Commonwealth Association of Legislative Counsel

THE LOOPHOLE

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THE LOOPHOLE—Journal of the Commonwealth Association of Legislative Counsel

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

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

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Contents

Editor's Notes

The *Loophole* is first and foremost a forum for legislative counsel from different parts of the world to communicate with each other about their craft. The conferences CALC has held since its inception have provided an opportunity to do this orally, most often in person, but more recently through the video-conferencing apps we have become accustomed to coming out of the COVID era. The *Loophole* is an extension, in written form, of the interaction many of us have experienced at CALC conferences and will no doubt experience at the upcoming conference in Jamaica.

After some years of pandemic shut-in, last year saw the re-birth of our conferences with the CALC European Conference in Wales and the CALC Africa Conference in Kenya. These events were enormously successful in bringing legislative counsel together again. This issue of the Loophole includes articles based on three of the presentations at these conferences.

Estelle Appiah, one of the giants of legislative drafting in Africa, leads off with her reflections on the rule of law as a lodestar of legislative drafting and the role of legislative counsel in preserving it in a globalized environment.

Christine Agimba follows up with her account of the law reform initiatives of the Kenya Law Reform Commission and its fusion of law reform proposals and legislative drafting.

Next, Terry Kowal takes us back to the Conference in Wales and his presentation on a unique law-making institution: the Qatar Financial Centre and the drafting challenges entailed in regulating the financial services industry and some of the stylistic and structural aspects of its rules.

This issue concludes with reminders of the drafting discourse beyond the CALC conferences. Chris Micheli's article recounts the legislative practice in California in relation to definitions and Anna Logie reviews two recently published books that may interest legislative counsel.

In conclusion, I bid my farewell as editor in chief of the *Loophole*. Almost 13 years have passed since I assumed this mantle from Duncan Berry in August 2011. It has been an honour to discharge this role and I hope to have been of some use in supporting the discipline of legislative drafting.

John Mark Keyes
Ottawa, April 2024

Globalisation and Rule of Law Challenges for African Commonwealth Legislative Drafting

Estelle Matilda Appiah[1]

Abstract

This paper describes what legislative counsel face to draft legislation for the Rule of Law. It focuses on Constitutionalism, the cornerstone of the legislative process and discusses the interface of globalisation and domestic law. The paper features the problems legislative counsel encounter to draft legislation that is clear, concise and easily understood in furtherance of the Rule of Law. Good governance is the key to national development and legislative counsel have a duty to facilitate it. Defensive legislative drafting is discussed and proposals made to sharpen the skills of legislative counsel. This includes innovative steps to ensure that the highest standard of legislative drafting is maintained.

Table of Contents

[1] Legislative Drafting Consultant, Ghana. This paper was presented at the Commonwealth Association of Legislative Counsel Africa Region Conference, Mombasa Kenya, 23rd-25th October 2023.

Introduction

This paper highlights the challenges for African Commonwealth Legislative Drafting in the context of Globalisation and the Rule of Law, the theme for the Second Commonwealth Association of Legislative Counsel Africa Region Conference 2023. Specifically, it emphasises the importance of Constitutionalism as the foundation of the Rule of Law and highlights the impact of globalisation on a sovereign state. The requirements to be a competent legislative counsel, the challenges of this specialised area of legal practice and innovation in legislative drafting that includes social media and artificial intelligence are also considered.

Constitutionalism

> "Constitutionalism must beget good governance and good governance must manifest, reflect and echo the glory of constitutionalism."
>
> Professor Mike Ocquaye, Speaker of the Seventh Parliament of the Republic of Ghana.

The Constitution must have, as an overriding aim, the promotion of the unity and cohesion of the nation. Every action and recommendation of the Constitution must aim at contributing to the attainment of a better standard of living for the people. A Constitution, though a

political document, should be a developmental document that shifts from the politics of democracy to the economics of democracy, so it is used as the source of a better life.

The 1992 Constitution of the Republic of Ghana is a resilient foundation for good governance. It has been the basis of the independent institutions under the Fourth Republic and guides the evolution of the institutions of the nation towards peace, prosperity and a good life for the people. Under the Constitution, there have been successful presidential and parliamentary elections in furtherance of democracy.

A Constitution Review Commission was established on the 11th January 2010 as a post legislative scrutiny activity and its final report was submitted to the government on the 20th December 2011. On the Executive, the Commission made recommendations to clarify the appointing power of the President. The recommendations of the Commission related to the legislative arm of government aimed at strengthening that branch and making it capable of acting as an effective institution of governance.

The recommendations of the Commission on the Judiciary recognised the singular role of that branch as the final arbiter over disputes in the nation. The recommendations seek to reinforce the independence of the Judiciary, provide for the elaboration of rules, regulations and administrative processes that enhance quick and cheap access to real justice. These include making the Court of Appeal the final court in interlocutory matters.

Successive regimes since 2011 have acknowledged the need to amend the Constitution to meet the current development needs of the country. These attempts have however failed, due to the lack of bipartisan consensus.

Constitutional Principles for Legislative Counsel

Legislative Counsel in Commonwealth Africa must be particularly mindful of the following constitutional principles:

- that the Constitution is paramount and that the restricted power to amend the Constitution is deliberate to avoid the arbitrary abuse of power;
- the separation of powers is a powerful tool to ensure checks and balances;
- the limitation of legislative authority to avoid tyranny;
- the limited delegation of legislative power; and
- the protection of fundamental rights and freedoms.

Legislative Counsel in Africa should appreciate the necessity for a broad, liberal and purposive construction of the Constitution to take account of the dynamics of society and should avoid a strict, narrow, technical and legalistic approach to its interpretation.

Guiding Principles in the Ghana Constitution

The premier consideration for the preparation of any guiding principle for a policy that will ultimately end in legislation is the supreme law, the Constitution. The Constitution of the Republic of Ghana, which came into force on the 7th January 1993 provides the benchmark for good governance.

The aspirations in the Directive Principles of State Policy in chapter 6 of the Constitution provide for political objectives. The State is to cultivate respect for fundamental human rights and freedoms and the dignity of the human person, article 35 (4). It is incumbent on the State to prohibit discrimination and prejudice on grounds of place of origin, circumstances of birth, ethnic origin, gender, religion, creed and other beliefs, article 35 (5). Article 36 (1) on economic objectives justifies the right of persons to adequate means of livelihood, suitable employment, public assistance and maximum welfare. The State is to take appropriate measures needed to protect and safeguard the national environment for posterity, article 36 (9). Article 37 on social objectives guarantees protection and promotes basic human rights and freedoms that include the rights of the disabled, older persons, children and other vulnerable groups. These provisions provide a constitutional framework for the best interests of an individual.

The Constitution also establishes independent constitutional bodies: the National Development Planning Commission and the Commission on Human Rights and Administrative Justice, under articles 86 and 216. They are relevant to the realisation of basic human rights and social policy interventions.

Rule of Law

The UN Secretary-General has described the Rule of Law as

> a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated and which are consistent with international human rights norms and standards. It requires as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.

The checklist for the Rule of Law by Frank Emmert provides the following:

- no government action without a legal basis;
- all government action subject to fundamental rights and freedoms enshrined in the Constitution and the legal basis;
- reasonably clear and fair laws about all important areas of economic and state activity;

- educated and efficient administrations to apply the laws in a fair and consistent manner;
- independent and investigative media to report about government misconduct;
- educated and courageous citizens and attorneys to demand good governance;
- independent courts to provide checks and balances for the government and to protect the rights of citizens and minorities; and
- genuine enforcement mechanisms to stop government violations of the law and to provide compensation to victims.[2]

Application of the Rule of Law

Persons and institutions should be subject to law and disputes should be determinable by due process. In addition, human rights norms and standards should apply and the fundamental principle that the law is supreme and no one is above it should be clearly understood by all. In order to have effective checks and balances, there should be adequate reporting arrangements. An independent and investigative media should operate as a government watchdog and courageous citizens and lawyers should demand good governance. The judicial system should be free from political interference and independent courts should give reviewable decisions that are reasoned, published and enforceable.

Equality before the law should be manifested in law enforcement and there should be rule according to law, rule under law and rule according to higher law. Legislative counsel as keepers of the statute book should observe Rule of Law principles, good law, good lawyers and good institutions and the check list for the Rule of Law should be observed. Legislative counsel are in a unique position to apply these tenets.

The Rule of Law supports transparency. There should be open discussion of public policy issues and competitive processes for public sector appointments and procurement. It recommends that administrative decisions from which there is not appeal should be taken by more than one person and that legislative gaps should be identified and plugged.

Legislative counsel are most often the policy advisers for legislation in the justice sector. They are therefore well placed to make recommendations for the digitisation of legislation for example. Digitisation rules out manual systems and enables machine readable data. This removes the human factor to reduce the opportunity for corruption by intermediaries who offer facilitation to expedite service for a fee.

Legislative counsel are also well placed to prompt the preparation of subsidiary legislation for laws that pose corruption threats, such as for procurement. The lack of implementation

[2] Frank Emmert, "Rule of Law in Central and Eastern Europe" (2008), *Fordham International Law Journal* 551.

detail that is provided in regulations affords public officers the opportunity to abuse their discretion and be corrupt.

The key principles for the statute book to avoid corruption about which legislative counsel should be mindful, are accountability and transparency. There must be provision for the Rule of Law in drafted legislation and the assurance that there is proper use of executive power. In the preparation of legislation, legislative Counsel should advise instructing officers to avoid complicated rules that encourage short cuts and provide the opportunity for middlemen to act as intermediaries and facilitators for a fee, for example in the registration of land.

In order to combat corruption by a public officer, discretion in legislation should be curbed and sole decisions avoided. The decision-making responsibility should be split and team work should rather be encouraged. The watchdog role of civil society can play an effective role in the combat of corruption. Legislative counsel can recommend to an instructing officer that civil society be included in the membership of a board or among those to be present at a public hearing, such as when development plans are to be discussed. Whenever public hearings can be organised, they should be encouraged and supported by legislation.

The implications of conflict of interest should be clearly spelt out in legislation. Legislation should stipulate that public officers necessarily have fiduciary responsibilities role and must exercise a duty of care to identify, assess and manage possible conflict of interest.

Drafting Defensively for the Rule of Law

Legislative counsel are required to write defensively and to that end, the level or rank of a public employee should be stipulated in legislation. Similarly, the qualification of an individual should be stated. It is incumbent on legislative counsel to make sure that reporting relationships are adequate and that legislation is drafted clearly. In order to ensure that a chief executive is not given too much power, legislative counsel should make sure that subsidiary legislation is prepared and enacted to prevent the exploitation of weak systems because checks and balances are lacking. Legislative counsel should always be on the look out to improve transparency by providing for the disclosure of interest for example. A strategy for inclusion is to provide for public hearings and have open competitive behavior. Decisions taken by more than one person should be properly reported.

Legislative counsel are in a privileged position to advocate for good governance principles. These include the use of self-regulation whereby professional associations and disciplinary committees can enforce standards on corruption such as in the advertising industry. Instructing officers should be encouraged to inform sponsors to put in place Codes of Conduct where applicable, to maintain ethical standards. When the population is aware of their human rights that include the right to information, people can become the watchdogs for corrupt practices. To enable those convicted of corruption to be “named and shamed”.

The need for discretion to be curbed in the drafting of legislation is a *sine qua non* but what does that entail? Essentially, it means that it is necessary to

- state who can do what;
- state who will oversee;
- stipulate criteria;
- state justification is required for decision making;
- state that written reasons are to be given;
- stipulate procedure and require feedback;
- prevent arbitrary decision making; and
- specify timelines.

Accountability in legislation can take two forms. It may provide for upward accountability or may provide for downward accountability. Upward accountability is ongoing and enables an aggrieved party access to accountability measures. The aggrieved person is given the power of appeal to a higher authority and a decision of a junior person is subject to the review by a higher person.

Downward accountability is where accountability is to a body such as the shareholders at a general meeting or where accountability is to constituents. A similar situation is where accountability in a local government context is to the members of the local government community. Legislative Counsel should be familiar with both forms of accountability and provide for it in legislation to avoid corruption.

