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THE LOOPHOLE



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Issue No. 1 of 2014

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Editorial Policies

The Loophole is a journal for the publication of articles on drafting, legal, procedural and management issues relating to the preparation and enactment of legislation. It features articles presented at its bi-annual 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

This 2013 CALC Conference in Cape Town featured a wealth of stimulating presentations and lively discussion. With this issue of the Loophole, the conference continues in two senses.

First, the papers here have benefited from the conference and reflect further musings of their authors and well as some updating to reflect developments since the conference last April. This demonstrates the vitality of the topics that interest legislative counsel.

In a second sense this issue brings the conference to the world-wide audience of legislative counsel comprising CALC's members as well as others who frequent its website. Those who could not attend the conference in person can do so in virtual fashion. This is not, of course, the same as being there, but it is the next best thing.

This issue begins with **William Robinson's** article from the 2nd session of the Conference, which addressed the "Evolution of Drafting Technique". His article looks at legislative drafting in the European Union, which spans 24 different languages and 28 national jurisdictions. Preparing EU legislation is unquestionably one of the most complex and politically challenging tasks in the drafting world. William presents a fascinating account of how drafting considerations that resonate with Commonwealth legislative counsel have been advanced in this environment.

The other three articles in this issue are from the 6th Session of the Conference, entitled "How Information Technology has Changed Legislative Drafting". These articles provide somewhat different perspectives on this topic.

Geoff Lawn starts thing off by considering how IT, and indeed other technological changes, pose a challenge in terms of drafting legislation that will operate effectively as these changes unfold in the years following its enactment. Although legislative counsel strive to bring sensitivity to the practical application of legislation, they do not possess crystal balls. Their objective is to find a balance between specifics that will capture the here and now and open-textured generalities that will embrace future developments. Geoff articulates these difficulties in compelling fashion, although he does not, quite understandably, provide easy solutions.

The next two articles focus on technology within a drafting office. **Lucy Marsh-Smith** and **Gordon Wright** take us through the challenges of bringing legislative drafting and publishing into the information age on the Isle of Man. Their article will be of great interest to smaller jurisdictions where budgetary limitations foreclose access to substantial IT investments. Their approach seeks to provide basic access to the law to the general public while at the same time leveraging revenue generation possibilities with more sophisticated users of legislative texts.

Phang Hsiao Chung concludes this discussion of IT by outlining the development of the "LEAP" (*Legislation Editing and Authentic Publishing*) System in Singapore, including the processes involved, and the challenges faced. He examines the different design options

considered, and whether, in hindsight, things should have been done differently. There are undoubtedly valuable lessons to be learned here, as there are as well from Lucy and Gordon's article.

This issue concludes with a review of a recently published book: *Subordinate Legislation in New Zealand* by Ross Carter, Jason McHeron and Ryan Malone. It rounds out a series of 3 texts in recent years on this subject from across the Commonwealth.

Finally, I would like to welcome Elizabeth Bakibinga to our Editorial Board. She has been a frequent contributor to the *Loophole* over the years and has graciously agreed to lend us a hand.

I trust you will find much of interest in this issue, and rest assured that many more equally stimulating papers from the Conference will make their appearance in upcoming issues. I would also encourage those who wish to contribute other articles to send their manuscripts for consideration by our editorial board.

Happy New Year!

John Mark Keyes

Ottawa, January, 2014

Evolution of European Union Legislative Drafting

William Robinson¹



Abstract

The drafting of European Union (EU) legislation has evolved considerably from the early years in the 1950s to the present day. This article outlines this evolution and describes the principal features that characterize the drafting of EU legislation today, including how EU legislation is drafted, the rules applying to EU drafting, and what has led to the changes in drafting style.

1. Introduction

1.1. General

The law of the European Union (EU) can trace its origins back as far as the European Coal and Steel Community (ECSC) established by the Paris Treaty of 1951.² That Treaty established the institutional framework that is still at the core of the EU today, consisting of:

- the High Authority (now the European Commission, the independent body representing the interests of the EU);
- the Assembly (now the European Parliament or EP, composed of members elected directly by EU citizens);
- the Council (composed of ministers from each Member State);

¹ Associate Research Fellow at the Institute of Advanced Legal Studies, London, formerly Coordinator in the Legal Revisers Group of the European Commission Legal Service.

² The ECSC Treaty and the Convention on the Transitional Provisions were signed at Paris on 18 April 1951. All EU Treaties and legislation can be found on the single portal EUR-LEX: <http://eur-lex.europa.eu/en/index.htm>.

- the Court of Justice (composed of wholly independent judges).

The ECSC, together with the European Economic Community (EEC, which later became just the European Community or EC) and the European Atomic Energy Community (EAEC or Euratom) established by the Rome Treaties of 1957,³ subsequently evolved into the EU.

The law of the EU has two special features which have a decisive impact on EU legislative drafting: it is a kind of international law which has to be acceptable to all the Member States, and it has to exist in all the official languages of the Member States. Since the entry of Croatia in July 2013 there are 28 Member States and 24 official languages.

The drafting of EU legislation has evolved considerably from the early years in the 1950s to the present day. This article outlines this evolution and describes the principal features that characterize the drafting of EU legislation today, including how EU legislation is drafted, the rules applying to EU drafting, and what has led to the changes in drafting style.

1.2. Early drafting style

In 1974, soon after the United Kingdom, Ireland and Denmark became the first new Member States to join the six founder members of the European Communities, a case involving the interpretation of EC legislation (which was then so alien to the common lawyer) came before the English Court of Appeal. Lord Denning gave a memorable description of it:

Regulations and directives ... are quite unlike our statutory instruments. They have to give the reasons on which they are based So they start off with pages of preamblesThese show the purpose and intent Then follow the provisions which are to be obeyed. ... words and phrases are used without defining their import. ... In case of difficulty, recourse is had to the preambles. The enactments give only an outline plan. The details are to be filled in by the judges.⁴

An illustration of the style of drafting Lord Denning was referring to can be found in Regulation No 1 of 1958, an act of fundamental importance since it lays down the rules on the languages to be used by the EU institutions.⁵ It is still in force today but the enacting terms have been amended each time new Member States have joined the EU to add their languages to the list of EU languages. It is worth reproducing the full text as it stands today to show how short and concise it is:

³ Signed at Rome on 25 March 1957.

⁴ *Bulmer Ltd v Bollinger SA* [1974] 4 Ch 401 at 411.

⁵ OJ 17, 6.10.1958 at 385: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31958R0001:EN:NOT>.

Regulation No 1 determining the languages to be used by the European Economic Community
THE COUNCIL OF THE EUROPEAN ECONOMIC COMMUNITY,

Having regard to Article 217 of the Treaty which provides that the rules governing the languages of the institutions of the Community shall, without prejudice to the provisions contained in the rules of procedure of the Court of Justice, be determined by the Council, acting unanimously;

Whereas each of the four languages in which the Treaty is drafted is recognised as an official language in one or more of the Member States of the Community;

HAS ADOPTED THIS REGULATION:

Article 1

The official languages and the working languages of the institutions of the Union shall be Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish.

Article 2

Documents which a Member State or a person subject to the jurisdiction of a Member State sends to institutions of the Community may be drafted in any one of the official languages selected by the sender. The reply shall be drafted in the same language.

Article 3

Documents which an institution of the Community sends to a Member State or to a person subject to the jurisdiction of a Member State shall be drafted in the language of such State.

Article 4

Regulations and other documents of general application shall be drafted in the official languages.

Article 5

The *Official Journal of the European Union* shall be published in the official languages.

Article 6

The institutions of the Community may stipulate in their rules of procedure which of the languages are to be used in specific cases.

Article 7

The languages to be used in the proceedings of the Court of Justice shall be laid down in its rules of procedure.

Article 8

If a Member State has more than one official language, the language to be used shall, at the request of such State, be governed by the general rules of its law.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 15 April 1958.

For the Council

The President

V. LAROCK

The following points may be noted:

- The entire text occupies less than two A4 pages of the *Official Journal* and consists of just 366 words. Formally it is presented as a single sentence beginning with the subject ('THE COUNCIL ...'), followed by a preamble and then the main verb ('HAS ADOPTED ...') with all the enacting terms forming the predicate.
- The title has never been amended and still refers to the European Economic Community, even though that has been superseded first by the European Community and later by the EU.
- The preamble consists of just one citation (beginning 'Having regard to') and one recital (beginning 'Whereas'). It does not bear any relation to present realities since it cites an article of a long-defunct Treaty and refers to just 4 languages.
- The enacting terms consist of 8 short articles (with an average of just under 30 words per article). Key terms like 'official language', 'working language' and 'document of general application' are not defined. On the basis of the wording of Article 4 saying 'Regulations and other documents of general application shall be drafted in the official languages' the doctrine has been developed that all the language versions of EU acts have equal status, there is not one original and 23 translations.
- There is no provision on entry into force or application. It was adopted on 15 April 1958 but was not published in the *Official Journal* until 6 October 1958. On the basis of the Treaty rules, therefore, it apparently did not have any effect until it came into force 20 days after its publication, on 26 October 1958. On the basis of EEC drafting convention it applied from the day on which it came into force.

1.3. Modern drafting style

It is useful to make a comparison with Regulation No 211/2011 on the citizens' initiative⁶ which, like Regulation No 1, is a quasi-constitutional provision and gives effect to a provision laid down in the basic EU treaties. The regulation is too long to be reproduced in full here but the key statistics are as follows:

- Regulation No 211/2011 takes up 22 A4 pages of the Official Journal and consists of some 8450 words.
- The preamble consists of 6 citations and 27 recitals (a total of 1776 words).
- The enacting terms comprise 23 articles (averaging over 155 words each).

⁶ OJ L 65, 11.3.2011 at 1: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32011R0211:EN:NOT>.

- The regulation refers to 5 other EU acts and contains a definitions article with 3 definitions. It has 7 annexes (2900 words), 3 of which have already been wholly or partially replaced by new texts.⁷ It has been corrected by 4 corrigenda.
- It has been implemented by a Commission regulation of another 6 pages.⁸

Clearly the rules in Regulation No 211/2011 are more voluminous than those in Regulation No 1 because they are more detailed and complex. There has been a shift from the ‘fuzzy’ or general-principles style familiar to many countries of continental Europe to the ‘fussy’ or more detailed drafting style familiar to common lawyers.

Before analysing how EU drafting style has changed it is appropriate to consider briefly how EU legislation is drafted, the rules applying to EU drafting, and what has led to the changes.

2. How EU legislation is drafted

2.1. Drafting process

EU legislation is adopted jointly by the European Parliament (EP), with its 766 Members (MEPs) directly elected by EU citizens, and the Council, in which all 28 Member States are represented. The first drafts are produced by the Commission, the EU’s executive body. The drafts are produced not by a small team of parliamentary counsel as in most common-law countries, but by a decentralised system, which is common in continental Europe. In the Commission the drafts are produced by policy officers for the sector concerned and then circulated to other departments in the Commission for consultation. It should be noted that many of those policy officers are not lawyers but technical specialists and that most of them have to work in a language other than their mother tongue.

When the Commission has finished its technical work on the draft it submits it as a proposal to the EP and the Council. In the EP, technical work is carried out by the competent committee, which appoints a rapporteur for each proposal, and the political decision is taken by the plenary. In the Council technical work is carried out in the working group composed of experts from each Member State and the final decisions are taken by the ministers for the sector concerned from each Member State. In both those institutions all suggestions for changing the policy are made in the form of textual amendments to the Commission’s draft.

The EP, the Council and the Commission have long had teams of lawyer-linguists (also known as jurist-linguists or legal revisers) working to improve the drafting quality of EU acts and to ensure that the drafting rules are complied with.

⁷ See Commission Delegated Regulation No 268/2012 (OJ L 89, 27.3.2012 at 1) and Council Regulation No 517/2013 (OJ L 158, 10.6.2013 at 1).

⁸ Commission Implementing Regulation No 1179/2011 (OJ L 301, 18.11.2011 at 3).

In the early days they used to check the texts of EU acts at the very end of the procedure. By then the draft acts had passed through many rounds of negotiation and the substance could not be touched. The lawyer-linguists would accordingly have to focus largely on formal points and linguistic matters, ensuring that the texts in all the languages corresponded and generally tidying them up.

An Interinstitutional Agreement on drafting quality of 1998 called for the lawyer-linguists to be given an enhanced role.⁹ As a result, they now get involved much earlier in the drafting process and are seeking to improve the drafting of the original version, moving towards a fully-fledged legislative counsel role.

Their numbers have been increased to cope with their new role. They are recruited after open examinations from candidates who must already possess qualifications in national law, EU law and languages. The institutions are increasingly coordinating their efforts by joint programming, regular contacts, joint work on drafting guidance and developing a joint training programme for all the lawyer-linguists in order to foster a common culture.

2.2. Drafting rules

At the inception of the European Communities only minimal rules on the form of European legal acts were laid down in the treaties and in the *Rules of Procedure of the Council*.¹⁰ Now there are many more rules and sources of drafting guidance. That is partly because the procedures have become more complex and involve more institutions and participants. As the EU has expanded and the body of legislation has increased there is a more compelling need for standardization and harmonization of the approach to drafting in the growing number of official languages.

Articles 288 to 299 of the Treaty on the Functioning of the European Union (TFEU) lay down rules on the legislative procedure and on EU legal acts, but include very few rules on their form. A basic template is set out in the current *Rules of Procedure of the European Parliament*¹¹ and those of the Council.¹²

Basic legislative drafting guidance common to all the EU institutions is set out in 22 Guidelines in the Interinstitutional Agreement on drafting quality of 1998.¹³ Those

⁹ OJ C 73, 17.3.1998 at 1.

¹⁰ See Articles 14 and 15 of the ECSC Treaty, Articles 189 to 191 of the EEC Treaty, Articles 161 to 163 of the EAEC Treaty and Articles 9 to 15 of the 1979 Rules of Procedure of the Council (79/868/ECSC, EEC, Euratom), (OJ L 268, 25.10.1979 at 1): <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31979Q0868:EN:NOT>.

¹¹ <http://www.europarl.europa.eu/sides/getLastRules.do?language=EN&reference=TOC>.

¹² Council Decision 2009/937/EU (OJ L 325, 11.12.2009, 35): <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32009D0937:EN:NOT>.

¹³ OJ C 73, 17.3.1998 at 1.

Guidelines were expanded upon in the *Joint Practical Guide for the drafting of Community legislation* (JPG), adopted in 2000.¹⁴

The Council and the Commission have also long relied on their own in-house guides. The Council's *Manual of Precedents* used to focus mainly on giving the equivalents in other languages for the French terms used in the original but now contains far more general guidance. It is produced in all the EU languages and is regularly updated, but is not publicly available. The Commission's *Manual on Legislative Drafting* is an insiders' manual with a lot of technical guidance, much of which has become outdated.¹⁵ Some of the material has now been rewritten and incorporated in a drafting tool for Commission staff, known as the Drafter's Assistance Package launched in 2013.

Guidance on standardising the presentation of all EU documents is also given by the *Interinstitutional Style Guide* of the Publications Office, which is publicly available in all the official languages on the Office's website.¹⁶

3. Reasons for change

3.1. General

Many of the reasons for the changes in drafting style are probably common to most legal systems and can be roughly summarised as follows: the world is more complex, more interconnected and faster changing, there is more regulation at many different levels into which any new rules must fit and the regulation has to be updated. A science of regulation has developed. New rules must be evidence-based and they may be open to challenge in various fora.

3.2. Reasons specific to the EU

But there are also a number of reasons which are specific to the EU.

The EU has grown much larger, expanding from 6 Member States at the inception of the European Communities to 28 in 2013. Its rules must work in the very different legal cultures of all those Member States.

From the original narrow areas of coal and steel, free movement of goods, agriculture and competition, EU legislative competence has extended into fields previously undreamt of,¹⁷ such as the environment, energy, consumer protection and some aspects of public health and

¹⁴ <http://eur-lex.europa.eu/en/techleg/index.htm>.

¹⁵ http://ec.europa.eu/smart-regulation/better_regulation/documents/legis_draft_comm_en.pdf.

¹⁶ <http://publications.europa.eu/code/en/en-000500.htm>.

¹⁷ See the extensive lists in Articles 3 to 6 of the Treaty on the Functioning of the European Union (TFEU) of areas of 'exclusive competence', 'shared competence', 'co-ordinating competence', and 'supporting competence'.

of social policy, even most recently into setting limits on bonuses paid to bankers!¹⁸ This accentuates the need for it to comply with standards of openness and accessibility, both in the interests of citizens and in the interests of business.

European legislation used to be agreed upon in a rather opaque manner between the technocrats of the Commission and the diplomats representing the Member States in the Council, meeting behind closed doors. Now the European Parliament is the joint legislative authority with the Council of Ministers, and much of the legislative process is public and subject to closer scrutiny.

There has been a cultural shift in the attitude to regulation in the EU institutions away from the idea that ever more European rules were needed to build Europe. As long ago as 2001 the EU, prompted in part by the Organization for Economic Cooperation and Development (OECD), began to adopt express policies to promote good governance and better regulation.¹⁹

A sharp reminder that the EU institutions needed to do more to engage with European citizens and foster their support for the European project came in 2005 when the proposed Constitution for the EU was rejected in separate referendums by the citizens of two of the founder Member States: France and the Netherlands. In that year the President of the Commission, José Manuel Barroso, made a telling remark in a press conference:

regulation fatigue is not just felt by the British eurosceptics. I recently met the presidents of the German *Länder* and what they said to me against excessive intervention by the Commission could have been written in the British tabloids. *The Latin idea that all problems can be solved by adopting a law is simply not true.* I do not conceive of a minimalist Commission but the Commission must contribute added value, as when I propose common energy or immigration policies. It is true that, apart

¹⁸ See Article 94 of Directive 2013/36/EU of the European Parliament and of the Council, OJ L176, 27.6.2013 at 338.

¹⁹ See in particular:

- the Commission White Paper on Governance (COM (2001) 428), point 3.2 of which stated that the EU 'must pay constant attention to improving the quality, effectiveness and simplicity of regulatory acts';
- the Commission Communication 'European Governance: Better lawmaking' (COM(2002)275);
- the Agreement on Better lawmaking adopted by the EP, the Council and the Commission in 2003 (OJ C 321, 31.12.2003 at 1);
- the Europe 2020 Strategy launched in 2010 aiming for 'smart, sustainable and inclusive growth' (COM(2010) 2020); and
- the Commission Communication on 'Smart Regulation in the European Union' (COM(2010)543) emphasising the need to take account of the whole regulatory cycle.

from the services sector, the major part of the single market has been achieved and that we must now concentrate rather on its implementation (*emphasis added*).²⁰

In the early days French was the uncontested lingua franca of all the European institutions, indeed the first European Treaty, the European Coal and Steel Community Treaty of 1951, was authentic in French only. Over the years English has come to be used more and more. A survey carried out in the Commission in 2001 found for the first time that more documents had been drafted in English than French. And a survey carried out in the Commission in 2009 found that over 90% of Commission staff regarded English as their main drafting language.²¹ The English used is rather special though. It is specific to the EU institutions and based on institutions, principles and concepts that have developed, originally in French, over 50 years. Moreover only a small minority of those writing in English are native speakers (13% according to the 2009 survey).

4. Changes to the EU's approach to regulation

As part of the Smart Regulation agenda²² (formerly known as the Governance or the Better Regulation agenda) the EU institutions have committed themselves to a package of measures to improve the quality of the regulatory environment generally.

- Before launching any legislative initiatives, the institutions will first look at all the options bearing in mind that one option may be for the EU to take no action. They will always seek to keep the regulatory burden as light as possible. To this end, they may in particular have recourse to self-regulation, whereby, for example, the business sector is left to adopt codes of conduct, and co-regulation, in which the EU adopts an act setting objectives, but leaves the practical arrangements for attaining those objectives to the business sector.
- More emphasis is placed on consultations of all the interested circles (representatives of business, civil society and the general public), and not just of the EU's standing advisory bodies (the European Economic and Social Committee and the Committee of the Regions), the Member States' representatives on the Council working parties and the committees assisting the Commission.²³
- The EU institutions systematically use impact assessments, which must follow detailed guidelines and, at the level of the Commission, are vetted by a semi-independent board. The board publishes all the impact assessments it receives, its

²⁰ *Sources say...* No. 5337 (press briefing, EC Directorate General, Communication, Brussels, 21.11.2005); author's translation.

²¹ http://ec.europa.eu/dgs/translation/publications/magazines/languagetranslation/documents/issue_01_en.pdf.

²² See the Commission website: http://ec.europa.eu/smart-regulation/index_en.htm.

²³ See the Commission Communication 'Towards a reinforced culture of consultation and dialogue' (COM(2002)704).

opinions on those assessments and annual reports.²⁴ The EP now also has its own impact assessment unit.

- The institutions prepare detailed programmes of forthcoming legislative initiatives so that everyone is aware of what is in the pipeline and the institutions can better coordinate their work.
- Greater transparency is provided by making public as much of the legislative procedure as possible and giving better explanations of legislative matters at EU level. The EU institutions maintain databases of legislative procedures.²⁵
- The institutions are committed to improving the follow-up to legislation after adoption, with checks and reports on compliance by the Member States.
- EU legislation is to be condensed by means of codification of acts which have been amended and repeal of obsolete acts.
- To improve accessibility of EU law the Publications Office has created a single portal, called EUR-Lex, which is now available in all the official languages without charge.²⁶ That portal gives access in particular to: the *Official Journal*; collections of the treaties and international agreements; legislation in force and in preparation, as well as up-to-date consolidated texts, case-law; parliamentary questions; and a site on legislative drafting.²⁷

5. Changes in the actual texts

5.1. Longer and more complex

One of the features of EU acts mentioned by Lord Denning is the use of preambles. EU legal acts are required by Article 296 TFEU to “state the reasons on which they are based and [to] refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties”. Preambles serve to meet that requirement and consist of two main parts: the citations and the recitals. The citations set out the legal basis in the Treaties for the adoption of the act, and any procedural requirements under that legal basis. The recitals set out the reasons for the act.

²⁴ See in particular: Commission Communication on the launch of impact assessment (COM(2002)276); the Impact Assessment Guidelines (SEC(2009) 92): http://ec.europa.eu/governance/impact/commission_guidelines/commission_guidelines_en.htm; the website of the Impact Assessment Board: http://ec.europa.eu/governance/impact/iab/iab_en.htm.

²⁵ European Commission Prelex: <http://ec.europa.eu/prelex/apcnet.cfm?CL=en>; EP Legislative observatory: <http://www.europarl.europa.eu/oeil/home/home.do?lang=en>.

²⁶ <http://eur-lex.europa.eu/en/index.htm>.

²⁷ <http://eur-lex.europa.eu/en/techleg/index.htm>.

While the citations of the legal basis have not become significantly longer, the citations of procedural steps have. This is because it is necessary to include details of the co-decision procedure with the positions and decisions of the EP and of the Council at the various stages. There are now also more mandatory consultations, including transmitting draft legislative acts to all the national parliaments of the Member States for a check on compliance with the principle of subsidiarity.²⁸

It is the length of the recitals that has increased most noticeably. Recitals used to be valuable to explain why EU acts had been adopted. This is because they were adopted by the Council alone and there was no publicly accessible record of the debates leading up to adoption. Now that the EU legislative procedure involves the EP, and is more open and transparent, that need is less strongly felt but other factors have come into play.

Under Article 263 TFEU the validity of EU acts may be challenged before the Court of Justice on the ground of “infringement of the Treaties or of any rule of law relating to their application”. To forestall any challenge that the statement of reasons for an act is not sufficient to satisfy the requirements of Article 296 TFEU drafters may be inclined to include more and more material in the recitals as a precaution. Standard formulas are inserted to confirm that the act complies with the principles of proportionality and subsidiarity enshrined in Article 5 TEU,²⁹ and with the Charter of Fundamental Rights as referred to in Article 6 TEU.³⁰

Recitals have also come to serve other functions. They have become bargaining chips in the negotiating process. If a party to the negotiations on a draft act is seeking a change in the enacting terms which the other parties do not wish to accept, one way in which it may be persuaded to drop that demand is by the offer of the concession of including a recital reflecting its standpoint. While that recital is not binding, it is part of the act and will be taken into account when the act comes to be interpreted by the courts.

