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

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

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Editor's Notes

With the close of 2014, this issue includes two of the most compelling papers presented at the 2013 Conference in Cape Town as well as papers from the Drafting Conference of the Canadian Institute for the Administration of Justice in Ottawa this past September.

We lead off with Duncan Berry's review of drafting in Australia. As one of the leaders in the movement for clearer legislative drafting in Australia and elsewhere, Duncan is uniquely positioned to assess whether this movement has had an appreciable impact on drafting. To do this he reviewed a sampling of legislation from each Australian jurisdiction and enacted in 3 time periods: before 1950, 1991-92 and from 2005 and onwards. His article outlines his careful methodology and the results of this extensive survey are contained in 3 appendices to his article. From them, he concludes that Australia has largely eradicated "legalese" from legislative drafting, although he is less sure of exactly how this came about.

The second article from the 2013 Conference is Janet Erasmus's Master Class presentation. This unique article gives readers a wonderful sense of her presentation at the conference and her approach to "inviting", rather than simply "obtaining", drafting instructions. She brings this critical step in the drafting process to life and provides a wealth of sound advice on how to manage it effectively. This is a Master Class that not only demonstrates a masterful product, but also a masterful process for getting there.

The third and fourth articles deal with the parliamentary scrutiny of delegated legislation. Delegated legislation is itself a somewhat neglected topic of study, despite its significance in terms of its volume and pervasiveness. But parliamentary scrutiny is a neglected topic within it. With the exception of Australia and the United Kingdom, it attracts little interest, notably from parliamentarians not to mention the legal community and the general public. The final session of the CIAJ Conference was devoted to this topic and this issue brings you the papers of two of the speakers.

Peter Davis is Counsel for Domestic Legislation in the UK House of Commons. He describes the extensive multi-committee scrutiny of delegated legislation in both the House of Commons and the House of Lords, illustrating its importance with issues about the extent to which bills delegate legislative powers and the controversy this has provoked at times in the UK.

Peter Bernhardt is General Counsel to the Canadian Standing Joint Committee for the Scrutiny of Regulations. He describes the challenges that Committee faces, despite the diligence and persistence of its staff. He too outlines some legislative and regulatory practices that raise troubling questions in terms of the rule of law.

John Mark Keyes

Ottawa, December, 2014

Upcoming Conference

2015 CALC Conference – Edinburgh, UK

Playfair Library Hall, Old College, Edinburgh University – 15-17 April 2015

The theme for the Conference is ***Legislative Counsel: Catalysts of Democracy and Keepers of an Effective Statute Book***. The theme recognises the importance of legislative counsel to providing governments and legislatures with effective legislation and how this is fundamental to democracy. The Conference will explore this theme in both general and practical terms. Topics of particular interest are:

- the multiple roles of legislative counsel and the ways in which fulfilment of these roles contributes to democratic government,
- what is needed for an effective statute book (including issues of accessibility and plain language),
- development of legislative drafting skills: theory and practice,
- the government context for legislative drafting, including relations with instructing officials,
- gender issues in the legislative context.

Registration details are available at <http://www.opc.gov.au/calc/conferences.htm>.

A Comparative Study of Legal Jargon in Australian Statutes

Duncan Berry¹



Abstract: In this study, I compared statutes enacted by the Australian Commonwealth and the six Australian States for legal jargon (“legalese”) over three distinct periods. The first period was that before 1950; the second period was the early 1990s; and the third was the period post 2010. For each period, I studied three statutes (selected at random) enacted by each of the seven jurisdictions. The study shows that for all of the Australian jurisdictions included in the study, there was a very significant reduction in the use of legal jargon over the periods studied.

Introduction

Everyone is presumed to know the law and in court proceedings, whether criminal or civil, it is no use trying to plead ignorance of the law. This is all very well and no doubt the legal system would become unworkable if the situation were otherwise. But apart from the problem of the sheer volume of Commonwealth statute law, State statute law and the common law, it is clearly unreasonable and indeed unfair to expect people to comply with the law if they cannot gain access to it or, having gained access to it, cannot understand what it is saying.

There continues to be a perception in the community that legal documents are incomprehensible because the lawyers who drafted them have written them in legal jargon, often referred to as "legalese". There are essentially two criticisms of lawyers' style. One is that it is strange. The other is that it cannot be understood. As long ago as the 16th century Sir Thomas More (1516) criticised statutes on these grounds. Jonathan Swift (1726) made

¹ LL.M, MPP, GDCM, SJD; barrister; consultant legislative drafting counsel in Kenya. This article is an updated version of an article published in *Clarity*, 1995 No. 33.

similar criticisms. In the 19th century, the famous jurist, Jeremy Bentham (1823) accused lawyers of "poisoning language in order to fleece their clients" and denounced legalese as "excrementious matter, literary garbage".

In more recent times, two law professors, Rodell and Mellinkoff respectively attacked legal language. In his seminal work "Language of the Law" (1963), Mellinkoff attacked what he called "the junk antiques" of the legal vocabulary, those streams of "forthwiths," "heretofores" and "whereases" that tumble endlessly through lawyers' writings. Elsewhere in the same work, he identified a number of patterns that characterise the style of legal texts and may be fairly described as "legalese":

- foreign phrases left intact (mainly Latin and French: *ex post facto*, *voir dire*, etc.);
- doublets and triplets (cease and desist; in my name, place, and stead);
- alliteration (lewd and lascivious; rest, residue, and remainder);
- archaic usage such as the compound words of Old English (hereinbefore, whomsoever); and
- words that are no longer in current use (slay), as well as vague, pompous, and inflated verbiage.

Rodell (1939) thought that "the chief function which legal language performs is not to convey ideas clearly but rather to so conceal the confusion and vagueness and emptiness of legal thinking that the difficulties which beset any non-lawyer who tries to make sense out of the law seem to stem from the language itself instead of from the ideas – or lack of ideas – behind it. It is the big unfamiliar words and the long looping sentences that turn the trick. Spoken or written with a straight face, as they always are, they give an appearance of deep and serious thought regardless of the fact that they may be, in essence, utterly meaningless." And elsewhere in the same work, he expressed the view that "Almost all legal sentences, whether they appear in judges' opinions, written statutes, or ordinary bills of sale, have a way of reading as though they had been translated from the German by someone with a rather meagre knowledge of English. Invariably they are long. Invariably they are awkward. Invariably and inevitably they make plentiful use of the abstract, fuzzy, clumsy words which are so essential to the solemn hocus-pocus of the law."

By the same token, the Renton Report provided a number of examples of criticisms of convoluted drafting in English statutes (Renton, 1975). Other writers have pointed out that legal language uses archaic, foreign and uncommon words in long complex sentences with intricate clause subordination patterns, expressed in the passive voice and totally lacking in humanity and colour (Danet, 1980; Malley, 1987).

Criticisms of legal writing in Australia

In Australia, there have been numerous criticisms of legal writing in recent years. These include the Senate Standing Committee on Education and the Arts, (1984), the Australian

Law Reform Commission (1982), the lay press, such as the Sydney Morning Herald, and legal journals, such as the Australian Law Journal (1985: 189). Not long afterwards, the former Attorney General of Victoria, the Hon. Jim Kennan (1985), picked up the torch for plain English drafting by announcing in the Victorian Legislative Council a new approach to the preparation of Parliamentary Bills - a process that he referred to as "Kennanisation"! In future all legislation for the State of Victoria was to be drafted in plain English. Shortly afterwards, the Victorian Law Reform Commission (1987) held an inquiry into the techniques and methods used in writing legislation and other legal documents. In identifying the nature of the problem, the Commission had this to say:

Many legal documents are unnecessarily lengthy, overwritten, self-conscious and repetitious. They consist of lengthy sentences and involved sentence construction. They are poorly structured and poorly designed. They use confusing tautologies such as "ordered, adjudged and decided" and "let, allow and permit". They retain archaic phrases such as "know all men by these presents" and "this indenture witnesseth". They use supposedly technical terms and foreign words and phrases, such as "inter alia" and "res ipsa loquitur", even when English equivalents are readily available. They are quite unintelligible to the ordinary reader, and barely intelligible to many lawyers. Language which suffers from some or all of these defects is called "legalese".

Areas of concern

Critics have identified four main areas of concern. These relate to vocabulary, syntax, organisation and style. Mellinkoff (1963 and 1982) and Benson (1985) have criticised lawyers' vocabulary on the grounds that legal documents contain, or at least contain too many:

- long words, such as "commencement" rather than "start";
- archaic English words, such as "aforesaid", "hereinbefore" and "witnesseth";
- Latin phrases, such as "mutatis mutandis"
- common words with unusual meanings, such as "prayer" and "consideration";
- Law French, such as "estoppel" and "voir dire";
- terms of art, such as "eminent domain", "fee simple",
- "messuage" and "hereditament";
- jargon (argot);
- formulistic formulae, such as "know ye all men by these presents";
- vague expressions, such as "reasonable care";

- doublets, such as "null and void", "full force and effect", "each and every", "fair and reasonable", "just and equitable" and "fit and proper";
- unusual prepositional phrases, such as "as to" and "in the event of"; and
- the use of "the said" and "such" as articles, for example, "until the said agreement is signed" and "until such person complies with the foregoing requirements".

Syntactic features (such as extremely long complex sentences with embedded subordinate clauses) can also pose problems for readers of legislation and other legal documents. One form of syntax that is peculiar to legal documents is the proviso. Provisos² are almost unknown to the English language outside the law and, because non-lawyers are totally unfamiliar with this kind of syntactic feature, they will undoubtedly find the presence of provisos in any legislation which they are called on to read both intimidating and an obstacle to comprehension. The existence of provisos is in itself bad enough, but the position becomes quite intolerable when a proviso appears to be subject to another proviso, although in many instances it is difficult to be sure whether a second proviso is qualifying the first proviso or the original proposition.

Other difficulties for the statute user can arise from poor style (for example, overloading sentences with too many ideas and legislation by reference³) and bad organisation (for example, the uncoordinated distribution of throughout the text of related material) but it is beyond the scope of this paper to discuss these kinds of phenomena.

Having determined what in broad terms is characterised by the term "legalese", I analysed statutes from the Commonwealth, New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia. The first analysis was of statutes enacted prior to 1950. The second was of statutes enacted during the early nineties and the third of statutes enacted from 2005 onwards.

The objectives of the examination were twofold. The first was to ascertain whether the perception in the community that statutes are full of vocabulary and phrases that constitute legalese was justified or not. The second was to examine some of those older statutes to determine whether the criticism, which might have been justified 6 or 7 decades ago, was

² A proviso is a formula, placed at the end of a legal proposition, which begins "Provided that" It is usually an exception to a general proposition, but sometimes it may be used to express a condition to which a proposition is to be subject. Coode (1848) described the proviso as "the bane of all correct composition". Even in the 19th century, he questioned whether there was any real need for provisos.

³ The following is an example of this technique:

"Subject to the regulations, the provisions of the Justices Act 1902 apply (with any necessary modifications) to and in relation to a warrant or summons issued or to be issued under this Act in the same way as they apply to and in relation to a warrant or summons of a corresponding kind issued or to be issued under that Act."

still justified in the early 1990s and, to the extent that it was, to ascertain what progress has been made over a decade later in eradicating legalese from Australian statutes entirely.

Criteria for determining what is legalese

For the purposes of this article, the criteria for determining whether or not any particular word or phrase amounts to "legalese" are largely those identified above by Mellinkoff (1963 and 1985) and Benson (1985). In sum, a word or phrase is regarded as legalese if it is found in legal documents but not generally in any other form of English writing. However, certain legal terms of art have been excluded from the analysis because more often than not no other suitable English word or phrase adequately describes or explains the particular concept under consideration. (The concept of fee simple is perhaps an example of this) There is also a problem with "long words" and "vague expressions" (items (1) and (9) above). Whether a word is long is a question for subjective determination and a word considered by one person to be "long" might not be considered to be so by another person. In some cases, moreover, the shorter word may be less familiar to the audience than the longer one⁴ and there may be no adequate synonym available. As regards vague words, "reasonable" or "sufficient" for example, these may be acceptable so long as an appropriate mechanism for processing the word is prescribed in the document concerned. Furthermore, these kinds of words are readily found in ordinary English usage.

With one exception, it was considered beyond the scope of the examination to look for unusual syntactic features, bad organisation or poor style. However, because provisos are a relatively easy phenomenon to identify, they have been included in the examination.

In the various statutes examined, the following examples of legalese were discovered:

deemed	thereafter	hereby
bona fide	thereat	hereinbefore
aforesaid	therefrom	hereinafter
the said	thereunder	hereafter
the same ⁵	thereto	howsoever
such ⁶	therein	hereof
thereof	herein	in lieu of
therewith	whereof	moneys
thereout	wherein	prima facie
therefor	whosoever	foregoing

⁴ For example, "otiose" as opposed to "superfluous".

⁵ When used as a pronoun.

⁶ When used as a substitute for "the" or "that".

thereafter	whomsoever	the like ⁷
thereby	whatsoever	hereunto
whereupon	namely	thereupon
thereunto	utilised	pursuant to
per centum	in pursuance of	by reason of
abode	message	notwithstanding
aforementioned	save as ⁸	mutatis mutandis
that is to say	furnish (meaning 'give' or 'provide')	

In addition, the following "doublets" and other tautologous expressions were found:

read and construed
final and conclusive
force and effect
null and void
prejudice or affect
ratify and approve
preference or priority
rights, title, powers and remedies
between or among
apply and extend
and/or
had and obtained
obtain and have effect
peaceable possession
penalty or pecuniary liability
application, statement, requisition, assessment, notice or any other document
account, books, records and documents
books, documents or paper
absolutely void

Other legalistic phrases found included—

"shall be in addition to and not in substitution for";

⁷ When used as a substitute for "the same" or "similar".

⁸ When used as a substitute for "except" or "unless".

"are in addition to and are in no way in derogation of;
"shall be construed as if".

Analysis of the Appendices

The results of the various statutes examined are set out in Appendices 1, 2 and 3 below. Each Appendix specifies in respect of each of the statutes surveyed the number of pages, the number of sections and Schedules, the number of items of legalese found (according to the criteria set out above), the approximate number of words⁹ and the number of items of legalese per 1,000 words. Appendix 1 contains a survey of Australian statutes passed before 1950; Appendix 2 deals with statutes passed in the early 1990s and 2000, while Appendix 3 deals with statutes passed more than a decade later.

It is immediately evident from the Appendices that there is a wide disparity between the older statutes in Appendix 1 and the more recent ones covered in Appendix 2 and Appendix 3. There is also a significant disparity between the various jurisdictions. Even in the pre-1950s statutes, Commonwealth statutes contained far fewer items of legalese than most State legislation.

Analysis of statutes covered by Appendix 1

Appendix 1 shows that for Commonwealth statutes the average number of items of legalese per 1000 words was 9.14 compared with the average for all Australian jurisdictions of 15.34. At other end of the spectrum, the average for the Queensland statutes surveyed was over 2.5 times higher at 24.3 items per 1000 words. Provisos, Latin expressions and words like "aforesaid", "hereinafter", "hereinbefore", "therein", "thereof" "hereof" and "thereafter" were relatively uncommon in even in older Commonwealth legislation. On the other hand, the older Queensland statutes are particularly errant in that regard, being infested with provisos, Latin expressions and the kind of vocabulary that is so characteristic of legalese. Although the older New South Wales and Victorian statutes were found to contain significantly fewer items of legalese than their Queensland counterparts, they still rated poorly. Appendix 1 shows that, after Queensland, the next worst States were Victoria with an average of 17.43 items of legalese per 1000 words and New South Wales with 15.82 items per 1000 words. The remaining States ranged between 15.55 items per 1000 (Tasmania) and 12.64 items per 1000 words (South Australia).

⁹ The number of words was counted on a number of pages in each Act and averaged. The average was multiplied by the number of full pages in the Act. The number of words was counted (to the nearest fifty) on pages that were only partly filled with text. The words in tables of provisions or contents have not been counted because, in most cases, they are a compilation of (and thus merely repeat) the headings to Parts, Divisions and Schedules, and the shoulder headings or marginal notes to sections, occurring in the Act concerned.

Analysis of statutes covered by Appendix 2

As one might expect, Appendix 2 demonstrates an enormous improvement in the legislation passed during the early 1990s as compared with the pre-1950s legislation. The most dramatic improvement was found in New South Wales statutes with a rate of only 0.94 items per 1000 words as compared with 15.82 items per 1000 for statutes of passed over 50 years before. New South Wales statutes were closely followed by those of the Commonwealth (1.06 items per 1000 words), South Australia (1.11 items per 1000 words) and Tasmania (1.24 items per 1000 words). The more recent Queensland statutes also showed a very considerable improvement. The rate for recent Queensland statutes would probably have been very much better had it not been for the fact that one of those statutes contained 125 items of legalese, a rate of 6.87 per 1000 words! The rate for recent Western Australian statutes was 4.8 items per 1000 words and once again the result would have been very much better had one of the three statutes examined not contained 40 items of legalese, giving a rate of 8.42 items for each 1000 words.

The most remarkable finding was that none of the recent statutes surveyed contained a proviso.¹⁰ No Latin phrases or words generally regarded as characteristic of legalese were found in any of the recent New South Wales, South Australian or Tasmanian statutes that were examined and it was extremely rare to find such phrases and words in recent statutes of the Commonwealth and the other States. However, it was not uncommon to find doublets, such as "full force and effect" and "affect or prejudice", and phrases like "in pursuance of" and "by reason only that". Words like "notwithstanding", "deemed", "furnished"¹¹ "instrument",¹² "moneys", "same"¹³ and "whatsoever" were also quite common. "Thereupon", "thereunder", "thereof", "thereto", "therefrom", "therein" and "hereby" were found, but only in one or two of the statutes examined.

Despite containing very little "legalese", some of the statutes were still quite complex. For example, most people affected by the *Superannuation Guarantee (Administration) Act 1992* (Cwlth) would have difficulty in understanding the complexities of Parts 2 and 3 of that Act. The Chairman of the House of Representatives' Legal and Constitutional Affairs Committee, Michael Lavarch, was quoted in the *Australian Law News* (August 1992) as saying:

Despite some moves towards plain English styles of drafting, it seems that our laws are still unnecessarily complex. We will be assessing whether there are ways of drafting legislation which would produce more simple but no less precise laws.

¹⁰ In an earlier examination of 1980s statutes, only one proviso was found and that was in the *Tobacco Products Act 1988* (Qld).

¹¹ In the sense of providing or supplying.

¹² As a substitute for "document".

¹³ Used as a pronoun.

He also pointed out that Australian taxation law had often been criticised as "impenetrable even for tax specialists". The complexity of recent Australian legislation was also the subject of criticism in *Taxation in Australia* (November 1992), which reported on a computer test conducted by the Victorian Law Reform Commission on the *Income Tax Assessment Act 1936* (Commonwealth).¹⁴ The test suggested that to understand some of the sections of the Act would require 12 years schooling and 15 years tertiary education!

Analysis of statutes covered by Appendix 3

The statutes covered by Appendix 3 show yet a further improvement as compared with those covered by Appendix 2. The rate of items of legalese per 1000 words for the statutes of all of the seven Australian jurisdictions surveyed fell by almost two-thirds, from 1.78 to 0.66.

No legalese was found in any of the Commonwealth statutes. The best performing State was Queensland with a rate of 0.13 per 1000 words, closely followed by New South Wales and Western Australian statutes both of which had a rate of 0.39 items of legalese per 1000 words. Next was South Australia with a rate of 0.78 items of legalese per 1000 words, closely followed by Victoria with a rate of 0.98 items per 1000 words. The worst performing State was Tasmania with a rate of 1.74 items of legalese per 1000 words, but even that was better than the rate for all Australian statutes enacted during the early 1990s. Thus, the steady progress since the 1990s suggests that it may not be too long before we may find that legalese has disappeared from all Australian statutes.

In the course of my survey of the statutes covered by Appendix 3, I observed several features that are arguably conducive to making those statutes more readable and comprehensible. Many (if not most) of the statutes included objects or purpose sections. Such sections are surely helpful to users in helping them to understand what policy objective those statutes are intended to achieve. Moreover, they are particularly helpful to judges in interpreting those statutes, bearing in mind that they are now expected to adopt a purposive approach to interpreting legislation.

