

COMMONWEALTH ASSOCIATION OF LEGISLATIVE
COUNSEL

THE LOOPHOLE



JULY 2007

COMMONWEALTH ASSOCIATION OF LEGISLATIVE COUNSEL

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CONTENTS

Editor's note	4
Address on the organisation of drafting offices DON COLAGIURI S.C.	6
Training and development of legislative drafters PETER QUIGGIN	14
Electronic publication of New Brunswick legislation—yesterday, today and tomorrow JUDITH KEATING Q.C.	31
'Challenges of drafting in a developing country' JOHN F. WILSON	36
Statutory interpretation and human rights RT HON LADY JUSTICE ARDEN D.B.E.	40
Drafting against a background of differing legal systems: Canadian bijuralism MARC CUERRIER	50
Drafting against a background of differing legal systems: Scots law and the UK statute book COLIN WILSON	70
What, how, when and why—making laws easier to understand by using examples and notes BEN PIPER	74

Editor's note

Duncan Berry asked me in September 2006 if I could arrange for the publication of this edition of *The Loophole*. I willingly agreed, although it has taken a little longer to accomplish than I had anticipated. I am grateful to Ross Carter, Parliamentary Counsel, and to Esther McCormick of our Editorial Services team, for their assistance.

Those of us who were able to attend the CALC conference held at London University in September 2005 will remember what a splendid conference it was. The conference programme was well balanced. The speakers, all experienced in their fields, provided stimulating insights into a wide range of issues concerning the drafting, publishing, and interpretation of legislation. Sir Geoffrey Bowman CB and his colleagues at the Parliamentary Counsel Office in London committed much time, effort, and thought to ensuring the success of the occasion.

This edition of *The Loophole* includes a number of the papers given at the conference. Some are formal papers. Others are more in the nature of comprehensive speaking notes, but lose nothing for that. It is hoped to publish other conference papers in a later edition.

A separate paper by Ben Piper, formerly of the Office of the Parliamentary Counsel, Victoria, Australia, is included on the use of examples and notes in legislation. This paper was not delivered at the conference.

Don Colagiuri SC's paper on the organisation of a drafting office contains predictably valuable insights into the kinds of issues that arise in the design of drafting offices, particularly those that are responsible for both drafting and publishing. Readers will see a reference at the end of his paper to what is described as the family business. The relevance of this is that when I introduced Don Colagiuri to speak I referred to a former relative of Don's who had close connections with an Italian organisation not universally known for its law abiding activities. Peter Quiggin's paper deals comprehensively with the training and development of legislative drafters and describes the approach and processes adopted by his office. The conference session on training took the form of a panel discussion in which Peter participated. Judith Keating QC's paper on the publication of legislation in New Brunswick, Canada, describes the move in that province away from hard copy to electronic publication. John Wilson's paper describes some of the challenges of drafting legislation in smaller jurisdictions.

The paper presented by Rt Hon Lady Justice Arden DBE, a member of the Court of Appeal of England and Wales, addresses the complex and difficult area of interpretation of human rights and constitutional rights legislation. Two papers were given at the session on Drafting Against a Background of Differing Legal Systems. Marc Cuerrier's paper discusses challenges in drafting legislation in a jurisdiction, Canada, where, to use his words, "legal cultures cohabit". Colin Wilson discusses the drafting of Bills for the Scottish Parliament and the drafting of Scottish provisions for Bills for the UK Parliament.

The paper by Ben Piper discusses examples and notes in legislation and his experiences in using them in drafting legislation in Victoria, Australia. Opinions differ among legislative

drafters, other lawyers, judges, and officials about the value and place of this kind of material in legislation. The paper strongly supports their use.

George Tanner QC
Chief Parliamentary Counsel
Wellington
New Zealand

Address on the organisation of drafting offices¹

Don Colagiuri, SC²

Introduction

The topic I undertook to address in this session of the Conference is not a very exciting subject. Sir Geoffrey, in his conference correspondence, indicated that we might explore the question of why drafting offices are organised in the way they are. The “why” question is a little more interesting, but always a difficult one. I propose to comment on a range of issues that impact on office organisation and leave particular matters of interest to questions afterwards.

At the outset can I make it clear that I am not an avid reader of management theories nor a regular attendee of management courses—like many heads of office, I am a drafter as well as a manager. This does not leave much time to indulge any passion for management theories.

Also at the outset can I apologise for using the NSW experience to illustrate issues. As George Tanner outlined in his introduction, this is the office I am familiar with. I have not been a travelling or nomadic drafter like Duncan Berry and others here.

Organisation of NSW Drafting Office

In order to put my observations on this topic in context, I thought that I would start with a broad overview of the NSW drafting office. The NSW Office used to be part of the Attorney General’s Department, but in 1993 it became a separate department reporting to the Premier. The Department Head of the office is the Director-General of the Cabinet Office (we share a Department Head with the Cabinet Office but are not part of that office).

Some brief statistics of the NSW Office:

- The office has an annual budget of \$6.4 million Australian (that sounds a lot but—as I have found out since arriving in London—Australian dollars do not buy very many UK pounds).
- The office has 48 staff—20 drafters and 28 editorial and support staff.
- We draft the full range of legislative instruments:
 - Government and non-Government Bills and amendments in committee,
 - regulations and other statutory instruments for Government Ministers and authorities,
 - instruments that regulate land use planning for local councils and the State (environmental planning instruments).
- Overall we produce about 4,000 pages of Bills introduced into Parliament, about 4,000 pages of regulations and other statutory instruments, and about 3,000 pages of environmental planning instruments.
- We have developed and maintained a publicly accessible website of all the legislative material we produce—providing the principal instrument incorporating amendments and an increasing capacity for point-in-time searching. We have continued to supply camera ready copies of the traditional paper versions for distribution by the Government Printer.

¹ Paper presented to the CALC Conference, London, September 2005.

² NSW Parliamentary Counsel.

- We also provide various legislation information publications, a hotline service for public inquiries on the status of legislation, and a weekly email of legislative activity to several thousand subscribers.

Of course, in many jurisdictions, particularly in the large jurisdictions, the drafting office is often focussed on only drafting Government Bills and/or statutory instruments. Nick Horne had a thorough survey of the activities of the various drafting offices published in a recent edition of the CALC newsletter. If you are faced with providing a wider range of services, it has a significant impact on the organisation of the office. I will come back to this issue.

Drafting office—separate department, part of Premier/Prime Minister or part of Attorney General’s?

One can begin an analysis of the organisation of a drafting office with the question of whether a drafting office should be an independent agency or part of another department (usually the Attorney General’s Department) or should report to the Prime Minister or Premier and be loosely or closely associated with The Cabinet Office. In Australia, and I suspect in other jurisdictions, there is a discernible trend. At first, drafting offices were part of the Attorney General’s Department reporting to the Attorney General, then many became separate agencies. In recent years many have moved from the Attorney General’s portfolio, reporting instead directly to the Premier/Prime Minister (and associated with the Cabinet Office).

My assessment is that this change is a response to the increasing central agency role of the drafting office (not as a mere mouthpiece, or, should I say, penpiece, for the various government agencies)—a recognition that the setting of priorities for the drafting of government legislation (and the use of the drafting office to break through an impasse caused by inter-portfolio conflict) is an important tool for the control of the Government’s legislative agenda—the things that those associated with the Premier/Prime Minister and the Cabinet Office think they should control.

There can be a significant increase in the policy development role of the drafter (especially when the Cabinet Office expects to be told when a legislative proposal that has been approved is flawed, or when the Cabinet Office requests you to start drafting a project that is stalled or undeveloped, thereby using the drafter to drive the legislative process). However, as my Director-General recently pointed out, parliamentary counsel are seen as infallible in matters of legislation and, like the Pope, when you are infallible you need to be very careful what you say.

On the downside, we need to develop strategies to maintain the confidence of the instructing departments (making it clear that we are in partnership with them in preparing the legislation). For my part I resist moves to be located in the same building as the Cabinet Office and commiserate with agency officials when the Cabinet Office turns to the “dark” side.

There are other benefits of an increasing association with the Cabinet and the Premier’s Office. You may end up in my position of having a Director-General who sits in Cabinet, who can tell you a definitive version of what the Government has decided to do, and who leaves the oversight of the administration of the office to an occasional meeting over coffee or a drink at a cafe or club.

The parliamentary counsel (drafter or manager or first among equals)

I will only touch on another central issue for the organisation of a drafting office. Who should manage a small professional drafting office?

- Should the head of office be a professional drafter who grafts management responsibilities onto continuing professional responsibility as a drafter?
- Should a senior drafter be groomed to take on management responsibilities (for example by temporary secondments to other agencies)?
- Should a person with no drafting experience or responsibilities take charge of the office?

- Should there perhaps be a rotation of head of office responsibilities among senior drafters (something that George Tanner here wistfully mentioned to me some time ago)?

I have a strong personal preference for the traditional view that the office should be managed by a drafter who continues to draft and to advise other drafters on their drafts, but time is too short to pursue that issue.

Issues relating to office organisation—legislation publication

Before dealing with some organisational issues concerning drafters, I would like to deal with the impact of the legislation publication role on a drafting office.

There are compelling arguments in favour of maintaining the traditional role of drafting offices, but many of us are in the business, or are being continually pressed to undertake the business, of securing and improving public access to legislation (particularly via the Internet which provides a big opportunity to enhance public access to legislation). The work can be regarded as the office providing drafters with improved tools to do their work and providing a spin-off benefit to the public.

Many drafting offices choose or find themselves obliged to take on wider public access responsibilities than merely producing the draft. If they are to provide efficient, cost effective and timely public access to legislation, the critical factor is for the drafting office to control the whole process through the life cycle of legislation—from birth at the hands of the drafter, its passage through Parliament and its public access until it is repealed. By controlling the process, I mean that the drafting office keeps control of the document (or electronic file) and provides a complete legislative service. This has a very significant impact on the drafting office.

In NSW, this means that we draft all Government and non-Government Bills; that we draft and supply all amendments in committee (that can be seamlessly incorporated into the Bill if passed as second or third prints for debate in the House); that we can provide an electronic version of the Bill within minutes of introduction so that it can be posted to the Parliament House website (and use that electronic file in our print shop to supply bulk printed copies to the House or supply it to others to do so); and that we can provide the vellum copy for assent purposes. But, most importantly, it means that once legislation is enacted, we can place it readily on our official legislation website and provide incorporated up-to-date versions of any amended principal Act within hours or a few days of the amendments commencing.

I realise that in the larger jurisdictions with more complicated processes and entrenched bureaucracies (in the Parliament and in the Government printing service and elsewhere) it is immensely difficult to control the document through its complete lifecycle, but without that control it is very courageous for a drafting office to assume full responsibility for public access to legislation.

Consequences of controlling the process

What are the consequences for a drafting office of controlling documents through their legislation lifecycle?

Delivering the quick Bill

Everyone will have their own experience of producing Bills to ridiculous timetables (of drafting on the floor of the House). When you control the document you can give the appearance of normality. Let me explain with an example. Recently, in NSW, a very short legislative proposal relating to terrorism was conceived at about 10 o'clock at night; the drafter, Robyn Hodge (who is here today), and I put a draft together about 9.30 in the morning; it was circulated electronically; it was settled at about 10.30 am; a legislation committee of Cabinet was then called and met at 11.30 am (with a very short report I provided on the Bill); the Minister walked into the Lower House of Parliament at noon with the printed copies we supplied (and an electronic copy for their website); and the House passed the Bill before they rose for lunch at 1 pm. From an outside perspective, apart from expedition, it all looked very planned and professional and no different to the process for any other Bill. The problem of course is that political staff observe what can be done but do not realise it is not sustainable.

Maintaining an after-hours presence

Our editorial staff (who publish, check, and incorporate changes to documents) need to be on duty whenever Parliament is sitting. They are in constant contact with parliamentary officers, providing amendments produced by the drafters, incorporating and providing second prints etc. When the numbers are tight in the Upper House, speed is of the essence in getting an amended Bill into the next stage and we must be ready to do so to very tight timeframes.

Similarly we need to roster on senior drafters every night Parliament is sitting to draft amendments and oversee operations. As a practical measure, the drafter of a Bill becomes responsible for drafting Government as well as non-Government amendments in committee (professional drafters can maintain mental Chinese walls—we do not need to import private sector conflict of interest notions into Government service of this kind).

Staff flexibility

In order to undertake a wider range of work efficiently, the organisational structure of a small drafting office needs to be flexible, and in particular emphasise multi-skilling. Since I do not have a power presentation or a slide show, I will have to ask you to imagine the organisational structure in NSW with drafters on one side and then several separate units—an editorial group that checks and publishes documents, an administrative support group that provides secretarial/corporate services, a database group that incorporates and maintains the database of legislation posted to our website, an IT support group, and a remnant group of one preparing paper reprint publications using the versions on our database. Staff at various times in their career move between these groups.

Bill checking, incorporating amendments on the database at peak periods, and the taking charge of, or assisting at, the editorial desk while Parliament is sitting, are undertaken by all the staff (even the second IT officer who has a background in editing is often called on to do this sort of work). Without that flexibility, the size of the non-legal staff would be likely to double.

IT implications

On the office IT side, control of the document (and its style) means you are able to produce systems for drafters and editors (complicated though they may be) that complement each other and can be delivered to a reasonable budget. The IT issues will be dealt with later in this conference—suffice it to say that we see the imperatives as securing the longevity of the legislative data; coping with the rich structure of legislation (we have opted for sgml/xml rather than a proprietary format); maintaining a small specialist IT branch within the organisation (and not being captive to the IT outsource market); and dealing with the inevitable consequences of the drafter shouldering a lot more responsibility for producing text that also has the necessary publishing attributes. In NSW we have a combined drafting and publishing tool—this is not a problem for the new young guns, but it is a challenge for the old hands like myself.

There is also a valuable role for a drafter to play in facilitating IT development and public access. This may not seem “real” drafting work to some, but drafting offices are very fortunate to find the drafter who is willing to become immersed in this work and who can bring the traditional methodology and expertise of the drafter to the development of relevant IT and other systems and at the same time make them responsive to drafters’ needs because of their unique position and knowledge.

The continuing need for a career structure

These demands put pressure on maintaining an office career structure. There is no doubt that drafting legislation and legislation publication is a very specialist task. Everyone tells us that the x and y generations no longer have any loyalty to an organisation—they move on regularly. To maintain the necessary flexibility and expertise of staff, there is nothing like that old public service career process. Start as the office boy and work your way through the organisation. We have our successes and failures. Our quality assurance manager (Ming Wong) started as a copy typist—for a drafter having

his Bill “Minged” is a guarantee that it contains no editorial errors. A senior member of the IT Group started as an executive secretary and was supported in obtaining an IT degree. My personal secretaries tend not to be mother figures. I have recently lost one who studied law while with us and secured first class honours. She has moved elsewhere to pursue her legal career—there is the upstairs downstairs mentality preventing non-legal staff moving on to become drafters.³

With control comes responsibility

When you do control the process there is also the responsibility for delivering the product in the end. This can have interesting consequences sometimes. I have told people this story before, but it illustrates the point. Recently, as part of a trade union protest against proposed changes to workers compensation legislation in NSW, union members blockaded Parliament (and withdrew staff services in the Parliament) in an attempt to prevent the passage of the Bill. Cabinet Ministers broke the picket line in a dramatic march of Ministers down the street from the Government offices to Parliament House. The only thing they forgot to do was to take a copy of the Bill with them. It became the responsibility of the drafting office to realise that a copy of the Bill needed to be provided and to get the Bill into Parliament. All electronic means of transmitting the Bill were unavailable. In order get the Bill into Parliament, it took a secret rendezvous within the Parliament House precinct between my office manager and the Minister's staffer (described to my officer manager as a tall lady in a blue dress). The offending Bill was passed in an unobtrusive envelope through the iron fence to the lady in question in the midst of the angry protestors.

Issues relating to office organisation—drafters

Supervision—Bill review

I might now deal with the purely drafting side of the office. There is something about drafting that attracts highly individualistic (dare I say sometimes eccentric) characters.

The traditional organisational arrangement is similar to chambers at the private bar with drafters acting relatively independently once the head of office has allocated a particular drafting project. With junior officers, there is a pairing with a senior officer until they have sufficient experience to operate on their own.

An alternative arrangement is a more corporate approach—where the work of individual drafters is reviewed and exposed to scrutiny by the widest possible range of people within the office (legal and non-legal) so as to produce a draft that represents the corporate view of the office. This involves all but the most senior drafters being supervised by and reporting to a senior officer, drafting being subject to peer review by a group of the most senior officers, drafts being checked by clerical officers to office editorial standards and a junior legal officer making a final check. The downside is the significant drafting resources required to fully implement the system. The most effective system of peer review is where the senior officers meet as a group to discuss the draft with the drafter. This brings a lot of experience to bear on a draft. The process of discussion leads to issues being exposed that were not readily apparent on a reading of the draft. The conduct of meetings for peer review, which had been a regular feature in the NSW Office, is now only rarely undertaken. Instead all relevant papers are copied and circulated to the peer review group and written comments on the draft are provided. The reason for the change is that it took up too much time of the senior officers. Peer review on the papers is still an effective tool. As a result, senior officers can still provide input and can become familiar with developments across the statute book (which assists in other matters including amendments in committee on the Bill when they are the duty officer during Parliamentary sittings). And, of course, for me as Chief Parliamentary Counsel, I am in a position to sound as if I have some idea of what I am talking about when drafted Bills are considered by the Legislation Committee of Cabinet for approval for introduction.

³ Since this paper was delivered, there has been movement in this area. The personal secretary has returned to the office as a drafter and 2 other personal assistants have completed their law degrees and been appointed to newly created paralegal positions that straddle legal and editorial work.

If you have the resources to implement a more thorough process of peer review, you still need to foster individual responsibility of the allocated drafter. The drafter has to think about the appropriateness and consequences of any changes suggested or required by the supervisor or a peer review. The drafter has to worry about the possibility that an instrument will not receive thorough review.

Drafting offices in a federal structure

Like Australia, many of you have to draft in a federal system where no one government has a monopoly of legislative power and there is a need for co-operation. Even the UK seems to be moving in that direction. It will come as no surprise that in a federal system there is constant pressure for the drafting of uniform legislation on various topics. Unless the States in a federal system co-operate we will be faced with increasing consolidation of legislative power at the federal level. In Australia the drafting offices have responded by establishing an organisation, the Parliamentary Counsels Committee, comprising the heads of the all the drafting offices in Australia and also New Zealand. When one of the many Federal and State Ministerial Councils decide on some uniform legislation, it is formally referred to our Committee. We find a volunteer from among our members to be the lead drafting office. We circulate drafts for comment and meet regularly to settle the drafts. We also meet to discuss matters of general interest to drafting. The Committee needs significant secretarial support, which was originally provided by Victoria and is currently provided by NSW. I can commend the system.

Allocation of drafting work

All heads of office need to put in arrangements to ensure that drafting work is properly allocated among drafters. One of the tools that I am hoping will assist in improving work allocation in NSW is our current IT development for a job tracking and data management system, which currently goes by the rather unimaginative title of the Legislation Lifecycle and Job Management System (a part of the Process Automation System). I am offering a bottle of good wine to anyone in the office who can come up with a snappy name for it.⁴ The new system should enable me (or any other supervisor) to get a very quick report of all the work with a particular drafter and the stage it has reached (and all other relevant information about it), arranged in different categories. I have seen some very good and less complex systems demonstrated at the Commonwealth level and in Western Australia.

We need to worry about whether drafters are allocated the range of work that best suits their expertise. It used to be thought that only senior officers should draft Bills, leaving other drafters to work on regulations or planning instruments, or as an assistant to a senior officer on a Bill. The reality now is that significant matters of policy are to be found in regulations, and there are many insignificant government or non-government Bills. Of course, senior drafters must still draft the major Bills. I must concede, however, I find it difficult to enthuse drafters about the latest planning instrument of the council from the back of Bourke (which we are called upon to draft in NSW).

An interesting arrangement in some offices is the division of work among groups of drafters allocated to particular portfolios. We have never done this in NSW. It is done in Queensland and other Australian jurisdictions and I understand has the advantage of building up good working relationships with government agencies.

Organisation arrangements to keep drafters

Drafting offices rely heavily on career drafters. This is under threat. At the same time there is an increasing need for drafters to appreciate the context in which they work or to obtain other relevant policy expertise. One needs to fight the natural reaction of not wanting to allow drafters to go off and pursue drafting or policy or other work in another organisation for fear that a good drafter whom you have spent years in training to their level of expertise will simply be lost and you will need to start again. We also need to accept the reality that when a drafter leaves temporarily on other pursuits it is the drafters left behind that have to shoulder the extra work—but as they say what goes around comes

⁴ The prize has been won since this paper was delivered—the new system is known as LEGIS.

around. Subject always to the demands on the office, we should encourage drafters to undertake secondments (for a few years or a few months) as policy officers, or on exchange in a jurisdiction that needs to develop its drafting capacity. We should be prepared to give people a couple of months or years on leave without pay to draft overseas or take career breaks.

Despite the predictions about the lack of commitment from the x and y generations, my experience of those who have the aptitude for drafting is that they appreciate and become committed to the wider public service they perform. Although they could readily make more money in the private sector, they will stay committed to drafting and hopefully to one of our drafting organisations. We also need to keep drafters at work after they retire. For my predecessor, Dennis Murphy, who many of you will know as a previous President of CALC, I have created the title of “Counsel to the Parliamentary Counsel”. He is still drafting on a part-time contract basis, and, as he mentioned to me recently, he has turned 65 but does not feel at all decrepit.

Dealing with public service dross

A significant issue for a drafting office is dealing with public service dross. The NSW office like many drafting offices is a separate government agency. With that welcome independence comes the public service administrative overheads. Every agency, no matter how big or small, must have the same suite of plans (the corporate plan, the disability action plan, the IT strategic plan, the asset disposal plan and on and on). Every conceivable matter needs to be reported on; one is reviewed by internal auditors, the Auditor General, the Ombudsman, Treasury budget officers, and many others. Since we are a very small office, I see this continuous flow of paper as it passes through my in-tray. There are a number of ways people respond to this problem:

1. There is what I fondly call the Mary Gaudron solution. Mary Gaudron was the first female High Court Judge in Australia and has recently retired. When Mary was the NSW Solicitor General in the eighties and had a small independent office within the Attorney General’s Department, she disposed of all the dross by hurling it into the bin with an appropriate expletive. This is something she could get away with because she was Mary Gaudron and she was part of a bigger department—but it is unlikely to be an available option for many of us.
2. The other option which one observes from time to time is the office that becomes immersed in and mesmerised by the dross. I worry about this constantly and try to resist it as best I can.
3. For a professional office that needs to focus on producing the professional product in a timely manner, there is no substitute for an astute non-drafting office manager, who can extract the matters that need your attention from the among the dross, and play the public sector management game for you with the rest.

Conclusion

In preparing this address I had some difficulty in finding some appropriate thoughts with which to conclude. You will need to forgive me if I conclude with an observation I made at the recent Australian drafting conference when discussing the drafting of criminal offences.

I mentioned that I had recently dashed off another draft Bill related to terrorism. I thought I had made a succinct and clear statement of there being “reasonable grounds for believing that there is an imminent threat of a terrorist act”. In response there was Crown Law advice that it was ambiguous and needed to be changed because it could be construed as referring to either an imminent threat or an imminent terrorist act. In one of those rash decisions one makes from time to time—I sent off a memorandum to the following effect:

One wonders whether there is a real problem. The words used in the phrase “an imminent threat of a terrorist act” can be technically fragmented, but this may not assist the ordinary comprehension of the phrase. In the tragedy, *King Richard III*, Shakespeare begins with Richard’s soliloquy:

“Now is the winter of our discontent
Made glorious summer by this son of York”

Address on the organisation of drafting offices

We need not ask whether the winter or the discontent has turned into glorious summer. I write this memorandum over a beer at the end of another working day. For parliamentary counsel, in June, in the last busy days of a parliamentary session, it is the winter of our discontent. I recall the words of the leading Italian/Australian poet, Luigi Strano (in one of his shortest poems):⁵

“Oh com’è amara la birra,
dopo un giorno
completamente perduto”.

Roughly translated: Oh how bitter beer tastes, after a day that is completely lost.

For those of you who need to deal with issues of office organisation and management, I hope that after your day’s labour the beer does not taste that bitter.

⁵ I might interpose here, following the revelations made by George Tanner in the introduction, that Don Luigi Strano is in fact my uncle and the eldest son of my grandfather, Don Mimi Strano, whose colourful Italian connections George has referred to. Don Luigi did not follow his father into the family business—at 94 he is still writing and publishing poetry. I also did not follow my grandfather into the family business even though he would, when I was a boy, take me with him to his office on a Saturday morning—I ended up in the business of writing legislation. But to get back to my memorandum and the poem....

Training and development of legislative drafters¹

Peter Quiggin²

Contents

1	Outline	15
2	Training the drafter	15
2.1	What is the function of a drafter?	15
2.2	What attributes are needed to perform that function?	15
	Analytical skills and creativity	16
	Communication skills	16
	Legal knowledge	16
	Knowledge of technical matters associated with preparation of legislation	16
	Broad experience in a range of drafting tasks and an ability to master new tasks quickly	16
	Accuracy	17
	Political skills	17
	Interpersonal skills	17
	Project management skills	17
	“Practical” common sense	17
2.3	So how do you teach someone to draft?	18
3	What system does OPC use?	18
3.1	Training philosophy	18
3.2	“Pairs system”	18
3.3	Mentoring of acting SES drafters	19
3.4	Director of Drafter Training	19
3.5	Drafter exchanges	20
3.6	Other training	20
3.7	Materials and technology	20
4	How well does OPC’s training system work?	21
4.1	Strengths	21
	Training is intensive and diverse	21
	Training is hands-on and practical	21
	Training is tailor-made to the particular needs of the organisation	21
4.2	Weaknesses	22
	Training may be patchy	22
	Quality of training depends on quality of trainer	22
	Training is resource intensive	22
	Personality clashes	22
4.3	So why prefer rotated pairings?	22
5	What other systems can be used?	22
5.1	Traditional “branch” structure	22
5.2	Flexible pairings	23
5.3	Formal drafter training	24
6	Summary	24
	Attachment A	25
	Training sessions so far provided	25

¹ Paper presented to the Commonwealth Association of Legislative Counsel conference in London in September 2005.

² First Parliamentary Counsel, Australian Office of Parliamentary Counsel.

Training sessions planned for the future	25
Attachment B	26
Training sessions given to new drafters as part of the induction program	26
Attachment C	27
Index of Drafting Directions	27
Attachment D	29
Index of Drafting Notes	29

1 Outline

1 This paper³ looks at the training and development of drafters, under a number of headings:

- What are the skills a drafter requires?
- What system does the Australian Office of Parliamentary Counsel (OPC) use?
- How well does that system work?
- What other systems can be used?

2 Training the drafter

2 To develop a method for successfully training drafters, it is necessary to identify the functions performed by drafters and the attributes needed to perform those functions.

2.1 What is the function of a drafter?

3 The core function of a drafter is to draft legally effective, clearly expressed legislation that best achieves the instructors' policy intentions and does so, as far as possible, within the timetable set down by the government.

4 It is worthwhile articulating the parameters within which an Australian Commonwealth drafter works:

- The drafter's role is collaborative—the drafter is expected to work with the instructing area to analyse policy, flesh out alternatives and resolve problems. However, the choice between one legislative option or another lies with the policy area. The drafter may in some cases become involved at the point where policy is being developed and help to build the legislative system from the ground up.
- It is the drafter's responsibility, so far as possible, to ensure that the government's legislative program is met.
- A senior drafter is expected to function as an autonomous leader of a drafting team.

2.2 What attributes are needed to perform that function?

5 The following attributes are necessary to perform the drafter's functions:

- analytical skills;
- creativity;
- communication skills;
- legal knowledge;
- knowledge of technical matters associated with preparation of legislation;

³ This paper was prepared by Peter Quiggin, First Parliamentary Counsel, Australian Office of Parliamentary Counsel. It draws heavily on a paper of the same name presented by Marina Farnan at the drafting conference held in St Lucia in July 2002 and by Peter Quiggin and Toni Walsh at the drafting conference held in New Zealand in March 2000.

- broad experience in a range of drafting tasks, coupled with an ability to master new tasks quickly;
- accuracy;
- political skills;
- interpersonal skills;
- project management skills;
- “practical” common sense.

Analytical skills and creativity

- 6 Sometimes the most difficult aspect of problem-solving is identifying what the problem is. A drafter’s analytical ability allows him or her to break a problem into its constituent parts, to explore the relationship between those parts and then build a system for grouping those parts. It may be necessary to manipulate the material—break up the problem differently, rethink the way in which one part relates to another, try a different theory to explain how it all fits together.

Communication skills

- 7 A drafter must be able to express complex ideas in a way that is readily understood by appropriate reader groups. A drafter must also know how to explain complex material in discussions with instructing officers and others.

Legal knowledge

- 8 When submitting a draft Bill for government approval, an OPC drafter must highlight whether there are any constitutional issues affecting the Bill. A sound understanding of Australian constitutional law is therefore necessary when working in OPC. A good general knowledge of legal issues is also essential.