If legislative Counsel responsible for the statute book are to advance the Rule of Law and deal with its antithesis, which is corruption, they must draft defensively.

Challenges of Corruption for the African Legislative Counsel

The challenges of corruption in Ghana are many: embezzlement, misappropriation, diversion of public funds and bribery of government officials are some. The inflation of contracts, over invoicing and the abuse of sole source procurement contribute to the increased cost of doing business. Added to that, there is the lack of transparency. Patronage and nepotism lead to the abuse and misuse of office and there is the trading of influence and speculation. Corrupt practices lead to capital flight and hinder development. The impunity of corruption has led to poor examples for the youth, the future leaders and creates the impression that corruption is acceptable.

Legislation should require written decisions and there should be a rotation of personnel in offices where bribery may flourish, such as in a land registration office. These rotations should be standard, as should periods for tenure of office.

Good governance requires the exercise of political power through rules that are transparent and create accountable and participatory decision-making procedures. Legislative counsel should be involved in the review of legislation since they hold the key to statutes and are

best placed to carry out a gap analysis of anti-corruption legislation. It is incumbent on anyone concerned with the legal framework for anti-corruption to provide mechanisms for the enforcement of proceeds of crime legislation. Any opportunity to advocate for or provide for "naming and shaming" those convicted of corruption should be taken.

Sometimes legislative counsel, in their multiple roles, are asked to advise on legal education. In this regard, financial crime courses could be proposed that could include education about money-laundering, since legal practitioners are generally accountable institutions for the purpose of suspicious transactions.

Globalisation

The creation of the League of Nations and then the United Nations after the Second World War established the principle of global interconnection. Transnational connections cut across nation-state boundaries and create a web of people, networks and institutions. This has led to the decline of the nation state and its replacement of the globe as a single unit in the context of international standards to which state parties have made commitments. The world has become a global village and no country can cut itself off from the rest of the world.

We are told by C. Thomas in "Globalisation and the South" that globalisation "... refers broadly to the process whereby power is located in global social formations and expressed through global networks rather than through territorially-based states".[3] An example is that the climate cannot be compartmentalised, a global approach can therefore be the only way to deal with the challenge of climate change.

The world has become unified in the quest to deal with terrorism, the environment, pandemics, money-laundering and human rights. It has become a single society that functions together with universal common values and principles.

The United Nations has grown from 51 member States in 1945 to 193 today. Globalisation has led to the weakening of state sovereignty. Multinationalism is the trend, not isolationalism. International standards have led to the loss of legislative sovereignty for peace, security and the environment. The globalisation of law is an inevitable phenomenon. Legislative Counsel must be aware of the process to domesticate treaties in the interest of international co-operation.

Treaties

A treaty is an international agreement concluded between States. A multilateral treaty is between many States. A bilateral treaty is between two States. Treaty law is the branch of public international law that deals with treaties. Treaties cover an unlimited range of

[3] C. Thomas, "Globalization and the South", in C. Thomas and P. Wilkin (eds.), *Globalization and the South* (Houndmills, Basingstoke: Macmillan, 1997) at 6.

subjects in furtherance of globalisation. Some of these are climate change, international peace and security, human rights, children's rights, women's rights, the environment, finance, trade and delimitation of the ocean. States may express their consent to be bound, but consent to be bound internationally does not make a treaty enforceable domestically.

Agreements are used for bilateral treaties that regulate trade such as fisheries, visa abolition and extradition. They are also used for multilateral treaties relating to economic trade. The exchange of letters occurs where two documents constitute the agreement. A Convention is used for multilateral agreements. A covenant is used for a multilateral human rights agreement.

A non-binding treaty is often referred to as soft law. Non-binding treaties include declarations, resolutions, instruments and international standards. Sometimes a treaty may contain both binding and non-binding provisions.

The Vienna Convention on the Law of Treaties 1969 codified treaty law and provides meaning for terminology. Ratification refers to the signing, acceptance, approval and accession of a treaty and is an expression whereby States indicate consent to be bound by a treaty. Reservation is the term used when a State opts out of a provision in a treaty at the time consent is given. The Convention provides meaning for the entry into force and revocation amongst others.

Monism and Dualism

These terms are used to describe two different approaches to the relationship between international and national law. Monism accepts that internal and international legal systems form a unity. In a pure monist State, international law does not need to be translated into national law. Once a treaty is ratified it can be applied directly by a judge. The international law can be invoked on a citizen as if it were a domestic law. In a monist state, a judge can declare a national law invalid if it contradicts an international law that has been ratified. Pure monism dictates that international law takes precedence even if national law predates the international law. France, the Netherlands and Kenya are monist States.

Dualism emphasises the difference between international and national law. It requires the translation of international agreements into national law. Without the transformation, they have no legal force as law in a nation state. International law must be domesticated to be applicable in a national court. When a State accepts a treaty but does not domesticate it, it remains international law. Citizens will not be able to rely on it for domestic litigation. A national law that conflicts with the international law will continue to remain in force. The UK and most Commonwealth jurisdictions operate the dualist system. The principle of dualism is that by the transformation of a treaty, a State acknowledges the importance of international law and the loss of national sovereignty.

Transformation of Treaties

The Republic of Ghana follows the dualist approach for the transformation of treaties. Treaties are part of a separate system of law. Accordingly, a treaty to which the Republic has expressed its consent to be bound does not automatically become applicable within the country until it has been transformed. International law must be incorporated into the legal system to be effective.

The transformation of treaties in Ghana may take different forms. The legislation may provide that a convention with the force of law. Examples of this are the *Children's Act, 1998* (Act 560) based on the Convention on the Rights of the Child. Another is the *Juvenile Justice Act, 2003* (Act 653) based on the same Convention and the UN Standard Minimum Rules for the Administration of Juvenile Justice, the Beijing rules. Act 653 provides for a juvenile justice system, protects the rights of juveniles, ensures an appropriate and individual response to juvenile offenders and provides for young offenders.

The *Human Trafficking Act, 2005* (Act 694) is based on the United Nations Convention on Transnational Organised Crime, the Palermo Convention. The Republic of Ghana acceded to this Convention on the 21st August 2012. Although the accession had not occurred before the enactment of the law, it was closely followed. The Act prevents, suppresses and punishes traffickers in persons, particularly women and children. It also provides for the rescue, rehabilitation and re-integration of victims of the trade, though the Palermo Convention is its source, the text of the Act does not make any reference to it.

Legislation may refer to a convention but not set it out and may give effect to it by separate substantive provision, not by granting the Convention the force of law. This happened in the *Geneva Conventions Act, 2008* (Act 780). The articles of the 1949 Geneva Convention extensively defined the basic wartime rights of prisoners, civil and military, established protections for the wounded and established protection for civilians in and around a war zone and were incorporated in Act 780.

Legislation may also set out a convention in a Schedule but for information or reference purposes only, such as in the *Refugee Act, 1992* (PNDCL 305D).

In contrast, legislation may set out the Convention in a Schedule and endow it, or part of it, with the force of law. This occurred in the *West African Examinations Council Act, 2006* (Act 719). This Act gives legal authority to the regional examining body.

The Constitution of the Republic of Ghana provides for the execution of treaties in article 73 and states that the government of Ghana is to conduct its international affairs in consonance with the accepted principles of public international law and diplomacy in a manner consistent with the national interest.

Article 75 of the Constitution outlines the process for the execution of a treaty. Article 75 (2) makes it clear that Treaties, Agreements or Conventions executed by or under the authority

of the President must be ratified by an Act of Parliament or a resolution of Parliament supported by the votes of more than one-half of the members of Parliament after the requisite Cabinet approval. Advice must be sought from the Attorney-General and Minister for Justice, the principal legal adviser to the government, to determine the legal obligations of the Republic and determine if the Treaty, Agreement or Convention conflicts with domestic legislation. The process for the transformation of treaties in Ghana, can be found in the Republic of Ghana Treaty Manual.

Translating Policy into Law

The methodology used by legislative counsel to translate policy into a range of enforceable provisions that meet the requirements of the Rule of Law should involve a staged approach.

The first stage in the law-making process should be the analysis stage. Legislative counsel must understand the policy and proposals, carry out background research, clarify the instructions and initiate consultations to refine the policy and proposals.

The second stage is the design stage where legislative counsel advise on the practicability of the proposals and decide on the legislative approach in order to work out the legislative scheme and requirements to prepare the plan for the overall structure of the legislation. At this stage, the existing laws should be examined to determine if changes and reform are required.

The third stage will be the drafting of the legislative text followed by the revision and redrafting after consultations.

The fourth stage is the scrutiny stage where the draft will be checked for accuracy, certainty and consistency to remove errors of substance, ambiguities of syntax and expression. Through the stages of the legislative process, it is the responsibility of legislative counsel to be the manager. Legislative counsel lead the facilitation of the consultative workshops and ensure that deadlines in the legislative timetable are met.

Legislative counsel are best advised to recommend the pre-legislative scrutiny of the proposed draft by legislators to the sponsors and warn that the quality of the law can be compromised if it is rushed through the legislative process. The progress of the legislative text through the enactment process must be monitored and the inevitable changes throughout the consultative process must be incorporated in the text by legislative counsel. Tactically, expectations for the completion of the law should be lowered and then exceeded, though the ultimate fate of the drafted law is beyond the scope of legislative counsel. The sponsor pilots the Bill through the enactment process to obtain the approval of the executive for the Bill to be laid in Parliament, after which it proceeds through the legislative process and ultimately becomes law after it has been assented to by the President.

Legislative Drafting Rules

Legislative drafting principles on style are used for clarity of expression, directness and conciseness in language. Plain language use should be mindful of the audience and users of the legislative text. As regards composition, accurate legislative syntax and grammatically sound writing is required to avoid ambiguity.

Finding aids are used in the draft due to the fact that legislation on a given subject may be scattered. The law should make use of schedules that contain ancillary laws and technical provisions. A schedule enables a detailed list of information to be included such as existing laws which might otherwise be difficult to locate. Access to public information is generally a perennial problem in a developing country.

Responsibilities of the Legislative Counsel

The legislative counsel is responsible to ensure compliance with the form, procedure, substance, terms and human rights in the Constitution. It is the duty of the legislative counsel to ensure there is no challenge in court or Parliament with drafted legislation. It is the task of the legislative counsel to evaluate drafting proposals personally and be a defender of democracy. The legislative counsel should make government aware of flaws in the Constitution and should adopt terms from the Constitution. The legislative counsel should use the *Interpretation Act* and be conversant with the provisions on repeals and reprinting of Acts of Parliament amongst others. The legislative counsel should be wary of development partner conditions for legislation that become triggers for funding that may lead to dysfunctional transplanted laws which cannot be enforced. This is especially important since only enforceable laws should have a place on the statute book.

Qualities for a Good Draft Bill

A good draft Bill should assist to further the Rule of Law. The standard provisions used in legislation should be updated. The relevant existing laws should be considered and simultaneous collaboration should be encouraged through commentary circulation and feedback. It is the responsibility of legislative counsel to warn that the quality of a draft can be compromised if the law is drafted too quickly, effectively, there should be agreement between the parties as to the deadline for completion of the work. Similar legislation from other jurisdictions should be researched, but legislative Counsel are best advised not to "copy and paste" without careful analysis. Questions from the sponsor should be encouraged and the Bill should be revised constantly after stakeholder review. Legislative counsel should propose an advocacy strategy to the sponsors of legislation, particularly for controversial legislation. They should be mindful of the need for quality assurance supported by stakeholders and should arrange pre-legislative scrutiny to build consensus. Drafted legislation should avoid cross referencing and legislative Counsel should apply the IF/THEN formula in the drafting process to ensure a logical flow of the text.

A clear statement of policy is the foundation of a good draft law. There should be willingness of the policy maker to answer questions that provide for client management through communication with an identified focal person provided by the sponsor. Instructing officers should provide sufficient time for the drafting process. Legislative Counsel should state whether the drafting deadline can be met with honesty, lower expectation and then exceed it. They should welcome questions from the sponsor and determine if purposive ambiguity is required because enforcement is questionable in certain cases despite political expediency.

Use of Plain Language

Legislative Counsel should use plain language, keep the language simple and use ordinary, well written speech. The law should not be mystified. It should be made easy for people to understand and ensure deeper understanding of the text.