I also detected other positive features that will arguably help users in their reading and comprehension of Australian statutes. Those features were—

- the inclusion in several of the statutes of overviews and helpful signposting notes;
- the provision of more copious white space;
- the absence of long sentences;¹⁵

¹⁴ Although enacted in 1936, this Act has been so heavily amended (particularly in recent years) that very few of the original words remain.

¹⁵ It was rare to find an untabulated sentence that was more than 25 words long. However, three excessively long, untabulated sentences were identified in the *Architectural Practice Act 2009* (SA).

- the provision of helpful examples in many of the statutes;
- the provision of headings for subsections in some of the statutes;
- with some exceptions, the provision of more informative section headings (some being in the form of questions) enabling users to navigate their way more easily around the statute concerned;
- the use of mathematical formulas for calculations and ‘step-by-step’ calculations instead of the old textual method for formulating calculations commonly found in older statutes; and
- the provision of an index in at least one of the statutes.¹⁶

On the other hand, I also noted a number of negative features that would give proponents of plain language legislation cause for concern.

One such feature was the frequent use of the passive voice when use of the active voice would be clearly more appropriate. From the point of view of the user, the unwarranted use of the passive voice is bad enough even when the person by whom the action is to be performed is mentioned, but when it is not, the user is left wondering who is to perform the action.¹⁷ An associated phenomenon that has become more evident in Australian statutes during the past 20 years is the propensity for parliamentary counsel in some Australian Parliamentary Counsel Offices to use expressions such as “there is to be ...”. Presumably this is intended to be a substitute for the phrase “there shall be ...”, which of course is inherently ambiguous. Is “there is to be ...” an improvement? I would say not. Again one has to ask, “Who is the actor”? One may surmise that “is to be” is softer than “shall be”. But if so, to what end? Should the interpretation of this phrase come before a court, the judge will surely come to the conclusion that it means something different.¹⁸ Perhaps the phrase is intended to create an obligation that is merely directory rather than mandatory. Perhaps it is not meant to be justiciable? The position is far from clear. The *Australian Astronomical Observatory Act 2010* (Cwlth) exemplifies some of these issues. Sections 8 and 9 of the Act state:

8 Australian Astronomical Observatory

There *is to be* an Australian Astronomical Observatory within the Department.

9 Director

(1) There *is to be* a Director of the Australian Astronomical Observatory.

¹⁶ See the *Tourist and Heritage Railways Act 2010* (Vic).

¹⁷ The latter are usually referred to as truncated passives. Examples are to be found in the *Audit Act 2009* (Qld); the *Integrity Act 2009* (Qld); the *Architectural Practice Act 2009* (SA); and the *Child Sex Offenders Registration Act 2006* (SA).

¹⁸ I have been unable to locate any judicial decision, let alone statutory provision, that clarifies what is the effect of this phrase.

(2)The Director *is to be* an SES employee.¹⁹

One wonders why the sections were not expressed in the following way:

8 Australian Astronomical Observatory

This section establishes the Australian Astronomical Observatory within the Department.²⁰

9 Director

The Secretary must appoint an SES employee to be a Director of the Australian Astronomical Observatory.

Surely the redraft is much clearer and removes the doubts created by the existing sections?

Another formulation that I found puzzling is section 3 of the *Architectural Practice Act 2009* (SA). The section provides as follows:

11—Registrar of Board

(1)There *will be* a Registrar of the Board.

(2)The Registrar *will be* appointed by the Board on terms and conditions determined by the Board.

“The phrase “*There will be*” is novel in legislation and I have never encountered it in any other statutes other than the South Australian ones covered in Appendix 3. Is this a prediction? Surely not! I would surmise that what was intended was the following:

11—Registrar of Board

The Board shall appoint a Registrar on terms and conditions determined by the Board.

If that is the case, why not state the provision in that way?

Other arguably user unfriendly features identified during the survey were the following:

- instances of sentence overload;²¹

¹⁹ In commenting on this example, the Parliamentary Counsel of New South Wales, Don Colaguri, had this to say:

At the risk of someone finding a Bill I have drafted that has committed the same drafting sin, the example you quote is no doubt an alternative formulation (to avoid the use of "shall") - the formulation seems odd to me and something to be avoided.

It says "there is to be" something. That answers Hamlet's question of "to be or not to be". But what next? It suggests that someone or some institution should then bring the desired result about. In the case of the Director, it suggests that the Public Service Commission must then create the office and appoint the person (but it does not expressly say this is the result). As for a statutory body that "is to be" how can this be brought about other than by the words of the statute?

²⁰ Which ironically is what the simplified outline in section 3 says! Alternatively, one might had expressed the proposition in either of the following ways:

The Australian Astronomical Observatory is established” or “The Australian Astronomical Observatory is established by this section.

- excessively long centre-embedded clauses and phrases (which are liable to distract the user from the main message of the legislative sentence);²²
- some of the statutes have section headings (and consequently tables of contents) that are too cryptic to enable users navigate their way around those statutes easily;²³
- instances of the same headings being used for different sections (which is likely to confuse users);²⁴
- the insertion of definitions into the middle of a legislative sentence (which are similarly liable to distract users from the main message of the sentence);²⁵
- instances of noun strings and nominalisations;²⁶
- defective punctuation (including four instances of missing conjunctions);²⁷
- two instances of legislating by reference that are not likely to be helpful to users;²⁸
- instances of dangling phrases and clauses;²⁹
- at least one instance of inappropriate ellipsis;³⁰
- the obscure and technical use of penalty units, the effect of which is not likely to be readily understood by users.³¹

²¹ For example, four instances of sentence overload were noted in the *Architectural Practice Act 2009* (SA).

²² For examples, see *Healthcare Identifiers Act 2010* (Cwth); the *Payroll Tax Rebate Scheme (Jobs Action Plan) Act 2011* (NSW); the *Tattoo Parlours Act 2012* (NSW); the *Audit-General Act 2009* (Qld); the *Integrity Act 2009* (Qld); the *Architectural Practice Act 2009* (SA); the *Child Sex Offenders Registration Act 2006* (SA); the *Health Practitioners Tribunal Act 2010* (Tas); and the *Electronic Transactions Act 2011* (WA).

²³ For examples, see the *Integrity Act 2009* (Qld); the *Architectural Practice Act 2009* (SA); the *Health Practitioners Tribunal Act 2010* (Tas); the *Cat Act 2009* (Tas); the *Wills Act 2009* (Tas); the *Electronic Transactions Act 2011* (WA); and the *Parental Support and Responsibility Act 2008* (WA).

²⁴ Examples are to be found in the *Wills Act 2009* (Tas).

²⁵ For examples, see the *Healthcare Identifiers Act 2010* (Cwth); the *Defamation Act 2005* (NSW); the *Tattoo Parlours Act 2012* (NSW); the *Architectural Practice Act 2009* (SA); the *Child Sex Offenders Registration Act 2006* (SA); the *Residential Parks Act 2007* (SA); and the *Wills Act 2009* (Tas).

²⁶ For examples, see the *Tattoo Parlours Act 2012* (NSW); and the *Infrastructure Investment (Asset Restructuring and Disposal) Act 2009* (Qld); and the *Child Sex Offenders Registration Act 2006* (SA).

²⁷ For example, see the *Auditor-General Act 2009* (Qld).

²⁸ See the *Auditor-General Act 2009* (Qld) and the *Payroll Tax Rebate Scheme (Jobs Action Plan) Act 2011* (NSW).

²⁹ See the *Australian Astronomical Observatory Act 2010* (Cwth) and the *Integrity Act 2009* (Qld).

³⁰ See the *Cat Act 2009* (Tas).

³¹ For examples, see the *Health Care Identifiers Act 2010* (Cwth) and the *Tattoo Parlours Act 2010* (NSW).

Summary of the surveys

The surveys of statutes enacted during the early 1990s and from 2005 onwards demonstrate a clear move away from legalese. This suggests that legislative counsel have adopted a simpler style. Apart from the removal of jargon and unfamiliar words, sentences seem to be shorter and better constructed. There seems to be a trend towards expressing propositions positively rather than negatively and to using the active voice instead of the passive voice, although, as already mentioned, the use of passives is still very common. There has also been a clear trend towards expressing proportions and calculations by means of mathematical formulae (with appropriate definitions) or by means of step-by-step calculations rather than by the use of text only.

Some statutes also disclose a move away from using clauses and phrases designed to connect one legislative provision to another.³² Such tautological phrases as "the provisions of" are also used less frequently. In the case of a sentence having a singular subject and a plural subject, most Commonwealth and New South Wales statutes follow Fowler (1968) by making the verb agree with the nearer of its subjects, rather than the cumbersome repetition of the verb.³³ There was also evidence of legislative drafters eschewing the unnecessary repetition of nouns in their drafts.³⁴

Some recent Commonwealth and New South Wales statutes (including some of those surveyed) have included aids designed to assist users' comprehension. Among these aids are introductory notes to assist readers in finding their way around the Act in question or to tell them how the Act works. Another aid is the use of a flow chart or algorithm to illustrate the procedural steps required to be followed under the Act. Yet another aid has been the introduction of examples which are designed to illustrate how the related legislative provisions are meant to function. Some legislative provisions are now followed by notes that explain how those provisions work.

Conclusion

So what may be inferred from the survey? While in the past one may have been justified in criticising Australian legislation for containing legalistic words, phrases and forms of the kind catalogued above, this criticism seems to be no longer valid, certainly not at least as far as most Australian statutes are concerned. However, the analysis is not conclusive. It would be necessary to carry out further research to determine whether the syntax, organisation and style of modern legislative drafting was sufficiently free from the characteristics associated

³² For example, instead of saying "An application made by a person under subsection (1)....." one is now quite likely to see "An application". Also phrases like "of this Act", "of this Part" and "of this section" have for the most part been omitted as redundant, although such phrases continue to appear in New Zealand statutes.

³³ For example, "A person or persons have" rather than "A person has, or persons have".

³⁴ For example, "A person to whom section 10 applies....." rather than "A person who is a person to whom section 10 applies"

with legalistic writing, such as the excessive use of the passive voice and overloading legislative sentences with too many ideas. Nevertheless, the fact that legalese is now rarely found in modern Australian statutes might suggest that one could expect to find clearer and better organised writing in more recent Australian legislation.

Having established that the survey of recent Australian statutes demonstrates a clear trend away from "legalese", one may reasonably ask what has brought about the change. There is little doubt that one contributory factor influencing the change was the Kennan speech mentioned earlier and the subsequent report of the Victorian Law Reform Commission (1987). The report argued that legal documents and legislation in particular, should be written in the style known as "plain English". The report claimed that this style was compatible with precision and was capable of expressing complex policy. This style was also claimed to be less time consuming than the traditional style. But an analysis of statutes enacted between 1982 and 1987 showed that in many Australian jurisdictions the so-called traditional style of drafting had already been abandoned. For example, a survey of five Tasmanian statutes passed in the early 1980s³⁵ revealed a rate of only 0.70 items of legalese per 1,000 words. A similar survey of Commonwealth legislation passed in the 1980s revealed no provisos and virtually none of the items of legalese set out earlier in this paper. It would seem therefore that, even before the 1985 Kennan speech and the Victorian Law Reform Commission's Report, at least some Australian Parliamentary Counsel were already moving towards a style that eschewed legal jargon.

On the other hand, it should not be inferred that the dramatic improvement apparent in Australian legislation has necessarily flowed through to the preparation of other kinds of legal documents. Despite attempts by Eagleson (1990), Kerr (1991) and others to educate lawyers as to the benefits of plain language in legal documents, a cursory glance at a few of the legal documents prepared by lawyers in the private sector would reveal that there is a long way to go before legalese is eradicated from the law. But even in the private sector there are some encouraging signs that the drive for plainer language is having some effect, with a number of commercial organisations adopting plain English documents that directly affect the general public.³⁶

³⁵ The statutes concerned were the *Long Service Leave (Casual Wharf Employees) Act 1982*, the *Chiropractors Registration Act 1982*, the *Apple and Pear Industry (Crop Insurance) Act 1982*, the *Apple and Pear Industry (Miscellaneous Acts Repeal) Act 1982* and the *Prisoners (Interstate Transfer) Act 1982*.

³⁶ Several of the larger Australian law firms, such as Mallesons, have established dedicated units designed to eradicate legalese from their documents. Also, many insurance companies now have 'plain language' versions of their insurance policies.

Appendix 1—Statutes enacted before 1950

Note: "Pvo" represents "proviso"; "tp" represents tautological phrase or expression; and "Lp" represents Latin phrase or expression.

<i>Name of Act</i>	<i>No. of pages</i>	<i>No. of sections and Schedules</i>	<i>No. of words (to nearest 50)</i>	<i>Items of legalese</i>	<i>Items of legalese per 1000 words</i>
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Commonwealth Statutes

Wood Distribution of Profits Act 1948	11	33; 0	3,400	43	12.65
Parliamentary Retiring Allowances Act 1948	10	28; 0	3,800	22	5.79
Nationality and Citizenship Act 1948	19	53; 2	6,650	38	5.72
River Murray Waters Act 1948	6	6; 1 1 preamble	4,100	61 (8 pvos; 1 Lp)	14.88
Total	46	120; 3 1 preamble	17,950	164 (8 pvos; 1 Lp)	9.14

New South Wales Statutes

Charitable Collections Act 1934	16	21; 0	4,950	135 (1 pvo; 2 tps; 1 Lp)	27.27
Technical Education Act 1940	56	86; 0	18,500	228 (8 pvos; 17 tps; 2 Lps)	12.32
Stock Foods and Medicines Act 1940	20	35; 0	6,600	128 (2 pvos; 17 tps; 2 Lps)	19.40
Horse Breeding Act 1940	12	17; 0	3,950	47 (6 pvos)	11.90
Total	104	159; 0	34,000	538 (17 pvos; 36 tps; 5 Lps)	15.82

<i>Name of Act</i>	<i>No. of pages</i>	<i>No. of sections and Schedules</i>	<i>No. of words (to nearest 50)</i>	<i>Items of legalese</i>	<i>Items of legalese per 1000 words</i>
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Queensland Statutes

Liens on Crops of Sugar Cane Act of 1931	11	23; 0	3,700	190 (10 pvos; 6 tps; 1 Lp)	51.35
Roofing Tiles Act of 1948	29	26; 0	9,500	204 (11 pvos; 14 tps)	21.47
Hide and Leather Industries Act of 1948	10	22; 0	3,000	19 (3 pvos; 1 tps)	6.33
Wheat Industry Stabilization Act 1948	10	19; 0	3,100	56 (3 pvos; 3 Lps)	18.06
Total	60	90; 0	19,300	469 (27 pvos; 21 tps; 3 Lps)	24.30

South Australian Statutes

Barley Marketing Act 1947	10	22; 0	3,000	17 (5 pvos)	5.67
Venereal Diseases Act 1947	5	7; 0	1,500	30	20.00
Building Materials Act 1945	9	17; 0	2,700	44	16.30
Total	24	46; 2	7,200	91 (5 pvos)	12.64

Tasmanian Statutes

Ringarooma and Cascade Water System (Agreement) Act 1947	9	11; 2	3,800	76 (3 pvos; 3 Lps)	20.00
Milk Act 1947	21	29; 0	7,200	67 (2 pvos; 3	9.31

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<i>Name of Act</i>	<i>No. of pages</i>	<i>No. of sections and Schedules</i>	<i>No. of words (to nearest 50)</i>	<i>Items of legalese</i>	<i>Items of legalese per 1000 words</i>
				Lps)	
Exton Water Act 1947	13	30; 1	3,600	84 (1 pvo; 2 Lps)	23.33
Total	43	70; 3	14,600	227 (6 pvos; 8 Lps)	15.55

Victorian Statutes

Local Government (Streets) Act 1948	15	30; 0	4,500	107 (1 pvo; 11 tps; 1 Lp)	23.78
Statute Law Revision Committee Act 1948	5	11; 0	1,450	27 (1 pvo; 2 tps)	18.62
Barley Marketing Act 1948	11	26; 1	3,150	26 (2 pvos; 2 tps; 1 Lp)	8.25
Cancer Institute Act 1948	13	27; 1	3,350	57 (2 pvos; 5 tps; 1 Lp)	17.01
Total	44	94; 2	12,450	217 (6 pvos; 20 tps; 3 Lps)	17.43

Western Australian Statutes

Coal Mine Workers Pensions Act 1943	35	49; 0	12,250	142 (11 pvos)	11.59
Censorship of Films Act 1947	16	31; 1	5,050	56	11.09
Country Towns Sewerage Act 1948	49	54; 4	17,550	249 (18 pvos)	14.19

<i>Name of Act</i>	<i>No. of pages</i>	<i>No. of sections and Schedules</i>	<i>No. of words (to nearest 50)</i>	<i>Items of legalese</i>	<i>Items of legalese per 1000 words</i>
Total	100	134; 5	34,850	447 (29 pvos)	12.83

All Australian Statutes

Total - Commonwealth and all States	424	718; 15 1 preamble	140,350	2,153 (98 pvos; 77 tps; 21 Lps)	15.34
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Appendix 2—Statutes enacted in 1991 and 1992

(Note: "Pvo" represents "proviso"; "tp" represents tautological phrase or expression; and "Lp" represents Latin phrase or expression.)

<i>Name of Act</i>	<i>No. of pages</i>	<i>No. of sections and Schedules</i>	<i>No. of words (to nearest 50)</i>	<i>Items of legalese</i>	<i>Items of legalese per 1000 words</i>
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Commonwealth Statutes

Broadcasting Services Act 1992	96 + 7	218; 3	34,200	15 (2 tps)	0.44
Superannuation Guarantee (Administration) Act 1992	47 + 3	80; 0	16,800	11 (3 Lps)	0.65
Disability Discrimination Act 1992	58 + 4	132; 0	21,500	51 (6 tps)	2.37
Total	201 + 5	430; 3	72,500	77 (8 tps; 3 Lps)	1.06

New South Wales Statutes

Government Pricing Tribunal Act 1992	19 + 2	30; 4	5,300	2 (1 tp)	0.38
Parking Space Levy Act 1992	15 + 2	32; 1	3,050	9 (2 tps)	2.95
Swimming Pools Act 1992	29 + 2	41; 3	6,600	3 (3 tps)	0.45
Total	63 + 6	103; 8	14,950	14 (6 tps)	0.94

Queensland Statutes

Contaminated Land Act 1991	40 + 3	57; 1	14,600	33 (7 tps; 2 Lps)	2.26
Grain Industry (Restructuring) Act 1991	54 + 5	92; 4	16,200	5	0.31

<i>Name of Act</i>	<i>No. of pages</i>	<i>No. of sections and Schedules</i>	<i>No. of words (to nearest 50)</i>	<i>Items of legalese</i>	<i>Items of legalese per 1000 words</i>
Transport Infrastructure (Roads) Act 1991	55 +4	93; 3	18,200	125 (42 tps; 6 Lps)	6.87
Total	149+12	242; 8	49,000	163 (49 tps; 8 Lps)	3.33

South Australian Statutes

Wilderness Protection Act 1992	26 +2	41; 1	8,700	5 (1 tp)	0.57
Survey Act 1992	26 +3	63; 1 (1 Schedule)	8,100	13 (5 tps)	1.60
State Government Insurance Commission Act 1992	12 +2	30; 1	3,850	5 (1 tp)	1.04
Total	64 +7	134; 3 (1 Schedule)	20,650	23 (7 tps)	1.11

Tasmanian Statutes

Perpetuities and Accumulations Act 1992	24 +2	28; 1	6,600	5 (1 tp)	0.76
Access to Neighbouring Land Act 1992	8 +1	16; 0	2,000	5 (2 tps)	0.25
Subordinate Legislation Act 1992	12 +2	18; 3	2,900	0	0.00
Education Providers Registration (Overseas Students) Act 1991	22 +2	38; 0	6,300	12 (3 tps)	1.90
Total	66 +7	100; 4	17,800	22 (6 tps)	1.24

<i>Name of Act</i>	<i>No. of pages</i>	<i>No. of sections and Schedules</i>	<i>No. of words (to nearest 50)</i>	<i>Items of legalese</i>	<i>Items of legalese per 1000 words</i>
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Victorian Statutes

Victoria Park Land Act 1992	17 +1	19; 2	3,600	14 (8 tps)	3.89
Superannuation (Public Sector) Act 1992	15 +1	21; 0	3,500	3	0.86
Swinburne University of Technology Act 1992	48 +3	70; 1	11,250	21 (11 tps; 1 Lp)	1.87
Total	80 +5	110; 3	18,350	38 (19 tps; 1 Lp)	2.07

Western Australian Statutes

Western Australia Financial Institution Authority Act 1992	24 +4	57; 0	3,950	2	0.51
SGIO Privatisation Act 1992	26 +2	30; 2	3,800	18 (3 tps)	4.74
Coal Industry Tribunal Act 1992	30 +2	39; 0	4,750	40 (7 tps)	8.42
Total	80 +8	126; 2	12,500	60 (10 tps)	4.80

All Australian Statutes

Total: Commonwealth and all States	687 + 75	1245; 31	205,750	367 (105 tps; 12 Lps)	1.78
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Appendix 3—Statutes enacted from 2005 onwards

(Note: "Pvo" represents "proviso"; "tp" represents tautological phrase or expression; and "Lp" represents Latin phrase or expression.)

