THE LOOPHOLE

The Newsletter of the Commonwealth Association of Legislative Counsel (CALC)

DECEMBER 1997

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Please ensure that a copy of this issue is circulated to each CALC member in your jurisdiction

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The Loophole is the newsletter of the Commonwealth Association of Legislative Counsel established on 21 September 1983 in the course of the 7th Commonwealth Law Conference held in Hong Kong.

The constitution of the Association provides for an elected Council. The present Council consists of :

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This issue is published on behalf of the Association by the Law Drafting Division, Department of Justice, Government of the HKSAR - editor : Duncan Berry; assistant editor : Jeffrey Gunter.

Editorial Note

On 1 July 1997, the People's Republic of China resumed the exercise of sovereignty over Hong Kong. However, for the next 50 years at least, Hong Kong will continue to operate under the English common law and statutes and subsidiary legislation will continue to be prepared and enacted in accordance with procedures that are the norm in the rest of the Commonwealth. This means that Hong Kong legislative counsel have a continued interest in retaining their links with the Commonwealth and in particular with the Commonwealth Association of Legislative Counsel.

Although Hong Kong is of course no longer a member of the Commonwealth, Hong Kong legislative counsel who were members of CALC before 1 July 1997 continue their membership because of the decision taken at the last triennial general meeting of the Association held in Vancouver in 1996. The Association also passed a resolution allowing legislative counsel from non-Commonwealth countries to become associate members of the Association. Because these gestures will facilitate the continued involvement with the Association of Hong Kong members of the Association, they are very much appreciated.

Duncan Berry
Editor

A message from the President of CALC

Welcome to this bumper issue of *The Loophole*! I would like, on behalf of the Council of the Association, to thank the Law Drafting Division of the Hong Kong Department of Justice for undertaking the preparation of this issue. In particular, I thank Tony Yen, the Law Draftsman for Hong Kong, for graciously agreeing to this task being undertaken and for contributing to this issue. Special thanks are due to Duncan Berry who produced it and to Jeffrey Gunter who assisted him.

It is, of course, most appropriate that this issue should emanate from Hong Kong, given the resumption of the exercise of sovereignty by China earlier this year. This issue has a considerable Hong Kong "flavour", and many of the matters discussed will strike chords in other jurisdictions.

Some of the matters raised in this issue will no doubt prompt responses, which we hope will be able to be published in a future issue. They may be sent to the Secretary of the Association, Edward Caldwell, in London.

The Loophole is the principal means by which members of the Association can keep in contact, and we welcome news about members from all parts of the Commonwealth for publication in future issues.

The suggestion in the article by Robert DuPerron that legislative paralegals should have a forum and access to *The Loophole* will, I think, be very warmly welcomed by members of the Association. The interests of legislative counsel and legislative paralegals are complementary, and a fuller recognition of the role of legislative paralegals will be an exciting development in the affairs of the Association.

Thanks again to the Hong Kong office for preparing this issue and to all contributors to it.

Best wishes from the Council to all members of the Association.

Dennis Murphy
President

One law, two languages

Tony Yen[1]

When the United Kingdom established sovereignty over Hong Kong some 150 years ago, English became the official language and the language of the law. All statute law was enacted in the English language only. Judges and lawyers used only English in legal proceedings. The fact that the legal system was operating in a language unknown to the majority of the population has brought negative effect to the spirit of the rule of law. With the awakening of social consciousness and the gradual development into a more open and democratic society, there came a great demand from members of the community of Hong Kong to use Chinese in the laws.

The reversion of the sovereignty over Hong Kong to the PRC also suggested that change was necessary. When the reversion became a political reality in 1984, there was little doubt that the Chinese language, being the official language of the People's Republic of China, would become at least one of the languages of law of Hong Kong.

Hong Kong's choice of building a bilingual legal system is an obvious one. Both the PRC and the United Kingdom saw the advantage of maintaining the existing legal system and the continued adoption of the system of common law, in which the English language is entrenched. Besides being the working tool of the common law, the English language is also a language of international commerce. The common law of Hong Kong cannot develop without making reference to case law and texts of other common law jurisdictions. It is essential that foreign English speaking lawyers are able to continue to participate in Hong Kong's legal system, whether in public authorities, firms, chambers, court rooms or tertiary education institutions. All these factors cannot be ignored when one wants to preserve Hong Kong's position as an international commercial, financial, transportation and communication centre.

On the other hand, Chinese sovereignty over Hong Kong is a fact, and nationalistic considerations apply. Also a fact is that Hong Kong is a predominantly Chinese community. Most people in Hong Kong are not proficient in the English language. The Chinese language is an integral part of their identity and cultural consciousness. Nationalistic and cultural reasons aside, the Chinese language's continued subordination to the English language as the language of law in Hong Kong is not in the interest of administration of justice and the maintenance of the rule of law.

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1 The Law Draftsman, Law Drafting Division, Department of Justice, Government of the HKSAR.

The decision to build a bilingual legal system is therefore a reasonable compromise between all these considerations.

In August 1986, the Hong Kong Royal Instructions, which were then the principal constitutional instrument of Hong Kong, were amended to include the following provision -

> "Laws may be enacted in English or Chinese."

This amendment was supplemented 7 months later by the enactment of the Official Languages (Amendment) Ordinance. Together, these amendments paved the way for the implementation of bilingual laws in Hong Kong.

The Official Languages (Amendment) Ordinance required that all new legislation be enacted in both official languages - English and Chinese. The first bilingual Ordinance was enacted in April 1989. Since then, all new Ordinances, including their subsidiary legislation, have been drafted and enacted bilingually.

The Attorney General's Chambers, Hong Kong (now called the Department of Justice) was responsible for "translating" from English into Chinese all existing legislation that had been enacted in English only. These amounted to over 530 Ordinances of about 21,000 pages. After the Chinese version of an existing Ordinance was prepared, the text was forwarded to a Bilingual Laws Advisory Committee for examination. The Chinese texts were examined line by line, word by word, by members of the Committee which included practising lawyers, prominent linguists and legal academics.

The translation work, which started in mid-1988, was completed in May 1997. Hong Kong now has a complete set of bilingual legislation.

Hong Kong is the only jurisdiction in which laws are enacted in both English and Chinese. From the outset, the objective of the bilingual legislation program has been to produce an authentic Chinese version of the laws of Hong Kong so that both the English and Chinese versions communicate an equivalent message in their own fashion. Authenticity has 2 aspects, firstly, the Chinese text must be given the same status in law as the English text. If one version enjoys a lower status, no one will be able to consult and rely on it with confidence. Secondly, the text must be accepted by the people and courts of Hong Kong as reliable.

The difficulty in the attainment of this objective must be considered in the light of the fact that Hong Kong is a common law jurisdiction and the common law of Hong Kong in its current form is based on the English common law. Common law is created, developed and expressed through the medium of the English language. A typical Hong Kong Ordinance, unlike a continental style code such as the Nationalist Civil Code of China, does not attempt to present a complete statement of the law

in any particular area. It is enacted against a backdrop of pre-existing case law and is invariably interpreted and construed by other cases decided after its enactment. It assumes the existence of the common law and either changes a particular aspect of this or provides new law to operate in areas where the common law is deficient in order to deal with the problems of a developing society. An Ordinance is, therefore, built on the foundation of the common law and must make use of its terminology. For so long as the common law continues to be at the heart of Hong Kong's legal system, Hong Kong's courts will continue to have regard to decided cases not only from Hong Kong and the United Kingdom, but also from the rest of the English speaking world.

It is because the present law of Hong Kong is expressed through the language of that law, English, that the drafting of a text expressing concepts of that law in Chinese is so difficult.

Now a few words about the technical difficulties we encountered in the process of bilingual drafting and legal translation.

English legal expressions are often difficult to translate into Chinese because they originate in the English legal system and reflect the socio-cultural context in which that legal system evolved. The legal expressions do not exist in isolation. The historical evolution of English law is an interaction of philosophical, moral, ethical, linguistic and cultural values. It is not therefore always possible to identify a Chinese expression that can accurately and fully convey the same ideas behind the English expression.

In anticipation of any perceived discrepancies between the authentic English and Chinese versions of the law, there are provisions in the law to resolve such situations. We have in our law the following two interpretation provisions -

> "Where an expression of the common law is used in the English language text of an Ordinance and an analogous expression is used in the Chinese language text thereof, the Ordinance shall be construed in accordance with the common law meaning of that expression."[2]

> "Where a comparison of the authentic texts of an Ordinance discloses a difference of meaning which the rules of statutory interpretation ordinarily applicable do not resolve, the meaning which best reconciles the texts, having regard to the object and purposes of the Ordinance, shall be adopted.".[3]

So this will enable a common law and legislative meaning of a particular legal expression to be always relied on even where the literal meaning of the expression in Chinese and English is

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2 Interpretation and General Clauses Ordinance (HK), s.10C.

3 Interpretation and General Clauses Ordinance (HK), s.10B(2).

sometimes different. We may regard this as a process of the "transplant" of the common law into the Chinese language texts. It is also because of this that we say while there are two languages, there is only one law.

The effectiveness of a Chinese statutory provision in conveying the legal message depends on how well it is understood by its readers. Common Chinese expressions are adopted as far as practicable. If however no common corresponding Chinese expression is available or if a common expression is not sufficient to bring out the technical meaning or legal flavour of the English expression, new expressions are "coined" to avoid the Chinese text's being interpreted according to the common meaning.

The legislature and the public generally have reservations on coined expressions because such expressions are inevitably unfamiliar to them, but we believe accuracy is not to be sacrificed for comprehensibility and we have managed in most cases to convince the legislature to accept them. In coining new terms we always aim at the best combination of appropriate Chinese characters so that it conveys the concepts represented by the English equivalent, but finding an ideal combination is not always possible. The coined terms are sometimes criticised as being difficult to understand, but the root of the alleged difficulty is the technical nature of the expression. As it cannot be expected that English legal expressions such as "easement" or "chose in action" are well understood even by educated English-speaking persons who have not received legal training, the Chinese equivalents cannot be reasonably expected to be readily comprehensible to lay persons either.

Because of the semantic, grammatical and syntactic differences between the English language and the Chinese language, achieving exactly the same legal effect of the English statutory provisions by Chinese translation is no easy job. The difficulty lies in the cultural differences between English and Chinese, which results in legal contexts that differ both in conception and expression.

It must be stressed that expressing the same legal concepts by the two texts is always the paramount objective. Accuracy of translation measured by this criterion prevails over readability. We accept a not-readily-comprehensible Chinese provision if all other alternative structures may result in an interpretation different from that of the English provision. But if the provision deviates so much from the grammatical norm in the Chinese language that it fails to convey accurately, or even adequately, its technical meaning, we will not accept it.

It does not surprise us that the Chinese texts of legislation have sometimes been described as difficult to follow or incomprehensible. Some of the critics may not be aware of the limitation we are subject to in respect of legal accuracy, while some others may simply have not yet got used to using Chinese as a working language. In many cases,

the problem is not unique to the Chinese texts. The readers of the English texts may well be making the same complaint. Legal language always accords priority to preciseness over conciseness.

Many of our laws were modelled on old English Acts. They were often written in an old, archaic English and in a convoluted style which is difficult to understand. They have also made the Chinese translation job difficult. It has been suggested that if these old laws could be re-written in plain, modern language, both the English and Chinese texts of the laws would be more easily understood and therefore more accessible to the public. This suggestion is now being seriously considered.

It is widely recognised that the preservation of the common law system of Hong Kong is a key to Hong Kong's continued success as a major commercial centre under Chinese sovereignty. If the common law system continues to operate in one of the 2 official languages mastered only by the professional and socio-economic elite, it is unlikely that the system will remain in its original state in the next 50 years. Bilingualism in law is the only option.

For the common law system to operate effectively in the Chinese language, a set of bilingual statutes is the foundation on which efforts in bilingualism in court proceedings, the practice of law and legal education can be made.

In the shorter term, access to common law can be enhanced by publication of more Chinese books on various topics in common law. The approach to the preparation of the Chinese version of the common law requires careful consideration by the legal profession, judicial officers, officials, academics and the general public.

In December of this year, the bilingual version of all our statute laws became freely available to the public on the Internet. The homepage address is www.justice.gov.hk. This is yet another step forward in making our laws more accessible to the public.

A mere decade ago, bilingual legislation was still a policy initiative viewed sceptically and pessimistically. The Government's commitment is evidenced by the investment of financial and intellectual resources in the past 10 years. Complete bilingualism in legislation is now achieved. There is no reason why other obstacles on the road to a fully bilingual system cannot be surmounted by the same resolution, imagination and pragmatism.

The language of legislation

Christopher Jenkins, CB, QC[1]

Clarity is an essential aim in drafting legislation. It is much more than an optional extra. If law is not clear, there is no certainty that the courts and others to whom it is addressed will give effect to it in the way intended.

The need for legislation to be clearly and simply drafted is one of the two main reasons why the Office of the Parilamentary Counsel[2] was established in 1869, with the object of "improving the form and harmonising the style of Bills promoted by the Government". (The other was to save money.) Lord Thring, the first holder of the office of Parliamentary Counsel, wrote[3]-

"Clearness is the main object to be aimed at in drawing Acts of Parliament. Clearness depends, first, on the proper selection of words; secondly, on the arrangement and the construction of sentences."

Producing clear and simple legislation is, of course, not easy. Many difficulties come between Parliamentary Counsel and the ideal level of clarity and simplicity at which they aim. Perhaps the most important are complexity of policy, the pressure of time under which legislation is prepared, and the constraints imposed by the Parliamentary process.

Complexity of policy

Some of the policies to which Counsel is asked to give effect cannot be expressed in a way which is easy to understand. This may be because the subject matter is inherently complex (for example, the capital gains tax rules on rebasing or indexation, or the inheritance tax regime for discretionary trusts). Or it may be because the policy rests on underlying factual or legal assumptions which the statute cannot hope to reproduce.

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1 First Parliamentary Counsel of England and Wales.

2 The office of the Parliamentary Counsel drafts almost all government Bills in the United Kingdom. Subordinate legislation - orders, regulations and rules - is generally drafted by departmental lawyers and not by Parliamentary Counsel.

3 Practical Legislation, HMSO London, 1877, p. 20. A later edition of the book (1902) contains the following passage, which is as relevant today as it was then :
"Mr Justice Stephen said, speaking from his own experience: I think that my late friend, Mr Mill, made a mistake upon the subject, probably because he was not accustomed to use language with that degree of precision which is essential to every one who has ever had, as I have had on many occasions, to draft Acts of Parliament, which, although they may be easy to understand, people continually try to misunderstand, and in which, therefore, it is not enough to attain a degree of precision which a person reading in good faith can understand; but it is necessary to attain, if possible, to a degree of precision which a person reading in bad faith cannot misunderstand. It is all the better if he cannot pretend to misunderstand it...'."

The draftsman will do what he can to minimise difficulties of this kind, but they cannot be avoided altogether. Much can be done to alleviate them, however, by explanatory material outside the Act. This can use editorial techniques - repetition of a proposition in different ways, illustrative diagrams and examples, and so on - which would not be appropriate in the legislation itself[4].

Pressures of time

Almost all legislation is produced under pressure of time. Often the pressure is enormous. This happens every year with Finance Bills. In these circumstances the first priority has to be to produce in time a draft which achieve the desired policy. The resulting provisions will not necessarily be in the form which would be most helpful to the reader.

Parliamentary constraints

Bills have to be designed not only to change the law, but also to pass through Parliament. This can mean that a form is adopted which is different from what it would be if the form of the final Act were the only consideration. For example, a number of disparate subjects may be gathered in one Bill, when ideally each would be dealt with in a separate Bill.

The making of amendments during the passage of a Bill can be another cause of difficulty. Even if, on introduction into Parliament, a Bill has the structure which is most logical and (which is normally the same thing) most helpful for readers, that is not the end of the story. The Bill may be amended heavily.[5] If extensive, the amendments may distort the original structure to such an extent that it ought to be taken apart and rebuilt, but this option is not available at that stage.

Trends in drafting

I have referred to a few of the difficulties facing the draftsman in the production of clear legislation. It is his job to do his best in spite of them. I believe his efforts have been more successful than is generally recognised - perhaps partly because the difficulties are not generally appreciated. Certainly over recent years there have been identifiable improvements.

For example, Bills drafted today generally use shorter sentences than those of twenty years ago. And archaic expressions of the kind which still appear in other legal documents (aforesaid, hereinafter) are avoided by the draftsman of statutes.

One of the ways of ensuring that legislation is drafted as helpfully as possible for those who are affected by it is for drafts to be put out to consultation. This cannot be done in every case,

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[4] Any technique which introduces words which are not strictly necessary or which may contradict or contrast with other words in the statute in a way which was not intended.

[5] Amendments can be proposed by any Member of either House. It is government amendments which most often end up in the statute as passed. These can represent changes of policy or the government's response to points made in debate.

either for reasons of confidentiality or for lack of time. But it is now happening increasingly often, and I see it as a highly desirable development.

There is, of course, always room for improvement. Statutory language, like language generally, is developing all the time. We will inevitably sometimes fall short of the standards we would like to achieve. But we will keep trying.

Clarity and precision in legislative drafting: Are they mutually exclusive goals?