Plain language drafting mechanics require the use of short sentences and everyday words**.** Active verbs should be used, as they are more direct and a readable type size should be used with boldface section headings. The layout and spacing should be taken into consideration to avoid dense text and the draft should have coherent organisation.

Post-legislative Scrutiny

Post-legislative scrutiny, monitoring and evaluation is generally weak in the African Commonwealth. Legislative Counsel should be advocates for periodic law review especially as regards social policy legislation due to the dynamics of societal change and globalisation.

Challenges for Legislative Counsel

Poor legislative drafting instructions are the bane of legislative counsel. The lack of attention to detail by sponsors, stakeholders and the legislative counsel will lead to a poor end product. The failure of legislative counsel to accept criticism will affect the legislative output. Legislative Counsel must have the ability to think of the past, present and the future and must be prepared to deal with tight timelines and think of drafting defensively to prevent loopholes lawyers will try to exploit. It is sometimes difficult for them to decide what is substantial for a Bill, what should go into Regulations and what can be handled administratively. The shortage of lawyers trained in legislative drafting hampers legislative drafting in some African Commonwealth jurisdictions.

Pitfalls of Poorly Drafted Legislation

Judges struggle to interpret and apply poorly drafted legislation. Lawyers face challenges to use the law. Users with a desire to conform are confused. The law fails to achieve its intent and unforeseen results may follow. Defects in legislation lead to litigation and may not

accurately translate policy into law. Poorly drafted law can be ambiguous, lack clarity and may result in conflicting laws.

Ethics and the Code of Conduct for Legislative Counsel

Legislative Counsel in the African Commonwealth should be mindful of their ethical responsibilities as legal wordsmiths. In the first instance, there are the principles of constitutionalism and the Rule of Law. Next, there is the principle of public service. Legislative Counsel owe the public the highest quality of service. Those matured in the discipline should observe the principle of mentorship and where possible assist to hone the skills of new legislative Counsel. The principle of professionalism provides that Counsel should be apolitical, impartial and non-partisan. Legislative Counsel should observe the principle of outreach as stakeholder engagement is essential. The principle of confidentiality is relevant as regards government business and impending legislation on the basis of the "need to know" principle. Legislative Counsel must give ethical consideration to how to manage legislative drafting instructions that conflict with human rights in the Constitution or instructions that do not comply with the enactment process.

Social Media, the Legislative Drafting Context

Legislative Counsel should be responsible, diligent and careful in the use of social media. Legislative counsel should not have a relationship with a person or organisation on social media that may convey an impression of influence on the legislative counsel. There should not be any comments about an impending law on social media or on a controversial political topic by legislative counsel. They should exercise extreme caution when engaging in any type of electronic communication for private or official purposes. The mantra for legislative counsel for social media should be when in doubt, do not say it or write it.

Best practice rules for legislative Counsel on social media is that circumspection should be used because of the widespread transmission and permanence of that type of communication. Legislative counsel may use social media to follow a topic of interest but should be cautious when following or liking an advocacy group since this could affect impartiality. Legislative counsel should not engage in a private exchange by social media about legislation. As a means of communication social media is a good thing and an excellent reference tool but should be used with caution.

Training and Sharpening the Skills of the African Commonwealth Counsel

According to Justice V.C.R.A.C. Crabbe:

> "Legislative drafting is a discipline. It requires continuous training and experience. It demands hours and hours of concentrated intellectual labour."[4]

Justice Crabbe states the qualities of a legislative counsel. The person requires facility in the use of language, a critical, enquiring, imaginative and systematic mind and orderliness in the formulation of thoughts. Other qualities necessary are an ability to work with colleagues and people skilled in other disciplines. Self-criticism and self-editing of the highest standard are a must.

Legislative counsel should be well trained to draft legislation that is clear, precise and consistent. One method used to train legislative counsel is the system of apprenticeship. Though this may be an effective method of learning, it is not the swiftest. In African Commonwealth jurisdictions, the absence of legislative drafting mentors makes this form of training impracticable. Senior Counsel are generally overwhelmed with their own work and do not have sufficient time to teach on the job. A course in legislative drafting is a better option where theory is combined with knowledge of the practical skills needed for legislative drafting.

The attrition of legislative Counsel is a problem for the African Commonwealth. How to attract lawyers to legislative drafting and how to retain them is a challenge. Law graduates are not aware of legislative drafting as a viable career option. Legislative drafting offices are generally short-staffed. Some of the factors that contribute to this are the lack of properly structured offices and a career path for legislative Counsel. Under-resourced offices, poor remuneration and unsatisfactory terms and conditions of service are also factors.

Institutional strengthening

The development or enhancement of in-house training and mentoring and the use of legislative drafting style manuals and guidelines on the legislative process can contribute to the institutional strengthening of legislative drafting offices. Training government officials and instructing officers on legislative processes, policy development and the preparation of drafting instructions will also lead to improved output from legislative drafting offices.

The promotion and effective marketing of legislative drafting as a career will attract lawyers to the field. This will involve re-profiling legislative drafting as a viable career option to increase the number of professionals in the area. The creation of networks of legislative Counsel to facilitate the exchange of expertise, problems and experiences and the

[4] V.C.R.A.C. Crabbe, "Teaching Legislative Drafting: The Commonwealth Experience" (1998), 19 *Statute Law Review* 113.

organisation of regional conferences on legislative drafting will contribute to institutional strengthening. Internships in drafting offices in other jurisdictions will contribute to information sharing and sharpening the skills of the African legislative counsel.

Innovation in Legislative Drafting is the Future Focus: AI

There are advocates who recommend the introduction of computer technology and the use of templates in legislative drafting. In the African context, the Association of Legislative Drafting and Advocacy Practitioners has developed a software, LEGISCRIPTA, which is a legislative drafting software. The software applies a simplified method for the drafting of fresh and amendment Bills and other legislative documents and is also a legislative information management system. The software helps legislators produce and submit Bills and motions based on a template. It enables input and tracks progress. The question has been asked as to whether artificial intelligence can make Counsel redundant. The general conclusion is that as it is "rubbish in and rubbish out", it is not the machine that drafts the Bill. The skill of a competent legislative counsel will always be required. Technology is here to stay. The African legislative counsel must be strategic and innovative. Artificial intelligence should be used with circumspection to facilitate the work but has its limitations. The future prospects of artificial intelligence in natural language processing and data analytics must be acknowledged.

Conclusion

The satisfaction of being a legislative counsel is the knowledge that a law writer is key to the machinery of government. Legislative Counsel contribute to nation-building and national development. They enjoy the familiarity and interaction with decision makers at the highest level of government business and are rewarded by seeing a Bill drafted conclude as an Act of Parliament. They are in a unique position to provide advice on legislation by virtue of the fact that they are keepers of the statute book. The skill of legislative Counsel is indispensable to the Rule of Law and good governance. In the turbulence of African politics, legislative counsel must uphold the tenets of democracy by drafting laws that are based on the Constitution and in furtherance of the Rule of Law and human rights. Globalisation and national sovereignty must interface to ensure that no-one is left behind in the quest for national development. Legislative counsel are expected to draft legislation that is clear, concise and easily understood in furtherance of the Rule of Law. Legislative counsel in Commonwealth Africa must strive to get the balance right because

> "Laws too gentle are seldom obeyed, too severe, seldom executed."
>
> Benjamin Franklin 1706-1790.

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Confluence of Law Reform, Legislative Drafting and Legislative Development: Milestones and Challenges for Law Reform Institutions

Christine Agimba[1]

Abstract

The traditional mandate of Law Reform Commissions across most Commonwealth jurisdictions has been to keep the law under review and to ensure its systematic development and reform, including unification and codification of the law, the elimination of anomalies, the repeal of obsolete and unnecessary laws and generally its simplification and modernisation.

Most legislation establishing law reform agencies in Commonwealth jurisdictions do not require them to prepare draft bills to accompany reports. In most jurisdictions, law reform agencies are not formally mandated to draft legislation for government. In these jurisdictions, drafting of bills is seen as the preserve of a legislative drafting office that is part of government and usually drafts government-approved bills. Further, many law reform agencies do not have in-house legislative drafting resources.

Kenya Law Reform Commission (KLRC or the Commission) stands out as a law reform agency where the expertise arguably reflects a fusion of law reform and legislative drafting expertise. This paper highlights this unique mandate by reflecting on the experience of the KLRC, the milestones achieved and challenges it faces in the confluence between law reform, legislative drafting and legislative development.

[1] Chairperson, Kenya Law Reform Commission. This article was presented at the CALC Africa Conference held in Mombasa, Kenya, on 24th October 2023 and was written with the assistance of Rachel Osendo (Principal Legal Officer) and Rajab Mwachia (Legal Officer) of the Kenya Law Reform Commission.

Table of Contents

Introduction - What is law reform?

Laura Barnett reflects on the difficulty of defining law reform and ascertaining clear roles of various actors in the law reform process, when she observes the following:

> Seen from the perspective of non-governmental organisations, law reform can mean years of lobbying governments and politicians for change; seen from inside government, law reform may signify months or years of consultation, drafting bills, and holding one's breath for Parliament; seen from Parliament, law reform may mean a relatively simple examination and passage of a Bill or months of political haggling; from the perspective of the public, law reform may appear variously political, idealistic, long and drawn out or hasty. Law reform is all of these things.[2]

Although there may be no universally accepted definition of law reform, the term is broadly understood to mean "*improving the substance of the law in a significant way"*.[3]And this is necessary because laws become out of date, too complex, archaic, obsolete or simply out of touch with societal values and aspirations. A law that does not change to reflect realities is very likely to prove incapable of enforcement and hence encourages the use of illegal means to achieve the intended objects of that law.

The conceptualization of law reform as improving the substance of the law in a significant way differentiates changing the law in substance, which is considered law reform and

[2] Laura Barnnet, *The Process of Law Reform; Conditions for Success* (2011), 39 Federal Law Review 161, available at http://classic.austlii.edu.au/au/journals/FedLawRw/2011/6.pdf. This observation is supported by Kirsti Samuels in Samuels, Kirsti, *Rule of law reform in post-conflict countries: operational initiatives and lessons learnt (English),* Social development Papers – Conflict Prevention and Reconstruction (2006), no. 37 Washington, D.C.: World Bank Group, available at http://documents.worldbank.org/curated/en/537621468137719257/Rule-of-law-reform-in-post-conflict-countries-operational-initiatives-and-lessons-learnt where the author stated that rule of law reform is a term that covers a range of initiatives and projects, means different things to different organizations, and has ranged in content and focus over time.

[3]Commonwealth Secretariat (2017), *Changing the Law: A Practical Guide to Law Reform*, Commonwealth Secretariat, London, available at https://doi.org/10.14217/9781848599666-en.

changing it just in form, which is not. Mere change of law in form includes activities such as revision and consolidation.[4]

The lack of a universal understanding of the term law reform reflects the possible challenge of delineating the exact mandate of law reform agencies. Some law reform agencies are responsible for law revision while others are not. Some law reform agencies may prepare draft legislation or bills as proposals for reform, some do not.

Law reform is an integral part of legislative development process. The process of legislative development encompasses the entire lifecycle of legislation—from the initial conceptualization, through to discussions with policymakers, key stakeholders, and the public, to preparing the draft legislation for tabling to the legislature, and finally to its enactment, implementation and evaluation.

In highlighting the experience of the KLRC in discharging its law reform and related mandates, and some of the Commission's milestones and challenges, the intention is to develop an appreciation of the confluence of law reform, legislative drafting and legislative development.

However, this discourse is confined to the contribution of law reform institutions and legislative drafting offices to the development of legislation, and in relation to the process of developing the legislative proposals or draft bills for the amendment of existing law or for new law or subsidiary legislation before the bills are brought before Parliament and enacted into the law. It does not consider the function of a legislature in making laws, amending or repealing them.

KLRC: Mandate and Functions

The Commission was first established in 1982 through the enactment of the *Law Reform Commission Act*, Chapter 3 of the Laws of Kenya. Its mandate under section 3 of the now repealed Act was

> to keep under review all the laws of Kenya to ensure its systematic development and reform, including in particular the integration, unification and codification of the law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments and generally its simplification and modernisation.