<i>Name of Act</i>	<i>No. of pages</i>	<i>No. of sections and Schedules</i>	<i>No. of words</i>	<i>Items of legalese</i>	<i>Items of legalese per 1000 words</i>
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Commonwealth Statutes

Australian Astronomical Observatory Act 2010	13 + 4	26; 0	1,799	0	0.00
Cancer Council Act 2006	18 + 4	38; 0	2,782	0	0.00
Healthcare Identifiers Act 2010	36 + 4	39; 0	7,968	0	0.00
Total	67 + 12	103; 0	12,549	0	0.00

New South Wales Statutes

Defamation Act 2005	42 + 3	49; 4	16,658	4	0.24
Payroll Rebate Scheme (Jobs Action Plan) Act 2011	23 + 3	63; 2	9,072	1 (1 tp)	0.11
Tattoo Parlours Act 2012	26 + 3	42; 1	10,448	9	0.86
Total	91+ 9	154;7	36,178	14	0.39

Queensland Statutes

Auditor-General Act 2009	31 + 4	96; 1	12,604	4	0.32
Integrity Act 2009	34 + 5	108; 2	13,574	0	0.00
Infrastructure Investment (Asset Restructuring and Disposal) Act 2009	14 + 2	28; 1	5,773	0	0.00
Total	79+ 11	232; 4	31,951	4	0.13

South Australian Statutes

Architectural Practice Act 2009	34 + 3	71; 1	12,769	12	0.94
Child Sex Offenders Registration Act 2009	42 + 3	73; 2	12,879	11	0.86
Residential Parks Act 2007	61 + 6	141; 1	24,194	14	0.58
Total	137 + 12	285; 4	49,842	37	0.74

<i>Name of Act</i>	<i>No. of pages</i>	<i>No. of sections and Schedules</i>	<i>No. of words</i>	<i>Items of legalese</i>	<i>Items of legalese per 1000 words</i>
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Tasmanian Statutes

Cat Act 2009	28 + 2	46; 0	6,796	21	3.09
Health Practitioners Act 2010	35 + 3	58; 3	9,322	8	0.86
Wills Act 2009	32 + 3	71; 4	10,348	17	1.64
Total	95 + 8	175; 7	26,466	46	1.74

Victorian Statutes

Carers Recognition Act 2012	14 + 1	13; 0	2,054	0	0.00
Tourist and Heritage Railway Act 2010	30 + 2	34; 0	5,213	6	1.15
Victorian Inspectorate Act 2011	36 + 2	49; 0	7,064	8	1.13
Total	80 + 5	96; 0	14,331	14	0.98

Western Australian Statutes

Electronic Transactions Act 2011	26+4	26; 0	5,379	2	0.37
Major Events (Aerial Advertising) Act 2009	14+4	17; 0	2,600	0	0.00
Parental Support and Responsibility Act 2008	37+6	39; 0	7,459	4	0.54
Total	77 + 14	82; 0	15,438	6	0.39

All Australian Statutes

Total - Commonwealth and all States	629 + 71	1,127; 22	186,785	121	0.65
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References

- Australian Law Journal* (1985) "Current topics - legalese and courtspeak", vol. 59, p. 189; (1986) "Current topics - the problem of drafting styles", vol. 60, p.369.
- Australian Law Reform Commission (1982) *Report on Insurance Contracts*, Report No. 20. Canberra: AGPS.
- Australian Law News* (1992) News reports, vol. 28, No. 7, p. 38.

- Benson, R. (1985) "The end of legalese: the game is over", *Review of Law and Social Change*, vol. 13, p. 519.
- Bentham, J. (1823, but written in 1792) *Truth v. Ashhurst; or law as it is*.
- Coode, G. (1848) *On Legislative Expression or the Language of the Written Law*. Philadelphia: T. & J.W. Johnson.
- Danet, B. (1980) "Language in the legal process", *Law & Society Review*, 14, 445-564.
- Eagleson, R. (1990) *The Benefits of Plain Language for Lawyers*, Sydney: University of Sydney,
- Fowler, H.W. (1968) *Modern English Usage* (2 ed), Gowers, E., London: Oxford University Press.
- Kennan, J. (1985) Plain English Legislation - ministerial statement given in the Victorian Legislative Council, Melbourne: Hansard, Parliament of Victoria.
- Kerr, E. (1991) *Plain Language: Is it legal?*, Sydney: Mallesons.
- Malley, Y. (1987) "The language of legislation", *Language & Society Review*, 16, 25-48.
- Mellinkoff, D. (1963) *The Language of the Law*. Boston: Little, Brown & Co.
- Mellinkoff, D. (1982) *Legal Writing: Sense and Nonsense*. St. Paul, Minn: West Publishing Co., 1982.
- More, Sir T. (1516) *Utopia* (P. Turner trans. 1965).
- Renton Committee (1975) *The Preparation of Legislation* London: HMSO.
- Rodell, F. (1939) *Woe unto You, Lawyers!* (2 ed), Littleton Co.: Rothman.
- Senate Standing Committee on Education and the Arts, (1984) *Report on a National Language Policy*, p. 20. Canberra: AGPS.
- Swift, J. (1726) *Gulliver's Travels*, University of Chicago edition, 1952.
- Taxation in Australia* (1992) November.
- Victorian Law Reform Commission (1987) *Plain English and the Law*, Report No. 9, Melbourne: Victorian Government Printer.
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CALC Conference Master Class – Inviting Drafting Instructions

Janet Erasmus¹ and Ross Carter²



Abstract

This article and the accompanying attachments were prepared for the Master Class Session of the 2013 CALC Conference in Cape Town. The Master Class was based on a set of drafting instructions prepared by Ross Carter. Janet Erasmus prepared two drafts. The first one included questions that prompted further instructions from Ross, which provided the basis for the second draft.

Overview

This article provides an account of the Master Class Session that Janet Erasmus presented at the 2013 CALC Conference in Cape Town.

It begins with her description of how she approached the drafting instructions that Ross Carter prepared, and more generally how she approaches the task of, as she puts it, “inviting” drafting instructions.

This description is followed by:

- Initial Drafting Instructions;
- First Draft identifying issues for the instructing official;

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- Further Drafting Instructions in response;
- Second Draft.

Inviting Drafting Instructions

My approach to the Master Class

The usual approach to these CALC master class events is that the participating legislative counsel present their work in a form that is as perfect as possible. The results are usually fascinating examples of how different legislative counsel can deliver effective (and largely equivalent) legislation in very different forms. But my approach was different.

I was honoured when John Mark Keyes (organizer for the 2013 master class) asked if I would participate, but my acceptance came with a caveat. Rather than producing the usual near-perfect draft, I wanted to use the master class as an opportunity to demonstrate techniques I have found helpful in encouraging instructing officials to provide me with effective drafting instructions, techniques I describe as “inviting” the instructions.

Why was I wanting to take this approach to the master class? Because I see an increasing need for these techniques in my personal work, and I expect that this need is not limited to my jurisdiction.

In Canada (and, I understand, in other Commonwealth countries), our public services are facing the reality of “boomer demographics” – experienced folk are retiring in large numbers, with the result that legislative counsel are working more and more with instructing officials who are new to the process of developing legislation. They have limited understanding of their role in providing instructions to legislative counsel, and often little experience even with reading legislation. In the past, these new instructing officials would be working under the guidance of experienced mentors in their policy branches, but this is no longer the case.

My personal view — good legislative drafting in this context involves a fair portion of teaching. It is teaching that benefits the instructions and so the quality of the legislation, and it is teaching that will pay back in benefits to our Offices of Legislative Counsel as we speed up the process of developing the capacity of our instructors.

The drafts and instructions that come with this article

When John Mark Keyes sent the instructions prepared by Ross Carter (New Zealand Office of Parliamentary Counsel), my plan had been to prepare a single draft that incorporated a number of the invitation techniques, then write accompanying materials about how I use these techniques and what they are intended to accomplish.

The plan shifted when I sent the initial draft to John Mark and Ross. John Mark enthusiastically suggested that Ross provide responding instructions to the issues identified in the first draft and that I prepare a second draft. The suggestion was accepted, and I offer my thanks for the opportunity to include a few more techniques in these master class materials and, more importantly, to prepare a second draft that demonstrates the effectiveness of techniques used in the initial draft.

Techniques for inviting (effective) drafting instructions

To put these inviting instructions/teaching techniques into broad categories, some are substantive (in that they determine *what* I will write in the draft), others are visual (in that they determine *how* I present the information). And then there is the “tracking table” that records the timing of my drafts and the responses from instructing officials.

Substantive techniques

In preparing a draft, I will:—

- **identify issues** directly at the relevant point in the draft

If the issue is one I consider significant, it will get an all-caps “ISSUE” at the start, as is done with my question in draft 1 about the “recovery” concept.

(In my early days of drafting, issue identification would be done by a separate memo with section-by-section discussion notes – an approach that required my instructing officials to read back and forth between the two documents in order to understand what issues they needed to answer for drafting to proceed.)

- **offer alternatives** for consideration

These will be [indicated by square brackets], as shown here.

Sometimes the alternatives will offer different legal results, and so I am looking for instructions on intention. If the differences are not obvious from the language, there will be an explanation note to go with the alternatives.

Sometimes the alternatives are just different approaches to expressing the same concept, and I am looking for a response about which one works best from a reader’s perspective.

- **set out assumptions**

Some of these will be where I am checking that the legal effect of what the instructions asked for is, in fact, the intended result (as in, checking on the instructor’s assumptions).

Others will be where I have added what I think is something missing from the instructions in order to achieve the intended result (as in, explaining my own assumptions).

- **provide reasons** for (or ask questions about) terminology choices

Sometimes these will be legal explanations for using specific terminology (such as the note in draft 1 about “calendar month” and the note in draft 2 about “disposition”). And sometimes these will be explanations about consistency with terminology used in other B.C. legislation (such as the note in draft 1 about “concurrency”).

Other times, the word choice will be directed to providing context for purposes of court interpretation (and so the draft 1 question about “manufacturer”). And yet other times, it will just be a question of better readability.

Visual techniques

In preparing a draft, I:—

- use **distinct fonts** for the my comments
(Times New Roman is used for the basic legislative text, **bold Arial** is my usual font for comments)
- use **colour** to make the comments immediately identifiable on a page
Usually the shading is a soft blue or green — easy to see and easy on the eyes (but I have been known to use something much brighter if there is a significant issue involved).
- use **line breaks** to focus attention on particular parts of the text

If I want the instructor to consider some particular part of a provision, I will set the part off by using a line break before and after the text (such as the separation of the terminology notes in the draft 1 definition of “board acquisition price”).

This technique is a personal favourite, as the benefits are significant:—

First, the instructing officials really cannot miss the issue.

Second, when they provide the needed instructions, the line breaks disappear and there is a fine positive reinforcement from seeing the draft become more like completed legislation. (Satisfying for the legislative counsel too!) The differences between drafts 1 and 2 of the Master Class assignment provide a good example of this.

Tracking table and timely instructions

This is the table that appears at the start of my drafts, tracking the dates on which drafts were sent and instructing official responses received. I started putting these in at the top of my drafts on large projects so that I could quickly identify when particular events in relation the project took place. I soon discovered that they were invitations to timely instructions: it seems that once my instructing officials became aware that I was tracking the timing of my drafts and their responses, turn-around times improved.

Other techniques used in the Master Class drafts

Defined terms are a legislative counsel’s best friend, but always test the acronyms

Defined terms let you create a language for your legislation that can be easily understood by readers, but still allow control over those fine legal points that need to be addressed. (See, for example, the definition of “local sale” in draft 2.)

But do always test the acronyms. You have to expect that users will create them, and the results can sometimes be surprising. By way of example, some time ago (and before my time) our government-of-the-day introduced a flagship Bill for the legislative session with the title *Budget Stabilization Fund Act*. I expect you can imagine the opportunities this provided to the Opposition. By way of example in relation this master class project, I had considered notional disposition price as a term, but the acronym “NDP” is used across Canada for one of our major political parties. I did not even offer it in the drafts.

“This section applies” statements

Some legislation tells a story. That is, its provisions move from one to the next with required connection (for example, voting procedures in election legislation, or the process for adopting a child).

But some legislation will have its readers coming in to look for a particular provision. For these, even if the conditions in which a section applies are not complex, it can help to have an opening statement of application — so readers can quickly know whether the section is relevant to them. If the conditions in which a section applies are complex, then it is almost always better to start the section with an application statement.

Heading note numbering in the draft

In British Columbia, section numbers go at the start of the first provision of the section (where the “#” appears in my Master Class drafts) and, for amending legislation, new sections will be assigned decimal numbering. To make reading easier while the draft is early stages, I will often use simple numbering (1, 2, 3, etc.) in the heading notes for easy reference. The actual decimal numbers will be applied once the draft is close to complete.

Cross-reference descriptors

The section numbering approach leads into the “cross-reference descriptors” that you see in the draft as “...section # (4) [*transitional adjustment for payments by board*] applies ...”.

There is a history behind the use of this technique.

I started using these italic cross reference descriptors many years ago on a project that was undergoing major change between drafts. The result was that I needed something to keep track of my cross-references down to the subsection level. The descriptors were my answer to the problem.

They worked well and I used them in all my drafting from that time on. My instructing officials liked them, too — to the point that there would be anxious protest when the descriptors were removed as we headed to the final stages of a project.

Then I came across a provision in the Canadian *Criminal Code* that authorized the use of references like this.³ I added an equivalent provision into a very large Act I was working on, to strong positive responses from the instructing officials. That provision became the basis for a 1999 amendment to our *Interpretation Act*, adding what is now section 11 (2):

Reference aids and clarifications

- 11** (1) In an enactment, a head note to a provision or a reference after the end of a section or other division
- (a) is not part of the enactment, and
 - (b) must be considered to have been added editorially for convenience of reference only.
- (2) In an enactment, if a reference to a provision of the enactment or any other enactment is followed by italicized text in square brackets that is or purports to be descriptive of the subject matter of the provision, subsection (1) (a) and (b) applies to the text in square brackets.

If a project is amending into an Act that already uses descriptors, they will be used in the amendments. (The master class draft was prepared with this assumption.) For a new Act, it will be the drafting legislative counsel’s choice about whether or not to use descriptors.

Formulas can be plain language

Where the primary audience for a legislative project is the business community, formulas can be the plainest of language: done well, their calculation is mathematically certain and the bookkeeping/accountant folk can more easily create the Excel or other algorithms needed to produce the results.

Choosing the right formula terms is the key to their readability:—

- If possible, use meaningful labels for the terms, as in:

$$\text{recapture charge} = (\text{fair market value} - \text{forest land value}) \times \text{recapture rate}$$

where

fair market value = the fair market value determined under section 22 (3) (a);

forest land value = the forest land value determined under 22 (3) (b);

recapture rate = the prescribed recapture rate.

This was the approach used in the Master Class formulas.

- If meaningful labels are not possible because the calculation is so complex, at least use meaningful letter formulas: labels for the terms, as in:

$$RC = (FMV - FLV) \times RR$$

³ RSC 1985, c. C-46, s. 3.

where

RC = recapture charge

FMV = the fair market value determined under section 22 (3) (a);

FLV = the forest land value determined under 22 (3) (b);

RR = the prescribed recapture rate.

- Do not use random letter formulas that provide no information about what the formula is really doing, as in:

$$A = (B - C) \times D$$

Table of contents

For a new Act, or for an amending Acts that adds a new Part, I will provide a table of contents from the very start. The table makes it easier for the instructors, and for me, to locate a particular section that we want to talk about. (The table is created by using the head notes, then changing the font for easier reading.)

Terminology tracking (what you do not see in the draft)

I will often maintain a list of terminology references for a project of any complexity. These are little clips that help me keep consistent phrasing throughout the drafting process.

The one I used for this project:—

dairy produce of a class designated under

applicable class of ddp

equalization adjustment in relation to a quantity

If I am working in tandem with another legislative counsel — for example, on the same Bill, on related Bills, one of us on the Bill and the other on the related regulations —then we will often be using a shared list along these lines.

**WHIB — an information template for preparing drafting instruction
(and for drafting)**

WHIB is an acronym for the template I provide to instructing officials, this with a view to helping them think about whether their instructions are complete. I also find it useful for checking about whether there are gaps in the legislation I have drafted.

WHIB	
W	<i>Who, What, When, Where, Why</i>
H	<i>How, How much</i>
I	<i>If, If not, If ... then</i>
B	<i>But</i>

Who *may / must / may not / must not do*

What the central statement of action

When: Is there a time aspect?

Where: Is there a place aspect?

Why: Does a reason need to be expressed?

How: Are procedural aspects to be included?

How much: Is there a cost or other financial aspect?

If: Does the rule only apply if ...?

If not: What are the consequences for non-compliance?

If ... then: Are variations needed?

But: Are there exceptions to the rule?

(WHIB is now part of the *Guide to Preparing Drafting Instructions* for the British Columbia Office of Legislative Counsel.)

Initial Drafting Instructions

Introduction

These instructions ask you to draft a series of provisions to implement an equalisation scheme for the prices paid for dairy produce. The provisions are to be administered by a Board, for example a Dairy Board. You should assume that the Board is already established, as is the concept of “dairy produce”.

You should consider this exercise as if it arises in your own jurisdiction and involves an amendment to a real or hypothetical Act of that jurisdiction. Your solutions should reflect current legislative drafting practice, interpretive approaches, and other legislation, in your jurisdiction. You are encouraged to use any drafting tool that avoids or reduces the proposal’s complexity.

The following are the details of a price equalisation scheme.

Board acquires, and markets, dairy produce for export

The Board is to acquire and market dairy produce intended for export. On acquiring dairy produce, the Board must pay a determined “export acquisition price” to the manufacturer. The Board determines the price that the Board is to pay for dairy produce for export acquired by the Board during each 12-month dairy season ending with the close of 31 May in a year.

Equalising prices of dairy produce

The price equalisation scheme is to apply to any kind of dairy produce that is approved by the Board with the responsible Minister’s concurrence (any “approved kind of dairy produce”). The scheme must enable the Board to make equalising payments to, and to recover equalising payments from, manufacturers disposing of approved kinds of dairy produce otherwise than to the Board (for example, intended for local sale).

Scheme is to equalise “[export] acquisition price” and “notional [non-export] price”

The equalising payments made to, or recoverable from, manufacturers are to be calculated for particular dispositions of dairy produce by comparing, for any approved kind of dairy produce:

- the “[export] acquisition price” at the time when, in the Board’s opinion, that produce was manufactured, payable by the Board for dairy produce of that kind acquired by the Board for export; and

- a “notional [non-export] price” fixed under the scheme for dairy produce of that kind (and unrelated to the actual price at which the manufacturer disposed of the dairy produce otherwise than to the Board).

The notional non-export prices should be fixed by the Board for approved kinds of dairy produce, and should take effect on and after stated dates (not earlier than the date of fixing).

