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Editor's Notes

As you will be aware if you have read your copy of the recent issue of the CALC Newsletter, CALC 2009 was a huge success. A total of 21 papers were presented, together with a lunchtime talk by John Wilson. One of the papers was on the merits of purpose clauses in statutes. The paper will be published in a later issue of *The Loophole*, so I don't want to discuss its contents here. From the subsequent discussion, I got the impression that most participants supported purpose clauses in principle. However, two participants told the gathering that, when purpose or objects clauses were included in their principal Bills, Government Ministers or officials often hi-jacked the clauses and pressured parliamentary counsel to modify the clauses so that they ended up becoming grandiose political statements rather than carefully crafted objective statements setting out what the Bill was intended to achieve if properly resourced and implemented.

Another kind of inappropriate political intervention occurs when Government Ministers or officials hi-jack a Bill's short title.[1] In my opinion, a short title should be just that — short — and should begin with a word that will make it easy for statute users to find after the Bill has been enacted.

To the extent to which this kind of behaviour is prevalent in Commonwealth legislative drafting offices, this is alarming and reprehensible. Can anything be done to prevent this sort of thing and to secure the independence of parliamentary and legislative counsel as keepers of the statute book? Perhaps it can. The Australian State of Queensland has enacted a *Legislative Standards Act*. Under that Act, one of the functions of the Office of Queensland Parliamentary Counsel is to provide Ministers and members of the Queensland Legislative Assembly with advice on the application of 'fundamental legislative principles'. Fundamental principles are defined in section 4 of the Act as principles relating to legislation that underlie a parliamentary democracy based on the rule of law. Arguably one of these principles is ensuring that legislation is drafted not only unambiguously and in a clear and precise way but also that the law is expressed in a coherent and objective way. In other words, that the legislation is free from subjectivism.

Another function of the Office is to ensure that the Queensland statute book is of the highest standard. Arguably hi-jacking a purpose or objects clause for blatant political party grandstanding would inhibit the performance by the Office of this function.

This may be wishful thinking on my part, but the enactment of similar legislation in other jurisdictions might provide heads of legislative drafting offices with a means of resisting inappropriate intrusions in the drafting process of the kind that I have mentioned above.

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[1] In 1999, the Australian Parliament passed legislation imposing a goods and services tax (GST). Any reasonable person would therefore expect the legislation to be called the "*Goods and Services Tax Act*", but no, the legislation is called "*A New Tax System (Goods and Services Tax) Act 1999*". Numerous other related Acts passed at the same time have titles that begin '*A New Tax System*'. How helpful to users who are searching for a particular statute dealing with taxing goods and services!

Problems in drafting anti-terrorism laws in Australia

Meredith Leigh[1]

What are the "anti-terrorism laws" in Australia?

Today's talk is called "Problems in drafting anti-terrorism laws". However, before I begin outlining some problems in drafting anti-terrorism laws, it is worth considering what constitutes an "anti-terrorism law". Although there have been a number of Anti-Terrorism Bills passed by the Australian Parliament, these have always been amending Bills. Intriguingly, there is no principal Act in Australia called the Anti-Terrorism Act. Rather, the laws that constitute "anti-terrorism laws" in Australia are dotted around the statute book and vary in nature.

By far the most obvious place to look for so-called "anti-terrorism laws" is in the *Criminal Code*. Chapter 5 of the Code is called "The security of the Commonwealth", and most of that Chapter is devoted to various offences related to terrorism.

Indeed, Part 5.3 of the Code is called "Terrorism". Division 101 contains offences relating to terrorist acts; Division 102 contains offences relating to terrorist organisations; Division 103 contains offences relating to financing terrorism or a terrorist. (I will discuss Divisions 104 and 105 in a moment.) However, other Parts of Chapter 5 of the Code can also be described as forming part of the "anti-terrorism laws" despite not forming part of Part 5.3. For example, Division 80 of Part 5.1 of the Code contains the offences for treason and sedition. Division 91 of Part 5.2 contains offences relating to espionage and similar activities. Division 115 of Part 5.4 of the Code contains offences for conduct outside Australia that causes the death or injury of an Australian citizen or resident of Australia.

Clearly, a large part of the "anti-terrorism" laws of Australia are in the nature of offences. However, there are other types of laws that are "anti-terrorism laws" that are not offences, such as Divisions 104 and 105 of the Criminal Code. Division 104 of the Code creates a scheme of control orders which "allow obligations, prohibitions and restrictions to be imposed on a person ... for the purpose of protecting the public from a terrorist act" (see section 104.1 of the Code). Division 105 of the Code creates a scheme of preventative detention orders which "allow a person to be taken into custody

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[1] First Assistant Parliamentary Counsel, Australian Office of Parliamentary Counsel.

and detained for a short period of time in order to prevent an imminent terrorist acting occurring, or preserve evidence of, or relating to, a recent terrorist act" (see section 105.1 of the Code).

The final kind of laws that form part of the "anti-terrorism laws" are laws that relate to the conduct of proceedings related to terrorism offences. For example, the *National Security Information (Criminal and Civil Proceedings) Act 2004* protects information whose disclosure in a criminal or civil proceedings is likely to prejudice national security. Section 15AA of the *Crimes Act 1914* provides that a bail authority must not grant bail to a person charged with a terrorism offence unless the bail authority is satisfied that exceptional circumstances exist to justify bail.

Problems in drafting anti-terrorism laws

Having given a brief overview of anti-terrorism laws, what are some problems raised in drafting those laws?

I'll begin with the 2 most obvious problems in drafting anti-terrorism laws in Australia.

Firstly, Australia has a written constitution. Our federal Parliament only has power to enact laws if it is found in the written Constitution. At the time that I was drafting the *Anti-Terrorism Bill 2005* and the *Anti-Terrorism Bill (No. 2) 2005*, it was not immediately clear that the federal Parliament had power to enact Part 5.3 of the *Criminal Code*. However, the States and Territories can, under section 51(xxxvii) of the Constitution, "refer" their power to make laws on a particular topic to the federal Parliament. It was such a referral that we relied upon in enacting the control order and preventative detention order provisions in the *Anti-Terrorism Bill (No. 2) 2005*.

However, in the 2006 case of *Thomas v Mowbray*,[2] a majority of the High Court of Australia found that the "defence power" in section 51(vi) supported the control order provisions (although interesting, some doubts were expressed about the validity of the reference of powers).

Secondly, there is the difficult issue of how to balance civil, legal and political rights with the constraints on liberty that anti-terrorism laws, by their very nature, require.

However, as today's topic is on "Problems in drafting anti-terrorism laws" I don't want to spend too much time on either of these issues.

Instead, I will begin with a quote about terrorism from Walter Laqueur of the Centre for Strategic and International Studies: "The only general characteristic of terrorism generally agreed upon is that terrorism involves violence and the threat of violence."3

At the heart of this quote is the fact that terrorism is amorphous and inherently difficult to define. The first point I want to make is that many of the problems raised in drafting anti-terrorism laws arise because of the amorphous nature of terrorism.

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2 (2007) 237 ALR 194; 81 ALJR 144; www.austlii.edu.au/au/other/HCATrans/2007/76.html.

3 From article entitled "Terrorism" on Wikipedia, http://en.wikipedia.org/wiki/Terrorism.

The use of the narrative in drafting anti-terrorism laws

The use of the narrative (that is, a prior reference to "a thing" which is followed by later references to "the thing") has become a popular plain English technique in legislative drafting. However, the technique is not without problems, as occurred in the case of some of the terrorism offences in the *Criminal Code*.

The *Security Legislation Amendment (Terrorism) Act 2002* inserted section 101.4 (among other offences) into the *Criminal Code*:

> **101.4 Possessing things connected with terrorist acts**
>
> (1) A person commits an offence if:
>
> (a) the person possesses a thing; and
>
> (b) the thing is connected with preparation for, the engagement of a person in, or assistance in a terrorist act; and
>
> (c) the person mentioned in paragraph (a) knows of the connection described in paragraph (b).
>
> Penalty: Imprisonment for 15 years.
>
> ...
>
> (3) A person commits an offence under subsection (1) even if the terrorist act does not occur.

The Director of Public Prosecutions was concerned about the reference to "the terrorist act" in subsection 101.4(3). He argued that it might imply that, in order for the offence to be committed, the offender had to possess a thing in preparation for a *particular* terrorist act. This potentially made prosecution difficult in a case where, for example, a person possessed explosives, but it was not clear what the person intended to blow up. Indeed, it was the view of the Director of Public Prosecutions that these kinds of cases would be more common than a case where it could easily be proven that the person possessed a thing in connection with a particular terrorist act.

In order to address this concern, we repealed and re-enacted subsection 101.4(3) of the *Criminal Code* in the following form:

> (3) A person commits an offence under subsection (1) ... even if:
>
> (a) a terrorist act does not occur; or
>
> (b) the thing is not connected with preparation for, the engagement of a person in, or assistance in a specific terrorist act; or
>
> (c) the thing is connected with preparation for, the engagement of a person in, or assistance in more than one terrorist act.

The ill-defined nature of terrorism and terrorists meant that the use of the narrative, which assumes a degree of certainty, was problematic.

The use of broad expressions in drafting anti-terrorism laws

As I discussed above, many of the anti-terrorism laws are offences. The Australian Law

Reform Commission ("the ALRC") has reviewed the sedition offences in the *Criminal Code* in a report called *Fighting words: A review of sedition laws in Australia*. The submissions made, and the ALRC's report, are instructive on some other problems that are raised in drafting anti-terrorism laws.

Let's begin by looking at the sedition offence in section 80.2 of the *Criminal Code* (see Attachment A). Many of the comments raised in relation to the sedition offence again related to the extremely broad nature of the offence. Concerns were expressed about the broad scope of the term "urges". It was also submitted that the expression "force or violence" was "unclear and too broad". Further, some people submitted that there should be a requirement for force or violence to be reasonably likely to occur as a result of the offending conduct.[4]

Although the ALRC did not recommend changes a result of these submissions (they did recommend a change that I will discuss below), the submissions all reveal the concern that these offences, which aimed to capture a broad range of conduct, were too broad and potentially ill-defined.

However, drafters are familiar with having to deal with concepts that are broadly expressed and are difficult to define. For example, there are 7 sections in the *Corporations Act 2001* that deal with the definition of "associate". Similarly, the definition of "control" in that Act is "the capacity to determine the outcome of decisions about [an entity's] financial and operating policies". As you can see, this is a very broad and far-reaching definition.

So are anti-terrorism laws any different from laws such as the *Corporations Act 2001*? On one level, I don't think that they are any different. However, the aspect of anti-terrorism laws that is different from many other kinds of laws is that, at least in Australia (and I suspect that it is the case in other countries), they are highly political and very high profile.

The intense scrutiny to which anti-terrorism laws are subject causes further problems in drafting anti-terrorism laws. How do you find the balance between drafting laws that need to be broad and far-reaching in order to be effective and that are subject to intense political and media scrutiny?