Knowledge of technical matters associated with preparation of legislation

- 9 These include:
- matters affecting the substance of the Bill, including drafting directions and in-house styles; and
 - matters affecting the handling of Bills within the office, such as editorial checking, printing and disseminating Bills; and
 - matters affecting policy clearance for Bills; and
 - matters affecting the introduction of a Bill into the Parliament.
- 10 With adequate in-house documentation and search systems, it should be possible to check these matters quickly, but most of us rely on a good knowledge of these systems to operate efficiently, and use searches and documentation only to look up more obscure cases.

Broad experience in a range of drafting tasks and an ability to master new tasks quickly

- 11 There are some tasks that all drafters within a particular jurisdiction will need to perform at some time. In our jurisdiction, for example, you might be called on to draft application provisions, savings provisions, transitional schemes, provisions scoping an Act to bring it within constitutional authority, provisions dealing with the acquisition of property on just terms and appropriation Bills. It is therefore necessary to couple a broad range of experience with the ability (through research, discussion with colleagues, analysis of precedents etc) to master new tasks quickly.

Accuracy

- 12 Draft legislation should, as far as possible, be free from error. A drafter needs to be meticulous, accurate in expressing an instructing area's policy intention and have a keen eye for spotting errors.

Political skills

- 13 Political skills include the ability to identify the process by which outcomes in a particular project occur. This often involves identifying the driving force behind decisions. Who, for example, of a group of instructors, will actually decide which policy to adopt? What, of the multitude of objections raised to a proposal, is the driving issue?

Interpersonal skills

- 14 Within OPC, the drafter functions as part of a team made up of a senior drafter, 1 or 2 assistant drafters and executive assistant support. Because senior and assistant drafters are paired, it is not uncommon to spend hours each day, day after day, in each other's company.
- 15 The interpersonal skills used by drafters day-to-day include:
- the ability to empathise with others (for example, by identifying that someone is uncomfortable with a proposal made during a meeting); and
 - the ability to discuss emotional issues (for example, by taking the heat out of a discussion between instructing officers by identifying the issues disturbing them and helping the parties to find a resolution); and
 - patience (for example, in helping an inexperienced instructing officer find a workable solution to a problem); and
 - the ability to keep things in perspective (a good sense of humour is often useful).

Project management skills

- 16 In our jurisdiction, the drafter functions as part of a team to prepare legislation. While the drafter has little to do with some aspects of the introduction of a Bill (for example, the preparation of the explanatory memorandum and second reading speech) the drafter does have an overview of much of the process for preparing and introducing a Bill and so often assumes the role of project manager within that team.
- 17 As project manager, the drafter often needs to do such things as:
- agree on a timetable for tasks with other members of the team; and
 - facilitate discussions between different areas of government responsible for aspects of the Bill; and
 - foresee potential problems in completing tasks.
- 18 To manage a project effectively, a drafter will need to read a situation (political skills) and to read other people (personal skills). He or she will also need a variety of other skills, such as:
- the ability to think strategically; and
 - the ability to assess and take risks.

"Practical" common sense

- 19 The drafter needs "practical" common sense to be able to focus on issues that really do need to be resolved (rather than purely theoretical possibilities) and to develop proposed solutions that are viable.

2.3 So how do you teach someone to draft?

- 20 Learning to draft is rather like learning an instrument. It involves talent, theory and practice.
- 21 You cannot endow a person with a talent they do not have, but you can nurture existing talents. You can teach the theory behind a particular approach, but that will not be enough without experience. You can offer broad experience tailored, as far as possible, to the needs of a particular drafter.

3 What system does OPC use?

- 22 This section of the paper describes how OPC attempts to ensure that our drafters develop the necessary skills and attributes.
- 23 To ensure “talent”, we ensure that a highly experienced drafter chairs each selection committee for new staff. We then only hire those applicants who meet the standards that we have set—we do not hire staff simply to fill vacant positions.
- 24 Using this process, we have hired staff in small groups on an annual basis for the last few years. Many of the staff hired in this way have now moved into Senior Executive Service (SES) positions.

3.1 Training philosophy

- 25 SES drafters in OPC have much more independence of action than SES equivalents in larger agencies and are essentially autonomous both in delivery of the drafting service and in finalising it with clients.
- 26 The aim of our drafter training is to produce drafters who have the skills, knowledge and self-confidence to take on the role of an SES drafter.
- 27 OPC believes that the best way of learning the drafter’s craft is by on-the-job training. Training requires experience with challenging work. Working within one’s level of competence does not develop skills as effectively as being expected to work slightly above one’s level of competence.
- 28 The usual notion of on-the-job training envisages a mixture of formal training sessions and closely supervised work experience. Both the training and the work increase in complexity over time and results are measured and accredited. Training in OPC has these components but the system is not a formal one and there is no formal accreditation process (although there is performance measurement through the performance appraisal system). Work experience is a much more important component of training than formal coursework.
- 29 The on-the-job training is provided through the teams (or “pairs”) system.

3.2 “Pairs system”

- 30 The drafters in OPC are divided into teams with 1 SES drafter and 1 or 2 assistant drafters.
- 31 Teams stay together for about 12 to 18 months. Drafters (both SES and assistant drafters) are given the opportunity to make any comments on teams before the teams are determined. In general, the only comments First Parliamentary Counsel (FPC) receives are that drafters want a particular team to continue.
- 32 Legislative projects are assigned to team leaders by FPC and from that point team leaders are operationally completely autonomous (there is of course general management oversight by FPC). Having been assigned a Bill, the team leader is responsible for the following:
- determining a method of proceeding with the client;
 - giving advice about alternatives, obstacles and implications which may substantially change the nature and direction of the Bill;

- devising detailed legislative solutions to the policy issues posed by the Bill;
- raising and ensuring the resolution of conflicts on policy, the law and deadlines;
- taking the Bill through to its final form and lodging it for introduction into Parliament.

33 Bills are not settled by FPC or by any “senior review team”.

34 Within the team the work is allocated by the SES drafter (usually after discussion with the assistant drafter).

35 Drafters are not tied to particular clients or subject matters, although particular SES drafters tend to specialise in particular areas for a number of years at a time. Consequently, particular drafters may draft mostly, say, taxation work, but would be available if some other Bill was required.

36 All teams work in different ways. This is a function of different SES drafters having different preferred approaches and the different levels of experience of assistant drafters. However, the following are fundamental features of the system:

- the SES drafter is responsible for clearing all Bills drafted by the team;
- the SES drafter has a responsibility to ensure that the assistant drafter is given access to appropriate developmental tasks;
- the assistant drafter has a responsibility to make the best use of the training opportunities provided.

37 These features are reflected in performance agreements and therefore regularly raised in the course of the performance management process.

3.3 Mentoring of acting SES drafters

38 There is a substantial difference in the level of responsibility placed upon assistant drafters and SES drafters.

39 Usually drafters act in SES positions for a year or more before being permanently promoted.

40 This gives the drafter the opportunity to see if they want to take on the additional pressure and responsibility and gives OPC the opportunity to see how the drafter performs in the job. This approach seems to have been quite successful in OPC.

41 While acting, drafters are assigned an SES drafter as their mentor. The role of the mentor is to provide such assistance and guidance as the acting SES drafter requires. The mentor does not settle the Bills drafted by the acting SES drafter.

42 Depending on the circumstances, the acting SES drafter may or may not be responsible for supervising an assistant drafter.

3.4 Director of Drafter Training

43 In May 2003, an SES drafter was designated as Director of Drafter Training (DDT). The DDT retains significant drafting responsibilities, but the DDT’s drafting workload has been adjusted having regard to the work required of the DDT.

44 The DDT is responsible for developing a more co-ordinated approach to drafter training. One of the main functions of the DDT is to supplement the on-the-job training provided through the teams (or “pairs”) system with formal drafter training sessions provided at OPC.

45 The training sessions are aimed at providing drafters with specialist legal knowledge (such as constitutional law or criminal law) or other specialist knowledge relevant to the drafter’s role (such as parliamentary procedure). Some of the sessions deal with general skills that are critical for successful drafting (such as analysis, creativity and problem solving).

- 46 The DDT has developed a rolling 3-year plan for OPC's training sessions for drafters. The plan provides for 10 2-hour training sessions each year, with 5 of the sessions each year presented by SES drafters from within OPC and 5 by external presenters. The plan provides for training sessions on constitutional law and criminal law each year because of the central importance of those topics for OPC's work. The remaining topics are intended to be covered over the course of the 3-year period covered by the plan.
- 47 A list of the training sessions that have so far been provided and of the training sessions planned for the future is set out at Attachment A.

3.5 Drafter exchanges

- 48 Some drafters within OPC have participated in drafter exchanges with other drafting offices. It has been the practice of the visiting drafter to present a session on the work of his or her drafting office and on the differences between the 2 offices. It has also been the practice of the OPC drafter, upon returning to OPC, to present a session on his or her experience of working in another drafting office.
- 49 Drafters from other drafting offices have also worked in OPC through short-term drafting placements. It has been the practice of such a drafter to present a session on the work of his or her drafting office and on the differences between the 2 offices.

3.6 Other training

- 50 A range of other training is provided within OPC. This includes:
- an induction program for new drafters to OPC and, in particular, the giving of a number of training sessions related to drafting (see list at Attachment B); and
 - IT training and, in particular, using the research tools that are available; and
 - informal monthly lunchtime meetings of drafters for the purposes of discussing drafting issues.

3.7 Materials and technology

- 51 There is considerable documentation of matters relating to drafting in OPC. While the materials are not created as a training resource, people who join OPC need to be trained in how to use them. Most of the material is now contained in searchable databases, which enhances their usefulness. OPC's IT system is highly customised and many aspects of drafting work are done automatically (for example, renumbering, style checking and other checking).
- 52 The Acts and Bills database contains all Commonwealth Acts (consolidated), Acts from recent sessions in Parliament, Bills currently in Parliament and Bills and parliamentary amendments being drafted. Learning how to search this database effectively is critical because of the need to amend cross references, and also to work out whether you are amending the same provision as someone else. The latter is a big issue for OPC because of the volume of legislation that is in the Parliament, or being drafted, at any given time. Often, the same Act is being amended by several drafters at once. This database is also useful for finding precedents.
- 53 The Office Documents database contains a lot of material relevant to drafting, particularly the Drafting Directions, Drafting Notes, Amending Forms Manual, Word Notes and IT circulars.
- 54 The Drafting Directions are instructions issued by FPC and all drafters are required to comply with them (see index of Drafting Directions at Attachment C). Drafting Directions can be general (for example, a recent Drafting Direction covers all aspects of OPC's new approach to commencement provisions), or may only deal with one issue (such as changes to terminology as a result of a particular Act). OPC is in the process of consolidating the Drafting Directions, so that for each particular topic all information is contained in only 1 or 2 Drafting Directions rather than several Drafting Directions ranging over many years.

- 55 The Drafting Notes are notes (mostly, but not always, written by drafters) on various topics relevant to drafting. They are less rule-oriented than the Drafting Directions and are more in the nature of essays on particular topics (see index of topics at Attachment D). The Drafting Notes were gathered together in a database because it became apparent that individual drafters were producing quite lengthy notes relating to specific situations they had encountered, and it seemed inefficient to lose all that information once the job was finished. A quality control system has been implemented under which all papers on the Drafting Notes Database are reviewed by an SES drafter.
- 56 The Word Notes and IT circulars contain detailed rules about the formatting of documents and preparation of Bills for printing etc.
- 57 The Amending Forms Manual contains the rules about how to word amendments and sets out very detailed precedents, which means that there is a high degree of consistency in the amending forms used. It also makes automation easier.
- 58 All the documentation mentioned above (apart from the Drafting Notes) can be found on OPC's website (www.opc.gov.au).

4 How well does OPC's training system work?

- 59 As noted in section 3.2, the chief component of our training system is rotated pairing in-house. As with any system, it has strengths and weaknesses.

4.1 Strengths

Training is intensive and diverse

- 60 In the early stages of an assistant drafter's career, a paired assistant drafter basically "shadows" the SES drafter throughout each drafting project, which means that he or she is exposed to large-scale and difficult projects and a range of projects. The assistant drafter can have a range of levels of involvement, from reading and commenting on drafts and attending meetings, to taking the main running of the job.
- 61 This gives the assistant drafter the opportunity to discuss issues as they arise, whether they are matters of government procedure, drafting approaches, legal interpretation, strategy when dealing with instructing areas or other issues. The assistant drafter can feel confident that the issues are being discussed with a drafter who has an equal, if not better, grasp of the detail of the project. By working with senior drafters, the assistant drafter is exposed to a lot of different drafting styles.

Training is hands-on and practical

- 62 Assistant drafters are involved in the drafting of Bills that are introduced into the Parliament and that become law. As assistant drafters progress, they reach a point where they can begin to manage projects for themselves. Indeed, to acquire the management skills necessary to operate at senior level, they must begin to manage projects themselves. At that stage, the pairing system offers a safety net for the assistant drafter and a system of quality control for OPC. Ideally, the assistant drafter would begin by managing simpler projects in which the senior drafter maintains close contact.

Training is tailor-made to the particular needs of the organisation

- 63 In-house training can be closely linked to the particular organisation in which it occurs. For example, as noted above, constitutional issues are very important in OPC, but may not be in other offices. In addition, OPC has fairly extensive written material relating to drafting approaches that must be followed, and training draws heavily on these.

4.2 Weaknesses

Training may be patchy

- 64 Whether an assistant drafter will gain experience in a particular area of law or drafting during their training can be quite hit and miss. It will depend upon the nature of the matters that come through the door and who an assistant drafter is paired with. It is hoped that some of these gaps will be filled in by seminars and other formal training co-ordinated by the DDT (see point 3.4).
- 65 Further, each SES drafter may hold a different view on when and how an assistant drafter should be introduced to managing their own projects. Some working methods for SES drafters do not lend themselves to giving aspects of a drafting project, or small drafting projects, to an assistant drafter. There are also projects that do not lend themselves to division.
- 66 Allowing an assistant drafter to manage a project, or an aspect of a project, is not always easy for an SES drafter, as he or she is ultimately responsible for the quality of the work produced by their team and needs to manage the risks involved.

Quality of training depends on quality of trainer

- 67 Drafters do not generally have any formal training in teaching and so the quality of the training may vary. This may be frustrating for assistant drafters who have to adjust to a variety of styles.

Training is resource intensive

- 68 The better quality the training the more of an impact on resources there tends to be.
- 69 There is a substantial cost in terms of the senior drafter's time and this reduces the capacity of the senior drafter to draft Bills. There is also a cost in training drafters (sometimes over a period of several years), who may then decide that drafting is not for them, or who may move to another drafting office.

Personality clashes

- 70 A pairing system can be very intense. Like all drafters, we often work to tight deadlines or in circumstances that are tense for other reasons. Working in a pair can sometimes require a high degree of professionalism and commitment.

4.3 So why prefer rotated pairings?

- 71 The short answer is that although there are weaknesses within the rotated pairing system, OPC's view is that problems are either soluble or worth putting up with to get the many benefits offered by the system. In addition, the formal training sessions co-ordinated by the DDT now supplement the fundamental method of training through the pairs system.

5 What other systems can be used?

- 72 There are many other training and supervision systems that can be used. The main 3 that we are aware have been used for drafters are:
- traditional branch structure; and
 - flexible pairings; and
 - formal drafter training.

5.1 Traditional "branch" structure

- 73 This is the method that I understand is used in a number of other drafting offices. It was also suggested at one time for OPC.

- 74 Under this arrangement, drafters work substantially on their own but with access to a more senior drafter for advice as required. Bills drafted by all but the most senior drafters are settled at the end of the process by a senior drafter.
- 75 The branches may or may not be structured around particular subject matters or client departments.
- 76 This is the structure that has the potential to be most efficient in the short term as all drafters are focussed on producing work (as opposed to the training of other drafters).
- 77 I see the following problems with this system:
- inexperienced drafters are only exposed to projects that they can largely handle by themselves—by necessity, this is only the simpler projects and the drafter is therefore not exposed during their early career to the complex analytical skills required by more complex work;
 - Bills are settled by drafters who have not had substantial involvement in the development of the Bill (and, in particular, the policy)—this is likely to lead to difficulties arising from a lack of knowledge of why provisions are drafted in a particular way;
 - the involvement of the senior drafter comes at a late stage in the process—this limits the opportunity to suggest completely different approaches and gives rise to situations where substantial changes need to be made at a late stage (this could be inconvenient for instructors and embarrassing for the drafting office);
 - the opportunities for development of the inexperienced drafter are reduced as:
 - they do not work with the senior drafter as he or she develops a legislative proposal from scratch; and
 - they do not see the senior drafter “in action” with instructors; and
 - the opportunities for discussing drafting issues as they arise during work are reduced.

5.2 Flexible pairings

- 78 This was a system used at OPC for a few years in the early 1990’s. It was intended to address problems with the pairs system as it was operating in OPC at that time.
- 79 The main problems that it was intended to address were:
- assistant drafters only working for a small number of senior drafters during their careers; and
 - assistant drafters with substantial experience not being provided with appropriate developmental opportunities; and
 - a lack of visibility for the work of assistant drafters.
- 80 The system involved each drafting job being allocated by FPC to 2 drafters (a senior drafter and an assistant drafter). FPC would also specify which of the drafters was primarily responsible for the drafting job.
- 81 As each drafter would generally be working on a number of drafting jobs at any one time, he or she would be concurrently working with a number of drafters.
- 82 There were a number of major problems with this system. These mostly arose from the lack of clarity of the role of senior drafters in relation to the training of assistant drafters. Because they did not have the exclusive responsibility of training particular assistant drafters, some took the view that they would not (or did not need to) put a great deal of effort into training those who worked with them.

- 83 It was also unclear at times who was responsible for the quality of Bills and it has been suggested that some of the work produced during that time was not up to the standard that OPC sets for its work.
- 84 In addition, OPC had just introduced its Performance Management Program (PMP) which required each assistant drafter to have a “supervisor” to prepare PMP reports. However, when the supervisors were appointed, it was not known whether or not they would actually be doing any work with the assistant drafter. For example, a number of my PMP reports were prepared by drafters with whom I had never worked. They had to rely (and try to reconcile) reports from the various drafters with whom I had worked.
- 85 Difficulties also arose in relation to the relative priorities of different drafting tasks that assistant drafters had. Some SES drafters considered that their work must be most important (because it was theirs) and this led to some assistant drafters having unreasonable demands placed upon them.
- 86 However, the most fundamental problem was the failure of this model as a method of training assistant drafters. It could be argued that this system was substantially responsible for OPC getting to a position several years ago where we had insufficient suitable drafters to fill our SES positions.
- 87 One positive thing that came out of having the alternative system is that when the pairs system was re-introduced the main problems that previously had been identified with it had been removed.

5.3 Formal drafter training

- 88 There are a number of institutions that conduct formal drafter training.
- 89 I believe that these can provide a useful grounding for new drafters who are learning the basics of drafting. However, much like many other trades or professions, there is no substitute for on-the-job experience working with a highly skilled person.
- 90 Formal drafter training could provide a useful adjunct to the pairs system operated by OPC. Unfortunately, the number of new drafters in Australasia each year would be insufficient to make such a course viable. What would be useful would be to have high quality generic materials that could then be modified and used by each jurisdiction.

6 Summary

- 91 OPC has found that the pairs system that we use has been successful in preparing drafters for senior drafting positions. This system does however require a substantial commitment of resources to the training of drafters.
- 92 This system has been improved by the addition of formal training sessions for drafters co-ordinated by the DDT to ensure that drafters receive training in all of the areas required.

Attachment A

Training sessions so far provided

Training sessions so far provided		
Item	Session	Presenter
1	Application and transitional provisions	SES drafter in OPC
2	The use of drafting plans	SES drafter in OPC
3	Criminal law	Officers in the Attorney-General's Department
4	Legal personality issues for drafters	SES drafter in OPC
5	Constitutional law	Academics
6	Statutory corporations	SES drafter in OPC
7	Statutory interpretation	SES drafter in OPC
8	Legislative instruments	SES drafters in OPC
9	Commonwealth-State cooperative schemes	SES drafter in OPC
10	Parliamentary practice and procedure	Officers in the House of Representatives and the Senate

Training sessions planned for the future

Training sessions planned for the future		
Item	Session	Presenter
1	Plain language	SES drafter in OPC
2	Criminal law	Officers in the Attorney-General's Department
3	Taxation	SES drafter in OPC
4	Courts and court jurisdiction	Officers in the Attorney-General's Department
5	Constitutional law	Academic
6	Bill project management	SES drafter in OPC
7	Financial provisions	SES drafter in OPC
8	Implementing international treaties	SES drafter in OPC
9	Privacy, confidentiality and secrecy provisions	Officers in the Attorney-General's Department
10	Subordinate legislation making powers	Officers in the Attorney-General's Department
11	Licensing and registration schemes	SES drafter in OPC
12	Customs and excise	SES drafter in OPC
13	Administrative law	Officers in the Attorney-General's Department
14	Statutory interpretation in providing legal advice	Australian Government Solicitor
15	Benefit schemes	SES drafter in OPC
16	Amounts, formulae and timing issues	SES drafter in OPC
17	Problem solving	SES drafter in OPC

Attachment B

Training sessions given to new drafters as part of the induction program

Training sessions given to new drafters as part of the induction program	
Item	Session
1	Introduction to OPC and legislative drafting
2	Drafting environment in OPC
3	Basic drafting theory
4	Drafting techniques
5	Legislation process
6	Useful legislation
7	Finding an up-to-date text of an Act

Attachment C

Index of Drafting Directions

Topic	Drafting Direction
1. PRESENTATION AND FORM OF LEGISLATION	
1.1 Bill titles	3/2005
1.2 Commencement provisions	10/2005
1.3 Amending forms	10/1989, 11/1994, 3/2001, 18/2004
1.4 Definitions	5/2005, 5/2001
1.5 Numbering and lettering	3/1989, 6/1990, 1/1991
1.6 Explanatory material	13/1994
1.7 Asterisking	6/2005, 6/2000
1.8 Tax Code drafting	6/2005
1.9 Treaties	8/2005
2. USAGE (INCLUDING PLAIN ENGLISH)	
2.1 Plain English	11/2004
2.2 Gender specific language	3/2001
2.3 Use of various expressions in Bills	12/2004
2.4 English usage, grammar, punctuation and spelling	11/2004
3. CONTENT	
3.1 Constitutional law	9/2005
3.2 Taxation	1/1993, 14/1993, 11/2001, 2/2005 [Draft Drafting Direction on statutory and other bodies would replace 1/1993]
3.3 Exercise of powers etc. (including by Governor-General)	3/2000, 17/2004
3.4 Coercive powers	3/1983, 7/1985, 12/1986, 17/1989, 2/1999, 15/2001
3.5 Offences (including secrecy provisions)	1/1981, 16/1985, 15/1995, 2/1999, 7/2001, 8/2001, 9/2001
3.6 Statutory authorities	1/1977, 7/1980, 8/1980, 9/1980, 10/1980, 7/1983, 2/1985, 5/1988, 14/1989, 8/1991, 1/1993, 6/1996, 4/1997, 7/2000, 2/2004 [Draft Drafting Direction on statutory and other bodies would replace 7/1980, 8/1980, 9/1980, 7/1983, 5/1988, 14/1989, 8/1991, 1/1993, 6/1996, 4/1997, 7/2000]
3.7 Tribunals	7/1974, 7/1980, 9/1980, 6/1984 [Draft Drafting Direction on statutory and other bodies would replace 7/1980 and 9/1980]
3.8 Decision-making and other administrative process (including disclosure of interests)	15/2004, 7/1980, 8/1980, 9/1980, 10/1980 [Draft Drafting Direction on statutory and other bodies would replace 7/1980, 8/1980, 9/1980 and 10/1980]
3.9 Subordinate instruments	5/2001, 19/2004
3.10 Evidence and proof (including oaths and affirmations)	2/1973, 16/1985, 1/2003

- 3.11 Australian governments or jurisdictions 7/2005
- 3.12 Commonwealth agreements 8/2005
- 3.13 Appropriations and public money 6/2004

4. PROCEDURAL MATTERS

- 4.1 Relationships with instructors 11/1984, 12/1984, 4/2005
- 4.2 Referral of Bills to other agencies 1/2005
- 4.3 Corporations legislation 4/2004
- 4.4 Statute law revision amendments 3/2004
- 4.5 AGS advice 4/2005
- 4.6 Legislation Approval Process 16/2004
- 4.7 Chairman's amendments 17/1984, 8/1990, 2/1991
- 4.8 Parliamentary amendments 9/2004, 10/2004
- 4.9 Presentation of Bills for Royal Assent 16/2001

5. OTHER DRAFTING DIRECTIONS

- 5.1 Obsolete and superseded Drafting Directions 7/1996, 1/1997, 2/2001, 7/2004, 8/2004
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Attachment D

Index of Drafting Notes

Drafting Notes
Title
Administrative law: What decisions should be subject to merits review?
Alternative versions of amendments of Acts
Bounty Bills
Breach of statutory duty
Constitution—Acquisition of property
Constitution—Australian citizenship and aliens
Constitution—Chapter III issues
Constitution—Commonwealth-State cooperative schemes—issues for drafters
Constitution—Cooperative legislative schemes
Constitution—Courts under Chapter III
Constitution—Discrimination and preference
Constitution—Discrimination, preference and taxing State property
Constitution—Insurance and the Constitution
Constitution—Judicial power and administrative decision-makers
Constitution—Judicial power and administrative tribunals
Constitution—Judicial power and good government
Constitution—Jurisdictional error and s75(v) of the Constitution
Constitution—Legislating for terms and conditions of employment under the conciliation and arbitration power
Constitution—Privative clauses & the Commonwealth institution: a primer
Constitution—Reading down and severance
Constitution—Section 53 paper by OGC
Constitution—State referral of matters to the Commonwealth Parliament
Constitution—Taxation and fees for services
Constitution—Taxes and fees
Constitution—The Gleeson Court and the Constitution
Constitution—The Hughes case and Commonwealth-State co-operative schemes
Constitution—Wakim: Notes on the Commonwealth’s response to the decision in the re Wakim cases
Commonwealth bodies—Commonwealth government entities
Commonwealth bodies—Making the Commonwealth etc. notionally liable to Commonwealth taxes and fees, and cancelling exemptions of other persons
Commonwealth bodies—Different types of Commonwealth bodies
Commonwealth bodies—Staff and consultants of statutory bodies
Commonwealth bodies—Statutory authorities
Commonwealth bodies—Statutory bodies: role of Minister
Corporations—Companies
Corporations—The new 2001 corporations legislation
Corporations—Notes on changes to corporations legislation
Corporations—Transitional provisions: treatment of the transitional issues in implementing the new corporations legislation
Criminal—Entry, search and seizure
Criminal—Forfeiture of goods
Criminal—Infringement notices
Criminal—Notes on criminal code harmonisation
Criminal—Notices to produce or attend
Criminal—Offences not covered by the Criminal Code
Criminal—Offences to which the Criminal Code applies

Drafting Notes
Title
Criminal—Penalties for criminal offences
Criminal—Spent convictions
Customs and excise tariff proposals
Scrutinising customs and excise tariff proposals drafted outside this Office
Decentralised tables of contents
Delegation
Drafting—Advanced drafting hints
Drafting—Application and transitional provisions
Drafting—Basic drafting theory
Drafting—Definitions—notes for non-SES drafters
Drafting—Drafting from a blueprint
Drafting—Geographical application of Acts
Drafting—Legal personality issues for drafters
Drafting—Use of graphics, diagrams and other aids to understanding
Drafting—Resolving uncertainties where traditional rules of grammar and usage are undergoing change
Drafting—Rewriting legislation: Federal Australian experiences
Drafting—Simplified outlines
Drafting—Status of notes in Bills and Acts
Drafting—When words aren't enough: Graphics and other innovations in legislative drafting
Electronic Transactions Act 1999
Employee—definition of
Financial—Appropriation Bills
Financial—Financial Management Legislation Amendment Bill 1999
Financial—Financial provisions
Financial—Indexation
First meeting with instructors
Internal review provisions
International—Giving effect to treaties
International—International agreements—thoughts about giving effect to them
Partnerships
Provisions for public inquiries
Renumbering and relettering an Act
Secrecy, confidentiality and disclosure of information
Statutory interpretation for drafters
Subordinate instruments and references to classes of matters
Subordinate instruments—talk on the Legislative Instruments Act
Taxing Acts—application to partnerships and unincorporated associations
Taxing Acts—garnishee powers
Territories—What happens to a Territory law when the power to make it is curtailed by the Commonwealth?
Trusts

Electronic publication of New Brunswick legislation— yesterday, today and tomorrow¹

Judith Keating, QC²

Background

Integrated system for drafting legislation—the relationship between Legislative Counsel and the Queen’s Printer

- New Brunswick uses an integrated system for drafting and publication of legislation. The drafting, editing and publishing functions are carried out within one office known as the Legislative Services Branch of the Office of the Attorney General.
- The Assistant Deputy Attorney General/Chief Legislative Counsel is responsible for the 3 units that comprise the Legislative Services Branch:
 - (1) The Drafting unit (16 Legislative Counsel—8 teams co-drafting in French and English—and 3 legal secretaries)
 - (2) The Law Reform unit (2 solicitors)
 - (3) The Queen’s Printer (1 Queen’s Printer, 1 Royal Gazette Coordinator, 2 Legislative Editors, 1 Electronic File Coordinator, 1 Desktop Publisher and 1 Administrative Assistant)
 - (4) At present there is a fourth unit within Legislative Services known as the Statute Revision unit. This unit was established in 2001 to carry out a statute revision. It will be disbanded once the revision is completed. Statute Revision is comprised of 1 Coordinator, 6 solicitors and a jurilinguist.