Recitals have also become a means of communication between the legislator and the user of the legislation. Recitals are included to mention all the other EU acts referred to in the act, whether simply as cross references or as acts being amended or repealed since this makes it possible to give the full bibliographical references to those acts in the recitals without cluttering the enacting terms.³¹ The *Joint Practical Guide (JPG)* specifically refers to mentioning certain consultations in the recitals (Point 10.17) and certain financial recitals

²⁸ The principle whereby the Union does not take action (except in the areas that fall within its exclusive competence), unless it is more effective than action taken at national, regional or local level: see Article 5 TEU and Protocol No 1 on the role of national parliaments in the EU and Protocol No 2 on the principles of proportionality and subsidiarity.

²⁹ JPG 10.15.3 and 10.15.4.

³⁰ See for an example recital 56 in Regulation No 346/2013 (OJ L 115, 25.4.2013 at 18): <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32013R0346:EN:NOT>.

³¹ JPG 16.10.3.

(Points 10.18 and 10.19).³² Sometimes recitals are mere declarations of what the legislative authority intends to do in the future or other political statements, even though the latter is forbidden by Guideline 10.

As a result the preambles have grown ever longer, particularly if a measure is controversial, as is illustrated by just two examples: the Services Directive of 2006 has just 46 articles but 118 recitals, while the Commission proposal had only 73 recitals;³³ the Roaming Regulation of 2012 has just 22 articles occupying 10 A4 pages but 100 recitals occupying 12 pages, while the Commission proposal had only 82 recitals.³⁴

The enacting terms themselves are also becoming longer.

One reason is that it is necessary to embed any new act in the *acquis*, the substantial body of existing EU legislation. And so a new act has to make clear how it relates to acts already in existence in the same area. The Services Directive provides a good illustration:

Article 1 begins with one short paragraph on the subject matter of the Directive but that is followed by two paragraphs on what the Directive ‘does not deal with’ and then seven provisions specifying what the Directive ‘does not affect’.

Article 2 on scope begins ‘This Directive shall apply to services supplied by providers established in a Member State’ but goes on to list 12 ‘activities’ which are excluded from the scope of the Directive and states that the ‘Directive shall not apply to the field of taxation’.

Article 3 deals with the relationship of the Directive with other provisions of EU law and the rules of private international law.

Another reason for the increased length and complexity of EU acts is that more “special provisions” and “exemptions” have to be inserted to accommodate the needs and wishes of more Member States. This is inevitable in a Union which is committed to “respect its rich cultural [...] diversity”³⁵ and in a legislative procedure in which any amendment to the Commission’s proposal requires unanimity amongst all the Member States.³⁶ But it does produce some surprising results.

For example, when rules on pet passports were introduced to make it easier for EU citizens to travel with their pet animals, they catered not just for cats and dogs, which are common

³² <http://eur-lex.europa.eu/en/techleg/index.htm>.

³³ Directive 2006/123/EC on services in the internal market (OJ L 376, 27.12.2006 at 36): <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006L0123:EN:NOT>.

³⁴ Regulation No 531/2012 on roaming on public mobile communications networks (OJ L 172, 30.6.2012 at 10): <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32012R0531:EN:NOT>.

³⁵ Article 3(3) TEU.

³⁶ Article 293(1) TFEU.

pets throughout Europe, but also for ferrets, much to the bemusement of countries with no ferreting tradition.³⁷

And while “tobacco for oral use” is banned throughout the EU, when Sweden joined it insisted on an exemption for “*snus*”, a form of wet snuff which is very popular there. As a result the EU tobacco rules have to contain not just an exemption for Sweden but a definition of tobacco for oral use and special provisions on its labelling.³⁸

5.2. More precise

Lord Denning’s observation that terms are used without being defined is no longer true. Many more definitions are now included in EU legislation. They are specifically provided for in Guideline 13, which also calls for them to be grouped in a single article at the beginning of the enacting terms, rather than being scattered throughout the act as previously. Some problems remain though since the status of definitions is not regulated in the drafting rules or elsewhere, and also because key terms are not always defined (perhaps because of lack of agreement in the negotiations on the draft).

For example, Framework Decision 2002/584 on the European Arrest Warrant³⁹ does not contain an article setting out definitions, even though the Commission proposal had contained an article with six definitions. The Framework Decision was challenged before the Court of Justice on the grounds in particular that it listed criminal offences in terms that were too vague and was thus contrary to the principle of legality.⁴⁰

Regulation (EC) No 261/2004 gives air passengers certain rights if they are ‘denied boarding’ or if their flights are cancelled or delayed.⁴¹ Passengers are entitled to both compensation *and* assistance (for example with meals and accommodation) in the first two cases, but *only* assistance in the case of delay. The regulation defines the key terms “denied boarding” and “cancellation”, but not “delay”. In the *Sturgeon* case,⁴² the Court of Justice noted the absence of a definition of “delay” and held that long delays could be equivalent to cancellation; accordingly the passengers concerned could obtain compensation, notwithstanding the legislature’s apparently deliberate exclusion of compensation for delay.

³⁷ Commission Implementing Regulation (EU) No 577/2013 (OJ L 178, 28.6.2013 at 109): <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32013R0577:EN:NOT>.

³⁸ Directive 2001/37/EC (OJ L 194, 18.7.2001 at 26): <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0037:EN:NOT>.

³⁹ OJ L 190, 18.7.2002 at 1: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002F0584:EN:NOT>.

⁴⁰ Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633.

⁴¹ OJ L 46, 17.2.2004 at 1: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004R0261:EN:NOT>.

⁴² Joined Cases C-402/07 and C-432/07 *Sturgeon* [2009] ECR I-10923.

But in fact most modern acts do contain definitions of the key terms. The Roaming Regulation for example sets out 17 definitions of its own but also refers to the definitions given in 3 other acts. While common lawyers may rejoice to find growing numbers of definitions in EU acts, lawyers from other systems are puzzled or troubled by the development. As long ago as 1992 the French Conseil d'état in a report on the impact of European law expressed its surprise that it should be felt necessary to define something as self-evident as milk.⁴³

In any reference to another EU act it is now standard practice to identify precisely the article and, where appropriate, the paragraph rather than leaving vague references to “set out in Regulation 531/2012” or even “set out in other EU provisions”. This is in accordance with Guideline 16 which states that ‘References shall indicate precisely the act or provision to which they refer’.

5.3. More detailed rules

In many early legislative acts the Commission was left a very wide discretion in implementing EU legislation. Various explanations might be offered:

- a cultural approach in which it was taken for granted that an executive should enjoy wide powers,
- those drafting the proposal for legislation in the Commission would welcome unfettered discretion,
- lack of awareness amongst non-specialised drafters of a possible issue, or mere oversight.

Now the TFEU itself stipulates that “the objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative acts” (Article 290).

Transitional provisions were, in the past, sometimes an afterthought, or left to the discretion of the Commission. Now they are generally regarded as part of the standard articles to be included in a legislative act and are indeed provided for in the drafting rules.⁴⁴

In the past drafters were perhaps too inclined to rely on the doctrine of implied repeal and not to make express provision for repeal of any earlier acts superseded by the new act. The drafting rules now call for the express repeal of acts made redundant by a new act,⁴⁵ and it is

⁴³ Rapport public 1992, Le droit communautaire (Etudes et documents, n. 44).

⁴⁴ Point 15.1.5 of the JPG includes in the standard structure of the enacting terms ‘rules for transition from the old system to the new’. And Guideline 20 states:

Provisions laying down [...] transitional provisions (in particular those relating to the effects of the act on existing situations) and final provisions [...] shall be drawn up in precise terms.

⁴⁵ Guideline 21 states:

Obsolete acts and provisions shall be expressly repealed. The adoption of a new act should result in the express repeal of any act or provision rendered inapplicable or redundant by virtue of the new act.

now standard practice to include amongst the final provisions an article repealing a list of earlier acts.

Another example of the approach of spelling things out relates to provisions on entry into force. Article 297 TFEU provides a default date of entry into force of EU legislative acts of 20 days after publication if no other date is specified. In fact, though, almost all regulations and directives specify the date of entry into force, even if it is 20 days after publication.⁴⁶

The combination of the above-mentioned factors perhaps makes EU legislation more complex and wordy. To counterbalance the difficulties these features pose for readers, efforts have been stepped up to make it more comprehensible.

5.4. Reader friendly

Various steps have been taken to make EU legislation more reader-friendly.

One was the introduction of short titles for EU acts. The full titles have tended to become longer than in the early days for at least two main reasons:

- there are now already over 20,000 acts in force⁴⁷ and, according to the JPG, point 8.3, it is necessary for the title of each act to be different from the titles of other acts in force;
- EU legislation is moving into ever more complex areas.

In 1998, therefore, Guideline 8 provided for the possibility of giving acts short titles to make them easier to refer to.⁴⁸ In fact, though, little use has been made of this possibility, partly no doubt because the JPG largely discourages their use in its exposition of the Guideline.⁴⁹

Another explanation is that short titles do not work so well in a system with 24 languages: what is short in one language may be rather longer in another and short titles will not be so

⁴⁶ See also Guideline 20.

⁴⁷ According to the Directory of EU legislation in force (<http://eur-lex.europa.eu/en/legis/latest/index.htm>).

⁴⁸ See Guideline 8 in the Interinstitutional Agreement of 1998 (OJ C 73, 17.3.1998 at 1): '... Where appropriate, the full title of the act may be followed by a short title'.

⁴⁹ See JPG points 8.7 and 8.8:

A short title for a legislative act is less useful in Community law — where acts are identified by a combination of numbers and letters (for example '1999/123/EC') — than in systems which do not have such a system of numbering. ...

The following rules apply to a short title:

it is created when the act is adopted, in anticipation of its future utility, in view of the importance of the act; it is not recommended where a number of related acts exist in the same field, when it could cause confusion;

it does not replace use of the full title when the act is referred to for the first time in a later act;

its use is not compulsory (the use of letters and numbers could be a more convenient and more certain means of reference, depending on the circumstances); ...'

if it is used, it is the only permitted abbreviation of the title of the act in question.

recognisable from one language to another, while numbers are generally readily recognisable across language boundaries.

Formerly the recitals were hard to read because they consisted of a series of incomplete sentences, each introduced by the word “whereas” and each ending in a semi-colon. Also if there was a reference for example to “the 28th recital”, all users would have to count the recitals for themselves to identify the one in question. The drafting rules now provide that the recitals should consist of numbered points, each of which may consist of a number of complete sentences ending in a full stop.⁵⁰

A standard pattern for the order of the enacting terms had evolved from the early years but it was not formalised until 1998. Now the standard structure of the articles is set out in the drafting rules.⁵¹

Headings for articles are useful to guide readers round longer acts. Even though there is no mention of such headings in the drafting rules, it has now become almost standard practice to give a heading for each article in all longer legislative acts.⁵²

5.5. Concision

Guideline 4 states: “Provisions of acts shall be concise Overly long articles and sentences ... should be avoided”. The JPG elaborates (in points 4.4 to 4.5.2):

Sentences should express just one idea, whilst an article must group together a number of ideas having a logical link between them. The text must be split into easily assimilated subdivisions

Each article should contain a single provision or rule. Its structure must be as simple as possible.

It is not necessary for interpretation, nor desirable in the interest of clarity, for a single article to cover an entire aspect of the rules laid down in an act. It would be far better to deal with that aspect in several articles grouped together in a single section

Particularly in the initial stages of drafting an act, articles should not be too complex in structure.

⁵⁰ See Guideline 11 and points 11.1 to 11.4 of the JPG.

⁵¹ See Guideline 15:

As far as possible, the enacting terms shall have a standard structure (subject matter and scope — definitions — rights and obligations — provisions conferring implementing powers — procedural provisions — implementing measures — transitional and final provisions).

The structure is elaborated in point 15.1 of the JPG.

⁵² Most unfortunately the practice was not followed for the drafting of the EU Treaties. Jean-Claude Piris, the long-serving head of the Council Legal Service at the time of the Lisbon negotiations, has written that they had to be deleted because it proved too difficult to agree on them, highlighting a recurrent problem in EU drafting (J-C. Piris, *The Treaty of Lisbon* (Cambridge University Press, Cambridge: 2010) at 42.

In EU practice articles are divided into paragraphs and subparagraphs. However, in compliance with Guideline 4 and the corresponding points of the JPG most drafters now generally keep articles to fewer paragraphs than before.

Efforts are made to keep sentences short and simple, as suggested by the JPG (points 4.4 and 5.2.2), but cultural and linguistic sensitivities come into play. From the Nordic countries criticism is voiced that the sentences in EU legislation are much longer than in domestic legislation⁵³ but countries further south counter that a succession of staccato sentences is ugly in their languages.

5.6. Numbering

Formerly paragraphs and subparagraphs were often unnumbered but modern practice is generally to number them. This makes it easier to refer precisely to part of a provision such as “Article 3(2)”, rather than “the second paragraph of Article 3”, and saves the reader having to count for example up to “the eighth paragraph of Article 3”. Since numbered paragraphs and subparagraphs must be drafted as independent units of the article⁵⁴ they can be amended without the risk of the structure of the whole article being undermined.

If a provision includes a list, Guideline 15 calls for each item to be numbered, rather than left as an unnumbered indent.

Generally the practice is to use a different numbering system for each level of division or subdivision of the articles. As a rule the Arabic numbering system will be used first (1, 2, 3, ...), then the lower-case letters of the Latin alphabet ((a), (b), (c), ...)⁵⁵ and finally small Roman numerals ((i), (ii), (iii), ...).

5.7. Accessible language

Guideline 1 calls for acts to be drafted simply and the JPG (point 1.4.1) elaborates:

The author should attempt to reduce the legislative intention to simple terms, in order to be able to express it simply. In so far as possible, everyday language should be used.

The JPG also cautions against jargon, vogue words, Latin expressions used in a sense other than their generally accepted legal meaning, expressions linked to one particular language, and expressions too closely linked to a national legal system (points 5.2.4 to 5.3.2).

⁵³ In a lecture in Brussels on 26.10.2006 Aino Piehl of the Institute for the Languages of Finland reported that the average number of words per sentence in Finnish legislation had fallen from 23.1 in the 1990s to 14.9 in the 2000s. However, according to a study she carried out in 2006 the average number of words in a sentence in EU legislation in the years 1992 to 2002 was still 23 (http://ec.europa.eu/dgs/legal_service/seminars/fi_piehl20061026.pdf).

⁵⁴ See row III. of the table following point 15.4 of the JPG.

⁵⁵ Letters are not suitable for long lists since the alphabets of the 24 official languages do not correspond completely.

Very little Latin is used in modern EU drafting, one notable exception being *mutatis mutandis* which is still occasionally found useful.

Archaic words are not such a problem in EU drafting as they are in certain national legal systems, partly because the EU system is a relatively young one. Another explanation might be that much of the drafting work is not done by drafting experts, but by technical experts who are working in a foreign language in which they simply do not know archaic words. Two glaring examples do, however, appear in every preamble, the preamble being the most formal part of the act and using formulas unaltered since the 1950s. The standard citation of the legal basis of most acts includes the word “thereof”. It is rarely used elsewhere in EU drafting. The word “whereas” introduces the recitals. Formerly it would be repeated at the beginning of each phrase in the recitals but now it appears only once in each act.

The standard method of expressing obligations in EU drafting is still by using “shall” and that usage is expressly indicated in the JPG (point 2.3.2). Some efforts are being made to reduce the use of “shall” but any changes are slow because they require agreement between all the EU institutions and have implications for all the languages which have established renderings for “shall”, “must”, “should”, “is to” and so forth.

5.8. Switch to English as drafting language

All EU texts were formerly drafted in French and the English versions were often perceived as clumsy because of the concern to be faithful to the French original. Some of the early expressions have now been superseded by ones easier on the English ear: for example, “regulation of the Commission” has become “Commission regulation” and “sheepmeat” has become “mutton and lamb”.

Others have become hallowed by use, such as “college” to describe the body of Commissioners forming the Commission and “configuration” to describe each of the different groupings of ministers making up the Council, and “bovine animals”.

In fact, now that most drafts originate in English it is the other languages that face problems. For example, the English language has a large number of near synonyms whose nuances cannot be reproduced in languages with smaller vocabularies (for example not all languages can make the distinction between “government” and “governance” or between “efficiency”, “effectiveness” and “efficacy”). And the English language lends itself to new coinages such as “mainstreaming” or “benchmarks” which are not easily reflected in other languages.⁵⁶

⁵⁶ See, for example, Council Resolution of 2 December 1996 on mainstreaming equal opportunities for men and women into the European Structural Funds (OJ C 386, 20.12.1996 at 1) and Commission Decision 2011/638/EU on benchmarks to allocate greenhouse gas emission allowances free of charge to aircraft operators (OJ L 252, 28.9.2011 at 20).

5.9. Gender neutrality

The classic approach in the English texts of EU legislation was that grammatically a person was masculine. In the last decade or so some variations on that approach have appeared. That classic approach is still visible in the drafting of the basic treaties as last amended by the Lisbon Treaty signed in December 2007. For example, Article 18 TEU provides:

The European Council ... shall appoint the High Representative [for Foreign Affairs and Security Policy, who heads the European External Action Service (EEAS)]
The High Representative shall conduct the Union's common foreign and security policy. *He* shall contribute by *his* proposals to the development of that policy, which *he* shall carry out as mandated by the Council (*emphasis added*).

However, Decision 2010/427/EU on the organisation of the EEAS, which implements the Treaty provision, provides that the EEAS is to

support the High Representative in fulfilling *his/her* mandate to conduct the Common Foreign and Security Policy, ... to contribute by *his/her* proposals to the development of that policy, which *he/she* shall carry out as mandated by the Council (*emphasis added*).⁵⁷

It may be noted that the negotiating language for the Lisbon treaties was French, while Decision 2010/427/EU was almost certainly originally drafted in English. The rather clumsy “he/she” was simply ignored in the French and German versions. That highlights one of the constraints on development of EU drafting practices: EU legislation is authentic in all 24 official languages and all drafting has to take full account of the principle of multilingualism which is reiterated in Guideline 5. That is why the gender-neutral drafting technique adopted in some English-speaking countries of using the third-person-plural pronoun and possessive adjective forms as singular forms would cause problems in EU drafting, although an isolated instance is to be found in Article 16 TFEU: “Everyone has the right to the protection of personal data concerning them”.

The *Charter of Fundamental Rights* (which is not part of the Treaties but is expressly referred to in Article 6 TEU) sets out to be gender neutral in the English and German versions for example. This is reflected differently in the two versions, with the English version using “citizen” and “he and she” (as in “Every citizen of the Union has the right to vote ... in the Member State in which he or she resides” – Art. 39), and the German version using “*die Unionsbürgerinnen und Unionsbürger*” (female citizens and male citizens) putting the feminine before the masculine.

⁵⁷ Council Decision 2010/427/EU (OJ L 201, 3.8.2010 at 30): <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32010D0427:EN:NOT>.

There are interesting differences here between the original French version published in 2000⁵⁸ and the version now printed in the Consolidated Treaties,⁵⁹ suggesting a retreat from a gender-neutral approach to strict application of the grammar rules. Article 39 again provides an example:

Original version: “Tout citoyen ou toute citoyenne de l'Union a le droit de vote et d'éligibilité aux élections au Parlement européen dans l'État membre où il ou elle reside” (literally “Each male citizen or each female citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State in which he or she resides”).

Current version: “Tout citoyen de l'Union a le droit de vote et d'éligibilité aux élections au Parlement européen dans l'État membre où il reside” (literally “Each citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State in which he resides”).

Yet another approach can be seen in the Staff Regulations, which lay down the terms of service of staff of the EU institutions and include the following provision:

Any reference in these Staff Regulations to a person of the male sex shall be deemed also to constitute a reference to a person of the female sex, and vice-versa, unless the context clearly indicates otherwise.⁶⁰

In 2008, the European Parliament issued its own gender-neutrality guidelines which suggest various ways to write in a gender-neutral manner but add:

In formal contexts (legislative acts, Rules of Procedure) it may not always be possible to avoid the occasional generic use of ‘he’ or ‘his’, but strenuous efforts should be made to keep such use to a minimum.⁶¹

5.10. Simplification

Beyond pure drafting issues the EU institutions are making efforts to simplify the existing body of legislation and to make it more accessible.

Consolidated texts of all EU acts that have been amended are published on the EUR-Lex site offering up-to-date texts of the enacting terms of all EU acts.⁶² They are generally reliable but they are not authentic.

⁵⁸ OJ C 364 , 18.12.2000 at 1.

⁵⁹ Article 6(1) TEU states:

The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

⁶⁰ Article 1c, OJ L 56, 4.3.1968, p. 1 (English special edition: Series I Volume 1968(I) p. 30).

⁶¹ *Gender-neutral drafting*, at 9 (first issued on 19.5.2008):

[http://www.europarl.europa.eu/RegData/publications/2009/0001/P6_PUB\(2009\)0001_EN.pdf](http://www.europarl.europa.eu/RegData/publications/2009/0001/P6_PUB(2009)0001_EN.pdf).

Codification and recasting are the methods used to adopt new authentic texts for acts that have been amended and to incorporate all the necessary changes. Agreements have been drawn up between all the EU institutions to govern the processes and to try to speed them up.⁶³ Nonetheless the processes still prove to be too time-consuming in a system operating in 24 languages and involving three EU institutions and 28 Member States and they have failed to make the progress hoped for.

The EU institutions are considering new ways to make acts that have been amended more accessible, either by consolidation or increased use of recasting.⁶⁴

In certain sectors the Commission is setting out to update, rationalise and simplify legislation, at the same time seeking to reduce the burden on business, by repealing all the old acts and replacing them by new modern-style rules.⁶⁵ The focus is on areas where EU rules have been in existence since the beginnings of the EU some 50 years ago, such as agriculture and fisheries,⁶⁶ and also areas where the rules have grown in piecemeal fashion and have become excessively multi-layered and complex.⁶⁷ The Commission is also combing through the statute book to identify obsolete acts to be repealed.

In December 2012 the Commission initiated a Regulatory Fitness and Performance Programme to create “a simple, clear, stable and predictable regulatory framework for businesses, workers and citizens”.⁶⁸ The aim was to review the entire stock of EU legislation to identify burdens, inconsistencies, gaps or ineffective measures. It has recently taken stock of the results of its efforts to simplify EU regulation and outlined its future plans in this field,⁶⁹ stating:

the Commission has made a concerted effort over the past few years to streamline legislation and reduce regulatory burdens. Since 2005, the Commission approved 660 initiatives aimed at simplification, codification or recasting [...]. More than 5,590 legal acts have been repealed. ...

The way in which the Commission now prepares regulation has changed significantly. Impact assessments and stakeholder consultation are systematically applied across the Commission. Red tape has been reduced by well above the 25% target set out in the

⁶² <http://eur-lex.europa.eu/en/consleg/latest/index.htm>.

⁶³ Codification, OJ C 102, 4.4.1996 at 2; recasting, OJ C 77, 28.3.2002 at 1.

⁶⁴ See COM(2013)685, at 10 and fn. 22.

⁶⁵ http://ec.europa.eu/dgs/secretariat_general/simplification/index_en.htm.

⁶⁶ See: http://ec.europa.eu/governance/better_regulation/simplification_en.htm#_sectoral.

⁶⁷ Such as the animal health rules which are set out in 50 legislative acts and some 400 pieces of secondary legislation, some of them adopted as early as 1964 (http://ec.europa.eu/food/animal/animal-health-proposal-2013_en.htm) and the plant health rules where the 70 existing acts are to be replaced by 5 new ones: see http://ec.europa.eu/dgs/health_consumer/pressroom/animal-plant-health_en.htm.

⁶⁸ COM(2012)746.

⁶⁹ Communication from the Commission on Regulatory Fitness and Performance (REFIT), COM(2013) 685.

Administrative Burden Reduction Programme. From start to finish Smart Regulatory principles motivate Commission action. But the process needs constant reinvigoration to keep up the momentum”.⁷⁰

One of the means to be used to support that process is better evaluation of regulation, both before and after its adoption.⁷¹

6. Final words

EU drafting has certainly evolved since the 1950s, but its development is complicated by the decentralised drafting process, the multiplicity of persons intervening in the process and the diverse rules applying to it.

There is no single EU drafting style as different styles have taken root in different sectors and there is no powerful unifying drafting force. Nor is the approach of the three EU institutions involved wholly uniform.