Fault elements in drafting offences for anti-terrorism laws

An example of the impact of political sensitivities on drafting anti-terrorism laws arose in the context of the fault elements for the sedition offence in the *Criminal Code*. Section 5.6 of the *Criminal Code* states that if a physical element consists only of conduct, intention is the fault element. If a physical element consists of circumstance or result, recklessness is the fault element. These are known as the "default fault elements": they apply even if they are not specified in the legislation creating the offence. It is our practice to rely on these default fault elements in drafting offence provisions, rather than specifying the fault elements.

Paragraph 80.2(1)(a) of the *Criminal Code* creates an offence of "urging another person

4 ALRC Report 104, Fighting words: A review of sedition laws in Australia, paragraphs 8.59 to 8.75.

to overthrow by force or violence the Constitution". The issue raised by the ALRC was whether this consisted of conduct only, or conduct plus result or circumstance. The Attorney-General's Department submitted that the physical element consisted only of conduct and therefore intention should apply.[5]

However, the ALRC report stated that "where interests in freedom of expression are constrained by criminal sanctions, community perceptions about what the law is and how it operates are especially important. Submissions to the Inquiry emphasised the importance of clarity in promoting community understanding of the law in order to avoid any chilling effect on freedom of expression."[6] The ALRC recommended that the fault element of intention be specified.[7]

Although the Government has not responded to this recommendation, my personal view is that, in hindsight, and despite our general drafting practice, it might have been better to be explicit about the fault elements of the sedition offence to avoid criticism and to provide complete clarity to the public.

Political awareness

Bringing an attuned political awareness when drafting anti-terrorism laws is essential. As drafters, we are constantly making decisions about different approaches to be taken to various provisions. When drafting anti-terrorism laws, the political sensitivity of each approach should be one of the factors taken into account in choosing between approaches. For example, an early version of a "use of force" provision in Division 105 of the *Criminal Code* stated that "an AFP member must not, in the course of taking a person into custody or detaining a person under a preventative detention order do anything that is likely to cause the death of, or grievous bodily harm to, the person *unless* the AFP member believes on reasonable grounds that doing that thing is necessary to protect life or to prevent serious injury to another person". Although this provision closely followed the existing provision in the *Crimes Act 1914* dealing with police powers in arresting a person for an offence, the provision was labelled by the media as the "shoot to kill" provision. As the public and the media were already concerned about the nature of the powers in the preventative detention provisions, the reference (albeit an indirect reference) to lethal force was problematic.

Because of the intense media coverage about this provision, it was changed to state that "A police officer, in taking a person into custody under and in detaining a person under a preventative detention order, has the same powers and obligations as the police officer would have if the police officer were arresting the person, or detaining the person, for an offence." Although this was the same in substance, it was more palatable for the media and commentators by avoiding the reference to lethal force.

Conclusion

I have argued today that the amorphous nature of terrorism can create problems in

5 Op. cit., paragraphs 8.44 to 8.51.

6 Op. cit.., paragraph 8.55.

7 Op. cit., paragraph 8.58.

drafting anti-terrorism offences. Traditional drafting techniques (such as the use of the narrative), which rely on some degree of certainty, might not be appropriate. Words, tests and expressions that are required for anti-terrorism laws need to be broad and are therefore potentially vague. The breadth of these offences is often exposed by a media fascinated by anti-terrorism and government responses to anti-terrorism. However, by bringing an awareness of the political context to the drafting of anti-terrorism laws, and by aiming for as much clarity as is achievable in the circumstances, drafters can help draft anti-terrorism laws that withstand the media spotlight.

Appendix A — Sedition provisions of the Criminal Code

80.2 Sedition

Urging the overthrow of the Constitution or Government

(1) A person commits an offence if the person urges another person to overthrow by force or violence:
   (a) the Constitution; or
   (b) the Government of the Commonwealth, a State or a Territory; or
   (c) the lawful authority of the Government of the Commonwealth.

   Penalty: Imprisonment for 7 years.

(2) Recklessness applies to the element of the offence under subsection (1) that it is:
   (a) the Constitution; or
   (b) the Government of the Commonwealth, a State or a Territory; or
   (c) the lawful authority of the Government of the Commonwealth;

   that the first-mentioned person urges the other person to overthrow.

Urging interference in Parliamentary elections

(3) A person commits an offence if the person urges another person to interfere by force or violence with lawful processes for an election of a member or members of a House of the Parliament.

   Penalty: Imprisonment for 7 years.

(4) Recklessness applies to the element of the offence under subsection (3) that it is lawful processes for an election of a member or members of a House of the Parliament that the first-mentioned person urges the other person to interfere with.

Urging violence within the community

(5) A person commits an offence if:
   (a) the person urges a group or groups (whether distinguished by race, religion, nationality or political opinion) to use force or violence against another group or other groups (as so distinguished); and
   (b) the use of the force or violence would threaten the peace, order and

good government of the Commonwealth.

Penalty: Imprisonment for 7 years.

(6) Recklessness applies to the element of the offence under subsection (5) that it is a group or groups that are distinguished by race, religion, nationality or political opinion that the first-mentioned person urges the other person to use force or violence against.

Urging a person to assist the enemy

(7) A person commits an offence if:
   (a) the person urges another person to engage in conduct; and
   (b) the first-mentioned person intends the conduct to assist an organisation or country; and
   (c) the organisation or country is:
      (i) at war with the Commonwealth, whether or not the existence of a state of war has been declared; and
      (ii) specified by Proclamation made for the purpose of paragraph 80.1(1)(e) to be an enemy at war with the Commonwealth.

Penalty: Imprisonment for 7 years.

Urging a person to assist those engaged in armed hostilities

(8) A person commits an offence if:
   (a) the person urges another person to engage in conduct; and
   (b) the first-mentioned person intends the conduct to assist an organisation or country; and
   (c) the organisation or country is engaged in armed hostilities against the Australian Defence Force.

Penalty: Imprisonment for 7 years.

Defence

(9) Subsections (7) and (8) do not apply to engagement in conduct by way of, or for the purposes of, the provision of aid of a humanitarian nature.

Note 1: A defendant bears an evidential burden in relation to the matter in subsection (9). See subsection 13.3(3).

Note 2: There is a defence in section 80.3 for acts done in good faith.

Enforcement Mechanisms (including Alternatives to Criminal Penalties)

Eamonn Moran[1]

Introduction

Self-evidently, the role of an enforcement mechanism is to ensure compliance with an enacted behavioural rule by those to whom the rule is directed. The legislature has a choice as to whether to use criminal procedures or civil procedures for this purpose or to provide an administrative method of dealing with the breach.

Criminal law covers a vast array of behaviour, from killing your neighbour to parking too close to a letter box. There may be no social shame attached to the offence. Hart noted that "a crime is anything which is *called* a crime"[2]. Criminal law is enforced by the State on behalf of the whole community with the aim of deterrence and punishment. A wide range of penalties are provided, from imprisonment to a community service order or licence cancellation. A high standard of proof is required and a person charged with an offence has access to many procedural protections (such as the right to remain silent and a privilege against self-incrimination). Perhaps because of this legislatures are increasingly seeking other means of enforcing compliance. The purpose of this paper is to focus primarily on two of those means—the use of civil penalties and infringement notice regimes—and refer briefly to certain other enforcement mechanisms. Necessarily the focus that I bring is very much from a Victorian viewpoint but, I suspect, the enforcement mechanisms and the considerations relating to their use are of general application.

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1 Law Draftsman, Hong Kong Department of Justice; at the time of presentation of this paper, Chief Parliamentary Counsel, Victoria, Australia.

2 H. Hart "The Aims of the Criminal Law" (1958) 23 *Law & Contemporary Problems* 404.

Civil Penalties[3]

Civil penalty provisions are statutory provisions that prohibit or require certain conduct and set out a penalty for contravention of the prohibition or requirement. However, contravention is not an offence and a person contravening is not subject to criminal prosecution, conviction and sentence. Instead, a court or tribunal is given power to impose the specified penalty (or a penalty up to the maximum specified penalty) on the contravener, on the application of a person specified in the civil penalty provision. This is usually a government body but may be a private party, for example, a union or employer association or a private individual.

The specified penalty may be a monetary amount including an order for the payment of compensation, a community service order (such as cleaning up an oil spill or publishing a notice regarding the contravention) or another sanction (such as licence cancellation or disqualification from being a company director). A monetary penalty may be payable to the Crown, a government agency or a private party. Injunctive relief may also be available. It is, however, regarded as inappropriate for imprisonment to be available as a civil penalty.

The same conduct may also constitute a criminal offence. There can thus be a choice available to enforcement bodies. A regulatory body may choose to pursue a civil penalty if it is not confident of being able to prove all the necessary elements (including any mental elements) of the offence to the required standard. It may choose to do this even if an absolute liability criminal offence is available. You may even find civil penalty proceedings being launched following unsuccessful criminal proceedings.

The penalty is imposed through the application of civil procedural processes. The standard of proof required is the civil standard (the balance of probabilities) but with a gloss that the court or tribunal must be satisfied to a reasonable level, having regard to the nature and consequences of the facts to be proved. The more severe the conduct and penalty, the higher the level of satisfaction required[4]. It would, of course, be possible for the civil provision to stipulate the applicable standard of proof but, to date, this has not been done in Victoria. Indeed generally legislation providing for civil penalties makes little, if any, provision as to the procedure to be followed.

Various defences may be available to a person charged with a criminal offence. These include defences relying on mental impairment, duress, claim of right, external intervention and, in the case of strict liability offences, a defence of reasonable mistake of fact. There is currently in Victoria no statement of general defences available in civil penalty provisions.

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3 See generally ALRC Report 95, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, December 2002.

4 See *Briginshaw v Briginshaw* (1938) 60 CLR 336. See also *Evidence Act 1995* (Cth.) s. 140.

The Attorney-General's Department of the Commonwealth of Australia has issued guidelines on the use of civil penalty provisions in Commonwealth legislation. They include the following—

The use of a civil penalty provision is most likely to be appropriate when—

- criminal punishment is not merited, or
- the size of the maximum penalty justifies the proceeding, or
- the proceeding is directed against white collar wrongdoing where imprisonment is either not available or inappropriate.

A civil penalty provision should be structured in the same way as an offence setting out all necessary elements. Mental elements should either be expressly applied or excluded (the latter is more readily justifiable because a conviction does not result). The penalty should be adequate for deterrence and will often be higher than a corresponding criminal penalty when the non-presence of a conviction is considered. A higher maximum penalty for a body corporate will often be appropriate. However, imprisonment must not be available as a penalty. The provision should clearly specify who may apply for a penalty and the time within which an application may be made. It should also specify the applicable rules of evidence and procedure. A person convicted of a criminal offence in respect of conduct should not be subject to a civil penalty proceeding in respect of the same conduct and civil penalty provisions should be stayed if criminal proceedings are commenced.