Bilingualism

- New Brunswick is the only officially bilingual province in Canada.
- Under Canada’s *Charter of Rights and Freedoms* and New Brunswick’s *Official Languages Act*, the Province is required to make the laws of the province available in both English and French and both language versions are equally authoritative.
- The legal necessity to produce legislation in both official languages must always be kept in mind when considering options for publishing legislation.
- The New Brunswick Government fulfills its duty to produce legislation in both languages by publishing single documents in a side-by-side bilingual format. (Single language versions of consolidated legislation are also provided on the Internet at this time.)
- When contemplating new ways of publishing, be they paper, electronic or other media, the bilingual format must be considered.

¹ Paper presented to the Commonwealth Association of Legislative Counsel, London, England, September 2005.

² Assistant Deputy Attorney General, Legislative Services, Office of the Attorney General, Government of New Brunswick.

Publication yesterday—the previous publishing system

Paper

- The last major publishing change was made at the time of the last statute revision in 1973.
- At that time, the decision was made to continue to print annual volumes of both statutes and regulations and to begin producing loose-leaf consolidations for both statutes and regulations.
- The *Queen’s Printer Act* was amended in 1974 to allow for the printing of loose-leaf editions of statutes. (Section 7.1 states that the Queen’s Printer may print and publish an edition of the Revised Statutes of New Brunswick, 1973, in what is commonly known as a loose-leaf form.)
- Updates in loose-leaf form were originally produced on an as-needed basis.
- Eventually, the decision was taken to publish loose-leaves for both statutes and regulations quarterly. New Brunswick was one of the few jurisdictions in Canada to produce loose-leaves so frequently, putting New Brunswick at the forefront of up-to-date consolidations for that time.
- Loose-leaves were produced quarterly until 2004. Subscribers would generally receive updates approximately 4 months after the cut-off.

Electronic

- An internal network was created for Justice and Attorney General employees in the mid 1990s. It housed single language versions of original and consolidated legislation.
- Legislation was originally posted on the Internet in 1997.

Why change?

The revision

- The main impetus for considering a change in how legislation was published and distributed was the decision to undertake a revision of the Statutes of New Brunswick.
- As previously mentioned, the last statute revision was in 1973 and, since then, little attention had been given to the publishing of legislation.
- The cost of publishing a revision in paper and the cost of having to do future revisions were considered.

New management, new approach

- There was a change in management at the Queen’s Printer soon after the beginning of the Revision in 2001.
- Until that time, there had been little pressure to consider how legislation was being produced, published and distributed.
- The status quo had been in place for several years and was working relatively effectively; however, it was decided that a more progressive approach would be taken in which e-publication would always be considered when making publishing decisions.

Technological advancement

- With the Internet becoming increasingly user-friendly and the continual influx of people using the Internet, it was necessary to increase the Internet presence.
- With the technological advancements and increased skills of staff, a decision was made to begin updating the Internet versions of legislation at the same time as loose-leaves (i.e. quarterly). Previously loose-leaves had been the priority and the Internet was updated as time

permitted. This meant that the Internet versions of legislation were always produced after the paper versions.

- By adding the annual volumes of legislation on the Internet site, users would have electronic bills, original legislation and consolidated legislation at their disposal.
- By choosing to update the Internet on an ongoing basis, this would increase the ability to get information out to clients in a more timely fashion than mailing information, as was often the case for clients living outside the city.

Decreasing clientele and an archaic accounting system

- With the increase in clients using the Internet, the number of clients requesting paper copies was steadily decreasing. In fact, the constant decrease in requests allowed the Queen's Printer to cut the Sales and Distribution unit (two positions) and absorb the sales duties into the administrative assistant position.
- The system that had been in place to maintain subscription lists and for accounting purposes was archaic and gradually slowing down to the point of near uselessness in early 2004. It was cost prohibitive to set up a new system, given the decrease in clientele.

Financial pressures of the day

- In the past few years, there has been increasing pressure to significantly decrease the Legislative Services Branch budget.
- The budget is almost entirely salary based. The Queen's Printer's budget is almost entirely based on salary and printing.
- Emphasis was placed on finding creative solutions to decreasing budget (i.e. not staff reductions). As a result, it was clear that the printing budget would need to be decreased.
- To maintain a paper-based publication system would mean ever increasing expenditures (based on paper, postage and equipment costs and the need for a new accounting system).
- As a result, decreasing printing costs was really one of very few viable solutions. Looking at creative and cost-effective solutions and utilizing e-publication was considered key.

The "e-publishing" situation in Canada

- Like New Brunswick, other provinces were looking to increase their Internet presence.
- Several provinces were updating the Internet on a more frequent basis than New Brunswick. There was some pressure to keep up with the standards being set, if not improve on them, as the New Brunswick Government is known as a leader in the e-environment.
- New Brunswick wants to continue to be a leader in e-innovation, including the publication of legislation electronically.

Publication today

Printing

- Printing has been pared to a minimum over a gradual period (2002–2005).
- Bills are produced in hard copy for the Legislative Assembly only.
- Hard copies of legislation are available on a print-on-demand basis only. Small orders are printed in-house; another department prints large orders.
- Government departments wanting paper copies order through a separate government department.

Paper products available (on a print-on-demand basis)

- Statutes (original and consolidated versions)
- Regulations (original and consolidated versions)
- Rules of Court
- *The Royal Gazette*

Bound annual volumes (for statutes and regulations)

- Bound annual volumes are no longer printed for public use with the exception of hard copies that are deposited with the Library of Parliament (Canada) and the New Brunswick Legislative Assembly for archival posterity.
- The last bound annual volumes were printed for the year 2002.
- The rationale for stopping the printing of annual volumes before stopping the printing of loose-leaves was based on the fact that there was a much lower subscription to annual volumes and the fact that most clients want the most up-to-date consolidation of the law.
- The decision to stop printing annual volumes was made by the Deputy Attorney General in consultation with the Assistant Deputy Attorney General/Chief Legislative Counsel and the Acting Queen's Printer.
- Little feedback was received regarding the decision other than criticism from a handful of individuals, the majority being librarians.

Loose-leaves

- Loose-leaves for statutes and regulations were last printed as of December 31, 2003, and are no longer being printed.
- A notice was sent to subscribers with their 2003 update informing them that there would be an update at the end of 2004, if demand was sufficient to warrant it.
- There was insufficient demand for the 2004 update and, as a result, no loose-leaves were printed.
- Loose-leaves have been replaced by the bilingual consolidated versions of legislation available on the Internet site.
- Few comments were received regarding the end of the production of loose-leaves.

The Internet

- The Queen's Printer web page at the Government of New Brunswick website is the only official site for New Brunswick legislation.
- Since 2002, the Queen's Printer has made a concerted effort to increase product availability on the Internet.
- In 2002, the decision was made to update consolidated legislation on the Internet quarterly (to match the loose-leaf updates).
- In 2004, the decision was made to move to monthly consolidations.
- In 2005, the consolidations began to be updated on an "as soon as possible" basis. Consolidated legislation is now generally available within a few days to a month, depending on workflow.
- The Queen's Printer home page was redesigned to incorporate more information. For example, a Royal Assent notification lets clients know when the last Royal Assent was given.
- The Queen's Printer is in talks with Library and Archives Canada to e-archive the annual e-volumes (and *The Royal Gazette*).

- Prior to 2005, consolidated legislation was available on the Internet in HTML (unilingual form). In 2004, a project was undertaken to provide consolidated legislation in PDFs (bilingual form) as well. This project was completed and PDFs were added to the Internet on April 1, 2005.
- The policy decision was made to move to an “e-based” publishing system and to allow online permissions to reproduce legislative products for non-commercial purposes. Those wishing to reproduce for commercial purposes must request permission in writing.
- Feedback has been very positive regarding these changes.
- Legislation is now available in a more timely fashion and free of charge on the Internet.

“E-products” available

- Consolidated statutes and regulations in PDF and HTML
- Table of contents
- List of statutes by department
- Rules of Court
- Royal Assent dates (links in to current annual volume)
- Annual E-Volumes for statutes and regulations
- Direct link to the status of bills for the current session

Publication tomorrow

The “e-laws initiative”

- The “E-Laws Initiative” (known as the New Brunswick LIMS Project) is a comprehensive overhaul of the existing legislative drafting and publishing systems.
- The Initiative impacts the Statute Revision unit, the Drafting unit and the Queen’s Printer.
- The Initiative will result in more standardized drafting and faster publication of legislation on the Internet.
- The Initiative will offer access to justice free of charge on a public Internet site. Visitors will be able to access legislation in its current consolidated form. Advanced and “point-in-time” searching will be available for legislation. Users will be able to access legislation in either language or both and will be able to pass between both languages easily.
- The Initiative is expected to take approximately 18 months and should be completed around the end of 2006.
- When the New Brunswick LIMS Project is completed, it is anticipated that legislation will be consolidated and available online within a week of coming into force.

Conclusion

- New Brunswick has been a leader within Canada in publishing legislation and this will continue with the move from paper publication to electronic publication.
- By expanding Internet access to the law, this results in the broader access to justice of New Brunswick citizens and individuals all around the world.
- The New Brunswick Department of Justice and Office of the Attorney General are proud to offer free full-service Internet publication of legislation and look forward to enhancing this service in the future with the completion of the New Brunswick LIMS Project.

'Challenges of drafting in a developing country'¹

John F. Wilson²

Author's background

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Barrister in Birmingham, U.K., 1967–76
Senior Crown Counsel, Solomon Islands, 1976–77
Attorney General, Tuvalu, 1977–79
Attorney General, Montserrat, 1979–1983
Senior Crown Counsel (Law Drafting Division), Hong Kong, 1983–86
Deputy Principal Crown Counsel (Localisation & Adaptation), HK, 1986–96
Constitutional Adviser, Tuvalu, 1997
First Parliamentary Counsel, Fiji Islands, 1998–2000
Legislative Draftsman, Grenada, 2000–2002
Senior Government Counsel, Hong Kong SAR, 2002–2004
Now a law drafting consultant based in Kettering, Northants, U.K.*

Introduction

Happy to be at CALC after missing it in 2003 (Melbourne). Glad that now that I have 'retired' to the U.K. after 30 years of working overseas, CALC has come to London.

Happy to talk about the Challenges of Drafting in a Developing Country. Slightly embarrassed to be on the same platform as Bangladesh, with its 144 million people and 144,000 square kilometres of land. The largest country I have worked for is Hong Kong with 6 million people, but only 1,000 square kilometres. My average size is a few thousand people and only tens of square miles. Tuvalu has 8,000 people on 26 square kilometres. (Ten square miles—the size of a small English village. Imagine drafting laws to comply with the international treaty obligations of Chipping Sodbury!)

At least I can feel some kindred spirit with Lesotho, whose upper chamber is said to be drawn wholly from tribal chiefs (one of the criticisms of the unreformed House of Lords.) In the Fiji Islands, where I was law drafter for 2 years, the Senate consists largely of tribal chiefs, and the Great Council of Chiefs has an important constitutional role in the appointment of the President. (There was a coup in Fiji in April 2000, 3 weeks after I left.)

So—I would like to share some thoughts on drafting in small developing jurisdictions. The title is 'Challenges' but I would like to share some of the rewards as well.

South Pacific

Picture this. You are sitting in an air-conditioned office on the ground floor with a view across a few yards of white coral beach to an azure blue lagoon. The scene is framed by palm trees gently waving in the trade wind breeze and on the horizon are a few tiny islets. On the lagoon there are some hand-carved outrigger canoes from which people are fishing by pole or net. On the beach children are splashing in the surf and dogs are barking. Girls in sulus (lava lavas) with frangipani in their hair walk

¹ Paper presented to the CALC Conference, July 2005.

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arm-in-arm past the Maneapa meeting house. As the sun goes down in a blaze of colour, a bell rings for evening service, and you close your files after another languorous day in Paradise.

Or picture this. You have some urgent photocopying to be done, but the machine has run out of paper. The only other copier in the building is being repaired. You try to use the computer printer, but that has run out of ink. Your email connection to the outside world is suspended because the satellite has shifted its position. Then the draft Bill you have spent all week on disappears from the computer screen; “unrecoverable disk error” it says (with that irritating spelling with a ‘k’). That evening there is a heavy tropical rainstorm and the next day you come to the office to find the roof has leaked and most of your papers have got soaked.

These are the two sides of Tuvalu, where I worked from 1977 to 1979 as Attorney General and in 1997 as a Constitutional Adviser.

Caribbean

Picture this. You are in a 200 year old colonial-style building on top of a hill with a view across red roofs and green nutmeg trees to a deep blue sea. A white cruise liner is tied up at the wharf. (In the distance is a fort on a headland where the Prime Minister of the country was shot by firing squad 20 years earlier.) Outside a brass band plays as the police in their white uniforms and plumed helmets march up the hill to escort the Governor-General to the opening of Parliament. He is going to give the Throne Speech outlining the laws that you will be drafting during the next year. Around you are men in dark suits and ladies in smart hats, eagerly awaiting the start of this annual event. You can hear the sound of the pipe organ coming from the church across the road, and girls in the convent school next door are practising a song. The Speaker’s clerk, carrying the largest Mace in the Commonwealth, walks in and the timeless ritual begins.

Or this. You are in your rather small office without windows or computer, trying to draft a Bill in pencil legibly enough for the copy typist. You are summoned to the Attorney General’s office and asked to take on a case in the court next door for which a defence must be filed today. The Solicitor General has just resigned, the Special Adviser is on leave and the only other Government lawyers are the DPP and a trainee. The file is incomplete and the witnesses are off the island. The judge has already refused one adjournment and the plaintiffs will be asking for judgment in default if the defence is not filed. You point out to the AG that you have not appeared in court or done litigation for over 20 years; he says “Well—you’re a lawyer, aren’t you?”

These are the two sides of life in Grenada where I was Legislative Draftsman (no gender neutrality there) from 2000 to 2002.

[The court case was brought by one of the 30 or more law firms that have offices in St. George’s town centre. They squat like hunters around their prey—the Grenada Government—waiting for it to make a mistake they can pounce on. They are all Grenadian lawyers, but none of them want to work for the Government. So the Government has to rely on lawyers from Guyana and Jamaica and other Windward Islands—and the occasional lone Englishman—to fill legal posts.]

Physical challenges

So there you have 4 snapshots of the joys and challenges of law drafting in developing countries. Or, at least, in the small island jurisdictions for which I have worked. Different in size and population from Bangladesh and Lesotho. But the physical challenges are probably much the same—lack of office resources; lack of lawyers prepared to work for the government; computer failures and loss of email connections; seasonal risk of cyclones or hurricanes;³ earthquakes;⁴ even volcanoes.⁵

³ Grenada was devastated by Hurricane Ivan in September 2004, and the Ministry of Legal Affairs lost its roof. The Cook Islands had 2 cyclones during the 3 days I was there in February this year.

⁴ including one in Vanuatu while I was there in February

⁵ Montserrat, where I was AG from 1979 to 1983, was devastated by the Soufriere volcano in 1995.

Working in small developing jurisdictions presents a constant juxtaposition of the fascinating and the frustrating; the sublime and the squalid. Joseph Conrad well describes the challenge of working in such an environment. In *An Outpost of Progress* he says—

To grapple effectually with even purely material problems requires more serenity of mind and more lofty courage than people generally imagine.

So please don't think that I have had an easy time of it, quaffing sundowners on the verandah of my villa while 'real' drafters have been commuting to their offices in cities through polluted traffic jams. It's tough out there!

Organisational challenges

I mentioned earlier the lack of government legal personnel in developing countries. One reason for this is economic: it is often better for a lawyer to work in a neighbouring island than in his or her own country, because of extra allowances, etc. For a law drafter this means that there may be few other lawyers to consult on a drafting proposal; few doors you can knock on for a bit of friendly advice (so to speak). Even if there are other government lawyers, they probably have little grasp of legislative technique or even parliamentary procedure. So even more than in a developed jurisdiction, a drafter in a developing country needs to be a Jack or Jill (Jane?) of all trades.

This is stimulating, but the challenge is compounded by the difficulty of keeping up with developments in the law in the world outside. There might be old copies of *The Times* around the office, but the library budget probably doesn't extend to any magazine subscriptions, let alone updates of textbooks. Fortunately, there are nowadays websites where legal texts can be found—the LexisNexis setup in the UK, and the PacLII websites for the Pacific jurisdictions. Assuming, of course, that you have access to a computer, which was not the case in Grenada. There was a computer, but in order to avoid misuse, the password to the internet was not made generally available so research after hours was not possible.

Another challenge of drafting in a small jurisdiction is that the people one needs to consult on a piece of legislation are often out of the country on conferences or negotiations. If in the country, they might well be at a training workshop, out in the villages explaining government policy, or off sick or on leave. The fact is that government officials in small and developing countries are too few and too busy. They are trying to meet the country's international obligations, deal with aid donors, formulate budgets and deal with personnel matters, while at the same time pleasing their political masters. They are quite likely to be running a business or looking after a small-holding, and will have their own domestic and financial problems to deal with. It is not surprising that it is sometimes difficult to get instructions on a piece of legislation.

Lack of scrutiny

Assuming you manage to produce a draft Bill, it's often difficult to get much critical input from the Cabinet or legislature in a small jurisdiction. Cabinet are concerned mostly with policy, and legislators are more concerned with making speeches to impress their constituents than with the detailed wording of a Bill. (No doubt this also applies to developed countries, but there are usually committees to sort out the details and they don't often exist in small jurisdictions.)

In a small jurisdiction it is rare to find a legislature with much continuity of membership, so that the knowledge of drafting conventions and legislative style is just not there. For example, it might be necessary to explain to legislators that there is an Interpretation Act which says that 'person' includes a body corporate. (And the male gender embraces the female?)

Knowing that there will be little scrutiny of a Bill puts a considerable onus on the drafter to get things right first time round. But it makes it difficult to know, for example, whether to give powers to the Minister or to a civil servant; whether to require consultation with the private sector; what rules to put in the Bill and what to leave to regulations; what level to pitch the penalties at; how much 'plain

English' to adopt, etc. It is tempting to include a salary increase for the drafter and see if it is spotted (along the lines of the Town Clerk of Derby precedent)—but so far I have resisted the temptation!

Role of drafter

The local response to any complaint about lack of instructions, etc, is likely to be, "*You are the drafter, so just get on and draft.*" No doubt most drafters would enjoy such a challenge. It means that whatever you put into a Bill is likely to become law. But it can be difficult to adjust to another working environment, as I found when I went to Hong Kong after being in small islands—not once, but twice (1983 and 2002). There, the extensive revisions of the drafting instructions and the detailed scrutiny of Bills by select committees of the legislature rather took me aback at first. The contrast in approach is shown by the numbers: during 2 years in Fiji I produced or vetted over 100 Bills and 300 items of subsidiary legislation. During my final 2 years in Hong Kong I drafted 4 Bills....

Apart from productivity, being the only drafter for a country, or one of a very small team, has other rewards. One of the rewards is a close involvement with the parliamentary process, including advising the Clerk, Speaker and President of the Senate on procedural points. The drafter has direct access to Permanent Secretaries and even Ministers and may be asked to attend Cabinet meetings to explain a Bill. In Fiji, I sometimes sat in the Parliament chamber at the Speaker's right hand, so that I could be consulted on any points that arose, particularly in Committee. So I was on Fiji One TV news some evenings, much to the delight of my 2 young daughters.

The challenge for a drafter in these circumstances is to maintain a boundary between law and politics. Still on the subject of Fiji, I saw recently on the Fijilive website that my successor, Rupeni Nawaqakuta, has been sent out to some of the villages to inform them about the Reconciliation, Tolerance and Unity Bill. This is a highly controversial Bill which has drawn criticism from many quarters, including overseas, as one of its provisions is amnesty for persons involved in the 2000 coup who can show that their offence was 'politically motivated'. (The army has even threatened to remove the Government if the Bill is passed!)⁶

Rupeni, who is a Fijian, has been sent on his own to 3 of the Provincial Councils as the Government's representative, and I have no doubt he is expected to persuade them to approve the Bill. As a professional colleague and former mentor, I hope he is successful. As a friend of Fiji, I am not so sure. As a law drafter, I am proud of the trust placed in a colleague by the Government. But I shudder at the responsibility implied, and I offer this as a striking example of the challenges of drafting in a developing country.

Thank you for listening.

⁶ [Readers will be aware of the coup led by Colonel Frank Bainimarama on 5 December 2006. For further information, please refer to article <http://news.bbc.co.uk/go/pr/fr/-/2/hi/asia-pacific/6161587.stm>, published 12 December 2006 on the BBC News site.]

Statutory interpretation and human rights¹

Rt. Hon. Lady Justice Arden, DBE²

Introduction

I am greatly privileged to be asked to give this address to such a distinguished gathering of legislative counsel from around the world. I have been asked to speak about human rights and I will treat my title as extending to constitutional rights. I will concentrate my remarks on the statutory interpretation of human or constitutional rights. I do not simply mean the interpretation of statutes which legislate for human rights. I also mean those situations where it is said that a statute dealing with some other subject-matter violates a constitutional or human right.

For a judge to address this subject in this forum might be said to be like looking down the wrong end of a microscope and seeing the clinician or microbiologist or whomever is using the telescope. But that metaphor must not be taken too far. Specimens seen under a microscope are usually put on a slide and extracted from all other matter. In statutory interpretation words have to be examined in their context. To find the meaning of even such simple words as “the cat sat on the mat” requires some basic common understanding of the laws of gravity.

The determination of a question of statutory interpretation is in general an exercise in attributing a meaning where it is not obvious and has become a source of dispute between two or more parties. (I should explain that in the UK we do not have any system whereby the courts can give purely advisory opinions.) Yesterday you discussed the intention of Parliament. Speaking entirely for myself, I would be very cautious about describing the task for the judge as one of ascertaining the intention of Parliament, since I am not clear whose intention I would then be seeking or where I would find it if not in the words used. The evidence that is available to the judge is not in general that of the intention of Parliament but that of the Government or the promoters of the Bill or of law reform agencies and it does not follow that the intention of Parliament was their intention at all.

What then is the role of judges? Is their task the purely mechanical task of reading the words legislative counsel have drafted and Parliament has passed? The answer to that question is no, for many reasons. I could of course devote all my time to discussing that question. However, there is so much else that I want to cover so it is sufficient for the purposes of this address if I quote to you what is said about the role of judges in the *Commonwealth Principles on the Accountability of and the Relationship between the Three Branches of Government*.

These Principles were agreed by the Law Ministers of the Commonwealth and endorsed by the Commonwealth Heads of Government Meeting in Abuja, Nigeria, in December 2003. These Principles state:

Independence of the Judiciary

An honest, impartial and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice. The function of the judiciary is to interpret and apply national constitutions and legislation, consistent with international human rights conventions and international law, to the extent permitted by the domestic law of each Commonwealth country...

(c) Judicial Review

Best democratic principles require that the actions of government are open to scrutiny by the courts, to ensure that decisions taken comply with the Constitution, with relevant statutes and other law, including the law relating to the principles of natural justice.

¹ Paper presented to the Commonwealth Association of Legislative Counsel, 9 September 2005.

² Member of the Court of Appeal of England & Wales.

So the time when judges come into contact with human rights and statute law together is when they are being asked to interpret a constitutional provision or human right or when they are being asked to decide whether some other statute actually violates those rights.

Diversity of constitutional and human rights

We should pause a moment at this stage to recall the wide variety of constitutional systems and the wide variety of human or constitutional rights. I am not familiar with by any means all the Commonwealth systems but it is sufficient to give some examples.

Our human rights in the UK are those set out in the European Convention on Human Rights (which I will call “the ECHR”). These include: the right to life, the right to liberty and security, the right to a fair trial, the right to respect for home and private life, the right to freedom of thought, the right to freedom of expression and so on. By and large the ECHR contains no socio-economic rights. There is moreover no self-standing right to equality in the ECHR. There is, however, a right to freedom from discrimination on any ground in the enjoyment of Convention rights.

By contrast, in South Africa, the constitution confers socio-economic rights, such as the right of access to healthcare facilities or to adequate housing. These are sometimes expressed in a qualified form so to impose only an obligation to take reasonable legislative or other measures within available resources to achieve the progressive realization of the right of access to housing. Rights in this form leave open the argument that they are susceptible only to a low level of judicial review. These two examples show that constitutional and human rights can have very different content and they can be drafted according to very different models.

Diversity of constitutional systems

There are also different models when it comes to making decisions about who should decide what violates human rights. Somebody has to have that power. In some countries this power is vested in the courts: the best known example is the US Supreme Court which has the power to strike down legislation which is unconstitutional. In the European Union (“the EU”), there are two levels of problems: first, is the legislation in accordance with EU law? Secondly, is the EU law in question consistent with constitutional rights conferred in the individual member states? The European Court of Justice (“the ECJ”) sitting in Luxembourg has the power to decide whether a law of a member state infringes European law or if a law of the EU is outside the competence of the EU. However, the German courts have a very interesting position on this. They take the view that, while the ECJ has the final say on EU matters, if there is also a question of whether an EU law contravenes the German constitution, that is a matter for the German Constitutional Court though that court would no doubt reach the same view as the ECJ in most cases. This problem reared its head this year when the German Constitutional Court decided that the EU arrest warrant, which would enable one member state to ask for a person present in another member state to be arrested in connection with an offence under the requesting member state’s laws, infringed the rights conferred by the German constitution to have questions of extradition considered by a German court.

In Hong Kong the position is different again: the Court of Final Appeal in Hong Kong is empowered to strike down laws which offend the Basic Law, but on certain reserved matters the decision of the Court of Final Appeal can be re-interpreted by the Standing Committee of the Chinese National People’s Congress. This Committee may find that the Court’s interpretation is not in accordance with the intention of the People’s Congress when the legislation was passed.

The system in Hong Kong is just another way of doing things. It could not be followed in the UK because the ECHR provides that an independent and impartial tribunal established by law must determine all disputes as to rights and obligations. I will explain the UK solution in a moment. But the point I am making is that there should be no necessary assumption that the judicial arm of government can only strike down legislation which is in violation of human rights. The courts do not have that power in the UK so far as primary legislation is concerned. But our law does provide that it is the role of the judges to interpret statute law in conformity with rights protected by the Human Rights Act 1998 (“the 1998 Act”). Only if statute law cannot be interpreted so as to conform to the ECHR can the

courts make a declaration of incompatibility. I shall explain later, if such a declaration is made, only Parliament can change the law or declare it inapplicable.

Diversity of approach by the courts

Another point on which we should reflect is the diversity of approaches to statutory interpretation. Not every court approaches questions of interpretation in the same way. Some courts approach questions of statutory interpretation with a close attention to the wording. Some adopt a more purposive approach. Each approach has its advantages and disadvantages. Where the courts give close attention to the wording this is likely to help people predict the results more easily and plan transactions so as to take advantage of the law. If, however, the courts give more weight to the purpose behind legislation, then it is arguably more likely that the rights, which the legislature intended to confer on citizens, will be recognized by the courts and enforced. Much depends on the constitutional framework in which the courts in question operate and the understanding as to their role in the society in which they operate. There is no “one size fits all” here.

Relative importance of statute law

Then again in some systems statute law is more important than it is in others. In the UK it is becoming increasingly important. There are very few areas of common law which have not been affected by statute law of one kind or another. Of course, where statute law applies, it will, unless it otherwise provides, displace the common law. The study of statute law is inter-disciplinary. It is relevant to all areas of law, for example company law, contract law, environmental law, damages and so on. Many lawyers are not particularly interested in statute law. I think they are wrong not to think it deserves separate and careful study. Statute law may be adjectival law but to me it is very important. It raises technical and constitutional issues.

Diversity of subject matter

Yet again, not every question of interpretation is amenable to the same approach. This may be because of the nature of the subject. Courts across the world tend not to get involved with purely political issues: for example, in the recent *Belmarsh*³ case concerning the detention of terrorist suspects, where the House of Lords accepted the view of the executive that there was a state of emergency threatening the life of the nation. It may be that the approach to statutory interpretation in one case is different from that in another case because of the objectives of interpretation. In the case of human (or constitutional) rights, courts have to give effect to a living instrument. Unless as a matter of law the constitution is to be interpreted exactly in the light of social circumstances as existing at the date of the constitution, then constitutional rights have to be updated as social conditions change. The European Court of Human Rights (which I will call “the Strasbourg court”) adopts an approach of dynamic or evolutive interpretation: it interprets the ECHR according to its current rather than its historic meaning. As one judge put it, “the Convention is written in the present tense”.

The dynamic approach to the interpretation of Convention rights can be seen, for example, in the progressive recognition by the Strasbourg court of the rights of illegitimate children and transsexuals. Since the principle of evolutive interpretation is embedded in the jurisprudence of the Strasbourg court it will be easy for the English courts to adopt it in relation to Convention rights. Indeed it has been held on the highest authority that, even though the 1998 Act does not oblige the English courts to follow the jurisprudence of the Strasbourg court, in the absence of special circumstances the English courts should do so. In the interpretation of constitutional rights, dynamic interpretation is a common feature: as Justice Kirby of the High Court of Australia said extra-judicially in his Hamlyn lectures:

Construing a constitution with a catch cry about “legalism”, with nothing more than judicial casebooks and a dictionary to help, and with no concept of the way it is intended to operate in the nation whose people accept it as their basic law, is a contemptible idea. As one sage put it: if you construe a constitution like a last will and testament, that is what it will become.

