretation is grounded in a presumptive preference for the "ordinary, grammatical, literal and natural meanings" ([15.2], p 222) of the text of any particular law. The text includes an analysis of how courts have approached this broad concept, distinguishing between each characterisation (ordinary, grammatical, literal, natural) together with illuminating examples, to the extent that such distinctions are meaningful.

However, the discussion does not address a fundamental issue with the current law: allowing courts to take judicial notice of what is in fact the "ordinary" (etc.) meaning of a text. The authors, unfortunately, fail to point their readers to Sullivan's cogent challenge to this concept as a cover for discretionary judicial decision-making in "The Plain Meaning Rule and Other Ways to Cheat at Statutory Interpretation" (2015).[11] She argues, among other things, that the plain meaning rule can be (mis-) used to replace an "appeal to judge-made law and policy" by an "exercise in technical expertise". Elsewhere, Sullivan sees as a desired outcome of the adoption of plain language drafting techniques that "[i]nstead of

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9 The text also cites the work of Bennion in this context, while Barnes' own scholarship apart from this work has made a considerable contribution to this "process" orientation in statutory interpretation theory.

10 The authors point to a significant distinction drawn by the courts between the general interpretation of a law and its application in particular circumstances ([1.4], p 6). According to this analysis, "general" interpretation is to be determined before the law is applied in a particular case. Theoretically, however, a case can be made for reversing this procedure. Interpretation is only ever required at points at which the law is applied (whether by a court or tribunal, or, far more commonly in practice, by an official administering the law); consequently, the interpretation of a law is always informed and influenced by the context in which it is applied. This seems to me entirely consistent with the authors' emphasis on interpretation as a process, and on sources of doubt in particular: a law has no "meaning" in the abstract, except as a vehicle for the production of meaning in various contexts and at various times. When we talk of the "meaning" of a law as such, we are projecting or predicting that process in advance, or (in an historical sense) pointing to the way in which that meaning has actually been produced in the past.

[11] See https://www.parliament.wa.gov.au/intranet/libpages.nsf/WebFiles/Useful+links+-+legislation+Plain+meaning+rule/$FILE/Plain+meaning+rule.pdf (last accessed 28-May-2023).

relying on judicial notice of meaning and their own common sense, judges will have to receive and assess evidence about the audience for which [...] legislation is written".[12]

Legislation, drafting and interpretation

As mentioned already, one of the strengths of this text is its integrated treatment of the legislative process, and in particular its consideration of the influence of drafting on interpretation (and vice versa). Chapter 10 deals with the drafting process, including the role of parliamentary counsel and the complex nature of drafting practice, drawing attention to the evolution and variability of drafting styles. Chapter 11 sets out clearly the mechanics of the enactment of legislation. Allied to this material is the treatment of particular features of the statute as a genre: a detailed account of commencement (Chapter 12) and a useful overview of the structure and components of an Act. Taken together with the treatment of other aspects of legislative history in Part V and of Interpretation Acts and other Acts of general application in Part VI, this offers a deeper and broader account than is currently available in any comparable Australian text of the contribution made by process and history to the (arguably controlling) interpretative factor of context.[13]

Of particular interest to legislative drafters will be the discussion (in Chapter 16) of the effect of drafting styles on interpretation. Three styles of drafting are distinguished: "traditional", "plain language" and "general principles", while it is acknowledged that much legislation adopts a hybrid of these styles. It is noted that drafting style is part of the "intrinsic context" of the legislation, and the discussion that follows, although necessarily broad, offers an indication of how drafting style may influence interpretation.

The authors observe that traditional style tends to be based on a presumption that the law as drafted is complete and its meaning exhaustively expressed, while plain language style opens out the language used more to its broad ordinary meaning, taking it outside the realm of legal argot. Contrasted to both of these, general principles style gives more weight to purpose; the use of broad terms results in relatively less certainty than either traditional or plain language styles, and implicitly cedes control to interpreters (most notably, but by no means limited to, the judiciary) to apply the law in particular circumstances. It is therefore highly relevant for such interpreters to consider the stylistic fabric of the legislation that is being applied in making interpretive decisions. The chapter concludes with useful notes on how to identify drafting style by reference to drafting manuals and other materials made publicly available by parliamentary counsel in Australia.[14]

It is most welcome to find a serious treatment of the interaction between drafting style and interpretation in a text such as this. However, the discussion of plain language drafting style

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[12] "The Promise of Plain Language Drafting", *McGill Law Journal* 47 (2001) p 97.

[13] Chapters 10, 11 and 12 condense the considerable practical experience of their lead author, Moran.

[14] Dharmananda, the lead author of Chapter 16, discusses this material in greater depth in "Drafting Statutes and Statutory Interpretation: Express or Assumed Rules?" (2019) 45(2) *Monash University Law Review* 401.

could have been more fully elaborated, since, even if it is not fully endorsed by drafting practice in all jurisdictions, this style has a pervasive influence and represents a standard (or ideal) against which drafting is perhaps most routinely judged and criticised. For example, some discussion of the use of "redundancy" techniques in plain language drafting, such as examples, legislative notes and readers' guides, and their effect of blurring the lines between "internal" and "external" context in terms of standard elements of interpretation, would have added more depth to the treatment of the topic here.[15]

Conclusion

There is no space here for discussion of other topics covered by the text; suffice to say that its treatment overall of both new and established aspects of its subject not only updates the treatment offered in comparable texts but contributes a clarity, concision and analysis to their discussion that rivals and in many ways surpasses that to be found elsewhere.

In particular, the structure of the text as a whole, and in its details, reflects a careful consideration for how both the practical and the theoretical aspects of statutory interpretation may be best communicated to its intended users, offering an overview of the subject and the contribution of each of its component topics at the same time as providing an arrangement that makes for easy access for the workaday practitioner.

This text is highly recommended for all those with a professional or academic interest in statutory interpretation, and to teachers and students of the topic. It is to be particularly commended for Australian and other legislative drafters as presenting a new approach in an accessible form to a subject that is vital to their practice.

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[15] For a seminal discussion of this topic, see Ruth Sullivan, "Some Implications of Plain Language Drafting", *Statute Law Review* 175 (2001), p 175, unfortunately not cited by the authors.