The Commission operated as a department under the Office of the Attorney-General from 1982 to 2008 and was then placed under the then Ministry of Justice, National Cohesion and Constitutional Affairs until 2013. The Commission is now established under the *Kenya Law Reform Commission Act, 2013* (the KLRC Act).[5] As currently constituted, it exemplifies

[4] Ibid.

[5] No 19 of 2013, available at: https://www.klrc.go.ke/images/images/downloads/kenya-law-reform-commission-act-no-19-of-2013.pdf (klrc.go.ke).

what is known as a standard model of a law reform agency with the following key elements:[6]

(a) It is established as permanent statutory body, with the primary mandate to keep all law in Kenya under review and make recommendations for its reform.[7]

(b) It comprises of a full-time Chairperson, both full-time and part-time members/ commissioners. There is a Secretary to the Commission, who is also the chief executive officer with responsibility for the day-to-day operations of the Commission.[8]

(c) It is not subject to the direction or control of any person or authority in the performance of its functions, which secures its intellectual independence from government and other interests.[9]

(d) It receives most of its funding from the government.[10]

The functions of the Commission are set out in Section 6 of the Act:

6. Functions of the Commission

(1) The Commission shall —

(a) keep under review all the law and recommend its reform to ensure—

(i) that the law conforms to the letter and spirit of the Constitution;

(ii) that the law systematically develops in compliance with the values and principles enshrined in the Constitution;

(iii) that the law is, among others, consistent, harmonized, just, simple, accessible, modern and cost-effective in application;

(iv) the respect for and observance of treaty obligations in relation to international instruments that constitute part of the law of Kenya by virtue of Article 2(5) and (6) of the Constitution;

(v) that the public is informed of review or proposed reviews of any laws;

[6]Above n.3 at 29. The Guide notes that most Commonwealth law reform agencies are 'classic' or standard model law reform agencies, established by statute. An alternative is the institute model, established by agreement between legal interests and stakeholders. The institute model is found at the state or provincial level in parts of Australia and Canada.

[7]Section 6(1)(a) of the *KLRC Act*.

[8] Ibid. Section 8 sets out the composition of the Commission.

[9]Section 33 of the *KLRC Act* provides that except as provided for under this Act, the Commission shall, in the performance of its functions, not be subject to the direction or control of any person or authority."

[10]Section 28 of the *KLRC Act* provides for the funds of the Commission.

(vi) that it keeps an updated database of all laws passed by Parliament and all laws under review.

(b) work with the Attorney-General and the Commission for the Implementation of the Constitution in preparing for tabling, in Parliament, the legislation and administrative procedures required to implement the Constitution;

(c) provide advice technical assistance and information to the national and county governments with regard to the reform or amendment of a branch of the law;

(d) upon request or on its own motion, undertake research and comparative studies relating to law reform;

(e) formulate and implement programmes, plans and actions for the effective reform of laws and administrative procedures at national and county government levels;

(f) consult and collaborate with State and non-State organs, departments.

The primary function of the KLRC is to keep the existing law under review and make recommendations for law reform, which is similar to most conventional law reform commissions in the Commonwealth. However, various functions discharged by the Commission arguably entail the drafting of Bills or preparation of legislative proposals. The KLRC, in line with its stated statutory functions, makes recommendations or proposals for the reform or amendment of national or county government legislation that are formulated as legislative proposals in the form of a draft bill or regulations.

A comparative analysis through a cursory sampling of the mandate and functions of various law reform agencies in the Commonwealth suggests that there is a varied experience about this. The Law Reform Commission of Hong Kong does not draft legislation because this is the exclusive mandate of the counsel employed as legislative drafters of the Law Drafting Division.[11] The Ghana Law Reform Commission is established to promote law reform in Ghana and may prepare draft legislation as proposals for reform.[12]

Although none of the Australian Law Reform Commission's statutory functions include legislative drafting, the Commission contributes to broader legal policy development through preparing draft legislation where specifically required by the terms of reference in individual inquiries.[13] The recently revived Law Commission of Canada is silent on issue of drafting legislative proposals.[14] The Zambia Law Reform Commission, on the other hand, is

[11]How Legislation is Made in Hong Kong; A Drafter's View of Legislation, available at: https://www.doj.gov.hk/en/publications/pub20030008.html

[12] Section 1 of the *Law Reform Commission Act, 1975*,

[13]Overview of Roles and Functions https://www.alrc.gov.au/publication/first-submission-to-the-inquiry-into-the-australian-law-reform-commission/2-role-governance-arrangements-and-statutory-responsibilities/overview-of-role-and-functions/

[14] See *Law Commission of Canada Act*, SC 1996, c. 9 The commission was first created as an independent body in 1971 to provide advice on law reform to the Canadian government. It was shuttered in 1992 as a

established to promote law reform in Zambia and may prepare draft legislation as proposals for reform.[15]

Experience and milestones

During the five-year period following the promulgation of the Constitution of Kenya in August 2010, the KLRC collaborated with the Office of the Attorney General under the coordination of the now defunct Commission for the Implementation of the Constitution to prepare, for tabling in Parliament, the laws required to be enacted with set timelines under the Fifth Schedule to the Constitution.[16]

This constitutional mandate was buttressed by the provisions of the KLRC Act which required the Commission to "work with the Attorney-General and the CIC in preparing for tabling, in Parliament, the legislation and administrative procedures required to implement the Constitution".[17]

In collaboration with other actors, the Commission played a critical role in developing the specific laws listed under the Fifth Schedule to the Constitution and other laws necessary for the implementation of the Constitution as a whole. This resulted in the development and enactment of legislation to support the reform of laws in the various sectors, to ensure that they are aligned to the Constitution, including: electoral reforms; land reforms; judicial reforms; governance and public sector reforms; education reforms; health reforms; devolution reforms; and the establishment of constitutional commissions.[18]

In collaboration with the key actors and stakeholders, the KLRC is proud to be associated with Kenya`s broader legislative development. The Commission has assisted and continues to assist government ministries, state departments and agencies with the development and review of their respective legislative frameworks

- to align them with the Constitution;
- in the development of legislation towards realization of Kenya's Vision 2030; and
- in the review and reform of laws and regulations to support the implementation of the national and county governments' development agenda.[19]

cost-saving measure. It was then revived with a new mandate in 1996 following the enactment of the *Law Commission of Canada Act*. Its budget was not renewed in 2006 and hence it was closed again. The Commission was surprisingly revived again in 2023.

[15] *Zambia Law Development Commission Act*., Act 11 of 1996, available https://www.zambialaws.com/consolidated-statutes/principal-legislation/zambia-law-development-commission-act.

[16] Pursuant to Clause 5(6) (b) of the Sixth Schedule of the Constitution.

[17] Section 6(1)(b) of the *KLRC Act*.

[18] See Annual Reports of the Commission for the Implementation of the Constitution and the KLRC.

[19] See Annual Reports of the KLRC.

It is evident that the Commission (as it did when discharging the joint responsibility of preparing legislation required to implement the Constitution for tabling before Parliament) engages in the formulation of legislative proposals and draft bills when providing advice and technical assistance on law reform issues to the national and county governments.

The Commonwealth Secretariat's guide to law reform recognizes that there is a significant advantage to a law reform agency when preparing a bill to reflect its recommended changes to the law.[20] A draft bill accompanying a law reform agency's report boosts the implementation of the agency's recommendations.[21] This is because those considering the report will have to consider not only the report, but also the draft legislation that reflects the proposals.[22] This enables the law reform agency to give a complete package to the government to consider, and begin the process of implementation of the proposed legal reforms.[23]

This experience has seen the Commission develop considerable capacity and expertise in legislative drafting and to use these skills in the formulation of legislation and drafting of bills as part of the law reform process. The fusion of law reform and legislative drafting skills and expertise allows the Commission's officers to use a legislative drafter's approach in discharging its mandate.

However, the KLRC also makes use of well-established law reform methodologies in the review of law, and in providing advice and technical assistance on law reform matters. The officers of the Commission are expected to consider the guiding principles, parameters and processes set out in the KLRC Act and best practices in law reform in discharging its mandate[24].

These include undertaking comprehensive research, receiving, collating and analyzing views, preparing the necessary issues paper, discussion paper and eventually a report outlining the proposed recommendations for reform and the reasons underlying those recommendations.[25] Any review of the law must be alive to the prevailing and emerging socio-economic realities and implementation challenges surrounding the legislation under review.[26]

This also entails consultation and collaboration with the institutions responsible for policymaking and consultations with key stakeholders. The intellectual independence that

[20]Aboven.3 at 146.

[21]Ibid.

[22]Ibid.

[23]Ibid.

[24]See Section 3 and 6 of the KLRC Act.

[25]A Guide to Legislative Drafting in Kenya https://klrc.go.ke/index.php/reports-and-publications/562-a-guide-to-the-legislative-process-in-kenya .

[26]Ibid.

the Commission exercises, and which is protected under section 33 of the *KLRC Act*, does not exclude wide consultation with stakeholders, including the government and other interests. Emeritus Professor Croucher observed the following on the importance of consultation in the law reform process:

> By always starting our inquiries with questions, never answers, it gives a message of openness and amenability to listening—of independence of mind—not being seen to be aligned with, or an advocate for, any particular viewpoint. For a law reform agency, the outcome should never be known until the process has been worked through. This openness facilitates securing stakeholder engagement. This is so important when extensive public involvement in law reform is crucial to the integrity of the process—it is the *sine qua non* accepted among institutional law reform bodies internationally—because it is a demonstration of independence of mind.[27]

The Professor further emphasized that independence from the executive should be expressed through consultation as follows:

> Intellectual independence does not mean we snub our noses at government. Having a good and open relationship with the relevant departments and relevant Ministers is important. Regular communication is sensible. Ensuring there are no surprises for Government is a different concept entirely from taking direction, which is anathema to independence.[28]

Stakeholder consultation and public participation are a key cornerstone of policy and legislative development processes as prescribed by the Constitution[29]. Kenyan courts have declared laws unconstitutional for want of public participation.[30] The law reform process entails making sure that the public is informed of any review or proposed reviews of any laws.

Confluence of law reform and legislative drafting in legislative development

The Parliamentary counsel or legislative drafter, on the one hand, and the law reform counsel, on the other, play distinct roles in the legislative development process. The former are lawyers with special skills in preparing drafts of legislation to be passed into law by the legislature. The responsibility of the legislative drafter is to transform government policy into legal provisions and is concerned not only with the technical aspects of law but also with the substantive aspects of law.

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[27]Emeritus Professor Rosalind Croucher AM, Law Reform Agencies and Government-Independence, Survival and Effective Law.Reform?https://www.law.uwa.edu.au/__data/assets/pdf_file/0004/3090568/CHAPTER-5.pdf

[28]Ibid.

[29] Article 10 of the Constitution.

[30]See for example Jimi Wanjigi & another v Inspector General of Police & 3 others [2021] eKLR.

The aim of legislative drafting is to ensure that the public has legislation that is well drafted, readable, understandable, and capable of being implemented. As Crabbe puts it, the output of the legislative drafter is "a law that has a beneficial effect for the audiences that are subject to the law's demands".[31]

Law reform, in contrast, may be seen as the process by which proposed changes in the law are attempted or accomplished as part of the process of examining existing laws, advocating and implementing change in a legal system. The aim is to improve the quality of the law, with the view of enhancing justice, improving quality of life or efficiency.[32]

A law reform counsel is required to undertake well-grounded research, comparative studies to inform the review of law. The law reformer engages state and non-state actors interested in the reform of law and to deliberate, in a consultative way on policy issues and policy considerations. They can guide the policy-making agency in considering what aspects of the policy should be anchored in law. After all, the translation of policies into law will often require the review or examination of existing legislation and making recommendations for its reform – whether it's an overhaul, replacement, repeal and amendment. While legislative drafters are reluctant to engage in policy discussions, it is safe to say that law reform sits at the intersection of policy and legislation.

The confluence of the efforts of those tasked with law reform and those tasked with drafting legislation contribute greatly to legislative development. These efforts come together or merge to ensure that policies are translated into law and in the development of legislation by which the government will implement its political and policy agenda.