Joseph Kimble[1]

The title of a recent law review article perfectly captures the stubborn myth that precision is incompatible with plain (or clear) language : "Should the main Goal of Statutory Drafting Be Accuracy or Clarity?"[2] The truth is that drafters usually do not have to choose between one or the other : "the instances of actual conflict are much rarer than lawyers often suppose."[3] What's more, by aiming for both, the drafter will usually improve both;

> The purposes of legislation are most likely to be expressed and communicated successfully by the drafter who is ardently concerned to write clearly and to be intelligible. The obligation to be intelligible, to convey the intended meaning so that it is comprehensible and easily understood, ... requires the unremitting pursuit of clarity by drafters. Clarity ... requires simplicity and precision.
>
> The blind pursuit of precision will inevitably lead to complexity; and complexity is a definite step along the way to obscurity.[4]

Typically, the critics argue their case by offering definitions of technical terms, like *standardized valuation per person* and *motor fuel*.[5] This argument is not convincing. Plain-language advocates have said repeatedly that technical terms and terms of art are sometimes necessary, and that some legal ideas can be stated only so simply. But technical terms and terms of art are only a small part of any legal document - less than 3% in one study.[6] This hardly puts a damper on plain language. Nor is it any real criticism that occasionally a plain-language version might miss a point or make a mistake. Here is what the Law Reform Commission of Victoria said about one of their projects :

> If some detail has been missed, it could

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1 Associate Professor of Law at the Thomas M. Cooley Law School, Lansing, Michigan USA

2 J. Stark, *Should the main goal of statutory drafting be accuracy or clarity*? 15 Statute Law Review, 207 (1994).

3 B.A Garner, "A Dictionary of Modern Legal Usage" at 663 supra note 8.

4 G.C. Thornton, "Legislative Drafting" (4 ed 1996), at 52-53.

5 Stark, supra note 2, at 212.

6 Benson, Barr et al., *Legalese and the myth of case precedent*, 64 Mich B.J. 1136, 1137 (1985); *see also* Benson, *supra* note 2, at 561, *A small island of true terms of art*; Stanley M. Johanson, *In defense of plain Language*, 3 Scribes J. Legal Writing 37, 29 (1992) ("the small subcategory comprising terms of art").

> readily be included without affecting the style of the plain English version. It would not be necessary to resort to the convoluted and prepetitious style of the original, nor to introduce the unnecessary concepts which it contains. Any errors in the plain English version are the result of difficulties of translation, particularly difficulties in understanding the original version. They are not inherent in plain English itself. Ideally, of course, plain English should not involve a translation. It should be written from the beginning. [7]

What is the point, after all, of being precise but unclear? The result is what Robert Benson calls "unintelligible precision."[8] It has about as much sense as precise mud. And besides, this whole debate assumes that traditional legal writing is precise to begin with - a dubious assumption.[9]

Of course, legal writers must aim for precision. But plain language is an aliy in that cause, not an enemy. Plain language lays bare the ambiguities and uncertainties and conflicts that traditional style trends to hide. At the same time, the process of revising into plain language will often reveal all kinds of necessary detail.[10] In short, you are bound to improve the substance - even difficult substance - if you give it to someone who is devoted to being intelligible.

One critic who downplays intelligibility makes these two revealing statements - one of them cavalier and the other one insular :

> if [legislative drafters] write a statute that is not rapidly comprehensible but fulfils the requester's intent, they have done their job, although they will slow down readers, which is a trivial consideration.[11]

> [L]egislative drafters will get help in advancing their art from advocates of focusing on accuracy, not from advocates of focusing on clarity ... . Also, major help will come not from academics, who not only are likely to be wedded to the plain language school but also have insufficient knowledge of the exigencies of drafting, but from professional legislative drafters. It is time for drafters to fill the vacuum into which the academics have rushed, to

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[7] Law Reform Commission of Victoria, "Plain English and the Law" (1987) at 49.

[8] R. Benson, *The end of legalese: the game is over,* 13 NYU Rev. L & Soc., Chango s. 19, (1984-85).

[9] See Garner, *supra* note 3, at 580 (describing "the myth of precision"); Mellinkoff, "The Language of the Law" (1963), at 388 (concluding that the language of the law has only a 'nubbin of precision'); Benson, *supra* note 2, at 560 ("[T]here is relatively little precision, intelligible or unintelligible, in legal language."); Robert D. Eagleson, *Plain English - A Boon for Lawyers,* The Second Draft (Legal Writing Institute), Oct. 1991, at 12, 12-13 ("[T]raditional legal language is not a security against imprecision [but rather] provides a ready cover for imprecision.").

[10] See Law Reform Commission of Victoria, "Plain English and the Law" (1987) at 19-33 (illustrating the problem of unnecessary concepts"); Kimble, *Plain English : A charter for clear writing*, 9 Thomas M. Cooley L. Rev. 1, (1992).

[11] Stark, *supra* note 2, at 209.

take responsibility for developing their own art.[12]

First of all, many of the academics who support plain language have done a good deal of legislative drafting.

Second, the vast majority of plain-language advocates are not academics at all. They are lawyers who draft legal documents for a living, under pressure. The proof is in the membership list of Clarity, an international organization that studies and promotes plain language.[13]

Third, the author - like many other critics of plain language - seems to be unaware of the plain-language literature and the extent of plain-language activities around the world. The argument that it can't be done, or done accurately, is answered by the fact that it is being done, by people with the will and the skill to do it. Here are some examples that involve legislative drafting alone (if only more of them were from the United States!) :

- In Australia, the Law Reform Commission of Victoria redrafted Victoria's Company Takeovers Code. They cut it by almost half. And the redraft was checked and rechecked for accuracy by substantive experts.[14]
- The Parliamentary Counsel of Queensland and of New South Wales have publicly endorsed a plain-language style of drafting.[15]
- A Commonwealth Inquiry into Legislative Drafting released a report saying that " the plain English style developed by the drafting agencies since the mid-1980s has made new Commonwealth legislation much easier to understand."[16]
- Recently, the organization that represents all Australian road authorities drafted a proposed new set of uniform national road laws. (They are "written in plain English to make them easy to understand."[17])
- In New Zealand, the New Zealand Law Commission

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12 *Ibid.* at 213.

13 Available from Mark Adler, 74 South Street, Dorking, Surrey RH4 2HD, England.

14 "Plain English and the Law", *supra* note 7, app. 2 (Victorian CompanyTakeovers Code). The figure of reducing the original legislation by almost half comes from David St. L. Kelly, *Plain English in legislation; the movement gathers pace,* in "Essays on Legislative Drafting" 57, 57 (David St. L. Kelly, ed. (1988)).

15 Office of the Queensland Parliamentary Counsel, Annual Report 1992-1993, at 2-3 (1993); NSW Parliamentary Counsel's Office and Centre for Plain Legal Language, A discussion paper; "The Review and Redesign of New South Wales Legislation" 3, 9 (1994).

16 House of Representatives Standing Committee on Legal and Constitutional Affairs, "Clearer Commonwealth Law" at xxii (1993).

17 *Austroad*, "Proposed Australian Road Rules", preface (1995).

has endorsed a plainer style of legislative drafting.[18]

- Also in New Zealand, the Government is rewriting the Income Tax Act. The new Act will be written in plain language - including everything from a better structure to the use of formulas, tables, and flowcharts - as a way to save administrative costs and compliance costs.[19]
- In South Africa, the Ministry of Justice is starting a drive to write laws and government forms in plain language - as part of a commitment to democracy and access to justice.[20]
- In Sweden, the Ministry of Justice has a Division for Legal and Linguistic Draft Revision, consisting of lawyers and linguists. This division reviews all draft statutes and converts them into plain Swedish, advises committees that are working on redrafting projects, gives training seminars for drafters, and prepares influential models and guidelines.[21]
- In England, Martin Cutts, a writing consultant, redesigned and rewrote an Act of Parliament, the Timeshare Act 1992. He cut it by about 25% and improved its comprehensibility.[22]
- In Canada, several federal agencies have created a partnership to develop a process for drafting in plain language. As part of a pilot project, they redrafted the Consumer Fireworks Regulations, consulted with typical users about the redraft, tested it on typical users, and then revised it. They concluded that although this process might involve some short-term costs, it would produce a number of long-term benefits and savings.[23]
- In the United States, the federal rules of civil procedure, criminal procedure, and appellate procedure are now being drafted according to plain-language principles.[24]

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18 New Zealand Law Commission, Report No. 17, "A New Interpretation Act: To Avoid Prolixity and Tautology" 4-5 (1990); Report No. 27, The Format of Legislation (1993); Report No. 35, Legislation Manual : Structure and Style 33-40 (1996).

19 Inland Revenue Department, "Rewriting the Income Tax Act: Objective, Process, Guidelines - A Discussion Document" 6-10, 19-38 (1994).

20 Dullah Omar, *Plain language, the law and the right to information*, Clarity No. 33, July 1995, at 11.

21 Barbro Ehrenberg-Sundin, *Plain language in Sweden*, Clarity No. 33, July 1995, at 16.

22 Martin Cutts, "Lucid Law", ss 1.7, 1.12, 8.28 (1994).

23 Shelley Trevethan et al., Department of Justice, "Working document: Consumer Fireworks Regulations - Final Report" (1995).

- Back in Australia, a four-member task force, including a legislative drafter and a plain-language expert, has rewritten part of Australia's Corporations Law under an express mandate to simplify it. Among many other things, their new version cuts one main section from 15,000 words to 2,000 words, eliminates many unnecessary requirements, and redesigns and reorganizes the entire text for easier access. Throughout the process, the various drafts were tested (23 testing sessions) on a wide range of potential users. And the proposed Bill was submitted for public comment before it was introduced.[25]

Note the last item. What a revolutionary way to draft major legislation!

The time has passed, you would think, when legislative drafters should argue that their only audience - or even primary audience - is the legislator who requests a law or the judge who may interpret it. What about those who have to read it because they are directly affected, such as administrators and professional groups? What about citizens who might wish to read it because it affects their lives? Do we discount them as merely secondary or as incapable of delving into such priestly matters?

The better view is expressed by the Parliamentary Counsel of New South Wales : "The ordinary person of ordinary intelligence and education [should] have a reasonable expectation of understanding ... legislation and of getting the answers to the questions he or she has. This is of critical importance."[26] Certainly, we have to recognize the political and employment realities that drafters face. Yet we can fairly ask them to be informed and open-minded and to consider what steps they could take together to begin changing old.

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[24] Kimble, *Plain English : a charter for clear writing?*, 9, Thomas M. Cooley L. Rev, at 41; see also B.A. Garner, "Guidelines for Drafting and Editing Court Rules" (1996).

[25] House of Representatives, First Corporate Law Simplification Bill 1994 - Explanatory memorandum, (1994) at 4-8.

[26] Dennis Murphy, *Plain Language in a Legislative Drafting Office*, Clarity No. 33, (July 1995) at 3, 5; see also "Plain English and the Law", *supra* note 7 at 50 and 51 (stating that the "law should be drafted in such a way as to be intelligible, above all, to those directly affected by it"; and that, while laws cannot always be made inteliigible to the average citizen, "every effort [should] be made to make them intelligible to the widest possible audience").

Linguistics and legislation

Nigel Jamieson[1]

"Law is language and language is imprecise" wrote Professor Uwe Wesel of Berlin in *Die Zeit* (28 Aug 1992). Most lawyers can cite the experience of being caught up in some conundrum of legal composition or comprehension by which the essential imprecision of language must compromise their task. But there is a theory of language drawn so tight as to outlaw or at least discredit a lot of everyday linguistic endeavour for its lack of mathematical precision. This theory repudiates the existence of synonyms, dismisses the possibility of translation between one language and another, and emphasises the extent to which every instance of utterance is unique. In terms of this theory we must confess that Professor Wesel never stated anything of the sort by way of law and language being imprecise since, strictly speaking, what he wrote was "*Recht ist Sprache ist ungenau.*"

The same extreme linguistic theories are sometimes applied to legislative composition. Drafters may argue against following standard forms or keeping precedent books for legislation on the ground that every instance of law-making is unique. In composing and construing legislation both drafters and judges may assume the perfectionist pose of searching for a single meaning and so mistake their own personal commitment to certain forms of communication for what they claim to be the proper meaning of a word. Literality in linguistics, by sanctifying the uniqueness of every utterance as an exercise of Heraclitian philosophy in not stepping into the same river twice, privatises language and thereby puts an end to general linguistics. A similar result for legislation, by regarding every legislative use of language as a legal formula in its own right (as if it were not also a linguistic usage) is to substitute for the rational discourse of legislative endeavour the semiotics of arbitrary command- Skinner's behaviourism rather than Fuller's morality of law.

Current aspirations towards establishing artificial intelligence or towards machine translating nevertheless promote literality in linguistics and legalism in legislation. Sometimes this is reflected in attempts to simplify or restate the law or to encourage more uniform legislation. At other times it is the programming of systems for retrieving information that require us to make an algorithmic rather than a heuristic response. We cannot then rely on the semantic entailment of ordinary language -- I am now either in Edinburgh or London (but cannot be in both places at once) -- to do the work of formal logic. Yet, as a number of linguists have concluded, in their rejecting the possibility of artificial

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intelligence or of machine translating, language is essentially a human endeavour. Thus literality in language and legalism legislation mimic the eighteenth century *ad absurdum* of Quantz's mechanical musician.

One does not get very far into linguistics before encountering the debate as to whether it is an old or new discipline -- as old an art as man's conscious use of words or as new a science as linguistic enquiry permits of verification. The old argument between a classical and modern education (which is but a revised version of the still older medieval argument between *aries* and *scientia)* has some bearing on the new debate, but the ultimate irony for those who am still around to recall Firth's appointment to the first chair of linguistics at any British university as recently as 1944 is to hear of linguistics being now venerated for its old age. The same equivocality besets the science -- or is it the art of legislation?

This question provokes one to jump into the middle of another linguistic dispute in deciding whether legislation, in having the declarative force of any performative instrument, is more of what linguists would call a "speech act" (whose meaning is determined by the referential and logical sense of the text) -- and so is illocutionary in origin -- rather than locutionary as decided by the "associational" meaning (to be derived from the physical and social features, together with the substantive content of the text). If this dichotomy between speech acts and associational meaning does not mean much by itself it may be because its chief protagonist J. L. Austin (1962) has been seen by other linguists (Palmer, 1976, 1981; 162) to close the dichotomy between performative and constantive utterances (such as those which simply state, report or describe) by claiming all to be speech acts. Apart from maintaining the rigorousness of this dichotomy, however, Bowers (1989) has shown both speech act theory and associational meaning to be revelatory for the analysis of legislation.

This short essay has dealt with some of the difficulties in arguing from a study of language to a study of law. Some of these difficulties stem from the increasing specialisation of knowledge so that the respective fields of discourse in linguistics and legislation became separated; but since language is a human endeavour the main difficulties are human ones in that we like to keep all our options open -- arguing now as lawyers that since we use language for legislation with the highest level of seriousness we know as much as linguists, or that since law is language, as linguists we know as much if not more about the law than lawyers. This human predilection to raise ourselves up by our own bootstraps and become self-made men (and women) especially surrounds the esoteric profession of legislative drafting whose practitioners emanate a mystique from classical times (See Plato, *Cratylus* 389d, Jowett) as a result of applying linguistics to lawgiving. It is no wonder that this mystical shell associated with legislation as the highest human endeavour (Helvetius, 1758) should separate

parliamentary counsel from their less esoteric common law colleagues; and no wonder either that their specialised skills should make them so vulnerable to periodic attack, both from within their own legal system, as by the strictures of the Statute Law Society (1970) or as at present from Dale (1977) and Bowers (1989) who point to the civil law being better written than the common law, and so done not by lawyers but by literary men.

French legislative editors (one English and one French editor are located at a satellite office in another department) as well as edit. There is an Assistant Legislative Editor who maintains an indexed cut-and-paste master set of the Statutes and who is also responsible for print publishing of the Statutes and reference Tables, and a Legislative Editing Clerk who maintains two indexed cut-and-paste master sets of the Regulations.

Duties

It may be helpful to describe the duties of the Legislative Editing Office. Although a legislative editor is not required to edit legislative texts in both official languages, a good knowledge of the other official language is required to properly perform the duties, which occasionally includes comparing the text of the two language versions for discrepancies. Therefore, all legislative editors are bilingual.

Government bills and motions prepared by the Legislation Section and regulations and orders in council examined by the Regulations Section are sent to the Legislative Editing Office for review. In addition to checking for correct grammar and spelling, legislative editors check each draft for clarity, consistency of language and the logical expression of ideas. They verify the accuracy of cross-references, check historical precedents and citations and ensure that the technical presentation of a bill or regulation conforms to the accepted format. Legislative editors frequently redraft provisions to assist drafters. They control the printing of the manuscript copies of draft bills, in preparation for the introduction in Parliament of the final version of the bills. Legislative editors determine the appropriate wording of amending clauses and advise drafters on the format of schedules, the standard wording of particular expressions, the formulation of coming into force and transitional provisions, and technical matters.

Over the years the Office has been responsible for many changes to drafting practices and procedures, such as the creation of the "Assented to" Acts publishing service, which completes the Parliamentary print record for bills and allows for quicker public access to laws after Royal Assent, and the reformatting of Acts and Regulations to uniform fixed margins with a bold and non-bold distinction of text in amending Acts and Regulations, which greatly facilitates subsequent electronic consolidation.