That is why drafting rules have an important part to play in the EU drafting process. Sometimes new drafting rules bring about changes in style directly (as for the numbering of recitals) or else they codify practices that are already discernible (as for the use of definitions). Sometimes the drafting rules seek to bring about a change but to little avail (as for short titles). And some changes in EU drafting style happen without any alteration to the drafting rules.

The pace of change is slow because of the general requirement for drafting solutions to work in all 24 official languages. But then we have seen in the case of gender neutrality that some solutions are asymmetrical, differing from one language to another. That highlights the importance of taking account of the differing linguistic and cultural sensitivities across the Member States of the EU and the complexity that can result.

⁷⁰ COM(2013) 685, at 2. See also the list of initiatives in the annex to that document.

⁷¹ COM(2013) 686.

Achieving technological neutrality in drafting legislation

Geoff Lawn¹



Abstract

Much legislation still mandates or contemplates the use of written material and processes that require paper documents. The implementation of the UNCITRAL Model Law on Electronic Commerce through Electronic Transactions Acts in many jurisdictions has permitted the use of electronic technologies as an alternative to paper. While legislation of this kind may be useful in the context of commercial transactions, it may not always clearly apply where government processes are involved.

This paper explores the problem of drafting legislation to allow for both paper and electronic processes, particularly in the governmental context. The key questions covered include:

- *to what extent does the use in legislation of many apparently paper-centric terms (such as document, written, signature, sealed and certified) inhibit the implementation and use of electronic technologies?*
- *what role can interpretation legislation and Electronic Transactions Acts play?*
- *can judges, through the application of statutory interpretation principles, help?*
- *is it possible to future-proof legislation to cater for ongoing developments in electronic technologies?*

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Introduction

This paper explores some of the implications of the digital revolution for the drafting of legislation. In particular, given the speed with which technology develops, the paper examines possible ways of drafting provisions so that they do not exclude particular technologies from their coverage or unduly hamper innovation by locking in particular technologies.

The paper focuses on uses of technology in circumstances commonly encountered in everyday drafting. It does not attempt to examine technology-neutral drafting in the context of complex legislative schemes such as those designed to regulate particular commercial practices or businesses.²

Digital Revolution

It is said that we live in a new “ICE” Age: here ICE stands for “the Internet Changes Everything”.³

According to Larry Downes⁴, there are 3 laws of digital life that, together, comprise the “laws of disruption”. He states that:

Ten years after the start of the Internet revolution, however, the inability of rules optimized for an analog world to keep the peace in the digital age has paralyzed much of the legal system. Conflicts over information use, acutely visible in thousands of lawsuits brought by the music industry against its own customers, will soon be joined by nascent fights over privacy, digital civil liberties, technology standards, network control, information crime, and global commerce. As the distance between innovation and the law that regulates it has widened over the past decade, the most alarming result is the speed with which tensions between the two have increased.

These struggles are side effects of the Law of Disruption. . . . the Law of Disruption is a simple but unavoidable principle of modern life: technology changes exponentially, but social, economic, and legal systems change incrementally. The technology we invent has the potential to change the world at an accelerating pace, but humans can no longer keep up. As the gap between the old world and the new gets wider, conflicts between social, economic, political, and legal systems honed in the age of steam

² For an examination of these more complex issues, see Reed, Chris *The Law of Unintended Consequences – Embedded Business Models in IT Regulation* [2007] JILT 11, available at http://www.bailii.org/uk/other/journals/JILT/2007/reed_2.html.

³ See further: New Zealand Law Commission, Issues Paper 27, *The News Media meets 'New Media': Rights, Responsibilities and Regulation in the Digital Age* (Wellington: 2011), Chapter 1 – The World Wide Web. Available at: <http://ip27.publications.lawcom.govt.nz/>.

⁴ Larry Downes, *The Laws of Disruption: Harnessing the New Forces that Govern Life and Business in a Digital Age* (Basic Books, Philadelphia: 2009).

engines and a generation raised on cell phones, iPods, and video games become more acute and more dangerous.⁵

I applied for a renewal of my New Zealand passport a few months ago. The whole process reminded me of how differently we now often interact with government agencies compared with only a few years ago. The first time I renewed my passport, I visited the relevant agency and obtained a long and rather complex form from the front desk. Having had several passport-size photographs taken at the local camera shop and waited for them to be developed, I filled in the form and got a friend to endorse the photographs and fill in their section of the form. I then revisited the government agency and handed in my forms together with the relevant fee (in cash). My renewed passport was mailed to me some weeks later.

This time, the process was almost totally electronic. I visited the same government agency's website and found the "renew passport" section. I had the option of downloading the relevant form, or applying online. I started an online application. This involved establishing an "igovt" logon which enabled me to use the same logon to access various New Zealand government online services.⁶

Having obtained from the local camera shop an updated photograph in digital format (which they emailed to me), I was ready to begin the renewal process. Using an online form together with my "igovt" logon, I entered my personal details, the relevant details of a New Zealand friend living in Perth, and uploaded my digital photograph. And of course my credit card details.

A few days later, my new passport was delivered to me in Perth by courier. I was impressed by the speed, simplicity and convenience of the whole process, especially as I was renewing a New Zealand passport from Australia.

Apparently New Zealand is the only country in the world where people can renew their passports entirely online. But in many other countries a number of government-provided or government-related services or processes that were previously paper-based are now conducted entirely or partly by electronic means.

The legislative process itself has been swept up in these changes. On June 30, 2000, US President Bill Clinton signed into law the *Electronic Signatures in Global and National Commerce Act* ("E-SIGN"). Although he signed it through a digital signature (actually a smart card encrypted with numbers), he also signed using a normal written signature in case there was any question of the validity of the electronic signature.

⁵ Downes, *ibid.* at 2-3.

⁶ This service is now known as "RealMe": see <https://www.realme.govt.nz/>.

However, in May 2011, President Obama signed an extension of the *PATRIOT Act* into law while in Europe. The President placed his signature on the Bill using an autopen.⁷ This is apparently the first time that a Bill was signed into law using this technology.⁸

The terminology of paper – a few questions

Previously, I would have applied for my passport renewal on a paper form and signed it.

Can a form that is filled in electronically using drop-down lists be called a “form”? Is the application even made in writing?

I did not sign my application. I ticked a box that acknowledged that the information in the form was true. Was this acknowledgement a “signature”?⁹

These are all terms associated with paper or “hard copy”.

To highlight the issues involved, let’s take another example of an area where paper has traditionally been the mandated medium — court processes.

Paper-centric terms such as “document” and “writing” are synonymous with this activity, as are the processes that surround them. So documents (sometimes multiple copies) are lodged or filed. Written notice must be served on the parties. Documents must be sealed or certified. Reasons for judgment must be recorded in writing. Warrants are issued. Originals or certified copies are admissible in evidence.

Physical documents and physical processes are assumed. The same is true of related concepts such as an address for service.

Can we just continue to draft using these terms and concepts, confident that they are flexible enough to accommodate the new digital world? Or do we need to adopt a different approach? A “technology-neutral” approach?

For example, if a law requires service of a document on a party to a proceeding, can I serve the document by emailing it or bringing it to the party’s attention on their Facebook wall?¹⁰

⁷ For an explanation of the autopen, see <http://blogs.smithsonianmag.com/design/2013/01/president-obamas-autopen-when-is-an-autograph-not-an-autograph/>.

⁸ See: <http://www.businessofgovernment.org/blog/business-government/electronic-signatures-and-us-whats-written-name>.

⁹ On what constitutes a signature, see UK Law Commission, *Electronic Commerce: Formal Requirements in Commercial Transactions: Advice from the Law Commission* December 2001, at 12-16, available at: <http://lawcommission.justice.gov.uk/publications/795.htm>.

¹⁰ For examples of where service of bankruptcy notices and other documents by email and Facebook have been permitted, see Scott Kiel-Chisholm *Catch me if you can: The effective service of bankruptcy documents in a changing world* (2012) 18 *Insolvency LJ* 197 at 202. In 2009, the UK High Court permitted an injunction to be served on an anonymous blogger via Twitter (see http://www.abajournal.com/news/article/uk_high_court_uses_twitter_to_serve_injunction_on_anonymous_blogger/).

Some terms/principles

Before examining these questions, it is necessary to define some key terms and principles.

The principle of *technology neutrality* means that no one technology is favoured over any other. So, for example, where the law imposes rules, the principle would mean that the rules should neither require nor assume a particular technology.¹¹

One commentator identifies as an aim of this principle the future-proofing of the law.¹² The most obvious outcome is to achieve sustainability so that the law does not need to be constantly revised to cope with technological change. A less obvious outcome (which is more a concern for policymakers than legislative counsel) is laws that are flexible enough that the future development of technology is not hindered.

A subset of the principle of technology neutrality is *media neutrality*: no one medium (for example, paper) should be favoured over any other, so that the law works the same regardless of the medium of communication used. As one commentator puts it, “the media chosen to convey information with legal effect should be interchangeable without loss of effect.”¹³

A closely-related concept is *functional equivalence*. This is the ability of different technologies to perform the same function. An example is the use of either a signature or a PIN number to complete a credit card transaction. Both mechanisms perform the same function – to authorise the transaction – on the assumption that a person’s ability to reproduce the specimen signature on the card, or a person’s knowledge of the card’s PIN number, sufficiently identifies the person as the cardholder.

Finally, there is the principle of *equivalence of risk*.¹⁴ This principle might be more clearly expressed as *equivalence of reliability*. In the context of electronic and paper documents, it means that a paper document is not to be regarded as any more reliable than an electronic document. So a person relying on an electronic document should not assume greater risk of the document not being authentic than if they had relied on its paper equivalent. They should be able to have the same confidence in both technologies.

¹¹ *Framework for Global Electronic Commerce*, US Government, 1 July 2007, available at: <http://clinton4.nara.gov/WH/New/Commerce/read.html>.

¹² Chris Reed, *Taking Sides on Technology Neutrality* (2007) 4:3 *SCRIPTed* 263. Available at: <http://www.law.ed.ac.uk/ahrc/script-ed/vol4-3/reed.asp>.

¹³ John D. Gregory, *The Law Goes Electronic* [2009] *Annual Review of Civil Litigation* 127. Available at: <http://www.euclid.ca/arcl2009.pdf>.

¹⁴ *Ibid.*.

Is technology-neutral legislation even possible?

*Trying to predict the future is like trying to drive down a country road at night with no lights while looking out the back window.*¹⁵

Drafters are obviously no better at predicting the future than anyone else. Nevertheless, legislation is generally forward-looking and is “always speaking” so as to apply to future circumstances as they arise.

And as the learned authors of *Statute Law in New Zealand* state, “In our legal system statutes, unlike contracts, cannot expire through disuse, obsolescence, or ‘frustration’.”¹⁶

Given the potential longevity of legislation, drafters must give at least some thought as to how to prevent legislation from becoming ineffective over time.

The pace of change in technology is particularly challenging. Indeed some commentators doubt that legislative counsel and language are up to the task.

Language cannot be completely technology-neutral: it is impossible to draft legislation with sufficient precision and clarity that addresses every possible future technical variation. ...

Drafters... are limited by foresight. If technological change is unpredictable, it is difficult to allow for it in advance.¹⁷

Difficulties and impossibilities are not unknown to legislative counsel. I think that sometimes we are like Charles-Alexandre de Calonne, Louis XVI’s Minister of Finance. Marie Antoinette is reputed to have asked him something, expecting it to be done but conceding that it might be difficult. He replied: “If it is only difficult, it is done; if it is impossible, we shall see.”¹⁸

Some recent New Zealand legislation (now repealed) in the context of election funding attempted to be right up to date with the latest technology, in this case a “blog”. The *Electoral Finance Act 2007* section 5 defined “election advertisement”, and excluded from the definition:

...the publication by an individual, on a non-commercial basis, on the Internet of his or her personal political views (being the kind of publication commonly known as a blog).

¹⁵ Peter J. Drucker.

¹⁶ J.F. Burrows and R.I. Carter, *Statute Law in New Zealand*, 4th ed. (Lexis Nexis, Wellington: 2009) at 607.

¹⁷ L. Bennett Moses, “Understanding Legal Responses to Technological Change: the Example of In Vitro Fertilization” (2005) *Minn J L Sci & Tech* 505, at 578 and 607. See also L. Bennett Moses, “Adapting the Law to Technological Change: A Comparison of Common Law and Legislation” (2003), 26(2) *U.N.S.W.L.J.* 394. Available at <http://www.austlii.edu.au/au/journals/UNSWLawJl/2003/33.html>.

¹⁸ Michaud J.F., *Biographie Universelle, ancienne et moderne* vol. 6, at 567.

So let us see what we can do to ensure, as far as we can, that what we are drafting is “technology neutral”.

Do we have to do anything special, or can we rely on existing mechanisms that solve the problem?

If there are no existing mechanisms, what drafting approaches can be adopted?

The remainder of this paper considers the following:

- interpretation legislation
- electronic transactions legislation
- statutory interpretation matters
- specific drafting approaches.

Interpretation legislation

Some of the terms where the issue of technological neutrality tends to arise are often defined in interpretation legislation. Commonly defined terms are “document” and “writing” (and its variants, such as “written”).

For example, the Western Australian *Interpretation Act 1984* section 5 has the following definitions:

document includes any publication and any matter written, expressed, or described upon any substance by means of letters, figures, or marks, or by more than one of those means, which is intended to be used or may be used for the purpose of recording that matter;

publication means —

- (a) all written and printed matter; and
- (b) any record, tape, wire, perforated roll, cinematograph film or images or other contrivance by means of which any words or ideas may be mechanically, electronically, or electrically produced, reproduced, represented, or conveyed; and
- (c) anything whether of a similar nature to that described in paragraph (b) or not, containing any visible representation, or by its form, shape, or in any manner capable of producing, reproducing, representing, or conveying words or ideas; and
- (d) every copy and reproduction of a publication as defined in paragraphs (a), (b) and (c);

writing and expressions referring to writing include printing, photography, photocopying, lithography, typewriting and any other modes of representing or reproducing words in visible form;

The New Zealand *Interpretation Act 1999* does not define “document”, but section 29, as originally enacted, defined “writing” in terms that expressly included electronic means as follows:

- “Writing” includes representing or reproducing words, figures, or symbols —
- (a) in a visible and tangible form by any means and in any medium;
 - (b) in a visible form in any medium by electronic means that enable them to be stored in permanent form and be retrieved and read.

That definition was replaced with the following in 2003 by the New Zealand *Electronic Transactions Act 2002*:

writing means representing or reproducing words, figures, or symbols in a visible and tangible form and medium (for example, in print).

The Commonwealth *Acts Interpretation Act 1901* (as extensively amended in 2011), contains definitions of “document” and “record” and “writing” in section 2B. They are as follows:

document means any record of information, and includes:

- (a) anything on which there is writing; and
- (b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them; and
- (c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else; and
- (d) a map, plan, drawing or photograph.

record includes information stored or recorded by means of a computer.

writing includes any mode of representing or reproducing words, figures, drawings or symbols in a visible form.

Taken together, the definitions of “document” and “record” clearly contemplate electronic documents. This is not so obvious from the WA definitions.

While “document” and “writing” can be widely defined and apparently capable of application to electronic matter, they of course must also take their meaning from the context in which they appear in a particular legislative instrument. Other terms may expressly or by implication limit their meaning to paper, or at least tangible material. If a document is required to be sent by post, this obviously excludes the emailing of an electronic version of the document.

How we send things to people has clearly changed as a result of technological developments. The Western Australian *Interpretation Act 1984* section 76 provides that where a written law authorises or requires a document to be served (whether the word “serve”, “give”, “deliver”, “send” or other similar words or expressions are used), without specifying how service is to be effected, then service may be effected by personal delivery, by post or by leaving it at the person’s home or place of business.

The provision clearly does not permit service by electronic means. This was found to be too limiting in certain contexts, and at least one enactment seeks to expand the ways in which documents may be served. The *Fines, Penalties and Infringement Notices Enforcement Act 1994* section 5A (inserted in 2008) provides that (with certain exceptions) information, documents and notices under the Act may be given to or served on a person, with that person’s consent, by fax or email.

Even in 2008, fax and email were not the only means of providing information or documents to people in electronic form. For example, the courts have permitted documents to be served by Facebook and Twitter.¹⁹ Because of its specificity, the provision would not permit service by those means, or by text message.

Interpretation legislation commonly deals with compliance with prescribed or approved forms. The Queensland *Acts Interpretation Act 1954* section 49(1) provides that strict compliance with a form is not necessary and substantial compliance is sufficient. The New Zealand *Interpretation Act 1999* section 26 provides that a form is not invalid just because it contains minor differences from a prescribed form, as long as it still has the same effect and is not misleading. The Western Australian *Interpretation Act 1984* section 74 is to similar effect.

But what if the form is not in a printed format, but is entirely electronic, like the one I used for my passport renewal application? Those provisions are unlikely to be of any assistance. New Zealand legislation contains a novel provision that might help. It is located in the *Electronic Transactions Act 2002*,²⁰ rather than the *Interpretation Act 1999*. It provides as follows:

¹⁹ See above n 10.

²⁰ The Canadian *Personal Information Protection and Electronic Documents Act*, RS 2000, c. 5, subsection 35(1) is in similar terms, and presumably inspired the New Zealand provision.

37. Authority to prescribe electronic forms and requirements for using electronic forms

- (1) A person who is authorised to prescribe a form under an enactment is authorised —
 - (a) to prescribe an electronic form for the purposes of that enactment; and
 - (b) to prescribe requirements in connection with the use of that electronic form, including requirements for its electronic signature.
- (2) Nothing in subsection (1) authorises a person to require the use of an electronic form under any enactment.

Electronic transactions legislation

Model Legislation

Many jurisdictions have enacted legislation that deals specifically with the legal status of electronic forms of communicating and storing information, based on or influenced by the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce.²¹ The Model Law was adopted by the United Nations General Assembly in December 1996.

The Model Law is designed to offer a set of internationally acceptable rules for overcoming certain legal barriers to electronic commerce, such as requirements that certain documents be in writing, that a written document be signed, the need to retain original documents and requirements relating to notices and the service of documents.²²

In Australia, the Model Law has been implemented through the enactment of the *Electronic Transactions Act 1999* (Commonwealth) and its various State and Territory analogues.²³ These laws were significantly updated in the last couple of years, principally to enable

²¹ The UNCITRAL website lists jurisdictions that have enacted legislation based on or influenced by the Model Law on Electronic Commerce: See: http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model_status.html.

²² See also the UNCITRAL Model Law on Electronic Signatures: http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2001Model_signatures.html. And see also United Nations Commission on International Trade Law, *Promoting confidence in electronic commerce: legal issues on international use of electronic authentication and signature methods* (United Nations, Vienna: 2009). Available at: http://www.uncitral.org/pdf/english/texts/electcom/08-55698_Ebook.pdf.

²³ *Electronic Transactions Act 2001* (ACT), *Electronic Transactions Act 2000* (NSW), *Electronic Transactions (Northern Territory) Act 2000* (NT), *Electronic Transactions (Queensland) Act 2001* (Qld), *Electronic Transactions Act 2000* (SA), *Electronic Transactions Act 2000* (Tas), *Electronic Transactions (Victoria) Act 2000* (Vic), *Electronic Transactions Act 2011* (WA).

Australia to accede to the United Nations Convention on the Use of Electronic Communications in International Contracts 2005. Most jurisdictions merely amended their Acts. Western Australia chose to replace the existing Act rather than amend it.

The New Zealand equivalent is the *Electronic Transactions Act 2002*. In the same year, South Africa enacted the *Electronic Communications and Transactions Act, 2002*. In Kenya, electronic transactions are provided for in the *Kenya Information and Communications Act, 1998 Part VIA* (as inserted in 2009).²⁴

The Uniform Law Conference of Canada adopted the *Uniform Electronic Commerce Act* in 1999. It is designed to implement the principles of the UNCITRAL Model Law on Electronic Commerce, and like the Model Law was intended to provide a template law on electronic commerce for Canadian jurisdictions to adopt.²⁵ At the federal level, the *Personal Information Protection and Electronic Documents Act* (otherwise known as *PIPEDA*) was enacted in 2000. Part 2, which deals with electronic documents, has as its purpose:

to provide for the use of electronic alternatives in the manner provided for in this Part where federal laws contemplate the use of paper to record or communicate information or transactions.²⁶

All the Canadian provinces (other than Quebec) and the three Canadian territories have also enacted legislation that implements, with some variations, the Uniform Act.²⁷ Quebec followed a slightly different path, preferring to enact a statute that adopts a more detailed approach.²⁸ However, one commentator suggests that the Quebec statute will rarely produce a different legal obligation from the Uniform Act.²⁹

Typical Provisions

Electronic transactions laws typically provide as follows:

- where the law requires information to be in writing, an electronic communication satisfies that requirement;

²⁴ For an African perspective on e-commerce, see the paper by Dr. Nnaemeka Ewelukwa, LL.M. presented at the 1st African Conference on International Commercial Law "Is Africa Ready for Electronic Commerce? A Critical Appraisal of the Legal Framework for Ecommerce in Africa", available at: http://www.acicol.com/temp/Dr_N.pdf.

²⁵ See further Gregory above n. 13. And see also Gregory, John D. *Technology Neutrality and the Canadian Uniform Acts*, paper presented to the 4th International Conference on Law via the Internet, 2002, available at: <http://informationjuridique.ca/docs/confs/2002/gregory.pdf>.

²⁶ SC 2000, c. 5, s. 32.

²⁷ See, for example, British Columbia *Electronic Transactions Act* (S.B.C 2001 c.10), Saskatchewan *Electronic Information and Documents Act* (S.S.2000 c.E-7.22), Yukon *Electronic Commerce Act* (RSY 2002, c 66).

²⁸ *An Act to Establish a Legal Framework for Information Technology*, RSO, c C-1.1.

²⁹ Gregory above n. 13.

- where the law requires a person’s signature, an electronic communication satisfies that requirement;
- a legal requirement to retain information in paper or other non-electronic form is satisfied by retaining an electronic form of the information;
- a legal requirement to provide or produce information in paper or other non-electronic form is satisfied by providing or producing the information in electronic form.

These are very general descriptions of the effect of electronic transactions laws, which usually impose specific requirements relating to the functional equivalence between paper and electronic media. As well, limitations on the scope or application of these laws can impact on the extent to which legislative counsel can rely on them to extend paper-specific terminology to apply to electronic media. Some of these limitations are as follows:

- exclusion of specific documents, requirements or transactions from the law’s coverage – typical exclusions relate to wills, powers of attorney, transactions that require a document to be verified, authenticated, attested or witnessed under a third person’s signature, and documents of title to land;
- limited application because of the need to designate particular laws to which its provisions apply – for example, the Canadian *PIPEDA* Part 2 provisions are only applicable to legislation specified in Schedule 2 or 3, and only 2 Acts have so far been specified; the Manitoba *Electronic Commerce and Information Act* (C.C.S.M. c. E55) Part 2 applies only to Acts and regulations designated by regulation;³⁰
- a requirement that a particular technology be used for certain provisions to apply – for example, the Canadian *PIPEDA* requires the use of a “secure electronic signature”, currently digital signatures created using the Government of Canada’s Public Key Infrastructure (PKI); these sorts of requirements obviously dilute the application of the principle of technological neutrality;
- the need for a party to a transaction to consent to the use of electronic means of doing business – for example, the New Zealand *Electronic Transactions Act 2002* section 16 provides that nothing in Part 3 of the Act requires a person to use, provide, or accept information in an electronic form without that person’s consent;
- express or inherent requirements that effectively limit the application of particular provisions to transactions between private individuals, and exclude governmental-type activities (this is explained in more detail below).

³⁰ See *Electronic Documents Under Designated Laws Regulation*, Man. Reg. 152/2011.

The New Zealand Law Commission recommended that the New Zealand electronic transactions legislation be confined to electronic transactions conducted “in trade”.³¹ The rationale for this recommendation was that this limitation would avoid the need to list a large number of legal requirements that would be exempted from the application of the legislation, including the method of delivery of government services. The Commission considered that it was especially important that each responsible government agency have the opportunity to consider whether its services could be delivered electronically and, if so, in what technological application. Any necessary legislative changes to accommodate service delivery in electronic form could then be proposed.