Both the legislative or drafting counsel and the law reform counsel in Kenya share a concern for the development of quality law and improving the quality of existing law. Ultimately, the concern is to have quality legislation that is in conformity with the Constitution, existing legislation and legal principles and that is capable of effective implementation.

In undertaking law reform and supporting legislative development, the Commission has found that legislative drafting skills are critical for drafting legislative proposals and bills in discharge of its functions. When a law reform agency houses the wide range of skills necessary for legislative development, good quality legislative proposals and draft bills formulated to support proposals for reform of national or county government legislation should be expected. This then complements the efforts of legislative drafters and parliamentary counsel resulting in better quality legislation.

[31]Justice V.C.R.A.C. Crabbe, The Role of Parliamentary Counsel in Legislative Drafting. (2000, United Nations Institute for Training and Research (UNITAR) Document 1).

[32] Above, n. 3.

The experience of the Commission firmly attests to the transformative aspects that a law reform institution plays in legislative development and contributes to the advancement of a nation's cultural, social-economic, governance and democratic space.

Some challenges

KLRC has observed a few challenges which impede the legislative process in Kenya generally, and the effective discharge of the Commission's mandate in particular. Both law reform institutions and legislative drafting offices experience budgetary and human resource constraints. And just as there is a recognized shortage of legislative drafting personnel, there are capacity constraints for law reform agencies generally, which affects the ability to ensure timely development of quality laws. With the demanding responsibility for keeping all law under review and to meet the high demand by the national and county governments for advice and technical assistance on matters related to law reform, the KLRC does not have adequate capacity to prioritize critical work. This is compounded by the lack of adequate funding to implement its law reform programmes.

Law reform counsel need to develop a wide range of critical skills and competencies to properly undertake their roles and discharge the functions of law reform institutions. While most law reform institutions will train their counsel in legislative drafting, there is scant regard to training on the nexus between public policy and law, global perspectives, research and comparative analysis, to mention a few areas.

In addition to specialized training, law reform counsel can build the necessary skills and competencies through in-house training, knowledge-sharing and the sharing of best practices in law reform through regional and international networks. This helps to mitigate the risk of those responsible for law reform shifting focus from key aspects in their roles as law reform counsel. Expertise in legislative drafting should not overshadow the other key skills that law reform counsel should master in order to be accomplished in law reform.

The KLRC has also observed that absence of a streamlined and collaborative approach to policy development may impede law reform, legislative drafting and the legislative process generally. Critical law reform initiatives are handled through government taskforces set up to review and make recommendations for the reform of policy, institutional, legal and regulatory frameworks for various emerging issues. These reviews aim to address gaps in policy or legislation, challenges in implementing the law and the alignment of laws to the political and priorities of the government of the day.

Inadequate policies and sometimes non-existent policies in key areas can compromise the direction, pace and quality of law review, reform and legislative development initiatives. It is well acknowledged that formulation of policy should ideally precede the formulation of legislation. In practice, much legislation is developed or drafted without an underlying policy. Addressing this problem requires enhanced collaboration and cooperation between all actors in the policy formulation and legislative process. Aware of this challenge, the

Commission seeks to cure this by promoting a streamlined and collaborative approach to law reform and legislative development generally.

Conclusion

If it is agreed that the common goal of the development of legislation is to meet the aspirations and needs of the citizen, it is important to foster an appreciation of the synergies required to ensure the development of a robust legal framework for any country.

A discussion on the future of legislative drafting should include a discussion that recognizes the differences and similarities between the roles of law reform institutions and legislative drafting offices. The blurred lines should not result in the unnecessary conflating of the objectives of law reform and legislative drafting.

This entails a deliberate awareness of the convergence of roles of law reform agencies and legislative drafting offices; of the importance of developing a collaborative approach to law reform and legislative drafting processes in legislative development; and adopting measures to promote a seamless and streamlined approach to legislative development. Better outcomes in legislative development can be achieved when each actor clearly performs their distinct roles in the process.

A jurisdiction within a jurisdiction – Drafting in the Qatar Financial Centre

Terry Kowal[1]

Abstract

The Qatar Financial Centre (QFC) is a free zone for financial services established in Qatar as a hybrid jurisdiction which has its own legal framework in some areas, but which also sits within the overall legal framework of the state of Qatar. Drafting financial services legislation in this context poses some challenges and the complex and specialist nature of the financial services industry also drives the style and structure of the rules that regulate it. This article looks at the legal framework of the QFC and the challenges that poses for the drafter of the rules regulating the financial services industry in the QFC and touches on some of the stylistic and structural aspects of those rules.

Table of Contents

Introduction

The regulation of financial services is a complex and esoteric area. In many jurisdictions, the regulatory rules are to be found in layers of primary legislation, secondary legislation

[1] Legislative Counsel, Qatar Financial Centre Regulatory Authority. Former Senior Legislative Counsel in the Office of the Legislative Counsel in Cardiff, Wales and Parliamentary Counsel in the Scottish Government Parliamentary Counsel's Office.

and rules made by quasi-government regulatory bodies established by statute (such as the Financial Conduct Authority (FCA) and Prudential Regulation Authority (PRA) in the UK or the Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC) in the United States). Other countries have established distinct free zones for financial services companies; separate jurisdictions in a designated area of the country with their own private law and a government-established regulator with legislative power to regulate the financial services industry within that mini-jurisdiction (the Dubai International Finance Centre (DIFC) and its regulator the Dubai Financial Services Authority (DFSA) are a good example of that model). Another option is a hybrid system whereby a free zone is created with limited power to differentiate from the private law of the state in which it is established (for example, in areas such as contract and the creation of bodies corporate) and a separate regulator of financial services with legislative powers but which nevertheless sits within the overall legal framework of the state. The Qatar Financial Centre and the Qatar Financial Centre Regulatory Authority are an example of this hybrid model (sometimes referred to as an "onshore financial centre"). Drafting legislation for the regulator in this kind of hybrid system presents some particular challenges.

What is the Qatar Financial Centre?

Established in 2005, the Qatar Financial Centre (QFC) is a free zone for financial services business and other associated business. As a free zone, it has its own regulatory regime, tax system and employment laws and, unlike in the State of Qatar itself, firms established in the QFC may be wholly owned by non-Qataris and all profits may be repatriated offshore.

The QFC is administered by the Qatar Financial Centre Authority (QFCA)[2] which is the body responsible for licensing all firms established in the QFC and for administering the tax system. Licensed firms who provide financial services in and from the QFC are further regulated by the Qatar Financial Centre Regulatory Authority (QFCRA).[3] A licensed firm may only carry out financial services activity[4] if it receives authorisation from the QFCRA to do so. The QFCRA is responsible for the legislation regulating financial services activity within the QFC.

There are currently over 1600 licensed firms in the QFC. The majority are not authorised to carry out regulated activities and they provide professional services or business support services. There are 65 authorised firms including branches of some of the globally systemically important banks such as Citibank, JP Morgan, Bank of China, Barclays,

[2] Home | Qatar Financial Centre (QFC).

[3] https://www.qfcra.com/.

[4] Referred to in State Law No. 7 of 2005 as "*regulated activities*", that term being further defined in the Financial Services Regulations as any activity specified in Part 2 of Schedule 3 to the Regulations and carried on as a business. The Financial Services Regulations also confer power on the QFCRA to declare an activity as a regulated activity in rules.

Deutsche Bank, Sumitomo and UBS. The banking sector alone in the QFC administers over QAR60bn[5] of assets under management.

Unlike general commercial free zones such as the Qatar Free Zones Authority (QFZA) near Hamad International Airport (HIA) and Hamad Port, or Jebel Ali in Dubai, the QFC is not a physically defined area. QFC licensed firms can locate their offices anywhere in Doha provided it is within a location designated by Qatar's Council of Ministers as a location from which a QFC licensed firm may operate. Most QFC licensed firms operate from one of a number of office towers in the business district of West Bay.

Government and legislation in Qatar and the QFC

The State of Qatar is a constitutional monarchy although article 59 of the Constitution expressly states that power is vested in the people of Qatar.[6] The current Constitution, which came into force in 2005, grants legislative authority to the Al-Shoura Council. The Al-Shoura Council is Qatar's legislature, comprising 45 members (two-thirds elected and one-third appointed). It approves laws to be enacted by the head of State, the Emir. The Emir does have executive power to refuse to enact a law approved by the Al-Shoura Council, but if the Council resubmits a refused law to the Emir, he is constitutionally bound to enact it (subject to a very limited power to temporarily postpone its effect). The executive branch is headed by the Emir who appoints a Council of Ministers, each of whom heads a government department.

The QFC is established by State Law No. 7 of 2005 (the establishing Law).[7] That law also established the QFCA and QFCRA and conferred power on those bodies to make legislation in the form of regulations. Those regulations must be approved by the Minister of Commerce and Industry and, in the case of QFCRA regulations, the full Council of Ministers.

In general, regulations deal with matters relating to the operation of the QFCA or QFCRA or they flesh out matters dealt with in the establishing Law, such as providing more detail as to what constitutes regulated activity which must be authorised by the QFCRA. Regulations may also confer power on the two bodies to make rules which are approved by the respective boards of directors of the bodies. Rules are intended to make more detailed provision on a particular topic. In the case of the QFCRA, the rules contain the detailed provisions regulating particular types of financial service[8] or regulating specific aspects of any financial service business.[9] However, the dividing line between what may be contained

[5] QAR60bn is equivalent to about £13.5bn or US$16.5bn.

[6] https://www.gco.gov.qa/wp-content/uploads/2016/09/GCO-Constitution-English.pdf

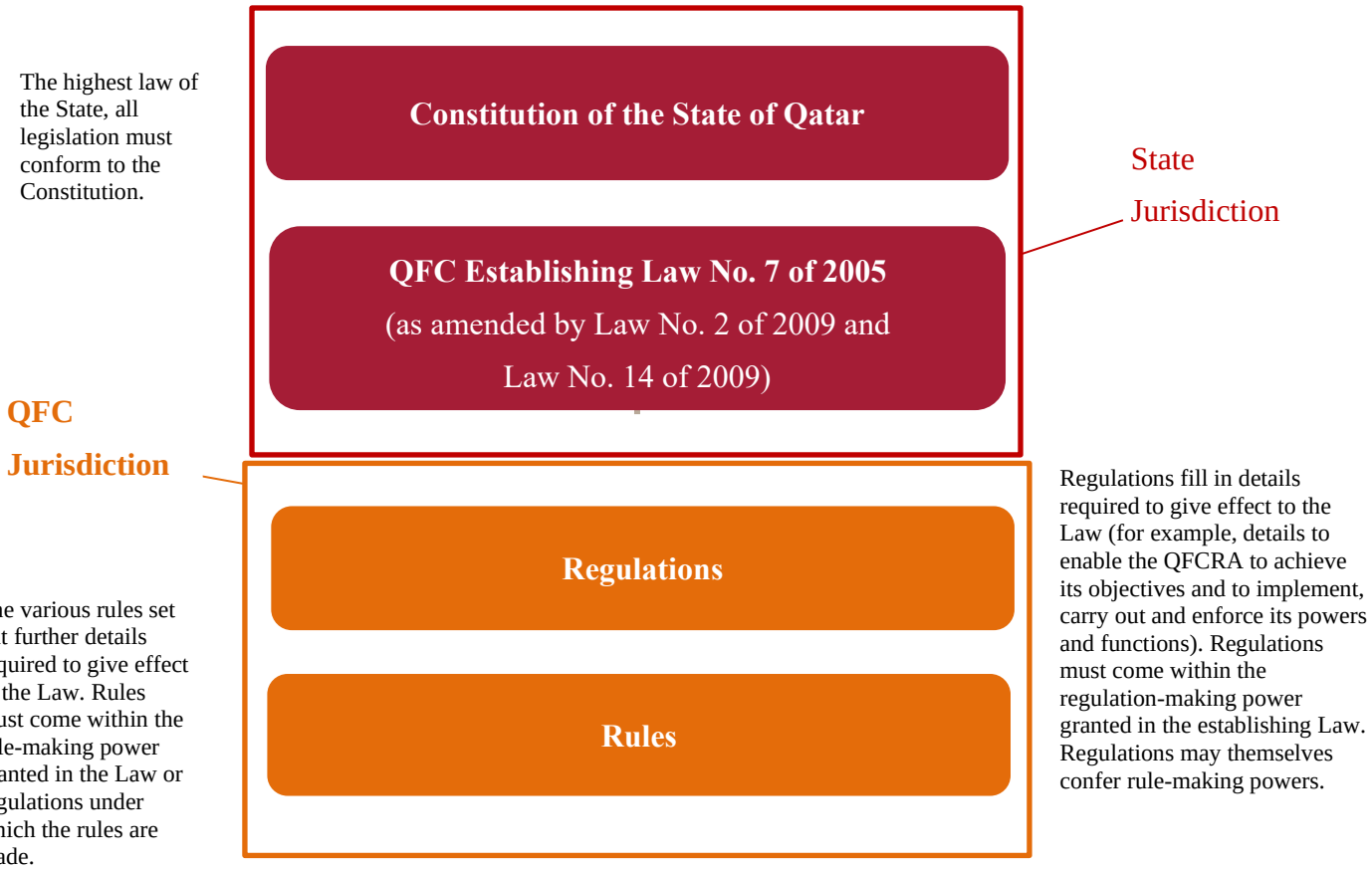
[7] https://qfcra-en.thomsonreuters.com/rulebook/qfc-law-no-7-year-2005

[8] For example, banking, insurance or investment management.