In addition to its editing duties, the Legislative Editing Office also -

- responds to daily requests from the public and law offices for up-to-date information on the status of legislation;
- drafts proclamations, commissions and other instruments for review by legal officers in the Regulations Section;
- verifies all reprints of bills ordered by Parliamentary committees to ensure that the changes directed by the

committees have been made correctly;

- maintains an electronic index of proclamations and orders in council relating to the coming into force of federal Acts;
- opens and closes legislation files on work in progress and maintains a daily report on the status of all government bills;
- prepares or assists in the development and preparation of various manuals (e.g., the *Regulations Format Document*, the *Legislation Deskbook*, the *Guide de redaction legislative francaise*, the *Manual on the Drafting of Regulations*, *The Federal Legislative Process in Canada* and *A Guide to the Making of Federal Acts and Regulations*);
- prepares and updates the office consolidations of the Constitution Acts;
- publishes -
  - (a) the Table of Private Acts,
  - (b) the "Assented to" version of Acts,
  - (c) Part III of the Canada Gazette,
  - (d) the Table of Public Statutes and the Table of Acts and Responsible Ministers, and
  - (e) the bound volumes of the Annual Statutes of Canada.

Hiring and training of legislative editors

When hiring, the Legislative Editing Office looks for university graduates who have a keen eye for detail and good analytical skills. Candidates for legislative editor positions must obtain at least 90% on proofreading, grammar and general editing skills tests in order to proceed to the interview stage where their knowledge of the legislative and regulatory process and the role of Parliament and the Department of Justice is assessed. As mentioned above, they must also be bilingual. On average, fewer than 10% of all applicants make it to the interview stage.

Just as finding appropriate training courses for legislative counsel is a difficulty faced by all drafting offices (see page 6 of the March 1997 edition of The Loophole), it is almost impossible to find training programs for the legislative editor/paralegal support function in Canada. There are no post-secondary institutions that offer training programs specifically for paralegal support of legislative drafting. Existing paralegal training programs are designed to produce legal clerks for law offices, financial institutions, real estate development corporations and court, registry and land title offices. Consequently, almost all training for the legislative editor/paralegal function must be obtained on the job.

Once on the job, new legislative editors must learn the many technical formalities involved in drafting legislation, starting with the proper use of amending formulas and historical

citations. This can be learned by consolidating amendments into the sets of master Statutes and Regulations. It is also necessary to become familiar with several internal procedures manuals, as well as how to research statutes and regulations using reference Tables and the revisions of the Statutes or consolidations of the Regulations.

The rules governing the interpretation of legislation set out in the Interpretation Act, as well as the statute and regulations governing subordinate legislation, must also be learned. For example, they can verify whether subordinate legislation is made in accordance with the proper enabling authority or that it does not have retrospective effect unless authorized. Once these technical aspects are mastered, and with sufficient experience, a legislative editor can assist drafters on more substantive issues in drafting legislation. They may raise questions on policy issues or on a proposed legislative concept or scheme. They may redraft certain provisions of a bill or regulation, or prepare an order in council for subsequent approval by a legislative counsel.

Expanding role

The Legislative Editing Office has enjoyed an extremely low staff turnover rate for many years. As a consequence, legislative editors have developed a great deal of experience in matters related to the drafting of legislation and are thus capable of taking on greater responsibilities. In 1994, a study conducted for the Department of Justice comparing the use of paralegals in the public and private sectors demonstrated that paralegals were used in the public sector at a rate of less than 25% of that in the private sector. The Department determined to increase the use of paralegals to assist lawyers in the delivery of legal services.

The Legislative Services Branch of the Department has implemented a pilot project whereby experienced legislative editors are given responsibility for the examination, re-drafting and final preparation of certain types of regulation files. When the legislative editor has completed work on the file, final approval and sign-off is given by a legislative counsel. In the two year period ending in May 1997, more than 100 files have been handled in this way. Results have been very good, particularly with respect to the shorter time it takes to complete and return these files to clients.

A similar project is underway with the Legislation Section for the preparation of the Miscellaneous Statute Law Amendment Act by legislative editors under the direction of legislative counsel.

The delegation to experienced legislative editors of work previously performed only by legislative counsel allows the work to be completed at a lower cost and frees legislative counsel to work on the more complex files, maximizing the use of resources.

Future developments

It would be interesting to read in future

issues of *The Loophole* what the experience is regarding legislative editors in other drafting offices. Several years ago I proposed the creation of an Association of Legislative Editors to some Canadian provincial drafting office editors. Such an association could establish contacts through a newsletter -- either an independent newsletter or possibly as an adjunct to The Loophole -- that could share information on the various responsibilities that legislative editors/paralegals in different jurisdictions may have and the way in which they are performed. Information on job classifications, remuneration and special projects performed by various offices could also be shared. The objectives of such an association might eventually include the following:

> Development of training courses or seminars for legislative editors/paralegals resulting in some form of certification. This might be done in conjunction with institutions that offer paralegal training courses.
>
> Expansion of the association to drafting offices outside the Commonwealth (e.g., United States).
>
> An association could make recommendations to various jurisdictions for standardization of certain aspects of legislation -- this could be achieved through representatives attending and making presentations at the annual Uniform Law Conference of Canada or similar conferences in other countries.
>
> An exchange program allowing legislative editors/paralegals to work in different jurisdictions -- the program could serve as a means to broaden the base of experience while, at the same time, allowing for the sharing of ideas or practices on the editing of legislation.

I welcome comments on this proposal from drafting offices in the Commonwealth and elsewhere. If you are interested, I can be contacted through any of the methods below. I look forward to hearing from you.

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Legislation Section: 50 Years of legislative drafting in Ottawa

Robert C. Bergeron, Q.C.[1]

Once upon a time... No, this is not a fairy tale but rather the story of the gradual emergence of a way of doing things, the legacy left to us by highly talented and exceptionally skilled jurists and legislative drafters. I have had the pleasure of knowing many of them, and the privilege of working with several. All admirably performed the very onerous task given them: that of drafting Bills required by the Government, within the time frames set by it, to enable the Government to implement its chosen policies. We, in the Legislation Section, are very proud of the original method of legislative drafting that we have devised. How did we arrive at co-drafting? What decisions led to our legislative process?

I don my gloves and gently blow away the historical dust - the most noble kind - from the Section's *Archives* file, the one that each Chief Legislative Counsel has in turn passed on to his successor. It is, to be sure, not a complete historical file, but it does contain the carefully thought-out comments that the legislative drafters in charge of the drafting team deemed worthy of being preserved. On its pages, I recognize the handwriting of Elmer Driedger, the Section's first legislative drafter and father of the Canadian legislative drafting tradition, who served as Deputy Solicitor-General in the sixties and was the originator of the legislative drafting course at the University of Ottawa in the early seventies. I notice the initials of Don Thorson, another highly skilled legislative drafter who occupied the position of Deputy Minister of Justice, and of Fred Gibson who, after also serving as Deputy Minister, is now a Federal Court judge. I see the incisive notes of Jim Ryan who, as early as 1967, recognized that the preparation of bilingual legislation in Ottawa involved a problem not in translation but in drafting and bijuralism. Finally, I find the ample handwriting of Gerard Bertrand and the pencilled notes of Peter Johnson.

I am no historian. I draft Bills and occasionally write articles on legislative drafting. My aim here is simply to outline the major stages in the Section's history, not provide a detailed explanation of everything that has made the Section what it is today: an exceptional team that - as was recently pointed out by a colleague in the Department - is asked to perform miracles.

Today, we are accustomed to the fact that a central body is responsible for drafting Government Bills as part of the legislative process. But this was not

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always the case. Although from 1867 to about 1920 the staff of the two Houses of Parliament was responsible for legislative drafting, it seems that, as of 1927, there were only two people left in the House of Commons' legislation section and only one in the Senate's section. Ministers therefore began to rely on their own departmental staff to draft Bills, which needless to say led to a marked lack of uniformity, varying degrees of quality, contradictions between Bills, and conflicts between Bills and existing legislation.

Toward the end of the thirties and especially during the course of the Second World War, departments got into the habit of consulting with the Department of Justice on the content of Bills to be introduced in Parliament. As a result, lawyers in the Department forged themselves a specialty. Consultation became the standard practice, and eventually was made mandatory.

This, I feel, was the most critical point in the history of the Legislation Section. The Section's monopoly in the area of legislative drafting is not something that was "imposed" from above, but is the result of a natural evolution. Long before the "client service" mantra became popular, jurists such as Driedger helped other departments work out the wording of Bills to give concrete expression to chosen policy, thereby giving birth to the Section, the existence and role of which were confirmed by means of a series of Cabinet directives.

The first of these directives, issued on 1 October 1947, made consultation with the Department of Justice mandatory for all Government Bills. Departments could either submit their Bills to the Department of Justice or provide the necessary instructions for the drafting of the bills. This officialization of the role of the Legislation Section, in our view, marked the true beginning of the Section, and the champagne will flow freely on 1 October 1997.

The situation was not perfect, however. At times, the Department's legislative drafters were asked to draft Bills without the benefit of the Cabinet's approval of the Bills' policy directions. In 1948, a new directive was issued making it mandatory to submit a Memorandum to Cabinet before any Bill was drafted. The directive indicated not only that a department wishing to draft a Bill must first submit a Memorandum to Cabinet, but also that the Memorandum was not to be in the form of a Bill. This directive was confirmed in 1950.

In 1952, the Cabinet replaced the directives of 1947, 1948 and 1950 with a new directive confirming the previous ones and, most importantly, setting out the role and authority of the Cabinet Committee on Legislation and House Planning. The mandate of the Committee was to prepare the Government's legislative program and keep the program under constant review. The preparation of legislation that the Government intended to introduce during a session of Parliament therefore came under the jurisdiction of a central body for priority-setting

purposes, even though the actual drafting was done by lawyers within the Department of Justice.

In 1967, a revision of the Cabinet directive on the preparation of legislation indicated that, to extend the process of preparing Bills over the whole year, all departments were to keep the various statutes that came under their administration under constant review and, whenever the need for adjustments became apparent, they were to immediately propose the necessary legislative amendments. Clearly, the so-called "proactive" way of thinking and legislative evaluation were not invented yesterday! The directive also indicated that, at the end of June in each year, the Secretary to the Cabinet Committee on Legislation and House Planning would write to all Deputy Ministers asking them to provide the Committee with a list of Bills to be drafted for their departments. The Committee was given responsibility not only for the preparation and review of the legislative program but also for the detailed examination of Bills after they had been drafted.

And the French version of Bills?

In another directive issued in 1967, the Cabinet ordered that Bills were to be submitted to Ministers in both French and English. In a memo sent to the Honourable Pierre Trudeau, the Minister of Justice at the time, Jim Ryan, then Chief Legislative Counsel, raised the question of bilingual legislative drafting. Even before the word "bijuralism" had been invented, Jim wrote, with what I consider to have been keen perception and insight: "[...] there is more than language involved; there is also the matter of the different cultural and legal concepts and approaches, which create a problem in the preparation of our statutory law as difficult as the problem of expressing the law in acceptable French words." He added: "In order to obtain equal quality in the French and English product of the legislative drafting process, it is necessary to develop our drafting techniques to the extent that full recognition is given to both versions of the product. He recommended "dual drafting" (the forerunner to co-drafting, which is used today): two legislative drafters, one French-speaking and one English-speaking, working together to produce what he referred to as "bi-legal statutory law".

In 1976, in response to severe criticism from the Commissioner of Official Languages, the Department charged a committee headed by Alban Garon, now a judge with the Tax Court of Canada, with the task of proposing a way to ensure the equality of French and English versions throughout the legislation preparation process in order to provide the Government with Bills of the highest possible quality. The committee came to the conclusion that there was no magic solution to be had and recommended co-drafting, an original drafting method that has since been adopted by other countries.

It is at this point that the line between history and the present becomes blurred. The Legislation Section

drafting team, a bilingual team that is proud of its roots, works within the Legislative Services Branch to provide other sectors of the Department of Justice and other Government departments with a bilingual legislative drafting service that respects both the common law and civil law systems.

The Legislation Section has produced a bilingual publication entitled *A Guide to the Making of Federal Acts and Regulations* that not only explains in detail the respective roles of the legislative drafters and the instructing officers in the departments, but also answers questions that readers may have concerning the legislative process at the federal level.

The legislation team is celebrating the Section's fiftieth anniversary with a slight feeling of awe as it looks back over the road travelled. Objectives remain the same, and if the challenges seem greater, it is perhaps only because they are today's challenges. The problems that our predecessors grappled with were every bit as difficult in their day. The pen has been replaced by the computer, but the drafting function remains the same: to prepare a judicious text based on third-party instructions within a time frame that is always too short.

Does legislation have to be published?

David Morris[1]

The answer to the question posed in this title might seem to be blindingly obvious. Certainly it would have seemed so to Barwick CJ who, in the Australian case of *Watson v Lee* (1979) 144 CLR 374 said -

> "I regard the availability of the terms of the law to a citizen to be of paramount importance. No inconvenience in government administration can, in my opinion, be allowed to displace the principle that a citizen should not be bound by a law the terms of which he has no means of knowing.".

However it may not be as obvious as one would suspect. In looking at the question we should first look at its terms. What is meant by "published"? The dictionary meaning is "to make generally known". Clearly then it is not the same as "printed". This distinction was recognised by Cozens-Hardy J in *McFarlane v Hulton* [1898] 1 Ch 884 . In that case he held that a newspaper was published when (and where) it is offered to the public by the proprietor. The judge also noted that many newspapers in fact acknowledged that they were printed in one place and published in another. The usual printer's endorsement "Printed and published by etc." also impliedly recognises the distinction. Clearly then even if a law is printed, it is not in fact published until it is actually made available to the public. I suspect that in practice often the sheer volume of law required to be published on a particular day precludes its being made available to the public on the same day.

The need for publication has, perhaps surprisingly, not often been considered by the courts. However in the case of subsidiary legislation there is at least one authority on the need for publication. In *Johnson v Sargant & Sons* [1918] 1 KB 101 Bailhache J held that a piece of subsidiary legislation came into operation on the day it became known, not the day on which it was made. He said, at p.103, "while I agree that the rule is that a statute takes effect on the earliest moment of the day on which it is passed or on which it is declared to come into operation, there is about statutes a publicity even before they come into operation which is absent in the case of many Orders such as that with which we are now dealing; indeed, if certain Orders are to be effective at all, it is essential that they should not be known until they are actually published.".

At common law, Acts of Parliament have never depended on publication for their validity. Bennion in his Statutory

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Interpretation (1984 at p. 121) says that "(Acts) are fully binding even upon persons who can have had no opportunity to read them or to even learn of their passing". He quotes *R v Bishop of Chichester* YB 39 Ed (1364) 7 as illustrating how far back this doctrine goes. Coke also accepts this as the law but considers that Acts ought to be published (see 4 Co Inst 26). It would seem that at common law the authorities have, as Bennion says only "a moral and practical duty" to promulgate statute law.

The common law has of course been modified in many jurisdictions. A provision similar to the following Hong Kong provision is not uncommon -

> "(1) An Ordinance shall be published in the Gazette.
>
> (2) An Ordinance comes into operation -
>
> (a) at the beginning of the day on which it is published; or
>
> (b) if provision is made for it to commence (sic) on another day, at the beginning of that other day."

With the common law background in mind however it would seem that if the intention was to override the common law something a lot clearer than this would have been devised. Specific provision could have been made to the effect that an Ordinance was not to come into operation unless and until it was published in the Gazette. It should also be noted with respect to subsection (2)(a) above that no time is specified within which publication is to be effected. Would a delay in publication of say, several years be in order? In *Bradley v Board of Works for Greenwich* (1878) 3 QB 384 the court held that an apportionment of rates which was required to be made by a statute, could validly be made years after it had first become possible to do so. The court in that case even refused to insert a requirement that the apportionment should be made "as soon as possible" after it had first become possible to do so. Apportionment of rates though is of course not quite the same thing as the publication of a law. Nevertheless if it is thought that delaying the publication of a law for several years might be going too far, it may at least be reasonably argued that so long as a law is published as soon as possible after it is made this would be sufficient compliance with the statutory requirement for publication. The courts have in other contexts held that impossibility of performance is a defence even to a mandatory requirement. See for example, *Mayer v Harding* (1857) 2 QB 410. In that case, where a statute required a case to be transmitted to the court within 3 days, the court held that where performance was impossible because the court was closed during the period in question, transmission as soon as it was possible after the court reopened was valid.

It seems logical to conclude then that where a commencement date for a piece of primary legislation prior to the date of its publication is specified, the legislation may come into operation on such earlier date. Therefore publication

cannot be said to be strictly necessary in order for legislation to come into operation.

Purposive approach nets raft fishermen

Anthony Upham[1]

It is not necessary to set foot on Hong Kong soil to "land" there for the purposes of section 19 of the Immigration Ordinance (HK).

The issue in *R v Tse Hing San and Others*, [1997] HKLRD 440, was the meaning of "land" and "disembark" in s. 38(1)(b) of the Immigration Ordinance (Cap. 115) (IO). As well as clarifying the meaning of these words, Leong J's judgement, dismissing the appeal, is an example of the purposive approach to statutory interpretation required by s. 19 of the Interpretation and General Clauses Ordinance (IGCO).

The appellants were convicted of remaining in Hong Kong without the authority of the Director of Immigration, after having landed unlawfully. They came on fishing vessels from China to fish rafts within Hong Kong territorial waters, upon which they remained throughout their stay. The rafts were floating structures attached to the seabed by concrete anchors.

Under s. 2(1) of the IO, "land" means:

> "to enter by land or disembark from a ship or aircraft; and in the case of a person who arrives in Hong Kong, otherwise than by ship or aircraft, land in Hong Kong".