This recommendation was not followed, and the legislation as enacted applies to all types of electronic transactions unless specifically excluded. There are a large number of exemptions, many relating to the delivery of government services.

Government Services

The principal focus of the UNCITRAL Model Law was on the use of electronic technology in the context of commercial activities. However, it was always contemplated that, in implementing the Model Law in domestic legislation, states could extend its scope beyond the commercial sphere. Thus, the *Uniform Electronic Commerce Act* promulgated by the Uniform Law Conference of Canada, while designed to implement the principles of the Model Law, specifically applies beyond the scope of commerce to almost any legal relationship.

Of course the extent to which a jurisdiction’s electronic transactions legislation can be relied on to enable government agencies (including courts) to deliver services electronically, and for citizens to interact electronically with government agencies, depends on how a jurisdiction has chosen to implement the Model Law or the *Uniform Electronic Commerce Act*.

In Australia, the Commonwealth *Electronic Transactions Act 1999* section 3 expressly states that the object of the Act is to provide a regulatory framework that, among other things, enables business and the community to use electronic communications in their dealings with government.

The WA *Electronic Transactions Act 2011* section 3 is to the same effect in a state context. This is mirrored in the electronic transactions legislation of all the other Australian jurisdictions except Tasmania, whose Act does not have an objects section.

The New Zealand *Electronic Transactions Act 2002* does not include any similar statement as part of its object. As indicated above, the Act applies to all types of electronic transactions

³¹ New Zealand Law Commission, *Electronic Commerce Part Two: A basic legal framework* NZLC R58, Wellington, 1999, at para 34.

unless specifically excluded. And many of the large number of exemptions relate to the delivery of government services.

The Commonwealth Act has certainly been applied in relation to dealings between a citizen and government. In *Getup Ltd v. Electoral Commissioner*,³² the Federal Court held that a digital signature on an electoral enrolment form was sufficient to satisfy the requirement in the *Commonwealth Electoral Act 1918* that the form be signed with the claimant's personal signature.³³

In some contexts, however, the concepts on which the Australian legislation is based tend to exclude certain governmental activities. Court proceedings are an example. All the Australian Acts contain a provision that a transaction is not invalid because it took place wholly or partly by means of one or more electronic transactions. A "transaction" is defined as follows:

transaction includes —

- (a) any transaction in the nature of a contract, agreement or other arrangement; and
- (b) any statement, declaration, demand, notice or request, including an offer and the acceptance of an offer, that the parties are required to make or choose to make in connection with the formation or performance of a contract, agreement or other arrangement; and
- (c) any transaction of a non-commercial nature.

The Australian Acts also provide that a requirement to give information in writing is satisfied by giving the information by means of an electronic communication where:

- (a) at the time the information was given, it was reasonable to expect that the information would be readily accessible so as to be useable for subsequent reference; and
- (b) the person to whom the information is required to be given consents to the information being given by means of an electronic communication.

The consent of the other party to a requirement being met by electronic means is also required in the context of signatures and the production of documents.

³² [2010] FCA 869 (13 August 2010), available at <http://www.austlii.edu.au/au/cases/cth/FCA/2010/869.html>.

³³ Other Australian cases in which an *Electronic Transactions Act* has been applied or was in issue are: *Aristocrat Technologies Inc v IGT* [2008] APO 33, *American Express Australia Ltd v Michaels* [2010] FMCA 103 (9 February 2010): <http://www.austlii.edu.au/au/cases/cth/FMCA/2010/103.html>, *SZAEG & Ors v Minister for Immigration* [2003] FMCA 258 (4 July 2003): <http://www.austlii.edu.au/au/cases/cth/FMCA/2003/258.html>, *Faulks v Cameron* [2004] NTSC 61 (11 November 2004): <http://www.austlii.edu.au/au/cases/nt/NTSC/2004/61.html>, *Reed v Eire* [2009] NSWSC 678 (22 July 2009): <http://www.austlii.edu.au/au/cases/nsw/NSWSC/2009/678.html>.

Court Services

It is arguable that the concept of a “transaction” is not really apt to apply to court processes such as the lodgement of documents by a party or the transmission of court documents. Further, the requirement for a person to consent to the use of electronic means of signing or producing documents runs up against the difficulty that a reference in legislation to a “person” does not usually include a court.³⁴ And even if it does, court requirements tend to be set out in statute or rules of court in terms that exclude any issue of consent.

Some jurisdictions specifically exclude the application of their electronic transactions legislation to court processes anyway. The New Zealand Act provides that Part 3 – which includes provision for legal requirements (such as a requirement for a signature or for something to be in writing) to be met by electronic means if certain conditions are satisfied – does not apply to the provisions of a number of enactments relating to the practice or procedure of various courts and tribunals.³⁵

The New South Wales legislation provides that the equivalent provisions in Part 2 do not apply to matters relating to the practice or procedure of a court including, in particular, matters relating to the filing, issue or service of documents. However, the New South Wales Act contains specific provision in Schedule 1 for authorising courts and other judicial bodies to use an electronic case management system. Such a system can, among other things, enable documents with respect to legal proceedings to be created, filed, issued, used and served in electronic form.

Other Government Activities

In Canada, at the federal level, *PIPEDA* makes specific provision for the use of electronic technology by public bodies. For example, section 33 provides that a minister of the Crown and any department, branch, office, board, agency, commission, corporation or body for the administration of affairs of which a minister of the Crown is accountable to the Parliament of Canada may use electronic means to create, collect, receive, store, transfer, distribute, publish or otherwise deal with documents or information whenever a federal law does not specify the manner of doing so. And section 34 provides that a payment required to be made to the Government of Canada may be made in electronic form in any manner specified by the Receiver General.

This approach has also been adopted at the provincial level. For example, the Ontario *Electronic Commerce Act, 2000* section 15(1) provides that if a public body (a defined term)

³⁴ See *Canadian Pacific Tobacco Co Ltd v. Stapleton* (1952) 86 CLR 1; *Kizon v. Palmer and Others* (1997) 142 ALR 488.

³⁵ Some legislation specifically provides for the use of electronic technology in court proceedings. For example, the *Criminal Procedure Act 2011* (NZ) section 386 (which empowers the making of rules of court in relation to criminal procedure) provides that rules made in accordance with that section may provide for the use of electronic technology.

has power to create, collect, receive, store, transfer, distribute, publish or otherwise deal with information and documents, it has power to do so electronically, but subject to any law that expressly prohibits the use of electronic means or requires them to be used in specified ways.

Similar provision is made in the South African *Electronic Communications and Transactions Act, 2002* Chapter IV. Section 27 provides that any public body that, pursuant to law, accepts the filing of documents, requires that documents be created or retained, issues any permit, licence or approval, or provides for a manner of payment may use or accept electronic means for the purposes of those activities. Section 28 provides that public bodies may prescribe requirements relating to the use of electronic means in that context, such as control processes and procedures to ensure adequate integrity, security and confidentiality.

In Kenya, the *Kenyan Information and Communications Act, 1998* section 83S also provides for the use of prescribed forms of electronic technology in the delivery of government services, but is in even wider terms. It applies where any law provides for

the effective delivery of public goods and services, improving quality of life for disadvantaged communities, strengthening good governance and public participation, creation of a better business environment, improving productivity and efficiency of government departments.

The provision applies notwithstanding anything contained in that law.

These examples help to illustrate the approaches to electronic transactions legislation taken in different jurisdictions. In some cases the approach is very similar. In others, it is quite different. So despite the existence of electronic transactions legislation in a jurisdiction, legislative counsel need to undertake a very detailed scrutiny of any applicable electronic transactions law before relying on it to “translate” paper-specific terminology into “digital-friendly” legislative provisions.

Statutory interpretation issues

Of course the more general the language legislative counsel employ in legislation, the more scope there may be for it to move with the times. As one commentator said some years ago:

It may indeed be the chief merit of a statute that by its employment of general words it is possible to adapt it to changing social needs.... The experienced draftsman [sic] will not try to keep the judges on too tight a rein.³⁶

And as an Irish Supreme Court judge put it,³⁷ “statutes should be put to work, not let work to rule”.

³⁶ DJ Payne “The Intention of the Legislature in the Interpretation of Statutes”, 1956 *Current Legal Problems*, 96 at 107.

Burrows and Carter give the example of the New Zealand *Sale of Goods Act 1908* as legislation that has endured, largely unamended, for over 100 years ago but is still doing its job.

...when the *Sale of Goods Act* was passed in 1908 mass-produced, cellophane-wrapped, consumer goods did not exist on the scale that they do today; yet the Act, unrepealed and substantially unamended, is still doing service in today's very different consumer society.³⁸

As it happens, one of the few amendments to the Act was made in 2003, to the definition of "goods". The amendment added a paragraph to the definition stating that, to avoid doubt, "goods" includes computer software. The amendment was actually quite controversial when it was debated in Parliament, with Opposition members pointing out that computer software was generally obtained under a licence rather than purchased.

However, if the particular language used in legislation becomes outdated in the light of technological developments, and facilitative legislation such as an *Electronic Transactions Act* does not assist, can judges, through statutory interpretation principles, help?

Dynamic/ambulatory/updating approach ("the law is always speaking")

The first life-line may be the so-called "dynamic" approach (also called the "ambulatory" or "updating" approach) to statutory interpretation. Burrows and Carter state that the court may find that an Act covers developments not foreseen when the Act was passed if the developments are within the purpose of the Act and the words of the Act, interpreted liberally, are capable of extending to them.³⁹ For example, in the New Zealand case of *R v Garrett*,⁴⁰ the court held that computer hacking can constitute the offence of "damage to property". In this case, the "damage" was the rearrangement of magnetic particles in the computer.

This contrasts with the "static" approach to statutory interpretation, which holds that the meaning of a term in legislation should be governed by its meaning at the time of enactment.

The basis for the dynamic approach is the principle that "the law is always speaking". Bennion states the principle as follows:

It is to be presumed that Parliament intends the court to apply to an ongoing Act a construction that continuously updates its wording to allow for changes since the Act was initially framed (an updating construction). While it remains law, it is to be treated as always speaking. This means that in its application on any date, the language of the

³⁷ *Keane v. An Bord Pleanála* [1997] 1 IR 184, per O'Flaherty J at 220.

³⁸ Burrows & Carter, above n. 16.

³⁹ Burrows & Carter, *ibid.* at 388-390.

⁴⁰ [2001] DCR 955 (DC), referred to in Burrows & Carter *ibid.* at 389.

Act, though necessarily embedded in its own time, is nevertheless to be constructed in accordance with the need to treat it as current law.⁴¹

Later he says:

Each generation lives under the law it inherits. Constant formal updating is not practicable, so an Act takes on a life of its own. What the original framers intended sinks gradually into history. While their language may endure as law, its current subjects are likely to find that law more and more ill-fitting. The intention of the originators, collected from an Act's legislative history, necessarily becomes less relevant as time rolls by. Yet their words remain law. Viewed like this, the ongoing Act resembles a vessel launched on some one-way voyage from the old world to the new. The vessel is not going to return; nor are its passengers. Having only what they set out with, they cope as best they can. On arrival in the present, they deploy their native endowments under conditions originally unguessed at.⁴²

Some jurisdictions include a statement of the principle in their interpretation legislation. So, for example, the *Interpretation Act 1984* (WA) section 8 states:

8. Written laws always speaking

A written law shall be considered as always speaking and whenever a matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to every part of the law according to its true spirit, intent, and meaning.

The Canadian *Interpretation Act* section 10 is in very similar terms, as follows:

10. The law shall be considered as always speaking, and where a matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to the enactment according to its true spirit, intent and meaning.

The New Zealand *Interpretation Act 1999* section 8 states the principle more simply:⁴³

⁴¹ FA.R. Bennion, *Bennion on Statutory Interpretation: A Code*, 5th ed, (LexisNexus UK: 2008) at 890. See also D. Greenbaum, *Craies on legislation: a practitioners' guide to the nature, process, effect and interpretation of legislation*, 9th ed. (Sweet and Maxwell, London: 2008) Chapter 21.

⁴² Bennion, *ibid.* at 892.

⁴³ This replaced the *Acts Interpretation Act 1924* section 5(d), which stated:

The law shall be considered as always speaking, and whenever any matter or thing is expressed in the present tense the same shall be applied to the circumstances as they arise, so that effect may be given to each Act and every part thereof according to its spirit, true intent, and meaning.

The New Zealand Law Commission, in its report *A New Interpretation Act: To Avoid Prolivity and Tautology* (NZLC R17, Wellington 1990), considered that a replacement for this provision was strictly unnecessary. However, it considered that a statutory statement of the principle may well be useful, removing any doubt

8. Enactments apply to circumstances as they arise

An enactment applies to circumstances as they arise.

The Commonwealth *Acts Interpretation Act 1901* does not contain a provision like this. Nor does the UK *Interpretation Act 1978*. And the recently enacted Scottish *Interpretation and Legislative Reform (Scotland) Act 2010* does not contain any statements of principles of interpretation. It was considered that the common law on statutory interpretation was working satisfactorily in Scotland.⁴⁴

There is also no equivalent provision in the South African *Interpretation Act 1957*. The South African Law Reform Commission reviewed this Act in 2006, and published a discussion paper containing recommendations for reform.⁴⁵ The Commission recommended that the following provision be included in new interpretation legislation:

Legislation to be interpreted in the light of changing circumstances

7. (1) Legislation must be interpreted –

(a) as applying to circumstances as they arise; and

(b) in accordance with the contemporary meaning of its language.

(2) Any interpretation of legislation in terms of subsection (1) must be consistent with the purpose and scope of the legislation.

An example of the application of the “law is always speaking” principle is *R v. Ireland*.⁴⁶ In that case, the House of Lords considered whether a nervous disorder caused by harassment over the telephone could constitute “bodily harm” and so make the harasser guilty of the offence of inflicting grievous bodily harm under the *Offences against the Person Act 1861* section 20. Counsel for the appellants submitted that “bodily harm” in Victorian legislation could not include psychiatric injury, relying on an observation of Lord Bingham of Cornhill CJ in *R v. Burstow*, where he said:

Were the question free from authority, we should entertain some doubt whether the Victorian draftsman of the 1861 Act intended to embrace psychiatric injury within the expressions “grievous bodily harm” and “actual bodily harm”.⁴⁷

Lord Steyn’s response in *R. v. Ireland* was as follows:

over the legitimacy of a court taking a dynamic view of legislation where that is appropriate and improving the accessibility of the law by stating the principle explicitly (at 36-37).

⁴⁴ See Interpretation and Legislative Reform (Scotland) Bill: Consultation Paper 2009, available at <http://www.scotland.gov.uk/Publications/2009/01/12112118/3>.

⁴⁵ South African Law Reform Commission *Discussion Paper 112* “Statutory Revision: Review of Interpretation Act 33 of 1957” (Project 25), available at: http://www.justice.gov.za/salrc/dpapers/dp112_interpretation.pdf.

⁴⁶ [1997] 4 All ER 225.

⁴⁷ [1997] 1 Cr App R 144 at 148–149.

...although out of considerations of piety we frequently refer to the actual intention of the draftsman, the correct approach is simply to consider whether the words of the 1861 Act considered in the light of contemporary knowledge cover a recognisable psychiatric injury. It is undoubtedly true that there are statutes where the correct approach is to construe the legislation 'as if one were interpreting it the day after it was passed' (see *The Longford* (1889) 14 PD 34 at 36).

... Bearing in mind that statutes are usually intended to operate for many years it would be most inconvenient if courts could never rely in difficult cases on the current meaning of statutes. Recognising the problem Lord Thring, the great Victorian draftsman of the second half of the last century, exhorted draftsmen to draft so that 'An Act of Parliament should be deemed to be always speaking' (see *Practical Legislation* (1902) p 83; see also Cross *Statutory Interpretation* (3rd edn, 1995) p 51 and Pearce and Geddes *Statutory Interpretation in Australia* (4th edn, 1996) pp 90–93). In cases where the problem arises it is a matter of interpretation whether a court must search for the historical or original meaning of a statute or whether it is free to apply the current meaning of the statute to present day conditions. Statutes dealing with a particular grievance or problem may sometimes require to be historically interpreted. But the drafting technique of Lord Thring and his successors has brought about the situation that statutes will generally be found to be of the 'always speaking' variety.

...

The proposition that the Victorian legislator when enacting ss 18, 20 and 47 of the 1861 Act, would not have had in mind psychiatric illness is no doubt correct. Psychiatry was in its infancy in 1861. But the subjective intention of the draftsman is immaterial. The only relevant inquiry is as to the sense of the words in the context in which they are used. Moreover the 1861 Act is a statute of the 'always speaking' type: the statute must be interpreted in the light of the best current scientific appreciation of the link between the body and psychiatric injury.⁴⁸

Recent developments in Ireland are quite interesting. In a report issued in 2000, the Irish Law Reform Commission examined the updated construction approach to statutory interpretation in looking at attempts by the Irish courts to interpret older legislation in the light of modern technological developments unforeseen at the time of enactment.⁴⁹ It concluded that the principle of dynamic construction of legislation should be adopted, and take the form of a statutory provision in new interpretation legislation.⁵⁰

⁴⁸ Above n. 46 at 233.

⁴⁹ *Report on Statutory Drafting and Interpretation: Plain Language and the Law* (LRC 61-2000), available at: <http://www.lawreform.ie/fileupload/Reports/rPlainLanguage.pdf>.

⁵⁰ The Commission based its provision on the statement of the updating construction approach by Bennion, above n. 41 at 893.

The Irish Parliament enacted new interpretation legislation in 2005.⁵¹ The *Interpretation Act 2005* section 6 is in essentially the terms recommended by the Irish Law Reform Commission. It provides as follows:

Construing provisions in changing circumstances.

6.—In construing a provision of any Act or statutory instrument, a court may make allowances for any changes in the law, social conditions, technology, the meaning of words used in that Act or statutory instrument and other relevant matters, which have occurred since the date of the passing of that Act or the making of that statutory instrument, but only in so far as its text, purpose and context permit.

Interestingly, the Act also contains an “always speaking” provision. Section 10 provides as follows:

Enactment always speaking.

10.—An enactment continues to have effect and may be applied from time to time as occasion requires.

Whether or not section 6 achieves the level of clarity and consistency of approach sought by the Irish Law Reform Commission remains to be seen. I have not managed to find any cases that apply the section. The express limitation on the application of the provision – that the court can make allowances for changed circumstances only in so far as the text, purpose and context of the enactment permit – may constrain its usefulness.

Technologically neutral interpretation

The second life-line, in Australia at least, may be what has been called “technologically neutral interpretation”. It seems to be a specific aspect of the principle that the law is always speaking. Three Australian cases involving copyright legislation inform the jurisprudence in this area.

In the 1925 Victorian case of *Chappell and Co Ltd v. Assoc Radio Co of Australia Ltd*,⁵² it was argued that the Commonwealth *Copyright Act 1912* did not apply to a radio broadcast in a public place because radio had not been invented when the Act was passed. So a radio broadcast could not be a “performance” of a work so as to constitute a breach of copyright. This argument was rejected by the Victorian Supreme Court. Cussen J stated:

⁵¹ For a discussion of the history of the measure, see Donlan, S.P & Kennedy R “A flood of light?: Comments on the Interpretation Act” [2006] *Judicial Studies Institute Journal* 92, available at: http://www.academia.edu/2078786/A_flood_of_light_Comments_on_the_Interpretation_Act_2005_With_R_Kennedy_.

⁵² [1925] VLR 350.

...it was not disputed that if things not known at the time of the coming into operation of an Act fall on a fair construction within its words, they should be held to be included.⁵³

Copyright legislation was again the subject of examination in *National Rugby League Investments Pty Limited v. Singtel Optus Pty Ltd* (the *Optus* case).⁵⁴ This time it was the earlier Act's successor, the *Copyright Act 1968*. The issues were who was the "maker" of copies of certain free-to-air television programmes (of AFL and NRL football games), and whether the copies were made "solely for private and domestic use by watching or listening to the material broadcast at a time more convenient than the time when the broadcast is made". A very sophisticated system called the "TV Now" system using highly automated technology had been developed for Optus. The system allowed a subscriber to have free-to-air television programmes recorded as and when broadcast, and then played back at the time (or times) of the subscriber's choosing on the subscriber's compatible Optus mobile device or personal computer. An Optus customer could subscribe to the service online, and once subscribed select programmes to be recorded. The system recorded the selected programmes at the time of broadcast, stored them, and streamed them to the subscriber's device when instructed by the subscriber. The copies of the programmes were not stored in any permanent form on the subscriber's device.

The trial judge held that it was the subscriber who "made" the copies by initiating a process utilising technology or equipment that recorded the broadcast selected by the subscriber. In effect, Optus was merely providing an automated service that enabled the subscriber to make the copy, equivalent to providing a VCR, DVR or photocopier.

On appeal, the Federal Court of Australia came to a different conclusion, preferring the view that both Optus and the subscriber, acting together, were the makers of the copies of the broadcast programmes. Since the copying, to the extent that it was done by Optus, was done for a commercial purpose, it could not invoke the "private and domestic use" exception to copyright infringement in the *Copyright Act 1968* section 111.

In its judgment, the Federal Court referred to "technologically neutral interpretation". This was stated to mean that legislation should not be interpreted so as to limit rights and defences to technologies known at the time when those rights and defences were enacted. The court stated that this approach to interpretation has been acknowledged for some time, but did not cite any authority for it. However, the Court held that the principle could not overcome the clear and limited legislative purpose of the provision in issue. And the Court could not re-draft the provision to secure an assumed legislative desire for such neutrality. It stated :

⁵³ *Ibid.*, at 361.

⁵⁴ [2012] FCAFC 59, available at <http://www.austlii.edu.au/au/cases/cth/FCAFC/2012/59.html>.

We are conscious that the construction which we are satisfied the language of s 111 requires is one that is capable of excluding, and does in fact in this instance exclude, a later technological development in copying. However, no principle of technological neutrality can overcome what is the clear and limited legislative purpose of s 111. It is not for this Court to re-draft this provision to secure an assumed legislative desire for such neutrality: *R v L* (1994) 49 FCR 534 at 538.⁵⁵

If the provision was to be extended to cover the Optus system, the Court considered that this was a legislative choice, not a judicial one.

Technological neutrality was again in issue in *Phonographic Performance Company of Australia Limited v. Commercial Radio Australia Limited* (the PPCA case).⁵⁶ The Full Court of the Federal Court had to consider the meaning of the term “broadcasting service” in the *Broadcasting Services Act 1992* (Cth) section 6(1), as affected by a Ministerial determination which could exclude particular services from the definition. At issue was whether a radio program streamed over the Internet simultaneously with a radio broadcast via the broadcasting services bands fell under the definition. The *Copyright Act 1968* was again at the heart of the case, since the resolution of the issue would determine whether the scope of a licence granted under that Act to radio stations to broadcast sound recordings included the right to play those recordings in a simulcast. The Ministerial determination excluded from the definition of “broadcasting service” a service that makes available radio programs using the Internet, other than a service that delivers radio programs using the broadcasting services bands.

In its judgment, the Court referred to a March 2000 report from the Productivity Commission that considered the impact of “technological convergence” on broadcasting. The Court referred to a recommendation of the Commission that regulation should be as technologically neutral as possible so as to avoid creating unnecessary regulatory distinctions between similar services that were delivered differently. The Commission’s view was that such distinctions could impose costs on the community by preventing or delaying the introduction of the most efficient and effective technologies.

In the end result, the Court determined that a simulcast was 2 different “services”. The Internet streaming service was not a “broadcasting service” because it did not use the broadcasting services bands, and so was not covered by the copyright licence. This reversed the decision of the trial judge, who had found that the simulcast was one service that combined various delivery methods or platforms and delivered the same radio program using the broadcasting services band. The simulcast was a “broadcast”, and therefore the copyright licence meant that broadcasters did not need to pay extra royalties for using copyrighted music in their Internet streaming service.

⁵⁵ *Ibid.*, at para 96.

⁵⁶ [2013] FCAFC 11, available at <http://www.austlii.edu.au/au/cases/cth/FCAFC/2013/11.html>.