Evidence given in a civil penalty proceeding should be inadmissible in a criminal proceeding and a defence of acting honestly should be provided. The provision should specify a range of considerations that a court or tribunal should take into account in determining the amount of a civil penalty. Provision should be made for a global penalty to cover two or more breaches. A person should be protected from being penalised under two or more civil penalty provisions for the same or substantially the same conduct.

Civil penalty provisions have been creeping into Victorian legislation in recent years[5]. They have been a frequent feature of Commonwealth of Australia legislation for many years. Clearly they are here to stay.

Infringement notices

An infringement notice regime offers an offender the chance to avoid being subject to a criminal proceeding or a civil penalty proceeding by paying an administrative penalty. They are generally used for low-level common criminal offences, such as parking offences.

Under an infringement notice regime a person is served with a notice setting out particulars of an alleged offence and giving the person the option to either pay the

5 *Outworkers (Improved Protection) Act 2003*, ss. 47-8; *Long Service Leave Act 1992*, ss. 88, 92; *Gas Industry Act 2001*, ss. 54-6; *Rail Corporations Act 1996*, s. 38ZZZC-F; *Victorian Renewable Energy Act 2006*, ss. 62, 63, 70-1; *Owners Corporation Act 2006*, s. 166; *National Electricity Law (Victoria*), ss. 58-69; *Consumer Credit (Victoria) Code*, ss. 100-112.

penalty specified in the notice or elect to have the matter dealt with by a court. The penalty is usually significantly less than the maximum penalty that might be imposed in open court, generally no more than 20-25 per cent.

The attraction of the regime lies in avoiding the need for prosecuting agencies to prove the offence and their prevalence takes pressure off the criminal courts.

In Victoria the *Infringements Act 2006* provides a framework for the issuing and serving of infringement notices and provides for their enforcement. Available enforcement mechanisms include warrants to seize property, the detention, immobilisation and sale of vehicles, driver licence suspension, vehicle registration suspension or non-renewal, attachment of earnings or debts orders and the placing of a charge over an interest in land. Offenders may work off outstanding fines under a community work permit scheme. Imprisonment is also an option for non-payment in certain circumstances. Operational guidelines on the use of sanctions have been developed. The use of the more serious sanctions requires court authorisation.

At the initial stages agencies may offer payment plans to people who meet specified criteria. Certain disadvantaged categories of person are automatically entitled to be offered a payment plan. Agencies are required to develop procedures for the internal review of infringement notices. Reviews are generally to be conducted within 90 days.

Particular provision is made to divert out of the infringements system people with "special circumstances" such as mental disability, drug or alcohol addiction or homelessness.

The Attorney General has issued guidelines under the Act to which there is annexed a policy document on infringement offences. The guidelines state that the four main principles used in assessing the suitability of an infringement offence are gravity, clarity, penalty and consequence.

Gravity

The policy states that it is generally inappropriate for more serious or complex offences to be dealt with under the infringement regime. This includes offences with fault elements (subject to a proposed limited trial) and offences that include an exception, proviso, excuse or qualification. Indictable offences, offences where imprisonment is a mandatory sentencing option and offences where there is a victim of violence are also regarded as generally inappropriate.

Clarity

There needs to be clarity about what constitutes the offending behaviour so that it can be adequately described on the infringement notice.

Penalty

As a general rule, the infringement penalty should be no more than approximately 25% of the maximum penalty for the offence and should generally not exceed 12 penalty units (approximately $1,400) for an individual and 60 penalty units (approximately

$7,000) for a corporation.[6] Infringements should not generally apply graduated penalties.

Consequence

A conviction should not be recorded as a result of the payment of an infringement penalty[7]. However, the fact of an offence having occurred can be recorded for certain purposes, for example, the issuing of demerit points.

In Victoria today many hundreds of offences may be disposed of under the infringements regime. Departments wishing to propose new offences to be dealt with in this way must consult the Infringement System Oversight Unit in the Department of Justice and comply with the Attorney-General's guidelines and the policy annexed to it. If the proposed infringement offence is to be made by means of a regulation made by the Governor in Council, the responsible Minister is required to obtain a consultation certificate.

Other enforcement mechanisms

In Victoria Division 2 of Part 11 of the *Fair Trading Act 1999* makes provision for other enforcement mechanisms to deal with contraventions of consumer legislation including—

- written undertakings with respect to contraventions of consumer legislation with which a court may direct compliance
- injunctions to restrain certain conduct
- injunctions requiring the taking of positive action including the institution of training programs, the refund of money, the disclosure of information about business activities or associates or the disposal of goods
- injunctions restraining a person from carrying on business
- the making of an adverse publicity order requiring the disclosure of information or the publication of an advertisement

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6 Penalty units are provided for by s. 110 of the *Sentencing Act 1991*:

"110 Meaning of penalty units

(1) If in an Act or subordinate instrument (except a local law made under Part 5 of the **Local Government Act 1989**) there is a statement of a number (whether whole, decimal or fractional) of what are called ***penalty units***, that statement must, unless the context otherwise requires, be construed as stating a number of dollars equal to the product obtained by multiplying the number of penalty units by the amount fixed from time to time by the Treasurer under section 5(3) of the **Monetary Units Act 2004**.

(2) If in a local law made under Part 5 of the **Local Government Act 1989** there is a statement of a number (whether whole, decimal or fractional) of what are called ***penalty units***, that statement must, unless the context otherwise requires, be construed as stating a number of dollars equal to the product obtained by multiplying $100 by that number of penalty units.".

7 The policy preserves the current Victorian "deemed conviction" for certain drink driving/excessive speed offences dealt with by way of infringement notice but declares that no new infringement offences which record a "conviction" will be allowed.

- orders prohibiting the payment of money or the transfer of other property
- orders appointing a receiver or trustee of property.

The availability of such mechanisms vastly increases the armoury at the disposal of regulators to attack non-compliant conduct without resorting to criminal prosecution or civil penalty action.

Conclusion

A modern complex society with limited judicial resources and an economic need for efficiency must necessarily seek mechanisms for the enforcement of its rules additional to traditional criminal processes. This is acceptable so long as procedures are in place to ensure fairness and that enforcement is carried out in a principled non-arbitrary way. Civil penalties and infringement notice regimes are regarded by regulators as satisfying that acceptability test. However, more needs to be done by way of providing procedural protection and certainty to parties to civil penalty proceedings and continuing vigilance is required to ensure that the infringement regime continues to comply with currently accepted policy guidelines. Close attention also needs to be paid to the development of other enforcement mechanisms to ensure accountability and the equitable application of the law.

The Need for Simplicity in Legislation and Challenges in its Attainment

Fredrick Ruhindi, M.P[1]

Introduction

The art of simplicity is a puzzle of complexity: Doug Horton.[2] The quest for simplicity is the ideal desire for any legislative counsel. Often this desire is frustrated due to limitations brought about by various factors. In the case of developing countries, the quest for simplicity is deterred by a number of challenges. The reality for developing countries is that a number of local communities are faced with poverty, illiteracy, long distances, inadequate access to media and apathy, among other problems.

This paper examines the need for simplicity in legislation and discusses a number of factors that affect its attainment. These include:

- Political machinations.
- Limitation of time and human resources (not enough legislative counsel) yet the Executive has a busy legislative schedule.
- Legal compatibility; the need to avoid ambiguity.
- The requirement for harmonisation of law and policy brought about under regional integration arrangements and globalisation.
- Limitations arising from judicial interpretation — whether liberal or strict; and
- Use of the active versus passive voice-usually determined by mother tongue influence.

This paper addresses the qualities of simplicity, namely:

- Economy of language, directness, familiarity of language and orderliness.

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1 Deputy Attorney General and Minister of State for Justice & Constitutional Affairs, Republic of Uganda.

2‘ Doug Horton Quotes’, posted at http://www.brainyquote.com/quotes/quotes/d/doughorton152740.html

- The conceptual and practical difficulties in attaining simplicity in addition to addressing the issue of ensuring certainty of legal effect in legislation.

This paper will further tackle the duty of legislative counsel to promote simplicity. Focus will also be on the merits of using simple language, the impact of simplicity on interpretation of laws and their enforcement and suggestions on the way forward. Some issues can only be better explained by drawing examples from legislative drafting activities at local government level.

Simplicity in legislation and the role of legislative counsel

Simplicity in Legislation

Communication is vital for good governance to prevail and one way of achieving this is through sharing of information and getting feedback. The rule of law requires that legislation should be drafted in such a way as to be clearly understood by those affected by it. The government on its part has an obligation to ensure that the Constitutional provision that all power vests in the people is obliged with. To this end, the lawmaking process must be de-mystified and as many people as possible be involved in the conception and delivery of any proposed laws so that it can be owned by all. Simplicity in legislation is very important in this regard. The subjects of any given law should be able to comprehend it, appreciate its objectives and be able to evaluate it- which is something crucial to the law reform process. The use of plain language is therefore encouraged.

Simplicity should not change the intent of the sponsors of the proposed legislation or that of the legislature. Over simplicity can lead to distortion of the proposal by resulting in ambiguity and therefore confusion as to how the law should be enforced and interpreted. What is important is to use short, well-constructed sentences; avoid jargon and unfamiliar words; avoid double/triple negatives; use the active voice instead of the passive; keep related words together and use parallel structures to express similar ideas.

Simplicity demands:

- Economy of language which requires the use of only what is required to bring out the meaning.
- Directness, in that the text is straightforward and avoids longwinded and indirect sentences.
- Language that uses familiar words in preference to that which does not.
- Orderliness whereby words are, where necessary, organised in a logical and chronological sequence throughout the legislative document.
- Consistency in language and style.

The Role of Legislative Counsel

It is the duty of legislative counsel to ensure that simplicity is attained otherwise the effort exerted on drafting legislation will have been wasted. The legislative counsel should be able to balance the sometimes conflicting and confusing interests of —

- the Executive, as sponsors of proposed laws, policy makers and law enforcers;
- the Legislature, as the primary audience and law-making body;
- the Judiciary, as interpreters of law and who have the capacity to “legislate

from the Bench" by virtue of their interpretation of a given provision;

- the public, as subject of a given law; and
- lawyers and paralegal staff, who depend on a correct interpretation of these laws to ensure good service delivery.

Legislative counsel have a duty to reconcile all tenets of a well drafted piece of legislation namely the need for clarity, avoidance of ambiguity, making law applicable and directly relevant to a given society and avoidance of unnecessary detail. Legislative counsel have to adopt an attitude that requires simplicity. The challenge to legislative counsel arises from the fact that they lack a legislative mandate and any amendments that are passed on the floor (at the Committee stage), depending on the available timeframe, may to a greater extent take a form that may depart from what the proponents of simplicity argue for.

The impact of simplicity of legislation on interpretation and enforcement

Simplicity eases interpretation of laws and their enforcement. This is so especially in the case of subsidiary legislation, namely guidelines, bye-laws and ordinances passed by local government councils, and where there are many non-legal officers implementing laws who need to quickly understand what is required of them under the law and cannot easily access the Attorney General's Chambers for counsel or guidance. Field officers in some departments may take decisions or refrain from doing so subject to consultation with the legal officers in the department or the office of the Attorney General.