³ *A v. Secretary of State for the Home Department* (2005) 2 AC 60.

The principle of evolutive interpretation is not confined to human rights. It may apply, for example, where Parliament has used words which involve a value judgment, as in the statutory requirement that company accounts show a “true and fair view”. What is true and fair is liable to change as the expectations of users of such documents change. There are statutes in many different fields which contain terms which require to be given a modern meaning even though they were enacted in the past. Such statutes have been described as “always speaking”.

The Commonwealth

One of the remarkable things about the Commonwealth is that the members of it display such diversity in their systems. Some Commonwealth systems are pure common law, like the English system, but others are based in whole or part on the civil law, for example the law of Quebec or Mauritius. Others again are in whole or part based on Roman-Dutch law such as South Africa and Sri Lanka. I am sure many other examples could be given. What is unique about an Association such as this is that it offers a forum where so many jurisdictions come together to discuss their approaches and broaden their own horizons. If we can pool ideas about how to solve problems and confront each other’s ideas we will in my view reach better solutions to our own problems in our jurisdictions when we return to our normal tasks again. As the last speaker in this conference I would like to think that you will go away with the conviction that the Commonwealth offers a useful and unique forum for the discussion of legal issues.

The position about human rights in the UK

In the UK, we have no written constitution. In 1950, the UK instead became a party to the ECHR, which is an international convention. For many years the UK did not incorporate the Convention into UK domestic law and so the domestic courts could not give effect to Convention rights. However, under the ECHR individuals are given the right to petition the Strasbourg court to determine whether there has been a violation. Prior to 1998, the only recourse open to a citizen of this country who asserted that his rights had been infringed was to petition the Strasbourg court. In 1998 Parliament passed the 1998 Act in order to give better protection to Convention rights in domestic law. I now turn to the relevant provisions of the 1998 Act.

Human Rights Act 1998

For my purposes the relevant provisions are sections 2, 3 and 4. In material part, these provide as follows:

2. (1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any—
 - (a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,
 - (b) opinion of the Commission given in a report adopted under Article 31 of the Convention,
 - (c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or
 - (d) decision of the Committee of Ministers taken under Article 46 of the Convention,whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen. . .
3. (1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.
 - (2) This section—
 - (a) applies to primary legislation and subordinate legislation whenever enacted;
 - (b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and
 - (c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation)

primary legislation prevents removal of the incompatibility.

4. (1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.
- (2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.
- (3) Subsection (4) applies in any proceedings in which a court determines whether a provision of subordinate legislation, made in the exercise of a power conferred by primary legislation, is compatible with a Convention right.
- (4) If the court is satisfied—
 - (a) that the provision is incompatible with a Convention right, and
 - (b) that (disregarding any possibility of revocation) the primary legislation concerned prevents removal of the incompatibility,it may make a declaration of that incompatibility.
- (5) In this section ‘court’ means—
 - (a) the House of Lords;
 - (b) the Judicial Committee of the Privy Council;
 - (c) the Courts-Martial Appeal Court;
 - (d) in Scotland, the High Court of Justiciary sitting otherwise than as a trial court of the Court of Session;
 - (e) in England and Wales or Northern Ireland, the High Court or the Court of Appeal.
- (6) A declaration under this section (“a declaration of incompatibility”)—
 - (a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and
 - (b) is not binding on the parties to the proceedings in which it is made.

These provisions demonstrate that, when Parliament incorporated the ECHR into UK domestic law, it did so in a way that preserved parliamentary sovereignty. In other words, it was a term of the constitutional settlement then reached that the courts should not be able to strike down primary legislation passed by Parliament. They could, however, make a declaration of incompatibility. A declaration of incompatibility has no effect on the validity, continuing operation or enforcement of the provision in question and is not binding on the parties to the proceedings in which it is made. Thus, the statutory provisions in issue remain unaffected unless and until Parliament changes them. The courts are also bound by the interpretative obligation in section 3 to interpret legislation, so far as possible, in conformity with the rights conferred by the ECHR.

The general expectation, when the 1998 Act was passed, was that, when there was a final order of a court making a declaration of incompatibility, Parliament would respect the court’s decision and change the law. It was recognized that Parliament should choose the way in which the law should be amended. But there is no provision in the 1998 Act compelling Parliament to change the law and it is doubtful whether there is any constitutional convention to that effect. Thus it is a consequence of the constitutional settlement in the 1998 Act, which I have described above, that, following a decision by the courts that primary legislation is incompatible with the ECHR, Parliament could, at least in theory, decide that it did not wish to change the law to make it conform to the ECHR or indeed that it wished to amend or repeal the 1998 Act.

This constitutional settlement was recently tested. After 9/11, Parliament passed the Anti-terrorism, Crime and Security Act 2001 which among other provisions conferred the right on the Home Secretary to detain terrorist suspects. In the *Belmarsh* case, to which I have already referred, the House of Lords found that those detention provisions violated the Convention rights to liberty and to freedom from discrimination because the provisions discriminated as against aliens and were disproportionate. They did not apply to terrorist suspects who were British subjects. The House of Lords could not strike the provisions down. All the House of Lords could do was make a declaration of incompatibility. But that did not lead to the release of the detainees. They had to apply for bail on the grounds that, if they were not released voluntarily by the Home Secretary, they would apply to the Strasbourg court for their release and those applications were likely to be successful because of the decision of the House of Lords.

When the decision in the *Belmarsh* case was handed down, the Government did not take any immediate step to release the detainees, or to change the law. However, in due course it did introduce a Bill which became the Prevention of Terrorism Act 2005 (“the 2005 Act”). The 2005 Act provides for the courts or in some circumstances the Home Secretary to make “control orders” under which conditions are attached to a person’s liberty, for example, conditions as to a curfew or a prohibition on using the Internet or a mobile phone and so on. The detainees are no longer detained in a prison. In the main they are now subject to control orders limiting their freedom of movement under this Act. I will return to the 2005 Act in my remarks later.

As we have seen, however, in the 1998 Act Parliament gave the courts an enhanced power to interpret legislation. Lord Nicholls has said that this is not interpretation in the usual sense of the term.⁴ The courts are indeed empowered to adopt a strained meaning if this is required to make legislation compatible with human rights. Moreover the courts are enjoined to apply this interpretation to statutes whenever passed, not just statutes passed after the 1998 Act itself became law. So the courts may no longer be concerned with the meaning of the words used by Parliament at the time it passed the legislation. However, there must be some limits to what may properly be called interpretation because Parliament has devised the alternative route of a declaration of incompatibility as already explained. I give two examples below of cases in which section 3 of the 1998 Act has been applied. They are both decisions of the House of Lords.

Human rights and the use of legislative history

It should be noted that, while on questions of statutory interpretation the English courts do not in general admit legislative history, they may be able to do so more freely where the question is whether the legislation is compatible with the ECHR, or whether its provisions are proportionate to the legitimate ends to which the legislation is directed.

Human rights and the quality of legislation

The *Belmarsh* case also raises concerns about the quality of legislation. In the UK, statute law tends to be relatively prescriptive, and judges pay close attention to the actual words of the statute. Accordingly it is important that the legislative drafting should be of the highest quality. This is not always possible where the parliamentary process is accelerated. The Anti-terrorism, Crime and Security Act 2001 went through its parliamentary stages at speed. The position with the 2005 Act was even more striking: it was considered and passed by Parliament over only 18 days. When this happens, Parliament may require the legislation to be reviewed annually or impose a sunset clause. In addition, when a Bill is introduced into Parliament, the Minister responsible for it must make a statement to the effect that the provisions of the Bill are compatible with Convention rights.⁵

These measures are some acceptance of the problem but not a total solution. The existing statute may still need to be interpreted by the courts. Where legislation is passed at speed, it may be that Parliament did not give adequate consideration to human rights, and the courts may look at the statute with that possibility in mind.

Jurisprudence on section 3 of the Human Rights Act 1998

I now turn to give two examples of the way in which the House of Lords has interpreted legislation in reliance on section 3 of the 1998 Act. The first case is *R v A (No.2)*.⁶ In this case, the appeal was by a defendant to a criminal charge of rape and concerned the question of whether certain evidence concerning the sexual behaviour of the complainant would be admissible at trial. The defendant wanted to adduce evidence of the complainant’s sexual behaviour in the three weeks prior to the alleged rape. However, section 41 of the Youth Justice and Criminal Evidence Act 1999 prohibits the admission of evidence as to the complainant’s sexual behaviour unless certain conditions were fulfilled. The conditions permit the admission of evidence of sexual behaviour on the issue of consent

⁴ Lord Nicholls “My Kingdom for a Horse: the Meaning of Words” (2005) 121 LQR 577, 590.

⁵ Human Rights Act 1998, section 19(1).

⁶ (2002) 1 AC 45.

if the prior sexual behaviour was so similar to sexual behaviour of the complainant that the similarity cannot be explained as a coincidence. But further conditions are attached to this exception, including a condition that the behaviour should have taken place as part of the event or at or about the same time as the alleged rape.⁷ The House of Lords held that an accused's Convention right to a fair trial might be violated if relevant evidence of the kind sought to be addressed by the appellant was excluded. The question then arose whether section 41 could be construed so as to prevent any violation of the defendant's rights. On this, their Lordships expressed different views.

First, Lord Steyn made some general observations about section 3:

44. On the other hand, the interpretative obligation of section 3 of the 1998 Act is a strong one. It applies even if there is no ambiguity in the language in the sense of the language being capable of two different meanings. It is an emphatic adjuration by the legislature: *R v Director of Public Prosecutions, ex p Kebilene* [2000] 2 AC 326, per Lord Cooke of Thorndon, at p.373F; and my judgment at 366B ... In accordance with the will of Parliament as reflected in section 3 it will sometimes be necessary to adopt an interpretation which linguistically may appear strained. The techniques to be used will not only involve the reading down of expressed language in a statute but also the implication of provisions. A declaration of incompatibility is a measure of last resort. It must be avoided unless it is plainly impossible to do so. If a *clear* limitation on Convention rights is stated in terms, such an impossibility will arise: *Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115, 132A-B per Lord Hoffmann. There is, however, no limitation of such a nature in the present case.

45. In my view, section 3 requires the court to subordinate the niceties of the language of section 41(3)(c) and in particular the touchstone of coincidence, to broader considerations of relevance judged by logical and common sense criteria of time and circumstances. After all, it is realistic to proceed on the basis that the legislature would not, if alerted to the problem, have wished to deny the right to an accused to put forward a full and complete defence by advancing truly probative material. It is therefore possible under section 3 to read section 41, and in particular section 41(3)(c) as subject to the implied provision that evidence or questioning which is required to ensure a fair trial under article 6 of the Convention should not be treated as inadmissible. The result of such reading would be that sometimes logically relevant sexual experiences between a complainant and an accused may be admitted under section 41(3)(c) ...

Lord Hope of Craighead took a different view. He considered that the question whether section 41 was incompatible with the Convention could not be finally determined at the pre-trial stage. Accordingly, he considered it was neither necessary nor appropriate to resort to the interpretative obligation in section 3 of the 1998 Act. Lord Hope added:

108. I should like to add, however, that I would find it very difficult to accept that it was permissible under section 3 of the Human Rights Act 1998 to read into section 41(3)(c) a provision to the effect that evidence or questioning which was required to ensure a fair trial under article 6 of the Convention should not be treated as inadmissible. The rule of construction which section 3 lays down is quite unlike any previous rule of statutory interpretation. There is no need to identify any ambiguity or absurdity. Compatibility with Convention rights is the sole guiding principle. This is the paramount object which the rule seeks to achieve. But the rule is only a rule of interpretation. It does not entitle the judges to act as a legislators ...

109. In the present case it seems to me that the entire structure of section 41 contradicts the idea that it is possible to read into it a new provision which would enable the courts to give leave whenever it was of the opinion that this was required to ensure a fair trial. The whole point of this section, as was made clear during the debates in Parliament, was to address the mischief which was thought to have arisen due to the width of the discretion which had previously been given to the trial judge. A deliberate decision was taken not to follow the examples which were to be found elsewhere, such as in section 275 of the Criminal Procedure (Scotland) Act 1995, of provisions which give an overriding discretion to the trial judge to allow the evidence or questioning where it would be contrary to the interests of justice to exclude it. Section 41(2) forbids the exercise of such discretion unless the court is satisfied as to the matters which that section identifies. It seems to me that it would not be possible, without contradicting the plain intention of Parliament, to read

⁷ Section 41(3)(c).

in a provision which would enable the court to exercise a wider discretion than that permitted by section 41(2).

110. I would not have the same difficulty with a solution which read down the provisions of sections (3) or (5), as the case may be, in order to render them compatible with the Convention right but if that were to be done it would be necessary to identify precisely (a) the words used by the legislature which would otherwise be incompatible with the Convention right and (b) how those words were to be construed, according to the rule which section 3 lays down to make them compatible. That, it seems to me, is what the rule of construction requires. The court's task is to read and give effect to the legislation which it is asked to construe ...

The other members of the House in substance agreed with Lord Steyn's approach. Lord Slynn held:

It seems to me that your Lordships cannot say that it is not possible to read section 41(3)(c) together with article 6 of the Convention rights in a way which will result in a fair hearing. In my view, section 41(3)(c) is to be read as permitting the admission of evidence or questioning which relates to a relevant issue in the case and which the trial judge considers is necessary to make the trial a fair one.⁸

Lord Clyde held:

If a case occurred where the evidence of the complainant's sexual behaviour was relevant and important for the defence to make good a case of consent, then it seems to me that the language would have to be strained to avoid the injustice to the accused of excluding them from a full and proper presentation of the defence.⁹

Lord Hutton held:

... pursuant to the obligation imposed by section 3(1) that section 41 must be read and given effect in a way which is compatible with article 6, I consider that section 41(3)(c) should be read as including evidence of such previous behaviour by the complainant because the defendant claims that her sexual behaviour on previous occasions was similar, and the similarity was not a coincidence because there was a causal connection which was her affection for, and feelings of attraction towards, the defendant.¹⁰

R v A (No 2) was one of the first cases where section 3 of the 1998 Act was considered. The House of Lords' approach has been developed in a number of other cases involving section 3, of which the most important is the recent case of *Ghaidan v Godin-Mendoza*.¹¹ In that case the statute in question confers rights of succession in respect of a tenancy on a person who had lived with the deceased original tenant "as his or her wife or husband". The issue was whether this provision applied to same sex couples. If it did not do so, then it discriminated against them in violation of article 14 of the ECHR read with article 8.

The House of Lords held that the statute in question had to apply to the survivor of a same sex relationship as much as it did to a surviving spouse. In the course of reaching that conclusion the courts gave authoritative guidance as to the limits of section 3.

The leading speech is that of Lord Nicholls. He held that the effect of section 3 was that the court might be required to depart from the unambiguous meaning of a statute. The question of difficulty was how far the courts should go. He held that the answer to this question did not depend on the actual wording used by Parliament. He continued:

32. From this the conclusion which seems inescapable is that the mere fact the language under consideration is inconsistent with a Convention-compliant meaning does not of itself make a Convention compliant interpretation under section 3 impossible. Section 3 enables language to be interpreted restrictively or expansively. But section 3 goes further than this. It is also apt to require a court to read in words which change the meaning of the enacted legislation so as to make it Convention compliant. In other words, the intention of Parliament in enacting section 3 was that,

⁸ Paragraph 13.

⁹ Paragraph 136.

¹⁰ Paragraph 163.

¹¹ (2004) 2 AC 557.

to an extent bounded only by what is “possible”, a court can modify the meaning, and hence the effect, of primary and secondary legislation.

33. Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention-compliant. The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must, in the phrase of my noble and learned friend, Lord Rodger of Earlsferry, “go with the grain of the legislation”. Nor can Parliament have intended that section 3 should require courts to make decisions for which they are not equipped. There may be several ways of making a provision Convention-compliant, and the choice may involve issues calling for legislative deliberation.

Lord Rodger also considered the boundaries of section 3 and gave further helpful guidance. He held that in deciding how to interpret the legislation the courts should not produce a meaning which departed substantially from a fundamental feature or cardinal principle of the legislation. Likewise the courts should be less ready to interpret legislation so as to be compatible with Convention rights where there would be important practical repercussions which the courts are not equipped to evaluate.

The decision in the *Ghaidan* case is a powerful statement of the court’s preparedness to interpret legislation so that it is compatible with human rights. The speeches, all of which repay careful study, contain extremely valuable guidelines. The House of Lords has recognized the force of the mandatory obligation in section 3. However, the words “in a way which is compatible with the Convention rights” make it clear that the courts have the choice as to how to interpret the legislation to achieve the objective in section 3, namely that, where possible, the legislation should be compatible with human rights.

The courts are not bound to give effect to Convention rights in exactly the same way as the Strasbourg court. As Lord Irvine LC put it in Parliament during the passage of the Bill, they can use the jurisprudence of the Strasbourg court as a floor rather than a ceiling.

Moreover, the House of Lords has made it clear that the courts do not have slavishly to follow a textual approach to achieve a compatible interpretation.

Where section 3 can be applied to part only of a statute, it is possible that words may mean one thing in the section subject to interpretation under section 3, and another in some other section of the statute which is interpreted in the ordinary way.

In his most illuminating speech Lord Rodger counsels against using jurisprudence of the Judicial Committee of the Privy Council since it is usually concerned with overriding constitutional provisions, rather than provisions such as section 3 which preserve parliamentary sovereignty. These are of course wise words. Nonetheless, it is still a point worth making that, with the exception of such experience as judges have obtained in the Judicial Committee of the Privy Council, the English courts have comparatively little experience in constitutional interpretation. The UK has no single statute containing a constitution, although it now has a number of statutes which deal with some of the matters that would be dealt with in a normal written constitution. Those statutes include the Parliament Acts 1911 and 1949 and the various statutes dealing with devolution and discrimination. It must be borne in mind that section 3 of the 1998 Act does not apply to all statutes of a constitutional nature. It applies only to those which have to be interpreted so as to conform to the ECHR. So, even after the 1998 Act, it is still true to say that the UK has no special doctrine of interpretation applying to constitutional statutes in general.

The position that English law has reached on section 3, while clearly right, may only be the beginning of the road. It still leaves some unanswered questions. For example, on the basis that the ECHR is a floor and not a ceiling, there must inevitably be a space between the floor and the ceiling which leaves the judges considerable room for the exercise of judgment. Is there any principle of interpretation which applies here? Likewise, is there any principle of interpretation which applies when the Court has to sort out conflicts between different rights, such as the right to freedom of expression as against someone else’s right to respect for his private life? We may have a long way yet to go in this field.

We are likely to need different sorts of guidelines for different sorts of cases. For example, it may be that Kirby J's quotation from the sage who said that constitutions must not be interpreted like wills should not be taken too far. Even in the field of constitutional rights, there may be occasions when a relatively technical approach will be needed, for instance in constitutional provisions setting out money-raising powers, or setting out the description of a group who are to enjoy particular privileges or protection under a constitution. In addition there will be some occasions when a historical approach is relevant.

Conclusions

The UK is a relative newcomer in the field of statutory interpretation and human rights. But it is clear, even from domestic law developments thus far, that human rights require a fresh approach to some of the established ideas and concepts of statutory interpretation. Moreover, there is plenty of scope for the courts to develop further the approach to the interpretation of legislation where human rights are involved.

Drafting against a background of differing legal systems: Canadian bijuralism

Marc Cuerrier

Introduction

Canada's colonial heritage has produced a unique legal landscape of mixed common law and civil law in Quebec and a coexistence of civil and common law at the federal level.¹ Indeed, in Canada, federal legislation must adapt to and reflect the private law of 12 provincial common law jurisdictions and the private law of the province of Quebec, a civil law jurisdiction. This interaction defines Canadian federal law and produces a duality of sources known as Canadian bijuralism.²

Different as they may be, the common law and the civil law systems are not the only sources of diversity in federal legislation, since legal rules and concepts, particularly in relation to the law of property, the law of obligations, family law or the law of persons and even commercial law, may also vary significantly from province to province in Canada. Such differences are merely the reflection of the different legal choices and policies that provincial legislatures may pursue in a federal democracy.

The mixed legal background of civil and common law in our legal system is, like bilingualism, the direct result of political compromises following the British conquest and the cohabitation of English and French Canadians in history, but more recently as a result of the reform of the *Civil Code of Québec*.³ Flowing from national unity considerations, the federal Government has undertaken to revise the Canadian statute book and regulations as well as its policies and administrative practices to ensure that they are compatible with the private laws of the province of Quebec and more generally with provincial private laws. This initiative has been associated with the development of language rights in the federal Government and has proceeded in parallel with the development and fostering by the federal Government of French common law terminology⁴ and related minority language rights.

The process whereby federal legislation is revised gradually and systematically to ensure its compatibility with provincial private laws and in particular with Quebec civil laws has been referred to as the *harmonization* of federal legislation and this harmonization mandate has been assigned to the Department of Justice of Canada.

The harmonization initiative has produced new interpretation rules that clarify the interaction between federal legislation and provincial private laws. This article will examine these rules and discuss their impact but first, it would be useful to examine the definition of Canadian bijuralism and to outline important differences between the common law and the civil law systems. Some background will be provided on the development of bijuralism in Canada, before we examine the interaction between federal legislation and provincial private law in Canada. After a discussion of the new rules used to interpret bijural enactments, their impact will be illustrated with an example using the concept of ownership and with drafting techniques used to implement bijuralism.

¹ For more details on the mixed character of Quebec law see John E.C. Brierley & Roderick A. Macdonald (eds.), *Quebec Civil Law: An Introduction to Quebec Private Law* (Toronto: Emond Montgomery, 1993) p. 5-73.

² Bijuralism is a term used to recognize the coexistence in federal legislation of Quebec civil law and common law with respect to matters of private law (property and civil rights). Bijuralism also refers to the mixed or hybrid system of civil law and common law (in public law matters) prevailing in the Province of Quebec as a result of the British conquest. Bijuralism does not deny the influence of native laws in Canadian law but for the purposes of this article we shall only consider the role of common law and civil law as complete systems of reference for federal legislation.

³ S.Q. 1991, c. 64 (C.C.Q.).

⁴ See the dictionary developed under the Project for the integration of both Official Languages in the Administration of Justice (POLAJ) at <http://www.pajlo.org/en/dictionary.php>.

I will not attempt to refer to all the articles which have been written on this subject;⁵ my purpose is simply to raise awareness and perhaps to alert readers of federal legislation to the emergence of new bijural terminology as well as to new drafting techniques and interpretation rules for bijural enactments in federal legislation. The Canadian experience may also provide useful examples of how legislation of a state may integrate and harmonize different norms that are founded on different legal systems while respecting the character and uniqueness of the concepts and principles of each legal system.

Canadian bijuralism: What is it?

Canada is a federation of 10 provinces and 3 territories. The population in Canada reached 32.5 million in 2006 and some 7.6 million are from Quebec.⁶ The inter-provincial trade flow between Quebec and the rest of Canada amounted to over \$51 billion [Canadian] in exports of goods and services and over \$53 billion in imports of goods and services in 2004.⁷ Quebec exported over another \$89 billion outside of Canada and imported almost \$88 billion from outside of Canada in 2004. This compares to Canadian goods and services exported abroad (\$443.1 billion) and those sold inter-provincially (\$232.5 billion).⁸ Quebec, like the rest of the Canadian provinces, has an open economy that exports more than half of its gross domestic product (\$52.7 billion) and that imports similar proportions of total goods and services used. In addition, more than 80% of those exports find their way to the U.S.⁹ (this is also the case of the other Canadian provinces where the U.S. is by far our principal business partner). Therefore the Quebec economy as well as its legal system is directly situated in the sea of North American common law.

The federal relationship in Canada is developing as a political, economic and social union between provinces and territories. Canada has a federal Government, a federal Crown and a federal Parliament with legislative powers and sovereignty that follow a model of a federal state. Canada also has 13 provincial or territorial governments, 13 provincial Crown representatives and 13 legislatures with their own set of powers and sovereignty that follow a model of federated provinces. The division of powers in our Constitution¹⁰ sets out the template for a dynamic federal relationship in pursuit of national unity and coherence in federal laws and programs while at the same time incorporating an equally strong desire to respect the autonomy and diversity of the constituent members.¹¹ For example, the federal Government handles national and international matters including “trade and commerce”,¹² bankruptcy, defence, banking, criminal law and maritime law. Provinces look after more local/social matters, such as hospitals, education, administration of justice and “property and civil rights”.¹³ Some powers, like immigration, agriculture, natural resources and taxation, are shared powers and the federal Parliament has power over a few private law matters (bankruptcy, marriage, divorce and letters of exchange). Thus, as a general rule, criminal law and matters of national

⁵ For a more complete bibliography see <http://www.bijurillex.gc.ca>.

⁶ Statistics Canada <http://www.statcan.ca/Daily/English/060927/d060927a.htm>.

⁷ Statistics Canada <http://www.statcan.ca/english/research/11-621-MIE/11-621-MIE2004011.htm>.

⁸ Statistics Canada <http://www.statcan.ca/cgi-bin/downpub/listpub.cgi?catno=13-016-XIE2006001>.

⁹ Quebec external trade, Facts and Figures, May 2005 Edition, http://www.mdeie.gouv.qc.ca/mdercontent/000021780000/upload/publications/pdf/Exportation/calepin_anglais_mai05.pdf.

¹⁰ For more information on the division of powers in Canada see Peter W. Hogg, *Constitutional Law of Canada* (Scarborough, Carswell, 1997), part II.

¹¹ For more information on the federal relationship in Canada see: C. Lloyd Brown-John, and Howard Pawley, “When Legal Systems Meet: Bijuralism in the Canadian Federal System”.

www.recercat.net/bitstream/2072/1225/1/ICPS234.pdf#search=%22lloyd%20brown%20bijuralism%22

¹² However encompassing “trade and commerce” may be in relation to private law matters, it has been interpreted rather narrowly as a result of early rulings by the British Judicial Committee of the Privy Council; see Hogg, *supra* note 10 at 20.1-20.3.

¹³ *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3 reprinted in R.S.C. 1985, App. II, No. 5, sections 91 and 92. See also Hogg, *supra* note 10 at 21.1. Note also that the federal Government has power to legislate on all matters of private law incidentally to dealing with a federal head of jurisdiction.

importance are within federal jurisdiction and most private law matters (law of obligations, contracts, civil liability, estates and trusts, business and commercial law etc) are the provinces' responsibility.

It should be noted that the exclusive power of provinces to deal with "matters of property and civil rights" is the foundation of bijuralism in Canada. As a result of the *Quebec Act 1774*,¹⁴ the civil law tradition of French Canadians has benefited from constitutional protection. A similar concession had been made in the Treaty of Union between England and Scotland in 1707 which guaranteed the continuance of Scots private law.

Canadian federal bijuralism refers to the co-existence of two private law traditions in Canada, the British common law tradition of common law jurisdictions and the French civil law tradition of Quebec. The federal statute book is thus bijural in the sense that federal legislation applies in all provinces and frequently relies on underlying provincial law. For example, a reference to contracts in a federal law is a reference to contracts as understood in a provincial context. As a result, federal legislation must dovetail with both the civil and the common law traditions.

It is important to distinguish between the requirement that federal laws be printed and published in both official languages (bilingualism) and the requirement that federal laws be in keeping with both the civil law of the province of Quebec and the common law of the other provincial jurisdictions in Canada, when touching upon matters of property and civil rights (bijuralism). In addition, bijuralism protects the legal rights of an important Anglophone civil law community in Quebec and the Francophone common law community outside Quebec. Bijuralism, like bilingualism, provides increased access to justice but also crosses over the language barrier in Canada and reflects the different legal traditions that are now embraced by French and English-speaking citizens alike. Since legal traditions are territorial in nature, in Canada, federal legislation based on property and civil rights concepts draws upon civil law when it applies in Quebec and upon common law when it applies elsewhere in Canada.

[f]ederal legislation in Canada is not only bilingual, but also bijural in the sense that it is applicable to persons, places and relations that are subject to the civil law in Quebec and to the common law in the rest of Canada. This wealth of possibility creates a difficult challenge for federal drafters, and for interpreters of federal legislation. Although Quebec is the only province with a civil law system, the French version of federal legislation is meant to operate in all the provinces. This makes it impossible simply to reserve the English version of legislation for application in the common law provinces and the French version for application in Quebec.¹⁵

There is little doubt however that common law is strongly embedded in the English language in the same way that civil law is close to the French language. To translate some words, concepts or rules from one language to the other is often a daunting task. It is equally challenging to transpose these words, concepts or rules from one legal system to the other.

There are significant differences between our provincial private laws, mostly between common law provinces and Quebec, but also among common law provinces themselves. Different legislative policies in individual provinces may result in significant differences in the private law of common law provinces due to varying judicial decisions and numerous provincial statutory incursions into the common law. For example, although they all originate in the House of Lords definition of charity in the *Pensel* case, important differences exist in the statutory definitions of charity for provincial law purposes; sports, culture and recreation are included in some jurisdictions and not in others.¹⁶

¹⁴ (U.K.) 14 George III, c. 83, reprinted in R.S.C. 1985, App. II. No. 2.