The scheme has 2 forms: (1) a simple form, and (2) a complex form. The simple form operates unless a notional non-export price is altered with effect for a stated number of months, in which case the altered notional non-export price operates for that stated number of months (and that operation for that period of the altered notional non-export price is, as discussed in detail below, the complex form of the scheme).

Simple form of price equalisation scheme: how it is to work

While a notional non-export price is in effect for an approved kind of dairy produce, the simple form of the scheme operates except during the stated number of months after an alteration to the notional non-export price.

Under the simple form of the scheme, the Board must—

- top up the amount a manufacturer actually received for dairy produce that it disposed of otherwise than to the Board at a price below the Board’s export acquisition price, by the amount by which the export acquisition price exceeds the notional non-export price; and
- recover from a manufacturer that disposed of dairy produce otherwise than to the Board at a price above the Board’s export acquisition price the amount by which the notional non-export price exceeds the export acquisition price.

The Board can recover an amount using either, or both, of the following methods:

- directing the manufacturer to pay it to the Board;
- deducting from money payable to the manufacturer by the Board.

Complex form of price equalisation scheme: how it is to work

Generally

While a notional non-export price is in effect for any approved kind of dairy produce, the complex form of the scheme operates during any transitional period following its alteration.

The notional non-export prices should be alterable with retrospective effect back to the date when the original notional non-export price took effect or with effect on a date on which conditions specified by the Board in making the amendment are met. On altering a notional non-export price, the Board must state a period of whole months after the date the altered

notional non-export price takes effect (the transitional period) during which the complex form of the scheme is to operate.

Once again, amounts are to be topped up or recovered; but their calculation is more complex.

Top-ups

A top-up is to be calculated by adding an initial amount and an additional amount.

The initial amount is to be the amount by which the value of the dairy produce at the export acquisition price for produce of that kind exceeds its value calculated at the higher of the notional non-export price in effect before it was last altered and the new notional non-export price.

The additional sum is to be determined by the Board, but must be at least the amount determined by—

- ascertaining how much dairy produce of that kind the manufacturer disposed of otherwise than to the Board during the 12 months before the transitional period began:
- calculating a notional quantity of dairy produce that is the same proportion of the total amount ascertained as the transitional period is of 12 months:
- attributing to that notional quantity a top-up calculated at the lower of the following rates:
- the difference between the notional non-export price in effect before it was last altered and the new notional non-export price:
- the amount by which the lower of those prices is less than the Board's export acquisition price for produce of that kind.

Recoveries

A recovery is to be calculated in an equivalent fashion, that is to say, by adding an initial amount and an additional amount.

The initial amount is to be the amount by which the value of the dairy produce at the export acquisition price for produce of that kind is less than its value calculated at the lower of the notional non-export price in effect before it was last altered and the new notional non-export price.

The additional sum is to be determined by the Board, but must be no more than the amount determined by—

- ascertaining how much dairy produce of that kind the producer disposed of otherwise than to the Board during the 12 months before the transitional period began:
- calculating a notional quantity of dairy produce that is the same proportion of the total amount ascertained as the transitional period is of 12 months:
- attributing to that notional quantity a top-up calculated at the lower of the following rates:
- the difference between the notional non-export price in effect before it was last altered and the new notional non-export price:
- the amount by which the lower of those prices is higher than the Board's export acquisition price for produce of that kind.

Final adjustments for:

(1) Annual export sales surplus

An adjustment should be provided for as soon as practicable after the end of each season to account for the effect on export acquisition prices of any relevant payments by way of an annual surplus (if the amount obtained for dairy produce sold beyond the country by the Board during the season exceeds the amount paid by the Board in acquiring and marketing that dairy produce).

(2) Actual annual disposition quantities

An adjustment should also be provided for so that notional non-export price additional discretionary sums (under the complex form of the scheme that operates after an alteration in the notional non-export price, and during the transitional period) that are based on disposition quantities in the previous 12 months are adjusted in the light of actual disposition quantities in the year concerned.

Background to, and nature of, this exercise

This exercise is based on, and can be seen in a New Zealand context in, the Dairy Board Act 1961 s 27 as substituted by the Dairy Board Amendment Act 1980 s 8 (deemed to have come into force at the season that began on 1 April 1980):

http://www.nzlii.org/nz/legis/hist_act/dbaa19801980n81215/

(The principal Act as first enacted – the Dairy Production and Marketing Board Act 1961 (1961 No 5) – is available at http://www.nzlii.org/nz/legis/hist_act/dpamba19611961n5365/. The Board's name was changed to its commonly known name (the Dairy Board) on 7 July 1966, by the Dairy Production and Marketing Board Amendment Act 1965 (1965 No 66) s

10 and the Order that is SR 1966/115. That 1965 Amendment Act is at [http://www.nzlii.org/nz/legis/hist_act/dpambaa19651965n66445/.](http://www.nzlii.org/nz/legis/hist_act/dpambaa19651965n66445/))

That s 27 exemplifies what, in 1980, was current legislative drafting practice in New Zealand. It is undesirably complex, and would today be drafted very differently. The drafting was completed under some pressure while the Bill was proceeding through the House.

In addition, references to dairy companies that manufacture dairy produce should be references to manufacturers (even if not dairy companies), and s 27(10) applies only if, and to the extent that, the complex form of the scheme has operated in the year concerned.

First Draft

This is a first draft done in the form that would be sent to my instructing officials

Draft	Date	notes
1	17 March 2013	5 March 2013 instructions from received JMK; 11 March: emt/emf Ross Carter re calculation of transitional rate

Part 4.1 – Dairy Produce Price Equalization Program

- 1 Definitions
- 2 Board authority to designate dairy produce and set initial equalization price
- 3 Changes to equalization price – transition period required
- 4 Equalization adjustments payable or recoverable by board
- 5 EA calculation – general rules that apply outside of transition period
- 6 EA calculation for transition period – board acquisition price higher than new equalization price
- 7 EA calculation for transition period – board acquisition price lower than new equalization price
- 8 Recalculations – end of dairy season surplus
- 9 Recalculations – transition period adjustments
- 10 Recalculations – retroactive effective date for equalization price
- 11 Payments and recoveries resulting from recalculations
- 12 Offset of payments and recoveries
- 13 Commencement

DAIRY MARKETING AMENDMENT ACT, 2013

The Dairy Marketing Act, R.S. CALC, c. #, is amended by adding the following Part:

PART 4.1 – DAIRY PRODUCE PRICE EQUALIZATION PROGRAM

1 Definitions

In this Part:

adjustment quantity

means, in relation to designated dairy produce for which an equalization adjustment is to be made under this Part, the quantity referred to in section # (a) [*board determination of quantity for applicable month*];

board acquisition price

means, in relation to designated dairy produce, the price that would have been payable by the board under this Act for the dairy produce if it had been acquired by the board at the time that,

in the board’s [opinion,] [consideration,]

["consideration" is used in the other discretionary determinations. Did you intend a different discretion here?]

the dairy produce was manufactured;

[ISSUE: “manufactured” (and manufacturer)

This is the terminology used in your instructions. If this is not currently used in a specific way, please consider using the less restrictive “producer” (which would mesh well with the “dairy produce” concept).

My concern is that “manufactured” may be read to restrict the authority for board designation to produce that has been through some form of manufacturing (as in, changing) process. If this is not intended but you do want to keep the terminology, then a statutory definition allowing this to be broader than actual manufacturing should be considered.]

designated dairy produce

means dairy produce of a class designated under section # (#) [*board authority to designate*];

equalization adjustment

means, in relation to the disposition of designated dairy produce other than to the board, the amount determined as required by section # (a) [*equalization adjustments payable or recoverable by board*] in relation to that disposition;

[*equalization price*] [*notional equalization price*] [*notional disposition price*]

means, in relation to designated dairy produce, the price set by the board under section # (2) [*initial equalization price*] or # [*changes to equalization price*], as applicable, in relation to the applicable class of dairy produce;

[A few choices here for your consideration. The “equalization” versions would emphasize the purpose, and so soften the arbitrary quality of “notional”. This draft is using the first alternative (but I must admit to liking the second for its better-sounding “NEP” acronym). Other terminology suggestions are welcomed.]

initial equalization price

means the equalization price established under section # (3) [*initial equalization price*] in relation to the applicable class of designated dairy produce;

new equalization price

means, in relation to the disposition of designated dairy produce during a transition period for that dairy produce, the equalization price of the dairy produce at the start of the transition period;

old equalization price

in relation to the disposition of designated dairy produce during a transitional period for that dairy produce, the equalization price of the dairy produce that applied immediately before the start of the transition period;

recalculation

means the recalculation of an equalization adjustment under section # [*recalculations – end of season surplus*], # [*recalculations – transitional adjustments*] or # [*recalculations – retroactive change to equalization price*];

transition period

means, in relation to a class of designated dairy produce, a period established under section # (3) [*changes to equalization price – transition period required*] in relation to that class.

[CONCEPT question:

If the “disposition other than to the board” that is being covered by this scheme is entirely (or almost entirely) non-export disposition, then it may be more understandable to users if the concept term is “local disposition” (with a definition that this means disposition other than to the board).]

2 Board authority to designate dairy produce and set initial equalization price

- # (1) **Designation of dairy produce for equalization purposes** — The board may, [for the purpose of providing manufacturers of dairy produce with more balanced compensation between dairy produce that is acquired by the board and dairy produce that disposed of by a manufacturer other than to the board] designate classes of dairy produce as dairy produce to which this Part applies.

[ISSUE: This is one of those rare occasions when I would recommend a purpose statement.

Yes, it will make the Part more easily understood. But, more importantly, it will demonstrably constrain the Board’s powers when – without this constraint – government should anticipate concerns about the extraordinary Board powers under this Part to create notional prices (including retrospective prices) that generate payments and recoveries.

If you agree with this purpose proposal, we will work on refining the placeholder description here.]

- (2) **Minister’s approval required** — A designation under subsection (1) may be done only with approval of the minister.

[BC legislation only uses “concurrence” in relation to one specified minister acting with the concurrence of another specified minister. For matters such as these designations, the standard language is “approval”. (I am assuming that you want the minister’s approval to be in advance of a designation, otherwise this could be crafted as “subject to approval by the minister”.)]

- (3) **Initial equalization price and effective date** — For a class designated under subsection (1), the board must establish

- (a) the initial equalization price that applies in relation to designated dairy produce of that class, and
- (b) the effective date for this initial equalization price.

- (4) **Restrictions on effective date** — The effective date established under this section must be the first day of a calendar month and may not be earlier than the date on which the equalization price is established. **[The use of “calendar” is based on the assumption that the use of “whole month” in the instructions is intended to mean a calendar month. I will be using this term consistently in the draft.**

(FYI - The BC Interpretation Act has a problematic definition for “month” which means we cannot just use the simple term here.)]

3 Changes to equalization price – transition period required

- # (1) **Changes to equalization price** — Subject to this section, the board may change the equalization price for a class of designated dairy produce.

- (2) **Effective date for change in equalization price** — The effective date for a change under this section is, as applicable,
- (a) the first day of the calendar month specified by the board, which may be retroactive to the first day of any calendar month that is, or is after, the date on which the initial equalization price became effective under section # (3) [*effective date for initial equalization price*], or
[Please confirm the intention to allow change all the way back to the initial pricing. (Hear, “Start again!” in a deep Monty Python voice). This could be happening a number of years later, and the recalculations of amounts payable and recoverable could be significant.]
 - (b) the first day of the calendar month in which
[the conditions specified by the board in making the change are met.]
[the circumstances specified by the board in making the change occur.]
[“conditions ... met” suggests some control over events. “circumstances ... occur” avoids the suggestion]
- (3) **Transition period for change** — In establishing a new equalization price, the board must also establish,
as the period for transition to the new equalization price,
[“for transition to” used to provide context for the Board’s discretion]
a specified number of calendar months that the board considers appropriate in the circumstances.
[A retroactive effective date as contemplated by subsection (1) (a) may invite a very long transition period, with the consequential adjustments amounting to some significant shifts in amounts payable by the Board or by manufacturers. If this is not intended, you may wish to constrain the transition period length.]

4 Equalization adjustments payable or recoverable by board

- # If the board considers that, in any calendar month, a manufacturer has disposed of dairy produce of a designated class other than to the board,
- (a) the board must determine, in accordance with this Part, the equalization adjustment for the quantity of that designated dairy produce that
the board considers
[Given the instructions for end-of-season recalculation based on “actual” quantities, I am assuming this one needs the less certain “board considers” approach]
was so disposed of by the manufacturer in the calendar month, and
 - (b) as applicable,
 - (i) the board must pay that equalization adjustment to the manufacturer, or
 - (ii) [the board may recover that equalization adjustment from the manufacturer.]
[the manufacturer is liable to pay that equalization adjustment to the board.]
[ISSUE: The “recovery” approach relies on the board exercising its authority to recover. The “liable to pay” approach creates immediate liability for the manufacturer. Which do you want?]

5 EA calculation – general rules that apply outside of transition period

[As you will see here and in the transition period provisions, I am using a formula approach to the EA determinations — for precision in the calculations, and for ease of use by Board/manufacturing accounting staff.]

- # (1) **Application of section** — Unless section # or # [equalization adjustments for transition period] applies, an equalization adjustment must be determined in accordance with this section.
- (2) **Equalization adjustment to be paid by board** — If, for the applicable calendar month, the board acquisition price for the designated dairy produce is greater than the equalization price for that dairy produce, the equalization adjustment payable by the board to the manufacturer in relation to the adjustment quantity for that month is to be determined as follows:

$$\text{equalization adjustment} = \text{BAP value} - \text{EP value}$$

where

BAP value = value of the dairy produce based on its board acquisition price

EP value = value of the dairy produce based on its equalization price.

- (3) **Equalization adjustment recoverable by board** — If, for the applicable calendar month, the board acquisition price for the designated dairy produce is less than the equalization price for that dairy produce, the equalization adjustment that

[the board may recover from the manufacturer]

[the manufacturer is liable to pay to the board]

[an example of the alternatives flowing from the s. 4 issue]

in relation to the adjustment quantity for that month is to be determined in accordance with the following formula:

$$\text{equalization adjustment} = \text{EP value} - \text{BAP value}$$

where

EP value = value of the dairy produce based on its equalization price

BAP value = value of the dairy produce based on its board acquisition price.

6 EA calculation for transition period – board acquisition price higher than new equalization price

- # (1) **Application of section** — An equalization adjustment is to be determined in accordance with this section if
- the equalization adjustment is for a calendar month that is, or is part of, a transition period for the applicable class of designated dairy produce, and
 - the board acquisition price for that class of designated dairy produce is greater than the new equalization price for that class.
- (2) **Equalization adjustment to be paid** — The equalization adjustment payable by the board in relation to the adjustment quantity for the applicable calendar month to the manufacturer is the total of
- the base adjustment as determined under subsection (3), and

(b) a transitional adjustment that the board considers appropriate in the circumstances, subject to the requirement that this must not be less than the amount determined under subsection (4).

(3) **Base adjustment** — The board must determine the base adjustment in accordance with the following formula:

$$\text{base adjustment} = \text{BAP value} - \text{higher EP value}$$

where

BAP value = value of the dairy produce based on its board acquisition price

higher EP value = value of the dairy produce based on whichever of the old and new equalization prices is greater than the other.

(4) **Minimum transitional adjustment** — The board must determine the minimum transitional adjustment in accordance with the following formula:

$$\text{minimum} = \text{annual quantity} \times \text{adjustment factor} \times \text{transitional rate}$$

where

annual quantity = the total quantity of designated dairy produce of the applicable class that the board considers was, in the 12 calendar months immediately before the start of the transition period, disposed of by the manufacturer other than to the board

adjustment factor = the number of calendar months in the transition period divided by 12

transitional rate = the lower of the following:

(a) the higher EP minus the lower EP;

(b) the BAP minus the lower EP

where

higher EP = whichever of the old and new equalization prices for the designated dairy produce is higher than the other

lower EP = whichever of the old and new equalization prices for the designated dairy produce is lower than the other

BAP = the board acquisition price for the designated dairy produce.

7 EA calculation for transition period – board acquisition price lower than new equalization price

- # (1) **Application of section** — An equalization adjustment is to be determined in accordance with this section if
- (a) the equalization adjustment is for a calendar month that is, or is part of, an transition period for the applicable class of designated dairy produce, and
 - (b) the board acquisition price for that class of designated dairy produce is lower than the new equalization price for that class.
- (2) **Equalization adjustment to be paid** — The equalization adjustment the board may recover from the manufacturer in relation to the adjustment quantity for the applicable calendar month is the total of
- (a) the base adjustment as determined under subsection (3), and
 - (b) a transitional adjustment that the board considers appropriate in the circumstances, subject to the restriction that this must not be greater than the amount determined under subsection (4).

- (3) **Base adjustment** — The board must determine the base adjustment in accordance with the following formula:

$$\text{base adjustment} = \text{lower EP value} - \text{BAP value}$$

where

lower EP value = value of the dairy produce based on the lower of the old equalization price and the new equalization price

BAP value = value of the dairy produce based on its board acquisition price.

- (4) **Maximum transitional adjustment** — The board must determine the maximum transitional adjustment in accordance with the formula under section # (4) [*transitional adjustment for payments by board*] but with the transitional rate determined as follows:

transitional rate = the lower of the following:

- (a) the higher EP minus the lower EP;
- (b) the lower EP minus the BAP.

8 Recalculations – end of dairy season surplus

- # (1) **Application of section** — This section applies if payments under section 28 [*application of annual surplus – additional payment for dairy produce acquired by board*] were made for a dairy season

[in relation to dairy produce of the same class as a class of designated dairy produce.]

[assumes this annual surplus adjustment is done by class]

- (2) **Recalculations based on revised board acquisition price** — As soon as practicable after the end of the dairy season, the board must recalculate the equalization adjustments under this Part in relation to designated dairy produce of the class referred to in subsection (1) using a revised board acquisition price that

[the board considers reflects an increase equivalent to that paid in relation to the class as a result of payments under that section for dairy produce acquired by the board.] **[does the “equivalent” concept capture your intention?]**

9 Recalculations – transition period adjustments

- # (1) **Application of section** — This section applies in relation to a dairy season if one or more calendar months of the dairy season are included in the 12-month period used to establish an annual quantity to be applied in determining a transitional adjustment under section # (#) or # (#) [*equalization adjustments for transition periods*].

- (2) **Recalculations based on actual quantities** — As soon as practicable after the end of the dairy season, the board must recalculate the transitional adjustments referred to in subsection (1) on the basis of

[the actual quantities]

[How are these “actual” amounts determined with certainty? or is this really about the amount that the board finally determines were disposed of by the manufacturer?]

of designated dairy produce of the applicable class that were disposed of by the manufacturer, other than to the board, in the applicable calendar months of the dairy season.

10 Recalculations – retroactive effective date for equalization price

[I am thinking that these will involve recalculations that should be able to access the related authorities respecting payment, recoveries and offsets.]

- # (1) **Application of section** — This section applies if a new equalization price for a class of designated dairy produce is made effective on a date earlier than the date on which the board established the new equalization price.
- (2) **Recalculations of amounts payable and amounts recoverable**— As soon as practicable after the new equalization price is established, the board must
- (a) recalculate the equalization adjustments made in relation to designated dairy produce of the applicable class for the past calendar months to which the new equalization price applies, and
 - (b) determine the amounts that, as a consequence of those recalculations, are payable or recoverable by the board.
- (3) **Recalculations based on actual quantities** — Section # (2) [*recalculations based on actual quantity*] applies to recalculations under this section in relation to past calendar months that are part of the transition period for the new equalization price but are not part of the current dairy season. **[yes?]**

11 Payments and recoveries resulting from recalculations

[To create the consequential payment obligations]

- # (1) **Payment by board** — If a recalculation under this Part results in
- (a) a higher amount that is to be paid to the manufacturer by the board, or
 - (b) a lower amount that is recoverable by the board,
- the board must pay the difference between the original equalization adjustment and the recalculated equalization adjustment to the manufacturer.
- (2) **Recovery by board** — If a recalculation under this Part results in
- (a) a higher amount that is to be paid to the board by the manufacturer, or
 - (b) a higher amount that is to recoverable by the board,
- the board may recover from the manufacturer the difference between the original equalization adjustment and the recalculated equalization adjustment.