Simplicity may prevent unnecessary litigation and help reduce costs in legal fees in cases where all that is needed is to read and understand a legal provision.

Interpretation of the law affects its enforcement in any society. How well the subjects of a law understand what is required of them greatly impacts on its enforcement. Law enforcement officers should be able to appreciate what the objective is; the extent of their mandate and the proper procedures to follow in executing that mandate. This can be made easy by having simplicity in drafting. Enforcement becomes easier when both the subject of the law and those charged with enforcement are in a better position to understand its provisions.

Anticipated readership influences the decision whether to have simple language or not. What is familiar to one category of readers may be far-fetched to another. The concept of clarity is subjective to the extent that it depends on the knowledge, abilities, experiences and state of mind of the person to whom the information is addressed.[3] For example in Uganda, the *Marine Insurance Act, 2002* (Act No.11 of 2002), which uses many technical words and expressions which the legislative counsel may find difficult to exchange for simpler ones, is a good example. Legislative counsel cannot afford to have a genre (media through which members of professional or academic communities communicate with each other) since the law is expected to have a broad readership. Foreign phrases such as *mutatis mutandis* should be discarded in favour of the English

[3] Gérard Caussignac, *Clear Legislation*, The International Co-operation Group, posted at www.justice.gc.ca/en/ps/inter/caussignac/notes.html

translation. A quick glimpse at the Civil Procedure Rules of Uganda reveals that legal practitioners are the anticipated readers. The ordinary man or woman on the street may fail to make sense of the contents of such legislation let alone what is expected of them. If legislative counsel have an attitude to drafting that puts the ultimate reader's interest ahead of all others, an immense problem is overcome and the issue becomes what steps can be taken to make difficult concepts easier to understand.[4] Byelaws are and should be drafted in simpler language most probably in consideration of the people at local government level whom the law affects directly.

The quest for simplicity: conceptual and practical difficulties

Ideally, the law should at all times be expressed in the simplest terms in such a way as to ensure that the intended audience should be able to comprehend it. The poet Boileau said, "What is clearly thought out is clearly expressed, and the words to say it come easily."[5] However, a multitude of difficulties arise to hamper the attainment of simplicity. These difficulties are further exacerbated by conditions prevailing in developing countries. Uganda, as an example of a developing country, has 69 % literacy rate and a ranking of 145 on the Human Development Index. Some areas are hard-to-reach even through improved telecommunication. This affects the possibility of getting timely advice from the offices of the Attorney General (Principal Legal Adviser of the Government) on pertinent issues.

As already pointed out before, the legislative counsel is faced with a number of challenges both conceptual and practical, which make achievement of simplicity a major challenge.

The principles governing legislative drafting demand that a legislative counsel ensures clarity and avoids ambiguity, the use of archaic language, complex grammatical structures, lengthy sentences and punctuation that makes the sentence incomprehensible. These demand that the legislative counsel should conform to certain principles and should not simplify legislation beyond a point that may jeopardise the whole process. Clarity is preferred at all times even if this may result in lengthy sentences.

With globalisation and the Information and Communication Technology (ICT) revolution that have reduced the whole world into a "global village", it has become easier for writers and by more so legislative counsel to adopt and use words which originate from foreign phrases and adjusted to suit English language readers. The adoption of the use of foreign words and expressions introduce unnecessary and superfluous words and expressions, which in some circles are considered to result in an increase in slovenliness, vagueness, ambiguity and verbosity among others.[6]

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4 David Elliot; *Using Plain English in Statutes*, Clarity's submission to the Hansard Society for Parliamentary Government, June, 1992 www.davidelliott.ca/papers/usingplain.htm

5 Nicolas Boileau, *L'Art Poétique*, 1674

6 See George Orwell, "Politics and the English Language", in *Shooting an Elephant and Other Essays*, Secker and Warburg, London, 1950, posted at www.orwell.ru/library/essay/politics/english/e_polit

The bill sponsor's or requestor's perception of what the law should read like can be a source of contention during the drafting process and impact on the quality of language used. David Hull captures this well in his observation that, for a law to work its legal spell, it must resort to incantation is surprisingly widespread and that people who are not lawyers sometimes become uneasy if they think a draft does not have a legal flavour[7] Hull concludes that it is not universally understood that the best way to give instructions, and to comment on drafts, is in everyday language.[8]

Another factor that arises during the drafting process is the nature of the subject matter. The choice of words is often dependent on the nature of the subject, simple versus complex especially in the areas of science and technology and procedural aspects. While the legislative counsel's duty is to simplify even the most complex subject and make it comprehensible to the target audience, technical areas that cannot be over-simplified may have to be addressed in such a way as to ensure that accuracy and clarity are not lost.

Some subjects are technically complex and it may be impractical to use simple language. Many critics argue that complexity should reside in the subject matter but not in the language used. This position is not as easy to attain. If these cannot be drafted in a simple way, there is no choice but to resort to a method that best brings out the desired meaning. The question would be whether to draft in simple language the bare necessities and leave the details for inclusion in subsidiary legislation, most times targeting technical persons and practitioners. Complexity of subject matter encourages the use of purpose statements and preambles that may be wordy and ambiguous, resulting in inconsistency at times. Laws relating to new concepts usually have preambles and purpose sections to make it clear to the reader what the intention of the legislature and the Executive are. In Uganda examples of new concepts are environmental management, decentralisation and natural resources management among others.

To ensure that certainty and clarity are achieved, language will not be over-simplified. In the schedules to the Convention on the Ban of Trade, Transportation of Hazardous Wastes and related regulations passed in Uganda, under the National Environment Act, Cap. 153 of the laws of Uganda language specific to hazardous waste management is applied. It is difficult to imagine a local government council attempting to reduce these provisions in byelaws to be applied at district and sub-county level. The issue will be whether simplification would not result in change of meaning among others.

The directness that is a desired element of simplicity is greatly affected by mother-tongue influence. An example is drawn from Uganda where, although the official language of communication is English, there is a multitude of indigenous languages that are commonly used by the vast majority of the people. Most, if not all, indigenous languages in Uganda and East Africa as a whole[9] communicate largely in the passive

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7 David Hull, "Draftsmen's Devils", *Jersey and Guernsey Law Review*, Volume 2 Issue 3, October 1998, posted at http://www.jerseylegalinfo.je/Publications/jerseylawreview/Oct98/draftmens_devils.aspx

8 Ibid.

9 Acholi and Luo in the Nilo-Saharan category and others in the Niger-Congo category,

voice. The use of passive voice introduces the use of many words and this serves to reduce the direct impact that a legislative sentence is intended to have on the reader, in addition to limiting the role of the actor or subject of the law.

Legislative timetables are most often over-crowded, usually hectic and high-pressured.[10] Most law makers are only in a position to handle legislative work during a particular session and have to divide their time between committee work, floor debates/plenary, question time, hearings, international commitments, obligations in the constituency among other activities. By necessary implication, legislative staff, including the legislative counsel, who is involved in these activities, may have great problems trying to handle different kinds of assignments, including ensuring that the tenets of simplicity in legislation are respected and applied throughout the legislative drafting process. In such conditions, it is very tempting for one to resort to precedents so that one does not exercise the right to draft simple laws. It is not uncommon to hear, "Why re-invent the wheel?"

When a State participates in regional integration initiatives, there are repercussions that most definitely affect the way of doing things at different levels. Uganda for example, is a member of the East African Community together with Kenya, Tanzania, Rwanda and Burundi. The Treaty establishing the Community provides for harmonisation and approximation of laws and policy and at that level it may not be easy to simplify beyond what will be acceptable.[11] The case would be different if common standards that address simplicity have been developed and are applied.

Furthermore, the proponents of globalisation have spearheaded drives for uniform laws and thus propagated model laws. These laws if not drafted in simple format may have effect on what is drafted at national level for those countries that choose to adopt them. Examples of such model laws include the UNCITRAL Model Law on International Commercial Arbitration, 1985, the United Nations Model Terrorist Financing Bill, 2003 (for common law systems), the United Nations/International Monetary Fund Model Legislation on Money Laundering and Financing of Terrorism 2005, (for civil law systems), the Model Franchise Disclosure Law (2002), the United Nations Model Bill on Money Laundering, Proceeds of Crime And Terrorist Financing (2003) and the United Nation Model Law on Competition to mention but a few.

Since the art of legislative drafting is acquired over time, central and local governments are handicapped if the number of staff dedicated to that task is inadequate. Most governments worldwide lack adequate numbers of legislative counsel at different levels of government most especially at local council level. At international level, the Commonwealth Association of Legislative Counsel has about 800 members, of whom 27 are from Uganda (10 in the Parliament, 7 at the Ministry of Justice).

Political machinations arise from the desire to promote political interests usually at all

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predominantly the Bantu language group of Central, Eastern and Southern Africa.

10 See Kaare Strom, *Parliamentary Governments and Legislative Organisation*, posted at http://www.uni-potsdam.de/u/ls_vergleich/Publikationen/Parliaments/chapter02.pdf

11 Treaty establishing the East African Community posted at http://www.iss.co.za/Af/RegOrg/unity_to_union/pdfs/eac/EACTreaty.pdf

costs and such considerations usually affect how law is drafted, interpreted and enforced. This is sometimes manifested through laws drafted to promote a particular political agenda such that questions of simplicity or complexity do not arise. Politicians prefer politically attractive laws. This is worse at local government level where district councillors are closer to the people and very much involved in the law-making and decision making process.

Increased public participation and the demands of democracy mean that lobby groups and other categories of people have a greater interest in how the final text of a law comes out. The increasing involvement of lobby groups and other external interested parties can mean that changes in particular provisions of a Bill may be sought to emphasise the importance of a range of varying agendas can lead to certain provisions being developed in amore expansive style.[12]

In Uganda, the draft Domestic Relations Bill (an amalgamation of all domestic related laws, namely marriage, divorce, separation, inheritance and property rights) is one such law that has attracted tremendous attention from all corners of society. To make the law more acceptable it may be tempting to have purpose statements to justify and explain the law sometimes in a lengthy and wordy manner or, indeed, to have separate bills instead of an omnibus one. The international community, mainly the development partners such as the International Monetary Fund, the World Bank also have an impact on the development of a law.

If judicial interpretation of statutes, whether strict or liberal, is taken into consideration, there is a tendency of legislative counsel consciously or not, to err on the side of caution and draft provisions that leave no shadow of doubt as to the meaning. Writing legislative discourse in terms of simple principles without adequate specification of the required scope, on the other hand, means giving wider powers to the judges and the courts to interpret the intentions of the legislature, which is not considered highly desirable in parliamentary democracies.[13] In such instances the legislative counsel labours to clearly bring out the purpose of the legislation so as to counter unfavourable interpretation by the judiciary and so may choose to resort to lengthy explanations and purpose statements.