The appeal turned on the meaning of "disembark": had the fishermen landed in Hong Kong by getting off the fishing vessels and on to the fish rafts? It was contended that as neither of them had set foot on dry land, they had not "landed" in Hong Kong. Support for that approach came from the New Shorter Oxford English Dictionary definition of "disembark", which is "to put or go ashore from a ship".

A similar point arose *in AG v Li Ah-sang* (unreported) AR No 10 of 1995. Having employed two PRC fishermen on his fish raft, Li pleaded guilty to employing persons not lawfully employable contrary to s. 171(1) of the IO. He was fined $HK5,000 in each case. The magistrate, apparently adopting a literal approach to "land" and "disembark", earlier acquitted the fishermen of illegally landing in Hong Kong. He considered remaining upon the rafts was not landing in Hong Kong and that they were not illegal immigrants.

Li was sentenced for employing unemployable immigrants rather then employing illegal immigrants. The prosecution applied for review of the sentence because of the implications of that approach. The review was unsuccessful for reasons peculiar to the case.

By adopting a purposive approach, the

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magistrate in *Tse Hing San* reached a very different conclusion about the status of the appellants. He was influenced by their means of arrival on the rafts and by the rafts being substantial structures securely anchored to the seabed. He also noted their proximity to dry land and location in areas where fish farming was carried on. He found that it would be naive to conclude that conduct of this nature would have been intended by the Legislature to be something other than having "landed" in Hong Kong."

On appeal it was argued that "to land" should have received its natural and plain meaning, "disembark", or its ordinary meaning of "put or go ashore from a ship". It was also argued that "shore" should have been accorded its dictionary definition of "land bordering the sea" or "part of a shore built up as a landing place or a wharf or a quay". On that approach, a fish raft was neither land, a wharf nor or a quay, even though secured to the seabed.

The prosecution contended, however, that a purposive interpretation was necessary to attain the IO's object of controlling immigration and deterring illegal immigrants. Reliance was placed on s. 19 of the IGCO,[2] which provides as follows:

> "An Ordinance shall be deemed to be remedial and shall receive such fair large and liberal construction as will best ensure the attainment of the object of the Ordinance ...."

To limit "land" to "setting foot on dry land" would unduly restrict the IO's object. Leong J considered that the issue was whether the Legislature intended that those unlawfully entering and remaining in Hong Kong to work by means not involving touching dry land should be death with differently from those who touched land.

Taking a purposive approach, he asked whether it was:

> "the intention that deportation apart, persons who had entered Hong Kong unlawfully and remained and worked on fish rafts which were secured close to the shore in Hong Kong waters, would be immune from prosecution under s. 38(1)(b) but once they set foot on dry land they would be prosecuted".

Leong J's purposive approach must surely be correct. If "embark" means to board a ship, "disembark" means to get off a ship. The relevant issue is the circumstances and reasons for disembarkation. Had the appeals succeeded, an influx of persons seeking to work on fish rafts was foreseeable. That could have spilled over to lighters and barges.

This case underlines the importance of s. 19 of the IGCO: Ordinances must be interpreted in the way that best gives effect to them. Application of the purposive approach resulted in a decision that accords both with the

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[2] The wording of section 19 is somewhat similar to that of s. 5(j) of the New Zealand Acts Interpretation Act 1924.

object of the IO and common sense.

(This article was first produced in the "Hong Kong Lawyer" in September 1997.)

BLIS : a searchable database of the bilingual laws of Hong Kong

Allan Roger[1]

In July of this year the Department of Justice in Hong Kong completed its modernization of The Bilingual Laws Information System (BLIS).

I'm Allan Roger, formerly a legislative counsel in the Law Drafting Division of the Department of Justice. I was also formerly (10 years ago) the Chief Legislative Counsel for British Columbia. In both capacities I was involved with the development and use of full text searchable databases of the statutory laws. Most recently I have been assigned to work full time managing an office technology strategy plan implementation, one project of which was to replace our ageing statute database platform.

I am very pleased to share with you the results of our new implementation which is far more user friendly and functional than any that I have used previously.

Following is a list of the features of our new system plus other details that may be of interest to other jurisdictions who may be about to commence or update a statute database.

(a) Bilingual (English and Chinese)

The first thing to note and then set aside is the fact that our database is bilingual, but that fact is immaterial to the operational functions of the program and database. Thus the following features are just as applicable to a unilingual environment as to a bilingual one.

(b) Content

The database contains all primary and subsidiary legislation in both English and Chinese. It also has a bilingual glossary of terms used in the legislation. The database does not contain Bills, or amending enactments not yet brought into force. Whole new laws that are not yet in force are included with a covering note to that effect.

(c) Structure

Each section. schedule, form, regulation, rule, bylaw, etc., is a separate document in the database.

(d) Currency

Under our previous system we were able to replace the on-line database with the up-dated off-line editing database every 3-4 weeks, maintaining an average of an update 3-4 weeks after changes to the law. This is in a legislative environment in which the enactment of laws, both primary and subsidiary, are spread reasonably evenly throughout the year.

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In the new database, editing is done on-line section by section, with sections subject to a pending amendment marked to indicate that fact. The amendment pending marks are added within a few hours after the law is changed, thus enabling readers to have considerable confidence that if there is no amendment pending mark, the provision is up-to-date.

The actual amendments are completed section by section and the marks removed over the next few days. We expect that we will be able to improve on the 3-4 week average and bring it down consistently below 2 weeks for all amendments. In the meantime readers can be assured that the vast majority of provisions are up to date.

(e) Search functions

In common with most text search engines, readers can search for individual terms, combined terms, alternative terms, excluded terms, phrases, and terms related by proximity to each other.

(f) Windows based

The program used for the database, Lotus Notes version 4.51, is Windows based, thus providing a more familiar and productive environment to readers. For example, readers can copy and paste the text from BLIS into their own email or word processing documents. A convenient facility to export text directly into a Microsoft Word document is also provided.

(g) Finding and viewing a particular enactment is as easy as moving the scroll bar through the list of enactments or doing a simple search for the relevant title or chapter number.

(h) Law as at a particular date -

One of the most significant features of the new BLIS is that readers are not restricted to viewing the current law. All changes to the law after 30 June 1997 will be stored as separate documents and readers will be able to choose to view the current law or the law as at any date after 30 June 1997. Readers can also easily check to see if changes have been made to a particular section.

(i) Bilingual text

If the PC is using Chinese Windows 3.1 or 95 or the Pan Chinese NT operating system, Chinese text can be viewed and the reader can switch between Chinese and English views or display both on screen at once in separate Windows.

(j) Sort by relevance

When a search is performed, the sections that have the most search terms will be presented first, but readers can also change the order to sort by Chapter # and section #.

(k) Preview

It is not necessary to *open* a document to see its contents. A Preview Pane can be invoked that will display the selected section content at the bottom of the screen.

(l) Word variants -

Readers can specify that a search will return common variations of terms.

For example, a search for canopy will return canopy as well as canopies.

(m) Thesaurus
Readers can also specify that a search will also return synonyms of the search term.

(n) Upper/lower case
Readers can restrict the search return to capitalised words.

(o) Favourites
If a reader is frequently referring to a particular section, Ordinance or collection of them, these can be placed in a Favourites folder for convenient future reference.

(p) No excluded words
In the old BLIS it was not possible to search for very common words such as the, a, in, of, this, etc. This restriction is not in the new BLIS. Thus a phrase search for Chief Executive *in* Council can be done.

Technical information, staff and cost

- Users - we have provided desktop access to 500 staff, all of the lawyers, lay prosecutors, paralegals, law translators and all support staff in the Law Drafting Division;

- The Lotus Notes program, version 4.51, is installed on a UNIX Server model HP9000 Model K220 Server CPU x 4, 120 MHz PA RISC 7200 with 256 MB CPU RAM. A Lotus Workspace licence is installed on each workstation;

- Hard disk size: 12 GB with a mirrored drive 12 GB;

- about 1.3 GB representing about 21,000 printed A4 size pages;

- The BLIS database maintenance staff consists of 2 supervisors and 10 clerical officers;

- Cost: US$475,000 broken down roughly as -

  (a) US$100,000: hardware and software:

  (b) US$375,000: vendor fees for management, customisation of Lotus Notes, data conversion, installation, training the trainers.

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HKSAR v Ma: The Basic Law "shall be" given a purposive interpretation

Jeffrey E. Gunter[1]

The first important judicial decision concerning Hong Kong's new mini-constitution, the Basic Law of the Hong Kong Special Administrative Region (the Basic Law), was rendered by the Hong Kong Court of Appeal on 29 July 1997, a mere 29 days after the resumption of sovereignty by the People's Republic of China. The main question in *HKSAR v Ma Wai-Kwan and others,*[2] was whether the common law had been preserved under article 160 of the Basic Law.[3] While the Court of Appeal addressed a number of significant issues in its decision,[4] in this article will focus on its approach to the interpretation of the Basic Law, and in particular article 160.

Background

Before we turn to the decision, it may be helpful to give a brief background. On 19 December 1984, the Government of the People's Republic of China (PRC) and the Government of the United Kingdom signed the Sino-British Joint Declaration on the Question of Hong Kong (the Joint Declaration). By virtue of the Joint Declaration, the PRC was to resume the exercise of sovereignty over Hong Kong with effect from and including 1 July 1997. Under article 3 of the Joint Declaration, the PRC declared certain basic policies regarding Hong Kong. The Hong Kong Special Administrative Region (HKSAR) was to be established under the principle of "one country, two systems" and it was to enjoy a "high degree of autonomy". The current social and economic systems were to remain unchanged for 50 years. The laws of Hong Kong and the legal system

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2 Unreported, Court of Appeal, Reservation of Question of Law No. 1 of 1997. Chan, CJ(HC); Nazareth, V-P; and Mortimer, V-P; presiding.

3 See the annex to this article for the text of article 160 and other relevant articles of the Basic Law.

4 In particular, the Court of Appeal decided, *obiter*, that the Provisional Legislative Council had been legally established notwithstanding that it did not meet the conditions for the establishment of the first legislative council set out in a decision of the National People's Congress made on 4 April 1990. It also decided, *obiter*, that the Hong Kong Reunification Ordinance (Ord. No. 110 of 1997), which was enacted by Provisional Legislative Council to deal with the continuity of legal proceedings and other matters at issue and which was considered sufficient to dispose of those issues, had been validly enacted. The Court acknowledged that it did not need to address these questions given its decisions on the questions reserved for its judgment, but it considered it in the public interest to do so.

were to remain basically unchanged. Further to the Joint Declaration and to implement these basic policies, in 1990 the National People's Congress (NPC) promulgated the Basic Law under article 31 of the Constitution of the PRC, to come into effect on 1 July 1997. Most of the provisions of the Joint Declaration are reflected in the Basic Law. The overriding theme of both is continuity and stability.

The facts of the case can be summarised as follows: The respondents were charged with the common law offence of conspiracy to pervert the course of public justice. An indictment was filed against them on 3 January 1997. The trial began in the High Court of Justice (now the Court of First Instance) on 16 June 1997. The trial resumed on 3 July 1997 in the Court of First Instance. On 7 July 1997, the respondents were arraigned on an amended indictment which had been filed on 19 June 1997. The respondents applied to the Deputy Judge to quash count 1 of the amended indictment, the charge of conspiracy. The prosecution then applied to reserve certain questions of law for determination by the Court of Appeal.

Two questions were reserved for the Court's determination:

(1) Was the offence at common law of conspiracy to pervert the course of public justice part of the laws of the HKSAR?

(2) Were the accused liable to be tried on count 1 of the indictment?

Survival of the common law

The answer to the first question depended on whether the common law had survived the establishment of the HKSAR on 1 July 1997. The respondents made two basic arguments. First, they argued that the Basic Law, in particular article 160, required that there be some positive act of adoption of the pre-existing law and that no valid act of adoption had occurred. Secondly, and alternatively, they argued that the common law failed to survive as a result of a decision made by the Standing Committee of the NPC under article 160. In a decision made on 23 February 1997, the NPC Standing Committee declared that certain Ordinances were in contravention of the Basic Law and therefore were *not* adopted as laws of the HKSAR. Among the Ordinances listed was the Application of English Law Ordinance[5] which, among other matters, declared the extent to which the common law applied in Hong Kong.[6] The respondents contended that the NPC Standing Committee's decision had the effect of repealing the common law.

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[5] Formerly, chapter 88 of the Laws of Hong Kong.

[6] Paragraph 1 of the NPC Standing Committee's decision states (in translation): "The laws previously in force in Hong Kong which include the common law, rules of equity, ordinances, subordinate legislation and customary law, except for those which contravene the Basic Law, are adopted as the laws of the HKSAR." Paragraph 2 then declares that the Ordinances listed in an annex to the decision are in contravention of the Basic Law and are not adopted. Among other Ordinances, the annex lists the Application of English Law Ordinance.

The Court's answer to the first question turned mainly on the interpretation of articles 8, 18 and 160 and it is in this context that the issue arose as to whether the Basic Law should be given a purposive interpretation. Articles 19, 81, 84 and 87 were also found to be relevant.

The respondents' main argument concerning article 160 centred on the words "shall be adopted". They contended that the words were used in the future tense and therefore some additional act extrinsic to the Basic Law itself was required before the common law could become the law of the HKSAR. In support of this interpretation, they referred to the NPC Standing Committee's decision which by its own terms was made under article 160 and which, in addition to declaring that the Application of English Law Ordinance was not adopted, purported to adopt the common law as law previously in force in Hong Kong[7]. In reply, the Government submitted that the common law survived the change of sovereignty by virtue of the Basic Law itself and that no further act of adoption was required. The Application of English Law Ordinance was merely declaratory and, since the Basic Law itself preserved the common law, the 'non-adoption' of the Ordinance was irrelevant. It argued further that, to the extent that the NPC Standing Committee purported to adopt the common law, it was not necessary for it to do so. In support of these views, the Government submitted that the Basic Law, as a constitutional document, should be given a generous and purposive interpretation.

His Lordship Chief Judge Chan agreed that the Basic Law should be given a purposive interpretation but he expressed reservations about taking such an approach in other than a constitutional context. He stated (at p. 7):

> "[T]he Government submits that a generous and purposive approach is to be adopted in the interpretation of the Basic Law since it is a constitutional document. ... *While I agree with this as a general proposition, I would add a few words of caution.* The Basic Law is a unique document. It reflects a treaty made between two nations. It deals with the relationship between the Sovereign and an autonomous region which practises a different system. It stipulates the organisations and functions of the different branches of government. It sets out the rights and obligations of the citizens. Hence, it has at least three dimensions: international, domestic and constitutional. It must also be borne in mind that it was not drafted by common law lawyers. It is drafted in the Chinese language with an official English version but the Chinese version takes precedence in case of discrepancies.[8]

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[7] The respondents' argument on this point may have been poorly summarised in the judgement. In effect, the respondents seemed to be claiming that (a) the NPC Standing Committee adopted the common law by paragraph 1 of its decision and (b) the NPC Standing Committee repealed the common law by paragraph 2 of its decision (by including the Application of English Law Ordinance in its list on non-adopted laws).

> That being the background and features of the Basic Law, it is obvious that there will be difficulties in the interpretation of its various provisions. ... *In my view, the generous and purposive approach may not be applicable in interpreting every article of the Basic Law. However, in the context of the present case which involves the constitutional aspects of the Basic Law, I agree that this approach is more appropriate.*"
> [emphasis added]

Mortimer, V-P, did not take such a qualified view but he recognized the potential difficulty of applying common law rules of interpretation to what is in essence a Chinese law. He stated (at pp. 73 and 74):

> "We have heard cogent submissions on how the Court should approach the interpretation of the Basic Law. The Basic Law is made under article 31 of the Constitution of the People's Republic of China. It is Chinese law applicable to Hong Kong which falls initially to be interpreted by Hong Kong courts used to interpreting laws passed in the common law tradition, applying common law principles. No doubt, from time to time, difficult questions of interpretation will arise, but not, it seems to me, from any inherent difficulty arising between the two traditions. The common law principles of interpretation, as developed in recent years, are sufficiently wide and flexible to purposively interpret the plain language of this semi-constitutional law [...]."[9]

Nazareth, V-P, simply noted that, in the case of the Basic Law, "a purposive approach appropriate to constitutions was called for".[10]

In the result, the Court accepted the Government's argument regarding the first question. After examining article 160 and other relevant articles, as well as the legislative history of the Basic Law, and using the corresponding provisions of the Joint Declaration as an aid to its interpretation, the Court concluded that the common law survived by the terms of the Basic Law itself. It held that the sole purpose of article 160 was to provide a mechanism for the *non-adoption* of those laws which were in contravention of the Basic Law. Once the NPC Standing Committee had declared under article 160 which laws were in contravention, there was no need for it to take the further step of adopting the laws which were *not* in contravention. The Court further held that the Application of English Law Ordinance was merely declaratory in its effect and that its non-

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[8] The NPC Standing Committee declared, in a decision dated 28 June 1990, that "in case of discrepancy between the two texts in the implication of any words used, the Chinese text shall prevail". The decision has constitutional effect.

[9] Mortimer, V-P, then quoted Lord Diplock in *A.G. of the Gambia v Jobe* [1984] AC 689 where he stated at p. 700: "A constitution and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled, is to be given a generous and purposive construction". He also cited *Minister of Home Affairs v Fisher* [1980] AC 319, in support of a purposive interpretation.

[10] At p. 47, in connection with the second question.

adoption did not affect the status of the common law.