¹⁵ Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed., (Vancouver, Butterworths, 2002) (Sullivan, *Driedger*), at pp. 94-95. On the relationship of language and law see also Mr. Justice Michel Bastarache, "Bijuralism in Canada" in *The Harmonization of Federal Legislation with the Civil Law of the Province of Quebec and Canadian Bijuralism*, 2nd publication, booklet 1, p. 24; also available online at www.bijurillex.gc.ca.

¹⁶ A variety of cases are cited in David G. Duff, "The Federal Income Tax Act and Private Law in Canada: Complementarity, Dissociation and Canadian Bijuralism", (2003) 51 *Canadian Tax Journal* at pp. 23-26 in particular his note 145 citing diverse provincial statutes; available online at: www.ctf.ca/pdf/ctjpdf/2003ctj1_duff-e.pdf.

Canadian private law is diverse and this diversity is an important constitutional value in our federation.

The development of bijuralism in Canada¹⁷

The battle for Quebec in 1759 and the Royal Proclamation¹⁸ of 1763 marked the end of the French rule and the passage to the English rule in Canada. The Treaty of Paris¹⁹ of 1763 established a global peace accord between France, England and Spain putting an end to the 7 years war and providing for the exchange of conquered territory. The treaty provided, among many other exchanges, for the transfer of Canadian colonies to England (including the freedom of its French population to retain its Roman Catholic religion). France regained its lucrative territories in the Caribbean (and its sugar trade) and England got most of continental North America with its natural resources and fur trade. While the objective of the *Royal Proclamation* had been assimilation, the growing population of French Canadians (over 75,000 at the Conquest and around 150,000 in 1774) combined with the limited number of British citizens (a few hundred mostly British troops) and the aspirations of independence in the 13 American colonies to the south (with a population of 1.5 million) resulted in the failure of the policy of assimilation. After little more than 10 years of British rule, the administration of justice in Canada was already moving towards bilingualism and bijuralism.

The formal recognition of Quebec civil laws began with the *Quebec Act* of 1774,²⁰ a Westminster Statute passed after more than 10 years of military government. The *Quebec Act* restored civil law “in matters of property and civil rights”.²¹ This critical political development officially introduced bijuralism in Canada and informs to this day the interpretation of federal legislation. Conversely the Quebec Act provided that common law would govern in all but private law matters; this is the basis for the mixed civil and common law nature of Quebec law where common law and civil law apply respectively in public law matters such as administrative law, criminal law and other non-private law matters, and in private law matters.²²

The recognition of Quebec civil law (made up, at that time, of the *Coutume de Paris* but later codified in the *Civil Code of Lower Canada 1866*) was later enshrined in the *British North America Act of 1867*. As a result, all the Provinces in Canada now have exclusive legislative authority over “matters of property and civil rights”, in essence, *private law*.²³ Again this means that when federal legislation touches on questions of private law it must take account of the specificity of provincial Quebec private law, if it applies in Quebec. As the development of bijuralism in Canada is historically tied to bilingualism, equal recognition of the common law and civil law systems in federal legislation is accompanied by a requirement that federal legislation be printed and published in our two official languages²⁴ (English and French).

Federally established courts have played a leading role in the development of Canadian bijuralism and in harmonizing federal legislation with provincial private law. In dealing with the interaction of federal and provincial laws and potential conflicts between them, the courts have gradually

¹⁷ For a more complete review of the historical context of Canadian bijuralism see Aline Grenon, “The Interpretation of Bijural or Harmonized Federal Legislation: *Schreiber v. Canada (A.G.)*” (2004) 83 Canadian Bar Review 131.

¹⁸ Royal Proclamation, October 7, 1763, reprinted in R.S.C. 1985, App. II, No. 1.

¹⁹ See <http://www.thecanadianencyclopedia.com/index.cfm?PgNm=TCE&Params=A1ARTA0006083>.

²⁰ *Supra* note 14; it should be observed also that the Royal Proclamation and the Treaty of Paris, in not providing for the temporary continuance of the laws of a conquered territory, were inconsistent with common law, see A. Shortt, and A.G. Doughty, *Documents relating to the Constitutional History of Canada 1759-91*, vol. 1 (Ottawa 1907) p. 526.

²¹ The *Treaty of Union* between England and Scotland had similarly recognized and guaranteed the continuance of Scots private laws in 1707.

²² *St Hilaire v. Canada (Attorney General)*, (2001) F.C.A. no 444, [2001] 4 F.C. 289 per J. Decary at para 26-28 (*St Hilaire*): <http://recueil.cmf.gc.ca/en/2001/2001fca63/2001fca63.html>; see also Brierley & MacDonald, *supra* note 1.

²³ *Constitution Act*, *supra* note 13, subsection 92(13).

²⁴ *Ibid* section 133.

recognized the bijural stream that runs through federal law.²⁵ In the seminal decision of *Quebec North Shore Paper Co. v. Canadian Pacific*,²⁶ the Supreme Court of Canada rejected the notion of a general “federal judicially-created common law” applicable throughout the country for all matters falling within the jurisdiction of the Federal Court. This decision and others that followed clearly set the stage for the recognition of the complementarity relationship between federal law and provincial law. Gradually also the autonomy and the specificity of the civil law came to be recognized and it is now accepted that the private law of Quebec supplements the application of federal laws in Quebec, much in the same way as the common law is called upon to supplement federal legislation in common law provinces.²⁷ The courts held that federal legislation often depended on provincial private law, either civil or common law, as the case may be, for much of its content and meaning; moreover, they are moving to accept that civil law and common law are separate and independent legal systems and that common law could not force its way into the Province of Quebec through the application of case law from other provinces²⁸ even though differences or asymmetry might result from the application of the federal provision.²⁹

It must be acknowledged, however, that courts have also carved out several pockets of autonomous federal law like maritime law, native law or Crown law that do not depend on private law to the same extent and that may be dissociated from it. These pockets of federal common law are treated as independent from provincial private law. As well, it is accepted that the federal legislator may set out its own private law rules in any federal enactment as a complete federal code, should it be rationally connected with a federal head of jurisdiction and necessary to have a uniform federal norm that applies across the board over and above the divergent provincial private law.³⁰

Similarly the development of bijuralism in drafting has been incremental. First implemented by translating legislation from English to French, it was subsequently carried out in the co-drafting method where Anglophone and Francophone drafters worked side by side to produce a French version for civil law and an English version for common law. Now the policy on legislative bijuralism³¹ mandates that federal legislation must speak to the 4 legal audiences: English and French common law community and English and French civil law community. As a result of this policy and in response to the reform of the *Quebec Civil Code* of 1994, the *Program for the Harmonization of*

²⁵ See the analysis of: Justice Louis Lebel and Pierre-Louis Le Saunier, “L’interaction du droit civil et de la common law à la Cour suprême du Canada” (2006) 47 *Les Cahiers de Droit* 179; see also Bastarache, *supra* note 15, pp. 23-26; France Allard, “The Supreme Court of Canada and its Impact on the Expression of Bijuralism”, *The Harmonization of Federal Legislation with the Civil Law of the Province of Quebec and Canadian Bijuralism*, 2nd publication, booklet 3, pp. 1-26 and Louise Lavallée, “Bijuralism in Supreme Court of Canada judgments since the Enactment of the Civil Code of Quebec” *The Harmonization of Federal Legislation with the Civil Law of the Province of Quebec and Canadian Bijuralism*, 2nd, booklet 3 pp. 1-30. These papers are available online at the Canadian Legislative Bijuralism Site: www.bijurilex.gc.ca.

²⁶ [1977] 2 S.C.R. 1085. See discussion in Allard, *ibid.*, pp 22-26.

²⁷ *Peoples Department Stores Inc. (trustee of) v. Wise* [2004] 3 S.C.R. 461 (*Peoples*); *St Hilaire*, *supra* note 22; 9041-6868 *Quebec Inc v. M.N.R.*, 2005 F.C.A. 334 (9041-6868 *Quebec Inc.*); *D.I.M.S. Construction Inc. (Trustee of)* [2005] 2 S.C.R. 564 (*D.I.M.S. Construction Inc.*); see also David Duff, *supra* note 16 at pp. 6-20 for tax cases where complementarity was recognized; and case comment by Philippe Denault, « D.I.M.S. Construction Inc. (Syndic de) c. Québec (Procureur général): La fin d'une controverse—Mise en oeuvre du principe de complémentarité par la Cour suprême du Canada », (2006) 27 *Revue de planification fiscale et successorale* 235.

²⁸ Pierre Archambault, “Contract of Employment: Why *Wiebe Door Services Ltd.* Does Not Apply in Quebec and What Should Replace It” in *The Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism—Second Collection of Studies in Tax Law* (2005) Association de planification fiscale et financière, Department of Justice Canada at 2:1 also available online at: http://www.apff.org/_site/DOCUMENTS/PDF/HARMONISATION_RECUEIL-2005/ANGLAIS/t-2_pierre_archambault_eng.pdf. See also the cases discussed by France Allard, *supra* note 25 pp. 15-18.

²⁹ *D.I.M.S. Construction Inc.*, *supra* note 27. Also Décary J.A. in *St Hilaire*, *supra* note 22[, para] 10.

³⁰ Hogg, *supra* note 10 at 15.9.

³¹ See the Policy on Legislative Bijuralism available at: http://jusnet.justice.gc.ca/lbs_e/Direction/politique.htm.

*Federal Legislation with the Civil Law of the Province of Quebec*³² was implemented to revise systematically all new federal legislation and to revise gradually our 600+ federal Statutes and 3000+ federal regulations and new rules of interpretation were adopted to interpret bijural enactments.

Some major differences between common law and civil law

There are numerous differences between the civil and the common law systems; similarly, there are also many differences between common law jurisdictions and civil law jurisdictions as between themselves. For the purpose of our discussion we will look at the most important differences that form the general characteristics belonging to the family of common law and of civil law systems.

The civil law tradition, it has been said, can be distinguished from the common law tradition essentially by its method, that is, its rules of interpretation, the different hierarchy of its sources and its inductive reasoning.³³

The primary source of civil law is not case law but legislation. Case law is only a secondary source of law although it enjoys a growing importance, as does legislation in common law systems. The civil law system is organized in the form of a single corpus of legislated rules, a code that purports to unify, systemize and prioritize these rules, thereby providing a global approach to, and vision of, the law. Civil law strives to present law as a complete and logical suite of rules set out in clearly defined categories and expressed as general rules that show a distinct taste for structure and normative synthesis.³⁴ Common law by contrast is less preoccupied by structure and organization and focuses on the case at hand and how it relates to previous cases.

The difference in the primacy of legislated law as a source of law is another fundamental characteristic of civil law. It explains differences in how the silence of the law or how uncertainties in the law are addressed. The code is the starting point of all legal enquiries as it contains the “common law” or *jus commune*, the general law or the law of general application that governs all matters in the absence of special legislation.³⁵ In other words it contains rules of general application that act as a default system or that apply *a priori* in all matters. In the common law system, statute law or legislated law does not supplement the common law. It will usually be the opposite. Codifications, however extensive, are never really independent from the common law. The common law, as discovered, expressed and reformulated by the judges, provides the fundamental normative basis that supplements the uncertainties and silences of statute law. Thus the attitude towards legislated law and the approach to the interpretation of legislation is markedly different in civil and common law. The civil law system’s view of the legislated law as the primary source of law and as the *jus commune* requires considerable sympathy for the intention of the legislator, whereas the common law system’s vision of the primacy of judge-made law and the often purely derogatory role of statute law has encouraged, historically, a narrower interpretation of the legislated rules.³⁶ Although this suspicious attitude, leading to narrow interpretation of legislated law, has tended to fade off with the proliferation of modern legislation, statute law or legislated law is still often regarded as a secondary source of law, not as the law of general application.

A final aspect of the differences in method between common and civil law is the inductive reasoning typical of the common law and the deductive reasoning that characterizes civil law. Common law is created (or discovered) incrementally from the bottom up through the process of generalizing common points with previous cases. A general rule is inferred from the *ratio decidendi* of previous

³² See Louise Maguire Wellington, “Bijuralism in Canada: Harmonization Methodology and Terminology” in *The Harmonization of Federal Legislation with the Civil Law of the Province of Quebec and Canadian Bijuralism*, 2nd publication, booklet 4, pp. 4, 5, 6; available online: Canadian Legislative Bijuralism Site: www.bijurillex.gc.ca.

³³ Bastarache, *supra* note 15 at 19.

³⁴ Brierley & MacDonald, *supra* note 1 at p. 99, and Alain François Bisson in his contribution “Caractéristiques et méthodes du droit civil” to Louise Bélanger-Hardy and Aline Grenon, (ed.) *Éléments de common law*, (Toronto: Carswell 1997), at pp. 155-156.

³⁵ Bisson, *ibid.*

³⁶ Pierre-André Coté, *The Interpretation of Legislation in Canada*, (Scabourough, Carswell, 2000).

instances. This process is pragmatic and provides the flexibility and durability characteristic of common law rules. Civil law, on the other hand, follows the opposite route in the application of the norm: from the top down. A general rule is interpreted and, from that general rule, the law applicable to the particular instance is inferred. The civilian process requires that the legislated rules be broad and abstract enough to be adaptable through time and social changes as the legislated rules cannot be reopened as often and do not provide the same flexibility; the redeeming feature, however, is that judges may nonetheless interpret the legislation very generously so as to adapt the broad norms to social changes.³⁷

Differences in the methodology and in the related structure and classification of rights and obligations between civil and common law are reminiscent of the differences that exist between the English garden and “le jardin français”. While they have different structures, and different internal organization, and while they represent different ways of thinking about law (or gardening), both are as autonomous, specific and beautiful. Like beautiful gardens, our different legal systems are organically bound in federal legislation as a result of our legal and constitutional history.

The interaction of federal legislation with provincial private law

As part of the harmonization initiative, two key concepts have been developed to describe the interaction between federal legislation and provincial private law: “complementarity” and “dissociation”. These terms address two very different relationships.³⁸ Federal legislation is either completed or complemented by provincial private law (complementarity) or it is separated or dissociated from provincial private law (dissociation).

Federal legislation in Canada is rarely autonomous; it does not often stand alone, complete and independent from the influence of provincial private law. In fact federal legislation is usually made up of a combination of public and private law rules, principles and concepts that govern matters over which the federal Parliament has jurisdiction. The private law component of the federal norm usually involves rules, principles and concepts drawn from provincial private law (the law that regulates relationships between persons as opposed to public law that regulates relationships with the State). This provincial private law component usually refers to or acknowledges the private law of general application (the private *jus commune* or common law). For example, the *Income Tax Act*,³⁹ in setting out the rules of taxation (public law), refers to numerous private law concepts such as trusts, partnerships or contracts (private law concepts) in the substantive tax rules without defining these private law concepts. This leads to inclusion of private law concepts, rules or principles into the federal norm such that federal legislation depends on these private law concepts, rules and principles for meaning and context. Federal law is not an island unto itself.⁴⁰ This reference to private law rules or concepts is not problematic when they are the same or similar across the country, but when they are not, incoherence may arise.

Inasmuch as most private law in Canada is under the legislative authority of the provinces, federal legislation is therefore inextricably linked with provincial private laws and prone to connecting to varying private law standards. When federal legislation is silent or incomplete, for example, provincial private law rules and concepts will kick in with supplemental rules drawn from the private law of the province where the federal legislation is being applied. This type of interaction is referred to as complementarity in our jargon because provincial private laws complete federal laws. In a

³⁷ Bisson, *supra* note 34 at p. 157.

³⁸ See Jean Maurice Brisson and André Morel, “Federal Law and Civil Law: Complementarity, Dissociation” in *The Harmonization of Federal Legislation with the Civil Law of the Province of Quebec and Canadian Bijuralism, Collection of Studies* (Ottawa: Department of Justice, 1999) 217 and Louise Maguire Wellington, *supra* note 32; both available online at the Canadian Legislative Bijuralism Site: www.bijurilex.gc.ca.

³⁹ R.S.C. 1985 (5th supp.) c. 1.

⁴⁰ Henry L. Molot, “Clause 8 of Bill S-4 (which became the *First Harmonization Act*): Amending the *Interpretation Act*” in *The Harmonization of Federal Legislation with the Civil Law of the Province of Quebec and Canadian Bijuralism, 2nd publication*, booklet 6 at p. 15 in fine, available online at the Canadian Legislative Bijuralism Site: http://www.justice.gc.ca/en/dept/pub/hfl/fasc6/fascicule_6b.html.

complementarity relationship, federal legislation *depends on provincial private law for meaning and content*. The private law of each province serves as a backdrop, a legal infrastructure for federal law.⁴¹

As we have seen above, the provincial private law rules and concepts that complete federal laws are drawn from the common law in common law jurisdictions and from civil law in Quebec. Not only are they bijural, but they may also vary from a common law province to another. Federal norms must accordingly be articulated around two legal systems with potentially different streams of meaning, and leading to separate pools of private law rules and concepts, the civil law of Quebec and the common law(s) of the 12 other jurisdictions.

Differences in the application of federal legislation are better understood given this intricate interaction and architecture of the federal norm. It is also important to note, however, that not all differences in provincial private laws will lead to material differences in the impact of federal legislation. Not surprisingly, the federal legislator may take exception to, or derogate from, some or all of this provincial private law and may set out its own separate and independent private law rules or concepts for its own federal purposes where the coherent application of federal policies is at risk, and policy gaps or discrepancies are looming.⁴² When federal legislation is dissociated from provincial private laws it may be dissociated from one legal system or the other (partial dissociation) or from both (complete dissociation). This second type of interaction is called “dissociation” in our jargon.

Examples of both complementarity and dissociation may be found in subsection 136(1) of the *Bankruptcy and Insolvency Act* which on the one hand sets out an elaborate rule of priority for the whole of Canada.

136. (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:

[10 paragraphs follow setting out an extensive list of creditors]

This rule was found to be a separate and independent federal rule dissociated from individual provincial private law priority schemes. On the other hand, the reference in this subsection to “secured creditors” is only defined very generally in the Federal Act and has been interpreted as referring back to provincially developed private law rules and definitions of secured creditors and therefore provides complementarity with the private laws of each province.⁴³ This example illustrates how the rules and concepts of federal legislation may be linked to and influenced by its various provincial private laws.

The metaphor of an iceberg comes to mind where the tip of the iceberg is the concepts or rules in the federal enactment and the underside is a mixed infrastructure made up of the private laws and concepts of each province that are necessary to give meaning and effect to the federal rule or concept.

Many more compelling examples of the tricky interaction that may exist between federal legislation touching upon private law rules and concepts can be found throughout the federal statute book but for the sake of simplicity we will examine 2 basic scenarios where the relationship of complementarity may pose distinct challenges to a drafter of bijural legislation. First, there is the situation where the federal provision uses a concept that has a different meaning or that is associated with different rules in civil law and in common law such as, for example, the concepts of ownership, contract, trust, servitude and gift. Secondly, the federal legislation may refer to common law rules or concepts that have no meaning in civil law such as an “estate” or “an interest in land” (fee simple, life estate, remainder or leasehold interests), “real and personal property”, or “equity and equitable or beneficial ownership”, etc. Similarly, harmonization problems arise where the legislation refers to civil law concepts that have no meaning in common law such as “dismemberments of ownership” (usufruct, emphyteusis, substitution, or right of use), “patrimony”, “movable or immovable property”, etc.

⁴¹ Brisson et Morel, *supra* note 38. See also Roderick A. Macdonald, “Harmonizing The Concepts and Vocabulary of Federal and Provincial Law: The Unique Situation of Quebec Civil Law” in *The Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism, Collection of Studies*, (Ottawa: Department of Justice, 1999), p. 29.

⁴² See Hogg, *supra* note 10. An example is the concept of common law spouse defined in federal legislation in order to avoid incoherent tax treatment and discussed *infra* at pp. 32 and 33.

⁴³ *Re Giffen* [1998] 1 S.C.R. 91 and *D.I.M.S. Construction Inc.* *supra* note 27 at paras 11 and 12.

Moreover, complementarity between federal legislation and the provincial private laws of 13 different jurisdictions raises the thorny policy issue of uniformity (equality under and before the law) versus diversity. In a federal system that recognizes two legal traditions and 13 provincial or territorial jurisdictions, uniformity is constantly in competition with the value of legal diversity. The policy for the harmonization of federal legislation with provincial private law in Canada is influenced by our legal and constitutional framework and must pay tribute to fundamental principles like the recognition of the equality of our legal traditions and equal access to justice and to the law for the citizens of each legal tradition and of each official language. The federal legislator may promote the uniformity of private laws among common law provinces.⁴⁴ In addition, the Uniform Law Conference of Canada has been steering the development of proposals in a legislative form (models and uniform statutes) for the uniformity of provincial legislation particularly in the field of commercial law.⁴⁵ Other important proponents in the development of a harmonization policy for federal legislation are the federally established courts. The Supreme Court of Canada, the Federal Court of Canada and the Tax Court of Canada are all required to apply the principles of both legal systems in the interpretation of federal legislation. As we have seen earlier, the policies of the federal legislator and of the judiciary in relation to the interaction of federal legislation with civil and common law, have gradually evolved. Courts first interpreted federal laws as requiring a uniform application; later, the specificity of civil law and the equality and autonomy of each legal system was gradually recognized in applying federal legislation in Quebec; now, bijuralism is viewed as a dialogue between legal cultures.⁴⁶

Convergence or divergence

In most cases the use of the civil law norm alongside the common law norm will suffice to give full effect to federal legislation and policies but where substantial differences exist between these two norms, significant conflicts arise, with possible discrepancies and gaps in federal laws or programs. How should these conflicts be resolved? The harmonization of federal legislation has spurred a debate in academic circles on how to resolve such conflicts. Should any legal system prevail over the other? Should there be convergence towards common rules, towards a common system? There is evidence in the Supreme Court of Canada decisions that the development of the common law and of the civil law is not oblivious to the solutions adopted by the other legal system in Canada and that there is a considerable degree of cross-pollination or influence, exercised by legal systems on each other in our legal environment. It would be an overreaction to consider that the harmonization of federal legislation with provincial private law aims at ultimately merging civil and common law into a unique federal norm. Whether there will or should be greater convergence between Canadian common law and Quebec civil law and whether divergences in the application of federal legislation should be eliminated by borrowing rules and concepts from one system to the other is often beyond the immediate purposes of harmonization of federal legislation. Harmonization may well be achieved by simply bridging gaps between the legal systems using rules and concepts that are specific to each legal system without necessarily borrowing rules and concepts foreign to a particular legal tradition or forging new hybrid substantive law. But harmonization may also be achieved by the creation of a new federal norm dissociated from existing provincial private law concepts or rules, so long as the new federal norm is complete, and accessible to and understandable by the users of each legal tradition.

In a recent article analyzing the jurisprudence of the Supreme Court of Canada on the question of convergence and divergence, Justice Louis Lebel of the Supreme Court of Canada states that the recognition of civil law has encouraged the emergence of a dialogue between the two legal systems. This dialogue has influenced the parallel evolution of both common law and civil law by promoting limited exchanges of solutions between legal systems and the use of comparative law arguments.

⁴⁴ *Constitution Act* s. 94, *supra* note 13.

⁴⁵ The Uniform Law Conference of Canada was formed in 1918-19 under the auspices of the Canadian Bar Association. more information is available on its website at: <http://www.ulcc.ca/en/home/index.cfm?sec=1>.

⁴⁶ Lebel and Le Saunier, *supra* note 25. See also France Allard, *supra* note 25 p. 202 and Ruth Sullivan, *The Challenges of Interpreting Multilingual, Multijural Legislation*, (2004) 29 Brooklyn Journal of International Law 985 (Sullivan, *Challenge*) at p. 1043.

Justice Lebel adds that convergence is very limited and focused primarily on aligning solutions or seeking equivalent legal effects to common problems (developing comparative law arguments). In the end, he suggests, the autonomy, the sources and legal methods of each system are preserved and respected rather than merged into a new mixed system or norm. He concludes that systematic and true convergence of the civil and common law is not prevalent in Supreme Court decisions and happens only in respect to limited legal issues (the law of damages is cited as an example). This analysis suggests that while there are significant cross-influences between common law and Quebec civil law, harmonization in the sense of convergence and fusion of the two systems by way of judge-made law in the Supreme Court is so limited because of the important structural and historic differences and because the decision to develop a new harmonized norm belongs primarily to the legislator. True harmonization, it is said, is the one that will result from the will of the legislator.⁴⁷

Since the responsibility for substantive private law in our constitution lies with provincial legislatures, the federal legislator is not as well positioned as the provincial legislator to legislate substantively in private law matters. However, the Supreme Court of Canada, in its appellate capacity over provincial private law matters, does play a leading role in the development of substantive provincial private law policies. The federal Government's involvement in substantive private law has been limited to a few heads of jurisdiction (divorce, marriage, bankruptcy and letters of exchange). The federal Government has also been active in supporting the work of the Uniform Law Conference of Canada and in negotiating and adopting international treaties (private international law).⁴⁸ Despite its authority to do so in section 94 of the *Constitution Act 1867*, there has been no direct and substantive intervention in the development of provincial private law by the federal legislator. Harmonization of private law and the decision to promote convergence or divergence between our two private law systems is a complex and unpopular subject that requires the concerted efforts of legislatures, the judiciary, the profession and academia, not to mention the involvement of several interest groups, such as business associations and bankers.

The federal lawmaker's intervention in private law making is incidental to the development of federal legislative policies. It does not much focus on convergence or divergence of legal systems; rather it aims at closing gaps and eliminating disparities that could interfere in federal legislation and programs. For example, the extension of the common law concept of "disclaimer" to include a civil law "renunciation" in subsections 248(9) and (10) of the *Income Tax Act*, or the definition "common law partner" in that Act and in federal pension legislation, were introduced to level the playing field (establish a common denominator among divergent concepts) for the limited purposes of federal tax and pension policies. Where federal policies and legislation are at risk of incoherent application due to divergent provincial private laws, the harmonization approach is functional and it adapts federal policy and legislation to ensure that it works in both the civil and the common law environment, without forming any value judgment. Federal harmonization is "legal system neutral", and focuses on achieving effective and equitable federal legislative policy results. This will usually be done by using equivalent (as opposed to identical) civil and common law rules, concepts and principles. In the unlikely event that equivalent rules, concepts and principles may not be found or created, harmonization efforts might turn to the reformulation of the rule or policy, moving away from narrow legal terms and concepts to avoid incoherence. Economic rules and concepts are very flexible and potent harmonization tools. At the limit, if all else fails, borrowing a unijural rule or concept from common law or civil law and spelling it out in a complete code as a uniform private law rule for specific federal purposes is also a possibility. An important difficulty with the latter solution is that one legal community is bound to be unable to fully understand the unijural rule or concept as it would be foreign to their private law system. Such an approach, needless to say, might not achieve equal access to justice and could be at odds with the constitutional division of powers.

In summary, the motivation and methodology of harmonization of federal legislation is unbiased or neutral in terms of which legal system should provide the better mode of expression of the federal

⁴⁷ Lebel and Le Saunier, *supra* note 25.

⁴⁸ See Valerie Hughes, "Harmonization of Private Rules Between Civil and Common Law Jurisdictions: A Canadian Perspective" in *Contemporary Law / Droit Contemporain* (Cowansville, Éditions Yvon Blais, 1992), p. 83 at p. 90.

norm. A strong case is made that the federal norm must adapt to each legal system, and that it must be compatible with both. Some degree of convergence of legal systems may or may not occur in the process as a by-product of harmonization.

Interpreting bijural legislation

In response to the intricacies of interpreting and drafting bijural enactments in a mixed system of civil and common law, new rules of interpretation addressing specifically the challenges of bijural enactments were adopted in 2001. With a view to clarifying the interaction of federal legislation with provincial private law and particularly Quebec civil law, the following two important rules for the interpretation of bijural enactments were enacted as amendments to the *Interpretation Act*:⁴⁹

- 8.1** Both the common law and the civil law are equally authoritative and recognized sources of the law of property and civil rights in Canada and, unless otherwise provided by law, if in interpreting an enactment it is necessary to refer to a province's rules, principles or concepts forming part of the law of property and civil rights, reference must be made to the rules, principles and concepts in force in the province at the time the enactment is being applied.
- 8.2** Unless otherwise provided by law, when an enactment contains both civil law and common law terminology, or terminology that has a different meaning in the civil law and the common law, the civil law terminology or meaning is to be adopted in the Province of Quebec and the common law terminology or meaning is to be adopted in the other provinces.⁵⁰

The rule in section 8.1 first declares that common law and civil law are equally authoritative in federal legislation and that they both represent a recognized source of the law of property and civil rights (private law). This declaration confirms and codifies the principle that federal legislation must be interpreted as referring to both the common law and the civil law systems and that both are equally authoritative and necessary components of the federal norm.