12 Offset of payments and recoveries

[The instructions only covered offset authority for recoveries. I am thinking that you will also want an equivalent on the payment side]

- # (1) **Offset of payments by board** — If, under this Part, the board is liable to pay an amount to a manufacturer, the board may apply all or part of that amount against an amount that the board may recover from the manufacturer under this Act.
- (2) **Offset of recoveries by board** — If, under this Part, the board may recover an amount from a manufacturer, the board may recover the amount
- (a) by requiring the manufacturer to pay the amount to the board,
 - (b) by deducting the amount from amounts payable by the board to the manufacturer, or

- (c) by requiring the manufacturer to pay part of the amount to the board and deducting the remainder from amounts payable by the board to the manufacturer.

13 Commencement

- # This Act comes into force on **[when?]**
[*specified date*].
[the date of Royal Assent.]
[by regulation of the Lieutenant Governor in Council.]

Further Drafting Instructions

From: Ross Carter

Sent: Tuesday, March 19, 2013 1:37 PM

To: Erasmus, Janet

Subject: CALC Conference - Master Class - Erasmus draft 1

Hi again Janet

Here are my "instructor" responses to your (to me, extremely impressive) draft 1 - 17 March 2013 (each response is related to a cited section in your added new Part 4.1):

- s 1 (Definitions), definition of 'board acquisition price' - query about "in the Board's opinion": No different discretion was intended in this context from Board discretionary determinations worded as involving the Board's "consideration". Agree consistent wording is best because no difference is intended.

- s 1 (Definitions), definition of 'board acquisition price' - query relating to "manufactured" (and "manufacturer"): The 1961 N.Z. principal Act apparently uses "manufacture" undefined (eg, in s 10(4)(a) "butterfat received . . . and manufactured into butter, cheese, or other manufactured product of milk or cream"). So, in terms of your query, that type of process does seem to contemplate "produce" that is the outcome of some form of manufacturing (as in, changing) process. Appreciate that "manufacturing" is an uncertain concept, for reasons that include impending litigation in New Zealand's Supreme Court about whether a process of blending of butane and motor spirits is under the Customs and Excise Act 1996 (N.Z.) the "manufacturing" of the resulting blend (sold as motor spirits or "petrol").

- s 1 (Definitions), definition of '[notional] equalization price': Thank you for raising for consideration the term or 'label' that is, or could be, used for this price. These are important questions.

"Notional" does have a quality of arbitrariness. But it does help to indicate that the price is not an actual price for local or non-export sales (dispositions of the produce otherwise than to the Board for export).

In setting this price, the Board determines the size of the top-ups or recoveries required for equalization.

The price set therefore helps avoid equalization being driven by actual "gaming" dispositions other than for reasonable market values (entered into because equalization will smooth out any discrepancies).

The local sales or non-export set price is also the base price (not the target price) for the equalization. The Board's acquisition price for produce for export is also involved in the equalization. So in that sense, both the local sales set price and the export sales set price are "equalization prices".

Essentially the local sales set price (LSSP) is equalized with (adjusted up or down to) the export sales set price (ESSP).

Acronyms could be very helpful and, if you think they would be, please use them accordingly. These comments are to inform your drafting advice rather than to direct you to take any

particular approach. They may simply confirm your approach in draft 1 if after consideration of these comments you remain of the view that terms draft 1 uses and defines are best.

- s 1 (Definitions), definition of 'transitional period' - 'local disposition': As you can see from my remarks above I agree that "non-export disposition" is essentially local sale. For consistency and simplicity referring in all price definitions to "sales" might be simpler than using inconsistently (in terms of both labels generally for, and labels for one side of, the transaction) "acquisition", "buying", "disposition", and "sale". From the manufacturer's perspective, every disposition is perhaps just a "sale"? Nonetheless, the use in the 1980 New Zealand amendment of "acquisition" and "disposition" was I suspect driven at least in part by other terminology in the principal Act, eg, Board's "acquisition" powers. Even so, that terminology could be accommodated or worked around by suitable drafting.

- s 2(1) (Board authority to designate dairy produce and set initial equalization price) - Purpose statement: Agree a purpose statement will aid with clarity and constraining the Board's powers. But wonder whether the purpose should also influence or inform the Minister's approval and (albeit in a more constrained way) the top-up and recovery calculations?

- s 2(2) (Board authority to designate dairy produce and set initial equalization price) - Minister's approval: Thanks for the explanation of use in BC legislation of "concurrence" and "approval". "Approval" is certainly plainer, and what is contemplated is not just approval in advance, but also in writing (ie, "written" approval).

- s 2(4) (Board authority to designate dairy produce and set initial equalization price) - "month" = "calendar month": Yes, the assumption that "month" = "calendar month" is correct. I did not know of the BC Interpretation Act's problematical definition of "month". For corresponding discussion of the N.Z. position, see paragraphs 3.1 to 3.14 of the discussion paper at <http://www.pco.parliament.govt.nz/interpretation-act-discussion-paper/>.

- s 3(2)(a) (Changes to equalization price – transition period required) - Effective date for change in equalization price - Retroactivity: Thank you for asking about this (intended) aspect of the instructions, which seems inadvisable for the problems it could cause in operation or practice, albeit that the backdating (rewriting of history) is limited to the period of operation of the price amended. Section 3(2)(b) as drafted of course also involves (lesser and also intended) retroactivity back to the start of the first day of the calendar month in which the specified conditions / circumstances (discussed below) are met or occur.

- s 3(2)(b) (Changes to equalization price – transition period required) - Effective date for change in equalization price - "conditions met" cf "circumstances occurred": Your query here perhaps highlights that the commencement date or effective date for the amended price should be able to be identified by the Board not only by reference to the first day of a specified calendar month but also by reference to the first day of a month in which specified circumstances or events occur or specified conditions are met.

- s 3(3) (Changes to equalization price – transition period required) - Transition period for change - "for transition to": It may indeed be helpful to indicate that the context for the Board's decision in setting the transitional period is that it is a period for transition to the amended price. The purpose of a transition period (which should if it exists at all begin at the same time as the amended price comes into force) is to allow the complex form of the program, with its more

nuanced softening mechanisms, to operate for a specified period of whole number of months before a reversion to the simple form of the program involving the amended price.

- s 3(3) (Changes to equalization price – transition period required) - Transition period for change - limit on length of transition period (given that price can be amended with retroactive effect): No limit is contemplated by the instructions, but practically a short period is likely. Also it seems unlikely that there would be more than 1 retroactive amendment of the price per season (since 2 or more such amendments would give rise to the prospect (unwelcome both in law and in practical terms) of overlapping transitional periods of potentially uneven numbers of calendar months)!

- s 4(a) (Equalization adjustments payable or recoverable by board) - Board determining equalization adjustment for quantity of produce Board "considers" manufacturer disposed of otherwise than to Board: "Board considers" here seems fine.

- s 4(b)(ii) (Equalization adjustments payable or recoverable by board) - Issue - liability to pay or exercise of authority to recover: Thank you for highlighting this issue. Exercise of discretionary authority to recover is intended. This affects as well the example you helpfully provide of this issue in s 5(3).

- s 5 (EA calculation – general rules that apply outside of transition period) - Use of formula - Commend this approach. Seems highly precise and operationally desirable. Haven't checked the workings in detail of the formulas as drafted, but can see that the elements help show clearly what is being done and how in these (re)calculations.

- s 8 (Recalculations – end of dairy season surplus) - s 8(1) application provision: The assumption that annual or end-of-dairy season surplus adjustments are made by classes of dairy produce is correct. Thank you for checking this aspect of the operation of the surplus adjustments and so the related aspect of the equalization program.

- s 8 (Recalculations – end of dairy season surplus) - s 8(2) recalculation obligation - "increase Board considers equivalent to" increase paid for the class of produce concerned as a result of surplus: As your instructions are to "account for the effect" of a surplus, use of the "increase the Board considers equivalent to" the increase paid for the class of produce concerned as a result of the surplus seems a good way of "accounting for the effect of" a surplus.

- s 9 (Recalculations – transition period adjustments) - s 9(2) (Recalculations based on actual quantities) - How are the "actual" quantities determined with certainty? Or is this a "final Board determination" replacing a "provisional Board determination"?: The instructions refer to "actual disposition quantities" in the year concerned, so we must suppose the Board has the legal or other practical ability to obtain those figures. The Board under the 1961 N.Z. principal Act did have some statutory powers to obtain information required or desirable for it to perform its functions. It is also entirely possible that the recalculations might in practice have results beneficial to manufacturers, so that they would therefore in practice be inclined to provide voluntarily information that facilitated the recalculations. Nonetheless your question is very valuable because it requires the Board to consider the workability of the recalculation proposed, including the adequacy of information-gathering mechanisms available to the Board.

- s 10 (Recalculations – retroactive effective date for equalization price): These recalculations seem an inevitable consequence of the ability to amend the price with retroactive effect. It is therefore

very helpful to make explicit the obligation to recalculate arising from that ability. Section 10(3) (Recalculations based on actual quantities) is certainly consistent with s 9.

- s 11 (Payments and recoveries resulting from recalculations) - Creating consequential payment obligations: Agree it must be made clear that the recalculations give rise to consequential payment obligations. But would another approach be just to make it clear that the recalculations operate with and modify the calculation sections and so depend and can rely on payment obligations arising from them?

- s 12 (Offset of payments and recoveries) - Agree it is very helpful to the Board to be authorised to offset its obligations to pay against its entitlements to recover. Thank you for raising this very practically helpful extension.

- s 13 (Commencement) - The intended time of commencement is the start of the first dairy season after the Amendment Bill becomes law.

Hope those responses help you to show the techniques you are using to draw out instructions.

Second Draft

This draft responds to the further instructions and contains my further thoughts.

Draft	Date	notes
1	17 March 2013	5 March 2013 instructions from received JM Keyes; 11 March: emt/emf Ross Carter re calculation of transitional rate
2	21 March 2013	19 March instructions received from Ross Carter

Part 4.1 – Dairy Produce Price Equalization Program

Division 1 – Equalization for Designated Dairy Produce

- 1 Definitions
- 2 Board establishment of equalization program
 - designation of dairy produce and initial notional equalization price
- 3 Changes to notional equalization price – transition period required

Division 2 – Calculation of Equalization Adjustments

- 4 Equalization adjustment payable or recoverable by board in relation to local sales
- 5 EA calculation — general rules that apply outside of transition period
- 6 EA calculation for transition period — board price higher than new notional price
- 7 EA calculation for transition period — board price lower than new notional price
- 8 Recalculations — end of dairy season surplus
- 9 Recalculations — transition period adjustments
- 10 Recalculations — retroactive effective date for notional equalization price

Division 3 – Payment and Recovery

- 11 Offset of payments and recoveries
- 12 Payments and recoveries resulting from recalculations

General Notes for draft 2:

- Divisions: have been added here so that
 - (a) readers can find the calculation sections quickly, and
 - (b) the core calculation statement of section 4 is at the start of a Division.
- Please see the issue note at the new “local sale” definition. Even if we do not use the local sale approach, I think you may want to deal with the “disposition” problem.
- I expect you are planning to consult with the Board on this initiative. If you are wanting to share an actual draft with them, I will have to convert what you have here into consultation format. (The form you have here is internal-to-government only.) And please check with your advising Legal Services Branch lawyer about the recommended form of confidentiality agreement for such consultation.

DAIRY MARKETING AMENDMENT ACT, 2013

The Dairy Marketing Act, R.S. CALC, c. #, is amended by adding the following Part:

PART 4.1 – DAIRY PRODUCE PRICE EQUALIZATION PROGRAM

Division 1 – Equalization for Designated Dairy Produce

1 Definitions

In this Part:

adjustment quantity

means, in relation to designated dairy produce for which an equalization adjustment is to be made under this Part, the quantity referred to in section # (a) [*board determination of quantity for applicable month*];

board acquisition price

means, in relation to designated dairy produce, the price that would have been payable by the board under this Act for the dairy produce if it had been acquired by the board at the time that, in the board’s consideration, the dairy produce was manufactured; **[I take it that the “manufacturer” concept has not been a problem with its current use in the Act. And, looking at an equalization scheme that we have in another Act, it seems this is standard terminology.]**

designated dairy produce

means dairy produce of a class designated under section # (2) [*board authority to designate*];

equalization adjustment

means, in relation to the disposition of designated dairy produce by local sale, the amount determined as required by section # (a) [*equalization adjustments payable or recoverable by board*] in relation to that disposition;

notional equalization price

means, in relation to designated dairy produce, the price set by the board under section # (2) [*initial notional equalization price*] or # [*changes to notional equalization price*], as applicable, in relation to the applicable class of dairy produce; **[I am proposing to keep this as an “equalization” price – this is the notional one, while the BAP is an actual one]**

initial notional equalization price

means the notional equalization price established under section # (3) [*initial notional equalization price*] in relation to the applicable class of designated dairy produce;

local sale

means disposition of dairy produce other than by disposition to the board, but does not include an agreement to dispose of dairy produce;

[ISSUE: “disposition” is broadly defined by the Interpretation Act (see below) to cover all forms of disposition, including agreeing to dispose of something. I am thinking that you will not want mere agreements to trigger the adjustment obligations. (Too much

opportunity to “game the system”, yes?) All of which means that “sale” is probably a better way of expressing the intention here.]

“dispose” means to transfer by any method and includes assign, give, sell, grant, charge, convey, bequeath, devise, lease, divest, release and agree to do any of those things;

new notional equalization price

means, in relation to the disposition of designated dairy produce during a transition period for that dairy produce, the notional equalization price of the dairy produce at the start of the transition period;

old notional equalization price

in relation to the disposition of designated dairy produce during a transitional period for that dairy produce, the notional equalization price of the dairy produce that applied immediately before the start of the transition period;

recalculation

means the recalculation of an equalization adjustment under section # [*recalculations – end of season surplus*], # [*recalculations – transitional adjustments*] or # [*recalculations – retroactive change to notional equalization price*]; **[may not need definition]**

transition period

means, in relation to a class of designated dairy produce, a period established under section # (3) [*changes to notional equalization price – transition period required*] in relation to that class.

2 Board establishment of equalization program

— designation of dairy produce and initial notional equalization price

- # (1) **Equalization program** — The board may, in accordance with this Part, establish an equalization program for the purpose of providing manufacturers of dairy produce with more balanced compensation between dairy produce that is acquired by the board and dairy produce that disposed of by a manufacturer by local sale.
- (2) **Designation of dairy produce for purposes of equalization** — The board may, with written approval of the minister, designate classes of dairy produce as dairy produce to which this Part applies.
- (3) **Initial notional equalization price and effective date** — For a class designated under subsection (2), the board must establish
- (a) the initial notional equalization price that applies in relation to designated dairy produce of that class, and
 - (b) the effective date for this initial notional equalization price.
- (4) **Restrictions on effective date** — The effective date established under this section must be the first day of a calendar month and may not be earlier than the date on which the notional equalization price is established.

3 Changes to notional equalization price — transition period required

- # (1) **Changes to equalization price** — Subject to this section, the board may change the notional equalization price for a class of designated dairy produce.
- (2) **Effective date for change in equalization price** — The effective date for a change under this section is, as applicable,
- (a) the first day of the calendar month specified by the board, which may be retroactive to the first day of any calendar month that is, or is after, the date on which the initial notional equalization price became effective, under section # (3) [*effective date for initial equalization price*], or
 - (b) the first day of the calendar month in which the circumstances specified by the board in making the change occur.
- (3) **Transition period for change** — In establishing a new equalization price, the board must also establish, as the period for transition to the new notional equalization price, a specified number of calendar months that the board considers appropriate in the circumstances. **[I take it that practical considerations will keep the length of these within administrative reason.]**

Division 2 – Calculation of Equalization Adjustments

4 Equalization adjustments payable or recoverable by board in relation to local sales

- # If the board considers that, in any calendar month, a manufacturer has disposed of dairy produce of a designated class by local sale,
- (a) the board must determine, in accordance with this Division, the equalization adjustment in relation to the quantity of that designated dairy produce that the board considers was disposed of by the manufacturer by local sale in the calendar month, and
 - (b) as applicable,
 - (i) the board must pay that equalization adjustment to the manufacturer, or
 - (ii) the board may recover that equalization adjustment from the manufacturer.

5 EA calculation — general rules that apply outside of transition period

- # (1) **Application of section** — Unless section # or # [*equalization adjustments for transition period*] applies, an equalization adjustment must be determined in accordance with this section.
- (2) **Equalization adjustment to be paid by board** — If, for the applicable calendar month, the board acquisition price for the designated dairy produce is greater than the notional equalization price for that dairy produce, the equalization adjustment payable by the board to the manufacturer in relation to the adjustment quantity for that month is to be determined as follows:

$$\text{equalization adjustment} = \text{BAP value} - \text{NEP value}$$

where

BAP value = value of the dairy produce based on its board acquisition price

NEP value = value of the dairy produce based on its notional equalization price.

- (3) **Equalization adjustment recoverable by board** — If, for the applicable calendar month, the board acquisition price for the designated dairy produce is less than the notional equalization price for that dairy produce, the equalization adjustment that the board may recover from the manufacturer in relation to the adjustment quantity for that month is to be determined in accordance with the following formula:

$$\text{equalization adjustment} = \text{NEP value} - \text{BAP value}$$

where

NEP value = value of the dairy produce based on its notional equalization price

BAP value = value of the dairy produce based on its board acquisition price.

6 EA calculation for transition period — board price higher than new notional price

- # (1) **Application of section** — An equalization adjustment is to be determined in accordance with this section if
- (a) the equalization adjustment is for a calendar month that is, or is part of, a transition period for the applicable class of designated dairy produce, and
 - (b) the board acquisition price for that class of designated dairy produce is greater than the new notional equalization price for that class.
- (2) **Equalization adjustment to be paid** — The equalization adjustment payable by the board in relation to the adjustment quantity for the applicable calendar month to the manufacturer is the total of
- (a) the base adjustment as determined under subsection (3), and
 - (b) a transitional adjustment that the board considers appropriate in the circumstances, subject to the requirement that this must not be less than the amount determined under subsection (4).

- (3) **Base adjustment** — The board must determine the base adjustment in accordance with the following formula:

$$\text{base adjustment} = \text{BAP value} - \text{higher NEP value}$$

where

BAP value = value of the dairy produce based on its board acquisition price

higher NEP value = value of the dairy produce based on whichever of the old and new notional equalization prices is higher than the other.

- (4) **Minimum transitional adjustment** — The board must determine the minimum transitional adjustment in accordance with the following formula:

$$\text{minimum} = \text{annual quantity} \times \text{adjustment factor} \times \text{transitional rate}$$

where

annual quantity = the total quantity of designated dairy produce of the applicable class that the board considers was, in the 12 calendar months immediately before the start of the transition period, disposed of by the manufacturer by local sale

adjustment factor = the number of calendar months in the transition period divided by 12

transitional rate = the lower of the following:

- (a) the higher NEP minus the lower NEP;
- (b) the BAP minus the lower NEP

where

higher NEP = whichever of the old and new notional equalization prices for the designated dairy produce is higher than the other

lower NEP = whichever of the old and new notional equalization prices for the designated dairy produce is lower than the other

BAP = the board acquisition price for the designated dairy produce.

7 EA calculation for transition period — board price lower than new notional price

- # (1) **Application of section** — An equalization adjustment is to be determined in accordance with this section if
- (a) the equalization adjustment is for a calendar month that is, or is part of, an transition period for the applicable class of designated dairy produce, and
 - (b) the board acquisition price for that class of designated dairy produce is lower than the new notional equalization price for that class.
- (2) **Equalization adjustment to be paid** — The equalization adjustment the board may recover from the manufacturer in relation to the adjustment quantity for the applicable calendar month is the total of
- (a) the base adjustment as determined under subsection (3), and
 - (b) a transitional adjustment that the board considers appropriate in the circumstances, subject to the restriction that this must not be greater than the amount determined under subsection (4).
- (3) **Base adjustment** — The board must determine the base adjustment in accordance with the following formula:
- $$\text{base adjustment} = \text{lower NEP value} - \text{BAP value}$$
- where
- lower NEP value = value of the dairy produce based on whichever of the old and new notional equalization prices is lower than the other
- BAP value = value of the dairy produce based on its board acquisition price.
- (4) **Maximum transitional adjustment** — The board must determine the maximum transitional adjustment in accordance with the formula under section # (4) [*transitional adjustment for payments by board*] but with the transitional rate determined as follows:
- transitional rate = the lower of the following:
- (a) the higher NEP minus the lower NEP;
 - (b) the lower NEP minus the BAP.