In the light of the *Optus* and *PPCA* cases, technology neutral interpretation may not prove much of a life-line, even though 2 judges at first instance were prepared to implement it. As the Australian Law Reform Commission pointed out in an August 2012 issues paper, the *Copyright Act 1968* section 111

may have been intended to be a technology-neutral exception (to copyright infringement), but ... the language of the exception does, in fact, exclude certain later technological developments in copying.⁵⁷

Even the combination of the acknowledged underlying purpose of the provision and the interpretation principle could not extend its application to a subsequent technological development.

What can legislative counsel do to “future-proof” legislation to allow for advances in technology?

What can legislative counsel do to help ensure that the words and concepts we use do not unduly restrict the application of legislation to the certainty of technological developments? There are a number of assumptions behind this question.

One of the assumptions is that it is very difficult to ensure that legislation is kept up to date by amendment as technology progresses. It would be easy to say that this is a policy issue, that legislative counsel can only deal with the here and now, and that if legislation becomes outdated it should simply be amended. However, the shortage of Parliamentary time for the introduction and passage of amending legislation (especially amendments perceived as technical in nature) is common to most, if not all, jurisdictions. And the advantage over primary legislation commonly attributed to subordinate legislation — that it is easier and quicker to change — is often illusory due to lack of resources or motivation on the part of administering agencies.

A further assumption is that drafting instructions will contemplate “future-proofing” the legislation. Sometimes, however, instructing officials are only interested in the immediate problem that confronts them. Their response to issues of future-proofing may be that amendments to the legislation will be promoted if the need arises. Often, of course, that never happens, or at least only after significant problems with the application of the legislation have emerged. Experienced legislative counsel will challenge this response.

I do not wish to suggest that all, or even most, legislation can and should be drafted with an eye to technological neutrality. There are factors that might require legislation to concern itself with a particular technology. The technology itself may be such a fundamental part of the legislative scheme that it must be “locked in”. I once drafted a *Radiocommunications Act*, which provided for the allocation and management of New Zealand’s radio and

⁵⁷ ALRC *Copyright and the Digital Economy*, Issues Paper 42 (IP 42), available at http://www.alrc.gov.au/sites/default/files/pdfs/publications/whole_ip_42_4.pdf.

television spectrum. The subject matter of the legislation was so specific and technical that future-proofing was not an issue.

In addition, the nature of the legislation may mean that only well-known and understood existing technologies should be captured in the legislation. If the legislation creates rights or imposes duties and liabilities, technology specificity may be required for reasons of certainty. Exposure to criminal sanctions might be an example, although I will examine this issue further below. Another example might be a requirement for personal service of court documents, in order to ensure that the individual to be served is actually made aware of the existence of a matter. Simply sending something electronically might not achieve the same assurance of notification, unless perhaps the recipient has consented to receiving communications in this way or impliedly done so by giving an email address for receipt of communications.

The need for awareness

Possibly the most important factor in achieving technological neutrality in legislative drafting is for the legislative counsel to be aware of the issue, and the limitations of any interpretation and electronic transactions legislation. Especially if one is an experienced legislative counsel, it is very easy to recycle well-worn phrases and adopt precedents that assume a particular technology, especially paper.

The issue can lurk in obscure places. Consider the following:

- *establishing a register*: does it have to be a physical register or will an electronic version be sufficient? how can it be inspected? at a physical address, or can it be made available on the Internet?
- *giving public notice*: traditionally this is done via a state-published gazette or widely-circulating newspaper; should publication on a website be allowed?
- *a requirement for something to be signed or certified*: will some other form of authentication suffice?
- *an application for and the issuing of a judicial warrant*: how is an application to be made? can it be made by telephone, fax, email, text message? is an affidavit (which will need to be sworn in front of another person) required? in what form can the warrant be issued? can it be issued over the telephone or by email?
- *a requirement for a prescribed form*: will an electronic version filled in via a form on a website be required?

Draft in general terms: the “whatever” approach

Being aware of the need to avoid technological specificity can help avoid locking in a particular technology by drafting in general terms. As DJ Payne suggests,⁵⁸ general terms might make it possible for a statute to adapt to changing social needs, and avoid keeping the judges “on too tight a rein”. For example, instead of saying that someone must give “written notice” of something to someone else, legislation might simply require the person to “communicate” that thing to the other person, leaving the means of communication unspecified.

Or, it may be possible to go even further and state expressly that the means of communication is left up to the communicator. I like to describe this as the “whatever” approach, because that is the term that I use in drafting. When empowering someone to publish something, legislation might state that publication may be by whatever means the person considers appropriate, as in the following example:

42. Excluded persons list

- (1) The Commissioner may compile one or more lists of persons (an *excluded persons list*) who the Commissioner is satisfied are persons who would pose serious threats to the safety of persons or property (or both) in a CHOGM security area during the CHOGM period.
- (2) The Commissioner must take reasonable steps to contact a person in order to notify the person that the person is named in an excluded persons list.
- (3) The Commissioner may (but need not) cause an excluded persons list to be published by whatever means the Commissioner considers appropriate.
- (4) Without limiting subsection (3), an excluded persons list may be published —
 - (a) in the *Gazette*; or
 - (b) in any newspaper published in the State (whether or not circulating generally throughout the State); or
 - (c) on a website.⁵⁹

This provision gives examples of the ways in which the material might be published, but this is not essential.

Of course, this approach may not be suitable in particular contexts. For example, in the context of giving someone notice, it may be important to determine when the notice was received. If something is able to be communicated by post, it is often provided that it is to be treated as having been received at the time when it would be delivered in the ordinary course

⁵⁸ Above, n. 36.

⁵⁹ *Commonwealth Heads of Government Meeting (Special Powers) Act 2011 (WA)*.

of post. These issues might need to be addressed specifically, depending on what has to be communicated.

Drafting in general terms may also give rise to evidential issues in judicial proceedings, particularly criminal prosecutions. For example, a court may insist that the prosecution provide expert evidence that a particular technology falls within a general term that purportedly includes electronic processes, rather than taking judicial notice that it does.⁶⁰ Providing non-exhaustive examples of particular technologies might assist in overcoming this problem, but may also limit the application of the provision.

Specify outcomes, not processes

Another approach is to avoid specifying how something is to be done (a process) and instead specify what needs to be achieved (an outcome). This aligns with the outcomes-based theory of regulation, which favours statements of desired outcomes or principles, rather than prescriptive rules.⁶¹ Stating requirements as outcomes might allow for a greater degree of “future-proofing”, since the desired outcome remains applicable as new technologies arise. This would then avoid the need to respond by the creation of new prescriptive rules. An example might be a provision that authorises a person to communicate a matter in any manner the person considers appropriate, as long as the means of communication chosen is sufficient to bring the matter to the attention of the recipient.

The various incarnations of electronic transactions legislation also adopt this approach in permitting electronic equivalents of paper-based dealings. An example is the *Electronic Transactions Act 2011* (WA) section 10(1):

⁶⁰ For example, that an email is an electronic communication.

⁶¹ For a discussion of this approach, see Julia Black, [Forms and Paradoxes of Principles Based Regulation](#) (London School of Economic Legal Studies Working Paper No. 13/2008. Principles-based regulation in the Australian communications sector was recently recommended by the Australian Convergence Review Committee in its final report: [Convergence Review: Final Report](#), Commonwealth of Australia March 2012, at xii-xiii.

10. Signatures

- (1) If, under a law of this jurisdiction, the signature of a person is required, that requirement is taken to have been met in relation to an electronic communication if —
 - (a) a method is used to identify the person and to indicate the person’s intention in respect of the information communicated; and
 - (b) the method used was either —
 - (i) as reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or
 - (ii) proven in fact to have fulfilled the functions described in paragraph (a), by itself or together with further evidence; and
 - (c) the person to whom the signature is required to be given consents to that requirement being met by the use of the method mentioned in paragraph (a).

No particular technology is prescribed as an acceptable substitute for a person’s signature, but the method employed must satisfy certain requirements. Those requirements have as their objective the identification of the “signing” person and the indication of the person’s intention in respect of the information communicated.

Another example is the *Credit Contracts and Consumer Finance Act 2003* (NZ) section 28(1). It is not related to technology neutrality, but illustrates the prescription of an outcome. It relates to the right of a consumer to cancel a consumer credit contract and is in the following terms:

Written notice of cancellation may be expressed in any way that shows the intention of the debtor to cancel or withdraw from the consumer credit contract.

While the provision requires notice of cancellation to be in writing, it avoids prescribing a particular form of words. What is important is that the notice shows that the debtor intends to cancel or withdraw from the contract.

General empowering provisions

As discussed above, some jurisdictions (notably in Canada and Africa) provide general authority in their electronic transactions legislation for the use of electronic technology by public bodies. These provisions can override existing paper-centric legislation.

For jurisdictions without this kind of overarching legislation, a legislative counsel could adopt the approach in the context of a single enactment or in legislation relating to a particular sector such as the operations of courts. The New South Wales *Electronic Transactions Act 2000* Schedule 1, discussed above, is an example.

A particular issue in this context is the extent to which existing criminal offences defined by reference to paper-centric concepts or tangible things can or should be modified by an overriding general provision. Consider the New Zealand case of *R v. Walsh*.⁶² The accused had forged many documents and faxed them from Amsterdam to victims in New Zealand. The question was whether she was guilty of the offence of forgery (making a false document). Because the offence is complete when the forged document is made, the prosecution argued that the documents re-created in the New Zealand-based fax machines were themselves forgeries.

The Court of Appeal, by majority, held that the accused was guilty of forgery.⁶³ Glazebrook J, focusing on the technology involved in the case, stated:

[34] ...In my view the proper way of seeing a facsimile as it goes into the sender's machine and as it comes out of the recipient's machine is as different physical manifestations of the same document. I consider it impossible in this digital age to sustain an interpretation of the definition of false document that sees each physical manifestation of a document as a different document.

[35] In common parlance we speak of a computer document without making any distinction between the document as it is stored in the computer, as it manifests itself on the screen and as it comes off the printer. If that document is sent by e-mail we make no distinction between the document in the hands of the sender and that in the hands of the recipient. It is seen as the same document. The same applies to faxed documents. It is the document itself which is seen as being transmitted and received and not a different document.

[36] It follows therefore that, if a document fed into the facsimile machine is a forgery, then the other physical manifestation of that document (the one received) must also be a forgery and one made by the person who made the original document and fed it into the machine.

However, the Supreme Court, by majority, rejected the majority's approach in the Court of Appeal that a wider concept of forgery was necessary to meet mischief facilitated by modern technology. The court considered that while the accused committed what would have been the offence of forgery if done in New Zealand, faxing false documents to New Zealand from overseas was not forgery. The offence of forgery was complete when the

⁶² [2007] 2 NZLR 109 (SCNZ). This case is discussed in Burrows & Carter, above n 16, at 400.

⁶³ [2007] 1 NZLR 738 (CA).

original document was created. The copies faxed to New Zealand did not purport to be made or authorised by anyone other than the accused, and so were not “false documents”. However, the accused was convicted of the offence of “uttering” a forgery.

If the accused had posted, rather than faxed, the documents from Amsterdam to New Zealand in this case, the result would presumably have been the same, since it was the geographical location of the forgery that mattered, not where the deceit was perpetrated.

An example of a general overriding provision in the criminal sphere can be found in the electronic transactions legislation of Quebec:

76. A provision creating an offence that specifies that the offence may be committed with the use of a document shall be construed as meaning that an offence may be committed whatever the medium of the document may have been, whether paper or any other, at any point in its life cycle.⁶⁴

I have not been able to ascertain how useful or effective this provision has been in Quebec. However, I do wonder what courts in purely common law jurisdictions would make of such a provision, given the traditionally strict construction approach to penal statutes. It is hard to see that its application would have led to a different result in the *Walker* case since the creation of a copy by a fax machine in New Zealand would not appear to be part of the life cycle of the original paper document. Nevertheless, the approach adopted in the Quebec provision, or a variant of it, may prove useful in some cases. I am not aware of any similar provision in other jurisdictions.

Provide for particular technologies to be prescribed by subordinate legislation

If the outcomes-focused or general overriding provision approaches outlined above are unsatisfactory or unattractive, an alternative is to draft general provisions that supplement or override paper-centric enactments but provide for the prescription of particular technologies by subordinate legislation. This approach is adopted in the electronic transactions legislation of some jurisdictions. For example, the Canadian *PIPEDA* provides the following in relation to witnessed signatures:

Witnessed signatures

46. A requirement under a provision of a federal law for a signature to be witnessed is satisfied with respect to an electronic document if

- (a) each signatory and each witness signs the electronic document with their secure electronic signature;
- (b) the federal law or the provision is listed in Schedule 2 or 3; and

⁶⁴ *An Act to Establish a Legal Framework for Information Technology*, RSQ, c C-1.1.

- (c) the regulations respecting the application of this section to the provision have been complied with.

Section 31 of *PIPEDA* defines a secure electronic signature as follows:

“*secure electronic signature*” means an electronic signature that results from the application of a technology or process prescribed by regulations made under subsection 48(1).

Section 48 of *PIPEDA* empowers the making of regulations in the following terms:

Regulations

48. (1) Subject to subsection (2), the Governor in Council may, on the recommendation of the Treasury Board, make regulations prescribing technologies or processes for the purpose of the definition “secure electronic signature” in subsection 31(1).

Characteristics

(2) The Governor in Council may prescribe a technology or process only if the Governor in Council is satisfied that it can be proved that

- (a) the electronic signature resulting from the use by a person of the technology or process is unique to the person;
- (b) the use of the technology or process by a person to incorporate, attach or associate the person’s electronic signature to an electronic document is under the sole control of the person;
- (c) the technology or process can be used to identify the person using the technology or process; and
- (d) the electronic signature can be linked with an electronic document in such a way that it can be used to determine whether the electronic document has been changed since the electronic signature was incorporated in, attached to or associated with the electronic document.

Effect of amendment or repeal

(3) An amendment to or repeal of any provision of a regulation made under subsection (1) that has the effect of removing a prescribed technology or process from the regulation does not, by itself, affect the validity of any electronic signature resulting from the use of that technology or process while it was prescribed.

The *Secure Electronic Signature Regulations*⁶⁵ currently prescribe the requirements for a secure electronic signature in terms of the Government of Canada’s Public Key Infrastructure (PKI).

⁶⁵ SOR/2005-30.

The approach has also been adopted in New South Wales in the context of giving official status to electronic versions of legislation. Under the *Interpretation Act 1987* (NSW) section 45C, the Parliamentary Counsel may publish on the NSW legislation website, under the authority of the Government, legislation (as originally made or as amended). The Parliamentary Counsel is to compile and maintain a database of legislation published on the NSW legislation website, and may certify the form of that legislation that is correct. Under that delegated authority, the Parliamentary Counsel has certified that the “In Force database” in HTML format is correct, and that the “As Made database” in PDF format is correct.⁶⁶ Such an approach obviously allows for the authorised formats of NSW legislation to be changed or expanded with technological advancement.⁶⁷

A similar approach is adopted in the New Zealand *Legislation Act 2012*. Under section 17, the Chief Parliamentary Counsel may issue official electronic and printed versions of legislation. An electronic or printed document that is identifiable as an official version of legislation in accordance with regulations must be treated as an official version unless the contrary is shown. Under section 22, regulations may be made specifying features by which an electronic document or a printed document is identifiable as an official version, including imposing requirements or conditions as to the form of the official versions of legislation and providing how official versions of legislation in electronic form can be authenticated. As in New South Wales, the regulations might specify that electronic legislation in a particular format is official, and provide that official versions of legislation can be authenticated by certain means, for example, a watermark or a digital signature.⁶⁸

Extending subordinate legislation-making powers

When drafting general provisions that supplement or override paper-centric enactments and provide for the prescription of alternative technologies by subordinate legislation, an issue that might arise is the scope of existing empowering provisions. These may not be wide enough to empower the making of the necessary subordinate legislation.

This issue arose in the context of legislation to provide for the establishment of a national electronic conveyancing system in Australia. The *Electronic Conveyancing National Law*,⁶⁹

⁶⁶ See <http://www.legislation.nsw.gov.au/certificate.pdf>.

⁶⁷ Microsoft Word or RTF versions of legislation are made available on some legislation websites. XML versions are made available on the [Canadian Justice Laws website](#).

⁶⁸ Official versions of legislation on the [Australian Capital Territory legislation website](#) are digitally signed. This is not a requirement in New Zealand. See the *Legislation (Official Versions) Regulations 2013*, which provide that electronic versions of New Zealand legislation issued by the Chief Parliamentary Counsel in PDF format on the New Zealand legislation website are official if they display or exhibit on their front page a representation of the New Zealand Coat of Arms.

⁶⁹ Enacted in New South Wales as the Appendix to the *Electronic Conveyancing (Adoption of National Law) Act 2012*. An example of the adoption of the national law by a jurisdiction is the Victorian *Electronic Conveyancing (Adoption of National Law) Act 2013*, which applies, as a law of Victoria, the *Electronic Conveyancing National Law* set out in the Appendix to the NSW Act.

which is designed to be adopted separately by each State and Territory, supplements existing land titles legislation by providing for the electronic lodgment of documents in each land registry by means of an Electronic Lodgment Network. To ensure that there are adequate powers (including subordinate legislation-making powers) available under a jurisdiction's land titles legislation to implement the new system, the Law includes the following provision:

42 Powers may be exercised for purposes of this Law

If any provision of the land titles legislation empowers the making of an instrument of a legislative or administrative character, or the doing of any other act or thing, that power is to be construed (with all necessary changes) as including a general power to make instruments of that character, or to do that act or thing, for the purposes of this Law.

This provision is designed to avoid the need for each jurisdiction to amend its land titles legislation to provide wider administrative and legislative powers.

Consider an example of a provision supplementing existing legislation that requires information, documents or records, or copies of documents or records, to be given to, or obtained by, a person in written form. The requirement is to be taken to be satisfied if the information, documents or records are given or obtained in electronic form in accordance with regulations. The provision might take the following form:

12. Giving or obtaining information, documents and records

- (1) This section applies to the following enactments —
 - (a) the Cat Act 2012;
 - (b) the Wombats Act 1975.
- (2) If, under a provision of an enactment to which this section applies, any information, document or record, or a copy of any document or record, is required to be given to, or obtained by, any person in written form, that requirement is to be taken to be satisfied if the information, document, record or copy is given to or, as the case requires, obtained by the person in electronic form in accordance with any regulations.

Depending on the scope of any regulation-making power in an enactment to which the provision applies, there may be a need to empower the making of subordinate legislation for the purposes of the overriding provision. There may also be a need to make it clear that this power is wide enough to empower subordinate legislation in relation to the use of electronic technology even though no subordinate legislation is required with respect to the use of paper documents in the same or similar circumstances. Finally, there may also be a need to

make it clear that subordinate legislation can determine when a document, record or copy given to a person in electronic form is to be taken to be received by the person.

So a provision along the following lines might be needed. Subsection (1) is a variant of the provision included in the *Electronic Conveyancing National Law*.⁷⁰

13. Power to make regulations extended

- (1) If a provision of an enactment to which section 12 applies empowers the making of any regulations for the purposes of that enactment, that power is to be construed (with all necessary changes) as including a general power to make regulations for the purposes of section 12.
- (2) Without limiting subsection (1), the power conferred by subsection (1) includes power to make regulations in relation to the use of electronic technology in particular circumstances even though no regulations are required with respect to the use of written information, documents or records in the same or similar circumstances.
- (3) Without limiting subsection (1), the power conferred by subsection (1) to provide that any information, document or record, or a copy of any document or record, is to be given to a person in electronic form includes power to determine when a document, record or copy given to a person in that form is to be taken to be, or to be presumed to be, received by, or brought to the attention of, the person.

Where a provision like this supplements existing powers in other enactments, it might also be helpful to include a “signpost” provision in the other enactments drawing attention to the application of the supplementing provision.

Conclusion

It may well be an overstatement to suggest, as Larry Downes does,⁷¹ that “The technology we invent has the potential to change the world at an accelerating pace, but humans can no longer keep up.” This is not to say that keeping up is easy, and for legislative counsel it may be more difficult than for many others.

One of the key features of legislation is its longevity. Unlike ephemeral publications like today’s newspaper or the latest blog, legislation is expected to last for a very long time. And it can be difficult to change, or at least change quickly. These features of legislation pose particular challenges for legislative counsel in attempting to draft legislation that is to any extent “future proof” when technological change is rapid and unpredictable.

⁷⁰ Above, n 69.

⁷¹ Above, n 4.

An awareness of the constraining effect of traditional legislative language based on a paper-centric world is essential. These limitations might to some extent be overcome by interpretation or electronic transactions legislation. And judicial approaches to statutory interpretation, such as the “dynamic” approach and “technology neutral interpretation”, which may be founded in common law principles or enshrined in or supplemented by interpretation legislation, might also prove of assistance. But drafting approaches that attempt to deal with the issue up front is clearly better than relying on backstops that offer little certainty of a positive outcome.

The approaches suggested above are not without their own difficulties. Drafting in general terms to achieve technology neutrality might lead to vague language that creates uncertainty. An outcomes-based approach that avoids the prescription of specific rules or processes can leave people unsure whether the means that they adopt to achieve the outcome will be acceptable to regulators. Regulators accustomed to the control available to them through a traditional rules-based approach might also find the approach unacceptable. Delegating the power to prescribe particular technologies that are acceptable at a point in time might provide greater flexibility and certainty, but also put too much power into the hands of the delegate to determine acceptable technologies.

No one approach is going to be appropriate or acceptable in all circumstances. A legislative counsel with an awareness of the issues and problems that technological change poses, and a range of drafting approaches in their toolbox, may find the “laws of disruption” easier to deal with.

A.P. Herbert provides a good example of the dangers of not specifying a particular technology. Legislative counsel born earlier than Generation X may recall a television series in the late 1960s and early 1970s that featured the case of *Board of Inland Revenue v. Haddock*⁷² In this case, Mr Haddock purported to pay his tax bill with a cheque written on a cow. He argued that there was nothing in the law that required cheques to be on paper. The Judge, Sir Basil String, found in his favour. The Collector of Taxes, having refused to accept the cheque tendered on the cow, was estopped from demanding the payment of the tax bill.

Requiring the use of paper in a particular situation may not necessarily be a bad thing. A cow is probably not functionally equivalent to paper. And there is probably no equivalence of risk: a paper cut would not compare to the damage possible from a cow’s horns.

I come back to the quote from Larry Downes at the start of this paper. In the conclusion to his book, he writes:

Our new laws won’t look much like the old ones. Treaties, statutes, regulations, and judicial opinions are giving way to more organic forms. The Declaration of Independence of digital life has already been written. Its Constitution, made up of

⁷² A.P. Herbert, *More Misleading Cases in the Common Law* (Methuen, London: 1930).

wikis, terms of service agreements, privacy policies, and the software code itself, is now being drafted. Deliberations over changes to its rules and regulations will take place on blogs, social networks, and tweets. Dispute resolution will be outsourced within the cloud of computing resources and network users best suited to minimize transaction costs. This process, so far, has been driven by the users. Lawmakers and business leaders need to catch up quickly if they want to have a voice.⁷³

I suggest that legislative counsel need to catch up quickly too.

Post Script – Recent Developments

Since this article was written, there have been a number of interesting developments:

- In early November 2013, the Western Australian Parliament enacted the *Courts and Tribunals (Electronic Processes Facilitation) Act 2013*. This Act facilitates the implementation in Western Australia of an Integrated Courts Management System (ICMS). The ICMS enables court processes (such as the filing of documents, the recording of court proceedings and the issue and service of court documents) to be undertaken electronically. Rather than amend a large number of individual enactments that currently provide for paper-based court processes, Part 2 of the Act contains general empowering provisions that authorise electronic processes in accordance with regulations or rules of court. Section 20 of the Act extends the regulation-making and rule-making powers conferred by the enactments to which the Act applies so that they confer a general power to make regulations and rules of court for the purposes of Part 2.
- In late November 2013, the *Judicature Modernisation Bill* was introduced into the New Zealand Parliament. Part 5 of the Bill would enact overarching provisions so that existing legislation relating to courts and tribunals can be interpreted as allowing electronic processes. Clause 472 enacts, as one of the principles of the Part, that “all persons should be able to deal with courts and tribunals in a technology-neutral way”.
- In December 2013, the *Electronic Conveyancing Bill 2013* was introduced into the Western Australian Parliament. The Bill will enact provisions corresponding to the *Electronic Conveyancing National Law*⁷⁴ to as to enable the introduction of electronic conveyancing in Western Australia. Among other things, the Bill amends the *Transfer of Land Act 1893*, which provides for the Torrens system of land title in Western Australia. One of those amendments inserts a provision into that Act conferring a general power to do things electronically. It is as follows:

⁷³ Downes, above n. 4 at 269.