There are challenges to simplicity in legislation that are brought about by weaknesses arising from the socio-economic limitations of a developing country. For developing countries, challenges extend from lack of access, lack of communication resources, weather vagaries, political unrest (a case in point is Northern Uganda, which has been at the centre of conflict for the last 20 years or so) to limitations of low average income, a limited industrial base, low adult literacy rates and low levels of human development, the effect going to lower levels for subsidiary legislation. John Wilson correctly points out a multitude of challenges, including physical and organisational and lack of scrutiny facing legislative counsel in the developing world, which challenges,[14] make it

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12 Brian Hunt, *Plain Language in Legislative Drafting: An Achievable Objective or a Laudable Ideal*?, posted at http://www.plainlanguagenetwork.org/conferences/2002/legdraft/legdraft.pdf

13 Vijay K. Bhatia; *The Power and Politics of Genre*, v16 n3 p359-71 Nov 1997, Blackwell Publishers Ltd. p.366

14 John Wilson, *Contrasts – The Challenges of Drafting in a Developing Country* [A paper given at

very tempting to depend solely on precedents picked from whatever place that these can be obtained, which by all means affect how well a legislative document turns out. Even with a literacy rate of 69% in Uganda, things are not very optimistic. The United Nations Educational Scientific and Cultural Organisation has defined literacy as the ability to identify, understand, interpret, create, communicate and compute, using printed and written materials associated with varying contexts and involves a continuum of learning to enable an individual to achieve his or her goals, to develop his or her knowledge and potential, and to participate fully in the wider society.[15] The question is whether the people with basic literacy are capable of comprehending material that is developed within the legislative context.

Other limitations at local government level are a direct result of weaknesses in implementing the decentralisation policy. The Government of Uganda has decentralised power with the intention of bringing services closer to the community and increasing efficiency, innovation and accountability. However, it is clear that as issues rise through the sub-county and district levels there is more politics involved which affects the quality of law making at that level. [16]

The way forward

Each country should develop standards and a model that promotes simplicity and use of plain language so that legislators at all levels of government have a point of reference.

The relevant governments have to increase capacity building efforts so that there are more legislative counsel available to handle legislative drafting tasks countrywide, especially in the most crucial offices.

In particular it is necessary for the working conditions of legislative counsel to be improved and kept under constant review as far as training, remuneration, privileges and status are concerned in order to ensure that the right calibre of dedicated persons are employed and their services are retained and they are thus not attracted by higher remuneration and more favourable conditions to the other branches of the public service or to private legal practice. Continuous training will ensure that the legislative counsel are kept abreast of developments and best practices in legislative drafting. In short, legislative drafting should be promoted as a good career.

The other factor closely related to training is the computerisation of the legislative drafting office. Whereas the UK has adopted software to assist in the efficiency of the drafting office, Uganda is still lagging behind. The availability and active use of computer programs and software to aid drafting is urgently required if a drafting office

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the Triennial Conference of the Commonwealth Association of Legislative Counsel (CALC) London, September 2005] posted at http://www.lawdrafting.co.uk/lighter/contrasts.php

15 Education for All Global Monitoring Report 2005, posted at http://portal.unesco.org/education/en/ev.php-URL_ID=35964&URL_DO=DO_TOPIC&URL_SECTION=201.html

16 An Assessment of Civic Literacy in Uganda's Local Government, posted at http://www.royalroads.ca/NR/rdonlyres/4864D118-CD0F-43A5-8F1F-2F331FA8F3A1/0/CanadaCorpReportFinal.pdf

is to improve on its efficiency.

Information and Communication Technologies (ICT) applications can be used to deliver all kinds of services in a wide range of sectors including health, agriculture, education, public administration and commerce. With the assistance of International Telecommunications Union, Multipurpose Community Telecentres projects have been deployed in a number of countries, providing access to communication facilities and enabling the delivery of services for health, education and agriculture, enhancing business activities, as well as facilitating access to government services.[17] There is need to apply ICT to the legislative drafting so that those in remote or hard to reach areas can be assisted with drafting and interpretation through online mechanisms. Through the same medium, the quality of legislation can be controlled.

There is urgent need to address the problems that generally affect the society such as illiteracy and lack of access to basic services such as communication.

Generally, simplicity can be achieved if the challenges that stand in the way are minimised. This has to come through deliberate attempts, programmes and plans of action.

[17] Multipurpose Community Telecentres and Multipurpose platforms; posted at http://www.itu.int/ITU-D/e-strategies/MCTs/

Law-drafting master class at the 2007 CALC Conference

Report and commentary by John Wilson[1]

Background

Sometimes at CALC Conferences there has been a drafting Masterclass, usually on the final day, when it can be regarded as a form of entertainment, or at least of relaxation for the audience. In Nairobi, the Master Drafting Class took place on Saturday 15 September. It was chaired by Don Colagiuri and the participants were Don Macpherson (Bermuda), Ben Piper (Melbourne), Gilbert Mo (Hong Kong) and John Wilson (UK-based freelance drafter).

For a law drafter to take part in a Masterclass in front of other drafters from around the Commonwealth can be rather unnerving — similar, no doubt, to a young aspiring musician taking part in a class with a world-renowned retired professional. The difference is that no-one takes on the role of the all-wise teacher, and all those taking part are supposed to be *par inter pares* (equal among equals, in Plain English.)

The Masterclass took the form of a series of presentations of alternative ways of solving a drafting problem set by Janet Erasmus of Canada. Unfortunately, Janet could not be present in Nairobi, but her work in producing drafting instructions for the Masterclass was a valuable contribution to the proceedings.

The drafting problem

Over the past few years I have been working on a "model" Bill for the English-speaking countries of the Pacific region (other than Australia and New Zealand.) It is called the regionally harmonised Biosecurity Bill and its aim is to replace animal and plant quarantine laws in the region. It is intended to modernise and harmonise laws on the trans-boundary movement of animals and plants, and internal control of animal and plant pests and diseases. Pacific island countries, which have mainly agricultural economies, and which are vulnerable to invasions of pests and diseases, need effective laws on this topic. (Anyone who travels in those parts knows how strict the border controls can be.) There are also a number of international agreements that need to be

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[1] Consultant legislative counsel, United Kingdom.

implemented in the legislation of the various countries. Hence the need for a draft of a Bill that can be adapted for use by all 13 client jurisdictions.

The CALC Council had earlier decided that the subject of the Masterclass should be derived from my draft Biosecurity Bill. The feature of the Bill that Janet chose as the problem for the Masterclass was the way it deals with the importation and export of goods by mail. She created a scenario of the Biosecurity Act having been in place in OurCountry for a year, but without any provisions relating to mail.

The Drafting Instructions required the drafting of provisions to control the importation and exportation of animals and plants and their products by mail. They contemplated a scheme for bringing mail within the border control system, by having a holding area and inspection system for incoming and outgoing mail. This would reduce the biosecurity risk for OurCountry and maintain good international relations.

The drafting solutions

As might be expected, the 4 drafters taking part in the Masterclass produced 4 rather different solutions. All 4 drafters produced an amendment Bill, and all 4 amended sections 26 to 30 of the OurCountry Biosecurity Act. These are the sections dealing with biosecurity points of entry and departure and biosecurity holding areas.

Don Macpherson

Don's draft Bill began with a Preamble, presumably because that is the preferred style in Bermuda. It stated that "it is desirable to bring mail within OurCountry's border control system in order to reduce the biosecurity risk and to foster better international relations." (The DIs had mentioned both points.)

Don's amendments added a power to designate points of entry or departure limited to the entry or export of regulated articles by mail (Regulated articles are animals and animal products and plants and plant materials.) The Bill added a requirement to consult the officers responsible for the Post Office Act when making such a designation.

Don also included some provisions about declarations in respect of outgoing mail, to satisfy the requirements of receiving countries, and the powers of biosecurity officers to open and destroy mail.

Ben Piper

Ben's draft Bill did not have a Preamble, but did have a "Purpose and outline" clause as clause 1. Subclause (2) of Ben's draft stated that "in outline, this Act inserts provisions into the Biosecurity Act —

(a) that require a person who posts an item of mail to attach a declaration; and

(b) that provide for the inspection of all mail in specially designated areas; and

(c) that provide for the opening of mail that contains, or is reasonably suspected of containing, a regulated article.".

(Ben tells me that Outline Clauses are widely used in Australia as a device to give readers "up-front" context in the Act itself. They do not replace the Explanatory

Memorandum, which is not usually written by the law drafters and not published with the Bill once it becomes an Act.)

Ben's draft created a whole new Part X of the OurCountry Biosecurity Act, with 5 Divisions, dealing with mail contents declarations, mail inspectors, the designation of mail biosecurity holding areas, mail biosecurity clearance rules and inspection of mail.

Gilbert Mo

Gilbert's amendment Bill was done in the preferred style for the Hong Kong Special Administrative Region. It set out the sections of the OurCountry Biosecurity Act showing the changes if the amendments were made. Gilbert added some new definitions of "mail" and "biosecurity mail inspector" (as did Ben) and provided for the designation of a mail holding area. Like Don and Ben, Gilbert created rules about declarations on outgoing mails and the inspection of mail items. His draft included exemptions in relation to small mail items sent for personal reasons, on the basis that the biosecurity risk of such items is small. However, the draft included a caveat about a belief of a threat, no doubt because a regulated article can range from an elephant (which can't be sent by post) to spores of anthrax (which can.)

John Wilson

My own draft began with an Arrangement of Clauses (rather than a Table of Contents, as in Ben's draft.) But there were only 4 clauses, making it the shortest draft. This was not because of laziness but because I was more aware than the other drafters of other provisions of the OurCountry Act (assuming it followed my Biosecurity Bill) which give power to biosecurity officers to open "containers", including packages and therefore mail. For this reason I did not include in my draft any fresh powers of inspection in relation to mail items. As regards, the need for a declaration on outgoing mail items, I rather dodged the issue by relying on the Minister's regulation-making power. I also relied on the existing offence of making a false declaration and did not make any special provision in relation to false mail declarations.

Unlike the other drafters, I proposed that a mail exchange could be an actual point of entry or departure, and not merely a holding area, as this had been agreed in the Pacific regional workshops on the model Biosecurity Bill. However, in the light of the masterclass, I subsequently revised the model Bill and reverted to the concept of a mail exchange as a biosecurity holding area. The mail bags will still have to come in through a point of entry although they can go direct to a mail exchange for biosecurity inspection.

Conclusion

As mentioned above, all 4 Masterclass participants came up with 4 different but equally viable ways of achieving the same result. This shows that drafting is still an art and not a science. Ben's draft could be said to represent the high water mark for a complete statement of the rules about sending regulated articles through the mail, which is appropriate for a draft from Australia, which has the strictest biosecurity controls. My draft took the line of least resistance, because I was looking for a simple statement of the rules and a minimum of change to a model that had already been agreed.

This Masterclass was perhaps unusual in being based on actual drafting work in progress, and I must say that it was a helpful exercise for me. The participants can feel

that they have contributed to the improvement of the Pacific regional version of a Biosecurity Bill. If they find their mail intercepted when they receive parcels of fans or mats from friends in the Pacific, they will know who to blame.