This statement and rule reaffirm the principle of equality of our two legal traditions and it unequivocally recognizes the duality inherent in our federal legislation when it deals with matters of property and civil rights. Noticeably, it refers back to the constitutional division of powers between the provinces and the federal Government and ties in with, and has the weight of, a constitutional rule.⁵¹

A second element of the rule in section 8.1 is to *require* (it says "reference must be made to") that federal legislation be completed or supplemented by the rules, principles and concepts of the law of property and civil rights (provincial private law).⁵² The supplemental or complementary character of provincial private laws in relation to federal law is not only confirmed but it is also set out as a requirement. This *statutory duty* to refer to provincial private law⁵³ is subject to two conditions: 1 that it be necessary to so refer to the province's private law, and 2 that the law not provide otherwise. Examples of situations where the statutory duty of reference to the requisite private law rules and concepts is not necessary would include federal enactments that do not touch upon provincial private law (pure criminal law or public law provisions) or enactments providing their own separate and independent private law rules as a more or less complete code that is dissociated from provincial private law rules.⁵⁴ Other exceptions would include federal enactments where dissociation from one or

⁴⁹ R.S.C. (1985), c. I-21.

⁵⁰ *Federal Law-Civil Law Harmonization Act, No 1*, S.C.2001, c.4 (*First Harmonization Act*).

⁵¹ *St-Hilaire*, *supra* note 22 at para 49: "It is the Constitution of Canada itself which provides that some federal laws have differing effects according to whether they are applied in Quebec or in the other provinces... To associate systematically all federal legislation with common law is to ignore the Constitution".

⁵² See *Peoples*, *supra* note 27; *9041-6868 Quebec Inc.* *supra* note 27, and *St-Hilaire*, *supra* note 27.

⁵³ Henry L. Molot, *supra* note 40 p.15 describes the requirement as a "statutory duty of reference".

⁵⁴ *Canada 3000 Inc., Re; Inter-Canadian (1991) Inc. (Trustee of)*, 2006 SCC 24: the concept of detention was interpreted as providing a separate federal remedy in a complete federal code, over and above any existing provincial remedies; *Canada (Minister of National Revenue – M.N.R.) v. National Bank of Canada*, 2004 F.C.A. 92: deemed trust provisions in federal tax law were complete and explicit as to their effect such that provincial

other provincial private law is implicitly or expressly provided by law. This might include federal provisions dealing with matters of aboriginal law, matters of Crown prerogative, maritime law, and even matters of international law that supersede the duty to refer to private laws and require uniform country-wide application. Such matters do not require a reference to provincial private law as they are interpreted as autonomous branches of federal law that depend on external sources separate and independent from provincial private laws.⁵⁵

A third aspect of the rule in section 8.1 is its ambulatory effect. Where reference is made to a provincial private law rule, principle or concept in a federal enactment, such reference will encompass the provincial private law in effect at the time of application of the federal enactment.⁵⁶ This rule provides automatic updating of federal references to provincial laws as these laws are amended from time to time. Thus, where a federal provision refers to a provincial private law concept or rule that has been amended (eg the new civil law concept of extra-contractual liability that replaces the concept of delictual liability) and where that provision is not adapted to reflect the change in provincial law, new section 8.1 would require that the provision be read as referring to the new concept or rule. While this aspect of section 8.1 might provide a good back up system for upgrading references to provincial law pending the revision of all federal legislation, legislative interventions in individual federal provisions will still be necessary to effect more intricate adaptations where the interaction with provincial private law is more complex.

Be that as it may, the introduction of these rules calls for a new attitude of the federal legislator vis à vis the interaction of its legislation with provincial private law. This is why a wholesale administrative revision of the federal statute book and regulations was mandated and will soon lead to a third harmonization bill in a series that will go on until all existing federal statutes and regulations are revised. As well, all new federal legislation is now systematically revised at the drafting stage to adapt it to Quebec civil law.⁵⁷

The Program for the Harmonization of Federal Legislation with the Private Law of the Province of Quebec has considerably different objects and purposes from harmonization in the European Economic Union and from other international and inter-jurisdictional unification exercises in relation to private law (Unidroit, UNCITRAL, US Uniform Code of Commerce, even Canadian Uniform Law Conference endeavours). The harmonization of federal legislation seeks to provide better access to justice in the Canadian federation and is also linked to linguistic rights and national unity considerations.⁵⁸ It is not a comparative law exercise motivated by legislative reform of the law with a

law did not apply; in *Théberge v. Galerie d'Art du Petit Champlain inc.* [2002] 2 S.C.R. 336, the historical common law definition of copyright was only concerned with economic rights and did not address moral aspects of the transaction as the civil law concept did; *A.Y.S.A. v. Canada Revenue Agency* [2006] F.C.A.136: not necessary to have recourse to the common law of Ontario as the federal tax law already defined charity in a manner that precluded the application of provincial law.

⁵⁵ See *ITO-International Terminal Operators Ltd.v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752 at 771 (“[T]he term ‘Canadian maritime law’ includes all that body of law which was administered in England by the High Court on its Admiralty side in 1934 as such law may, from time to time, have been amended by the federal Parliament, and as it has developed through judicial precedent to date.”).

⁵⁶ Henry L. Molot, *supra* note 40 at p.16.

⁵⁷ All federal legislation is revised to ensure bijural application, since 2002. This includes tax legislation of the Department of Finance where Technical Bills and Budget Bills are revised in cooperation with Finance drafters. Research and development for a number of more thorny issues continues and will require further adjustments in future Bills.

⁵⁸ The Preamble to the *First Harmonization Act* reads:

“WHEREAS all Canadians are entitled to *access* to federal legislation *in keeping with the common law and civil law traditions*;

“WHEREAS the civil law tradition of the Province of Quebec, which finds its principal expression in the *Civil Code of Québec*, reflects the *unique character of Québec society*;

“WHEREAS the harmonious interaction of federal legislation and provincial legislation is essential and lies in an interpretation of federal *legislation that is compatible with the common law or civil law traditions*, as the case may be;

view to developing uniform standards and stamping out diversity, rather it purports to acknowledge and reflect diversity as much as possible while pursuing national interests.⁵⁹

The issue also arises whether common law judicial precedents fall within the meaning of the phrase “unless otherwise provided by law” for the purposes of the exception to the duty to refer to private law in sections 8.1 and 8.2. It would appear that case law does not provide a valid justification for the application of the exception to the duty to refer to provincial law.⁶⁰ Case law predating the introduction of section 8.1 and ignoring provincial private law needs to be revisited and reassessed in light of the statutory duty to refer to provincial private law in section 8.1. It was ruled recently that cases decided in relation to common law jurisdictions and setting out a “comprehensive judicial test” to determine whether a taxpayer was an employee or a self employed person, for the purposes of contributions under the federal *Employment Insurance Act*, did not apply in Quebec where the *Civil Code of Quebec* now specifically provides the “sole legal criteria” of subordination as the test for the status of employee. Although pre-existing case law that disregards provincial private law is no exception to section 8.1, courts may well decide that some case law is founded on an express or implicit intention to dissociate federal legislation from one or other provincial private law system and apply it uniformly across Canada. Uniform application that is contrary to provincial private law is only warranted under section 8.1 where reference to provincial law is not necessary or where a clear intention to derogate from provincial private law is expressly or implicitly provided in the federal legislation.⁶¹

A question that often arises in dealing with the rule in section 8.1 is whether it applies retroactively to a time before its introduction in the *First Harmonization Act*, in June of 2001? The rule in section 8.1 is declaratory in nature as it merely restates the law that has always existed and as such applies to fact situations arising before 2001. This is borne out by the ambulatory nature of the rule. However, while section 8.1 is intended to apply in the interpretation of statutory provisions that involve a transaction or event in progress, it is not intended to reopen transactions or events that are over and the legal effect of which is already spent. Therefore one must consider carefully the particular operation of the federal provision in order to give full effect to the scheme and intent of the federal provision without

“WHEREAS the full development of our two major legal traditions gives Canadians enhanced opportunities worldwide and facilitates exchanges with the vast majority of other countries;

“WHEREAS the provincial law, in relation to property and civil rights, is the *law that completes federal legislation when applied in a province, unless otherwise provided by law*;

“WHEREAS the objective of the Government of Canada is to *facilitate access to federal legislation that takes into account the common law and civil law traditions, in its English and French versions*;

“AND WHEREAS the Government of Canada has established a harmonization program of federal legislation with the civil law of the Province of Quebec to *ensure that each language version takes into account the common law and civil law traditions*;

“NOW, THEREFORE, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:”

⁵⁹ Martin Boodman, “The Myth of Harmonization of Laws” in *Contemporary Law / Droit Contemporain* (Cowansville, Éditions Yvon Blais, 1992), p. 126 at p. 149 & (1991) *American Journal of Comparative Law*, 669 concludes that all systems of law are by definition harmonized and that harmonization is vague and meaningless without clear relationships, purposes and objects with elements to be harmonized in a particular project. See also Marie Claude Gervais, “Harmonization and Dissonance: Language and Law in Canada and Europe, Program to Harmonize Federal Legislation with the Civil Law of the Province of Quebec, Assumption of Complementary and Methodological Issues”, in *The Harmonization of Federal Legislation with the Civil Law of the Province of Quebec and Canadian Bijuralism, 2nd publication*, Booklet 1: pp. 10-18. which is also available at www.bijurilex.gc.ca.

⁶⁰ See *9041-6868 Québec Inc. v. M.N.R.*, *supra* note 27 paras 5, 6 and 7, and Henry L. Molot, *supra* note 40 p. 19.

⁶¹ The argument that judicial precedents should not be regarded as “law” for purposes of the exclusion in section 8.1, intimates that such precedents, to displace provincial law, need to be based on explicit provisions of federal law or *absolutely necessary implications* (emphasis in original) thereof – see Roderick A. Macdonald, *Provincial Law and Federal Commercial Law* (1992) 7 *Banking and Finance Law Review* 437-51 at 447; Aline Grenon *supra* note 17 at pp. 16-17; Pierre Archambault *supra* note 28 at para. 30, and David Duff *supra* note 16 at 49; see also *9041-6868 Québec Inc.*, *supra* note 27.

reopening past transactions or events that have already attained their legal effects under the scheme of the federal legislation.⁶²

The rule in section 8.2 states that the terminology of bijural enactments must be read and interpreted in a manner that is consonant with the legal system of the province of application. Accordingly, for purposes of applying a provision that contains both common law and civil law terminology (for example when the expression “real property or immovable” is used) the reader is reminded to interpret the provision using civil law terminology in Quebec (“immovable”) and common law terminology elsewhere (“real property”). By the same token, when the meaning of a term used in a bijural provision is different under both systems, the reader must ensure that the civil law meaning is applied in Quebec and the common law meaning is applied elsewhere. This rule, like the rule in section 8.1, sets out as a statutory presumption of complementarity that may similarly be reversed when the law provides otherwise.

The presumption that civil law terminology applies in Quebec and that common law terminology applies elsewhere in Canada is particularly reassuring for readers of federal enactments who are not familiar with both of our private law systems as it enables anyone to understand and apply federal enactments in the private law system of the province with which that person is familiar. Conversely, for anyone who works on private law issues with cross-border application, familiarity with both legal systems becomes an important asset in the practice of federal law. Drafters are undoubtedly in the latter group.

Further assistance in the interpretation of bijural federal enactments is also provided through various interpretative tools. The Department of Justice of Canada publishes a record of bijural terminology⁶³ that succinctly explains the bijural problems encountered in a provision and describes the solutions adopted to resolve them in each language version of the bijural provision. The Department of Finance of Canada also describes in its technical notes for tax bills the adaptations made in the application of bijural tax provisions to Quebec.

In summary, the interpretation rules in sections 8.1 and 8.2 are predicated on the recognition that federal laws in Canada have a composite structure calling on diverse provincial private law. Federal law must take account of provincial private law as it provides supplemental rules that form part of, and complete, federal law. Bijuralism flows from this composite architecture and, as we have seen, may lead to variations in the application of federal legislation based on differences in the provincial private law component of federal laws. Asymmetries or differences in the application of federal legislation are normal in the federal bijural context of sections 8.1 and 8.2 and when federal policies and legislation cannot be applied consistently and coherently, adaptations become necessary to avoid disparities or gaps and to achieve similar federal policies for Quebec and the other provincial jurisdictions. In this manner, harmonization maintains the right balance between the competing needs of coherence in national policy objectives (through greater uniformity) and provincial autonomy as expressed in private law diversity.

Bridging bijural gaps in federal legislation is routinely done as part of the ordinary drafting process where Bills are co-drafted by an Anglophone common law lawyer and a Francophone civil law lawyer with the help of comparative law experts who ensure the best trans-systemic fit. Increasingly, however, harmonization has to be implemented upstream at the policy development level, before the drafting process, to avoid couching federal policies in a policy structure or design that is too tightly wrapped up in legal concepts at odds with bijuralism. A good example is the use of the concepts of “legal” and “beneficial ownership” throughout federal legislation where these concepts have no equivalent in the civil law system.⁶⁴ Such legal traps could be avoided by more sensitivity to bijuralism at the policy development stage.

⁶² See in this respect Sullivan, Driedger, *supra* note 15 at p. 548; and Coté, *supra* note 36 at pp. 115-137.

⁶³ See <http://canada.justice.gc.ca/en/ps/bj/harm/Index.html>.

⁶⁴ A similar problem exists in international tax Conventions for the avoidance of double taxation that refer to the concept of beneficial ownership where that concept is foreign to the legal system of certain contracting civil law States like the Netherlands. In *Indofood International Finance Ltd. v. JPMorgan Chase Bank N.A.*, [2006]

These new interpretation rules have significant implications for the drafting of federal legislation. The interpreter must now assume the complementarity of federal legislation and provincial private law; similarly lawmakers⁶⁵ and drafters should anticipate and adapt their legislation in light of their combined effect with provincial private laws. Only where this is not possible or necessary would federal legislation be dissociated from provincial private laws, and such dissociation would nonetheless set out clearly how the federal rule should apply in the provincial private law environment from which it is dissociated.

Lawmakers and drafters must now design and draft federal legislation so as to either adequately embrace, or derogate from, the private law rules, concepts and principles of each of the 13 provincial or territorial private law jurisdictions. Fortunately this process involves mostly fine tuning federal laws so that they better reflect civil law rules, concepts and institutions. Typically, changes in terminology are made to ensure that federal provisions work in a civil law environment and that the federal policies are achieved for Quebec. For example, references to “movable” and “immovable” property are added alongside “personal” and “real” property, to “hypothec” alongside “mortgage”, to “extra-contractual civil liability” alongside “liability in torts”, or to “solidarily” alongside “jointly and severally”, all with the view to adequately addressing similar civil law rules and concepts.⁶⁶

Some adaptations are more complex⁶⁷ and require the invention of an equivalent rule or concept where the rule or concept used in the federal provision does not have any equivalent in the other legal system. For example, federal rules for the taxation of usufructs in Quebec have been adapted using as a model the rules for the taxation of trusts even though civil law usufructs are not trusts legally and resemble more life interests. The tax concept of a “partial gift” (contribution to a charity where a part of the contribution is used to purchase tickets or a meal offered by the charity to raise funds) has been invented for common law jurisdictions to allow the deduction of charitable contributions that would be valid under Quebec civil law but not at common law.⁶⁸ In the *Federal Real Property and Federal Immovables Act*,⁶⁹ “immovable” is defined as including the rights of a lessee over such property in the Province of Quebec. This ensures that Quebec leases are treated in the same manner as leasehold interests at common law even though such leases do not amount to a real right (interest in land) and the lessee does not hold an immovable (real property) but rather only has a personal right in relation to that property.

To sum up, the new rules of construction of bijural enactments buttress the complementarity of federal legislation with provincial private law by setting complementarity as the default system where it is necessary to refer to private law. This forces lawmakers and drafters to unequivocally embrace or derogate from provincial private laws. It is now up to federal lawmakers to anticipate differences in the application of federal legislation caused by incompatible provincial private laws and to bridge, as required, gaps and disparities by derogating from the apprehended effect of inconsistent provincial private laws.

EWCA Civ 158 (England and Wales Court of Appeal (Civil Division)) the Court of Appeal found that this concept had acquired an “international” meaning based on the commentaries of the OECD model convention that included certain intermediaries and conduits.

⁶⁵ See “Cabinet Directive on Law Making” on the website of the Privy Council of Canada: www.pco.gc.ca (publications).

⁶⁶ See Bijural Terminology Records, *supra* note 63.

⁶⁷ Beware of those who say that harmonization is just a symbolic exercise and that it suffices to throw in a few Quebec buzz words and the problem will disappear.

⁶⁸ At common law there is no gift if any consideration is received; proposed subsections 248(30)-(33) create a regime similar in its effects to the civil law partial donation with a view to allowing that portion of the transaction that is a “true gift”, notwithstanding the consideration given for the “non-gift” portion of the transaction.

⁶⁹ S.C. 1991, c. 50, harmonized in S.C. 2001, c.4, section 11.

Practical impact on federal legislation

To illustrate further the practical impact of bijuralism in the context of federal legislation in Canada, let us imagine a hypothetical provision that could be part of Canadian public law and that would read:

- X. (1) The officer may seize any thing by means of or in relation to which the officer believes on reasonable grounds that an offence under this Act is being or has been committed.
- (2) The *owner* of the seized thing may apply to the court...

Having regard to the differences in the law of ownership between the Province of Quebec and the other Canadian jurisdictions, one might ask whether in Quebec a trustee or a beneficiary of trust property might be able to exercise the recourse in subsection (2). One might also enquire whether a mortgagee of a chattel and the mortgagor, including their equivalents in the civil law of Quebec, the hypothecary creditor and hypothecary debtor, could be regarded as owners for this purpose.

In a civil law trust neither the trustee nor the beneficiary owns the trust property. Under Quebec civil law, trust property is held in a separate patrimony distinct from the property of the trustee and of the beneficiary. The trustee is a mere manager of the trust property and has no “real right” or legal title to the property. There is no such thing as equity or equitable ownership and the beneficiary merely has a claim (a personal right not a right *in rem*) against the trustee for failure to enforce the trust. Thus, neither the trustee nor the beneficiary owns the trust property.⁷⁰

More generally, since ownership in civil law is absolute, perpetual, exclusive and unitary, ownership cannot be fragmented into a bundle of rights and there is no such thing as concurrent ownership interests over the same land, exercised by different persons. Ownership is not flexible. Only one form exists in civil law: absolute ownership. If there is more than one owner of property, all the co-owners share the absolute ownership (an indivisible portion of the title to property). The meaning of owner is fixed and invariable. Unlike common law, ownership is not an economic network in relation to property but rather a symbol and an attribute of liberty.⁷¹

Under Quebec civil law, security interests do not involve actual ownership of property as is the case in a common law mortgage but rather, *in rem* rights as a creditor. Thus, the civilian equivalent of a mortgagor, the Quebec hypothecary creditor, never owns the property.⁷²

By contrast, the common law definition of owner is wide and varies according to context; it includes mortgagors and mortgagees alike, trustees and beneficiaries.

The solution to the differences between the common law meaning of owner and the civil law meaning for the province of Quebec might be to extend the meaning of owner to hypothecary creditors and debtors, and to trustees and beneficiaries, for the purposes of this provision. It would be easy to do if one could use as a common denominator the concept of an interest in land but unfortunately this concept does not exist in civil law and resort must be had to more convoluted formulae.

⁷⁰ See article 1260 - 1298 C.C.Q. *supra* note 3.

⁷¹ For more information on the differences in ownership at civil law and common law see Aline Grenon, “Reflections on the Civil Law and Common Law Concepts of Ownership, in the Context of Harmonization and of Integrated Economies” in *The Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism*, Second Collection of Studies in Tax Law (2005), A.P.F.F. / Department of Justice Canada, 2005, doc. 1; France Allard, «Entre le droit civil et la common law: la propriété en quête de sens», dans J. C. Gémar and N. Kasirer (ed.), *Jurilinguistics: Between Law and Language*, Montréal, Editions Thémis, 2005, p. 193 available at: www.bijurillex.gc.ca.

⁷² See articles 2660-2802 C.C.Q. *supra* note 3.

Drafting techniques of bijuralism⁷³

We note above that bijuralism is deeply rooted in the Canadian constitution and that harmonization of federal legislation is now guided by a clear statutory duty of reference to provincial private law⁷⁴ in the *Interpretation Act*. The new rules for the interpretation of federal bijural enactments have direct implications for the drafting of federal legislation. Federal legislation must be drafted harmoniously with the provincial private law of the provincial jurisdictions where it will apply. Federal legislation must “speak” to Canadians not only in English and French but also in legal terms that are relevant to the jurisdiction to which they belong and with which they are familiar. This is the best way of ensuring access to justice and equality before and under the law, to the end user.

Accordingly, drafting techniques used to implement bijuralism in federal legislation aim at 4 legal audiences in Canada: the Anglophone common law community, the Anglophone civil law community, the Francophone civil law community and the Francophone common law community.

A most natural technique used to harmonize federal legislation with provincial private law is neutral terminology. Following this approach, neutral or generic terms that apply both in common law and in civil law are used to express a private law concept or rule that is different in the provinces. An example of the technique of the neutral term might be the use of the single common term “loan/prêt” as a substitute for a reference to the phrase “mortgages and hypothecs/hypothèques”. Neutral or generic terminology may avoid some of the traps of specific legal terminology and may provide useful trans-systemic tools. Tax legislation often substitutes economic tests, generic, ordinary or non-legal terms to narrow legal terminology in order to enhance the scope of anti-avoidance rules.

Sometimes the underlying legal rules and principles are so different that even generic terms may not adequately capture the intended scope of a provision as is the case, for example, with the terms “lease/bail”. Such terms are neutral yet not adequate when a provision is intended to refer to an interest in land and its civil law equivalent real right/*droit réel* as the civil law lease does not encompass a leasehold interest but merely involves a purely personal right (not real property) that does not amount to an interest in land. The underlying law of property is so different between common law and civil law that the common denominator of an interest in land may not be used without adaptations to include civil law leases.⁷⁵

The technique of the definition is also used to bridge gaps in the meaning of private law concepts that result from differences in provincial private law. A textbook example of the definition technique in Canada is the following definition of “common law partner/conjoint de fait” in the *Income Tax Act*:

248. (1) “common law partner”
- “common-law partner”, with respect to a taxpayer at any time, means a person who cohabits at that time in a conjugal relationship with the taxpayer and
- (a) has so cohabited with the taxpayer for a continuous period of at least one year, or
 - (b) would be the parent of a child of whom the taxpayer is a parent, if this Act were read without reference to paragraphs 252(1)(c) and (e) and subparagraph 252(2)(a)(iii),
- ...

The *Income Tax Act* provides various benefits and obligations in relation to a taxpayer’s spouse or common law partner. In the late 1980s and early 1990s, the status of common law partner was

⁷³ For more information and examples see Maguire Wellington, *supra* note 32 and Marie Claude Gaudreault, *Canadian Legislative Bijuralism: An expression of legal duality, 2006* (to be published) will become available at www.bijurillex.gc.ca.

⁷⁴ Not to mention: the *Policy on Legislative Bijuralism*, *supra* note 31; the Preamble to the *First Harmonization Act*, *supra* note 58; and the Cabinet Directive on Law Making, *supra* note 65.

⁷⁵ *Supra* note 69 in reference to changes made to the definition of immovable in the *Federal Real Property and Federal Immovables Act* to include Quebec leases in the concept of immovable and to treat immovable in the same way as real property for the purposes of that Act.

considerably different from one province to the other. For example, in the Province of Quebec persons that were not married to each other did not enjoy any special rights or obligations for the support of each other nor over each other's property, while in most common law jurisdictions, unmarried persons having cohabited for variable periods of 1 to 5 years or having a common child were treated as spouses (more particularly common law spouses) both for support and division of property obligations. One province had recognized same-sex partners living in a conjugal relationship and was treating them as spouses as well for civil obligations. The federal *Income Tax Act* introduced a definition of "common law partner" for tax purposes. This definition attempted to create a common denominator for what constituted a common law partner for federal tax purposes and bypassed the "balkanized" provincial definitions. Thus the definition technique is a useful tool for merging different provincial norms into a broader and more workable definition intended to apply to both the common law and the civil law audiences while respecting the specificity and autonomy of each legal system.

The scope of the definition technique for the resolution of systemic legal issues is very broad as it may address both differences in terminology as well as in the substantive private law rules themselves. Some definitions however can be problematic, for example in some federal provisions a short cut was attempted by defining real property as including an immovable in civil law. Such definition although it may technically bridge the bijural gap is inadequate in that it does not treat both legal systems as being equal; it could give the impression that common law is the dominant source of federal legislation and deny the equal status provided in section 8.1 of the *Interpretation Act*.

An innovative technique that seems particularly promising to resolve differences in terminology between the civil law and the common law is the technique called the double. By setting up the common law term and the civil law term side by side in the federal provision, the character and uniqueness of the concepts and principles of each legal system are respected and the bijural nature of federal legislation is emphasized and better reflected in keeping with the objectives of accessibility and equality.

Popular examples of the double technique might include the pairs "real property and immovable", "personal property and movable", as well as "mortgage or hypothec". The mixing and matching of civil and common law terminology in a given provision should not pose any special problem as the new rule in section 8.2 of the *Interpretation Act* specifically requires that civil law terms and meanings apply in Quebec and common law terms and meanings apply in the other provinces.

The technique of the double is inspired by a similar approach used in Westminster to harmonize UK legislation that extends to Scotland and take into account Scots law by including Scottish provisions in a Westminster Bill to address Scots civil law and reflect the bijural nature of UK legislation.

Another form of the double involves setting up side by side the substantive private law rule (as opposed to the terminology only) for Quebec on the one hand and the rule for the other provinces on the other hand. Such division based on territorial lines or on legal systems is unambiguous and clearly sets out the scope or the effect of the federal provision at common law and under civil law. The drawbacks of the double technique are longer provisions and potentially poorer readability.

Conclusion

When federal legislation is being applied in any one of the 13 Canadian jurisdictions, provincial private law rules and concepts will be called upon to complete or supplement its application. When there are differences in the private laws of the provinces, whether they are systemic or merely due to differences in provincial legislative policies, federal legislation will apply differently in different provinces unless it is dissociated from divergent provincial private laws. Bijuralism challenges the assumption that all federal legislation is intended to apply uniformly across Canada. Material differences in the application of federal legislation in any province may sometimes result in unacceptable gaps and disparities in federal practices, policies and programs. While unacceptable

gaps and disparities need to be fixed, understandably, some degree of asymmetry is inevitable, having regard to the legal diversity inherent in Canadian federalism.⁷⁶

Coherence in the application of policies and programs is, of course, an important objective but so is respect for diversity (fostering other important values of equality and access to justice) in our federal democracy. The goals of legal diversity and uniformity compete to create the right democratic balance between local and national interests. Bijuralism carries with it the need for a dynamic rebalancing of legal values.

While civil law and common law complement the private law provisions of federal legislation, at the same time, federal legislation should not be applied uniformly throughout the country in every respect. Our objective is legal duality, not necessarily to achieve one rule to be applied uniformly across Canada; this requires respect for the character and uniqueness of the concepts and principles of each legal system. The fact that provincial legislatures may pursue distinctive legal policies which might each be different as well as different from those of Parliament, is a principal justification for federalism.⁷⁷

Unlike harmonization of laws in the European context, harmonization of federal legislation in Canada does not aim at a uniform and independent set of supra-national norms. Neither does it purport to iron out legal diversity. Harmonization of federal laws often serves the opposite purpose of acknowledging diversity of our legal traditions⁷⁸ so that federal legislation may “speak” to both the civilian and the common law community in French and in English. The objective of harmonization in Canada is very different and yields a very different product: law that recognizes the unique character of the concepts and rules of each system. The Canadian experience is nonetheless relevant to those involved in unification of the law. In dealing with concepts and rules that are unique to each system such as the rules of equity or the concepts of interests in land or of beneficial ownership, for example, policy gaps and discrepancies need to be avoided. Where trans-systemic bridges are required between legal traditions or legal substitutes and equivalent rules or concepts must be created in the other legal system, Canada’s know-how in the field of building legal bridges, avoiding policy gaps, finding suitable substitutes and drafting against backgrounds of differing legal systems may be of assistance and I invite you to visit our website www.bijurillex.gc.ca for more information.

The debate will continue regarding the finality of harmonization as to whether harmonization should lead simply to the equal recognition of each legal system or whether it should lead to greater convergence and even the fusion of our common law and civil law systems.⁷⁹ There are at least three proponents of the harmonization of laws in Canada: the federal Government, the judiciary, in particular the Supreme Court of Canada, and the provincial and territorial jurisdictions (acting with the Uniform Law Conference of Canada). Each group has different perspectives and purposes. The federal Government pursues national interests and unity and therefore is more focused on the dilemma of equality versus legal diversity. The Supreme Court of Canada in its final appellate role over private law matters has legal authority to promote the convergence of legal solutions; and, finally, legislatures hold the pen in private law matters and work with the Uniform Law Conference to reform and unify private law in Canada.

The idea that Canada offers prime testing ground for a dialogue between two different ways of thinking about law (through a civil and common law prism) is making headway. It feeds the ideal of convergence or “rapprochement” that occurs inevitably when legal cultures cohabit.

⁷⁶ Peter W. Hogg, *Constitutional Law of Canada*, loose-leaf ed., (Toronto: Carswell 1997), at 2.4 (notes 38, 39) and at 17.3(b): “There is no constitutional requirement that federal laws be uniform across the country”. See also *Perron-Malenfant v. Malenfant (trustee of)*, [1999] 2 R.C.S. 375, para. 56 where the court stated: “This Court cannot undo the Quebec legislature’s express choices and adopt the policy of the common law provinces, only because it is convenient to do so in a particular case. This is something to be left for the consideration of the legislature itself.”