Although the Court generally favoured a purposive approach to the interpretation of the Basic Law, it reached its conclusions on the first question without expressly relying on a purposive interpretation. In the view of the Court, the deficiency in the respondents' argument was simply that it failed to treat paragraph 1 of article 160 in the context of the Basic Law as a whole. If accepted, the respondents' interpretation would have led to conflicts with other provisions of the Basic Law, including article 160 itself. Chan, CJ(HC), stated (at pp. 10 and 11):

> "The respondents' argument is based mainly on Article 160 which uses the words "shall be adopted". It is suggested that "shall" in this term is used in the future tense. In my view, that provision cannot be read in isolation but must be considered in the light of the rest of the Basic Law [...]. It cannot be construed to have a meaning which is inconsistent with the other articles relating to the adoption of the existing laws and legal system.
>
> In any event, Article 160 even on its own has the same theme as the other provisions. There is a sense of continuity in this article. In the first paragraph of this article, it is provided that any laws which are later to be found to be in contravention of the Basic Law shall be amended or cease to have force. Laws which have not yet come into force cannot cease to have force. In my view, this paragraph clearly indicates that the laws previously in force in Hong Kong are to be effective on 1st July 1997 without any act of adoption. Paragraph 2 of that article puts the matter beyond argument. It provides that documents, certificates, contracts, rights and obligations valid under the laws previously in force shall continue to be valid. How can these continue to be valid if the laws which govern their validity cannot even apply without an act of adoption? It simply makes no sense that the Basic Law continues the validity of these documents, certificates, contracts, rights and obligations but requires the laws which upholds them to be adopted."

Chan, CJ(HC), later concluded that the English text of article 160 was "quite clear and without ambiguity."[11]

Nazareth, V-P, admitted that article 160, if taken by itself, was ambiguous. But he, too, emphasised the need to construe article 160 in the context of the Basic Law as a whole. On this basis, there was no ambiguity. He stated (at p. 44):

> "If article 160 is to be reconciled with articles 8, 18 and 84, then upon a common law approach, it would clearly be directory rather than mandatory, thus posing no threat to the survival in the HKSAR of the common law."

Mortimer, V-P, thought the answer to the first question was beyond doubt. He did not even see a need to rely on the

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[11] At p. 13.

principles of interpretation found in *A.G. of the Gambia v Jobe* and *Minister of Home Affairs v Fisher,*[12] principles which he had previously cited in support of a purposive interpretation. He stated (at p. 75):

> "[...] in my judgment, the language in the Basic Law is so clear that the first question can be answered without falling back on these principles of interpretation."

Survival of the indictment

The respondents arguments on question number 2 were based on the fact that the indictment had been filed before the change of sovereignty and their trial had commenced in a court which had ceased to exist. In essence, they argued that the Basic Law simply did not cover the situation.[13]

The Government again turned to article 160 for an answer. It argued that the second paragraph of the article fully addressed the matter. The Government's position, as summarised by Nazareth, V-P (at pp. 46 and 47), was that -

(a) the institution of the indictment vested a right in the prosecuting authorities to have it heard and determined in the courts;
(b) there is a concurrent obligation imposed on the accused to be tried on that indictment, and an obligation to answer to it [...]; and
(c) there is a clear indication in Article 160 of the Basic Law that rights and obligations as before are to continue.

Again, the Court agreed with the Government but not without noting that a purposive approach in this case was needed. Chan, CJ(HC), stated (at pp. 16 and 17):

> "Under Article 160, documents and rights and obligations valid under the laws previously in force continue to be valid, recognised and protected. *Adopting a purposive approach* to Article 160, these clearly, in my view, cover indictments, the right of the Government to prosecute offenders and the obligation of an accused person to answer to the allegations made against him." [emphasis added]

Nazareth, V-P, along the same lines, stated (at p. 47):

> "Given the predominant theme of a seamless transition and *the purposive approach appropriate to constitutions* that is called for [...], it seems to me right that the last paragraph of Article 160 should be construed in the manner contended for by the Solicitor General." [emphasis added]

Mortimer, V-P, expressed a similar view on the second question. After acknowledging the general rule that a

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[12] Supra, note 9.

[13] In addition, the respondents argued that the Provisional Legislative Council had not been validly established under Chinese law and that consequentially the Hong Kong Reunification Ordinance, which provided for the continuation of legal proceedings and for the establishment of the courts and which admittedly would have addressed the issues raised by the second question, was invalid. See, supra, note 4.

court ought to lean against a construction that has penal consequences, he stated (at pp. 77 and 78):

> "Bearing in mind the principles to which I have referred when considering the interpretation of the Basic Law on the first question [...] I believe a *strongly purposive construction* of the Basic Law is justified and required by those principles." [*emphasis added*]

Commentary

It is difficult to find fault with the Court of Appeal's conclusions regarding article 160 of the Basic Law. The respondents' arguments on the first question, at least as summarised in the decision, appear inherently flawed and lacking in substance. The best that can be said is that the challenge was a bold one. In the end, the Court resolved the ambiguity presented by the words "shall be" simply by invoking the ordinary rules of statutory interpretation, that is, by interpreting the first paragraph of article 160 in the context of the Basic Law as a whole. In this respect, the Court's conclusions are unremarkable.

The Court's decision on the second question followed naturally from its decision on the first.

It is worth noting that there was no ambiguity in the Chinese text of article 160, a fact uncontested by the respondents and recognized by the Court.[14] As the English text is only a translation, albeit an official one, and the Chinese text prevails in the case of any discrepancy,[15] one has to wonder why the Court didn't rely on the Chinese text alone. On this point, Chan, CJ(HC), concluded that it was unnecessary to do so as the English text was already quite clear.[16] Of course he was able to reach this conclusion only after he had thoroughly examined the English text. With respect, I suggest that this approach to the interpretation of the Basic Law is wrong. The Basic Law is after all a Chinese law written in the Chinese language. It is a constitutional document. The courts' understanding of the Basic Law must, in the end, derive from their understanding of the original text. I would submit therefore that questions of interpretation of the Basic Law should be resolved by an examination of the Chinese text in the first instance. This approach of course may present practical difficulties to both the courts and the bar, imbued as they are in the traditions of the English common law, but these are difficulties that the courts and the bar should be able to be overcome.

With respect to the Court's more general comments on the purposive approach to interpretation, those of Chief Judge Chan are, to me, the most interesting. The question that remains is whether his doubts about the purposive approach will also find expression in

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[14] See Chan, CJ(HC), at p. 13 and Nazareth, V-P, at p. 45.

[15] Supra, note 8.

[16] Supra, note 14.

future decisions by the Court of Final Appeal,[17] or indeed by the NPC Standing Committee.[18] His classification of the Basic Law into three aspects (international, domestic and constitutional) may very well lead to a model of interpretation that applies the purposive approach only in a limited category of cases or to a limited category of articles of the Basic Law.

What is perhaps most significant about the decision in *HKSAR v Ma Wai-Kwan and others*, at least from the point of view of statutory interpretation if not constitutional law, is the fact that the Court of Appeal did not hesitate to apply common law rules of interpretation to the Basic Law, thus helping to assuage any doubts. The irony of course is that the Court did so in a case that challenged the very notion of the common law, and its concomitant rules of interpretation, having survived the change of sovereignty.

Annex

(*Selected Provisions of the Basic Law*)

Article 8

The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law *shall be maintained*, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region.

Article 18

The laws in force in the Hong Kong Special Administrative Region *shall be* this Law, the laws previously in force in Hong Kong as provided for in Article 8 of this Law, and the law enacted by the legislature of the Region [...].

Article 19

The Hong Kong Special Administrative Region *shall be vested* with independent judicial power, including that of final adjudication.

The courts of the Hong Kong Special Administrative Region shall have jurisdiction over all cases in the Region, except that the restrictions on their jurisdiction imposed by the legal system and principles previously in force in Hong Kong *shall be maintained.*

Article 81

The Court of Final Appeal, the High Court, district courts, magistrate's courts and other special courts *shall be established* in the Hong Kong Special Administrative Region. The High Court shall comprise the Court of Appeal and the Court of First Instance.

The Judicial system previously practised in Hong Kong *shall be maintained* except for those changes consequent upon the establishment of the Court of Final Appeal of the Hong Kong Special Administrative Region.

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[17] The Court of Final Appeal is, as its name suggests, the final adjudicative body in the HKSAR.

[18] Article 158 vests the NPC Standing Committee with the power of interpretation of the Basic Law.

Article 84

The courts of the Hong Kong Special Administrative Region shall adjudicate cases in accordance with the laws applicable in the Region as prescribed in Article 18 of this Law and may refer to precedents of other common law jurisdictions.

Article 87

In criminal or civil proceedings in the Hong Kong Special Administrative Region, the principles previously applied in Hong Kong and the rights previously enjoyed by parties to proceedings *shall be maintained.*

Article 160

Upon the establishment of the Hong Kong Special Administrative *Region*, the laws previously in force in Hong Kong *shall be adopted* as laws of the Region except for those which the Standing Committee of the National People's Congress declares to be in contravention of this Law. If any laws are later discovered to be in contravention of this Law, they shall be amended or cease to have force in accordance with the procedure as prescribed by this Law.

Documents, certificates, contracts, and rights and obligations valid under the laws previously in force in Hong Kong shall continue to be valid and be recognized and protected by the Hong Kong Special Administrative Region provided that they do not contravene this Law. [*emphasis added*]

Extrinsic materials as an aid to statutory interpretation - a Hong Kong view

Paula Scully[1]

Introduction

In April 1997, the Hong Kong Law Reform Commission (HKLRC) published a report on "The Use of Extrinsic Materials as an Aid to Statutory Interpretation". The report makes recommendations on the use of extrinsic aids, such as reports of legislative proceedings and reports that have given rise to particular legislation.

Trends in other common law jurisdictions

The trend in other common law jurisdictions has been to relax the rules governing the exclusion or limitation on the use of extrinsic aids. In 1993, the Singaporean legislature passed an amendment to its Interpretation Act[2] which added a new section, 9A, so as to allow the use of ministerial statements as an aid to the interpretation of the relevant legislation. Section 9A was modelled on section 15AB of the *Australian Acts Interpretation Act 1901* (Cwlth).[3] In line with that approach, the HKLRC recommended that legislation should be enacted to enable Hong Kong courts to use a range of extrinsic aids when interpreting legislation and to provide criteria for the use of those aids.

The HKLRC considered that the proposals would, if implemented, give the courts more assistance in tracing the source or purpose of a disputed statutory provision. The HKLRC was supported in its view by the fact that section 19 of the Hong Kong *Interpretation and General Clauses Ordinance (IGCO)* already requires the courts to adopt a purposive approach to the construction of legislation[4].

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1 Senior Government Counsel, Hong Kong Law Reform Commission. The views expressed in this article are those of the author alone.

2 Section 9A of the Interpretation Act 1985 as inserted by section 2 of the Interpretation (Amendment) Act 1993. It was brought into force on 16 April 1993. See further, Commonwealth Law Bulletin, October 1993, 1364.

3 The (Federal) Acts Interpretation (Amendment) Act 1984 inserted a new section 15AB into the Acts Interpretation Act 1901 (Cwlth).

4 This states: *"An Ordinance shall be deemed to be remedial and shall receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Ordinance according to its true intent, meaning and spirit"*. This is similar to section 5(j) of the New Zealand Acts Interpretation Act 1924, section 15AA of the Acts Interpretation Act 1901 (Cwlth), section 15 of the United States Uniform Statutory Construction Act, and section 15 of the Canadian (Federal) Interpretation Act.

Impact of** Pepper v Hart **in Hong Kong

The HKLRC was also influenced by the developments in other common law jurisdictions, particularly the judgement in *Pepper v Hart*.[5] It will be recalled that in *Pepper v. Hart*, it was held that, subject to any question of parliamentary privilege, the rule excluding references to parliamentary material as an aid to statutory construction should be relaxed so as to permit the courts to refer to that material if -

- legislation was ambiguous or obscure or led to absurdity,
- the material relied on consisted of one or more statements by a Minister (or other promoter of the Bill) together if necessary with such other parliamentary material as was necessary to understand those statements and their effect, and
- those statements were clear.

The courts in Hong Kong have already applied *Pepper v Hart,* but only a small number of cases have been reported. Despite the differences between the legislative process in Hong Kong and the United Kingdom, only in *Ngan Chor Ying v Year Trend Development Ltd*[6] was a reservation expressed as to this fact by Findlay J. In *Matheson PFC Limited v Jansen*[7], Penlington J regarded a statement in the explanatory memorandum by the Attorney General as "a clear statement from the equivalent of a Minister...".

The courts have sometimes referred to the relevant extract from the legislative debates even where they have decided that the legislation is not ambiguous, obscure or absurd. In *Hong Kong Racing Pigeon Association Limited v Attorney General,*[8] Nazareth J noted the purpose of the Bill as stated by the Secretary for Health and Welfare in moving the second reading. Nazareth J emphasised the constraints on the relaxation of the exclusionary rule, as set out in *Pepper v Hart* by Lord Bridge,[9] Lord Oliver[10] and Lord Browne-Wilkinson.[11]

Impact of change of sovereignty

On 1 July 1997, Hong Kong became a special administrative region of the People's Republic of China, Despite the fact that article 8 of Hong Kong's Basic Law provides that -

> "the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for those which contravene this Law or have been amended by the legislature of the Hong Kong Special Administrative Region"

and Article 84 of the Basic Law provides that -

> "the courts of the Hong Kong Special Administrative Region may refer to precedents of other jurisdictions",

doubts remain as to whether or not the

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5 1992] 3 WLR 1032.

6 [1995] 1 HKC 605, 610.

7 (1994) Civil Appeal No. 72 of 1994, (CA) 26 July 1994.

8 [1995] 2 HKC 201(CA).

9 [1995] 3 WLR 1032, at 1039H.

10 *Ibid* at 1042H.

11 *Ibid* at 1056B.

courts in Hong Kong would consider themselves bound by the decision in *Pepper v Hart* now that the exercise of sovereignty over Hong Kong has reverted to the People's Republic of China. The HKLRC felt that legislating to allow Hong Kong courts to use extrinsic aids in interpreting legislation would remove these doubts.

Legislating for extrinsic aids

The HKLRC also considered that that there were some issues that were not covered by the principles laid down in *Pepper v Hart* and that there were some uncertainties in the application of those principles. For one thing, it was not entirely clear which parliamentary materials fell within the principles - explanatory memoranda for example. There has been little analysis as to whether *Pepper v. Hart* allowed the courts to have regard to the reports of parliamentary standing committees or to the speeches made during the proceedings of those committee. The *Pepper v Hart* principles have yet to have an impact on the interpretation of treaties.[12] Moreover, neither *Pepper v Hart,* nor the judgements since, make clear the respective weight of different aids other than *Hansard*, nor their weight *vis a vis Hansard.*

The common law position concerning extrinsic aids is complex and not readily understood. Having considered all the arguments, the HKLRC concluded that it was desirable to codify and modify the existing common law principles so long as the legislation could provide comprehensive and easily understood criteria for the use of extrinsic aids in interpreting Hong Kong legislation. The HKLRC therefore proposed that the Hong Kong IGCO should be amended by inserting a new section 19A, which would allow Hong Kong courts to use certain specified extrinsic aids when interpreting legislation. Proposed section 19A is set out in Annex 1. It is modelled on section 15AB of the Australian Acts *Interpretation Act 1901* ("AAIA"), but with modifications made for the Hong Kong context.

Criteria

Section 15AB(1)(b) of the AAIA is similar to the criterion for the use of extrinsic aids set out in the first limb of *Pepper v Hart.* The criteria adopted by the HKLRC are that courts should be permitted to have regard to extrinsic aids -

- if the provision to be interpreted is ambiguous or obscure, or
- if the ordinary meaning of the provision, taking account of its context and purpose, would lead to a result that is absurd or unreasonable.[13]

The HKLRC did not recommend that courts should be permitted to have regard to extrinsic materials in order to confirm the meaning of a statutory provision as provided for by section 15AB(1)(a) of the AAIA. This was

[12] In *R v Foreign Secretary, ex p Rees-Mogg,* which arose out of the United Kingdom's accession to Europe, there was reference to *Pepper v Hart.*

[13] Section 15AB(1)(b) was adopted subject to deletion of the word "manifestly".

because the HKLRC feared that to do so could lead to an escalation of legal costs.

List of permitted extrinsic aids

The HKLRC recommended that the proposed legislation should encompass the list of extrinsic aids set out in section 15AB(2) of the AAIA, as modified to meet the circumstances of the legislative and administrative structures of Hong Kong.[14]

Among the aids included in the HKLRC recommendation were the following -

- the explanatory memorandum prepared for the relevant Bill;
- the second reading speech of the policy Secretary in the Legislative Council[15];
- any relevant material in the official record of debates in the Legislative Council,
- relevant international treaties;
- relevant official reports, such as HKLRC reports.

The HKLRC also thought it sensible to follow section 15AB(2)(a) of the AAIA, which recognises the use of internal aids.

International treaties

Sometimes a Bill is drafted in order to give effect to an international treaty. The HKLRC recommended that there should be included in the Bill a statement that the proposed Ordinance was intended to have that effect as contemplated by subsection (2)(g) of the draft section set out in Annex 1. This would have the effect of ensuring that the treaty and its *travaux preparatoires* would be available to the courts as aids to interpreting the Ordinance.