[9] For example, consumer protection or anti-money laundering.

in regulations and what may be in rules is not precise. The vires for both are widely drawn so it can often be a matter of judgement for the drafter as to what is appropriate in the circumstances.[10]

The hierarchy of legislation in the QFC looks like this:



Rules are separated by topic, each of which is referred to as a Rulebook. Rulebooks can be amended by making amending instruments, also in the form of rules. The drafting office of the QFCRA is responsible for the maintenance of the QFC statute book online[11] and the QFC legislation website contains up-to-date consolidated versions of all regulations and Rulebooks.

The QFC as a separate jurisdiction

The QFC is treated as a separate jurisdiction, at least to a certain extent. The establishing Law provides that, to the extent that a QFC licensed firm is regulated, supervised and

[10] It is also fair to say that practicalities factor into it. Given the workload of the Council of Ministers, getting regulations approved by that body can be a drawn-out process, so there is often a practical advantage in making rules rather than regulations.

[11] QFC Legislation | Rulebook (thomsonreuters.com)

subject to enforcement procedures under the Law and regulations and rules made under it, that entity is not subject to State Laws in so far as they cover the same ground.[12] It is also worth noting that while all State laws are drafted in Arabic as per State Law No. 7 of 2019 with an unofficial English translation provided, QFC regulations and rules are drafted in English.

The establishing Law also expressly provides for any contracts, transactions and other arrangements entered into between QFC licensed firms, or between a QFC licensed firm and an entity established in the State, to be governed by the establishing Law and QFC regulations and rules (although the parties are permitted to agree otherwise).[13]

But the status of the QFC as a separate jurisdiction is limited. It applies only to those matters which are legislated for by the establishing Law or by regulations or rules made by the QFCA or QFCRA. For example, there are QFC regulations about whether a QFC licensed firm can own real estate outside of certain designated locations but the law relating to ownership of real property (whether or not in a designated QFC location) remains the State law (i.e. procedures for transfer and registration of title etc.). The drafter of QFC regulations or rules which touch on areas also affected by State laws must bear that in mind.

The establishing Law also expressly provides that the criminal law of the State applies in the QFC.[14] Neither the QFCA nor the QFCRA have powers to legislate to create criminal offences, although civil enforcement regimes can be, and are, created as part of the regulation of financial services activity in the QFC.

This can cause difficulties for the drafter of QFC legislation. For example, legislation about real estate investment trusts may have to take account of State laws relating to land ownership by corporate entities. The drafter must therefore be aware of the effect of such laws - not always an easy task when English translations of State laws are not always provided or are not necessarily accurate. I am personally very grateful for the assistance of my Qatari colleagues when these situations arise.

Similarly, conduct which may lead to enforcement procedures being carried out by the QFCRA against a person (for example, unlawful selling of financial products) may be of such a serious nature that it amounts to criminal activity under the laws of the State.[15]

[12] See Article 11(4) of Law 7/2005.

[13] Article 18(3) of Law 7/2005.

[14] Article 18(1) of Law 7/2005.

[15] In this scenario civil proceedings in the QFC Tribunal are stayed until the criminal proceedings in the State courts are completed. Of course, it is quite possible that the two sets of proceedings lead to different outcomes on the same facts due to the differences in the underlying law and rules of evidence, burden of proof etc.

Disputes in the QFC come under the jurisdiction of the Qatar International Court and Regulatory Tribunal (QFC Court and Tribunal).[16] These are courts and tribunals set up specifically for the jurisdictions of Qatar's free zones. They are separate from the State court system and are presided over by a mixture of Qatari judges and judges from various jurisdictions around the world.[17]

The QFC is said to be a common law jurisdiction whereas the State of Qatar is a civil law jurisdiction with its foundation in Sharia Law. The style of legislation in the State is therefore quite different to that in the QFC. It is less detailed and often less structured (in the sense of not breaking up the legislation into thematic divisions). In most cases it is necessary to look at the underlying implementing regulations that are made in relation to any State law, as they will tend to fill in some of the gaps.

A common law jurisdiction?

Although the QFC holds itself out to be a common law jurisdiction (it is described as such in the marketing materials produced by the QFCA promoting the QFC as an investment destination), there is nothing in the establishing Law or in subordinate legislation stating this to be the case. The QFC has become a common law jurisdiction through a process of general acceptance that QFC legislation is drafted on the principles of the common law of England and Wales, and the QFC Court and Tribunal make judgements on that basis.[18]

However, this principle is limited by the fact that the QFC Court and Tribunal are Qatari Courts and will take account of provisions of relevant State law and conditions in Qatar – a point made clear by Lord Thomas in *Prime Financial Solutions LLC v QFC Employment Standards Office*.[19]

[16] The Court has jurisdiction over civil disputes between QFC licensed firms and between a QFC licensed firm and a person outside the QFC (e.g. an individual or company in the State). The Tribunal has jurisdiction over civil disputes between a QFC licensed firm and either of the QFC Authorities (the QFCA and QFCRA).

[17] The current President of the QFC Court is the former Lord Chief Justice of England and Wales, Lord Thomas of Cwmgiedd.

[18] The common law of England developed over centuries. It is generally thought to have originated as a legal system in the Middle Ages, mostly following the Norman Conquest of 1066 and continued to be developed primarily by judges until the late 19th century. The law of England was established in Wales by the Laws in Wales Acts of 1535 and 1542.

[19] *Prime Financial Solutions LLC v QFC Employment Standards Office* [2022] QIC (A) 1 at [29], quoting from *Chedid & Associates Qatar LLC v Said Bou Ayash* [2015] QIC (A) 2 at [18]: "QFC Regulations set out detailed codes of employment law and general contract law. Some of the provisions reflect principles of common law, but in many respects conditions in Qatar differ markedly from conditions in England and other common law countries. Where an issue is governed by a QFC Regulation, the correct approach is to apply that Regulation according to its natural meaning and having particular regard to conditions in Qatar. Foreign jurisprudence can sometimes be of assistance, but it should be used sparingly as a last and not a first resort."

Having said that, Lord Thomas' final judgement in *Prime* rests heavily on the analysis of the meaning of "good faith" in *Street v Derbyshire Unemployed Workers Centre*,[20] a decision of the Court of Appeal of England and Wales.

Contrast this with other free zones that purport to be common law jurisdictions. In particular, the Abu Dhabi Global Markets (ADGM) has regulations expressly stating that the common law of England and Wales (including the principles and rules of equity) and certain UK statues form part of the law of the ADGM.[21]

This is not the approach generally taken in the QFC. For example, the QFC *Contract Regulations 2005*[22] are a codified contract law based on the contract law of England and Wales but not expressly incorporating it.

There is one exception where QFC law has expressly incorporated the law of England and Wales. Article 8 of the *Trust Regulations 2007* reads as follows—

> ARTICLE 8 - COMMON LAW AND PRINCIPLES OF EQUITY
>
> (1) The common law of Trusts and principles of equity applicable in England and Wales supplement these Regulations, except to the extent modified by these Regulations or any other Regulations.
>
> (2) The statute law of England and Wales applicable to Trusts does not, except to the extent it is replicated in these Regulations, apply in the QFC.[23]

It is not clear why Article 8 of the *Trust Regulations 2007* was drafted as it is. Particularly when the rest of those Regulations form a fairly comprehensive code of trusts law broadly based on the law of England and Wales. QFC regulations have at times been drafted by private law firms on a contractual basis rather than by specialist legislative drafters. It is fair to say that this has led to some inconsistencies in approach and may explain why Article 8 (and especially the wholly superfluous paragraph (2)) was included in this instance. In defence of the drafter (for paragraph (1) at least), it may have been thought that, in order to incorporate the principles of equity, express provision to that effect was required.

Working in the QFCRA

The QFCRA is a small organisation with around 100 staff. This consists of supervisors who oversee and monitor the various financial institutions authorised to operate in the QFC, enforcement staff who are responsible for any civil enforcement action taken by the QFCRA (as well as any legal proceedings taking place outside the QFC jurisdiction which involve

[20] [2004] EWCA Civ 964; [2005] ICR 97.

[21] Application of English Law Regulations 2015.

[22] Contract Regulations 2005 | Rulebook (thomsonreuters.com).

[23] https://qfcra-en.thomsonreuters.com/rulebook/article-8-common-law-and-principles-equity.

the QFCRA), support functions (such as IT, HR and finance) and an advisory legal team led by the QFCRA's General Counsel.

Policy-making responsibility falls to a small policy team of between 3 and 4 policy specialists. The Legislative Counsel's Office sits in the same department as the policy team; currently we comprise one Legislative Counsel from the UK (me) and one from Qatar. We have also recently recruited a second Qatari drafter who is training with us, and we contract out some drafting work to 2 former holders of the Legislative Counsel posts in the QFCRA.

We primarily draft QFCRA rules, that is the detailed legislation which regulates financial services activity carried out in and from the QFC. We may also become involved in drafting QFC regulations although there remains a practice within the QFCA to contract out drafting work on their regulations to private firms. In an effort to bring more coherence and consistency to the QFC statute book, we are trying to reduce that tendency but, as ever, available resources and timing demands can get in the way of our best intentions.

Instructions are received directly from the policy team, with input from the General Counsel's office where specific legal issues arise. Sometimes the instructions are a comprehensive set of written instructions, at other times they may be in the form of a draft consultation paper or internal discussion paper. We may even be involved in the production of such a paper at the early stages of policy development.

Characteristics of drafting in the QFC

Specialist audience

QFCRA rules regulate the provision of financial services in and from the QFC. As such, the audience for the rules is the firms who provide those services and their clients. It is a specialist and technical field and, while we aim to use the plainest language possible to convey the intended meaning in our rules, we must bear in mind that the plain language of the investment banker, for example, is quite different from the plain language used by a person on the Clapham Omnibus (or Doha Metro).

For example, see Division 6.3.B of the *Banking Business Prudential Rules 2014*.[24] These provisions tell banks that are not in the business of writing options contracts how to calculate the charge to be levied on their capital to account for options risk – that is the risk of holding positions on options contracts.[25] As you can see, this is referred to as the

[24] https://qfcra-en.thomsonreuters.com/rulebook/bank-division-63b-simplified-approach.

[25] Under these Rules, Banks are required to hold a certain amount of capital to cover various categories of risks to their business. Part 6.3 of Chapter 6 of the Rules is about calculating the amount of capital that needs to be held to cover the risk from having positions on options contracts. That calculation is different depending on whether the bank, as part of its business actually writes options contracts (i.e. issues them to other entities) or simply buys options contracts but does not write them.

"simplified approach" because banks that are in the business of writing options are subject to a different and more complex calculation:

Division 6.3.B Simplified approach

6.3.3 Using simplified approach

A banking business firm that does not write options must calculate capital charges in accordance with:

(a) rule 6.3.4 for a position that is a 'long cash and long put' or 'short cash and long call' position; or

(b) rule 6.3.5 for a position that is a 'long put' or 'long call' position.