⁷⁴ See above n. 69.

14. Commissioner and Registrar may exercise functions electronically

- (1) Anything that the Commissioner is required or authorised to do under this Act may be done by the Commissioner by electronic means in any way the Commissioner determines is appropriate.
- (2) Anything that the Registrar is required or authorised to do under this Act may be done by the Registrar by electronic means in any way the Registrar determines is appropriate.
- (3) If, in reliance on this section, something is done electronically when it would otherwise be required to have been done, or could have been done, using or with respect to a paper document, the doing of that thing electronically has the same effect as if that thing had been done using or with respect to a paper document.
- (4) This section applies even though the provision requiring or authorising the Commissioner or Registrar to do something expressly or impliedly requires or authorises the thing to be done by means of a paper document.

- In November 2013, in *Re Yu* [2013] QSC 322⁷⁵, the Queensland Supreme Court made a declaration admitting to probate an electronic document that purported to be a will. The document had been created on the deceased’s smartphone using its “Notes” app, shortly before he committed suicide. The document did not otherwise satisfy the requirements in Queensland law for the execution of a valid will, which are generally that it must be in writing, signed by the testator and attested and signed by 2 witnesses. The court made the declaration in reliance on a provision in the Queensland *Succession Act 1981* (section 18) that enables the court to dispense with the execution requirements for a will if the court is satisfied that a document that purports to state the testamentary intentions of a deceased person was intended to form the person’s will. The court held that the material on the smartphone was a “document” for the purposes of the *Acts Interpretation Act 1954* (Qld) section 36, and therefore capable of coming within section 18.

⁷⁵ Available at <http://www.austlii.edu.au/au/cases/qld/QSC/2013/322.html>.

Information Technology on a Budget: A Giant Leap for the Isle of Man

Lucy Marsh-Smith¹ and Gordon Wright²



Abstract

This article describes the IT system used in the Isle of Man for drafting, storing and displaying Manx legislation prior to recent technological changes. It also describes the need for change identified in the light of economic constraints, the solution adopted and why it was chosen. The article includes the following recommendations and conclusions :

- *legislative drafting offices need to move all activities in-house to cut costs and to provide a timely and quality product.*
- *all drafting needs to be template-based to ensure flexibility, consistency, longevity, interoperability, efficiency and accuracy;*
- *template-based systems that use PDF (Portable Document Format) as the delivery medium can offer simple, flexible and universal access to the data. Legislation can then be presented in exactly the same way that it was created, and published to any type of output device;*
- *PDF files can be indexed and searched by most good search engines and are an international archive and document standard;*
- *the implementation of a template-based system will improve productivity but require minor restructuring to ensure the maximum return on investment;*

¹ Chief Legislative Drafter, Attorney General's Chambers, Isle of Man and project sponsor for MAN/eX. Recognition for the implementation of the project must go to Howard Connell, legislative drafter and project leader.

² CEO of WW4 Pty/Ltd and designer of template and website solution for Isle of Man Government.

- *the addition of a point-in-time web-based solution adds a plethora of revenue-raising possibilities and will ultimately raise the profile of the legislation produced;*
- *IT systems should be implemented by a single company with a proven track record across all areas of expertise: legislative publishing, template production, scripting, PDF generation and manipulation, CMS development and modification, training and support; they should also be based upon open standards using open source software where possible.*

Background

The Isle of Man is a jurisdiction of some 85,000 people on an Island 33 x 13 miles in the Irish Sea between Great Britain and Ireland. Like the Channel Islands it is a Crown Dependency, a possession of the Crown with autonomy in its domestic affairs. It has a diverse economy with a significant emphasis on financial services. The impact of the current global economic situation has been exacerbated by an unfavourable variation of its VAT-sharing agreement with the United Kingdom, placing significant economic constraints on its Government.

Legislative drafting in the Isle of Man is the responsibility of a division of the Attorney General's Chambers. A team of 4 legislative counsel is aided by a legislation clerk. Their duties include drafting all the primary legislation and advising on the drafting of secondary legislation, the vast majority of which is drafted by departmental legislation officers.

The Isle of Man developed a legislative drafting and publishing system in Microsoft Word, their word-processing system of choice, and the total system, including work-flow, web site, data conversion, training, and support cost less than £60K. Due to existing expensive publishing contracts no longer being necessary and the raising of drafting efficiency, this cost was recouped in the first year.

Former drafting and legislative data systems

Before to the implementation of the current system in 2011-12, all drafting was done in MS Word by use of a crude template or saving and over-writing an existing document. The standard layout of Bills was based on the one used in Westminster prior to the changes made at the beginning of the Millennium, with marginal notes and complex initial lettering. The Bills were typeset by commercial printers who were emailed the draft as prepared by the legislative counsel with the formatting stripped out. One or more proofs were produced for checking within Chambers. Typically a completed Bill had to wait a month for first reading for the printing stage. Once a Bill completed its passage through the Branches of Tynwald (the Manx Parliament) any amendments were added to the version held by the printers who were then responsible for producing a Royal Assent copy for transmission to London, and ultimately the final Act, with proofing by Chambers at each stage. No electronic version of the text was held within Government, but from 2001 a PDF version of each of the 16-20

new Acts each year was uploaded onto the Government information website. The system was expensive both from the point of view of costs of production and the time spent proof-reading.

Using powers in the 1981 *Reprints Act* a printed edition of the more than 800 current Acts of Tynwald going back to 1417 in updated form was produced in bound volumes arranged according to subject matter by commercial publishers at significant cost to Government. The volumes were produced initially every 3 years, then latterly every 5 years, with a CD Rom available, which was replaced every 6 months. The books and CD Roms were available to purchase by practitioners and the general public. In addition annual volumes of the Acts were produced and 4 copies kept up-to-date in Chambers with 'paste up', annotations being made with pen, paper and glue. Manx secondary legislation was available in paper form only with copies available to purchase from the Tynwald library. For a sophisticated jurisdiction like the Isle of Man looking to attract outside investment it was clearly unacceptable that Manx legislation was obtainable only by subscription and a trip to the Tynwald library. Moreover, the modern standard, as promoted by the Free Access to Law Movement, is for countries to have public legal information available to all free of charge.³

Many countries around the world have disjointed legislative publishing work-flows and rely on costly external agencies to manage legislation after it is drafted, so the Isle of Man was not alone. Now that publishing has ceased to be a specialist skill, these agencies are no longer necessary. Re-keying and other labour-intensive tasks can cause errors to creep into the legislation, which is obviously unacceptable. When data is held in proprietary software applications by external sources it leads to jurisdictions being locked into contracts they cannot withdraw from easily. Legislative publication systems must be timely in their delivery, and above all, accurate.

In today's economic climate it is increasingly important to minimise costs wherever possible. Legislative publishing is one vital area where this can be achieved by establishing a streamlined work-flow, and moving the updating and publishing of legislation to an in-house operation. Doing so allows a more 'pro-active' capability for the government of the country, and makes possible huge cost savings and economic benefits, not only in the delivery of hard copy legislation, but in potential revenue streams that come from full control over the electronic publishing models.

Preliminary changes

To facilitate the production of camera-ready copy and web publishing, the drafting division obtained approval to modify the layout of Bills to remove marginal and other side headings and make other improvements to the appearance of the text, which the legislative counsel

³ See <http://www.worldlii.org/worldlii/declaration/>. Accessed 2013-12-08.

recommended following a review of styles in many other jurisdictions. The secondary legislation was scanned and that made since 2000 was uploaded to the Tynwald website.

The legislative counsel also discussed and agreed on a house style for the future, the features they wished a drafting template to provide and how to cater for the various stages of the 'Bill to Act' procedure. Plans were made for a new dedicated legislation website to display updated Acts of Tynwald, links to applicable UK legislation and to the secondary legislation as made.

Challenges

There were 2 major hurdles to be overcome. Most importantly there needed to be a source of funding and the only realistic option was a fund held within Government as part of the change management programme designed to support IT projects. As the support had to be IT-related, the legislative counsel were not able to progress any plans they might have had for a whole-scale law revision enabling the updating of the secondary legislation, which would in any event have been very expensive, and arguably unnecessary bearing in mind the existing reprint powers, which were already in established use. Because the production of the templates and website saved a large amount of direct costs it was in fact an easy win. Preliminary investigations indicated it was possible to achieve a workable system for a 5 figure sum. The cost of Bill production would go down from £17 a page to 3p a page, a saving in the order of £7,000 a year. The 5-year cost of another run of re-printed books and CDs averaged out per year was in the order of 4 times this amount. Therefore the new system would pay for itself very quickly, even without taking account of the huge time-saving for legislative counsel, legislation officers and proofers, which was estimated conservatively at over £70,000 a year.

The second hurdle was Isle of Man Government's own Information Systems Division. Drawing on experience gleaned from other jurisdictions it was strongly felt that the contract must go to someone who understood the needs of legislative counsel and legislation officers, the level of accuracy required, the importance of where on the page the text appeared. An in-house solution with assistance from the usual local contractor was therefore strongly resisted.

A third but smaller hurdle was the need to convert the data currently held as a single file in a CD Rom into the form of the Bill template for it to be uploaded onto the website. Some contingency funding was made available to achieve this.

Methodology

As part of the case to obtain the funding the legislative counsel had to work up their ideas in some detail and various approaches were considered and discussions held with many people. The following is an analysis of the chosen methodology.

The key to a flexible, efficient, consistent, and simple work-flow is the use of document templates. However, when designing a good system it is important to look at the deliverables or client goals first, often referred to as the "start-at-the-end" methodology.

PDF – our preferred delivery mechanism

We considered that the best delivery mechanism for legislation is the PDF. The same file that is sent out for printing can also be published on a web site. PDF is an international standard (ISO) archival and document format, and possibly more importantly, it is Open Source. Since the PDF standard does not belong to any one company it tends to have universal acceptance. What makes PDF better than other Open Source formats (such as XML, SGML in regard to legislation) is its what-you-see-is-what-you-get feature. In other words the document can be viewed on a computer screen or printed on paper and it will always look the same. Text-based formats such as XML/SGML rely on some type of style-sheet for the presentation of data, and to print documents that retain the same style as current legislation requires a complex conversion tool. Publishing data in proprietary formats is merely a regression to the past with all the underlying issues that we have fought so hard to overcome.

The cost of producing a PDF solution for legislation is far less expensive than XML/SGML systems. Many large jurisdictions have implemented valid XML/SGML based solutions, but because of their very technical nature, they had to employ specialist programming and support staff, something that is beyond the reach of smaller countries or jurisdictions. Most IT departments embrace these complex systems as it is a form of job security.

Since most modern word-processors are embracing XML as an alternative output file format, solutions using PDF (as the main delivery mechanism) can now co-exist with output solutions based upon well-formed XML. The most common usage of this form of extra output is in the area of data exchange between jurisdictions. Essentially, by taking someone else's XML data and mapping it to your own template styles, you can convert the data into your own style with minimal effort.

One of the main reasons XML/SGML was adopted for legislation was to make possible point-in-time systems. Point-in-time XML/SGML systems generally rely on documents being prepared on-the-fly from various fragments in a back-end database. So relying on a single data source (the database) is inherently problematic, and when comparing file-based to normal relational databases the process can be very slow.

However the same can be achieved quickly and cost effectively using PDF files and a web-based point-in-time delivery mechanism. The PDF system still relies on a database, but the files themselves reside outside the database structure as stand-alone files. Here, if the database fails, reverting to a previous version will potentially lose the meta-data for the newly added files, not the files themselves. In the XML/SGML system the file and meta-

data information is normally lost and must be restored, sometimes a difficult and time-consuming task. The perceived disadvantage with PDF delivery is that you have to produce a new PDF file for every change (not merely new fragments), but with the storage capabilities of modern hard drives this is not important.

Since PDF is an archival standard, it must (by definition) be backwardly compatible, so the files you produce today can be printed or searched well into the future. PDF documents produced in 1991 can be still opened, searched and printed using modern PDF tools. On the other hand databases are constantly evolving and periodically the XML/SGML data must be migrated to new database systems. XML/SGML systems also evolved because of the constant re-purposing of proprietary legislative data (for example, Microsoft Word version 1.0 to 2.0). Every time you moved to a new version of the main drafting tool the data had to be converted and consequently has to be proof-read to ensure the quality of the legislation. XML/SGML text by itself is stable as it is only text with no formatting, but when divided up into thousands or millions of fragments, moving from one database system to another is still dangerous, though not as bad as the early days of word processing. PDF, because of its standalone nature, has much better longevity and no danger of being lost or corrupted.

The main consideration in developing a PDF-based delivery system is to ensure that the drafting tool seamlessly integrates with PDF and that the company developing and automating that process has a high level of expertise in PDF files and the printing of those files. The delivery of PDF as a point-in-time solution will require an intimate understanding of the legislative publishing process and flexible database development and programming skills. Too many projects have failed where any one of these skills was missing.

Templates

Templates are a simple way to ensure that legislation is drafted in a consistent manner. The template controls the look of the document via paragraph, character, table and even page styles. By utilising a template, periodic changes to the look-and-feel can be easily managed, and current documents easily updated.

To ensure that all document management is performed in a consistent manner, the templates also have a number of scripts or macros associated with them, so the complete work-flow can be micro-managed. The scripts are linked to dialog boxes, menu commands and even keyboard shortcuts, so the data structure of the file is consistent and the manual application of styles to text can be efficient and flexible. Even a keyboard matrix chart can be added to the keyboard shortcuts to assist the user to apply styles very rapidly. By linking a series of repetitive steps to one command via a script, the productivity of the user is enhanced and the overall accuracy is greatly improved.

There is also additional functionality that can be added to the template to improve the quality of the document. Legislative graphics such as the government crest can be

converted to a typeface. A normal graphic of a crest can be around 300 Kbytes, and may be used a number of times in a document, thereby adding a considerable overhead to each file. A crest typeface is around 10 Kbytes in size and besides being a vector image (scalable and extremely high resolution), it can be used any number of times in a document without any addition to the file size. File size becomes extremely important in web delivery.

The creation of a crest typeface has a further advantage in the area of document authenticity. Without the typeface resident, the computer printing the file with the crest will print only the corresponding character in the default typeface (for example, the letter "C"). Therefore the concept of an authorised printing source can be realised. Many jurisdictions now operate an on-demand printing section for legislation using modern photocopier technology. Connected to the local network, or even automated via the internet, on-demand printing eliminates the costly storage of hardcopy legislation and provides a revenue stream for government.

Producing templates with all the required attributes requires specialist legislative publishing knowledge. The common mistake made in attempting to produce a Legislative Publishing Work-flow is the application becomes too specific. By over-doing the processes the system quickly becomes dated requiring more programming to alter the flow. Over a period of time this eventually fragments the system to the point it becomes unworkable, especially if there is a change of development staff.

The key to eliminating these problems is the knowledge of exactly how much to automate, and to provide adequate documentation of the flow, including the professional commenting of every line of code. Another good housekeeping process is for any variables (such as people's names, places etc.) to be kept outside the script in files that can be easily managed by internal administrative staff, or integrated with other office systems (for example, email systems).

All modern word processing and page layout applications have the ability to be "extended" using some form of scripting or programming language. Moreover the scripting language can even interact with the host computer operating system. The real skill in the development of such systems comes in knowing when to apply automation techniques and when not to, knowing how documents are drafted and managed and applying techniques that will enhance the process rather than hindering it.

The Conversion Process

Moving from a manual drafting system to an automated (template driven) work-flow based upon scripting and styles does create some hurdles to jump. Where jurisdictions out-source the publication of their legislation the external company is normally managing the legislation in a totally different application. The reason for doing so is sometimes justifiable but in most cases it is merely commercial. In extreme cases the drafting section cannot even

re-use the data it is producing and has to rely heavily on the contracted resources to make any type of change to a document, in effect losing control of the quality and timeliness of their own legislation.

The only plausible and efficient outcome in the on-going management of legislation is to adopt an "in-house" policy. There are jurisdictions that believe that policy is outside their skills base or mandate. Given the number of small countries that have already achieved this goal, those fears are unfounded and so it was shown to be the case in the Isle of Man.

The first step is obviously to develop the templates that the office will use, train the staff and implement the system for the current documents. The next step is to address all the legacy data. In a worst-case scenario the hard copy may need to be scanned and converted to text, but in the case of the Isle of Man the data was already in a computer-based form; it was just the conversion that had to be catered for.

In other jurisdictions the extraction of the data has proved a major stumbling block. A real example of finding a way to overcome this hurdle involved a contractor's encrypted proprietary system where the files were unreadable outside the application. The documents were printed using a PDF driver and the PDF files were then converted to Rich Text Format (RTF) and then to plain text (ASCII). The text was flowed into the new template and styled one paragraph at a time. In another case the restyling was achieved using a pattern recognition script to convert 90% of each file automatically.

The best way to effect the conversion of the data is to establish a temporary section of administrative type personnel led by a technical co-ordinator. The whole process becomes an additional skills-honing exercise for these operators. When the conversion task has been completed some of the staff can be utilised in a "reprints" type section (see *Consolidation and Reprints*, below).

In the Isle of Man no staff were available to effect the conversion which was therefore done as an add-on to the contract for the website with a programme being devised to convert the existing electronic data.

Publishing the Legislation to PDF

Once the documents currently being drafted are in the new style and all legacy documents have been converted, the documents are ready for the publishing phase via traditional printing, on-demand printing or electronic distribution using CD-ROM or the internet.

The delivery system should be via PDF as the files can be used for all forms of output without modification. Here you simply make a script to convert the files, either individually or in a batch process. The real expertise here is populating those PDF files so that they become a rich and valuable tool for the people that will be viewing the document. For hard copy printing nothing really needs to be added, but CD-ROM or internet files can have a great deal of value added to them in the output process.

First, information from the files themselves (document variables) can be added to the meta-data of the PDF file. Information such as short title, long title, author, commencement, Act number, copyright, etc. can be automatically inserted into the meta-data fields in the PDF file to enable flexible document management and present valuable results when indexed by a search engine.

Next, extra links can be inserted into the PDF file to enable efficient navigation of the document. The Table of Contents (TOC) items, which are automatically generated within the template based upon styles, can be converted into links in the PDF file. Clicking on a topic in the TOC will take you to the corresponding text. Also the document styles (for example, section headings) can be mapped to a series of bookmarks in the PDF file to allow all section headings (and any nested sub-headings) to be viewed in a navigation window (bookmarks view) alongside the main text window. Again clicking on a topic in the bookmarks will take you to the corresponding text in the main window.

Finally, other internal links in the drafted document can be converted to links in the PDF. These links can include footnotes and endnotes, but through the combination of scripting and a back-end database all cross-references can be dynamically linked to external files. The link can even take you to the appropriate page (section) in the linked file.

So it is extremely important that the company developing the template should also be deeply involved in the conversion to PDF as both processes need to be fused together to provide a valuable outcome.

Making the information available on the Internet

Once fully populated PDF files are available the next stage is to consider how to deliver those files in the most efficient way. Traditionally the files were arranged alphabetically or by year (passed or made). The display of files via HTML requires a sound knowledge of that mark-up language. The main disadvantage is that the pages are static and must be manually prepared or updated.

The next generation of web technologies has seen the adoption of a Content Management System (CMS) for the display of data on the web. Here there is a single template and each page is prepared by storing the data in a back-end database and dynamically presenting the data on screen when requested. The advantage is that the management of the data can be accomplished by anyone with word-processing skills. However, to build a CMS requires high-level programming skills.

Fortunately, with the emergence of Open Source technology, a number of very capable and well written CMSs have emerged, such as Drupal, Joomla, WordPress, etc. Open Source requires no costly licences and is free and open. The difficult part comes when you want to integrate a Legislative Publishing System (LPS) into a CMS. You can create a stand-alone application and use an i-Frame in the CMS to display the data. However, to leverage a very

stable and secure administration system within the CMS, the LPS really needs to be fully integrated into the CMS. In such a system the secure management of the legislative data is possible, but more importantly, the input of a new piece of legislation can even be performed during the conversion to PDF by the script in the template. The obvious scenario is there would be a menu command such as "Convert and Publish." Here the file is converted to PDF, emailed to the printer, a new record created in the web site from the meta-data and the file uploaded to the web site and placed in the correct directory. This process is now possible.

An extra bonus of a CMS is that you are able to display related information alongside the legislation and the web site becomes a valuable information dissemination tool that can be managed securely by any number of authors. Content can include news, important events, legislative guides and links to government agencies.

The semi-automated process of publishing PDF files on the internet becomes an integral part of the whole legislative work-flow and therefore it is only logical that it should developed by a single contractor.

Consolidation and Reprints

Most legislation produced today will be amended many times throughout its life-cycle. Normally those amendments build up over time and make the reading and interpretation of the current law sometimes difficult and time-consuming. Periodically the legislation is consolidated and sometimes revised, generally by external contracted resources. The process is very costly and quickly becomes out-of-date.

The solution to this legislative roller-coaster (given current technology) is to do it in-house. Combine a drafting system based upon templates, the use of PDF as a delivery mechanism, and an internet based legislative publishing web site that is geared to presenting different versions of files based upon time and you have all the necessary tools to indeed do it in-house without the need for specialist staff.

The first phase of the project involves converting to a template based system. Publishing those files can be achieved fairly quickly. The website will carry the current files and amendments so it is important that the web site is able to present the data in this way and provide a path to a complete point-in-time system when needed.

To provide a flexible and modern point-in-time delivery system you still need to start with a complete and up-to-date statute book. In other words the data still needs a complete consolidation, but if you wish to ensure that the content is accurate and conforms to current best practice standards, including plain English, a Law Revision is necessary.

Next a Reprints Section needs to be established. Most jurisdictions find that when they adopt a template-based drafting environment there is a real and measurable improvement in efficiency. Generally the establishment of a Reprints Section does not change the existing

resources, it just rearranges them. The bottom line is you end up with a more efficient work-flow, by taking control over the timeliness and quality of the legislation. Ultimately this leads to a better and more flexible product that is more attractive to business users should you desire to create an income stream.

The Reprints Section is responsible for incorporating amendments, checking the files, applying new versions based upon commencement dates and updating the in-house database and website. The files can also be accessed via an on-demand based printing system. Users of the web site are then given the option of viewing the current legislation or selecting a point-in-time version. To most professional users this functionality is something they will and do subscribe to. The CMS is the perfect vehicle for delivery in this case as the additional point-in-time functionality can be easily controlled via a secure log-in process.

Most countries have an obligation to publish the legislation to the general public. However, access to other valuable (value added) forms of legislation can be strictly controlled, and used to generate revenue such as Acts as passed, subordinate legislation as made, Gazettes, recent changes (including email notifications of changes), repealed legislation, legislation by category, links between enabling and secondary legislation, Bills in the House, printable indices, links to case law (requires additional resources) and even a mechanism whereby certain portions of legislation can be displayed inside a frame on another website. This feature is particularly useful to government departments as they can display only their sponsored legislation, and when changes are made to the central repository, those changes are instantly reflected in the linked sites.

Therefore a Reprints Section opens a whole new chapter in potential revenue, which more than justifies its existence. Most current drafting sections pay large amounts for external agencies to manage and publish their legislation. The published products are then used by the external company as a revenue stream with very little (if any) of the profits coming back to the owners of the information.

Implementation

The development of a template based legislative publishing system should be done in close co-operation with all stake-holders. The keys to the success of this type of project are training and support. Besides producing an extensive set of training manuals, code explanations and documentation, the development company needs to be deeply involved in the day-to-day operations of the office for an initial period after commissioning. Once the staff have achieved a level of autonomy the support should retract to an internet-based incident reporting system. Periodically, especially when updates to the system are required, on-site visits should be scheduled and time allowed during those visits for new issues to be resolved. Therefore any contract should cover on-going support on a yearly basis.

Isle of Man solution: project MAN/eX

The detailed specification produced for the Isle of Man project proved that this was a specialist job and following a tendering process Gordon Wright was engaged to design the templates, one for primary legislation, one for secondary legislation, and the website.