Application of proposals to existing legislation

It has been argued that that no specific provision needs to be made for the application of the proposals to existing legislation. This is because section 2(1) of the Hong Kong IGCO provides:

> "Save where the contrary intention appears either from this Ordinance or from the context of any other Ordinance..., the provisions of this Ordinance shall apply to this Ordinance and to any other Ordinance in force, whether such other Ordinance came or comes into operation before or after the commencement of this Ordinance...."

However, in order to remove the doubt, the HKLRC recommended the adoption of the amendment made to section 15AB of the AAIA by section 2 of the *Australian Acts Interpretation (Amendment) Act 1984*[16]

Interaction between legislation and the common law

The HKLRC was concerned that, by legislating to enable the Hong Kong courts to have regard to extrinsic aids, the development of the common law might be stultified or and might be

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[14] See draft section in Annex 1.

[15] This would be Hong Kong's equivalent to a Government Minister.

[16] See Annex 1.

regarded as having been consolidated, modified or abolished. The HKLRC thought there was an advantage in retaining the common law to provide for matters not covered by the legislature and therefore recommended the saving provision set out in subsection (5) of the proposed section.[17]

Rights of the individual

The common law canon of construction that the legislature is presumed not to enact legislation that detrimentally affects the liberty of the citizen unless the legislation includes a provision expressly making it clear that this was the legislature's intention, has been treated as applying to Hong Kong.[18] In the absence of such a provision, any ambiguity has to be resolved in favour of the citizen. The HKLRC noted that the relevant provision of section 15AB of AAIA had not inhibited the Australian courts in developing a jurisprudence that balanced the interests of the citizen with the public interest. However, for the avoidance of doubt, the HKLRC recommended the inclusion in the proposed section 19A(6) so as to provide that extrinsic materials should not be used by the courts to derogate from the rights of the individual.[19]

Other proposals

(a) Objects clause

The HKLRC considered a proposal for the incorporation of objects clauses in Bills so as to more clearly reflect the purpose of the relevant legislation.[20] Although the implementation of the proposal could be regarded as being in keeping with the spirit of section 19 of the Hong Kong IGCO, the HKLRC concluded that, on balance, a *mandatory requirement* for the inclusion of objects clauses in legislation might cause practical difficulties and impose unreasonable constraints on legislative counsel.

(b) Explanatory memoranda

The explanatory memoranda of Hong Kong Bills[21] are generally speaking not very detailed. The only requirement is that they should state the contents and objects in non-technical language.[22] The HKLRC considered whether a more detailed explanatory memorandum should be published with a Bill. The memorandum would include the

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17 See Annex 1.

18 *R v Hallstrom, ex p W (No.2)* [1986] QB 1090, at 1104.

19 For full text, see Annex 1.

20 In New Zealand, statutes increasingly include a purpose clause. See "A New Interpretation Act", Report No. 17 of the New Zealand Law Commission, paragraph 70 (1990).

21 The Bill is published, with the explanatory memorandum, in Supplement No. 3 of the Hong Kong Government Gazette. When enacted the Ordinance, without a explanatory memorandum, is published in Supplement No. 1. Subsidiary legislation, with explanatory notes, are published in Supplement No.2.

22 Order 38(6) of the Standing Orders of Legislative Council.

background, objects and purposes of the proposed legislation and would be amended to reflect changes as the Bill passed through its various stages in the Legislative Council.[23] However, the HKLRC concluded that it would be more useful to continue with explanatory memoranda in their existing form but with a more comprehensive statement of the objects of, and reasons for, the legislation. The HKLRC thought it was unrealistic to require a Bill's explanatory memorandum to be revised to reflect all amendments passed during the proceedings of the legislature.

(c) Notes on clauses

The HKLRC also considered the Renton Committee's recommendation that notes on clauses and similar additional explanatory material should be made available at Committee stage debates.[24] It concluded that it was unnecessary to deflect resources to prepare an explanatory memorandum for all amendments, but it would be of considerable assistance for complex or sensitive Bills.

Listing sources in a Schedule to a Bill

The HKLRC considered that it could be appropriate in complex legislation, legislation implementing a report of a law reform body and legislation with an international element to refer to the extrinsic materials in a schedule. This would be similar to the Arbitration Ordinance (Cap 341),[25] where a schedule of extrinsic materials was inserted which facilitates tracing the relevant documents.

(d) Information on legislative history

The New Zealand Law Commission recommended that the following information should be included in every statute:

- the date of the second reading speech;
- the name of the Bill as introduced;
- the date of other parliamentary stages;
- the number of the Bill and of its later versions and of any relevant supplementary order paper;
- a reference to any printed report on the Bill.[26]

The HKLRC decided to adopt the New Zealand proposals but with one modification, namely that the date of the second reading speech should be inserted in each Ordinance as originally printed but should be omitted from revised editions of the Ordinance.

The HKLRC recommended that, where legislation implements a law reform report, the legislation should refer to any relevant law reform publications.[27]

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[23] The United Kingdom Law Commissions had recommended such memoranda in their 1969 report. See *infra* for reference.

[24] "The Preparation of Legislation" (1975:Cmnd 6053) at paragraph 15.10.

[25] Sixth Schedule. It also included a report of UNCITRAL and of the Secretary General.

[26] Paragraph 115 of "A New Interpretation Act", (Report No 17, 1990).

[27] The New Zealand Law Commission suggested that a brief summary of the Act's legislative history could include references to any relevant law reform publications.

Such a reference is included in the Sixth Schedule to the Arbitration Ordinance (Cap. 341). The HKLRC also recommended that legislation should include a reference to any law reform report prepared in a foreign jurisdiction when that report was its source.

The HKLRC also recommended that further consideration should be given by those involved directly in the legislative process to the type of explanatory materials which are needed, their availability, and the weight to be attached to them.

(e) Explanatory notes to sections etc.

The British Hansard Society Commission on the Legislative Process,[28] recommended that explanatory notes on sections, based on "Notes on Clauses",[29] would be approved by the Minister and laid before Parliament, but should not require formal approval. That Commission envisaged that the notes would be published at the same time as the Act concerned. However, the HKLRC considered that the inclusion of such explanatory notes would present practical difficulties, similar to those identified for specially prepared explanatory memorandum, and so declined to recommend their adoption.

(f) Reports of Law Reform Commissions

The New Zealand Law Commission recommended that, when legislation is based on, or influenced by, a provision of some other Act, a court decision or the report of a law reform commission or some other body, the legislation should included a reference to the provision, decision or report (possibly in a table annexed to the legislation).[30] The HKLRC concluded that it would be useful to include, in each Hong Kong Ordinance, references to other relevant legislation, and to reports of law reform bodies, on which the Ordinance is based. This should include references to foreign legislation where that legislation was the source of the Hong Kong law.

(g) Evidence of "Hansard"

Section 35 of the Hong Kong Evidence Ordinance (Cap. 8) provides that, in civil proceedings, the *Government Gazette* may be proved by its production. In the Hong Kong context, this would not cover references to reports of Legislative Council proceedings. For the removal of doubt, the HKLRC recommended the enactment of a provision similar to section 7(1) of the Australian Evidence Act 1905.[31] Such

("The Format of Legislation" report, at paragraph 37 *supra*.)

[28] "Making the Law: The Report of the Hansard Society Commission on the Legislative Process" (1993).

[29] Notes on Clauses contain an explanation of the purpose and effect of each clause, often including practical examples of its application, but are only for use by Ministers.

[30] "The Format of Legislation", Report No. 27, December 1993, paragraph 33. See Commonwealth Law Bulletin, January 1994, at 202 for a useful summary.

a provision would allow extrinsic materials to be proved simply by producing them in the relevant legal proceedings.

(h) Status of government circulars

The extrinsic aids listed in section 15AB(2) of the AAIA does not cover Government circulars or other post-enactment explanatory materials. Christopher Jenkins[32] has suggested that, since *Pepper v Hart,* legislative counsel may have to take a more active part in checking documents that brief a Bill's sponsors or members of the legislature to ensure that those documents accurately and comprehensively explain the Bill.[33] This could extend to press releases, circulars and advertisements issued by Government departments to explain new legislation.

Jenkins also recommended that legislative counsel and civil servants should check what was actually said in the legislative proceedings to ascertain whether any additional statements or corrections are required.[34]

(i) Guidelines

Legislative counsel and Government legal advisers may have to vet more closely documents or statements made to explain a Bill, whether before or after enactment. The HKLRC felt that more attention should be paid to assurances given in such documents as regards the consequences of a particular Bill to a particular identifiable class of persons. The HKLRC recommended that the Hong Kong Government should draw up guidelines for its civil servants as to which documents fall within the categories of extrinsic materials that could be used as aids to statutory interpretation.[35]

(j) Practice direction

The HKLRC recommended that the Hong Kong judiciary should issue a practice direction governing the production of extrinsic materials before the courts. It considered that such a direction be issued without waiting for legislative reform in this area.[36]

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31 This federal Australian provision states; - "all documents purporting to be copies of the *Votes and Proceedings* or *Journals* or Minutes of either House of the Parliament which purport also to be printed by the Government Printer, shall on their mere production be admitted as evidence thereof in all courts." See Brazil "Reform of Statutory Interpretation - the Australian Experience of Use of Extrinsic Materials" (1988) 62 ALJ 510.

32 *Pepper v Hart: A Draftsman's Perspective* 15 Stat LR 23 (1994).

33 *Pepper v Hart: A Draftsman's Perspective* ibid. In the Hong Kong context, this would include Legislative Council briefs and notes on amendments.

34 Jenkins, *supra.*

35 If it is for internal use, this briefing document should not itself fall within the criteria.

36 See Practice Direction (Hansard; Citation), Supreme Court [1995] 1 WLR 192. The Direction covering the House of Lords is at [1993] 1 WLR 303.

Other extrinsic aids

The HKLRC was unwilling to recommend that other extrinsic aids be included in a statutory provision, such as historical setting, textbooks, other statutes, conveyancing practice, and uniform court decisions It considered that these are rarely of relevance.

Implementation of the HKLRC report

The HKLRC report has been submitted to the Legal Policy Division of the Department of Justice for its consideration. At this stage, it is not known whether the report will be implemented or, if it is, which of the recommendations will be followed.

Anyone who wishes to obtain a copy of the report should write to the Secretary to the Hong Kong Law Reform Commission, 20/F, Harcourt House, 30 Gloucester Road, Wanchai, Hong Kong. Alternatively send a request by facsimile message to (852) 2865-2902 or by E-mail to : reform@justice.gcn.gov.hk. A summary of the report is at http://www.info.gov.hk.

Annex I

Draft section 19A proposed to be inserted into the Interpretation and General Clauses Ordinance

(1) Subject to subsection (3), (4), (5) and (6), in the interpretation of a provision of an Ordinance, if any material not forming part of the Ordinance is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material:

(a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account section 19 of this Ordinance; or

(b) to determine the meaning of the provision when -

(i) the provision is ambiguous or obscure; or

(ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the Ordinance and the purpose or object underlying the Ordinance leads to a result that is absurd or is unreasonable.

(2) Without limiting the generality of subsection (1), the material that may be considered in accordance with that subsection in the interpretation of a provision of an Ordinance includes :

(a) all matters not forming part of the Ordinance that are set out in the document containing the text of the Ordinance as printed by the Government Printer;

(b) any relevant report of a commission, the Law Reform Commission, committee of inquiry or other similar body that was published before enactment of the provision;

(c) any relevant report of a body similar to the Law Reform Commission in any jurisdiction other than Hong Kong where the provision was modelled on legislation from such jurisdiction implementing any recommendations of the report;[37]

[37] Since Hong Kong legislation is sometimes

(d) any relevant treaty or other international agreement that is referred to in the Ordinance or in any of the materials that are referred to in this subsection;[38]

(e) any explanatory memorandum relating to the Bill containing the provision, or any other relevant document[39], that was laid before, or furnished to the members of the Legislative Council by the policy Secretary or other promoter before the time when the provision was enacted;

(f) the speech made to the Legislative Council by a policy Secretary or other promoter[40] on the occasion of the moving by that policy Secretary or other promoter of a motion that the Bill containing the provision be read a second time in the Council;

(g) any document (whether or not a document to which a preceding paragraph applies) that is declared by the Ordinance to be a relevant document for the purposes of this section;[41]

(h) any relevant report of a committee of the Legislative Council before the time when the provision was enacted."[42]

(3) The weight to be given for the purposes of this section to any such matter as is mentioned in subsection (1) or (2) shall be no more than is appropriate in the circumstances.[43]

(4) For the avoidance of doubt, the amendments made by this Ordinance shall apply in relation to all Ordinances in force whether such an Ordinance came or comes into operation before or after the commencement of this Ordinance.

(5) Nothing in this section shall prejudice any right to rely on extrinsic materials as provided for under common law.

(6) Nothing in this section shall prejudice the common law rule that ambiguous legislation cannot be construed to derogate from the rights of individuals.

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influenced by reports prepared in foreign jurisdictions, the HKLRC wanted to ensure that those reports could be studied by judges when seeking to resolve ambiguities in relevant Hong Kong legislation.

38 Clause 1(1)(c) of the draft Bill appended to the United Kingdom Law Commission's report was reworded in this subsection. See *infra*.

39 This term would appear to include Legislative Council briefs which are prepared by the policy branch and forwarded to the Members of the Legislative Council when a Bill is introduced there.

40 This would include the Secretary for Justice, whose role before 1 July 1997 was performed by the Attorney General.

41 An example of this document would be where an ordinance is implementing a treaty. Then the treaty and its *travaux preparatoires* can be treated as "relevant documents".

42 The Commission did not favour specific reference to minutes of meetings of Bills Committees, as these are not always accurate and are not included in *Hansard*. However, the proposed 19A(2)(h) is broad enough to include the report of a Select Committee though these are rarely established in Hong Kong. There are also references in the Standing Orders of the Legislative Council to reports of other committees, such as the Public Accounts Committee and Panels.

43 The Commission favoured the adoption of the draft clause suggested by the United Kingdom Law Commissions in their report "The Interpretation of Statutes", (Law Com No. 21)(Scot Law Com No. 11) (1969) rather than section 15AB(3).

Compilation, consolidation and revision of the laws of Hong Kong

Fanny Ip[1]

Introduction

In Hong Kong (now formally known as the Hong Kong Special Administrative Region of the People's Republic of China), the Department of Justice (formerly the Attorney General's Chambers) has responsibility for the compilation, consolidation and revision of the laws of Hong Kong. The terms "revision" and "consolidation" may have different connotations, depending on the nature of a territory's statute law. In Hong Kong, where statutes are amended textually (that is, by removing and replacing words of the principal statute), it is appropriate to refer to "consolidation" as the incorporation of amending statutes into the principal statute without any change in wording and to "revision" as the process of changing, omitting or rearranging the wording, without changing the intent of the law, in order to tidy up and modernize the statute book.

The revised edition system

From 1965 to 1989, the legal framework for the compilation, consolidation and revision of the laws of Hong Kong was provided for under the Revised Edition of the Laws Ordinance 1965 ("1965 Ordinance"). The revised edition system under the 1965 Ordinance was in essence an ordinance-by-ordinance consolidation and revision system, to avoid the need for a periodic revision and reprint of all of the laws. Individual Ordinances (including subsidiary legislation) were compiled into individual booklets. The various booklets were contained in a number of volumes, and a booklet could be easily removed from and replaced in a volume. If an Ordinance was extensively amended, a new booklet was issued containing the consolidated law with perhaps some minor revision. If the amendments were not sufficiently extensive to justify the preparation and publication of a new revised edition of that Ordinance, the existing booklet remained and the amendments were issued, together with unconsolidated minor amendments to other Ordinances, in a cumulative supplement of unconsolidated minor amendments, as a separate volume.

Under the 1965 Ordinance, the revised edition of the laws of Hong Kong ("Revised Edition") represents the "sole and only proper law" of Hong Kong in respect of all Ordinances contained in it.[2] That is to say, the Revised Edition provides an authoritative statement of the law.

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[1] Deputy Principal Government Counsel (acting), Law Drafting Division, Department of Justice, Government of the HKSAR.

[2] See section 15(3) of the 1965 Ordinance.

The 1965 Ordinance conferred on the commissioner appointed under that ordinance a wide range of revision powers for the preparation of the Revised Edition. Thus, a revised statute issued in a new booklet may differ in wording (though of course it should not differ in meaning) from the original gazetted version as amended from time to time. In consequence, for purposes of historical research, all extracted booklets that were superseded by subsequent booklets and minor amendments booklets must be kept as they supplant the Gazettes as the authoritative source of the law.

Under the 1965 Ordinance, the processes of consolidation and revision were combined and took place annually, i.e. there was an "annual edition" of new booklets and the cumulative supplement.

By 1989, the following shortcomings of the revised edition system were identified -

(a) the "annual edition" was insufficiently up to date for the convenience of users in ascertaining the current statute law and a separate noter-up service had to be provided throughout the year;

(b) the noter-up service consisted of regular issues of minor amendments, in a form in which each amendment could be cut and pasted into a booklet in its appropriate place. This was very labour intensive for subscribers to maintain. Besides, the insert slips would be difficult to follow if the ordinance was frequently amended and the slips were overlaid. With the continuing expansion in the volume of legislation, the noter-up had over the years become much less manageable;

(c) for subscribers who did not take the noter-up service, the minor unconsolidated amendments were in a separate volume, thus were inconvenient to locate and to compare with the principal text, and the amendments could be up to 18 months out of date.