8 Recalculations — end of dairy season surplus

- # (1) **Application of section** — This section applies if payments under section 28 [*application of annual surplus – additional payment for dairy produce acquired by board*] were made for a dairy season in relation to dairy produce of the same class as a class of designated dairy produce.

- (2) **Recalculations based on revised board acquisition price** — As soon as practicable after the end of the dairy season, the board must recalculate the equalization adjustments under this Part in relation to designated dairy produce of the class referred to in subsection (1) using a revised board acquisition price that the board considers reflects an increase equivalent to that paid in relation to the class as a result of payments under that section for dairy produce acquired by the board.

9 Recalculations — transition period adjustments

- # (1) **Application of section** — This section applies in relation to a dairy season if one or more calendar months of the dairy season are included in the 12-month period used to establish an annual quantity to be applied in determining a transitional adjustment under section # (#) or # (#) [*equalization adjustments for transition periods*].
- (2) **Recalculations based on actual quantities** — As soon as practicable after the end of the dairy season, the board must recalculate the transitional adjustments referred to in subsection (1) on the basis of the actual quantities of designated dairy produce of the applicable class that were disposed of by the manufacturer by local sale in the applicable calendar months of the dairy season.

10 Recalculations — retroactive effective date for notional equalization price

- # (1) **Application of section** — This section applies if a new notional equalization price for a class of designated dairy produce is made effective on a date earlier than the date on which the board established that new price.
- (2) **Recalculations of amounts payable and amounts recoverable**— As soon as practicable after the new notional equalization price is established, the board must
 - (a) recalculate the equalization adjustments made in relation to designated dairy produce of the applicable class for the past calendar months to which that price applies, and
 - (b) determine the amounts that, as a consequence of those recalculations, are payable or recoverable by the board.
- (3) **Recalculations based on actual quantities** — Section # (2) [*recalculations based on actual quantity*] applies to recalculations under this section in relation to past calendar months that are part of the transition period for the new notional equalization price but are not part of the current dairy season.

Division 3 – Payment and Recovery

11 Offset of payments and recoveries

- # (1) **Offset of payments by board** — If, under this Part, the board is liable to pay an amount to a manufacturer, the board may apply all or part of that amount against an amount that the board may recover from the manufacturer under this Act.
- (2) **Offset of recoveries by board** — If, under this Part, the board may recover an amount from a manufacturer, the board may recover the amount
 - (a) by requiring the manufacturer to pay the amount to the board,
 - (b) by deducting the amount from amounts payable by the board to the manufacturer, or

- (c) by requiring the manufacturer to pay part of the amount to the board and deducting the remainder from amounts payable by the board to the manufacturer.

12 Payments and recoveries resulting from recalculations

[I will think on your suggestion that this section is not necessary. It was included to create clear payment liability/recover authority where amounts had already been applied using the offset rules. I still think it advisable. (With the new Divisions, if this section is kept, the order will be shifted as in this draft.)]

- # (1) **Payment by board** — If a recalculation under this Part results in
 - (a) a higher amount that is to be paid to the manufacturer by the board, or
 - (b) a lower amount that is recoverable by the board,the board must pay the difference between the original equalization adjustment and the recalculated equalization adjustment to the manufacturer.
- (2) **Recovery by board** — If a recalculation under this Part results in
 - (a) a higher amount that is to be paid to the board by the manufacturer, or
 - (b) a higher amount that is to recoverable by the board,the board may recover from the manufacturer the difference between the original equalization adjustment and the recalculated equalization adjustment.

13 Commencement

- # This Act comes into force at the start of the first dairy season after the date of Royal Assent.
-

UK Secondary Legislation and Parliamentary Committees

Peter Davis¹



Abstract

The doctrine of supremacy of Parliament in the United Kingdom leaves Parliament theoretically able to delegate the power to legislate as it sees fit; also legislation made under delegated powers in the United Kingdom is normally immune from being amended. This paper covers how the Select Committee system in the United Kingdom Parliament is used both (a) to inhibit the use of Acts to delegate legislative powers to an extent unacceptable to Parliament, and (b) to oversee the delegated legislation itself so as to reduce the risk of its immunity from amendment carrying an unacceptable reduction in quality.

Introduction

1. This paper begins with an outline of delegation of legislative powers in the UK. It then covers the stages of scrutiny by Select Committees in Parliament. The first stage involves scrutiny of Bill provisions that delegate powers to legislate and the second stage involves scrutiny of the delegated legislation itself. Examples of how each Committee works are included and, at the end, there is a brief discussion of implications.

¹ Counsel for Domestic Legislation, House of Commons (UK). This article reflects the personal view of the author rather than being the expression of the institutional view of the United Kingdom Parliament. This paper was presented at the National Conference of the Canadian Institute for the Administration of Justice entitled “Nudging Regulations: Designing and Drafting Regulatory Instruments for the 21st Century”, held in Ottawa, 8-9 September 2014.

Outline of delegation of legislative powers in the UK

2. Legislative precision (as part of the rule of law) and supremacy of Parliament are standard assumptions in the UK constitutional settlement. A court cannot say that an Act of Parliament doesn't count. No person can legislate except Parliament and there is nothing that cannot be included in an Act of Parliament. However it is implicit that Parliament can delegate the power to legislate, and the delegate then is empowered to legislate within the limits of the delegation.

3. Given that, as a matter of concept, there are no constraints at all on what can be delegated, there is no intrinsic reason why the system could not be used either to pass legislation that is deliberately vague or even to impose a dictatorship. The steps would be easy enough – Parliament passes an Act to bestow unlimited concurrent powers to legislate on the Government, and the Government then uses that concurrent power to dissolve Parliament and ban opposition.² Even in the absence of any sinister intentions, the complications in preparing and passing primary legislation make the delegation of wide legislative powers tempting to a Government.³

4. While an Act, which can contain anything, can theoretically be totally random in the delegation it includes,⁴ in general the conventions observed are that –

- some delegations call for no parliamentary procedure – for example, statutory instruments to bring into force provisions of an Act that do not come into force automatically;
- standard delegations call for negative resolution procedure, which operates by default; in its most common form the statutory instrument comes into force on the day the instrument says it does, but it has to be laid before Parliament before it comes into force in the absence of urgency and it can be annulled by a vote of either House within 40 sitting days of laying, the result being that nothing can be validly done under it after such a vote;
- more politically controversial delegations call for an affirmative resolution procedure, the most common form being that a draft statutory instrument is laid before both Houses for prior approval and the statutory instrument cannot be made unless it is in the terms of a draft so approved by both Houses;
- the widest delegations call for super-affirmative resolution procedure – an affirmative resolution procedure preceded by a proposal with reasons for making

² An equivalent device was used in the German *Enabling Act (Ermächtigungsgesetz)* enacted by the Reichstag in 1933.

³ The term 'statutory instrument' is the standard generic term in the UK for an item of delegated legislation, as it covers the common nomenclature, for example, 'regulation', 'order' and 'rules'.

⁴ Not all delegations are delegations to Government Ministers – there are, for example, occasional delegations to statutory regulatory bodies.

the statutory instrument laid before both Houses for 60 days and scope for either House to recommend amendments, which must either be taken on in the draft or rejected with reasons.

None of those delegations expressly reserves to Parliament a *direct* power to amend a statutory instrument (though Acts of Parliament are necessarily capable of doing so). The reason why the responsible Government Minister is assumed to have the final say in the content of a statutory instrument is that, unlike primary legislation, delegated legislation can be challenged in court either as being outside the scope of the enabling power or as being irrational, and in any such case it is the Government Minister not Parliament that defends the challenge.

Select Committee scrutiny

5. The specialist Select Committee system in Parliament for scrutinising delegation can be used, and indeed has been used, as a protection against the risk that legislation is deliberately vague or that Parliament is undermined. The system is by no means the only protection, but it comprises an important link in the protective chain. There are two aspects to Select Committee scrutiny. One is the scrutiny that is carried out before a Bill is introduced or while it is proceeding through Parliament (the first stage) and the other is scrutiny of the delegated legislation itself (the second stage).

Scrutiny at the first stage

6. There is one automatic element of scrutiny at the first stage. At a time when any Bill goes to the House of Lords (and so while there is still time to amend the Bill), a memorandum identifying each delegation in the Bill and the reason for it is submitted by the Government to the House's own Delegated Powers and Regulatory Reform Committee.

7. It is routine for that Committee to be vigilant in spotting mismatches. If a memorandum states that a power is needed for specified purposes and the power in the Bill provides for wider delegation, the Committee is likely to recommend narrowing the power to match the intention.

8. Also, it is routine for the Committee to keep an eye on the procedures under which delegation is planned to operate. Here the Committee may well recommend a level of scrutiny different from that proposed by the Government, depending on the controversy or width of the proposed power.

9. In addition, the Committee may recommend that some provisions are unsuitable for delegation altogether, generally because they are of a nature for which detailed amendment might be called for, with even the scope in super-affirmative procedure being insufficient. Thus, in 2005, what eventually became the *Companies Act 2006*⁵ was under consideration

⁵ [2006, c. 46](#) (UK)

by the Committee. Part 31 of its then current text comprised a power to make “company law reform orders” amending or repealing primary legislation relating to companies, and the Committee recommended that Part 31 should not be included at all.⁶

10. As is normal in the case of a Select Committee, its Report is formally no more than a statement of the opinion of the Committee members. However in practice it expects that its recommendations will be acted on in the absence of compelling contrary reasons and, in particular, the general company law reform power did not appear in the 2006 Act when passed.

11. I have highlighted the House of Lords Delegated Powers and Regulatory Reform Committee first because that is the Committee that automatically considers delegated powers. But there are other Select Committees that, while not required to consider delegation of powers, have terms of reference with sufficient latitude to enable them to make their views known if they choose⁷.

12. The most dramatic example in my experience was the reaction to the first appearance of the Bill provisions that eventually became Part 1 of the *Legislative and Regulatory Reform Act 2006*.⁸ At the time bill-preparation started there was already the *Regulatory Reform Act 2001*,⁹ which itself contained a wide power to amend primary legislation by statutory instrument if it imposed burdens on businesses but required super-affirmative procedure in each case. Those working on the new Bill, frustrated by the small number of measures taken by statutory instrument under the 2001 Act, in effect took the company law reform power just before it was removed from what became the *Companies Act 2006*¹⁰ and introduced it as the main power – with the word ‘company’ crossed out.

13. The result was that a delegated power, if enacted in that form, could be used to make law reform orders generally by statutory instrument, covering all primary legislation. The introducing Minister also had a choice of procedures, though Select Committees tasked with considering statutory instruments under it were – unusually – offered a small window of opportunity to require the procedure to be a more onerous one, the requirement being legally effective unless the requirement were overturned by a vote of the House as a whole. Only a very limited range of measures was excluded from the scope of those instruments, and the range seemed to have been included by extrapolation from arguably irrelevant precedents. It

⁶ House of Lords Delegated Powers and Regulatory Reform Committee, [Ninth Report, Company Law Reform Bill \(2005-06 HL 86\)](#) at.5-7.

⁷ The terms of reference of the various Select Committees in Parliament are rarely mutually exclusive.

⁸ [2006, c. 51](#) (UK).

⁹ [2001, c. 6](#) (UK).

¹⁰ [2006, c. 46](#) (UK).

appeared likely that the Government, keen to reduce what it saw as the burden of red tape on business, had barely taken the constitutional implications into account.¹¹

14. Six separate Select Committees, three in the House of Commons, two in the House of Lords and one being a Joint Committee of both Houses, commented critically on the width of proposed delegation and suggested how it might be narrowed.¹² In addition there was an unusual degree of warning on the topic in the press: the titles of relevant articles spoke for themselves.¹³

15. Faced with that, the Government introduced amendments to Part 1 to limit the main power in it. In its final form, in outline, statutory instruments under it could be used to remove what the introducing Minister saw as a burden on persons and bodies other than central Government itself. Also the exclusions were widened. In particular a statutory instrument under it could not be used for anything the Minister saw as constitutionally significant. In addition the window of opportunity for Select Committees to require more onerous procedures was widened and they were also granted a veto, which – like the power to require the procedure to be more onerous – would be legally effective unless overturned by a vote of the House. The power remains a very wide one, but it is within the range of previously accepted precedent in a way that it was not when the Bill first appeared.

16. A more recent example can be found in the Deregulation Bill which is proceeding at present. This Bill, as is the case in some Bills, was published as a draft Bill before being formally introduced. It contained a general power for a Minister by statutory instrument to repeal legislation considered by the responsible Minister no longer to be of practical use. A Committee of both Houses was established to report on the draft Bill. It took evidence from various Committees and reported that the draft provision was too wide for delegated

¹¹ On February 4, 2006, the “Your Business” section in the *Financial Times*, after explaining the hopes of business groups that the new powers would “at last help to contain the rising tide of burdensome rules”, finished with the following passage: “A Cabinet Office spokesman said the new deregulation bill was an attempt to give the existing rules a ‘kick up the arse’. He added: ‘the principles of the previous legislation were right but it is not working quickly enough’.”.

¹² In chronological order of publication their reports comprised: House of Commons Regulatory Reform Committee, First Special Report, Legislative and Regulatory Reform Bill (2005-06 HC 878); House of Commons Procedure Committee, First Report, Legislative and Regulatory Reform Bill (2005-06 HC 894); House of Lords, House of Commons, Joint Committee on Human Rights, Seventeenth Report, Legislative Scrutiny: Eighth Progress Report (2005-06 HL 164, HC 1062); House of Commons Public Administration Select Committee, Third Report, Legislative and Regulatory Reform Bill (2005-06 HC 1033); House of Lords Delegated Powers and Regulatory Reform Committee, Twentieth Report, Legislative and Regulatory Reform Bill (2005-06 HL 192); and House of Lords Select Committee on the Constitution, Eleventh Report, Legislative and Regulatory Reform Bill (2005-06 HL 194).

¹³ D. Finkelstein, “How I woke up to a nightmare plot to steal centuries of law and liberty”, *The Times* (London), 15 February 2006; M. Berlins, “Why is the Government seeking the power to pass far-reaching laws without Parliament’s approval?”, *The Guardian* (London), 15 February 2006; J. Chapman, “Blair ‘wants to make new laws without Parliament’”, *The Daily Mail* (London), 17 February 2006”; Q. Letts, “An immodest proposal – free votes for all”, *The Daily Telegraph* (London), 19, February 2006; S. Carr, “Now we can all make laws if our faces fit”, *The Independent* (London), 8 March 2006; P. Johnson, “A Doomsday Machine for Parliament Home Front”, *The Daily Telegraph* (London), 13 March 2006.

legislation.¹⁴ The provision was not in the actual Bill when it came to be introduced, nor so far has it been sought to be introduced by Government amendment.

Scrutiny – second stage

17. Scrutiny at the second stage can be divided into scrutiny before and after delegated legislation is made. That depends on what Standing Orders of both Houses say in establishing the Select Committees specifically charged with considering the statutory instruments in question. As a slight simplification, there are four specialist Committees –

- the House of Lords Delegated Powers and Regulatory Reform Committee mentioned above, which scrutinises statutory instruments under Part 1 of the *Legislative and Regulatory Reform Act 2006* – also mentioned above – and other powers with parallel procedures; it carries out its scrutiny on behalf of the House of Lords;
- the House of Commons Regulatory Reform Committee, which scrutinises the same statutory instruments on behalf of the House of Commons;
- the House of Lords Secondary Legislation Scrutiny Committee, which scrutinises most other statutory instruments on merits grounds for the House of Lords; and
- the Joint Committee on Statutory Instruments, which scrutinises them on technical grounds on behalf of both Houses.

Each is dealt with turn below, but the first two are linked as the coverage is materially parallel, and an illustrative example is given in each case.

House of Lords Delegated Powers and Regulatory Reform Committee and House of Commons Regulatory Reform Committee

18. The statutory instruments that these Committees consider all have to be laid before both Houses in the form of a proposal for a draft before they can be made; they have to lie for a specified period along with an explanatory document which must indicate the type of procedure intended: automatic effect in the absence of a vote for rejection within a limited period, prior approval required or prior approval with the possibility of amendment. The Committees consider the instruments at the proposal stage, and they can recommend making the procedure more onerous. They can also recommend approval, rejection without a veto and veto. A veto recommendation is legally effective unless overturned by the House, as is a recommendation to make the procedure more onerous.¹⁵ In making recommendations the Committees are operating partly on a policy basis and partly on a technical basis.

¹⁴ Report of the Joint Committee on the Draft Deregulation Bill (2013-14, HL 101, HC 925).

¹⁵ See in particular [Legislative and Regulatory Reform Act](#) 2006, c. 51, sections 12 to 18, and House of Commons Standing Orders 18, 141 and 142. Terms of reference for the House of Lords Committee can be

19. There were interesting legal implications in the lead up to the London Olympic Games, which called for a statutory instrument to vary an Act of Parliament.

20. The need for such a statutory instrument arose from a difficulty related to the location of the temporary police HQ. The authorities saw the best location as the southern end of Epping Forest, a stretch of rural land that juts into north-east London. Although it is called 'Epping Forest', only some is actual forest and the rest is open land. Epping Forest is protected by specific Acts of Parliament which among other things prohibit structures being placed on the land and permit neighbouring landowners to graze sheep and cattle on it. The statutory instrument power the Government proposed to use could indeed vary those Acts on a temporary basis, but it could only be used if there was a requisite level of prior consultation with local residents and relevant authorities. There is no doubt that those required to be consulted were actually consulted. But what was consulted on was arguably incomplete, for the formal consultation document took the location of the HQ for granted and did not ask those consulted whether they thought the HQ should be somewhere else. If that consultation were legally incomplete, then, irrespective of any vote in favour, any purported temporary variation of the Epping Forest Acts would be a nullity.

21. Faced with that, what were the two relevant Select Committees to do?

22. Well the Committees are supposed to act in accordance with their terms of reference. The relevant technical reporting ground here is *vires* doubt, rather than an actual *ultra vires* finding. On that basis, both the Lords and the Commons Committees identified in their reports that consultation was arguably incomplete. However, in looking at the instrument from the perspective of their policy role, they both recommended approval.¹⁶

23. Anyone new to the subject matter might think of that as a partial abdication of responsibility, but to those familiar with the Select Committees it was not one at all. What they were implicitly saying was that they liked the proposal, but were highlighting the possible legal inadequacy, a determinative finding on which was a matter for the courts and not for them. After all, had they recommended a veto, the project might well not have gone ahead at all even if legally valid, whereas not recommending the veto did not prevent legal challenge. Following the Committee Reports both Houses voted for the draft secondary legislation to vary the primary legislation on a temporary basis and then the Government made the statutory instrument in question.¹⁷

found at <http://www.parliament.uk/business/committees/committees-a-z/lords-select/delegated-powers-and-regulatory-reform-committee/>.

¹⁶ House of Lords Delegated Powers and Regulatory Reform Committee, Fourteenth Report, Draft Legislative Reform (Epping Forest) Order 2011 (2010-12 HL 142), House of Commons Regulatory Reform Committee, Second Report, Draft Legislative Reform (Epping Forest) Order 2011 (2010-12 HC 963).

¹⁷ [Legislative Reform \(Epping Forest\) Order 2011](#), No 1761.