The essential features needed for the templates, which were to be in MS Word, were auto-numbering, auto cross-referencing, a recognised style for each portion of text and an auto-generated index. The legislative counsel wanted any text in amending legislation to be inserted into primary legislation to be marked up in a way that would make it easy to identify for adding to it for the website version. In the case of the secondary legislation website, they wanted auto-prompts to ensure that the powers, making body and Tynwald procedure (for example, whether the document required approval by Tynwald or laying before Tynwald), were identified by the legislation officer.

Also part of what became known as project MAN/eX, were steps to convert the document to each of its subsequent stages. In the case of primary legislation, a Bill for introduction with the name of the mover and line numbering inserted, then a version for transmission to the UK Ministry of Justice to advise on Royal Assent, which inserted different text at the top and removed the line numbering, and finally the final Act version. Printing only, with no manipulation of the text, was to become the responsibility of Isle of Man Post as the Government printer. Drafts were stored on the Government network and backup up locally. The network would facilitate the legislative counsel being able to view and mark-up changes to the secondary legislation they reviewed.

The new website was to contain the Acts of Tynwald in PDF format and would be kept up to date in-house using existing resources, time having been saved from the removal of the need for proofing and paste-up tasks. The Acts would be available alphabetically, by year and by subject-matter and kept up to date to the beginning of the previous month. Essential was an advanced search engine and a 'point in time' facility going forward, enabling search of the law at a given date. These features were to be available to subscribers only, thereby generating an income stream to defray the cost of website maintenance and the search engine licence, and provision was to be made to enable other entities to display sections of the website on their own websites in a way that the updates would apply automatically. However, the display of current law, legislation as enacted and a Google search engine were to be available to all. It was intended to provide links to the secondary legislation as made⁴ and UK Acts and Orders in Council applicable to the Island. There were also further opportunities to use the website to create an on-line Gazette.

⁴ The ultimate aim is to include the secondary legislation as amended when funding allows, but a preliminary stage was to reduce the volume – over 1,000 a year – by changes to the powers in primary legislation.

Conclusion

The Isle of Man now has a highly workable system of drafting templates, storage and website at a price that is within the grasp of most jurisdictions. A new *Interpretation Act* and a *Legislation Act* to strengthen revision powers and enable authentication of the website version or legislation are intended to be brought forward shortly. The level of sophistication of the new system relative to its cost may encourage other small jurisdictions to seek a similar system. This small Island, the fifth nation most likely to land a man on the moon⁵ and famous for its high speed TT races, has taken a giant leap forward in terms of the efficiency of drafting, appearance and accessibility of its legislation. The winds of change may be blowing through legislative drafting as we all harness technology to transform our working practices, but the Isle of Man has not forgotten either the importance of history or the need to serve the public, to whom access to the law is a basic right. For the front of the website there was chosen a picture of the annual Tynwald ceremony, the Island's ancient Parliament said to date back to 979. On it was added these words from the preface to the 'Lex scripta of the Isle of Man comprehending the ancient Ordinances and Statute Laws from the earliest to the present date, a new edition, 1819':

The laws are plain, simple, summary, - to all capacities intelligible...so...that the door of justice is open to the poor and the rich.

Thanks to the recent reforms these words can but be truer for the Island today.

⁵ According to the industry consulting company *Ascend* – see http://www.ascendworldwide.com/nextspacepn_07-09-10.pdf, accessed 2023-12-12.

Appendix 1 – Old Style

c.2

Civil Partnership Act 2011

17



Signed in Tynwald: 15th March 2011
Received Royal Assent: 15th March 2011
Announced to Tynwald: 15th March 2011

AN ACT

to make provision for civil partnership; to make minor amendments in respect of adoption; and for connected purposes.

BE IT ENACTED by the Queen's Most Excellent Majesty, by and with the advice and consent of the Council and Keys in Tynwald assembled, and by the authority of the same, as follows:—

PART 1

INTRODUCTION

1. (1) A civil partnership is a relationship between two people of the same sex ("civil partners") — Civil partnership
P1804(1)(1)
- (a) which is formed when they register as civil partners of each other in the Island under Part 2;
 - (b) which is formed when they register as civil partners of each other in any part of the United Kingdom in accordance with CPA 2004;
 - (c) which is formed in any of the Channel Islands in accordance with a law having a corresponding effect to this Act; or
 - (d) which they are treated under Part 3 as having formed (at the time determined under that Part) by virtue of having registered an overseas relationship.
- (2) Subsection (1) is subject to the provisions of this Act under or by virtue of which a civil partnership is void.

Appendix 2 – New Style

C
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CIVIL PARTNERSHIP ACT 2011

<i>Received Royal Assent:</i>	<i>15 March 2011</i>
<i>Announced:</i>	<i>15 March 2011</i>
<i>Commenced:</i>	<i>15 March 2011</i>

AN ACT to make provision for civil partnership; to make minor amendments in respect of adoption; and for connected purposes.

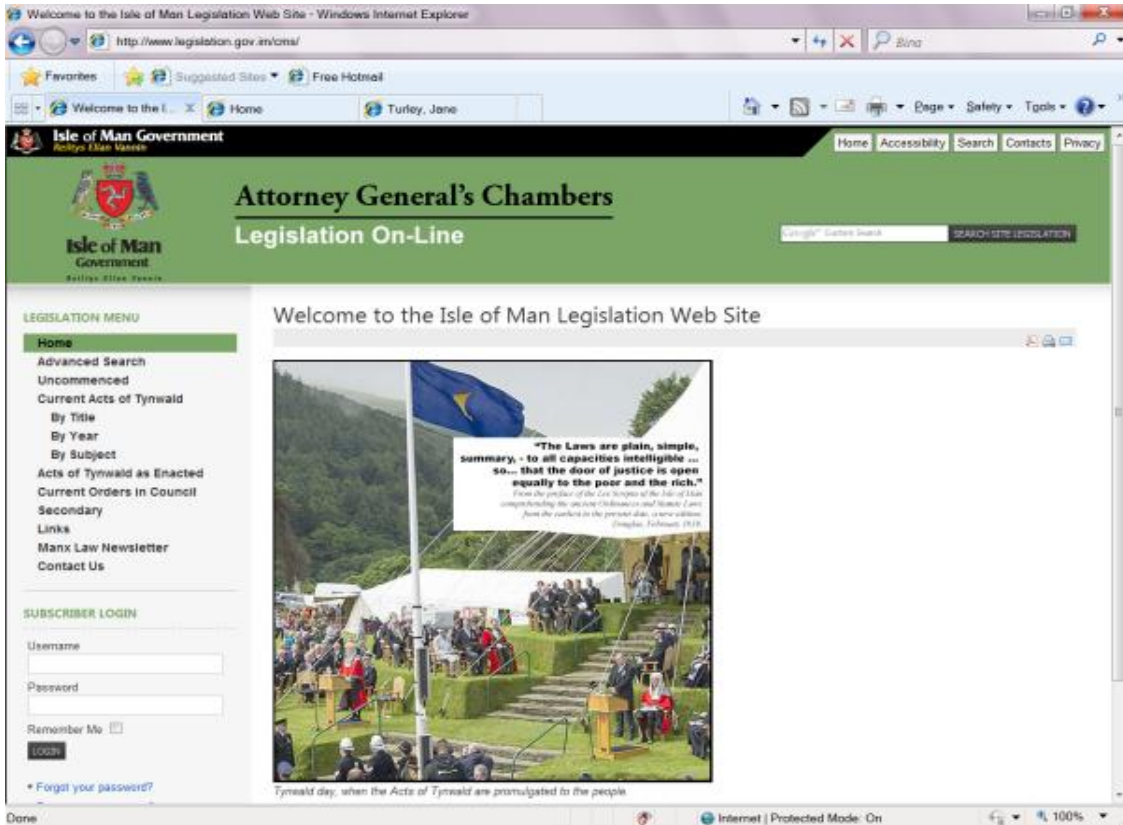
PART 1 – INTRODUCTION

1 Civil partnership

[P2004/33/1]

- (1) A civil partnership is a relationship between two people of the same sex ('civil partners') –
 - (a) which is formed when they register as civil partners of each other in the Island under Part 2;
 - (b) which is formed when they register as civil partners of each other in any part of the United Kingdom in accordance with CPA 2004;
 - (c) which is formed in any of the Channel Islands in accordance with a law having a corresponding effect to this Act; or
 - (d) which they are treated under Part 3 as having formed (at the time determined under that Part) by virtue of having registered an overseas relationship.
- (2) Subsection (1) is subject to the provisions of this Act under or by virtue of which a civil partnership is void.

- (3) A civil partnership ends only on death, dissolution or annulment.
- (4) The references in subsection (3) to dissolution and annulment are to dissolution and annulment having effect under, or recognised in accordance with, this Act.
- (5) References in this Act to a relevant relationship are to be read in accordance with Part 3.



Integrating the Drafting, Publishing and Consolidation of Legislation – a Singapore Perspective

Phang Hsiao Chung¹



Abstract

The Legislation Editing and Authentic Publishing (“LEAP”) System maintained by the Singapore Attorney-General’s Chambers comprises: (a) an Electronic Drafting System for the drafting and revision of legislation, and the production of camera-ready copies of legislation in portable document format; and (b) a Versioned Legislation Database which provides access to the different versions of Singapore legislation in force at different points in time, and serves as the official legislation website in Singapore. This paper discusses the development of the LEAP System, including the processes involved, and the challenges faced. The paper also examines the different design options for such a system, and whether, on hindsight, things should have been done differently.

Background

The central legislative drafting office in Singapore is the Legislation and Law Reform Division (“LLRD”) of the Attorney-General’s Chambers (“AGC”). LLRD’s work includes:

- (a) preparing drafts of Government Bills and Explanatory Statements for introduction in Parliament;
- (b) preparing drafts of subsidiary legislation; and

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(c) producing Revised Editions of Acts and subsidiary legislation under the direction of the Law Revision Commissioners.²

The authentic versions of Singapore legislation are in hard copy, and comprise the following documents published by the Government Printer:³

- (a) the Revised Editions of Acts and subsidiary legislation; and
- (b) the Bills Supplements, Acts Supplements and Subsidiary Legislation Supplements of the Government *Gazette*.

The Government Printer also maintains the Electronic *Gazette* (or *eGazette*) website (at <http://www.egazette.com.sg>),⁴ on which soft copies of Bills Supplements and Acts Supplements, and *Gazette* Notifications of subsidiary legislation, are published in portable document format (“PDF”) and displayed for 5 working days, beginning on the date on which they were first published on that website. The publication on the *eGazette* website of the PDF copies of the Bills Supplements and Acts Supplements, and the *Gazette* Notifications of subsidiary legislation fixes the date on which the corresponding Bills, Acts and subsidiary legislation are first published in the *Gazette*.⁵ However, only the hard copies of the Bills Supplements, Acts Supplements and Subsidiary Legislation Supplements⁶ that are printed by the Government Printer are to be admitted in evidence by all courts and in all legal proceedings without formal proof, and taken and accepted as prima facie evidence of their contents.⁷

² The Law Revision Commissioners are appointed under section 3(1) of the *Revised Edition of the Laws Act* (Cap. 275) “to prepare and publish a revised edition of Acts and a revised edition of subsidiary legislation and to make an annual revision thereof”. They comprise the Attorney-General, the Solicitor-General, the Chief Legislative Counsel and such other persons as may be appointed by the President of the Republic of Singapore.

³ In Singapore, the Government Printer is a commercial printer appointed by the Ministry of Communications and Information to publish official Singapore Government publications, including the *Gazette* and the Revised Editions of Acts and subsidiary legislation.

⁴ The *eGazette* website was launched on 15 September 1998, and its archives provide PDF versions of all *Gazette* Notifications and Revised Editions of Acts and subsidiary legislation that were published on or after 15 September 1998.

⁵ Section 2(1) of the *Interpretation Act* (Cap. 1) defines “*Gazette*” or “*Government Gazette*” as “the *Gazette* published in electronic or other form by order of the Government and includes any supplement thereto and any *Gazette* Extraordinary so published”. Under section 2(6) of the *Interpretation Act*, “Where a *Gazette* is published in more than one form, the date of publication of that *Gazette* shall be deemed to be the date that *Gazette* is first published in any form”.

⁶ The Subsidiary Legislation Supplements of the *Gazette* are weekly hard copy compilations of all *Gazette* Notifications of subsidiary legislation published as of Friday.

⁷ Under section 48 of the *Interpretation Act*, all printed copies of the *Gazette*, purporting to be published by authority and to be printed by the Government Printer, shall be — (a) admitted in evidence by all courts and in all legal proceedings whatsoever without any proof being given that those copies were so published and printed; and (b) taken and accepted as prima facie evidence of subsidiary legislation, appointments, notifications and other publications therein printed and of the matters and things contained in such subsidiary legislation, appointments, notifications and publications, respectively.

As hard copies of legislation have to be manually updated and are not readily available to members of the public, reliance is increasingly placed on the electronic versions of Singapore legislation made available on the following legislation websites maintained by AGC:

- (a) Singapore Statutes Online (“SSO”), which provides access to current Singapore legislation through the Internet, and is Singapore’s official legislation website (at <http://www.statutes.agc.gov.sg>); and
- (b) Versioned Legislation Database (“VLDB”), which provides access to the different versions of Singapore legislation in force at different points in time, and is available:
 - (i) within AGC, through AGC’s info-communications technology (“ICT”) network; and
 - (ii) to all Government departments and statutory boards, through the Singapore Government Intranet.

A replica of VLDB is also made available to the public through the legal research module of LawNet,⁸ a legal practice portal (at <http://www.lawnet.com.sg>) operated by the Singapore Academy of Law.⁹ Any person can access the legal research resources on that module, either as a paying subscriber of LawNet or as an ad hoc user charged on a pay per use basis.

VLDB allows a user to browse the text of any Singapore Act or subsidiary legislation in force on any date on or after the version base date, and to conduct point-in-time searches for one or more words or phrases contained in any Singapore Act or subsidiary legislation in force on any date on or after the version base date. VLDB also allows a user to view Bills Supplements of Bills introduced from 1961 onwards, Acts Supplements of Acts enacted from 1985 onwards, and *Gazette* Notifications of subsidiary legislation published in the Subsidiary Legislation Supplements from 1996 onwards.

The original VLDB was developed from 1996 to 1997 using SGML (or Standard Generalised Markup Language), and was launched in 1998 with a version base date of 1 January 1997. It displayed minimally formatted legislation in HTML (or HyperText Markup Language). It was meant to be used solely as a legal research tool (and not as a source of authentic legislation), as:

- (a) its base data originated from an earlier text-based in-house legislation database the data entry for which had been outsourced; and

⁸ The legal research module of LawNet aggregates content from several different sources. The resources in that module include, in addition to Singapore legislation from VLDB, case law from Singapore, Malaysia, England, Australia, India and Hong Kong, and certain journals and textbooks.

⁹ The Singapore Academy of Law is a statutory body established under section 3 of the *Singapore Academy of Law Act* (Cap. 294A). Its functions include promoting and maintaining high standards of conduct and learning of the members of the legal profession in Singapore, and promoting the advancement and dissemination of knowledge of the laws and the legal system.

(b) it was maintained by an external vendor, which manually updated the database by pasting text from draft legislation prepared by LLRD in Microsoft Word.

The original VLDB also generated content for the original SSO.

The original SSO was developed as an add-on to the original VLDB, and was launched in November 2001. It provided, without charge, only HTML versions of current Acts. It was maintained by the vendor for the original VLDB, and was updated once a month.

The process for preparing camera-ready proofs of subsidiary legislation for publication in the *Gazette* (including the *eGazette* website) was as follows:

- (a) LLRD would draft the subsidiary legislation using a Microsoft Word template.
- (b) The Government Printer would then typeset the proof of the subsidiary legislation, using the printer's own publishing software, based on LLRD's draft.
- (c) LLRD would then manually check a hard copy of the proof, and annotate any corrections on the hard copy.
- (d) The Government Printer would then correct the proof, and obtain LLRD's approval to publish the corrected proof on the *eGazette* website.
- (e) The Government Printer would then compile the *eGazette* proofs of all subsidiary legislation published in a week into the Subsidiary Legislation Supplements for publication in hard copy, without further reference to LLRD.

A different process has been in place since 1 April 2002 for the preparation of camera-ready proofs of Bills. LLRD would draft and typeset a Bill using a Microsoft Word template, and then generate a PDF copy of the Bill for use as the proof of the Bill. The Government Printer would then incorporate the PDF copy into the Bills Supplements for publication on the *eGazette* website and printing in hard copy. This reduces the time required to prepare a printer's proof of a Bill.

By 2005, the original VLDB was close to the end of its lifespan, and there were concerns that technical support for the technology used in the original VLDB would cease to be available. AGC had to replace the original VLDB, and took the opportunity to explore how the replacement system could also address the following matters:

- (a) There were human errors and delays in the manual updating of legislation on the original VLDB.
- (b) The contents of the original VLDB were not authoritative.
- (c) There were deficiencies in the representation of legislation on the original VLDB.
- (d) It was time consuming and labour intensive to manually check proofs of subsidiary legislation prepared by the Government Printer.

AGC therefore decided to embark on a project to integrate the processes relating to the drafting, publishing and consolidation of legislation, so as to enable the same data to be used to generate different renditions of legislation with minimal human intervention. The underlying assumption was that the opportunity for human error would be reduced by automating as many processes as possible. If a single source of legislative text can be used to generate both: (a) the authentic legislation published by the Government Printer; and (b) HTML and PDF renditions of the same legislation for display on the new VLDB, this would go some way to ensuring the accuracy and reliability of the data on the new VLDB, and pave the way for a database of authentic legislation. The project would also cater for enhancements in the delivery of legislation content by the new VLDB, e.g. through web and mobile services.

Legislation Editing and Authentic Publishing System

The ICT system to be developed through the project was named the Legislation Editing and Authentic Publishing (“LEAP”) System. There are 2 components to the LEAP System:

- (a) an Electronic Drafting System (“EDS”); and
- (b) a new VLDB.

From the onset, there were certain design constraints. First, the LEAP System was not supposed to duplicate the functions of another ICT system that was being developed concurrently, namely, the Enterprise Legal Management System (“ELMS”). ELMS was a collaborative system which was to provide an integrated electronic view of information on legal matters within AGC, and replace the different standalone systems that had been implemented in different Divisions of AGC for matters such as case management and workflow management. Among other things, ELMS was to provide an electronic filing and archival system, and enable certain processes (e.g. the assignment of work, and the clearance of advice) to be carried out electronically. ELMS was implemented in December 2009.

Second, the LEAP System was intended to be compatible with the Singapore Government Standard ICT Operating Environment Programme (“SOEasy”). SOEasy consolidated the ICT services used in different Government agencies and harmonised them in a single operating environment. When SOEasy was extended to AGC in 2010, SOEasy had adopted Microsoft Word 2007 as the standard word processing software. It was therefore decided that the LEAP System would use Microsoft Word 2007 as the base software for its document editor, so as to facilitate the communication of draft legislation between LLRD and its instructing Government agencies.

Third, the LEAP System had to accommodate the following legacy matters inherited from the original VLDB:

- (a) Many legacy documents were drafted in Microsoft Word 2003, so the LEAP System also had to be compatible with Microsoft Word 2003.
- (b) The new VLDB had to retain all capabilities of the original VLDB, as those were useful features that users were familiar with.
- (c) The new VLDB had to be integrated with LawNet.

The project to develop the LEAP System was split into 2 Phases. Phase 1 involved a consultancy study and the development of a data type definition for the System. The consultancy study would:

- (a) review the existing business processes;
- (b) provide an analysis of legislation document requirements;
- (c) explore areas of data collaboration and data capture with external parties (e.g. Parliament and the Government Printer);
- (d) examine the key bottlenecks and issues encountered in the existing system and processes; and
- (e) provide a proof of concept for the LEAP System.

Phase 2 involved the actual development of the LEAP System, and was to draw from the knowledge gained during Phase 1. There were 2 parts to Phase 2:

- (a) Phase 2A involved the development of the EDS, and covered matters such as:
 - (i) a workflow management engine for the legislative drafting and law revision processes, and the publication of legislation on the new VLDB;
 - (ii) a versioning engine to manage, and provide version control for, the different versions of draft legislation to be stored in the EDS;
 - (iii) a data repository for the storage of the different versions of published legislation; and
 - (iv) an information search and retrieval system.
- (b) Phase 2B involved the development of the new VLDB, including its front-end user interface, web service interface, RSS (or Really Simple Syndication) feed functions, data transformation engine and presentation transformation engine.

The deliverables stipulated in the tender for Phase 2 included the following:

- (a) a document editor in the form of a new Microsoft Word 2007 drafting template;
- (b) a database for the storage of working and significant versions of draft legislation;
- (c) the automatic updating of the new VLDB once legislation comes into operation;

- (d) the display of authentic PDF and accurate HTML versions of Bills Supplements, Acts Supplements, *Gazette* Notifications of Subsidiary Legislation and Revised Editions of Acts and subsidiary legislation on the new VLDB;
- (e) the display of accurate unofficial consolidations of all legislation; and
- (f) a capacity for enhancements to the new VLDB, including the back capture of historical data.

The entire LEAP project took about 5.5 years to complete.¹⁰ LEAP Phase 1 began on 6 December 2006 and ended on 12 February 2008. LEAP Phases 2A and 2B began on 24 September 2008. The user requirement study for the EDS and the new VLDB was conducted from 30 October 2008 to 6 March 2009, while formal system development took place from 1 December 2008 to 30 April 2010. This was followed by user acceptance testing for the EDS from 1 February 2010 to 2 November 2011, and for the new VLDB from 31 May 2010 to 18 March 2011. The LEAP System was partially commissioned on 3 October 2011, when the new VLDB was made available concurrently with the original. The entire LEAP System was commissioned on 2 November 2011, when the EDS became operational. The performance guarantee period for the LEAP System ended on 29 May 2012.

The new VLDB replaced the original on 15 October 2011, when the original ceased to be updated. The new VLDB was developed using XML (or Extensible Markup Language). It maintains the existing version base date of 1 January 1997, but allows earlier versions of legislation to be added. The new VLDB was developed primarily for use as a legal research tool, but the intention is for it to display authentic future versions of legislation. To achieve this end, legislation data migrated from the original to the new VLDB will be verified by LLRD when the legislation concerned is amended or revised, so as to produce accurate consolidations of legislation. The new VLDB will also be maintained in-house by LLRD through the EDS, thus allowing LLRD to put in place measures for ensuring that the new VLDB is updated accurately.

In addition to displaying HTML versions of legislation in a house-style that closely resembles the house-style of authentic Singapore legislation, the new VLDB provides PDF copies of certain authentic Bills Supplements, Acts Supplements, *Gazette* Notifications of subsidiary legislation and Revised Editions of Acts and subsidiary legislation, and unverified PDF copies of informal consolidations of certain legislation that are automatically generated by the LEAP System. The new VLDB also provides:

- (a) RSS (or Really Simple Syndication) feeds for what's new on VLDB;

¹⁰ This is the approximate period between the commencement of LEAP Phase 1 and the completion of the performance guarantee period for the LEAP System.

- (b) advanced search features (e.g. the ability to choose the collection of legislation from which to conduct the search, the ability to refine search results by adding additional user-defined search criteria, and the ability to browse search results that are refined using certain pre-defined facets);
- (c) advanced browse features (e.g. the ability to determine temporal settings for browsing, and the ability to view repealed or uncommenced legislation); and
- (d) the ability to set user preferences.

A new SSO also replaced the original in October 2011. The new SSO is in fact a module of the new VLDB that is configured to display a subset of the data available on the new VLDB, and is automatically updated when the corresponding data in the new VLDB is updated. Generally, the new SSO will be updated within 3 working days after any change is made to the legislation displayed on it. The new SSO provides, without charge:

- (a) HTML versions of all current Acts and, with effect from December 2011, all current subsidiary legislation;
- (b) HTML versions of Acts Supplements and *Gazette* Notifications of subsidiary legislation, as published in the *Gazette*;
- (c) PDF copies of certain Acts Supplements and *Gazette* Notifications of subsidiary legislation; and
- (d) a subject index.