⁷⁷ Bastarache, *supra* note 15 at p. 24.

⁷⁸ “Our legal system must now incorporate the shared values of society as a whole, without excluding or discriminating against anyone”: Bastarache, *supra* note 15 at p. 25.

⁷⁹ Lebel and Le Saunier, *supra* note 25 at p. 202; Sullivan, *supra* note 46, at p. 1043; Allard, *supra* note 71, at pp. 21 and 22.

There is evidence of convergence and cross-fertilization even in the UK. In the seminal case of *Donoghue v. Stevenson*, the House of Lords under the pen of Lord Atkin, a Scot,⁸⁰ produced the idea of a general tort of negligence similar to what existed in the private laws of Scotland as a species of “culpa”.⁸¹ Convergence or harmonization of legal systems does not require that the specificity and autonomy of a legal system be lost; it may well suffice that similar solutions be sought within the rules and methods that are unique to each legal system. Legal traditions like languages can be opened to foreign influence without losing their originality and specificity.

In modern times, knowledge of different legal traditions, like knowledge of different languages, is an asset both nationally and internationally (dialogue of legal diversity). Canada and the UK have experienced the co-existence in their domestic laws of civil and common law as several other jurisdictions have and increasingly will. The ability to synthesise legal knowledge and conjugate it in another legal system is critical to the integration of the new pluralist legal culture that is emerging in the global village.

⁸⁰ [According to *the Dictionary of National Biography* (1941-1950), Lord Atkin was in fact born in Australia and later moved to Wales to be with his mother’s family.]

⁸¹ [1932] A.C. 562, All E.R. 1 (H. of L.). Lord Atkin reconciled the civil law concept of fault with the common law tort of negligence by using the common idea of moral wrongdoing and extending the duty of care. He stated: “The liability for negligence, whether you style it such or treat it *as in other systems as a species of ‘culpa’*, is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The *rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer’s question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.*”

Drafting against a background of differing legal systems: Scots law and the UK statute book

Colin Wilson¹

The UK statute book

The UK statute book does not exist in any physical sense. We use the expression to refer to the body of legislation having effect in some or all of the parts of the United Kingdom at a given time.² It carries with it implications of coherence and continuity—the idea that the legislation extending to the different territorial jurisdictions within the United Kingdom forms part of a single coherent body of law drafted to a common standard and subject to similar rules of construction.

In practice it falls to the three drafting offices in the United Kingdom, working in cooperation, to ensure that legislation extending to each part of the United Kingdom works properly as a matter of English law, Scots law or the law of Northern Ireland, as the case may be, and meshes properly both with pre-existing legislation extending to the jurisdiction in question and with the legislation for other parts of the United Kingdom.

How different is Scots law?

Scots law is a mixed system, with elements of Roman–Dutch law as well as common law characteristics. Its historical roots are particularly evident in Scots private law, in areas such as the law of persons, the law of obligations and the law of property, and in Scots criminal law. The Treaty of Union between England and Scotland in 1707 guaranteed the continuance of Scots private law, the Scottish court system and the Scottish legal profession (but not, interestingly, their English equivalents). It is not surprising that most Scottish legislation on those matters extends only to Scotland. The differences from English law are generally much less in the public law area, particularly where the matter is one which is mainly or completely regulated by statute.

Someone wishing to find out the statutory position in relation to a matter governed by Scots law may be faced with Acts of the Parliament of the United Kingdom (both pre- and post-devolution), Acts of the Scottish Parliament, and regulations and orders under either or both. In the case of a Westminster Act and instruments under it, the relevant provisions may extend to Scotland only or to Scotland together with one or more of England, Wales and Northern Ireland. The user is entitled to expect that legislation extending to Scotland, regardless of its provenance, is drafted with proper regard to the principles, concepts and terminology of Scots law, while integrating fully with pre-existing law and with the corresponding legislation extending to the other parts of the United Kingdom. As First Scottish Parliamentary Counsel said in an address to the Statute Law Society in 2003, in relation to Acts of the Scottish Parliament:

Our devolved legislation should ... slip easily into the warp and weft of pre-devolution Scottish legislation and of GB and UK legislation whether pre- or post-devolution.³

The same is of course true in relation to provisions of Westminster Acts which extend to Scotland.

Devolution

Since 1999 we have had a Scottish Parliament with legislative competence to pass Acts relating to devolved matters, that is to say matters other than those reserved to the Westminster Parliament by the

¹ Scottish Parliamentary Counsel, Office of the Scottish Parliamentary Counsel.

² *Craies on Legislation*, 8th edition, para 1.1.7.

³ (2004) 25 Statute Law Review 136 at p. 138.

Scotland Act 1998.⁴ The Scottish Parliament can, for example, legislate about justice, health, education and housing but not about immigration, terrorism or social security. Although the Westminster Parliament retains the right to legislate for Scotland on devolved matters as well as reserved matters a convention, known as the Sewel convention, operates to ensure that Westminster will not normally legislate on devolved matters without the consent of the Scottish Parliament. Experience shows that that consent cannot always be taken for granted.

There are other limits on the Scottish Parliament's legislative competence. The most significant for present purposes is that the Parliament cannot legislate to amend the law of a country or territory outside Scotland. That limitation, while readily understandable, can cause problems in practice.

The Office of the Scottish Parliamentary Counsel (OSPC) is answerable to the Scottish Ministers, who constitute the devolved Scottish Government. We draft most Bills for Acts of the Scottish Parliament (ASPs). But we also, on behalf of the United Kingdom Government, draft Scottish provisions for inclusion in Westminster Bills.

Bills for Acts of the Scottish Parliament

The Scottish Ministers initiate most Bills for ASPs. They have no responsibility for Westminster legislation on reserved matters that extends to Scotland. Their interest in Bills for ASPs is, understandably, primarily a political one, focusing on getting the Bill onto the statute book. Unless there is a possibility of the resulting Act being successfully challenged in the courts, or failing to deliver the policy, Ministers are not generally interested in how easy or difficult it is for the end user to understand or use the legislation. It falls to the drafters in the OSPC, in drafting a Bill, to try to look after the interests of the end user.

Bills for ASPs are drafted by drafters in the OSPC on written instructions from lawyers in the Scottish Executive. ASPs are very similar in layout and style to Westminster Acts. The careful reader may notice one particular difference—from the outset, ASPs have been drafted in gender-neutral (or, more accurately, gender-avoiding) language. The rules of construction are similar to those for Westminster legislation. An Interpretation Order under the Scotland Act 1998 makes provision for ASPs and subordinate legislation under them similar to much of that in the Interpretation Act 1978⁵ for Westminster legislation.

You might think that a Bill instructed by Scots lawyers, drafted by Scottish Parliamentary Counsel and passed by the Scottish Parliament stood a reasonable chance of paying proper regard to Scots law, and you would, for the most part, be correct. The challenges that we face are those common to drafters everywhere—issues such as inadequately worked out policy (sometimes mirroring policy south of the border without proper analysis), unrealistic deadlines for drafting, and pressure to include buzz words and phrases in a Bill to ease its passage through the Scottish Parliament.

There is, however, one particular difficulty in relation to Scottish Parliament Bills. Few areas of legislation operate in isolation. A Bill changing Scots law on a devolved topic often gives rise to the need for consequential changes to Scots law on a reserved matter or to English law or the law of Northern Ireland. Legislation in other parts of the United Kingdom may contain references to provisions or expressions being amended by the Scottish Bill; or it may be necessary to have cross-border provisions dealing, say, with the transfer of court orders or prisoners from Scotland to another part of the United Kingdom, or vice versa. Before devolution, the Scottish Bill (in the Westminster Parliament) would have contained the appropriate provisions, drafted by or cleared with Parliamentary Counsel in Whitehall or Legislative Counsel in Belfast. But the Scottish Parliament does not have competence to make those changes. An order under section 104 of the Scotland Act 1998 and subject to procedure only in the Westminster Parliament is required to complete the legislative endeavour begun by the Scottish Parliament Bill.

⁴ 1998 c 46.

⁵ 1978 c 30.

Although section 104 orders are drafted in Edinburgh, they need to be checked and cleared by the UK government departments responsible for the legislation being amended. Those departments sometimes see the orders as a low-priority irritation. And United Kingdom Government Ministers are unenthusiastic about having to sponsor the orders in the Westminster Parliament. But the consequences of not completing the legislative package begun by the Act of the Scottish Parliament are that the statute book will quickly begin to fragment, with cross-border provisions that do not work properly, provisions of Great Britain or United Kingdom extent that have been amended for Scotland only, and out-of-date references that serve only to confuse. Like Humpty Dumpty, it is easy to break the statute book but much harder to put it together again.

The good news is that there is an emerging acceptance and understanding by those responsible for the devolution settlement in the United Kingdom Government and the Scottish Executive that we need to find a way of tackling these difficulties. With goodwill on both sides, I have some hope that they can be overcome.

Westminster Bills

The role of Scottish Parliamentary Counsel in relation to Bills for Acts of the Parliament of the United Kingdom varies greatly from one Bill to another. At one extreme, legislation about some topics such as tax or social security usually extends to Great Britain or to the United Kingdom and requires little adaptation to take account of Scots law. The adaptations are often predictable and precedented (for example, delict instead of tort and interdict instead of injunction). Drafters in the Parliamentary Counsel Office (PCO) will sometimes include the Scottish adaptations in their drafts in the reasonable certainty that they are correct. Our role in the OSPC is simply to check that the provisions, with the Scottish adaptations, achieve the policy for Scotland and work as a matter of Scots law.

At the other extreme, there is the possibility of a Westminster Bill extending only to Scotland, although there has been, I think, only one example of that since the establishment of the Scottish Parliament. Such a Bill would be drafted by the OSPC.

In the middle there is a wide range of Bills intended to give effect to a similar policy for Scotland and for England and Wales but requiring significant input from the Scottish drafter to make the Bill work in Scots law. That may involve drafting freestanding Scottish provisions or extending the provisions for England and Wales to Scotland with or without modification. The aim is to arrive at a text which takes proper account of Scots law and is accessible to the Scottish reader, while being consistent, as far as possible, with the structure and drafting approach of the Bill, for which counsel in the PCO has overall responsibility.

Unless the Scottish provisions are to be freestanding and different, it often makes sense for the Scottish drafter to wait to see the first drafts of the provisions for England and Wales before tackling the drafting of the Scottish provisions. He or she can then consider how best to make provision for Scotland. But the Scottish drafter is trying to hit a moving target—the English drafting will be developing as comments and further instructions are received from the Whitehall department and acted upon by the PCO, and the Scottish drafter is usually playing a game of catch-up. As the deadline for finalising the drafting approaches, last-minute changes of policy and drafting in relation to England and Wales may need to be replicated for Scotland. Close cooperation between the Scottish drafter and the drafting team in the PCO is essential at this stage. The prize is a Bill which properly reflects Scots law on introduction in Parliament, avoiding the need for amendments during its parliamentary passage that might suggest that we are merely “putting a kilt on” English legislation as an afterthought.

There are some constraints on what we can do by way of Scottish provisions in a Westminster Bill. We need to work within the structure and approach adopted by counsel in the PCO in relation to the Bill, although colleagues in the PCO are always happy to discuss how best to incorporate the Scottish provisions. There may be difficult drafting decisions about whether a provision which is to extend to Scotland requires adaptation at all. Sometimes a provision is drafted in language which does not sound quite right to a Scots lawyer, but there is no real doubt that it would be correctly interpreted by a court in Scotland. Does the Scottish drafter press for an adaptation or not? The answer may depend

on whether or not the Bill has been introduced in Parliament—if it has, there may be a reluctance to agree to later non-essential amendments.

The Sewel convention may also constrain the drafting of a Bill and the underlying policy. If it has been agreed that a Westminster Bill is not to require a Sewel motion giving the Scottish Parliament's consent to the Bill so far as it amends devolved Scots law, the drafter needs to be careful to avoid including provisions that would trigger the need for Sewel consent, for example, provisions conferring functions on the Scottish Ministers.

Conclusions

To sum up, the strength of the working relationship between the three United Kingdom drafting offices is the glue that holds the UK statute book together. There was a period following the establishment of the Scottish Parliament when we in the OSPC were concentrating almost exclusively on the drafting of Bills for the Scottish Parliament. Scottish provisions for Westminster Bills were being drafted by one of our number billeted in the PCO in Whitehall. There was little reason for the two Offices to be in touch with each other, and such contact as took place was intermittent. But now that we are doing the Scottish drafting for Westminster Bills in Edinburgh, the Offices are in touch on a daily basis and it is much easier to build and maintain a positive working relationship.

Drafters in the OSPC and in the PCO are answerable to Ministers in different administrations. In theory that could cause problems about communications between the Offices and the sharing of information. But we share a professional pride in our work and a commitment to producing good legislation—even where those who instruct us would be content with something that is merely “fit for purpose” in delivering the policy. The Offices are happy to share with each other general information and experience about drafting practice, parliamentary procedure, matters of statutory interpretation, etc.

It falls to the drafters in the OSPC, working with our colleagues in the PCO in relation to Westminster Bills, to try to ensure that the legislative output of the Scottish Parliament and of the Westminster Parliament works as a matter of Scots law and dovetails properly with the UK statute book. We in the OSPC see that as an important part of our function. If we do not do it, it is probable that no one else will. And the loser would be the end user of what we draft.

What, how, when and why—making laws easier to understand by using examples and notes¹

Ben Piper, June 2005

Contents

Potted personal and Victorian history of the use of notes and examples	75
Examples—old style	75
Potted history of elsewhere	76
A threshold issue	77
Introduction to the notes and examples	78
What?	78
How?	80
When?	81
Why?	81
Providing connections	82
Making sure it's covered	83
Maths stuff	83
Reminder	83
Setting limits	84
Explanatory notes in amending legislation	84
Hidden benefits	85
The crowd roars	86
The dark side	87
But isn't it an admission of failure?	88
The frontier of a new dimension: a challenge	89

The legislative drafter also labours under another difficulty. Writers of other documents are at liberty to set their work out in the form that best suits the task of conveying their intention. However, the legislative drafter is obliged to follow a form that enables the bill as drafted to be debated in accordance with the standing orders of the parliament that is to consider it. This means that the bill must be divided into separate clauses and that for the most part material that is merely illustrative of the intended effect of the legislation must not be included.

These handicaps go to make the conveyance of meaning in legislation particularly difficult.²

It is my intention in this paper to show that it is no longer necessary for drafters to labour under the difficulty described. By using notes and examples we can now illustrate the intended effect of what we do, we can now make our laws far more accessible to readers of our work, be they judge, bureaucrat or citizen, and we can now communicate with our readers in an entirely new way.

Although this paper only talks about legislative drafting, most of what I will say applies equally well to contract drafting, which I believe is the area where examples were first explored in the legal arena, and which is an activity that is, in my limited experience of it, very similar to legislative drafting.

I should also confess that there is probably little in this paper that is original in terms of concept, and that the research I have undertaken could more accurately be described as hit and miss, rather than as

¹ I am a legislative drafter in the Office of the Chief Parliamentary Counsel, Victoria, Australia. The views expressed in this paper are my personal views and do not necessarily represent the views of that Office.

² D.C. Pearce and R.S. Geddes, *Statutory Interpretation in Australia*, 5th Edition (2001) p. 3.

scholarly and comprehensive.³ Also, I have not been able to test the examples I will be putting forward in this paper beyond their immediate audience of bureaucrats.⁴

However I am hoping that you will find all that to be irrelevant to my purpose. It is my belief that notes and examples are a very valuable drafting and plain English tool that is vastly under-used. My purpose is to attempt to get more legal writers to use this valuable tool. I intend to do this by putting forward examples of how I have used notes and examples, and showing how I believe they have improved my work and my ability to communicate. I am also hoping that some of my examples will prompt light bulbs to flash in your head and for you to exclaim “I can do better than that!”.

Potted personal and Victorian history of the use of notes and examples

I first started using notes in about 1990, when it was possible to insert the notes as footnotes on the relevant page of a law. Unfortunately soon after I began flexing my wings in this regard my feathers were trimmed by a rule that was introduced in our jurisdiction that only permitted notes to appear as an endnote in our laws. These endnotes appeared among all sorts of other material at the end of our laws and were very difficult to find.⁵ I thus only attempted to use notes on a handful of occasions in the 1990s, and during that period I only used the occasional textual example.⁶

Then in 2000, a further change occurred—our Interpretation Act was amended to recognise notes and examples as part of our laws. From the start of 2001 we in Victoria have been free to insert notes and examples immediately after the provisions to which they relate, confident that those notes and examples form part of the law in which they appear. I have taken advantage of the freedom we have had since 2001 and have used notes and examples whenever appropriate since then.

Examples—old style

Before continuing I should first mention that most English-speaking jurisdictions (including Victoria) have used what I call “textual examples” for many years. A textual example is an example that appears as part of the text of a law.

The ‘classic’ textual example is something like the following from section 6 of the *Jobseekers Act 1995* (C.18)(U.K.):

- (2) ... those regulations may ... provide that a person—
 - (b) may restrict his availability for employment in any week in such circumstances as may be prescribed (for example, on grounds of conscience, religious conviction or physical or mental condition because he is caring for another person) ...

In jurisdictions that do not expressly provide for examples, this is basically the only way that an example can be put forward with the confidence that it forms part of the law. By its nature it is clearly part of the text of the law.

There is another sort of textual example that is handled differently by different jurisdictions. The very next sub-section of the *Jobseekers Act 1995* provides an example of this alternative form:

- (3) The following are examples of restrictions for which provision may be made by the regulations—
 - (a) restrictions on the nature of the employment for which a person is available;
 - (b) restrictions on the periods for which he is available; ...

³ With respect to examples, I refer those interested in a more scholarly exposition to the paper “Shining examples” by Jeffrey Barnes, published in the June 2004 edition of *The Loophole*.

⁴ For convenience I use the term “bureaucrat” in this paper to describe government employees. Given that I am one myself, I certainly have no pejorative intentions in using it.

⁵ This material includes such things as extended publishing histories and notes, notes containing information about the parliamentary history of the Bill that became the Act, indexes and reproductions of bits of the relevant law that had been passed, but that had not yet come into operation.

⁶ These are examples that form part of the text of a law. They are discussed in more detail in the next section.

If this provision had been drafted in Victoria in 1995 the opening words would have been written along the following lines:

- (3) Without limiting sub-section (2), the regulations may provide for—

In other words, in Victoria we would not have stated that the specific instances were examples, even though that is clearly what we regarded them as. Given that we have always had a concern that our specific lists of instances are in danger of causing the general empowering words to be read down despite our express words that that is not to happen (this is particularly so in the case of long specific lists), the U.K. approach has considerable attraction, as something that is explicitly called an example is far less likely to be used to read down the general words of which it is an example.

Incidentally, I have come across a number of examples in Ontario that are a hybrid of the Victorian and U.K. approaches. They adopt wording similar to the Victorian wording, but they insert a sub-section heading above that wording stating “**Examples**”.

Although textual examples have some attractions, they have the disadvantage that they are not a suitable vehicle for telling a story.⁷ This is because narrative examples often need a few sentences for their telling and usually refer to people in one form or another. Generally, if they were put into the middle of a provision it would be almost impossible to properly read the provision, as the example would be more of an obstacle than an aid to understanding.

In my opinion it is basically only narrative examples that have the potential to communicate with readers in new ways. As the now sadly neglected (in Australia, in any event) Rudolph Flesch stated years ago—

Whenever you write about a general principle, show its application in a specific case; ... tell a pointed anecdote. These dashes of color are what the reader will take away with him. Not that he will necessarily remember the illustration or anecdote itself; but it will help him remember the main idea.⁸

While at present it is perhaps a bit too radical to suggest that we illustrate every general principle in our laws with a dash of colour, I do suggest that we do it in cases where readers might have more difficulty than usual in understanding a general principle. And in those cases the only thing suitable for the job is a narrative example or a decent note.

Potted history of elsewhere

Various other jurisdictions in Australia have used notes and narrative examples in their legislation since at least the early 1990s. For instance, in our federal sphere extensive worked examples appeared in our social security legislation in 1991. A number of Australian jurisdictions do not use notes and examples at all.

In some of the Australian jurisdictions that use notes and examples it is clear that they form part of the law, in others it is not so clear, and in some it is a factor that varies from Act to Act. There are also some differences in these jurisdictions as to whether or not examples can extend the law.⁹

With respect to the rest of the world, a number of jurisdictions, including the U.K. and a number of U.S. jurisdictions, have used textual examples for quite some time. New Zealand and a number of Canadian jurisdictions occasionally use narrative examples in the way that I will be advocating in this paper. I have not had sufficient time to find out the situation in other English-language jurisdictions, but my suspicion is that they would only use textual examples. I also suspect that these other jurisdictions do not make much use of notes.

⁷ See pages 82 and 83 for examples of narrative examples.

⁸ *The Art of Readable Writing* (Collier Books, New York, 1962 edition) p. 38 [1st published in 1949].

⁹ I refer those interested in the details of this to the paper of Jeffrey Barnes cited in note 3.

A threshold issue

From a strict legal point of view there is not much point in having notes and examples in laws unless it is clear that they are actually part of the law, and have the same status as the operative provisions of the law, or, at the very least, that they are matters that can be taken into account in interpreting the laws to which they relate. More particularly, in my opinion, it is highly undesirable to have a situation where there is an express statement that if there is a conflict between a provision of a law and an example of that provision, the provision of the law prevails. This is the case in at least several jurisdictions in Australasia. It is undesirable because you then have a situation where on the face of the law it appears that the law does not achieve the intention of the writer of the law. For instance, take the following hypothetical definition and example in relation to an injury compensation scheme:

"medical service" includes—

- (c) the provision of any article needed to operate, run or repair any medical equipment;

Examples

Examples of things referred to in paragraph (c) include electricity, water, lubricating oil and replacement filters and batteries.

Paragraph (c) only refers to articles, but the very first example is "electricity", which is hardly an "article" in the strict sense of that word. It appears the drafter really intended to refer to "thing" in paragraph (c) rather than "article". If this provision appeared in a Queensland law, a court would be bound to find that the provision prevailed and that electricity therefore could not be considered to be a medical service, even though it appears to have been within the contemplation of Parliament/the drafter that electricity should be a medical service. However, in Victoria it would be open to a court to find that electricity was a medical service.

This is because in Victoria we have the following provisions in our Interpretation Act:

An example (being an example at the foot of a provision under the heading "**Example**" or "**Examples**"), diagram or note (being a note at the foot of a provision and not a marginal note, footnote or endnote) in an Act or subordinate instrument forms part of the Act or subordinate instrument ...

If an Act or subordinate instrument includes at the foot of a provision under the heading "**Example**" or "**Examples**" an example of the operation of the provision, the example—

- (a) is not exhaustive; and
- (b) may extend, but does not limit, the meaning of the provision.¹⁰

In the case of our hypothetical provision, I suggest that the Victorian result is the more desirable outcome.

At the same time as the Victorian provisions were introduced a decision was made allowing us to insert notes immediately after the provision to which the note applied.

Should other jurisdictions be tempted to introduce similar provisions (which is what I am hoping this paper will encourage to happen) I recommend, on the basis of my experience with our Interpretation Act provisions, that paragraph (b) immediately above be split into the following 2 paragraphs:

- (b) may extend the meaning of the provision; and
- (c) does not limit the meaning of the provision unless the contrary intention appears.

This rewording enables examples a bit more scope, which I will explore in a bit more detail later in this paper, and it also overcomes the possibility that it can be argued that negative examples (that is, examples of what is not covered by a provision) are not part of the law.¹¹

¹⁰ The first of these is section 36(3A) of the *Interpretation of Legislation Act 1984* (Vic.) and the second is section 36A(1) of that Act. They were inserted in 2000 with effect from 1 January 2001.

¹¹ See the discussion below under the heading "Setting limits" for more detail on this.

I should also mention that in at least one Australian jurisdiction individual Acts have set out their own interpretation provisions with respect to the examples that appear in them. This is, of course, the only option contract drafters have, but it is also something individual legislative drafters might like to consider doing in jurisdictions that have no Interpretation Act provisions dealing with notes and examples.

Introduction to the notes and examples

The examples of notes and examples that follow are only a relatively small, but hopefully representative, sampling of the notes and examples I have inserted, or attempted to insert, into Victoria's laws. I had initially intended to only use my own examples as a base, and I had fully intended to use examples from a number of my colleagues and from other jurisdictions. But once it got to the point that I was having to try to cull my own examples to keep the size of this paper within reasonable bounds before I had used any other examples, I decided to let my egocentric tendencies off the leash.

To keep faith with anyone who might have been attracted by the title to this paper, my first 4 groups of examples reflect that title. Those groups are not mutually exclusive, nor were they ever intended to be comprehensive. After the 4 groups I have taken the liberty of including some other types of notes and examples. There are undoubtedly many many other types. I doubt that there is much purpose to be served by creating these classifications other than for the sake of convenience.

What?

It is the lot of the legislative drafter from time to time to write something that, at first glance, and perhaps even at second and third glance, appears, to put it kindly, to be strange. In the past all we could do was write these provisions and hope that users would realise from the context, or from their deeper knowledge of the relevant environment, what the strange provision was attempting to do. Notes, in particular, now provide us with a means to provide all readers of our laws with an explanation of what's going on. As I write these words I can already hear in my head pleas for examples of what I'm talking about. So here goes.

Example no. 1

Recently we attempted to standardise the enforcement provisions in 3 related Acts. One of these Acts had already been enacted with the model provisions, and it was my job to insert replicas of those model provisions into the other 2 Acts. One of the provisions I had to replicate provided for the administrative review of certain enforcement decisions—these were defined as "reviewable decisions". One of the Acts that I was amending had a section 10A that also provided for the administrative review of decisions made under that Act. For purposes of uniformity, it was thus necessary to include the following provision in section 10A:

(2A) Sub-section (1) does not apply to any reviewable decision.

This had the result that on the face of section 10A any decision under the Act could be reviewed except "reviewable decisions". As I was sure that that would cause some head-scratching I therefore included the following note immediately after sub-section (2A):

Note: A "reviewable decision" has the meaning given by section 20—see section 3(1).
Reviewable decisions are excluded from sub-section (1) because they are dealt with by Part IIA. Essentially, a wider range of people may apply for the review of a reviewable decision and there is a process of internal review available in respect of those decisions.

Example no. 2

Several years ago we had an Act containing a section 20 that made some amendments to section 15(1) of another Act, which was then followed by section 21 that completely replaced section 15(1) of that other Act. On the face of the Act it looked like a mistake had been made. While the commencement section made it clear that no mistake had been made, that section was 30 pages away from those amending sections. I therefore included the following note after section 21:

Note: Section 2(2) provides for this section to come into operation on 1 July 2005. Section 20 will come into operation on a day to be proclaimed on or before 1 June 2004.

Example no. 3

A provision was inserted into our Liquor Control Act that required people who were required by another provision of the Act to complete a responsible service of alcohol course to produce evidence that they had completed the course, if they were asked to do so by an inspector. This provision had the following exception:

- (3) Sub-section (2) does not apply if the [person] has not completed the required program or course, or did not complete the program or course within a required period.

At first glance this seems to be creating a loophole by saying that a person can avoid the provision by not doing the course. A little bit of thought makes it clear that while it is a means of avoiding the provision, it would in fact be unreasonable not to have this provision. But to avoid the need for readers to have to stop to work this out for themselves I decided it would be helpful to provide the following explanation:

Note: Sub-section (3) ensures that a person does not commit an offence by failing to produce evidence that does not exist. If the evidence does not exist the person would have committed a more serious offence under section 108 in not complying with the licence or permit conditions [these conditions required that the person do the course].

Example no. 4

Another provision I had to insert into our Liquor Control Act was the following:

3B. Where supply occurs if off-premises request made

For the purposes of this Act, if liquor is provided to a person who was not on licensed premises at the time the person ordered the liquor, the supply of the liquor to the person occurs at the place where the liquor provided was appropriated to the person's order.

The phrase “appropriated to the person’s order” is not the sort of phrase I use in legislation (or anywhere else, for that matter). In fact I fought long and hard to not use it. Unfortunately it related to an issue that was of great importance to a fairly common type of prosecution under the Act, and it was a phrase on which several courts had offered their opinions in the past. So the department insisted that the phrase continue to be used. However, it also was sufficiently moved by my concerns to expressly ask me to include examples illustrating what the phrase meant. Hence:

Examples:

1. A customer sits down at a kerb-side table of premises operated by the holder of a general licence. She orders a glass of wine. The waiter takes the order to the bar, where a glass is filled. The waiter then takes the glass to the customer. In this scenario the wine in the glass is supplied to the customer at the bar because that is where it was appropriated to the customer's order.
2. A customer orders the home delivery of a carton of beer by phone from the manager of premises licensed to supply liquor for consumption off the premises. The customer pays for the beer by providing his credit card details over the phone. The manager selects the beer from the fridge, and a staff member delivers the beer to the customer's house. In this scenario the beer is supplied to the customer at the fridge because that is where it was appropriated to the customer's order.