24. The next stage was that a local resident brought a court action to challenge the validity of the statutory instrument, which of course the Government defended.¹⁸ Both sides sought to use the Select Committee reports in evidence. The parliamentary lawyers then intervened to try persuade them not to, but they were insufficiently successful to prevent the court itself from citing one of the reports, relying heavily on the Committee's conclusions in developing its own argument. This type of practice has been criticized by the Joint Committee on Procedure¹⁹ on the basis that the late 17th century *Bill of Rights* article 9 protects parliamentary proceedings from being questioned in court; it is an aspect of separation of powers in the UK. That does not prevent the parties from repeating arguments used in the reports, but the fact that those arguments could be found in the reports was neither here nor there. So reminding the parties of the significant principle that courts do not sit in judgment on the proceedings of Parliament should not be seen as inhibiting them in the actual arguments they might adduce.

25. For completeness it should be added that the Government won the case, and therefore nobody could graze cattle or sheep in the temporary police HQ. A significant factor was that there had been various meetings with residents and authorities about location before the formal consultation and it was accepted by the court that the history could be taken into account in deciding what to consult on.

House of Lords Secondary Legislation Scrutiny Committee

26. This Committee was set up about a decade ago because it was considered that the terms of reference of the existing Committee that scrutinised routine statutory instruments – being purely technical – left a hiatus in scrutiny of secondary legislation on merits. In other words, members of the House could usefully do with a reasonably non-partisan steer on which instruments were sufficiently important to be suitable for debate.²⁰

¹⁸ *R (Pelling) v Secretary of State for the Home Department and others* [2011] EWHC 3291(Admin).

¹⁹ 2013-4 Session Report of the Joint Committee on Parliamentary Privilege ([HL Paper 30/HC 100 Published 03 July 2013](#)), Chapter 5.

²⁰ Its relevant terms of reference are as follows:

The grounds on which an instrument, draft or proposal may be drawn to the special attention of the House are—

- (a) that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House;
- (b) that it may be inappropriate in view of changed circumstances since the enactment of the parent Act;
- (c) that it may inappropriately implement European Union legislation;
- (d) that it may imperfectly achieve its policy objectives;
- (e) that the explanatory material laid in support provides insufficient information to gain a clear understanding about the instrument's policy objective and intended implementation;
- (f) that there appear to be inadequacies in the consultation process which relates to the instrument.

27. The type of thing that one may expect to see in this Committee's reports is the highlighting of inconsistencies in a Department's overall approach in making a statutory instrument.

28. In a recent example, the Committee considered an Explanatory Memorandum – a document routinely published with every statutory instrument that has a parliamentary procedure. The memorandum identified one purpose of a particular statutory instrument as being “to allow consumers to have the information they need to make informed and healthy food choices, and to ensure they are not being misled”. That struck the Committee as inconsistent with a permission, included in the instrument, to omit declarations of the fat content of minced meat destined purely for the home market.²¹

Joint Committee on Statutory Instruments

29. For technical scrutiny of routine statutory instruments, responsibility falls to the Joint Committee on Statutory Instruments. It is joint because it has Commons and Lords members. Where there is a draft affirmative instrument the Committee considers the draft before it is voted on.²² Where the negative procedure applies, or there is no procedure, scrutiny takes place after the instrument is made. While in such cases all the Committee can do is publicise flaws, as it sees them, its advice tends on the whole (though not always) to be followed, for example by making a later amending statutory instrument to get rid of the flaws.

30. The main reporting grounds are defective drafting, requiring elucidation, unexpected use of powers and doubtful *vires*, but the relevant standing orders allow the Committee to highlight anything that does not impinge on policy and merits.²³ In other words, it is purely technical.

31. Given that its role involves holding the Government to account, it is always chaired by an opposition MP, and it not only examines the specific delegated legislation, but also is able to issue themed reports. A recent one covers a worrying tendency of makers of statutory instruments to blur material that is essentially legislative with material that is not.²⁴ A classic example is the statement that some person or body ‘will’ perform a given function, leaving it unclear whether what is intended is an obligation or the exercise of discretion. The Committee's view of such usage has been that -

- if either discretion or obligation is intended, wording such as ‘must’ or ‘may’ should be used to make the position clear, and

²¹ House of Lords Delegated Secondary Legislation Scrutiny Committee Eighth Report, Food Information Regulations 2014 (2014-15 HL 42).

²² This is invariable in relation to the House of Lords and usual in relation to the House of Commons.

²³ House of Lords Standing Order 73, House of Commons Standing Order 151.

²⁴ Joint Committee on Statutory Instruments First Special Report, Excluding the Inert from Secondary Legislation (2013-14 HL 6, HC 167)

- if the intention has not been settled but the instrument maker simply wants to give some sort of assurance of likely behaviour, the statement including ‘will’ should be confined to guidance notes and press statements, for example, and should not be in an operative provision of legislation.

32. A more specific example of how the Joint Committee on Statutory Instruments stresses the need for precision can be found in a pair of statutory instruments giving enforcement officers the right to enter the homes of defaulting debtors to seize property to sell it to pay the debts, qualified by a prohibition on doing so if the only person in the home was ‘vulnerable’, a term that could have been defined but was not. The Department responsible defended the imprecision as deliberate, as they wanted to give enforcement officers flexibility. The Committee was particularly critical, stressing that –

- the Department was confusing flexibility with uncertainty,
- the enabling power did not provide scope for bestowing discretion on enforcement officers, and
- imprecision as a deliberate policy in secondary legislation, to compensate for lack of power in primary legislation, was inimical to equality before the law and would be alarming if adopted widely.²⁵

Implications

33. As is apparent from the above, scrutiny is split between scrutiny where there is still time to change the legislation and scrutiny where the legislation is already made. So a question naturally arises – why bother with the second type of scrutiny? The answer is that there is a strict constitutional basis – Ministers have powers to legislate only because Parliament has delegated the powers and has not cancelled the delegation, and the Committees accordingly comprise mechanisms for making the recipients of those powers answerable to the donor.

34. In addition there is, in my view, an informal justification. It involves comparing Westminster procedures for primary and secondary legislation. In making primary legislation, both Houses go through Public Bill Committee²⁶ and Report stages, at which point any amendment moved, whether by Ministers, back benchers or opposition, has to be

²⁵ Joint Committee on Statutory Instruments Eleventh Report, Taking Control of Goods Regulations 2013 (2013-14 HL 71, HC 166-xi) and Twenty-first Report, Taking Control of Goods (Fees) Regulations 2014 (2013-14 HL 135, HC 166-xxi).

²⁶ A Public Bill Committee is different from the Select Committees described above. In the House of Commons it is generally appointed *ad hoc* to represent the parties in proportion; it is responsible for scrutinising a Bill in detail after the House as a whole has approved it in principle at Second Reading (First Reading provides no more than the opportunity to read the Bill). Once the Public Bill Committee has completed amending the Bill, the Bill returns to the House as a whole for Report Stage, at which point amendments can be tabled by any MP, and then at Third Reading the House votes on the Bill in the form then reached. In the House of Lords the equivalent of Public Bill Committee stage is conducted by the House as a whole. Normally Bills are considered first by Commons then by Lords then they return to Commons for consideration of Lords’ amendments but converse procedure is possible.

debated. At times those stages can be pretty bland, but the mere fact that nobody can be sure in advance that those stages will be bland has a major relevance to precision. It means that, when Bills are prepared by the Government to survive those stages, that can only be done securely if those preparing Bills think out what they want to achieve in detail, and express it in full as exactly as they can, rather than hoping to skate over difficult issues without them being noticed. Internal Government machinery operates with that in mind. In contrast, with almost no exceptions, there is no formal procedure for amending secondary legislation and therefore there is not the equivalent internal Government machinery,²⁷ so the temptation to skate over matters is inevitably stronger. Thus, although the publication of Select Committee reports does no more than make public what otherwise might be concealed, that very publicity is probably the most cogent means of replicating, for secondary legislation, the disciplines that the very existence of Public Bill Committee and Report stages imposes on the making of primary legislation.

35. A further point is a question that might arise – are so many Committees actually needed? No doubt systems could be differently devised but there is a logic in the fact that all the Committees are in one House or other except the purely technical one which is a Joint Committee. The logic is that there is no expectation of potential disagreement between the two Houses where the issue is a technical one,²⁸ while the two Houses can well disagree on a policy issue.

36. Finally I should touch on whether the Committees that purely consider secondary legislation can have an influence on later primary legislation, and although that is rare there is one recent example where that appears to have happened and another where it appears likely to happen.

37. The first example relates to a policy of the present Government that each statutory instrument that imposes demands of particular types should be reviewed every five years by the responsible Department to see whether it has become excessive. This is coupled with a duty to report the review to Parliament. This obligation started to be put in each such instrument, but it was not clear that all Acts provided for it be included in the legislation itself (rather than just being a statement of policy intention), and on the odd occasion a misdirected inclusion of a review obligation had been highlighted in Joint Committee on

²⁷ For example, a Bill, although based on instructions from lawyers in the sponsoring Department, is drafted in the Office of Parliamentary Counsel, which is independent of the Department in question. In contrast statutory instruments are drafted by Departmental lawyers.

²⁸ On one occasion it was possible that reorganisation of Select Committee responsibilities might give the Joint Committee on Statutory Instruments a minor policy responsibility and the idea was opposed by the then Chairman, who described it as a relief to have a weekly meeting with political opponents and no scope for political argument at all. However it should be noted that in the Scottish Parliament, which is unicameral, a single Committee covers a combined remit of the House of Lords Secondary Legislation Scrutiny Committee and the Joint Committee on Statutory Instruments.

Statutory Instruments Reports.²⁹ So a new primary legislation provision was enacted to ensure that it could be so included securely.³⁰

38. The second example relates to a further policy of the present Government to the effect that particular types of businesses should where possible have a longer lead in time to comply with new legislation. Attempts to achieve that in secondary legislation have more than once been highlighted by the Joint Committee on Statutory Instruments as lacking precision in defining what those types of businesses comprise.³¹ Now there is a proposed provision in the Small Business, Enterprise and Employment Bill, 2014-15 that if enacted will give a meaning to 'small business' and 'micro-business' when those terms are used in statutory instruments.

39. In conclusion, no procedure guarantees precision and while the Committees that consider statutory instruments cannot enforce precision, they can clearly make it more likely. The understood assumption is that, if it is going to be departed from, the place to do it is in primary legislation, where amendments can be tabled and debated, and not secondary legislation, where they cannot. So there is an easy answer to Departments arguing that the Committees are making matters impossible for them. The solution, if they wish to avoid precision, is the same as when they want to go beyond what the enabling powers permit – to use primary legislation and seek to persuade Members of Parliament and Lords of the need to do so, in a forum that automatically provides scope for prior debate.

²⁹ For example Joint Committee on Statutory Instruments Twenty-seventh Report, Food Additives (England) (Amendment) (No. 2) Regulations 2011 (2010-12 HL 183, HC 346-xvii).

³⁰ [Enterprise and Regulatory Reform Act 2013, c. 24](#), section 59, inserting a new provision (section 14A) into the Interpretation Act 1978. Salient extracts from the inserted text read as follows: "(1) This section applies where an Act confers a power or a duty on a person to make subordinate legislation

(2) The subordinate legislation may include—

(a) provision requiring the person to review the effectiveness of the legislation within a specified period or at the end of a specified period;

(b) provision for the legislation to cease to have effect at the end of a specified day or a specified period...

(3) The provision that may be made by virtue of subsection (2)(a) includes provision requiring the person to consider whether the objectives which it was the purpose of the legislation to achieve remain appropriate and, if so, whether they could be achieved in another way."

³¹ Joint Committee on Statutory Instruments Twenty-first Report, Consumer Rights (Payment Surcharges) Regulations 2012 (2012-13 HL 141, HC 135-xxi), Seventh Report, Draft Equality Act 2010 (Equal Pay Audits) Regulations 2014 (2014-15 HL 33, HC 332-vii).

Parliamentary Scrutiny of Delegated Legislation in Canada: Too Late and Too Little?

Peter Bernhardt¹



Abstract

A scrutiny committee is one means by which Parliament can oversee the exercise of legislative powers it has delegated to the executive. Such committees are a feature of many Commonwealth legislatures. While these committees have much in common, their powers, practices and procedures vary, as does their effectiveness.

Canada has lagged somewhat in this area. While at the federal level the Standing Joint Committee for the Scrutiny of Regulations was established some 40 years ago, provincial counterparts are almost non-existent. Moreover, the Joint Committee seems to have greater difficulty than many other scrutiny committees in obtaining timely responses from regulation-makers and in securing the making of promised amendments. In addition, there are a number of legislative practices that present a challenge to effective parliamentary scrutiny. Regardless of what the future may hold for the Standing Joint Committee, however, it remains a fundamental principle that the executive must be accountable to Parliament for the rules it makes.

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Origins of Parliamentary Scrutiny

Let me begin with a quote:

There is in existence, and in certain quarters in the ascendant, a genuine belief that Parliamentary institutions and the Rule of Law have been tried and found wanting.²

The author went on to describe a “new despotism”, the goal of which was “to subordinate Parliament, to evade the Courts and to render the will, or the caprice, of the Executive unfettered and supreme.”³ The main weapon to achieve this was said to be the unfettered growth of executive legislation.

Some will have recognized the source. The year was 1929. What brought these comments considerable attention was that the author was the Lord Chief Justice of England.

The immediate response was the appointment of a committee made up of members of Parliament, senior civil servants, academics and practising lawyers to inquire into and report on the issues raised by the Lord Chief Justice. The Report of this Committee on Ministers’ Powers,⁴ as it was called, concluded that the criticisms levelled against delegated legislation, though significant, did not destroy the case for its use. Rather they illustrated that there were dangers, that there was the possibility of abuse, but that the problem could be addressed by putting safeguards in place.

The Committee recommended that the time had come to establish parliamentary committees to scrutinize both regulations and bills containing any proposals to delegate legislative powers. It was not until 1944, however, that a committee to scrutinize regulations was first formed.⁵

Meanwhile, at the federal level in Australia, a Senate Regulations and Ordinances Committee had already been established in 1932.⁶

Origins of Parliamentary Scrutiny in Canada

Suffice it to say that Canada has never been a leader in this area. Prior to the passage of the *Regulations Act*⁷ in 1950, there was not even a general statutory requirement that subordinate legislation be published, or tabled in Parliament.

² The Rt. Hon. Lord Hewart of Bury, *The New Despotism*, (London, E. Benn Ltd., Reprinted 1945) at 14.

³ *Ibid.*, at 17.

⁴ Report, 1932, Cmd 4060. (Often referred to as the Donoughmore Report.)

⁵ O. Hood Phillips, *Constitutional and Administrative Law* (7th ed.), (London, Sweet and Maxwell, 1987) at 631.

⁶ D. Pearce and S. Argument, *Delegated Legislation in Australia*, 4th ed., (Lexis Nexis Butterworths: Chatswood, 2012) at 59.

⁷ SC 1950, c.50.

No provision was made for parliamentary scrutiny by the *Regulations Act*.⁸ Eighteen years later, the House of Commons did set up a Special Committee to consider and report on “procedures for the review by this House of instruments made in virtue of any statute of the Parliament of Canada.”⁹

The MacGuigan Committee, as it was known, made a number of recommendations, including that a committee of the House should be instituted, to which all regulations should stand permanently referred.¹⁰ In response, the government promised a new act and agreed to the establishment of a scrutiny committee.

The new act was of course the *Statutory Instruments Act*,¹¹ which is still with us today. The then Minister of Justice, the Hon. John Turner, stated that the Bill, together with other steps to be taken, was an attempt to restore a measure of parliamentary control over the executive and to redress the balance in the relationship between the individual and the state.¹² In the end it was decided that the scrutiny committee should be a joint committee of both the Senate and the House of Commons, and the Joint Committee began to function in November of 1974. Better late than never.

Evidently there was considerable antipathy in government circles to the establishment of a parliamentary scrutiny committee. The initial attitude seems to have been that if the Joint Committee was ignored it would soon enough just go away.¹³ In any event, nearly 40 years on the Joint Committee is still around.

Unfortunately, the idea of committees of the legislature whose mandate is to scrutinize the exercise of delegated legislative powers has never really caught on in Canada at the provincial level. While there is a long history of active scrutiny committees in the Australian states,¹⁴ we have very few provincial counterparts. Even where provision is made for provincial committees, they are more often than not moribund, or at best intermittent, in their functioning.¹⁵

⁸ RSC 1952, c. 235.

⁹ Fifteenth Report of the Special Committee on Procedure and Organization, presented to the House on December 14, 1964 (House of Commons (Can) *Journals* at 988).

¹⁰ Third Report of the Special Committee on Statutory Instruments, House of Commons (Can) *Journals*, October 22, 1969, at 1411-508

¹¹ SC 1970-71-72, c. 38.

¹² House of Commons (Can) *Debates*, June 16, 1970 at 8155-6.

¹³ In his memoirs, the late Senator Eugene Forsey, the first Senate Joint Chair of the Standing Joint Committee for the Scrutiny of Regulations, describes the Committee's early days. (*A Life on the Fringe*, Toronto, Oxford University Press, 1990, Ch. 9, “Preserving the Rule of Law”.)

¹⁴ See D. Pearce and S. Argument, *Delegated Legislation in Australia* (4th ed.), (Australia, Lexis Nexis Butterworths, 2012), ch. 3.

¹⁵ Only in Ontario and Manitoba is provision made for a scrutiny committee of the legislature. (Ontario *Legislation Act, 2006*, S.O. 2006, c. 21, Schedule F, s. 33; Manitoba *Regulations Act*, CCSM 1988, c R60, s.11.) The attention devoted to the scrutiny of regulations by the Ontario Standing Committee on

Is Parliamentary Scrutiny Working in Canada?

Delays in Resolving Matters

So, how effective is the Standing Joint Committee for the Scrutiny of Regulations, and after all these years just what has it accomplished? Well, every year there are dozens of amendments made to regulations in response to matters raised by the Committee. Unquestionably, however, it is far easier to secure agreement on a point of drafting or clarification than on an issue of substance. Moreover, there are often significant delays between the time an issue is first raised with a regulation-making authority and the final resolution of the matter. In fact, much of the Committee's time is taken up in trying to ensure that promised amendments actually get made.¹⁶

Delays in obtaining replies from regulation-making authorities and in the fulfillment of undertakings seem to be common concerns among scrutiny committees in all jurisdictions.¹⁷ To some extent, the degree of concern varies depending upon the manner in which a particular committee carries out its mandate. In some jurisdictions, scrutiny committees simply identify concerns and report them to the legislature. Other committees follow an approach more like that of the Standing Joint Committee for the Scrutiny of Regulations, pursuing the substance of a response with the regulation-maker where the Committee considers the response to be incorrect or otherwise unsatisfactory. Only when the Committee is satisfied that further correspondence serves no purpose will it report on the matter.¹⁸

This approach of course increases the volume of correspondence, as well as the time files remain active. On the other hand, many amendments secured by the Committee have been made only after a lengthy debate on the merits of the respective views of the Committee and the regulation-making authority.

In addition, it appears that the Joint Committee has greater difficulty than many other scrutiny committees in securing the timely making of promised amendments. Whether this reflects a particular attitude towards the work of the Committee, or perhaps to Parliament more generally, or is simply a reflection of the pace of federal regulation-making is a matter

Regulations and Private Bills has been sporadic, while the Manitoba Standing Committee on Statutory Regulations and Orders has apparently not met for many years. (See B. Schwartz, M. Armstrong, D. Hildebrand and J. Mozeson, "Democratizing the Regulation Making Process in Manitoba: Drawing on National and International Best Practices", (2012), [35 Manitoba Law Journal 1](#) at 33-34.

¹⁶ P. Salembier and P. Bernhardt, "Understanding the Regulation Making Process" (2002), [25 Canadian Parliamentary Review No.1,18](#).

¹⁷ Standing Joint Committee for the Scrutiny of Regulations, Fourth Report (Report No. 85 - *Australia – New Zealand Scrutiny of Legislation Conference, July 2009*), 2nd Session, 40th Parliament.

¹⁸ P. Salembier and P. Bernhardt, above n. 16.

of speculation. I would suggest that in Canada, the balance between the executive and the legislature tilts more towards the executive than in many comparable jurisdictions.

Where there is an unsatisfactory delay, either in providing a substantive response or in taking promised action, the options available to a scrutiny committee are limited. It can pressure the department or the responsible minister directly, it can call witnesses to explain the delay, it can report the matter to Parliament, and possibly recommend disallowance. Ultimately, however, it is the government that controls the pace of the process.