At that time, in view of the People's Republic of China's resumption of the exercise of sovereignty over Hong Kong on 1 July 1997, it was anticipated that if the revised edition system was to be continued, the Revised Edition had to be reprinted in whole to incorporate authentic Chinese texts of all the then existing laws (which had been monolingually enacted in English only). The opportunity was taken to consider alternative mechanisms to replace the revised edition system. It was decided that the loose-leaf system should be adopted.

The loose-leaf system

Thus, since 1990, Hong Kong has begun to publish the laws of Hong Kong in loose-leaf form, pursuant to the Laws (Loose-leaf Publication) Ordinance 1990 ("1990 Ordinance"). All the Ordinances contained in the Revised Edition and in force have been re-formatted and published in the Loose-

leaf Edition of the Laws of Hong Kong ("Loose-leaf Edition"), which is kept up to date by regular issues of new or replacement pages. Amendments to Ordinances are consolidated into the principal text and printed in loose-leaf pages for replacement of the pages containing the affected principal text. No doubt, from the user's point of view, it is the most efficient means of presenting the current statute law. There are two main advantages. One is a clear, easy-to-read consolidated text. The other is that loose pages (without binding or noter-up additions) are easy to remove and photocopy.

Unlike the 1965 Ordinance, the revision powers under the 1990 Ordinance are extremely limited and consist only of the powers to arrange the grouping and sequence of legislation, assigning chapter numbers to Ordinances, alteration of short titles in defined circumstances and omitting enacting, expired or spent provisions.

Under the 1990 Ordinance, a provision of an enactment appearing in the Loose-leaf Edition is deemed to be correct unless the contrary is proved. In other words, in case of a discrepancy, the authoritative source text would be -

(a) in the case of an enactment published in the Revised Edition (i.e., enacted before 1 January 1990), the Revised Edition and further amendments (if any) to the Ordinance as published in the Gazette; and

(b) in the case of an Ordinance enacted on or after 1 January 1990, the original text of the Ordinance or subsidiary legislation as published in the Gazette and further amendments (if any) so published.

As the Loose-leaf Edition does not represent the "sole and only proper laws" in respect of the Ordinances contained in it and is not the authoritative source text, the extracted pages may be discarded.

A usual concern about a loose-leaf system is that a user may not be able to find out whether his set of the loose-leaf publication is correctly assembled and updated to the latest issue. This concern is addressed by printing the number of the relevant issue of the Loose-leaf Edition on each of the pages comprised in that issue and the combined use of various check lists, as elaborated below.

For each principal ordinance and the subsidiary legislation made under it, there is a "Check List and Instructions", which is printed on pink sheets and placed immediately before the text of the principal ordinance or subsidiary legislation. This pink check list contains -

(a) a list of all of the current pages of the principal ordinance or subsidiary legislation, setting out their page numbers, the issue number of each page and instructions for withdrawal and insertion;

(b) information on the enactment history; and

(c) citations to amendments to the principal ordinance or subsidiary legislation that are not yet in force as of the date of the current issue.

For each issue, there is a "Master Check List and Instructions", which is printed on blue sheets and placed at the beginning of the Loose-leaf Edition. This blue master check list includes (inter alia) a list of all of the current pink check lists, setting out the issue number of each of the pink check lists and instructions for withdrawal and insertion.

If a set is properly maintained, the "pink check list" of an enactment should bear an issue number which is the same as that shown in relation to that enactment in the "blue master check list" and the pages containing the text of that enactment should each bear an issue number as that shown in relation to that page on the "pink check list".

Updating issues

There are several issues of new or replacement pages each year to keep the Loose-leaf Edition up to date. Instead of issuing updating pages for the whole edition as at fixed "issue dates" (which is the case for most statute loose-leaf publications), the publication frequency of the updating issues may be adjusted according to need.

The "cut-off date" for an updating issue is determined by the editor of the Loose-leaf Edition. The updating issue will include all new principal legislation enacted since the "cut-off date" of the preceding updating issue ("the "last cut-off date""). If the new principal legislation is not yet in operation, that fact will be recorded in the "pink check list". An amendment is not incorporated in the Loose-leaf Edition until it has been brought into operation, thus only amendments that have come into operation since "the last cut-off date" (whether on or before the "cut-off date") will be included in the updating issue. The "cut-off date" is not published. It is merely a device to facilitate the preparation of the updating issue as there is necessarily a period of time after the "cut-off date" before the updating issue comes out. This time is taken up in the necessary tasks of sending instructions to the printer, preparing manuscripts, proofreading of printer's proof, revision, printing, collation and distribution.

When the preparation for the updating issue approaches completion, the editor will determine the "blue master check list" date for that issue. A list that keeps track of amendments that have come into operation since the "cut-off date" will be checked. In relation to an enactment that does not have any amendment having come into operation since the "cut-off date", the "blue master check list" will state that the text of that enactment in the Loose-leaf Edition reflects the law as at the "blue master check list" date. For an enactment with amendments that have come into operation since the "cut-off date", an entry will be inserted in the Exception List in the "blue master check list" to show that the text of that enactment in the Loose-leaf Edition only

reflects the law as at the day before the coming into operation of such amendments (if the amendments have come into operation on different dates, then the day before the earliest date of those dates). A new "blue master check list" will go out with each set of the updating issue plus a "pink check list" for each enactment that requires pages to be inserted, replaced or withdrawn.

The lay-out of the Loose-leaf Edition

The Loose-leaf Edition is printed on A4 page size in landscape orientation (i.e., rotate the page 90 degrees). Bilingual texts of legislation are printed respectively in 2 columns, with the bilingual texts of each provision facing each other. There are now 39 volumes. In each volume, the pages are held in moveable binders on the left hand side. Materials in the existing Volume 39 will be removed in the next issue and constitutional documents (including the Constitution of the People's Republic of China and the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China) and other relevant documents will be included.

Bilingual legislative texts and the problem of textual ambiguities

SUEN Wai-chung[1]

In Hong Kong, draft legislation is today prepared in both of the official languages, i.e., Chinese and English.

For those laws that were originally enacted in the English language only, a Chinese version has to be prepared. However, language is frequently susceptible to ambiguity, and the English language is no exception. To resolve ambiguities in statutes, the common law has devised a variety of rules of statutory interpretation. It must be remembered, however, that the rules of statutory interpretation normally come into play only when the statute is ambiguous or unclear.

As Chief Justice Tindal observed in *Warburton v Loveland*, [1832] 2 Dow & C1 480:

> "[w]here the language of an Act is clear and explicit, we must give effect to it, whatever may be the consequences, for in that case the words of the statute speak the intention of the legislature."

Lopes LJ in *R v The Judge of the City of London Court* [1892] 1 QB 273 also cautioned against usurping the functions of the legislature:

> "if the words of an Act are unambiguous and clear, you must obey those words, however absurd the result may appear... otherwise the Court would be legislating instead of the properly constituted authority of the country, namely, the legislature."

If the courts should not rewrite the law, a *fortiori* nor should the legislative counsel who prepares a text of that law in another official language. For this reason, legislative counsel have resisted the temptation to "improve" the law even where "errors" or "mistakes" are obvious.

Thus, even though "Director of Buildings and Lands" in s. 29(3) of the *Mass Transit Railway (Land Resumption and Related Provisions) Ordinance* (Cap. 276) should have read as "Director of Lands", the Chinese equivalent of the former title was adopted in the Chinese text.

In the Schedule to the *Tate's Cairn Tunnel By-laws* (Cap. 393 sub leg), traffic sign number 19 refers to certain categories of dangerous goods. In the English text of the law the sign is bilingual - the English version "Categories 1, 2, 5" clearly indicates three categories, and the Chinese characters "第一二五類" (category No. 125) suggest "category 125". Even though the "imperfection" is in Chinese,

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it was thought not appropriate to simply publish the Chinese text showing a "第一、二、五類" (category 1, 2, 5) label in Chinese only.

The better course of action would be to amend both the English and Chinese texts of law at the same time, which has now been done.

When the language is clear and unambiguous counsel will endeavour to produce a corresponding text in the other official language that will give the same clear and unambiguous meaning. Yet the meanings of most words are not constant and distinct. Many words have more than one meaning.

In this regard, Lord Atkinson's often quoted observation in *Victoria (City) v Bishop of Vancouver Island*, [1921] 2 AC 384, is instructive:

> "in the construction of statues their words must be interpreted in their ordinary grammatical sense, unless there be something in the context, or in the object of the statute in which they occur, or in the circumstances with reference to which they are used, to show that they were used in a special sense different from their ordinary grammatical sense."

What is the ordinary grammatical sense? It is usually the first meaning of a word found in a dictionary.

Yet quite often a particular word is *prima facie* capable of more than one meaning in a particular provision. For example, "action" can refer to the process of acting, which is the meaning most commonly used, or a legal process in the legal sense. Sometimes such "ambiguity" can be easily resolved by looking at the context.

As Oliver Wendell Holmes remarked:

> "[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in colour and content according to the circumstances and the time in which it is used..." (*Towne v Eisner* [1818] 245 US 418).

The two senses of "action" as used in "suffering damage as a result of any *action* taken in compliance with the Director's directions" (s. 11B of the *Shipping and Port Control Ordinance* (Cap. 313)) and in "action brought in the Supreme Court" (s. 3 of the *Judgments (Facilities for Enforcement) Ordinance* (Cap 9)) can be readily distinguished by the context.

Adopting Lord Atkinson's statement, the less common meaning should be preferred in this case. In so doing, the draftsman of the Chinese version is not resolving an ambiguity by applying a rule of statutory interpretation. He or she is simply translating a provision which is clear and unambiguous in the context of the statute. The "ambiguity" in this case is not a real, but only an apparent ambiguity.

There are, however, certain cases in which the distinction between apparent and real ambiguity is not so obvious. Sometimes two or more meanings are capable of being given to a particular sentence. The use of the word "copy"

in various legislative provisions is an example of this.

In the *Oxford English Dictionary*, the first modern meaning given to "copy" is "a transcript or reproduction of an original". This may be regarded as the ordinary grammatical sense of the word. In *A New English-Chinese Dictionary*, the meanings given to copy are "抄本" (a transcribed version), "繕本" (a copied writing), "謄本" (a version in imitation) and "複製品" (a reproduction based on an original), "拷貝" (a reproduction in the cinematography context) and "副本" (a reproduced version, suggesting a sense of a duplicate, in the legal context).

In ordinary Chinese, "副本" (a reproduced version) is often used, correctly, as the standard translation for a "copy" of a document. "Copy" appears in s 10G of the *Landlord and Tenant (Consolidation) Ordinance* (Cap. 7), the English version of which reads:

> "[W]here a landlord serves a notice of increase on the tenant under subsection (1) he shall, at the same time, send a copy of the notice to the Commissioner."

In this situation, the landlord serves a notice (presumably the "original") on the tenant, and sends a copy thereof to the Commissioner.

"Copy" here is translated as "副本" (a reproduced version), which adequately conveys the sense of "a transcript or reproduction of an original", and is most apt in Chinese syntax too. In fact, "copy" has been so translated at least 400 times in Hong Kong ordinances, not to mention subsidiary legislation. This is nothing extraordinary. The ordinary grammatical sense of the word for the Chinese version should be adopted where this is possible.

However, there are instances in which the context suggests that a word could be used in a number of closely related, but somehow different, senses. For example, s. 99 of the *Interpretation and General Clauses Ordinance* (Cap. 1) provides:

> "The Government Printer may, with the authority of the Governor, print copies of any Ordinance with all additions, omissions, substitutions and amendments effected by any amending Ordinances, and such copies shall be deemed to be authentic copies of the Ordinance so amended as the date of such printing."

In this provision, "copies" is used in the sense of "[o]ne of the various (written or printed) specimens of the same writing or work" and no reference to an original is intended (see the *Oxford English Dictionary*). For this use of "copy", "副本" (a reproduced version) would be inappropriate because it places undue emphasis on the existence of an "original".

This second sense in which "copy" is used in English is explained, rather than translated, in *A New English-Chinese Dictionary*. In the end, the less common "文本" (roughly, "a text of a writing") was adopted as the translation of "copies" for s. 99.

In some cases "一份" (one number) can be used as a quantifier describing the

relevant document where the Chinese syntax allows it (e.g., s. 10A(2) of the *Landlord and Tenant (Consolidation) Ordinance* (Cap. 7)). In many cases, however, it is not acceptable to use solely "一份" (i.e. one number of what?), since this expression serves only as a quantifier and cannot usually stand as a substantive noun in a sentence. For example, "一份" (one number) would be inappropriate in s. 141(3) of the same ordinance, which reads:

> "Section 4(b) of the amending Ordinance 1985 shall not apply in respect of any proposed agreement a copy of which is submitted under section 28(2) before 1 July 1985."

The Chinese equivalent adopted for "copy" here is therefore "文本" (a text of writing), a translation not found under "copy" in *A New English-Chinese Dictionary*, but more accurate than "副本" (a reproduced version) in this context. Since the sense of "文本" (a text of writing) is less restrictive than "副本" (a reproduced version), it is also used in contexts where there can be argument as to whether there is an "original" and, if there is, whether the "original" or a duplicate will suffice. Certain references to orders or affidavits in some provisions are illustrative in this regard.

The frequent use of "文本" (a text of writing) in legislative provisions may seem linguistically artificial, but in order to preserve the semantic ambiguity in the English text, counsel sometimes have to compromise the flow of the Chinese text. This approach reflects a reluctance on the part of counsel in the Law Drafting Division of the Hong Kong Department of Justice to interpret provisions rather than preserve their inherent ambiguity.

Ambiguities of meaning arise not only from the fact that words may have multiple meanings, but also from the fact that the meanings of words change over time. When counsel in the Law Drafting Division are preparing Chinese texts for enactments made in English only, however, they are concerned mainly with current meaning and current terminology. This is because the Chinese text will be declared as the authentic text of the relevant ordinance as of a very recent date.

For example, s. 50 of the *Criminal Procedure Ordinance* (Cap. 221) reads:

> "[t]he accused person, on being arraigned, by pleading generally the plea of not guilty, shall, by such pleas, without further form, be deemed to have put himself upon the country for trial."

Although the language is not very elegant, the meaning seems clear enough. Yet, "country" here does not connote the usual sense of "state" or "nation". It refers, as explained in *Jowitt's Dictionary of English Law*, to "a jury, as coming from the neighbouring country or surrounding parts of the country". This meaning is not recorded in general dictionaries such as *The Concise Oxford English Dictionary*, and in any event is not the ordinary meaning of the word.

If counsel were to render "country" here as "國家" ("nation") or some other

similar expression, the Chinese text would create confusion and be most misleading. "國家" ("nation") in the Chinese language, like the English term, has a very strong sense of "nation", but the other sense of "neighbouring country or surrounding parts" is not inherent in the Chinese term.

In this case, counsel have to ascertain the original meaning intended in the word and render it as "陪審團" ("jury"). In the context of Hong Kong, it is not necessary to elaborate any further on the aspect of "neighbouring country" or its surrounding parts.

In this particular case, it is appropriate to employ an obscure Chinese term, but this is an exceptional situation. Counsel would have avoided "陪審團" ("jury") for "country" in the provision cited above if they had been able to find another Chinese equivalent that could have conveyed the obscure, or perhaps obsolete, sense of the English word. As observed by GC Thornton:

> "the etymology or history of a word is a totally unreliable guide to word meaning. Etymology may be as fascinating as it is misleading and the draftsman must resist seductive but fallacious arguments that the original meaning of a word is its "correct" meaning and therefore to be preferred to deviant later meanings[2].

Moreover, because the Chinese version of a law that was originally enacted can in English only deal with the law as it currently stands, counsel should be concerned with the current meaning and usage of the word, not its history or original meaning, particularly where the original meaning has changed.

Yet, if there is really a need to go into the history of meanings, counsel should do it. But this course should only be taken where the usual current grammatical senses of a word are not appropriate, and it is necessary to consider the historical meaning in order to deliver the correct rendition.

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2 "*Legislative Drafting*", 3rd ed, at page 15

Members' movements

- Alan Pierce, whose novel *The Cheung Chau Dog Fanciers Society* is reviewed elsewhere in this issue, has taken leave without pay from the Commonwealth Office of Legislative Drafting in Canberra, to write another novel, this time set in Papua New Guinea.

- Roy Griffey took early retirement from the Hong Kong AG's Chambers Law Drafting Division in March after 17 years service. Roy was probably best known for his exploits as President (and latterly spokesperson) for the Hong Kong Association of Expatriate Civil Servants and led the recent fight against the Hong Kong Government's localisation policy. He now resides in his stately mansion in Bishopsworth, south-east of Bristol in England.

- About the same time as Roy departed, the Deputy Law Draftsman on the Chinese drafting side of the Law Drafting Division, May Wong, also retired. May made a substantial contribution to the recently completed program to translate Hong Kong Ordinances and subsidiary legislation into Chinese.

- Tony Watson-Brown (who hails from Queensland and is a previous contributor to the *Loophole*) also left the Division at the end of March. Tony has remained in Hong Kong however and is now practising at the Hong Kong Bar. Between April and July, Tony assisted the then Chief Executive designate, Tung Chi-hwa, with the preparation of legislation required for the resumption of sovereignty by China.

- The resumption of sovereignty also saw the departure of the last Attorney-General of Hong Kong, Jeremy Mathews, after a career of 29 years in the Hong Kong Civil Service. Jeremy, who was the most senior British civil servant in place when British sovereignty ended, was replaced on 1 July by Elsie Leung, but she holds the title of Secretary for Justice, as provided by the Basic Law of the HKSAR. Jeremy did a long stint in the Law Drafting Division of the HK AG's Chambers before being appointed as Deputy Crown Solicitor and then Crown Solicitor in 1982. He was extensively involved in advising the Hong Kong Government on legal issues concerning the Sino-British negotiations on the future of Hong Kong, including the Sino-British Joint Declaration in 1984. He has now taken up residence in London.