Version 1 — Presented by Don MacPherson

A BILL

entitled

BIOSECURITY AMENDMENT ACT 2007

WHEREAS it is desirable to bring mail within Bermuda's border control system in order to reduce the domestic biosecurity risk and to foster better international relations:

Be it enacted by The Queen's Most Excellent Majesty, by and with the advice and consent of the Senate and the House of Assembly of Bermuda, and by the authority of the same, as follows:

Short title

1 This Act may be cited as the Biosecurity Amendment Act 2007.

Amends section 26

2 Section 26 of the Biosecurity Act 2007 (hereinafter referred to as "the principal Act") is amended —

(a) in subsection (2) —

(i) by inserting immediately after paragraph (b) the following —

"(ba) export of regulated articles by mail;" and

(ii) by inserting immediately after paragraph (c) the following —

"(ca) entry of regulated articles by mail from particular countries;" and

(b) in subsection (3) —

(i) by deleting the words "or the Minister responsible for the administration of" and substituting a comma; and

(ii) by inserting immediately after the words "the *Maritime Act*" the words "or the *Post Office Act*".

Amends section 27

3 Section 27 of the principal Act is amended —

(a) in subsection (1) —

(i) by substituting a semicolon for the full stop after paragraph (b); and

(ii) by adding immediately after paragraph (b) the following —

"(c) designate an area in a post office or an area of land adjacent to land designated under paragraphs (a) or (b) as a biosecurity mail holding area in which incoming or outgoing mail may be held for inspection pending biosecurity clearance or other disposition under this Act."; and

(b) in subsection (2) —

(i) by deleting the words "or the Minister responsible for the administration of " and substituting a comma; and

(ii) by inserting immediately after the words "the *Maritime Act*" the words "or the *Post Office Act*".

Note – Repeal Minister's order under section 31(1) of the Act [exempting mailbags from being held for inspection in biosecurity holding areas and from the clearance procedures that apply to regulated articles imported or exported by other means].

Inserts sections 29A to 29C

4 The principal Act is further amended by inserting immediately after section 29 the following —

"**Declaration respecting outgoing mail**

29A (1) A person must not send or attempt to send anything by mail to a destination outside Bermuda unless the person has affixed to it a signed declaration in such form as may be established by the Minister —

(a) indicating that the mail does not contain a regulated article; or

(b) indicating that the mail does contain a regulated article and identifying it.

(2) A person who fails to affix a declaration as required by subsection (1) or who makes a false declaration commits an offence.

Illegal mailing of regulated articles to Bermuda prohibited

29B (1) A person must not mail a regulated article to Bermuda or have a regulated article mailed to Bermuda from outside the country.

(2) A person must not mail a regulated article or have a regulated article mailed to Bermuda from a country listed in the Schedule, unless the person does so in compliance with the law of that country respecting the export of regulated articles by mail.

(3) A person must not attempt to mail or have a regulated article mailed to Bermuda from outside the country in contravention of subsections (1) or (2).

(4) A person who contravenes any of subsections (1) to (3) commits an offence.

Schedule

29C The Minister may, by order, add to or delete from the Schedule the name of any country that —

(a) enters into an agreement with Bermuda respecting biosecurity controls on regulated articles in the mail; and

(b) has in place controls that are roughly equivalent, in the Minister's opinion, to those imposed by this Act."

Inserts sections 30A to 30C

5 The principal Act is further amended by inserting immediately after section 30 the following —

"Powers of authorized postal officials

30A For the purposes of the administration and enforcement of this Division, a postal official authorized by the Director of Biosecurity to inspect mail has all the powers of a biosecurity officer.

Power of biosecurity officers to open personal mail

30B (1) A biosecurity officer may only open a personal letter if the officer has reason to believe that the letter poses a biosecurity threat.

Power of biosecurity officers to destroy mail

30C (1) Subject to subsections (2) and (3), a biosecurity officer may destroy mail if the officer has reason to believe that —

(a) it contains a regulated article; and

(b) one of the following applies to the mail —

(i) it does not have the declaration required by section 29A(1) affixed to it;

(ii) it has a declaration affixed to it that the officer has reason to believe is false;

(iii) it was mailed to Bermuda from a country listed in the Schedule in a manner that the officer has reason to believe contravenes the law of that country respecting the export of regulated articles by mail;

(iv) it was mailed to Bermuda from a country not listed in the Schedule and the officer has reason to believe that the mail poses a biosecurity threat.

(2) Before destroying the mail, the biosecurity officer must send a notice by registered mail to the person who appears to have originated the mail and the person to whom it is addressed, if known, informing them of their right to object in writing to the destruction of the mail.

(3) A biosecurity officer may only destroy the mail if —

(a) the addresses of the originator of the mail and the addressee cannot be ascertained;

(b) no objection to a notice sent under subsection (2) is received within 30 days after sending the notice; or

(c) a written objection to the notice is received but, in the opinion of the Director of Biosecurity —

(i) the objection is frivolous, vexatious or otherwise without foundation; or

(ii) the interest in protecting Bermuda against the threat that the mail poses to its biosecurity outweighs all written objections made to the destruction of the mail pursuant to this section."

Adds Schedule

6 The principal Act is further amended by adding the following Schedule —

"SCHEDULE

(Sections 29B and 29C)"

Commencement

7 This Act, or any provision of this Act or of the Act amended by this Act, comes into operation on such day or days as the Minister appoints by Notice in the Gazette.

Version 2 — Presented by Ben Piper

The Biosecurity (Amendment) Bill 2007

Commentary

General preliminary comments

The instructions are not in a state from which I would normally start drafting[2]. In fact the state they are in clashes with the natural law on the conservation of energy as applied to drafting (also known as the 1st of Ben's Laziness Principles ("Do it only

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[2] Incidentally, this is not intended as a criticism of the instructor in this case – I believe the instructions have been deliberately drafted to bring out issues relating to the adequacy of instructions.

once")). Thus I am not usually keen on drafting something that may well have to be significantly redrafted. However, as in this case I did not, and do not, expect to ever hear from anyone in OurCountry again, I was happy to proceed (of course, Kenya is another matter — there I'm hoping to hear from lots of people).

To even begin contemplating these instructions I would, in the real world, first have to have a much firmer grasp of the context in which the instructions are given. In particular, in a case like this I would first like to have read the *Biosecurity Act 2007*, and I would also like to have had OurCountry's Customs Act and its Postal Act available for scrutiny. Many countries already have mail declaration provisions, and I would have been surprised if OurCountry didn't have something similar. There may have been a chance to piggyback on these existing provisions (= less work, in keeping with the second of Ben's Laziness Principles ("Don't do what you don't have to do"). At the very least it is probable that the amending Bill would have to make some provision for fitting the new requirements in with existing requirements.

For the purposes of this exercise I have assumed that there is nothing of relevance in any of OurCountry's other legislation (other than, of course, the *Biosecurity Act 2007* itself). In saying this I am aware that the instructions do not support this assumption (as the first paragraph suggests that there may be provisions of interest in the Customs Act), but there is no other assumption that I can make in the circumstances of this exercise.

The sort of context I have just discussed is not something I would necessarily have expected my instructor to assist me with. Of course, in an ideal world it is the first thing an instructor should tackle (and it is difficult to see how one can come up with sensible instructions without tackling it), but sadly I have been drafting too long, so my expectations of instructors in this regard are not high. There are, however, some preliminary issues on which I would like more detailed instructions.

The principal matter on which I would like more clarity is not obvious on the face of the instructions. The 2 obvious issues, namely whether or not mail will need its own holding areas and inspectors, are not particularly troubling in that they are relatively incidental issues and can be changed relatively easily (although in real life, the Laziness Principles would require me to make a serious attempt to get an early decision on these issues, as I am not keen on doing any more drafting than is absolutely necessary, and even changing incidental matters can cause the Drafter's Curse (renumbering)). (In the draft I have referred to "mail inspectors", but I have not included any appointment provisions.)

The issue that causes me the most concern is whether the proposed amendments are to apply to international couriers and express companies (such as FedEx and UPS). The instructions only seem to contemplate "official" mail, but in terms of the apparent policy intent of the amendments, it is difficult to see why they should only apply to "official" mail. (One assumes that if bioterrorists become aware that OurCountry's biosecurity laws only apply to "official" mail, they would have no qualms about FedExing whatever nasties they intend to dispatch by mail.)

Given that such couriers and companies live or die on the speed with which they carry out deliveries, it is also eminently foreseeable that there may well be some serious kicking and screaming if the amendments are intended to apply to them, as having to submit their deliveries to government-appointed inspectors working on typical government industrial conditions may not fill them with joy. (In real life, if one raises an issue such as this with an instructor who has not previously contemplated it, the

response is usually along the lines of "Yes, it would be a good idea, but there's now not enough time to do the policy work that would be needed to support it".)

From my point of view this issue is critical, because depending on whether or not the amendments are to apply to private entities fundamentally affects the drafting of the most critical parts of the amendments. (For starters, I couldn't use the term "mail", or if I did, I would have to attempt to define it substantively.) For the purposes of this exercise I had intended to assume that private entities were to be included, but I very quickly realised once I started down this path that I really needed some quite detailed instructions on how these entities operate to be able to do anything sensible. Just the basic concept of what is mail cannot be tackled unless one has some idea of exactly what private entities are prepared to deliver. If, for instance, there are companies that would be prepared to deliver shipping containers for clients, an issue arises as to how to draw the line between an express company and an exporter/importer. Thus, again employing the 2nd Laziness Principle, I quickly decided to confine the amendments to OurCountry's "official" mail service.

There are some other overarching issues that I would normally also want to discuss with my instructor before starting to draft. One could put up a reasonable argument that the declaration provision is not really needed given that it will not be possible to rely on the presence, or the contents, of declarations (for instance, there won't be many declarations on incoming mail in any event for awhile, if ever). (I discuss a further rationale for this suggestion in my comments on proposed section x12.) I would also query whether we need a provision like my section x32 ("All mail to be taken to a mail biosecurity holding area") worded as an offence given that the process will be entirely under the control of OurCountry Post and can be dealt with administratively. I wouldn't normally expect these queries to come to anything, but sometimes it is worthwhile giving instructors the idea that you are occasionally awake in the time between the naps that the Laziness Principles allow you to have.

Style and format

I have generally attempted to write in a style consistent with the *Biosecurity Act 2007*. Thus I have used the existing method of designating offences, even though it is not my preferred way of doing so. Incidentally, I note that in keeping with real life, the instructions are silent on the issue of penalties. (Which is perhaps fortunate, as I am not sure how they would be shown using this style, as there are no examples in the extracted bits of the *Biosecurity Act 2007*.) I have also attempted to cut and paste existing provisions as much as possible where they are relevant.

However, I have deliberately not used the formatting style of the *Biosecurity Act 2007*. Instead, I have taken advantage of the opportunity that participation in the Master Class has provided me by using a style that I am currently attempting to develop and refine. As part of that attempt I would be very interested in obtaining feedback on that style. (Please send any comments you may have to bpiper@ntc.gov.au).