In some jurisdictions, greater use is made of the reporting power as a means of dealing with delays. Where a committee is unable to obtain a response within a reasonable time, or when a longstanding undertaking remains in abeyance, the delay itself is reported to the legislature. In this connection, it may be noted that both the Rules of the Senate¹⁹ and the Standing Orders of the House of Commons²⁰ provide for the tabling of a comprehensive government response to a committee report within 150 and 120 days, respectively. If the government can be required to prepare and table a comprehensive response to a committee report within such a time, there is no reason not to expect that a reply to the Joint Committee's correspondence should not be expected within a similar period.

Disallowance Procedures

Disallowance procedures are in place in many Commonwealth jurisdictions.²¹ In some of these the possibility that a parliamentary committee would recommend disallowing a provision is viewed with sufficient seriousness that merely giving notice of an intended disallowance leads to remedial action.²² Elsewhere, governments are more inclined to simply seek the defeat of a disallowance motion.²³ The dearth of disallowance reports under the statutory procedure enacted federally in Canada in 2003 may indicate that it was not as

¹⁹ Senate (Can), Rule 12-24.

²⁰ House of Commons (Can), Standing Order 109.

²¹ See D. Pearce and S. Argument, *Delegated Legislation in Australia* (4th ed.), (Australia, Lexis Nexis Butterworths, 2012), ch. 3; *Legislation Act, 2011*, No. 119 (NZ), ss. 37-47; *Statutory Instruments Act* (Can), RSC 1985, c. S-22, s.19.1.

²² See, for example, D. Pearce and S. Argument, *Delegated Legislation in Australia* (4th ed.), (Australia, Lexis Nexis Butterworths, 2012) at 66.

²³ In the case of the two most recent disallowance reports tabled by the Standing Joint Committee for the Scrutiny of Regulations, both concerning the same regulatory provision, adoption was deemed in the Senate but the House of Commons voted not to proceed with disallowance and to refer the matter back to the Committee. (Standing Joint Committee for the Scrutiny of Regulations, Second Report (*Report No. 75 – Disallowance*), 1st Session, 38th Parliament (see House of Commons, *Debates*, 8 June 2005); Standing Joint Committee for the Scrutiny of Regulations, Fourth Report (*Report No. 78 – Disallowance*), 1st Session, 39th Parliament (see House of Commons, *Debates*, 21 February 2007).

significant a development as might have been thought at the time.²⁴ Whether disallowance is a dead letter remains to be seen.

One difficulty with the Canadian disallowance procedure is that there may be a reluctance to have recourse to it where the matter in question is relatively minor or where the revocation of a provision might, even if only for a short time, create a legislative void having undesirable consequences. Some jurisdictions have disallowance procedures that permit not only the removal of a provision, but also its amendment.²⁵ This clearly provides a more refined mechanism for remedying concerns raised by scrutiny committees.

Scrutiny of Bills and Statutes

There are other mechanisms besides review by the Joint Committee that are intended to ensure that Parliament maintains some degree of control over how delegated powers are exercised. These include mandating parliamentary review of legislation after it has been in force for a specified period of time, and requiring the tabling of regulations or proposed regulations. All of these, however, take place after the enabling legislation has been passed.

A number of Australian jurisdictions²⁶, as well as New Zealand²⁷ and the United Kingdom²⁸, have parliamentary committees whose mandate includes scrutinizing bills specifically to identify provisions that may constitute overly broad delegations of power. Sometimes this is part of a broader mandate to focus on the effect of proposed legislation on individual rights and liberties.²⁹

In some jurisdictions, a single committee scrutinizes both bills and delegated legislation,³⁰ and it will be seen that the focus of the two functions is quite similar, although of course the scrutiny of a bill takes place prior to the passage of the legislation and concerns the delegation of powers and the enabling provisions themselves, rather than their exercise.

²⁴ Section 19.1 of the *Statutory Instruments Act* was enacted by SC 2003, c. 18. Prior to this, the disallowance procedure was set out in the Standing Orders of the House of Commons. As such, it only bound those in the House, and thus applied only to statutory instrument made by the Governor in Council or a minister. The intent of the statutory procedure was to extend the scope of disallowance to all statutory instruments reviewed by the Committee, and to involve both Houses of Parliament. Between 1986, when the procedure in the Standing Orders was first instituted, and 2003, eight disallowance reports were adopted by the House of Commons.

²⁵ For example, New Zealand (*Legislation Act, 2012, s.46*; Western Australia (*Interpretation Act, 1984, s.42(4)*); Australian Capital Territory (*Legislation Act, s.61*).

²⁶ See S. Argument, "Legislative Scrutiny in Australia: Wisdom to Export?" (2011), 32 *Statute Law Review* 116 at 120-121.

²⁷ *Standing Orders of the House of Representatives, 2014* (New Zealand), standing Order 318.

²⁸ See P. Davis, "UK Secondary Legislation and Parliamentary Committees", 2014-3 *The Loophole* 60.

²⁹ *Ibid.*

³⁰ Such jurisdictions include New Zealand, Victoria, and New South Wales.

The effectiveness of scrutiny of bills committees can be difficult to measure, and no doubt varies from jurisdiction to jurisdiction. In some legislatures it is not unusual for bills to be amended where concerns are raised by scrutiny committees.³¹ Elsewhere, bills are rarely changed as a result of comments made by scrutiny committees.³² The degree to which scrutiny of bills committees may have an effect on the manner in which bills are drafted, thus serving as a deterrent to objectionable practices, is impossible to quantify.

Obviously, the Canadian Parliament has no equivalent to a scrutiny of bills committee. As for whether this means that Canada lags behind, there can be no doubt that too little attention is given to provisions in bills that grant regulation-making authority and otherwise delegate powers to the executive.

The advantages of a scrutiny of bills committee would be that these issues could be addressed in a consistent manner, in a comparatively non-partisan fashion. The committee would develop an expertise on the relevant issues, drawing concerns to the attention of the Houses, or perhaps to the committee studying the bill directly. Over time this could also have an effect on the drafting of legislation more generally.

Scrutiny of Administration and Interim Orders

It is also worth noting that the problems that citizens encounter are often not with the actual regulation *per se*, but with how the regulation is applied and administered. Some jurisdictions,³³ including a number of provinces,³⁴ have an ombudsman who investigates the administrative actions of government organizations that implement regulations. That ombudsman is typically an officer of the legislature, and so provides another level of oversight of how powers delegated by the legislature are exercised. While specialized complaint offices have been created for specific purposes,³⁵ they encompass only a small portion of the decisions and actions taken at the federal level in Canada.

Parliamentary scrutiny of regulations was a response to the realization that one result of the economic and social demands of the modern state was that the power to establish rules had increasingly been turned over to the executive branch of government. At the same time, Parliament had a duty to ascertain that the delegated powers were exercised in a manner that

³¹ See Davis, above n. 28.

³² See, for example, A. Shearer, M.P. "The Role of the Legislative Review Digest in NSW", paper presented to the Australia-New Zealand Scrutiny of Legislation Conference, "Scrutiny and Accountability in the 21st Century", Canberra, July 8 and 9, 2009.

³³ Such as New Zealand and Australia, at both the Commonwealth and state levels.

³⁴ For example, Ontario (*Ombudsman Act*, RSO 1990, c.O.6) and Quebec (*Public Protector Act*, RSQ c. P-32).

³⁵ For example, the Commissioner of Official Languages, the Privacy Commissioner and the Information Commissioner. See also D. Rowat, "Time for a Federal Ombudsman", (1995-96), [18 Canadian Parliamentary Review No. 4.](#)

complies with the letter and spirit of the delegating statute. In many ways, we have now moved into a “post-regulations” era, with more and more rules of conduct found, not in acts of Parliament or in regulations, but in other documents such as manuals, international agreements, third-party standards and executive orders that supplant regulations.

There is no doubt that this has given rise to certain legislative practices that present a significant challenge to effective parliamentary scrutiny. A few examples follow.

It has become routine to provide in statutes that the responsible minister may make so-called “interim orders” containing any provision that may be contained in a regulation made under the act in order to deal with situations of significant risk. Typically, an interim order ceases to have effect 14 days after it is made unless it is approved by the Governor in Council. If so approved, the interim order then ceases to have effect on the earlier of one year after its making or the day on which when a regulation having the same effect as the order comes into force. Interim orders are usually exempted from examination, registration and publication under the *Statutory Instruments Act*, although they are subject to individual publication requirements. The *Aeronautics Act*³⁶, *Food and Drugs Act*³⁷, *Canadian Environmental Protection Act, 1999*³⁸, *Canada Consumer Product Safety Act*³⁹, and the *Navigation Protection Act*⁴⁰ are but some of the statutes that now include such a mechanism.

Thus we come to the case of the *Interim Orders Respecting Private Operators*. These Orders dealt with private operators of Canadian aircraft that are not used to provide commercial air service. They ran to some 35 pages and replaced 27 sections of the *Canadian Aviation Regulations*⁴¹.

The initial *Private Operators Interim Order*⁴² was followed by a series of eight more consecutive interim orders.⁴³ Each was only published after it had expired. The Governor in Council then approved a series of three one-year interim orders⁴⁴ before regulations were

³⁶ RSC 1985, c. A-2, s.6.41.

³⁷ RSC 1985, c.F-27, s.30.1.

³⁸ SC 1999, c.33, ss. 94, 163, 173, 183, 200.1 and 331.

³⁹ SC 2010, c.21, s.40.

⁴⁰ RSC 1985, c.N-22, s.32.

⁴¹ SOR/96-433.

⁴² *Canada Gazette*, Part I, April 16, 2011.

⁴³ *Canada Gazette*, Part I April 23, 2011, *Canada Gazette*, Part I, May 14, 2011, *Canada Gazette*, Part I, May 21, 2011, *Canada Gazette*, Part I, June 11, 2011, *Canada Gazette*, Part I, June 18, 2011, *Canada Gazette*, Part I, July 6, 2011, *Canada Gazette*, Part I, July 23, 2011, *Canada Gazette*, Part I, August 6, 2011.

⁴⁴ The Interim Order published on August 6, 2011 was approved by P.C. 2011-823 of July 28, 2011 (*Canada Gazette*, Part I, August 6, 2011). Interim orders dated June 25, 2012 (*Canada Gazette*, Part I, July 14, 2012) and May 31, 2013 (*Canada Gazette*, Part I, June 22, 2013) were approved, respectively, by P.C. 2012-946 of June 28, 2012 (*Canada Gazette*, Part I, July 14, 2013) and P.C. 2013-668 of June 6, 2013 (*Canada Gazette*, Part I, June 22, 2013).

finally made to enact the content of these orders.⁴⁵ Thus, the interim order mechanism was used for more than three years.

It was claimed that the need for these interim orders arose from “extraordinary circumstances that warranted immediate measures to address a significant risk to aviation safety”.⁴⁶ What were these circumstances? Well, the Department of Transport had decided that it would take over the issuing of private operator certificates from the Canadian Business Aviation Association, but the Department was unable to prepare the necessary new regulations by the date it had announced. Subsequent timelines were also not met, leading to a series of interim orders lasting three plus years.⁴⁷ In other words, the extraordinary circumstances that warranted immediate measures to address a significant risk to aviation safety were entirely created by the Department itself.

While it was argued that the repeated use of interim orders was not an attempt to bypass the usual rulemaking process, this was precisely the result.⁴⁸ If a succession of eleven orders does not “bypass the usual rulemaking process”, what does?

Incorporation by Reference and Regulatory Process Exemptions

Another common feature of statutes has become the inclusion of a power to make regulations incorporating material as amended from time to time “regardless of its source”.⁴⁹ In other words, the regulation-maker can incorporate its own material as amended from time to time. Where material to be referentially incorporated originates with the regulation-making authority, there is the obvious danger that this technique may be abused in order to circumvent the regulatory process. Moreover, the ambulatory incorporation by reference of such internally produced material in effect transforms a legislative power conferred by Parliament into a power to be exercised as a matter of administrative discretion.

In this connection of course, Bill S-2 which is currently before the House of Commons,⁵⁰ would amend the *Statutory Instruments Act* to expressly sanction open incorporation by reference in a number of circumstances in which the Committee would currently object. It is worth noting that while the Bill would place some limits on the incorporation of material produced by the regulation-maker, these limits do not touch any power to incorporate by

⁴⁵ *Regulations Amending the Canadian Aviation Regulations (Parts I, II, IV, VI and VII— Private Operators)*, SOR/2014-131.

⁴⁶ See *Proceedings of the Standing Joint Committee for the Scrutiny of Regulations*, May 9, 2013.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ For example, the *Food and Drugs Act*, RSC 1985, c. F-27, s.30.5(1); the *Navigation Protection Act*, RSC 1985, c. N-22, s.30(1); the *Safe Food for Canadians Act*, SC 2012, c.24, s.52.

⁵⁰ At the time of publication, the Bill had been [passed by the Senate and had been given second reading in the House of Commons and referred to Committee.](#)

reference that is conferred by another Act.⁵¹ Any limits in Bill S-2 on ambulatory incorporation by reference of internally produced material can be overridden in any given statute, and thus are largely illusory. On a purely practical level, parliamentary scrutiny of revisions to material incorporated as amended from time to time is impossible.

Then there is the increasingly common technique of granting exemptions from all or some of the requirements of the *Statutory Instruments Act* pertaining to examination, registration, publication and review by the Joint Committee.⁵² Where instruments such as interim orders are of a legislative nature – inasmuch as they may contain anything that could be set out in a regulation – why should they not at least be subject to the same registration and publication requirements as regulations?

One result of all of this is that, ironically, in an age in which citizens have unprecedented access to information from an infinite variety of sources via the Internet, we are in danger of actually regressing in terms of access to the law. Increasingly, the rules citizens must obey, or at least the means by which they are expected to obey them, are scattered across a variety of sources, have different and variable means of publication, and are of variable accessibility. We risk turning the clock back to 1949.

It is simply not sufficient to rely on a vague general requirement that all of this quasi-legislation, documentation and incorporated material “be accessible” or that no one can be convicted of an offence for contravening it if it is not.⁵³ What does “accessible” mean? The Joint Committee has been told that material is accessible if it can be purchased for \$345.00 from the source organization, if it can be examined at the National Energy Board office in Calgary, and if it can be requested through interlibrary loan.⁵⁴ As a citizen, I would disagree. Even government websites are often out of date and incomplete.

Nor is it acceptable that meeting constitutional language requirements be equated with accessibility. Simply because a document that exists in one official language may be constitutionally incorporated by reference does not mean it is accessible.⁵⁵ We should be able to aim higher than the bare constitutional minimum.

⁵¹ Proposed s.18.2.

⁵² For example, s. 6(2)(1)(d) of the *Aeronautics Act* RSC 1985, c. A-1 provides that interim orders made by the Minister are exempt from the examination, transmission and registration and publication requirements of the *Statutory Instruments Act*. Subsection 10.01(1) of the *Canada Deposit Insurance Corporation Act*, RSC 1985, c. C-3, authorizes the Minister of Finance to make orders granting exemptions from a great many provisions of the Act. Subsection (5) of s. 10.01 provides that the *Statutory Instruments Act* in its entirety does not apply to such orders, thus removing them, from scrutiny by the Standing Joint Committee for the Scrutiny of Regulations pursuant to s. 19 of the *Statutory Instruments Act*.

⁵³ Bill S-2, proposed s.18.6.

⁵⁴ *Proceedings of the Standing Joint Committee for the Scrutiny of Regulations*, September 25, 2014.

⁵⁵ This has been suggested in connection with Bill S-2. See *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, April 2, 2014.

There are jurisdictions in which this kind of material must be made available to the public,⁵⁶ including on the Internet,⁵⁷ or notice must be published as to how the material can be obtained.⁵⁸ In some jurisdictions material incorporated by reference is even subject to the same registration and publication requirements as the incorporating legislation. This includes any future amendments.⁵⁹

The Australian *Legislative Instruments Act 2003* sought to expand the ambit of the making, publication and commencement procedures for delegated legislation to all instruments of legislative character.⁶⁰ In Canada, we seem more concerned with finding ways around the regulatory process and restricting the scope of its application

Performance-based Regulations

Still on the subject of access, another relatively recent phenomenon involves regulations that require those in a particular industry to prepare and implement plans or manuals that set out how the general “goals” of the regulations are to be met. This so-called “performance-based approach” is said to provide greater flexibility and efficiency. So what we have is a statute that gives, for example, a broad power to make regulations respecting safety, a regulation that requires the industry to operate in a safe manner and to prepare a plan for review and approval that sets out how that is going to be done, and a series of plans that contain the actual requirements that must be met. Rather incredibly, both the government and industry then claim that the contents of these plans, the actual measures that must be taken to comply with the law, and the contravention of which is an offence, constitute confidential third party business information, and therefore cannot be made public.⁶¹ Secret rules – to all intents and purposes – secret law.

Conclusion

There is no doubt that the use of these kinds of mechanisms – incorporation by reference, regulatory process exemptions and performance-based regulations – will only increase. There are a number of reasons for this. The ever quickening pace of technology, globalisation and the harmonization of standards and requirements internationally, the need for federal-provincial cooperation, and the value of relying on technical standards developed by non-governmental bodies, to name a few. Globalization aside, in Canada there is always

⁵⁶ Ontario, *Legislation Act*, 2006, SO 2006, c. 21, Sched. F, s. 62(4).

⁵⁷ Australian Capital Territory, *Legislation Act 2001*, A2001-14, s.47(6)

⁵⁸ Victoria, *Interpretation of Legislation Act* 1984, s.32.

⁵⁹ New South Wales, *Interpretation Act 1987*, s.69(2)(b)

⁶⁰ Cth 2003, no. 139.

⁶¹ See, for example, “[Railway safety plans kept secret](#)”, *Toronto Star*, November 5, 2013 at .A1; “[Transport Canada keeping railway safety plans secret](#)”, *Toronto Star*, April 4, 2014, at A1; “[Rail carriers keep emergency response plans secret from residents](#)” *Toronto Star*, November 11, 2014.

considerable pressure to establish regulatory standards and regimes that are consistent with those of the United States, by far our largest trading partner.

From a purely bureaucratic perspective, there is also administrative convenience. For example open incorporation of material generated by the regulation-maker is frequently justified as being a more “flexible” approach. What this really means is that it allows rules to be imposed without having to go through the regulatory process.

Combine all this with an increasingly ineffective Parliament, and one may even question whether a scrutiny committee remains an effective model for ensuring accountability.

Section 19 of the *Statutory Instruments Act* provides that all statutory instruments, with a few exceptions, stand permanently referred to the Committee. The Committee does not do a selective review: *all* instruments referred to it are reviewed. Would it be more useful to undertake a selective inquiry into certain regulations, with more focus on how they are applied, administered and enforced? Could the role the Joint Committee now assumes be performed by the other parliamentary committees within their respective areas? Is some other mechanism for parliamentary oversight preferable to committee review, such as a parliamentary regulations office? Can parliamentary review of regulations continue to serve a useful purpose, or has Parliament by now simply abandoned the field? All these are legitimate questions.

To end where I began, with the Lord Chief Justice back in 1929, perhaps it is not the Rule of Law that can be found wanting, but rather those who are responsible for protecting it. A public that is largely indifferent to the gradual erosion of principles that it took centuries to establish. Governments unconcerned with means, as opposed to ends. Members of Parliament who abdicate their role as legislators in favour of petty partisanship. A judiciary that is deferential to executive legislators to the point, for instance, at which the difference between a fee and a tax, a distinction fundamental to our constitutional order, has become largely theoretical in Canada. Officials who administer programs but do not truly grasp the difference between legislation and administrative documents, and who view the Rule of Law as simply one consideration when “managing risk”. Lawyers who more often than in times past lack a thorough knowledge of some basic tenets of our constitution.

However, the supremacy of Parliament must be more than merely a quaint notion that people used to fight for. Both the legal and the democratic validity of delegated legislation depend on its being authorized by Parliament. It follows that the executive must be accountable to Parliament for the rules it makes. Whether this accountability takes the form of a scrutiny committee or some other mechanism, the underlying principle remains the same.