Guidance

In the simplified approach, the position in the option and the associated underlying asset (cash or forward) is not subject to the standard method. Instead, each position is carved-out and subject to a separately calculated capital charge for specific risk and general risk.

Note As a general rule, the standard method is used to measure market risk—see rule 6.1.3.

6.3.4 Capital charges—'long cash and long put' or 'short cash and long call'

(1) For a position that is 'long cash and long put' or 'short cash and long call', the capital charge is calculated by multiplying the market value of the underlying security by the sum of the specific and general risk capital charges for the underlying, and then subtracting the amount by which the option is in-the-money (bounded at zero).

Guidance

1 In cases (such as foreign exchange transactions) where it is unclear which side is the underlying security, the underlying should be taken to be the asset that would be received if the option were exercised. In addition, the nominal value should be used for items if the market value of the underlying instrument could be zero (such as in caps, floors and swaptions).

2 Some options have no specific risk (such as those having an interest rate, currency or commodity as the underlying security); other options on interest-rate-related instruments and options on equities and stock indices, however, would have specific risk.

(2) In the simplified approach, the capital charge is:

(a) 8% for options on currency; and

(b) 15% for options on commodities.

(3) For options with a residual maturity of less than 6 months, a banking business firm must use the forward price (instead of the spot price) if it is able to do so.

(4) For options with a residual maturity of more than 6 months, the firm must compare the strike price with the forward price (instead of the current price). If the firm is unable to do this, it must take the in-the-money amount to be zero.

6.3.5 Capital charges — 'long put' or 'long call'

(1) For a position that is 'long put' or 'long call', the capital charge is the lesser of:

(a) the market value of the underlying security multiplied by the sum of the specific and general risk capital charges for the underlying; and

(b) the market value of the option.

(2) For subrule (1) (b), the book value of the option may be used instead of the market value if the position is not included in the trading book (for example, options on particular foreign exchange or commodities positions).

Despite this being the simplified approach, there would not be many outside of the world of investment banking who would understand terms such as "*long cash and long put*", "*short cash and long call*" or "*in-the-money*" (nor indeed some of the terminology in the guidance; such as "*swaption*"). Yet these terms are left undefined because the audience for the provisions are the investment bankers responsible for managing a bank's options contracts. Anyone working in this part of the financial services industry knows what these terms mean. If they don't then they should not be in the business of managing options![26]

Another example is the use of the word "*haircut*" in various places in the same Rules. Again the word is undefined, but it does not refer to what happens when you take a trip to your local barbershop!

The task for the drafter is to ensure that they understand these specialist terms and they are satisfied that the ordinary meaning in this context will be understood by the intended audience. This is where the policy team and, in particular, the specialist supervisory teams, can be a great help. For example, the banking supervisory team are in daily contact with the banks in the QFC and have a deep understanding of the terminology used by people working in the industry.

Size of the audience

The QFC is not a large jurisdiction. As mentioned above, there are over 1600 licensed firms and of those, only 65 are authorised financial services firms. Those authorised firms can then be further categorised by the services they provide (banks, insurers, investment advisors etc.) and there is little overlap between those categories.[27]

With that in mind, we are very conscious that each of our Rulebooks are read by relatively small numbers of people and that these people often only have a need to look at a small number of Rulebooks.[28] Therefore, we try to ensure that each Rulebook is drafted so that it can be understood in isolation. At the creation of the QFC the Interpretation and Application Rules 2005 set out some interpretation rules that apply across all QFCRA rules, including a list of defined terms, but over the years we have sought to reduce reliance on that Rulebook

[26] It is worth noting that the wording of these provisions is derived from the Bank for International Settlements' Basel Committee on Banking Supervision's Minimum capital requirements for market risk (see paragraph 40.76 at page 118, Minimum capital requirements for market risk (bis.org)). Similar wording is used in legislation in numerous jurisdictions that have implemented the Basel standards.

[27] For example, none of the QFC banks also provide insurance services.

[28] For example, it would be wise for all QFC authorised firms to be familiar with the Anti-Money Laundering and Combating the Financing of Terrorism Rules 2019 (other than certain insurance firms who have a separate rulebook on these topics). Equally the *General Rules 2005* and *Governance and Controlled Functions Rules 2020* have general application to QFC authorised firms. But only insurance businesses have any need to look at the *Insurance Business Rules 2006*, only those setting up professional investment funds and those investing in them need look at the *Professional Investors Fund Rules 2022*, and only non-Islamic banks need look at the *Banking Business Prudential Rules 2014* (there is a separate Rulebook for Islamic banks – the *Islamic Banking Business Prudential Rules 2015*).

and, if time and resources allow, we aim in the near future to make the necessary amendments to render it completely redundant; at which point it will be revoked.

Sometimes the audience for a particular policy is so small that there is little point in crafting a detailed legislative provision to cover it because the QFCRA supervisors can simply contact the firms to which the proposed policy may apply and advise them directly. For example, we are changing the rules for insurance businesses that are closing down certain aspects of their business. One possibility for such insurers would be to transfer the business to another type of entity but this raises a number of transitional issues. Our supervision team have told us that there is only one firm who could ever choose to go down this route and they are unlikely to do so. So, rather than spell out the transitional details in the rules, we propose to make a general provision to allow for this process subject to the insurer transitioning in accordance with guidance or advice given by the QFCRA.[29] In reality, our supervisors would just meet with the business and talk them through the necessary steps.

Determining the style of legislation

Being a small drafting office with a very small number of drafters passing through our doors since 2005 means the style of QFC legislation has largely been determined by one or two people. The first Legislative Counsel of the QFCRA was a former head of the Australian Capital Territory Parliamentary Counsel's Office and former Chief Parliamentary Counsel of Queensland. Subsequent Legislative Counsel have also hailed from Australia. It is therefore no surprise that the style of QFCRA rules broadly follows a modern Australian style. This includes things that those of us from a UK background might regard as highly innovative, such as embedded explanatory notes, examples and guidance and even two-sentence provisions.[30] This is an example of all 4 in a single relatively short rule in the *Banking Business Prudential Rules 2014*[31]—

4.5.4 Obtaining capital relief

(1) To obtain capital relief, the CRM technique and every document giving effect to it must be binding on all parties and enforceable in all the relevant jurisdictions.

Example

When accepting eligible financial collateral, a banking business firm must ensure that any necessary legal procedures have been followed, to ensure that the collateral can be enforced.

Note Under rule 4.2.2, a firm's credit risk management policy must establish effective credit risk administration to monitor documents, legal covenants, contractual requirements, and collateral and other CRM techniques.

(2) A banking business firm must review the enforceability of a CRM technique that it uses. The firm must have a well-founded legal basis for any conclusion about enforceability, and must carry out further reviews to ensure that the technique remains enforceable.

[29] Note that there is no prohibition on sub-delegation within the QFC scheme of legislation and there are broad powers for the QFCRA to give guidance (Article 17 of the *Financial Services Regulations*).

[30] Although that technique is sometimes utilised by the brave drafter in a UK office.

[31] BANK 4.5.4 Obtaining capital relief | Rulebook (thomsonreuters.com).

Guidance

A banking business firm should consider whether independent legal opinion should be sought on the enforceability of documents. The documents should be ready before the firm enters into a contractual obligation or releases funds.

(3) The effects of a CRM technique must not be double-counted. The firm is not allowed to obtain capital relief if:

(a) the risk-weight for the claim or asset is based on an issue-specific rating; and

(b) the ECRA that determined the rating had taken the technique into consideration in doing so.

We expressly state in our Rulebooks that notes are explanatory and not part of the rules and that examples are non-exhaustive and may extend but cannot limit the meaning of the rules to which they relate. In addition, Article 17(4)[32] of the *Financial Services Regulations* states that any guidance is indicative of the view of the QFCRA at the time at which it is given.[33] However, there has yet to be an occasion where the QFCRA has changed its view on a matter on which there is guidance in the rules without amending the guidance itself. To do so would lack transparency and it is a pitfall we have so far managed to avoid.

Separate explanatory notes are not produced, nor does the QFCRA tend to produce separate guidance documents.

I have found the availability of these techniques to be useful aids in bringing clarity for the reader, although I expect that I employ them more sparingly than my antipodean predecessors. It will be interesting to see whether that changes over time.

Legislative process

QFCRA rules are approved by the QFCRA's Board at one of the Board's quarterly meetings. The rules will state the date on which they come into force.[34] There are no amending stages, so it is imperative that the drafter gets things right in the draft submitted for Board approval. However, there is a statutory duty to consult on draft rules[35] and the QFCRA's Board members can, and do, comment on the draft rules both prior to the consultation period and in the period between the end of the consultation and the submission of rules for final approval. So there is a reasonable opportunity to make improvements and corrections to a draft after the initial complete draft of an instrument has been prepared.

[32] https://qfcra-en.thomsonreuters.com/rulebook/article-17-guidance

[33] Note also that guidance is highlighted to make it easy to distinguish from the operative text.

[34] Customarily that day is the first day of the month next following the Board meeting at which the rules were approved. Although there is no express prohibition in the enabling powers on making retrospective rules, this has never been done and, in the absence of express power to make retrospective provision, the ability of the QFCRA to do so is questionable to say the least.

[35] See Article 15(4) of the *Financial Services Regulations*.

Other advantages and disadvantages

In common with most drafting offices in smaller jurisdictions there are advantages and disadvantages of scale.

We work very closely with our policy team. We are generally involved in policy development from an early stage. Physically they are only a couple of desks away, so it is easy to discuss things. This is also true of our supervisory teams. If we need to find out how things really operate on the ground, we can ask one of the teams that sit around the corner.

And the size of the jurisdiction also means that it is relatively easy to have a dialogue with stakeholders. Some of them are in the same building and none of them are far away. When draft rules are out for consultation, we know who the main interested parties are, and we may contact them directly to discuss the proposals. Indeed, the policy team may do this at an earlier stage when they are formulating policy, especially on larger and more impactful reforms.

On the other hand, the size of the jurisdiction does not mean our rules are necessarily less complex or less comprehensive. The QFC is intended to be a regime that operates to the highest globally recognised standards and, as such, our legislation must meet the standards set by various international bodies.[36] Hence our Banking Business Prudential Rules run to nearly 350 pages with the Islamic Banking Business Prudential Rules being 100 pages longer still. Both are likely to expand by another 200 pages or so in the near future in order to maintain adherence with the most recent recommendations from the Bank for International Settlements' Basel Committee on Banking Supervision and the Accounting and Auditing Organisation for Islamic Financial Institutions.

Maintaining a statute book that is comparable with larger jurisdictions such as the EU and the United States is challenging given the size of our team and the ambitions of our Chairman and Board to have a comprehensive regulatory regime for all aspects of financial services. But it is a challenge that keeps us occupied and keeps the work interesting.

[36] The main standards setting bodies are—

BIS (the Bank for International Settlements) and especially its Basel Committee for Banking Supervision in relation to banking,

IAIS (the International Association of Insurance Supervisors) for insurance,

FATF (the Financial Action Task Force) in relation anti-money laundering and countering terrorist financing,

IFSB (the Islamic Finance Standards Board) and AAOIFI (the Accounting and Auditing Organisation for Islamic Financial Institutions) in relation to Islamic finance, and

IOSCO (the International Organisation of Securities Commissions) in relation to investments in securities.

Despite the challenges it is a very pleasant and collaborative working environment and, although it can be unbearably hot in the midsummer, we have year-round sunshine to keep us happy!

California Legislation and Defined Terms

Chris Micheli[1]

Abstract

This article discusses practices for drafting definitions in legislation, particularly in relation to the State of California in the United States. It outlines the reasons for drafting definitions and provides examples of the various types in the legislation of that State.

Role of Definitions

Defined terms can play an important role in any legislation. Defining words or phrases is done to provide the reader of the legislative or statutory text with clear guidance regarding how those words or phrases are to be interpreted and applied in the context of that specific text. When legislative counsel defines a term in a legislative text, the defined word or phrase must be used in that same manner throughout the entire text of the statute.