Clause 1

In subclause (2) the repetition of "that" at the start of each paragraph is deliberate. It is designed to provide better continuity as one reads down the paragraphs, the idea being that as the mind starts to read the 2nd and subsequent paragraphs it can orient itself more quickly and place the new paragraph in its context better because of the familiarity of the first word. However, I note this is a practice that is very context

specific, and there are many instances in which I would not use it.

I was very much in two minds as to whether or not to include the note to subclause (2) owing to its length. However, as I mention "regulated article" 3 times in that subsection, even I was beginning to wonder what it was, so I decided that the informative effect of the note might just outweigh its clutter effect. I am well aware that it has resulted in a particularly unaesthetic front page, but they are the breaks (and I note the relationship between aesthetics and legislation has yet to even get to the introduction stage in most jurisdictions).

Clause 2

As happens almost every time, I have not been given any instructions as to when the amendments are to take effect. As happens every time that this happens, I have taken a guess (although in real life I would usually highlight the fact that I have taken a guess by adding a draft note).

Clause 3

This clause is intended to avoid the need to repeat in each section that the Act is amending the *Biosecurity Act 2007*. This is a mechanism that is now used in at least one Australian jurisdiction. (The rationale is that having no reference to the amending Act is no different than referring to the "Principal Act" in amending provisions.) I am not aware that it has caused any distress in any of the places where I have used it to date.

Clause 4

The amending mechanism I have used here assumes that OurCountry's Interpretation Act has a provision that provides for the global insertion of new definitions. Clearly I had to make such an assumption in the absence of a copy of section 1 of the *Biosecurity Act 2007*.

As a general rule I attempt to avoid putting anything meaty into definitions that appear in a general definition section. My strong preference is to place meaty definitions in the part of the Act to which they are most relevant, and to then place a signpost definition (for instance "***mail contents declaration*** – see section x11;") in the general definition section. Giving definitions their own sections enables one to do a lot more with them than can be done in a general definition section.

I have assumed that "OurCountry Postal Corporation" is sufficient identification in OurCountry's laws, and I have assumed that it is the sole "official" postal service.

I have deliberately avoided attempting to define "mail" in any substantive way, as there is no great need to do so (and it is one of those slippery and diabolical concepts such as "book"). The purpose of the definition is to distinguish the mail the inserted provisions deal with from purely domestic OurCountry mail.

Clause 5

Proposed section x11

I have taken the liberty of assuming that there is already a general regulation-making power in the Biosecurity Act that would supplement this provision.

I have used "thing" extensively throughout the Bill. I am aware that many drafters try to avoid it where possible, but I happily embrace because of its wide scope. Over the

years I have seen problems caused by the use of narrower terms when there was no real need to use them.

I have specifically mentioned that the details can include the declarer's name, address and other identifying information to attempt to head off possible privacy arguments (which in this case, if successful, would render the entire declaration process unenforceable). Given their importance, I would normally be very tempted to go further and make it a positive requirement that those details be included to try to prevent them being forgotten when the regulations are written.

I have left the specification of how declarations are to be attached to things to the regulations, as I can envisage that there may be some unusual situations given the wide variety of things that can be sent by mail.

Proposed section x12

The instructions refer to treating personal letters differently with respect to inspections. I would strongly recommend to my instructor that such letters also be treated differently with respect to declarations. Requiring a declaration for every personal letter and Xmas card seems like a lot of possible trouble for no great benefit. (I note that in practice mail inspectors cannot rely on declarations to detect regulated articles in mail.)

On the issue of "personal letters", the third of Ben's Laziness Principles states: "Don't waste too much time trying to do the impossible". In this case I didn't waste any time on this issue, because it was instantly apparent to me that it would not be possible to devise a workable definition of "personal letters" (because obviously, whatever definition I came up with would require the letter to be opened to see whether it meet the definition of "personal", thus instantly defeating the purpose of having the concept of personal letters). From a policy point of view, it is also very difficult to see why a distinction should be made between a one page personal letter, and a one page business letter.

I have assumed that my instructor accepted my recommendations on these issues. (In real life I wouldn't have gone further until I had a yea or nay, in keeping with my Laziness Principles.) I have thus attempted to come up with a distinction between mail that needed a declaration, and mail that didn't. I also attempted to come up with ways of determining the distinction that could be checked on an external inspection of the mail. I might mention that the 25-gram criterion involved the application of the fourth of Ben's Laziness Principles: "Don't reinvent the wheel" (sometimes alternatively phrased: "If you come across a good idea, steal it"). Our Commonwealth (Australian) postal legislation uses the 25-gram cut-off to distinguish mail that can be examined for drugs from other mail, so I have gratefully "borrowed" it. As it is an arbitrary limit, based on long experience I can be sure that my instructor will want to change it to some other arbitrary figure.

Given our overall purpose with respect to regulated articles, I thought it best to include an additional test in relation to the composition of what was excluded (as lots of biological agents weigh less than 25 grams). I thought it best to specifically mention cardboard because of its use in Xmas and birthday cards, and I specifically mentioned photographs to nip a possible area of uncertainty in the bud. Unfortunately, years of drafting have simply confirmed for me that one of the natural laws of drafting is "There is no such thing as an 'obvious' thing.") In keeping with this natural law I also included a note just to make sure that the subtle distinction I made between envelopes and their contents was not missed. The distinction is of some importance given the

variety of materials that are used in envelopes these days.

I should also mention that I have not given effect to the instruction to exclude personal letters from inspections, as I could not see how inspectors could determine whether a personal letter posed a threat (and thus could be inspected) without inspecting it. However, by restricting initial inspections to non-invasive procedures I would hope that I have achieved the underlying policy objective behind this instruction.

In subsection (7), I had to express this in the passive because it would have been almost unenforceable had I expressed it in the active (the "a person must not post" formulation would require prosecutors to prove that a person posted the item, which would be quite difficult without an admission, and the "a person must not sign" formulation has difficulties because to be effective it also requires that the declaration be attached to the mail—this is problematic because the declaration would often be signed before it was attached to the mail.

That of course raises the question: how enforceable is subsection (1), which does use the "a person must not post" formulation? I'm afraid the answer is the same: it is almost unenforceable, as even if letter senders give details of their name and address on the envelope or the letter itself, that does not prove that they sent it. To overcome this, a deeming provision would be required, but that is not something I would put in spontaneously. This issue raises the whole question of whether the declaration provision should exist or not: if it can't be properly enforced, is there much point in having it? Unfortunately this sort of situation is not uncommon, and the usual response is that the provision is still worth having.

Proposed Division 2

There are a number of variations in relation to inspector appointments and their supporting provisions, so the 1st Laziness Principle has prevented me from attempting to guess what my instructor would like in this regard. (Particularly as the instructions suggest that my instructor probably still has no idea yet of this sort of detail, and particularly as there is a suggestion that inspectors will be appointed for "areas", which is a relatively novel concept for me — our inspectors tend to be more free-range in Australia.)

Proposed section x31

The reference to "by order" is a bit sparse, but I have assumed that there are other provisions in the *Biosecurity Act 2007* or in OurCountry's Interpretation Act that flesh out the procedure that needs to occur to make an order.

Division 3

The provisions in this Division are essentially a cut and paste of the similar provisions in the *Biosecurity Act 2007*. The exception is section x32, but it is different only because of the difference in the circumstances between mail and exports/imports (for instance, a mailbag may be a very small component of a load of general cargo carried by an airplane – it would be unrealistic to require the airplane to land at a certain airport just because it was carrying the mailbag). As I have mentioned elsewhere, the effect that this provision achieves could be equally well achieved administratively.

Division 4

Proposed sections x41 and x42 may well need further translation provisions, but obviously any such provisions cannot be drafted without one having access to the

relevant parts of the *Biosecurity Act 2007*. The instructions also mention that mail found to contain unreported regulated articles "is to be held pending biosecurity clearance conducted on application of the recipient" – without having access to the import biosecurity clearance rules I am unsure what provisions, if any, may be necessary to give effect to this instruction. I am also not sure that I can use the phrase "biosecurity clearance rules" in the way that I have, but again I need to see more of the Act.

Division 5

I have taken a number of liberties with the instructions here. These are the sort of liberties I often take when drafting if there is scope to do so. Proposed section x51 owes a lot to a similar provision in our (Australian) national postal laws (another application of my 4th Laziness Principle).

Proposed section x52(3) is the sort of provision I would suggest to partially try to overcome the difficulty of enforcing the declaration provision. It provides some incentive for people to make required declarations. It is on the cusp of the sort of provision that I would provide spontaneously to an instructor. Ideally I would prefer to be instructed to include a provision of that sort.

I would also advise my instructor that these inspection provisions should be supplemented with "repair" provisions that specify how any damage caused to envelopes during the inspection process is to be dealt with, and provisions requiring that there be a written explanation to accompany any damaged item. Again, in keeping with the Laziness Principles, I would not venture to begin drafting such provisions until I was confident that the instructor wanted them.

One instruction not dealt with

There is one instruction I have not tackled. This is the instruction to provide for incoming mail from particular countries to have mail contents declarations.

I have not tackled this instruction because it poses a number of difficulties, and I would strongly prefer to have more detailed instructions before I tried to tackle these difficulties. Also, given the subject matter of this instruction, and the fact that it will rely on agreements with other jurisdictions, I would strongly recommend to my instructor that nothing be placed in the Act on this subject matter, as it is easy to foresee that doing so might cause difficulties in the agreement negotiation process. It would be much better to amend the Act once an agreement has been reached.

The main difficulty on which I would seek further instruction is that the country from which the mail would be coming would presumably have subjected all mail that is declared to have a regulated article to its biosecurity clearance processes. To draft anything sensible, I would need to be given a fair idea of what aspects of those processes can't be relied by OurCountry.

Biosecurity (Amendment) Act 2007

1. Purpose and outline

(1) The purpose of this Act is to amend the *Biosecurity Act 2007* to enable the inspection of mail for biosecurity purposes.

(2) In outline, this Act inserts provisions into the *Biosecurity Act 2007* —

(a) that require a person who posts certain items of mail to attach a declaration to the mail declaring whether or not the mail contains any regulated article; and

(b) that provide for the inspection of all mail in specially designated areas to determine whether the mail contains any regulated article; and

(c) that provide for the opening of mail that contains, or that is reasonably suspected of containing, a regulated article.

Note

Section 1 of the *Biosecurity Act 2007* defines a regulated article as any of the following:

(a) any animal or animal product;

(b) any plant or plant product;

(c) any living organism, whether modified or not;

(d) soil, sand, gravel or aggregate;

(e) any genetic material of any living organism;

(f) human remains;

(g) any clothing, machinery or other article or material that contains or has adhering to it anything referred to in paragraph (a), (b), (c) or (d);

(h) any clothing, machinery or other article or material that has been in contact with a regulated pest or exposed to a regulated disease;

(i) garbage.

2. Commencement

This Act comes into operation on 1 January 2010.