Example no. 5

In the recent standardisation exercise I described in example no. 1, in one of the Acts we were amending it became necessary to move 2 offence provisions that were very inconveniently located for the purposes of the changes we were making. These sections had a subject matter that had nothing to do with the amendments we were inserting. The only way to move the provisions was to re-enact them in a different place in the Act. However, I was concerned that in doing this it would appear that

we were creating new offences. I therefore inserted a note along the following lines after each of the sections:

Note: This section re-enacts section 15 of the Act as it was before the commencement of section 13 of the [amending Act].

How?

Example no. 1

Several years ago the Victorian Government decided to regulate public auctions of land. Concern had been expressed, in particular, about the widespread practice of the making of bids on behalf of the sellers of land at auctions of land, without it being disclosed on whose behalf the bids were being made. Obviously those bids could not be genuine bids, and they were seen as unfairly pushing up the prices obtained at auctions, as genuine bidders at those auctions had no way of knowing that they were bidding against dummy bidders. One of the provisions of the new law stated:

A person at a public auction of land must not falsely claim to have made a bid, or falsely acknowledge that he or she made a bid.

The relevant department was concerned that readers of the new law would wonder how someone could falsely claim or acknowledge that they had made a bid. Thus, for the exposure draft that was released for public comment before the law was presented to Parliament, I prepared the following example at the department's request:

Ron is trying to sell his house by public auction. His brother Jim agrees to help him. Just before the auction starts Ron introduces Jim to Maria, the auctioneer, and all 3 of them have a chat.

The auction starts. At one point the bidding seems to stop. The reserve price is still a mere hope on the horizon. To get things going again Maria takes a bid from a convenient tree. (In doing this, she commits an offence against section 36C(2).) One of the previous bidders is suspicious and asks Maria to identify the last bidder. Maria points to Jim and asks him to acknowledge making the last bid. In accordance with his pre-auction discussion with Maria, Jim raises his hand. In doing so he commits an offence against this section. He is not guilty of an offence against section 36B because he did not make a bid at the auction.

If Jim had made a bid and Maria had accepted the bid, Maria would have committed an offence against section 36C(1).

The department was satisfied that this enabled readers to fairly readily understand how the provision worked, and, to the best of my knowledge, no concerns were ever expressed about the provision.¹²

Example no. 2

I was again asked to make an amendment to our Liquor Control Act. There was existing provision for the controllers of a liquor licence to nominate a person (“a nominee”) to operate the licence. Once a nomination took effect the nominee assumed a number of the responsibilities of the licence controllers. I was asked to insert a provision explicitly specifying certain circumstances in which a person ceased to be a nominee (this was in addition to some existing provisions that enabled a person to stop being a nominee), and to then provide that on such a cessation, the licence holders re-assumed their responsibilities. There was no problem with the first part of this instruction, and I produced the following provision:

(10) A person ceases to be a nominee on ceasing to manage or control the licensed premises in circumstances in which that cessation is, or is likely to be, permanent.

However, there was a problem with the second part of the instruction, as the existing provisions were structured in a way that made it unnecessary to do anything—those provisions already achieved the

¹² This example is a sentimental favourite of mine, as it was the first narrative example I ever drafted. Sadly, although this example, and quite a few like it, remained in the Bill when it was first introduced into Parliament, it did not survive the re-introduction of the Bill following an election. I also note that its style shows glimpses of what may be possible for drafters in the future.

desired result. The department was not happy with this advice in that they had had considerable problems in practice in getting people to understand what occurred when a person ceased to be a nominee under the existing provisions. I therefore offered to include the following note under sub-section (10):

Note: On a person ceasing to be a nominee, section 53(4) ceases to apply. This has the effect under section 53 of re-imposing liability as a licensee or permittee on the directors or members of the committee of management (as the case may be) of the body holding the licence or permit.

When?

Example no. 1

Last year I had a fairly large Act that contained a commencement section that covered a page and that provided for different parts of the Act to come into operation at 12 different times. One of those times was at a fixed date in the future. This date applied to 11 sections that were scattered throughout the Act. The bulk of the Act came in immediately. It thus occurred to me that it might be helpful to anyone looking at the Act to provide warning that particular sections had a delayed, but certain, starting date. Hence the following note appeared after each of the delayed sections:

Note: This section comes into operation on 1 February 2005—see section 2(4).

The sections with a retrospective commencement had a note along the following lines:

Note: This section was deemed to come into operation on 16 June 2004—see section 2(7).

Example no. 2

In Victoria work injuries are covered by a statutory compensation scheme. The Act regulating this scheme is frequently amended. Often when amendments are made, the provisions as amended only apply to injuries that occur after the amendments come into operation. Often in the past our practice in these situations was to include a new sub-section at the end of the section where a relevant amendment had been made stating that the section as amended by the amending Act only applied to injuries that occurred after the amendments came into operation. Often these new sub-sections appeared physically many sub-sections after the sub-sections to which they applied.

Several years ago I attempted an alternative way of dealing with these provisions. I created a Part at the back of the Act that contained details of all of the amendments that had particular starting times. In the body of the Act, after each amendment that had a particular starting time I inserted a note along the following lines:

Note: Paragraph (c) does not apply with respect to injuries that occur before the date of commencement of section 8 of the **Accident Compensation and Transport Accident Acts (Amendment) Act 2003**—see section 265.

Intuitively it seems to me that keeping all this information together should be very helpful to readers, but unfortunately I have not received any feedback to confirm this.¹³

Why?

Example no. 1

Clause 146 of a Bill dealt with the recovery of money owed to employees by an employer. Sub-clause (5) provided that a Court could order the employer to pay a penalty to the employee in certain circumstances. Sub-clause (6) imposed a cap on the amount of the penalty and sub-clause (7) provided as follows:

¹³ These sorts of notes are the only ones I have come across to date where one has to suffer for one's art. Having 20 or so of these notes in one Bill is a prescription for a quick trip to the funny farm unless one takes the precaution of waiting until the absolute last moment before inserting the relevant section numbers.

- (7) If a claim is made under this section by an employee's personal representative, sub-sections (5) and (6) apply despite anything to the contrary in section 29 of the **Administration and Probate Act 1958**.

Given that this clause appeared in a proposed Industrial Relations Act, I thought it might be useful to explain the purpose of sub-clause (7). Thus the following note:

If a person dies, section 29 of the **Administration and Probate Act 1958** enables the continuation of most legal actions the person could have taken if he or she were still alive. However, section 29 does not permit the recovery of exemplary damages. As this restriction could interfere with the awarding of a penalty under clause 146, sub-clause (7) ensures that the penalty can still be awarded if the Court thinks it appropriate.¹⁴

Example no. 2

An amendment to our workers' compensation legislation inserted a formula to be used in the calculation of certain lump sum payouts to injured workers. One element of the formula, item "A", could have one of 2 alternative meanings (either a gross amount or a net amount), depending on whether or not the relevant Minister had published a certain document. This was a very unusual provision that appeared to provide the Minister with an arbitrary power, so I provided the following note:

Note: The purpose of this provision is to enable the Minister to respond to possible policy changes in relation to the taxation of settlement payments by the Commonwealth Government.

(If certain policy changes that were in the offing had been made, recipients of the pay-outs would have suffered significant tax disadvantages unless the appropriate gross or net amount was used for item "A".)

Providing connections

So far I haven't even touched on the most common circumstance in which notes are used by drafters generally. This is the situation where a provision of a law relies on, or is significantly affected by, another provision of the law that is not in its immediate vicinity. To assist readers in this circumstance it is common to provide a cross-reference.

For example, in one of my recent Acts I inserted the following provision:

174. Liability of operator

- (1) A person is guilty of an offence if—
- (a) the person is the operator of a vehicle; and
 - (b) the vehicle is in breach of a mass ... limit

Note: The penalties that apply in respect of the offence created by this section are set out in section 178.

We don't usually now separate penalties from the offences to which they relate. This was an exceptional case because the penalty depended on whether the offender was a body corporate or not, and on which of 3 separate categories of offence the transgression fitted into. Section 178 covered the best part of 2 pages, and the penalties it contained applied to section 174 and to 4 other sections. So while that was all well and good, a reader of the law would only come across section 178 if she or he read the Act sequentially. Most people only read laws relating to heavy transport vehicles sequentially if all the other insomnia cures they have tried have failed. Notes in this circumstance are thus very helpful to readers, and I think most drafters now recognise that.

¹⁴ This Bill was introduced into Parliament in 1990, but did not become law.

Making sure it's covered

Another very common circumstance in which examples are used relates to a concern that a provision cover a specific factual situation. In the past these situations were the cause of much disputation with instructors, as they needed the certainty that a common circumstance would be covered, and drafters were worried that the inclusion of specific circumstances would risk causing the generality of the relevant provision to be read down. Examples following provisions solve both these problems, and may even enable examples of what is not intended to be covered to be given (although, as previously mentioned, the legal effectiveness of these negative examples is open to question in Victoria).

This provision appeared in a rewrite of a section dealing with how a person's pre-accident earnings were to be calculated after a compensable accident:

- (4) This sub-section applies, if during the 12 months immediately before the relevant day, there was, as a result of any action taken by the earner, a significant change in his or her earnings circumstances that resulted in the earner regularly earning, or becoming entitled to earn, more on a weekly basis than he or she was earning before the change occurred.¹⁵

The original provision contained a couple of textual examples that I took the liberty of augmenting when I included the following directly underneath this provision:

Examples

Examples of a change of circumstances to which this sub-section would apply include a change of job, a promotion, a move from part-time to full-time employment, or a pay increase arising from the achievement of performance standards. This sub-section does not apply to a pay rise applying across an industry.

Despite this example, I might also mention that it is usually my practice in relation to these sorts of examples to not restrict myself to the humdrum. I think it is generally helpful to include things as examples that are at the outer edges of the envelope of what is caught by the provision.

Maths stuff

Another very common circumstance in which examples, in particular, are used is if a provision contains anything that even vaguely looks like a calculation. For instance one of my amendments to an injury compensation scheme included the following:

- (10) A number determined under the A.M.A. Guides must be rounded to the nearest whole percent.

The department asked me to include an example of how this provision would work. In providing the following examples I also took the opportunity to make it clear that the ordinary rules of mathematics applied to this situation:

Example

A final degree of impairment of 9.5% must be rounded to 10%. A final degree of impairment of 8.4% must be rounded to 8%.

Incidentally, I chose the first example quite deliberately, as 10% was a very significant threshold in the particular scheme of things here—significant benefits were only available to those who had a 10% or more degree of impairment.

Reminder

I was re-enacting a section that conferred a power of delegation on various people and authorities. It was envisaged that the delegates would include people and bodies who were not under the administrative control of the department administering the section. It thus wanted to be able to impose

¹⁵ I had best insert a "what" note here, as this sub-section reads strangely by itself. Another sub-section in the section took effect if sub-section (4) applied. It was a device I used to break up the material.

conditions on how the delegations it conferred were exercised, and asked me to insert a provision in the section to achieve that effect. I advised that this power was already conferred by our Interpretation Act. The department was concerned that future administrators of the section would be unaware of that fact, so I was asked to add the following note to the bottom of the section:

Note: Section 42A(1)(b) of the **Interpretation of Legislation Act 1984** provides that a person delegating a power or function may specify conditions or limitations on the exercise of the power or function by the delegate.

Setting limits

In the amendments I prepared in relation to sales of land, I created the following offence:

- (5) The person must not do any thing with the intention of preventing, causing a major disruption to, or causing the cancellation of, the auction.

In thinking over what might or might not be a "major" disruption, it occurred to me that it might be helpful for me to attempt to provide some guidance, particularly as a major disruption had to be something that wasn't so major that it led to the cancellation of the auction. I was also concerned to ensure that it couldn't be argued that any disruption to an auction was a major disruption. I also thought I might have a bit of fun (relatively speaking, of course). Thus:

Example

Fred attends a public auction of a house he intends bidding for. His son accompanies him to the auction with a radio. At one point during the auction Fred's son whispers into Fred's ear. Fred immediately interrupts the auctioneer to announce that Essendon has just beaten Carlton at the match at the MCG.¹⁶ While this announcement causes the auctioneer to lose concentration and to stop taking bids, she is quickly able to resume the auction. Fred has not caused a major disruption to the auction.

Harry attends a public auction of a house he intends bidding for. Shortly after the auction starts he sets off a stink bomb. It is not possible to resume the auction until the fumes from the bomb have dissipated, which takes 30 minutes. Harry has caused a major disruption to the auction and has thus committed an offence against sub-section (5).¹⁷

Sadly this is one of the examples that didn't make it into the law that was passed by our Parliament. However, if it had been, it would have caused the courts a headache, as my first example, which arguably is attempting to limit the scope of the provision, isn't, according to our Interpretation Act, allowed to do so. On the other hand, courts follow the general principle that they must attempt to give some meaning to a legislative provision. This is the primary reason why I have recommended that other jurisdictions modify the Victorian Interpretation Act provision if they intend to head down the track we have taken.¹⁸

It doesn't take much imagination to think of some of the possibilities that would open up if examples were able to both expand and limit provisions at the same time. For instance, drafters would be able to attempt to put boundaries on concepts such as what is "reasonable" in particular circumstances by providing examples of what is, and what is not, reasonable (in much the same way as I tried to do in the last example with respect to what was, and what was not, a major disruption).

Explanatory notes in amending legislation

It has been the practice for some time now of one Australian jurisdiction, the Australian Capital Territory (A.C.T.), to include an explanatory note immediately after every one of its amending

¹⁶ For non-Australian readers, this refers to a local religion we have known as "Australian Rules football". Essendon and Carlton are 2 of its chief denominations, and the MCG is its chief shrine. I encourage you all to experience its ceremonies at least once in your life.

¹⁷ This example is critically discussed by Paul O'Brien, one of my colleagues and fellow advocates of the use of examples and notes, in "Use and misuse of examples", published in the March 2005 edition of *The Loophole* at p. 50.

¹⁸ See the discussion above under the heading "A threshold issue".

provisions in its statute law revision Acts. These are Acts that make a variety of minor technical amendments to other Acts. In Australia generally explanatory notes normally appear all together as a separate document that is either physically attached to, or that accompanies, the relevant Bill. Often these notes simply paraphrase the provisions of the Bill which they explain, but they can be used to provide material as to why an amendment is being made, how it fits into the scheme of things and how it is intended to work, among other things. They can also include examples. In some Australian jurisdictions these notes are written by the drafter of the Bill, in others by the instructing department.

The A.C.T. practice is something that I commend to your attention. There is obviously a concern that if a provision is to be inserted as an amendment, and that provision has a note or example, in the amending provision you will have both that note or example and the explanatory note that accompanies the amending provision.¹⁹ There is some danger that readers may feel overwhelmed by all of this subsidiary material, and in fact it has been my observation that the text of the law does tend to get buried a bit at times in these A.C.T. Acts, despite the fact that obviously a lot of effort has gone into making these laws both visually effective and attractive.

However, taken as a whole I believe it is an initiative that is well worthy of consideration for use on a wider basis. It is also a welcome reversal of a trend in Australia towards the increasing incomprehensibility of amending laws. Unfortunately, of course, it has significant resource implications as there is no point in heading down this path unless the notes contain helpful explanatory material. As I think it is fair to say that the majority of explanatory notes in Australia are anything but explanatory, it means that much more work than occurs now would need to be done if the A.C.T. model was adopted.

Hidden benefits

It has always been a practice of mine to test any provision I have just drafted by mentally running notional examples through the provision to ensure that the provision will work in the way that I intend it to work. I think most, if not all, drafters do the same. It has been my experience that the practice of physically writing out an example and describing how the posited scenario and the intended provision interact for the purpose of including the example as part of a Bill often results in me finding deficiencies in my work that I did not notice in running examples through my head. Although that does not seem to be a particularly startling observation, I suspect it may come as news to some drafters.

The starkest illustration of this at work occurred several years ago. I was preparing a number of examples for an exposure draft. The wording of the draft had already been approved, but I had been asked to illustrate several of its provisions with examples. I was writing a fairly straightforward and short example for a relatively minor sub-section. The section itself was the fundamental section of the particular scheme I was working on, but the particular sub-section dealt with an incidental matter. As I was writing the example and thinking through how it would work, I quickly realised that I had not drafted the section to cover circumstances like those I was setting out in the example, even though those circumstances would often occur in practice. It became necessary to completely rewrite the whole section, and to restructure the part that it was in.

Anyone looking at the law now would not realise how close it came to having a significant deficiency, nor that the act of writing an example had prevented that deficiency from being in the law.

I have also had several experiences where a department has changed its policy after seeing one of my examples illustrating a provision giving effect to its policy. In one case a department had asked me to illustrate a particular aspect of a provision. To be able to do that I had to use an example that covered the provision as a whole. The Bill into which the example went was then released as an exposure draft for public comment. The feedback was such that a significant change had to be made to the provision. No one appeared to have any concern about the aspect of the provision that had led to the request for

¹⁹ I note that the explanatory note falls by the wayside when the amendment actually occurs. I should also mention that the Victorian Law Reform Commission in the late 1980s strongly advocated the adoption of the practice of placing explanatory notes with the provisions they were explaining.

the example—the problem was that the example demonstrated the width of the provision as a whole, and this width, which had previously gone unnoticed, became noticed.

Another example I prepared, again at the request of a department, brought to light problems that had not previously been considered and that the department would have been likely to face in enforcing the provision. This resulted in a significant change to the provision.

The crowd roars

Unfortunately humble legislative drafters such as I do not have any means of testing our work with users of legislation in any sort of scientifically meaningful way. If there is something drastically wrong with what we do, we do get to hear about it fairly quickly, but otherwise our efforts usually disappear into a feedback void. This is of course very disappointing on those occasions when we try to do something to attempt to improve our work from a plain English point of view. In Victoria we have had the experience of making fairly radical changes to our Bill format without anyone really noticing.

Therefore the experiences I have had with notes and examples have come as a pleasant surprise. Not that anything earth-shattering has happened, but if you have managed to read through all of the examples I have set out above, you may have noticed that in several of the cases I noted that the note or example being described was inserted at the request of the relevant department. In fact it has been my experience that the majority of the notes and examples that I have inserted in laws have been inserted at the request of departments. This majority does not include those cases where the insertion of a note or example is the result of a compromise on some issue of contention between a department and me. Admittedly these requests sometimes occur as the result of my either suggesting or recommending the inclusion of a note or example, but by and large the most common circumstance is that I insert a note or example in a Bill, and I am then asked to insert a note or example elsewhere in the Bill, quite often in a completely different context. In a recent set of instructions the following appeared:

... To ensure clarity we suggest that a note be included under the provision to state that in addition to [various specific matters] this includes [various other specific matters]—helpful examples may be found in section xx of the xxx Act.

This was interesting because the authors of this request, unlike me, were not involved in amendments to the xxx Act which inserted the "helpful" examples, although they would have read the amendments as part of their duties. And, the context in which this request was made was very different from the examples to which it refers.

Given that bureaucrats are in practice our main audience when we write laws, although that observation may shock some,²⁰ it is quite pleasing that those bureaucrats who have been exposed to the sorts of notes and examples I am advocating find them sufficiently helpful and useful so as to actually request them.

There was also an interesting occurrence in relation to the first Bill in which I used narrative examples. The Bill was introduced into Parliament, but then lapsed when an election was called before the Bill had been passed. When the Bill was re-introduced after the election the examples had been removed (as a result of a decision made in our Office, rather than by the relevant department), but otherwise the Bill was unchanged (as the election had not resulted in a change of government). Shortly after the Bill was re-introduced an article appeared in the press reporting that the Bill had been

²⁰ To further explain my observation, I have been writing laws for almost 20 years. In that time all of those laws would have been closely read by bureaucrats, both in the process of making them, and in the process of implementing them. Those laws would also have been read by a relatively smaller number of politicians. Some of the laws, or parts of those laws, would have been read by lawyers, but relatively speaking very few lawyers would have done so (in my experience it is fair to say that the cannabilised expression that applies to laws and lawyers is: "when all else fails, but not before then, read the Act"). Some minute fraction of all that I have written would have been read by some judges. Some of my work would also have been read by those to whom particular laws apply and by members of the public, but again I suspect that the overall number of such readers is quite small.

introduced, and describing the main features of the Bill. The interesting thing was that the article used several of the examples that had originally appeared in the Bill to explain what the Bill did, even though those examples were no longer in the Bill.

This experience highlights another aspect of narrative examples, in particular, that has yet to be explored: they may enable drafters to communicate with citizens through secondary means such as the press. For instance, most of the Bills I write are reported in the press once they are introduced into Parliament. The reports are usually based on press releases issued by the government. I have never had any effect on what appears in those press releases (nor, I must admit, have I ever had an interest in having such an effect). It is very very rare for the media to reproduce any part of any Bill I have written. Yet in the case of my first narrative examples Bill, which I have just described, I had significant slabs of my examples reproduced word for word in a newspaper report. Far more citizens would have read those examples than would have ever read anything else that I have ever done.

Because narrative examples tell stories, and the prime means by which the media communicates is also by telling stories, there is potentially great scope for the media to be interested in repeating the stories in laws, particularly given that it needs to report information about laws in any event.

Finally in relation to feedback, I should also mention that I have had a situation where an Opposition member of Parliament has sought to have a detailed example inserted into one of my Bills. I assisted the member (as part of my normal duties) to prepare a House amendment to do that at the Committee stage of the Bill. The member had become aware, in consulting on the Bill before it was debated, that a particular section of the Bill was not well understood by the industry groups to which it was to apply. He had planned to move an amendment to that section which would have further complicated the section. I recommended to him that he include an example to help make his proposed amendment clearer. This was agreed to. However, he then decided not to proceed with his amendment, but thought that the example, suitably modified to remove references to the change that had been proposed, would help the relevant industry groups to understand the provision as drafted by the Government. He thus moved an amendment whose sole purpose was to insert an example to a Government provision.²¹ For various political reasons the amendment was not allowed by the Government.

The dark side

But isn't it dangerous to use notes and examples? Can't they be misused, or overused? Yes, yes and yes. They can be dangerous, they can be misused and they can be overused.

Dangerous

Anything and everything that appears in a law can be “dangerous” in the sense that it might be used in a way that was never intended, and might have the effect of causing the law to be interpreted in a way that was never intended by the drafter of the law or by the drafter's instructors. I contend that notes and examples are no more dangerous in this sense than anything else in the law, and that if they are used with a bit of intelligence and care they will considerably enhance the prospect that a law will be understood as it was intended to be understood. Used with intelligence and care, notes and examples also have an enormous potential to ensure that a law is understood by far more people than might be the case if they are not used. At the very least notes and examples have the potential to save readers of laws much time by explaining how a provision of a law fits in with other provisions of the law.

Given the potential benefits of notes and examples I think the risk of having a mistake in a note or example causing a law to be misinterpreted is well worth taking. And in a jurisdiction such as Victoria, for instance, it is possible that a note or example may help overcome mistakes in provisions themselves. I refer, for example, to the hypothetical example I posited earlier in this article which might enable electricity to be considered to be an “article” in an infelicitously worded provision.

I should also say that I hope nothing I have said in this paper suggests that I think that the drafting of notes and examples is in any way a less demanding activity than the drafting of the operative

²¹ *Hansard*, Legislative Council, p. 75 (15 December 2004).

provisions of laws. Notes and examples should be drafted as if they were part of the law even in those jurisdictions where they are not formally part of the law.

Misuse

With respect to misuse, Paul O'Brien, one of my colleagues, has already produced a paper entitled "Use and misuse of examples".²² With respect to misuses, he cites examples of examples that contain material that really should have been in the provision to which the example is attached. This is a very legitimate concern, and I have seen a number of other examples of it myself. In fact there is sometimes a very fine line as to where material should be placed. However, certainly in jurisdictions that have Interpretation Act provisions like Victoria's, this particular misuse probably doesn't matter all that much in terms of the legal effect it has, as the material in the example has to be read as part of, and as extending, the provision.

Another misuse cited is the failure in examples of offences to make it clear that various defences may apply. This is a failure of which I have been guilty, but I am not sure that I see it as a misuse. I would prefer to characterise it as an area where the wording of examples could perhaps be refined. Rather than to throw the baby out with the bathwater, in my opinion the concern expressed would be better dealt with by inserting an appropriate disclaiming phrase concerning other possible defences.

Paul's paper also examines the use of colloquial language in examples and the use of names in examples. The first does not concern me—in fact I must admit I am still exploring where the edges of the envelope are in respect of what is considered to be colloquial. My findings to date are that there is enormous variation in what people consider to be colloquial. I am also of the view that non-extreme colloquialisms may be quite helpful in making examples, in particular, more readable.

The same applies, with bells on, with respect to the use of names. Even though I agree that the use of names may raise problems with respect to gender or ethnic stereotyping if they are not used with care, these problems are far outweighed by the plain English benefits of using names. Rudolph Flesch made the following comment after reproducing several examples:

There's one flaw, however, in all these examples: the people mentioned don't have names. Yet nothing adds more realism to a story than names; nothing is as unrealistic as anonymity. Imagine a story whose hero has no name! If you ever read Franz Kafka's nightmarish novels about "K", you will know what namelessness does to a story.²³

Overuse

With respect to overuse, I do not advocate the use of notes and examples for the sake of using them. I still occasionally write laws that do not contain a single note or example. However, given that only a minority of jurisdictions appear to countenance their use, and that only a minority of drafters appear to be comfortable using notes and examples in the jurisdictions where they are countenanced,²⁴ at present I see under-use as being of more concern than overuse. I am happy to take the chance that my advocacy of the use of notes and examples will result in me having to write a paper entitled "Enough is enough—why we don't need to use so many notes and examples" in 5 years or so.

But isn't it an admission of failure?

Although I have not heard anyone state that competent drafters should not need to use notes and examples because their work should be so clear that the subsidiary explanation provided by notes and examples should be unnecessary, and that therefore the use of notes and examples is really an

²² Paul O'Brien, the work cited in note 17.

²³ Flesch, the work cited in note 8, at p. 80.

²⁴ In Victoria I would roughly estimate on the basis of my observations of Victorian laws that about a third of my drafting colleagues are regular or semi-regular users of notes and examples. In the other jurisdictions my comments are based on a quick and totally unscientific survey of randomly chosen laws or volumes of laws from those jurisdictions.

admission of incompetence or failure, that is probably only because of the hermit-like existence I lead as a legislative drafter. But it is an argument that I can see may be of concern to some drafters. It therefore needs to be addressed.

First, there are things that drafters do that, with the best will in the world and regardless of their ability, cannot be expressed in a way that is not going to cause some head-scratching by readers—for instance, there are all sorts of limits that restrict what drafters can put in a law. Notes and examples are a means by which this head-scratching can be reduced, and these limits side-stepped. It is a means that is an aid to readers, not an admission of failure.

Second, it is hopefully clear from a number of the examples of notes that I have presented in this paper that they provide information that is intended to save readers time. Sure, everything in a relevant law may be perfectly understandable if you read the whole thing, but it can be enormously helpful if you can be given a glimpse of some of the interconnections that exist without having to read each element before you are able to understand how everything works. And, of course, lots of readers of laws, particularly in this day and age, only ever read bits of laws—there is a real danger that those readers won't ever get to find out that what they read is incomplete.

Third, I refer doubters to the work of the plain English pioneers—we really are talking about a tool to make our work easier to read. In fact it is my hope that within the not too distant future the use of notes and examples in laws will be universally seen as the mark of a highly competent legislative drafter.

The frontier of a new dimension: a challenge

In conclusion, it is my strong belief that the use of notes and examples in laws places us on the edge of a new frontier—the frontier of a new dimension in communication by drafters. As I have shown, I have only taken tentative exploratory steps in this dimension, but what I have seen to date excites me tremendously. It is my hope that you will not only join me and share my excitement, but that you will leapfrog me and everyone else who has begun to explore this new dimension.



Commonwealth Association of Legislative Counsel

MEMBERSHIP APPLICATION FORM

The Secretary, Commonwealth Association of Legislative Counsel, 6/F, Office of the Attorney General, Government Buildings, Upper Merrion Street, Dublin 2, Ireland

I,, wish to apply to become an individual member/associate individual member* of the Commonwealth Association of Legislative Counsel.

(signed) Applicant

**Note: Persons are eligible to become individual members of CALC if they are or have been engaged in legislative drafting or in training persons to engage in legislative drafting and are Commonwealth persons. A "Commonwealth person" is a person who is a citizen or a permanent resident of, or who is domiciled in, a country or territory that is a member of the Commonwealth of Nations. Persons who have been so engaged but who are not Commonwealth persons are eligible to become associate members of CALC.*

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Isle of Man Government
H.M. Attorney General's Chambers

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Seminars on the quality of European Union legislation

The Legal Revisers Group in the Legal Service of the European Commission organises a series of seminars on quality of legislation. It invites experts from the Member States of the European Union and beyond to speak in Brussels on such topics as:

- National approaches to drafting quality;
- What national rules on legislative drafting exist and how they are applied;
- Training in legislative drafting;
- Problems caused by transposition and application of Community acts;
- Practical examples of drafting problems and solutions.

The seminars generally last half a day and attract an audience of over 200. The participants are largely drawn from the European institutions but increasingly include national drafters, staff of permanent representations and missions to the EU, academics and representatives of lawyers' associations.

Summary reports are drawn up after each seminar. Those reports and other materials made available by the speakers are available via the links in the:

List of seminars on the quality of legislation organised by the Commission Legal Revisers Group:

http://ec.europa.eu/dgs/legal_service/seminars_en.htm

The next seminar in the programme is:

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