In California bill drafting, when there are multiple defined terms, they are most often found near the beginning of the statutory provisions. This is because of the view that this approach makes definitions easier to find for the reader and instructs the reader how these words or phrases should be used when reading the remainder of the statutory provisions. On the other hand, in some jurisdictions, such as the United Kingdom, definitions are often placed at the end of the legislation pursuant to their parliamentary drafting practice.

According to the Training Materials used in the Athabasca University's Graduate Diploma in Legislative Drafting Program, "essentially, definitions can perform two different functions: *labelling* and *stipulating*."[2] A labelling definition's purpose is to allow the term to

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[2] See *Training Materials on Legislative Drafting*, Module 5, Section 4 – How do we draft interpretation provisions? These materials are produced by the Commonwealth of Learning and available on its website at https://www.col.org/projects/legislative-drafting/.

be used instead of a longer sentence that sets forth the definition repeatedly throughout the legislative text. A stipulating definition's purpose is to provide a specific meaning for the defined term or phrase as it is to be used in the legislation.

Drafting Definitions

For purposes of drafting definitions in legislation, legislative counsel are to follow the drafting guidelines of their respective jurisdiction, but much of this area is common among other jurisdictions. Counsel generally develop definitions in the planning stage of preparing legislation to draft when they anticipate certain words or phrases will need to be defined, as well as when they are actually drafting because they have determined that a definition would help explain a word or phrase used in the legislative text.

In some legislation, there is an entire definitions section, such as Assembly Bill 1712 (Irwin) in the 2024 California Legislative Session, which often begins with an introductory phrase such as:

> *For purposes of this chapter (or act, or section), the following definitions apply: …*

Another example from California law is:

> *For purposes of this article, the following terms have the following meanings: …*

Thereafter, the word or phrase is defined, with that word or phrase in quotation marks according to California's drafting style. In some jurisdictions, boldface or italics are used instead for the word or phrase that is being defined. In most jurisdictions, including California, the word or first word of a phrase is not usually started with a capital letter (unless it is a proper noun) and does not include a definite ("the") or indefinite ("a" or "an") article.

What are the types of definitions commonly found in legislation in this state? A comprehensive definition includes a complete statement of what the defined term means. It is concise and includes the entire definition. An example in California law (*Public Contract Code* Section 22351) might be:

> *(b) "Contractor" means an individual, business, or other entity doing business with an agency.*

An enlarging definition is intended to extend the usual definition of a word. An example in California law (*Business and Professions Code* Section 26001(m)) might be:

> *(k) "Commercial cannabis activity" includes the cultivation, possession, manufacture, distribution, processing, storing, laboratory testing, packaging, labeling, transportation, delivery, or sale of cannabis and cannabis products as provided for in this division.*

Another example from California law might be:

> *(p) "Delivery" means the commercial transfer of cannabis or cannabis products to a customer. "Delivery" also includes the use by a retailer of any technology platform.*

A common example from California law might include the phrase "includes, but is not limited to," such as the following:

> *(c) "Protective hairstyles" includes, but is not limited to, such hairstyles as braids, locks, and twists.*

An excluding definition is used to remove something from the usual meaning of a word or phrase. An example in California law might be: "*"Employer" does not include a religious association or corporation not organized for private profit.*" A similar example from California law might be:

> *(f) "Essential functions" means the fundamental job duties of the employment position the individual with a disability holds or desires. "Essential functions" does not include the marginal functions of the position.*

A referential definition utilizes a defined term in another area of statutory text by specifically referring to that particular definition and where it is found in the law. An example in California law might be:

> *(a) "Agency" has the same meaning as in subdivision (b) of Section 1798.3 of the Civil Code.*

As a general rule of legislative drafting, for a comprehensive definition, legislative counsel should use the word "means." The word "includes" does not create a comprehensive definition. Also, counsel should never use the phrase "means and includes". In addition, a definition is usually not required to merely repeat a dictionary definition. Judges expect a definition to be needed when the common dictionary term is not being used.

Definitions of words and phrases play an important part in statutes, particularly where these words or phrases are not used in their common, ordinary manner, such as may be found in a dictionary.

Book Review

The Legal Singularity: How Artificial Intelligence Can Make Law Radically Better

by Abdi Aidid and Benjamin Alarie: University of Toronto Press, Toronto, 2023

Reviewed by Anna Logie[1]

In their recently published 226-page book, *The Legal Singularity: How Artificial Intelligence Can Make Law Radically Better*, Canadian authors Abdi Aidid and Benjamin Alarie provide an interesting framework for future discussion and elaboration on the growing topic of designing ethical and human-centric AI in the legal sphere.[2] Importantly, the book includes analysis of the current and potential future impacts of AI on drafting, interpreting and applying legislation. Both authors are professors at the University of Toronto Faculty of Law with backgrounds working in the area of artificial intelligence, machine learning and legal prediction.

The authors argue that legal information has moved through three eras, from the analogue/paper-based era to the digital era to the emerging computational era in which large amounts of legal data can be synthesized efficiently. They further argue that, due to accelerating advances in AI, societies are on a trajectory towards the "legal singularity", defined as a future state of law which would be fully comprehensive and predictable, with legal uncertainty being resolved quickly and accurately. The authors are of the view that "[i]n some ways, civil codes represent an early aspiration to implement a system that can readily provide a guide for answering legal questions, without recourse to the case-by-case analysis demanded by the common law method" (p. 15).

> "Realizing a stable, safe, and normatively desirable legal singularity will require deliberation, experimentation, wisdom, knowledge, and the cumulative efforts of governments, academia, and industry over the coming years." (*The Legal Singularity*, p. 24).

The three goals of the book are: (1) to popularize the concept of the legal singularity in the popular imagination, (2) to highlight the ways in which technology-based changes to legal systems are already happening and are accelerating, and (3) to join the emerging international movement to secure the most safe and responsible path to the legal singularity, mindful of the risks and potential unforeseen consequences of AI. *The Legal Singularity* is a thought-provoking, future-oriented book that also takes the time to consider and suggest approaches to solving some of the most common AI-related concerns, including the concern

[1] Legislative Counsel, Legislation Section, Department of Justice Canada. Any views expressed are my own and not those of the Department of Justice Canada.

[2] As noted by Professor Guzyal Hill and legislative counsel Matthew Waddington in relation to the fast-changing area of AI and the law, "CALC members must be in tune with the new developments to ensure creation of ethical and human centric AI, with as many voices as possible being heard while the systems are being built": *CALC Newsletter* (December 2023), Commonwealth Association of Legislative Counsel, p. 23. Online: https://www.calc.ngo/sites/default/files/newsletter/2023%2004%20CALC%20Newsletter%20-%20December%202023.pdf.

that it could mirror and exacerbate existing biases in a way that is disguised due to automation bias, the cognitive tendency to believe in technology's objectivity (Chapter 5: Defending the Legal Singularity from its Critics; Chapter 9: Towards Ethical and Equitable Legal Prediction).

I particularly enjoyed Chapter Eight: Implications for Government, which explored possible uses of AI in government such as adopting AI-powered tools to draft legislative rules and to make more precise predictions about the consequences of those rules (pp. 177-178). The authors even suggest that, decades in the future, it could be possible for legislators to vote on which scenarios predicted by AI-tools they intend to capture with a new bill. In this futuristic scenario, they contend, at least two approaches could be taken using the data collected: 1) "the system could generate a draft text for the law, which would have all the specificity of a rule with all the accuracy of a standard", after which the text could be amended as needed and then voted on, or 2) the data itself could be voted on and "the results of the votes themselves, as data, could become the law" (p. 177). The authors also explore some concerns with this approach, including that it could lead to less room for judicial creativity to deal with exceptional cases (p. 178).[3] However, in my view, the authors do not go far enough in assessing the feasibility or desirability of this approach and its potentially profound implications for our legal system and for the rule of law. I hope that this area will be analyzed further in the future.[4]

The Legal Singularity is a great resource for CALC members and anyone interested in learning more about the projected impacts and opportunities of the computational era. Whether one views the futurist vision of *The Legal Singularity* as bright, dark, or somewhere in between, it is a book that raises important questions for our time. The book's key insight – that AI will not just change the content of specific laws, but the general nature of the law – is sure to spark discussion for years to come.

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[3] See also Chapter 6: Implications for the Judiciary.

[4] For articles discussing some of the opportunities and limits of AI (and Rules as Code) in relation to legislative drafting, see for example Matthew Waddington, "Machine-consumable legislation: A legislative drafter's perspective – human v artificial intelligence", *Loophole*, Commonwealth Association of Legislative Counsel (June 2019). Online: https://www.calc.ngo/sites/default/files/loophole/Loophole%20-%202019-02%20%282019-06-24%29.pdf; Guzyal Hill, "Legislation for AI, Legislation with AI: Round No 1 ChatGPT v Australian Law Council", *Loophole*, Commonwealth Association of Legislative Counsel (December 2023). Online: https://www.calc.ngo/sites/default/files/loophole/Loophole%20-%202023-03%20%282023-12-09%29.pdf.

Book Review

Drafting, Interpreting and Applying Legislation

by John Mark Keyes and Wendy Gordon: Irwin Law, Toronto, 2023

Reviewed by Anna Logie[1]

An exciting new resource on legislation was published in 2023. In *Drafting, Interpreting, and Applying Legislation*, John Mark Keyes and Wendy Gordon bring their years of experience and insight to lay out, in a logical and concise manner, the modern life cycle of legislation from drafting to interpretation to application. Both authors had extensive and distinguished careers as legislative drafters, with John Mark Keyes serving as legislative counsel at the Department of Justice Canada, culminating in the position of Chief Legislative Counsel, and Wendy Gordon serving as legislative counsel at the Department of Justice Canada and at the House of Commons, culminating in the position of House of Commons Deputy Law Clerk.

At 133 pages (excluding Annexes and endnotes), *Drafting, Interpreting, and Applying Legislation* is an excellent guide for those seeking a birds-eye view of how primary and delegated legislation are made, interpreted and applied. It is one of eight books in the "Understanding Canada" series, a collection of books designed to provide a comprehensive and accessible understanding of Canada's constitutional political and legal institutions.

The book is divided into two parts. Part 1 discusses the process of drafting and enacting legislation. Chapter 1 provides the definition and purposes of drafting and describes a number of good drafting practices, including in relation to languages, form and word choices, and the importance of understanding legislative policy and considering legal effectiveness. Chapter 2 provides a very helpful window into how legislation is drafted in practice, including a description of drafting offices and parliamentary drafting offices and the general drafting processes for primary and delegated legislation. Chapter 3 describes how draft primary and delegated legislation are made into law.

> "Legislative drafting is about imagining the future, but this is a challenging task, especially in a complex and constantly changing world" (*Drafting, Interpreting, and Applying Legislation*, p. 68).

Part 2 of the book discusses how legislation is interpreted and applied. Chapter 4 describes what legislation is used for and why it is sometimes difficult to understand, as well as the role that legislators and courts play in that context. Chapter 5 offers an overview of the evolution of drafting and interpretive practices over time. Chapters 6, 7 and 8 delve into three aspects of modern legislative interpretation (text, context and purpose). The last chapter, Chapter 9, discusses how legislation is applied, including temporal and territorial aspects as

[1] Legislative Counsel, Legislation Section, Department of Justice Canada. Any views expressed are my own and not those of the Department of Justice Canada.

well as the application of legislation to state entities. In the two annexes, the book includes resources from the Uniform Law Conference of Canada.

I particularly enjoyed reading *Drafting, Interpreting and Applying Legislation* as it touched on drafting topics that have gained increased prominence in recent years. For example, it includes discussion of

1) COVID-19-related legislation (as an example of the increasing complexity of the matters legislation addresses),

2) the drafting of amendments at committee stage and related challenges, and

3) Indigenous legal traditions, Indigenous languages, and the UN Declaration on the Rights of Indigenous Peoples.

Although the book's focus is on Canada's system of written laws, the drafting processes and interpretive principles it describes come largely from the traditions of England which are pursued throughout the Commonwealth (with the notable exception of the drafting processes and interpretive principles in relation to the *Civil Code* of Quebec). It is a book that stands out for its comprehensiveness and accessible writing style and it is well worth reading, including by legal practitioners, law students, and public servants.