- Peter Johnson (former Chief Legislative Counsel of Canada) has now returned to Ottawa after a 2-year stint in the Irish Parliamentary Drafting Office in Dublin. He has been replaced by Claire Reilly, a former Senior Legislative Counsel

with the British Columbia Legislative Counsel Office.

- Jim Dorling, the former Parliamentary Counsel of the Australian Northern Territory, has returned to Australia after a 2 year stint in the Irish Parliamentary Draftsman's Office.

- John Wilson, whom many members will recall having met at the CALC meetings held in Hong Kong (1983), Auckland (1990) and Vancouver (1996), left the Hong Kong Attorney General's Chambers at the end of 1996. He had been head of the Localisation & Adaptation of Laws Unit in those Chambers for some time. (The Unit has now been disbanded.) On leaving Hong Kong, John was engaged by the Tuvalu Government to rewrite Tuvalu's constitution with a view to that country becoming a republic. However, that project has since been abandoned and it is understood that John is soon to be appointed as First Parliamentary Counsel of Fiji.

- George Tanner, who has been a member of the New Zealand Parliamentary Counsel Office for some years, has been appointed to succeed Walter Iles as Chief Parliamentary Counsel of New Zealand. As most members will be aware, Walter has been a member of the CALC Council since 1986.

- Ian Hurrell, who joined the New Zealand Parliamentary Counsel Office in 1965, retired earlier this year. We all wish him better health in his retirement than he enjoyed in the latter part of his career as a Parliamentary Counsel in that Office.

Vale Gerard Bertrand and Vincent Grogan

Gerard Bertrand, the first Francophone to hold the position of Chief Legislative Counsel of Canada, passed away on 5 June 1996. He was 69 years old.

Gerard had dedicated almost all his professional energies to the federal public service of Canada. Building on his experience, first as a diplomat and then as Assistant Secretary to the Cabinet and Registrar of the Supreme Court, Gerard brought to the Legislation Section his enthusiasm, his sense of duty and his knowledge of legal channels. He advanced the cause of French not only in legislation in Ottawa but also in the Uniform Law Conference of Canada, of which he was president. He did not retire in December 1986 but rather redirected his career towards other activities and challenges. He assumed the chair of the commission responsible for implementing French government services in Ontario. Finally, he dedicated the last years of his professional life to training young legislative drafters at the University of Ottawa.

Gerard was a founding member of the Commonwealth Association of Legislative Counsel, of which he was the Secretary in 1986-87.

I will always remember his somewhat rolling walk (which a hip operation finally fixed), his smile, and his concern for establishing and maintaining a team of drafters that was united by a rare sense of team spirit.

Robert C. Bergeron, Q.C.[1]

Perhaps the longest serving legislative counsel ever, Vince Grogan, died in Dublin in July. Vince, who was 82 years old at the time of his death, was still a member of the Irish Parliamentary Draftsman's Office. His drafting career spanned over 50 years. During that time, he drafted legislation for Ghana, Swaziland and the European Communities (now the European Union) as well as Ireland. He will be missed by all who knew him well.

(*I know of only one legislative counsel who even comes close to emulating Vince's remarkably long stint - Tom Willis, former Deputy Parliamentary Counsel of New South Wales, who remained a consultant in the New South Wales Parliamentary Counsel's Office until the age of 79. He put down his "drafting quill" for the last time in 1994 and now lives in retirement in Sydney. - ed.*)

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[1] Senior General Counsel, Legislation Section, Department of Justice, Government of Canada.

Tribute to Peter Johnson

Donald Maurais[1]

Peter Johnson, former Chief Legislative Counsel of Canada, decided to "hang up his skates" on 31 December 1995, after 30 years of public service in Canada. In fact, however, he did not retire completely, since he accepted a contract to work as legislative counsel to the government of Ireland, where he pursued his professional activities from February 1996 to February 1997.

He is now back in Canada and appears to be enjoying his retirement thoroughly.

Mr. Johnson has held two important positions in the Department of Justice of Canada in the area of legislative services: head of the Regulations Section and Chief Legislative Counsel (head of the Legislation Section). He joined the Department in 1972, coming from the government of Saskatchewan, where he had worked as a legislative drafter.

He was recognized by all his colleagues as a particularly efficient fellow-worker as well as an excellent lawyer and drafter with sound judgment. They could always count on his sense of fairness and his ability to remain objective in difficult circumstances. He left many friends behind.

Peter attended the 1990 meeting of the Commonwealth Association of Legislative Counsel held in Auckland, New Zealand, and was always a strong supporter of the Association.

We wish him a long and most enjoyable retirement.

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[1] Deputy Chief Legislative Counsel (Legislation), Department of Justice, Government of Canada.

Attorney General v Shimizu Corp (formerly known as Shimizu Construction Co Ltd)(No 2)

Court of Appeal - Civil Appeal Nos 185 and 186 of 1996
Godfrey, Liu and Mayo JJA
19, 20 February, 7, 18, 20 March 1997

The applicant, the Hong Kong Government, appealed to the High Court against two awards of compound interest on sums found by the arbitrator to be due to the respondent, Shimizu (the claimant in the arbitration) in a major construction arbitration : see [1996] 3 HKC 175 for earlier proceedings. These awards were made under the Arbitration Ordinance (Cap. 341) s 22A(1) (an amendment added to the principal Ordinance in 1984), by virtue of which an arbitrator "may, if he thinks fit, award interest at such rate as he thinks fit - (a) on any sum which is the subject of the reference but which is paid before the award, for such period ending not later than the date of payment as he thinks fit : and (b) on any sum which he awards, for such period ending not later than the date of payment of that sum as he thinks fit". This wording was modelled on the English Arbitration Act 1950 s 19A, albeit the qualifying word "simple" used in the 1950 Act was omitted from s 22A of the Ordinance.

The Government's appeal against the awards was by agreement of both parties. Following an extensive review of the legislative history, commentaries on the legislation, the common law position and comparable overseas legislation, Seagroatt J dismissed the appeal (see [1996] 3 HKC 175). The Government appealed to the Court of Appeal.

Shimizu contended that -

- by omitting the word "simple" from s 22A of the Ordinance, the legislature in Hong Kong clearly intended to empower an arbitrator to order the payment of compound interest;
- s 22A had introduced an important change in the law to meet a change in the context in which the term "interest" should be considered, and
- whenever similar enactments in England and in other jurisdictions were intended to limit the payment of interest to simple interest, express words of limitation were always added.

The Attorney General contended that it was inconceivable that such a far reaching change in the law would be made in such a casual manner without an in-depth analysis of the consequences and that to do so was contrary to all canons of legislative drafting. Law should be altered deliberately, not casually and there is a presumption that the legislature does not intend to make a radical change in

existing law by a sidewind. The more fundamental the change, the more thoroughgoing and considered should be the provisions implementing it. The Attorney General contended further that it was unlikely that the omission of the word "simple" from s 22A was inadvertent. The term "interest" as used in s 22 of the Ordinance (interest on awards) clearly means simple interest and it would be highly unsatisfactory for provisions of the same Ordinance dealing with similar subject matter to have conflicting expressions.

The Court of Appeal held (Godfrey J A dissenting) that -

(1) an arbitrator has no jurisdiction to award compound interest under the Arbitration Ordinance (Cap. 341) s 22A because -

- it was most unlikely that the legislature would have introduced the change contended for by Shimizu simply by omitting the qualifying word "simple" from s 22A of the Ordinance (at 459H);

- having regard to the wording of s 22 of the Ordinance, which also deals with interest, it was unlikely that the omission of the word "simple" was inadvertent. Almost inevitably, a conscious decision was made not to include this word in s 22A of the Ordinance (at 459I-460A);

- the legislative history showed that when the 1984 amendment was enacted, both the English and the Hong Kong legislation restricted the payment of interest to simple interest and specific provisions would need to be enacted to change this (at 457I);

- for a very long time, the ordinary legal usage of the term "interest" has connoted simple interest and it would be too radical a departure from settled practice for a tribunal to be vested with a discretion to depart from this. *Shun Fung Ironworks Ltd v director of Buildings and Lands* [1994] 1 HKC 35 considered (at 461G-462D).

(2) the Attorney General's contentions were supported by (i) examination of the parliamentary material circulated to the Executive Council and the Legislative Council at the time of the 1984 Bill, which material contained no reference to provisions empowering an arbitrator to order compound interest, and (ii) the enactment of the English Arbitration Act 1996 and in, Hong Kong, the Arbitration (Amendment) Ordinance 1996 (75 of 1996), both of which expressly confer powers on

arbitrators to award compound interest. Matheson PFC Ltd v Jansen [1994] 2 HKC 250 applied at (460C-F).

In dissenting from the majority, Godfrey JA was of the opinion that, on its true construction, s 22A of the Ordinance confers an unqualified power to award interest, which may include compound interest if that is what the arbitrator considers appropriate. It is wrong to attribute the omission of the word "simple" from s 22A to a deliberate decision to bring its language into line with that of s. 22, which had been enacted much earlier. The framers of the English Arbitration Act 950 s 19A recognised the need expressly to exclude the power to award compound interest. Having deliberately excised the word "simple" from s 22A of the Ordinance, on the other hand, the framers of the Hong Kong legislation must be taken to have intended the opposite (at 462I-463D).

On 20 March 1997 the Court of Appeal (Godfrey, Liu and Mayo JJA) refused leave to appeal to the Privy Council, see [1997] 1 HKC 463. Special leave was, however, granted by the Privy Council on 9 April 1997 but the appeal was not proceeded with.

Book review - "Cheung Chau Dog Fanciers' Society"

by Alan B. Pierce[1]

Reviewer - Rubert Winchester

I've read hundreds of Hong Kong novels. From *Taipan* and *White Tiger* to sensitive tales of adolescent sexual awakenings in Yaumatei, they all have one thing in common (apart from being set in Hong Kong): they're rubbish. Novelists seem to take Hong Kong too easily at face value and imagine that the backdrop of the "fragrant harbor," combined with "bad joss taipan" cliches, will ensure them telephone number sales. There is only one book set in Hong Kong that is worth reading for its literary merit: *The World of Suzie Wong*, a book that concentrates on relationships and ignores the cliches (although, ironically, the book's image has become one). Until now, that is. For Alan B. Pierce, with *The Cheung Chau Dog Fanciers' Society*, has done much the same.

The plot revolves around a rather shabby financial consultant who accidentally gets involved with people he shouldn't. He has to move to Cheung Chau and lay low while he tries to sort his life out. It's a good story, with strong and intriguing characters and a refreshing lack of the stock scenes and ideas that plague most Hong Kong fiction.

Of course, it can't avoid all of the pitfalls. There are sinister heroin dealers, Peak-dwelling snobs, bent coppers and the like. But the writing is clear and smooth, the location, the plot plausible and the narrator neatly pathetic but lovable. The book never tries to get on any tourist guide list of recommended reading, but simply tries to tell a story, and works all the better for it. I don't want to go overboard, but this is one of the best Hong Kong novels ever written. John Updike probably isn't looking worriedly over his shoulder, but it puts James Clavell to shame.

[Having read the novel, I thoroughly endorse the reviewer's comments. A good read! (Also see "Members Movements!!) Ed.]

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1 Alan Pierce was formerly Deputy Law Draftsman in the Law Drafting Division of the Hong Kong Attorney General's Chambers (now the HKSAR Department of Justice). He now works as a legislative counsel in the Office of Legislative Drafting in Canberra, Australia.

Closure of the Centre for Plain Legal Language[1]

The Centre for Plain Legal Language, based at the University of Sydney Law School, closed on 30 June 1997.

The Centre for Plain Legal Language began life on 22 October 1990. Its first three years were funded by a generous grant from the Law Foundation of New South Wales, and for that reason it was originally called "The Law Foundation Centre for Plain Legal Language".

The Centre was established under an agreement between the Law Foundation of New South Wales and the University of Sydney, and was located within the Faculty of Law at the University of Sydney. The agreement spelled out the Centre's main objective in the following terms:

> to promote the study and use of plain language in public and private legal documents (including legislation and official forms) for the purpose of :
>
> (a) improving public access to the law;
>
> (b) assisting legislators, administrators, judicial officers and members of the legal profession in expressing, clarifying, developing and administering the law.

The Centre's first Directors were Associate Professor Robert Eagleson and Associate Professor Peter Butt, both of the University of Sydney. Professor Eagleson is a linguist and Professor Butt is a lawyer. Their appointment was intended to demonstrate the need for both legal and linguistic skills in simplifying legal language.

The Centre's operations were overseen by a board of Directors, chosen for their interest and expertise in the area. The initial board members were Dennis Murphy (Parliamentary Counsel of New South Wales), Edward Kerr (a partner in Mallesons, Stephen Jaques, a Sydney law firm with a leading reputation in plain legal language), Terence Purcell (Director of the Law Foundation), James Crawford (Dean, Faculty of Law), and Peter Butt and Robert Eagleson. The Centre's principal researcher was Judith Bennett, a law graduate with expertise in both law and language.

The Centre soon began to make its influence felt in legal and government circles. Its early projects included: drafting a plain language residential mortgage for St George Bank; working with the Water Board on redrafting standard forms; and undertaking research into public and professional attitudes to traditional legal language.

1 Material provided by Mark Duckworth, former Director of the Centre.

Two of projects begun at this time continue to have a lasting impression. One was its regular (monthly) column in the Law Society Journal, *Words and Phrases*. Each month the Centre researched a traditional legal word or phrase, and then suggested a plain language equivalent which would be easily understood by a lay reader, without losing the legal nuance of the original. Centre staff continued to write this column every month until the Centre closed. The other was its work with Parliamentary Counsel in redesigning the layout of legislation - the aim being to present legislation in a more easily-readable form. The results of that work can be seen in the form of present day legislation.

Also early in its life. the Centre began its training courses for lawyers. These courses were designed to teach lawyers, and others working in law related areas, the techniques of plain legal language. The Centre also supported Professor Butt's course in Legal Drafting at Sydney University, which aimed to teach law students the techniques of plain language legal drafting. It was Australia's first law course in this field.

In 1994 the Centre became a self-funding part of the Law School. Mark Duckworth was appointed its Director. Mark Duckworth, a lawyer and historian, had previously worked for the Law Reform Commission of Victoria on a number of reports and projects on plain language, statute law and the design of legislation.

The Centre expanded its training programs and developed a comprehensive set of training materials. It introduced a series of popular public training sessions, and undertook customised training programs for many Commonwealth and State government agencies, tribunals and Commissions, as well as a number of law firms. It also combined with the Australian Centre for Industrial Relations Research and Training to run several courses on writing industrial awards and enterprise agreements.

To help first year law students with legal writing the Centre developed a pilot course based on modern techniques of computer assisted learning.

Another initiative was the publication of the Centre newsletter *Explain*.

In mid 1994 Anne-Marie Maplesden joined the Centre as its Principal Drafter. The Center increased the amount of drafting it did for both public and private sector clients. It drafted suites of General Insurance polices for a number of major insurance companies. It also carried out a number of large drafting projects for Commonwealth State and local government agencies.

Between 1994 and 1996 Mark Duckworth and Professor Gordon Mills of the Centre Microeconomic Policy Analysis at Sydney University conducted a detailed study into the effects of plain language documents. The Law Foundation of NSW funded this project. The project lead to three publications *The costs of obscurity (1994), The Gains from Clarity: a research project on the effects of plain-language documents* (1996), and a practical manual *Organising a plain-language project* (Federation Press 1996).

The Centre also re-edited 30 of the columns from the Law Society Journal and published them as *Law Words: 30 essays on legal words and phrases* (1995).

The Centre also continued to promote the use of plain language through the media and submissions to government inquiries. It acquired a reputation in Australia and around the world for expertise in the use and misuse of language in the law. In 1994 Mark Duckworth and Christopher Balmford, from the law firm Phillips Fox, toured the USA talking to many law firms - a tour that gained wide coverage in the US legal press.

Another of the Centre's important resources was its library. Although small in size it grouped together a large number of books and articles on legal drafting and plain language. Some of these were not available any where else in Australia. The Centre made these resources available to all who wanted to use them.

One other development in this period was the opportunity the Centre gave to final year law students and recent graduates to be involved in actual drafting projects. Most of these had completed Peter Butt's course. This exercise in practical legal education was an important link between the Centre and the Law School.

In late 1995 Mark Duckworth left the Centre, to join the NSW Cabinet Office. This change coincided with a general review of Centres within the University

For the next one and a half years, there were a number of reviews into the Centre's role within the Law Faculty. Despite its uncertain future brought about by these reviews, the Centre continued to promote plain language through its research, publications, drafting projects and workshops (including one for judges and magistrates in Papua New Guinea). A number of the workshop and drafting projects were carried out by the Centre free because of their social merit. Anne-Marie Maplesden was acting director during this period. She has accepted a position with the NSW Parliamentary Counsel's Office.

In early 1997 a decision was made to close the Centre by June 1997.

The Centre has helped to increase awareness in the legal profession, government and private industry, of the need for and the benefits of plain language. It has sought to focus the drafter's attention on the needs of the intended users of the documents. It has encouraged drafters to try and communicate information in the most efficient and effective way possible, while remaining technically correct. The Centre has played an important part in the movement towards using plain language in the law.