The principal components of the LEAP System are as follows:

- (a) an XML Legislative Document Repository, which utilises a TeraText Database System (DBS) Content Server, augmented by a TeraText Replication Server and a TeraText Advanced Administration Server;
- (b) the EDS, comprising:
 - (i) a document editor which utilises Microsoft Word 2007, augmented with MathType;
 - (ii) an Amending Engine which utilises the TeraText for Legislation Toolkit;
 - (iii) a Workflow Management Module which utilises a SOAP (Simple Object Access Protocol) interface from the document editor and the web-browser interface, and the TeraText Document Management System (DMS) Workflow Enactment Service;
 - (iv) a Content Versioning and Management System which utilises the TeraText DMS Document Version Manager;
 - (v) a Data Rendering Engine which utilises the PTC Arbortext Advanced Print Publisher; and

(vi) an Information Search and Retrieval System which utilises a TeraText DBS Content Server, augmented with the TeraText DMS; and

(c) the new VLDB, which utilises a TeraText DBS Application Server.

With the implementation of the LEAP System, LLRD had to quickly learn to use, and adapt to, the new drafting, publishing and workflow management tools of the System. LLRD has also started to take on the following new functions:

(a) producing camera-ready versions of Acts Supplements, *Gazette* Notifications of subsidiary legislation and Revised Editions of Acts and subsidiary legislation, in addition to Bills Supplements;

(b) updating the new VLDB, including carrying out data cleansing and fixing XML errors; and

(c) ensuring ready online access by the public to accurate and updated legislation at the SSO website.

In addition, in anticipation of the publication of authentic legislation, and in view of the provision of an electronic version of a subject index, on the new SSO, the *Revised Edition of the Laws Act* (Cap. 275) and the *Application of English Law Act* (Cap. 7A) were amended,¹¹ with effect from 1 March 2012.¹²

- (a) to empower the Law Revision Commissioners to cause any Act that has been published in hard copy to also be published in electronic form;¹³
- (b) to enable a Revised Edition of an Act that is published in electronic form to be taken and accepted, in all courts and for all purposes, as prima facie evidence of the proper law in Singapore in respect of that Act;¹⁴
- (c) to provide that where there is any discrepancy or inconsistency between a Revised Edition of an Act published in hard copy and the same Revised Edition of that Act published in electronic form, the Revised Edition of the Act published in hard copy will prevail;¹⁵

¹¹ See sections 11 and 12 of the *Statutes (Miscellaneous Amendments) Act 2012* (Act 2 of 2012), which amended the *Application of English Law Act* and the *Revised Edition of the Laws Act*, respectively.

¹² See the *Statutes (Miscellaneous Amendments) Act (Commencement) Notification 2012* (G.N. No. S 77/2012).

¹³ See section 11A(1) of the *Revised Edition of the Laws Act* and section 9(7) of the *Application of English Law Act*.

¹⁴ See section 11A(2) of the *Revised Edition of the Laws Act* and section 9(8) of the *Application of English Law Act*.

¹⁵ See section 11A(3) of the *Revised Edition of the Laws Act* and section 9(9) of the *Application of English Law Act*.

- (d) to extend the application of the new provisions relating to Revised Editions of Acts published in electronic form to Revised Editions of subsidiary legislation, with the necessary modifications;¹⁶ and
- (e) to remove the then existing requirement for the Revised Edition of Acts to include an index in hard copy, as an electronic version of that index will be made available on the SSO website, thus rendering the hard copy of that index redundant.¹⁷

Lessons Learned

LLRD gained some insights from the development of the LEAP System which other jurisdictions developing similar ICT systems may find useful.

Project Management

Splitting a project into different phases may not necessarily bring about the anticipated benefits. As mentioned earlier, the project to develop the LEAP System was split into 2 Phases, with Phase 1 involving a consultancy study and the development of a data type definition for the LEAP System, and Phase 2 involving the actual development of the EDS and the new VLDB. One objective of splitting the project was to ensure that the requirement study in Phase 1 was not biased towards any particular product or solution. Unfortunately, the reality was that the vendors with the requisite expertise who were unsuccessful in the Phase 1 tender did not participate in the Phase 2 tender. While the costs of Phase 1 were kept low because of the competition for that tender, the amounts tendered for Phase 2 were high relative to estimates because of the absence of competition. Eventually, the Phase 2 tender was awarded to a partnership which included the Phase 1 vendors, as no other vendors who participated in the Phase 2 tender had the requisite expertise.

Working with multiple partners in a project can present problems. The Phase 2 tender for the LEAP System was in substance awarded to a partnership comprising a main contractor (namely, the vendor for ELMS) and 2 sub-contractors (namely, the successful vendors in Phase 1). This arrangement made sense to AGC, as the Phase 2 tender provided for integration with ELMS, and the sub-contractors were familiar with Phase 1 requirements. Unfortunately, the project was delayed because of certain defects detected during user acceptance testing. There were also disputes between the vendors on who was responsible for the defects and delays, and these disputes were exacerbated by cultural differences between the vendors. When AGC withheld payment because of the defects, some of the vendors began to experience cash flow issues. Consequently, contract variations had to be made to facilitate payment to keep the project going.

¹⁶ See section 17(6) of the *Revised Edition of the Laws Act*.

¹⁷ See section 12(b) and (c) of the *Statutes (Miscellaneous Amendments) Act 2012*.

System Requirements

Be very careful during the formulation of system requirements. Be proactive and detailed when formulating the User Requirements Specifications and the System Functional Specifications, as these may determine whether a particular behaviour of an ICT system is a defect. When it comes to the drafting of the User Requirements Specifications and the System Functional Specifications, do not rely on the vendors to act in your interests, even if they are paid to do so, as the vendors will draft the Specifications based on their perspectives and not yours. Vet all documentation carefully – everything in the User Requirements Specifications and the System Functional Specifications has significance, even diagrams. In fact, one dispute which AGC had with the vendors for the LEAP System (over whether the absence of a particular function was a defect) was resolved in AGC’s favour only after AGC was able to find a diagram within the Specifications which illustrated that function. There is a need to maintain proper records of all documentation and correspondence, as these will be vital to proving your case in the event of a dispute with your vendors.

System Design

Drafting of Amendments using Tracked Changes

One of the features of the LEAP System is that it allows amending legislation to be generated by tracking the changes to be made to any principal legislation onto a copy of the principal legislation. A summary of how this works follows:

- (a) The legislative drafter would first create and save a significant version of a “stub” for the amending legislation. The “stub” is a template that provides the EDS with instructions on how to organise the amending legislation.
- (b) The legislative drafter would then download from the EDS a copy of the principal legislation to be amended, track the changes to be made onto that copy, and save it as a new significant version of the principal legislation. This enables the EDS to read the tracked changes and translate them into amending actions.
- (c) The legislative drafter would then use the Amending Action Organiser of the EDS to generate a Grouped CDD (Change Description Document) from the “stub”, link the principal legislation containing the tracked changes to it, generate a list of amending actions, configure how the amending actions are to be organised in the amending legislation, and save the configuration.
- (d) The legislative drafter would then prompt the EDS to generate a draft of the amending legislation. The draft amending legislation generated by the EDS will contain default amendment wording, and have amendments organised in accordance with the Grouped CDD.

(e) The legislative drafter makes alterations, if necessary, to the default amendment wording in the draft amending legislation, and saves a new significant version of the amending legislation. This becomes the source text for the amending legislation, from which different renditions of the amending legislation can be generated by the EDS for different purposes. The original Microsoft Word 2007 rendition can be sent to the instructing agency for review and further instructions. The XML rendition stored in the EDS can be used to publish the amending legislation on the new VLDB. A PDF rendition can be generated to serve as the proof of the amending legislation meant for publication on the *eGazette* website.

(f) The Grouped CDD is used by the EDS to generate not only the draft amending legislation but also an informal consolidation of the principal legislation which incorporates the tracked changes.

In order to achieve this, the EDS document editor will insert hidden codes at the beginning of each provision in a document (whether the “stub”, the copy of the principal legislation on which the changes are tracked, the draft amending legislation that is generated by the EDS, or any new legislation that is being drafted) when a particular style is selected and applied to that provision. The EDS will then assign a GUID (Globally Unique Identifier) to that provision when a new significant version of the document is saved. Consequently, care must be taken to ensure that the hidden codes and GUIDs are not inadvertently deleted or altered, as system errors may be encountered if a critical hidden code or GUID is deleted or altered. Conversely, in certain circumstances where provisions are to be deleted, care must be taken to ensure that the hidden codes and GUIDs are also deleted, as the failure to do so may also result in system errors.

The process of drafting amendments using tracked changes provides the following benefits:

(a) A useful by-product is created through the process, namely, a copy of the principal legislation on which the changes to be made have been tracked. Instructing agencies that have received such copies of principal legislation have invariably responded favourably, as it makes it easier to review the changes made.

(b) The process allows the semi-automation of the drafting of amendment wording. The legislative counsel need not draft the amendment wording from scratch, and can focus instead on the textual changes to the principal legislation.

However, there are also limitations to the process:

(a) The process requires amendments to a piece of legislation to be made sequentially. Provisions that were inserted into any principal legislation by an earlier amendment cannot be amended using the process until those provisions have been consolidated into the principal legislation, and such consolidation can only take place when a date has been appointed for those provisions to come into operation.

(b) It is not possible to fully automate the generation of amendment wording, especially in the case of a Schedule or Table. The structure of a Schedule may not conform to the legislative drafting house style, e.g. where the Schedule reproduces an international treaty or convention. The same amending action may be described by different amendment wordings, depending on the structure of the Schedule. Likewise, the structure and organisation of Tables varies from one Table to another. The same amending action may be described by different amendment wordings, depending on how the Table is structured and organised. For the purposes of generating default amendment wording, the best that the EDS can do to identify a particular cell in a Table is to describe the cell by reference to the row and column of the Table in which it appears; however, this is clearly not satisfactory for the drafting of a Table containing numbered items.

There is therefore a need to provide for a manual drafting option. Amending legislation is drafted manually using the EDS document editor, for instance, when making amendments to legislation that is not in force yet, or where it is not feasible to draft the amendments using tracked changes due to time constraints. Automatic consolidation is of course not possible if amendments are drafted manually.

One of the main difficulties which AGC experienced in developing the EDS was in getting the vendors to understand Singapore's legislative drafting house style, and to program the EDS to generate the correct default amendment wording. Depending on the context, a particular provision may be described in different ways in the legislative drafting house style. For instance, subsection (4)(b)(i) would be referred to as "subsection (4)(b)(i)" if a word in that provision was to be deleted, but as "sub-paragraph (i) of subsection (4)(b)" if that entire provision was to be deleted.

On hindsight, the development of the EDS would have been much simpler if changes had first been made to Singapore's legislative drafting house style to facilitate the generation of amendment wording. In order for a process involving the drafting of amendments using tracked changes to work effectively, steps should be taken:

- (a) to simplify the structure of legislation;
- (b) to standardise how amendments are made (e.g. by replacing the entire section, subsection or paragraph, if the amendment involves an alteration of the structure of the section, subsection or paragraph, as the case may be); and
- (c) to standardise and simplify the standard amendment wording under the legislative drafting house style.

That being said, even if the current legislative drafting house style had been simplified, it will still be necessary to program the EDS to provide for legacy legislative drafting house styles in order to cater for existing legislation and the back capture of historical versions of legislation.

Beware of Bells and Whistles

Jurisdictions developing similar ICT systems should also be wary of introducing any “bells and whistles”. By this I mean features that appear attractive but are not crucial to the proper functioning of a legislation database. Such “bells and whistles” may increase the complexity and cost of the ICT system, as well as the workload involved in using the system.

An example in the context of the LEAP System is the hyperlinking feature of the new VLDB. The new VLDB provides hyperlinks to provisions specified in the text of legislation. The original hyperlinks were inserted by running a script developed by the vendors through the entire collection of legislation available prior to the commissioning of the new VLDB. Thereafter, hyperlinks would be inserted when legislation is drafted using the EDS document editor by tagging the cross-references to other legislative provisions.

The hyperlinking feature is convenient for users of the new VLDB, but is strictly speaking unnecessary. A consequence of the hyperlinking feature is that when any legislation is downloaded from the EDS as a Microsoft Word 2007 document for the drafting of amendments using tracked changes, it will have content control applied to all cross-references to other legislative provisions. The content control, while preserving the hyperlinks, causes breaks in text which affect searches of word strings. It also affects the drafting of amendments using tracked changes, especially when the amendments begin or end in content controlled text, as the EDS may interpret amendments that are made within the content control differently from amendments that are made outside the content control. Legislative drafters usually do not have the time to tag or verify cross-references to other legislative provisions, so in reality, the insertion of the hyperlinks has to be done as a separate manual process by the team that publishes legislation on the new VLDB. There are also errors in the hyperlinks that were automatically inserted by the vendors’ script, which are corrected as and when they are detected. However, a typical legislative drafting office will not have the resources to do a detailed verification of the accuracy of all hyperlinks in its legislation database. On hindsight, AGC would probably have left out the hyperlinking feature from the new VLDB and left the insertion of hyperlinks to a content aggregator, e.g. LawNet.

Ultimately, there will always be trade-offs when introducing new features in a legislation database. Generally, new features that require a high level of maintenance should only be introduced if there is a commitment to maintaining those features.

Security

As the EDS may store sensitive draft legislation that are works in progress, during the development of the LEAP System, AGC was prohibited by Singapore’s Internal Security Department from providing remote access to the EDS due to security concerns. However, business contingency planning dictates that LLRD legislative drafters should be able to work remotely from home, if necessary. AGC resolved this by separating the EDS

document editor from the EDS content and workflow management system. The EDS allows the downloading of documents to a legislative drafter's laptop to enable him or her to work offline. The updated documents would then be saved into the EDS content and workflow management system when the legislative drafter returns to office. The hard disk of the legislative drafter's laptop would be encrypted to prevent unauthorised access to the downloaded documents.

Staffing

The commitment involved in developing an ICT system also extends to staffing. Depending on the complexity of the ICT system, there may be a need to increase staff before the benefits can be realised, and staff can be reduced. Some of the matters during the development of an ICT system that may require a higher staff commitment include system design (including discussions with the vendors and stakeholders, and the vetting of the User Requirements Specifications and System Functional Specifications), user acceptance testing, data verification (to ensure that any data migrated into a new database from an existing database is migrated correctly and accurately represented in the new database) and project delays.

One of the things that AGC assumed during the development of the LEAP System was that it would reduce LLRD's staffing requirements by the elimination of tedious manual processes in the checking of proofs of subsidiary legislation that were prepared by the Government Printer. However, LLRD actually ended up taking on new functions which increased LLRD's staffing requirements. There is also a phase when the old processes will run concurrently with the new processes, thus increasing the workload of the legislative drafting office.

Development Challenges

There were 2 major challenges faced during the development of the LEAP System. The first was the complexity of the proposed ICT system. AGC and its vendors had some difficulty initially in complying with the security requirements imposed by Singapore's Internal Security Department. The vendors also did not fully appreciate the user requirements for the LEAP System, and consequently did not fully deliver on certain requirements. There were also disputes over whether certain "features" and behaviours of the LEAP System were defects.

The second major challenge was that of data migration. The project was contingent on the successful migration of SGML data from the old VLDB to LEAP XML. It was discovered later in the project that the migrated XML data had to be "enriched" in order to be used by the new VLDB. There were also a number of data migration errors.

Consequently, AGC had to adopt “parallel updating” as a remedial measure. What this means is that static documents (e.g. Bills Supplements, Acts Supplements and *Gazette* Notifications of subsidiary legislation as published in the *Gazette*, and legislation that had not been amended) would be downloaded from the old VLDB as RTF (Rich Text Format) documents, restyled by LLRD using the EDS document editor as LEAP Microsoft Word 2007 documents, and converted to XML via a LEAP DOCX to XML conversion script, before being loaded into the EDS via a load script. This would proceed concurrently with the conversion of SGML data from the old VLDB into LEAP XML via a data migration script, the loading of the LEAP XML into the EDS via a load script, and the updating and cleansing of the LEAP XML data in Microsoft Word 2007 using the EDS document editor, in the case of versioned documents (i.e. legislation that had been amended and for which there were 2 or more different point in time versions).

Implementation Challenges

LLRD also encountered a number of challenges in implementing the LEAP System. First, LLRD had to undergo change management. Legislative drafters who were familiar with the old process (where drafts were prepared by support staff using word processing software, and were manually checked by the legislative drafters) experienced some frustration with the new process, and expressed a preference for the old process. Staff had to undergo user training, in particular, on how to use the EDS. There was also a need to modify work processes in the light of the LEAP System.

Second, LLRD had to contend with system issues. When the entire LEAP System was commissioned in November 2011, there were a number of performance issues, including issues relating to processing speed, system stability, data integrity, and presentation errors (e.g. on the user interface of the new VLDB). Old defects that had been addressed previously resurfaced, from time to time, in new releases of the LEAP System software. With most of these issues addressed over time, LLRD’s current focus is on improving the LEAP System to address operational problems.

Lastly, LLRD continues to experience legacy database issues from the old VLDB. Data errors that pre-date the migration of data into the new VLDB continue to surface from time to time. LLRD hopes to address these data errors over time by speeding up the law revision process. When any legislation has been revised using the EDS, a PDF rendition of the legislation will be transmitted to the Government Printer for publication in hard copy, while the XML rendition of the same legislation will be converted for publication online on the new VLDB and the new SSO. In time to come, all current versions of legislation published on the new VLDB will be as good as authentic.

Book Review

***Subordinate Legislation in New Zealand* by Ross Carter, Jason McHerron and Ryan Malone, published by LexisNexis NZ, Wellington: 2013**

Reviewed by John Mark Keyes¹

About a year ago, I celebrated the appearance of Dennis Pearce’s and Stephen Argument’s 4th edition of *Delegated Legislation in Australia*. However, I continued to lament their decision dating back to the 2nd edition to confine their attention to Australia and not address New Zealand, as had been done in the 1st edition. Happily, this lacuna has now been amply filled by a new book by Ross Carter, Jason McHerron and Ryan Malone: *Subordinate Legislation in New Zealand*. Their text sheds considerable light on the making and review of subordinate legislation in that country and demonstrates that is in close competition with its neighbour to the west in terms of global pre-eminence in this regard. This subject is most decidedly *not* neglected in New Zealand.

One of the most striking features of *Subordinate Legislation in New Zealand* is its presentation of not only the jurisprudence of that country, but also its “legisprudence” in the form of parliamentary resolution proceedings to confirm or disallow subordinate legislation and the reports and commentary of the Regulations Review Committee (RRC) of the New Zealand House of Representatives. The authors particularly demonstrate how the work of this committee has to informed and contributed to developing the principles on which subordinate legislation is made in New Zealand. The RRC is referenced throughout, and indeed two chapters (9 and 10) are devoted to its development, its processes and the application of its grounds of review. Given the generally thin record of legislative scrutiny of delegated legislation in many other parliamentary jurisdictions, the Committee has assumed a remarkably significant role and demonstrates that effective review by parliamentary institutions is possible with political will.

One striking feature of the analysis of the jurisprudence and legisprudence is how little explicit interaction there is between them. Although there are occasional references to court cases in the proceedings of the RRC (for example, it has adopted the common law definition of “consultation” elaborated in *Air New Zealand Ltd. V. Wellington International Airport Ltd.*²), parliamentary and judicial review appear to occupy quite different, albeit complementary, spheres. The RRC is largely driven by parliamentary perspectives and, despite its receptivity to complaints from the public, it receives very few.³

Subordinate Legislation in New Zealand provides a meticulously comprehensive treatment of its subject with a wealth of examples from New Zealand that may well serve as useful precedents elsewhere. It also probes its subject to a depth that legislative counsel will

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² Wellington CP 403/91, 6 January 1992, noted in *Subordinate Legislation in New Zealand* at 194.

³ *Ibid.*, at 169.

appreciate, reflecting the experience of those who have worked in the preparation of subordinate legislation. For example, Chapter 4 covers a remarkably broad range of types of enabling provisions, providing drafting insights as well as relevant case-law and commentary by the RRC. Similarly, section 5.2 deals with the drafting responsibilities of the Parliamentary Counsel Office and other drafters, notably those employed by the departments and agencies having policy and enforcement responsible for subordinate legislation. Finally, the perhaps aptly numbered Chapter 13, provides guidance on what to do when it turns out that subordinate legislation has not been properly authorized: enact validating legislation. It includes a comprehensive list of such legislation in New Zealand dating back to 1854.

This book begins in true legislative style by defining the basic terms and concepts used to discuss its subject, including subordinate legislation itself and how it is distinct from other types of legal instruments. Its opening chapter also provides a sense of the book's orientation towards a unitary parliamentary jurisdiction, unencumbered by federal or international arrangements that constrain parliamentary supremacy.

The first distinction is between primary and subordinate legislation: Acts of Parliament are ascribed to the former and prerogative instruments to the latter. This may be somewhat surprising to those familiar with Lord Fraser of Tullybelton's characterization of prerogative instruments as primary legislation.⁴ However, the contrary view expressed in the book suggests that they are not primary legislation because they, and the power to make them, are subject to Acts of Parliament. Thus, the defining feature of primary legislation is that it prevails over all other forms of law. This makes sense in a jurisdiction where parliamentary sovereignty is the pre-eminent constitutional principle and there are no hierarchies of statute law, which appears to be the case in New Zealand. For example, while some jurisdictions have given pre-eminent status to certain types of laws, notably those protecting human rights, [section 4](#) of the *New Zealand Bill of Rights Act* expressly protects other legislation from invalidity or implied repeal by reason only of any inconsistency with it.

The opening chapter of *Subordinate Legislation in New Zealand* provides a useful introductory discussion of a range of types of legislation and basic concepts, such as the various forms of instruments and instrument choice. However, there are two notable omissions: by-laws made by local bodies and disallowable instruments. These are addressed later in some detail (Chapter 11 and section 12.6), but it would have been helpful to have them introduced at the outset with other key terms. It might also have been helpful to introduce the Regulations Review Committee (RRC) at this point given the references to it throughout, rather than leaving it to Chapter 9.

⁴ *Council of Civil Service Unions v. Minister for the Civil Service* [1985] 1 AC 374 at 399.

The heart of this book is Chapter 3: Principles Affecting the Delegation of, and Use of Delegated, Law-making Power. It addresses almost everything that is addressed elsewhere and is invaluable in demonstrating the solid foundation for the rules that have grown up for making subordinate legislation. These rules are not mere whims of bureaucrats; they are rooted in the fundamentals of our institutions of government and the legal system.

However, Chapter 3 stretches the notion of “principle” well-beyond its commonly understood meaning. Although it deals with concepts such as the rule of law that clearly embody principles, it also discusses what matters are appropriate (or not) for subordinate legislation (which is also the topic of Chapter 2 – Parliament’s Power to Delegate its Law-making Power) as well as procedural matters, such as the publication and commencement of subordinate legislation (which are covered later in Chapter 6 – Publication of Subordinate Legislation). While the appropriateness of delegating powers and the procedures for exercising them are clearly animated by principles, notably those bound up in the rule of law, the discussion in Chapter 3 goes well beyond matters of principle and gets into considerable detail. The result is a somewhat fragmented discussion that may leave readers flipping back and forth to piece together what they want to learn about these subjects.

At the beginning of this review, I remarked on how the authors’ treatment of subordinate legislation combines both legisprudence and jurisprudence. The legisprudence is outlined in Chapters 10 and 11, which describe parliamentary resolution proceedings in the House of Representatives and review by the RRC, which the book notes is more fully described in the *Regulations Review Digest*.⁵ The jurisprudence is described in Chapter 12 dealing with judicial scrutiny. Although there are some intersections between these two (notably compliance with statutory prerequisites to making subordinate legislation), *Subordinate Legislation in New Zealand* demonstrates how the issues of concern are remarkably distinct and in fact complementary. It is particularly valuable in addressing the oft-neglected legisprudence.

Finally, I would note that *Subordinate Legislation in New Zealand* is dedicated to the memory of George Tanner who was Chief Parliamentary Counsel of New Zealand from 1996 to 2007. He was also one of the original co-authors and his genius is still very much alive in the work that has now been published. I had the great pleasure of meeting him several times at drafting conferences and of entertaining him and his wife Alison at my home on one occasion. These all too brief encounters left a lasting impression of a very kind and supremely competent practitioner of legislative drafting. This book is a fitting tribute to him and his mentorship of generations of legislative counsel in New Zealand and elsewhere.

⁵ Available online at <http://www.victoria.ac.nz/law/centres/nzcpl/publications/regulations-review-committee-digest>.