3. Act being amended by this Act

This Act amends the *Biosecurity Act 2007*.

4. Insertion of new definitions

In section 1, insert the following definitions –

"***attached***, in relation to a mail contents declaration – see section x11(4);

[completed mail contents declaration – see section x11(2)]

incoming mail means any ***thing*** from a place outside OurCountry that is given to OurCountry Post in the course of its postal service for delivery in OurCountry;

mail means any incoming or outgoing mail;

mail biosecurity holding area means an area designated by the Minister under section x31;

[mail contents declaration – see section x11]

mail inspector means a person appointed under section x2x;

OurCountry Post means the OurCountry Postal Corporation;

outgoing mail means any thing that is given in OurCountry to OurCountry Post in the

course of its postal service for delivery to a place outside OurCountry.".

5. Insertion of Part X

After Part W insert —

"**Part X — Mail**

Division 1 – Mail contents declarations

x11. What is a mail contents declaration ?

(1) A ***mail contents declaration*** is a declaration as to whether or not the thing to which the declaration is attached contains any regulated article.

(2) A mail contents declaration is ***completed*** if —

(a) it is made in a form specified by, and it contains the details required by, the regulations for the purposes of this section; and

(b) it is signed by the person making it.

(3) Without limiting subsection (2), the regulations may require that the person making the declaration include her or his name, address or other identifying details in the declaration.

(4) A mail contents declaration is ***attached*** to a thing if it is secured to the thing in a way specified by the regulations for the purposes of this section.

x12. Certain mail must have a declaration attached

(1) A person must not post for delivery outside OurCountry any thing, other than an ordinary letter, that does not have a completed mail contents declaration attached to it.

(2) A person who contravenes subsection (1) commits an offence.

(3) An ***ordinary letter*** is an envelope that only contains items made of paper (including photographs) or cardboard and that, together with its contents, weighs 25 grams or less.

Note

[***The requirement concerning the composition of the contents of an envelope only applies to those contents — it does not apply to the envelope itself.***]

(4) For the purposes of this section, a thing is ***posted for delivery outside OurCountry*** if it is given to OurCountry Post, in the course of its postal service, for delivery to a place outside OurCountry.

Examples

1. Placing a letter in an OurCountry Post box that states on the front of its envelope –

   (a) an address in France; or

   (b) "The Pope" (without an address).

2. Giving a parcel to an employee or agent of OurCountry Post for delivery to an address in China stated on the address label on the front of the parcel.

(5) A person commits an offence if any thing that is posted for delivery outside OurCountry has attached to it a mail contents declaration signed her or him that is false or misleading in any significant way.

Division 2 -- Mail inspectors

[Further instructions needed]

Division 3 -- Mail biosecurity holding areas

x31. Designation of mail biosecurity holding areas

(1) The Minister may, by order, designate any place as a mail biosecurity holding area at which mail may be held for inspection pending biosecurity clearance or other disposition under this Act.

(2) A designation under subsection (1) may be limited in any way specified by the Minister.

(3) Without limiting subsection (2), the Minister may limit a designation in relation to one or more of the following —

(a) particular types of mail;

(b) incoming mail from particular countries;

(c) outgoing mail to particular countries.

(4) Before making an order under this section, the Minister must consult with the Director of Biosecurity and with the Minister responsible for the administration of the *Postal Act.*

x32. All mail to be taken to a mail biosecurity holding area

(1) A person bringing any incoming mail into OurCountry must, immediately after entering OurCountry, take the mail to a mail biosecurity holding area.

(2) A person must not take any outgoing mail out of OurCountry unless it has been processed at a mail biosecurity holding area.

(3) A person who contravenes subsection (1) or (2) commits an offence.

x33. Restrictions in relation to biosecurity holding areas

(1) A person, other than a mail inspector acting in the course of her or his duty, must not enter a mail biosecurity holding area unless she or he has —

(a) the permission of a mail inspector for that area, or

(b) the written permission of the Director of Biosecurity.

(2) A person who does any of the following commits an offence —

(a) contravenes subsection (1);

(b) damages, interferes with or in any way reduces the effectiveness of measures taken to secure a mail biosecurity holding area or any mail, regulated article or other thing in the holding area;

(c) removes, or attempts to remove, from a mail biosecurity holding area any regulated article without obtaining biosecurity clearance for the article.

x34. Exceptions from biosecurity control restrictions

(1) The Minister may, by order, provide exceptions to the restrictions that apply under this Division.

(2) Before making an order under subsection (1), the Minister must consult with the Director of Biosecurity.

Division 4 -- Mail biosecurity clearance rules

x41. Biosecurity clearance rules for outgoing mail

(1) This section applies to any item of outgoing mail that contains a regulated article.

(2) The biosecurity clearance rules set out in Part XX apply to the item as if it was an intended export item.

x42. Biosecurity clearance rules for incoming mail

(1) This section applies to any item of incoming mail that contains a regulated article.

(2) The biosecurity clearance rules set out in Part xx apply to the item as if it was an intended import item.

Division 5 – Inspection of mail

x51. Inspection of mail

(1) A mail inspector may inspect any item of mail that is at a mail biosecurity holding area, but may not open or physically interfere with the cover of the item except as permitted by section x52.

(2) For the purposes of an inspection, a mail inspector may X-ray an item, or use an animal, a metal detector, an odour detector or any other thing that is able to detect one or more regulated articles.

x52. Opening of mail for inspection

(1) A mail inspector may open an item of mail, and may physically interfere with the cover of the item for that purpose, if —

(a) in the case of an item of mail that has a mail contents declaration attached, she or he has reasonable grounds for believing that the declaration is inaccurate in any significant way; or

(b) in any other case, she or he has reasonable grounds for believing that the item contains a regulated article.

(2) A mail inspector may also open an item of mail that has a mail contents declaration attached that states that the item contains a regulated article if she or he has reasonable grounds for believing that it is necessary to do so to determine how the regulated article is to be treated under the [***biosecurity clearance rules***].

(3) Without limiting subsection (1)(b), a mail inspector has reasonable grounds for believing that an item contains a regulated article if the item does not have a mail contents declaration attached, but she or he has reasonable grounds for believing that the item should have such a declaration attached.

Example

An inspector could open an item weighing 40 grams under subsection (4) if it did not have a mail contents declaration attached to it.".

Version 3 — Presented by Gilbert Mo[3]

Definitions

1 In this Act:

…

biosecurity mail inspector means:

(a) a biosecurity officer; or

(b) a postal officer within the meaning of the *Postal Service Act*,

who is appointed as a biosecurity mail inspector by the Director of Biosecurity.

incoming international mail item means a mail item that is:

(a) sent from a place outside OurCountry; and

(b) addressed to an address in OurCountry.

mail item means a mail item to which the Conventions of the Universal Postal Union apply.

outgoing international mail item means a mail item that is:

(a) sent from OurCountry; and

(b) addressed to an address outside OurCountry.

regulated article means any of the following:

(a) any animal or animal product;

[3] Deputy Law Draftsman, Law Drafting Division, Department of Justice, Hong Kong.

(b) any plants or plant product;

(c) any living organism, whether modified or not;

(d) soil, sand, gravel or aggregate;

(e) any genetic material of any living organism;

(f) human remains;

(g) any clothing, machinery or other article or material that contains or has adhering to it anything referred to in paragraphs (a), (b), (c) or (d);

(h) any clothing, machinery or other article or material that has been in contact with a regulated pest or exposed to a regulated disease;

(i) garbage.

Division 5
Biosecurity Controls of Entry and Departure of Regulated Articles

Biosecurity points of entry and departure

26 (1) The Minister may, by order, do the following:

(a) designate airports and seaports as biosecurity points of entry for the purposes of allowing the entry of regulated articles into OurCountry;

(b) designate airports and seaports as biosecurity points of departure for the purposes of allowing the export of regulated articles from OurCountry.

(2) A designation under subsection(1) may be limited in relation to one or more of the following:

(a) particular types of aircraft or vessels;

(b) particular types of regulated articles;

(c) entry from particular countries;

(d) export to particular countries.

(3) Before making an order under subsection (1), the Minister must consult with the Director of biosecurity and, as applicable, with the Minister responsible for the administration of the *Aeronautics Act* or the Minister responsible for the administration of the *Maritime Act*.

Biosecurity holding areas

27 (1) The Minister may, by order, do the following:

(a) designate any part of an airport or seaport as a biosecurity holding area in which incoming aircraft or vessels may be held for inspection pending biosecurity clearance or other disposition under this Act;

(b) designate any area of land at or adjacent to an airport or seaport as a biosecurity goods holding area in which incoming or outgoing containers or goods may be held for inspection pending biosecurity clearance or other disposition under this Act.

(2) Before making an order under subsection (1), the Minister must consult with the Director of Biosecurity and, as applicable, with the Minister responsible for the administration of the *Aeronautics Act* or the Minister responsible for the administration of the *Maritime Act.*

Biosecurity mail holding area

27A (1) The Minister may, by order, designate:

(a) any area of land at or adjacent to a biosecurity point of entry or biosecurity point of departure; or

(b) any area in a mail exchange within the meaning of the *Postal Service Act*,

as a biosecurity mail holding area in which incoming international mail items or outgoing international mail items may be held for inspection pending biosecurity clearance or other disposition under this Act.

(2) Before making an order under subsection (1), the Minister must consult with the Postmaster General, the Director of Biosecurity and, as applicable, the Minister responsible for the administration of the *Aeronautics Act* or the Minister responsible for the administration of the *Maritime Act*.

Entry and departure restricted

28 (1) The captain of an aircraft that is entering OurCountry must not cause or permit the aircraft to land at a place other than a biosecurity point of entry.

(2) The captain of an aircraft that is leaving OurCountry must not cause or permit the aircraft to leave from a place other than a biosecurity point of departure.

(3) The master of a vessel that is entering OurCountry must not cause or permit the vessel to berth at a place other than a biosecurity point of entry.

(4) The master of a vessel that is leaving OurCountry must not cause or permit the vessel to leave from a place other than a biosecurity point of departure.

(5) Subject to section 42 *[emergency entries and departures]*, a person who contravenes any of subsections (1) to (4) commits an offence.

Imports and exports restricted

29 (1) An person must not import, or attempt to import, a regulated article into OurCountry except through a biosecurity point of entry.

(2) A person must not export, or attempt to export, a regulated article from OurCountry except through a biosecurity point of departure.

(3) A person who contravenes subsection (1) or (2) commits an offence.

International mail must go through biosecurity mail holding area

29A The Postmaster General must ensure that:

(a) no incoming international mail item is delivered to the addressee before:

(i) it has been sent to a biosecurity mail holding area after it has been unloaded from the aircraft or vessel on which it is carried into OurCountry; and

(ii) biosecurity clearance for it has been granted under this Act;

(b) no outgoing international mail item is delivered on board the aircraft or vessel on which it is to be carried out of OurCountry before:

(i) it has been sent to a biosecurity mail holding area; and

(ii) biosecurity clearance for it has been granted under this Act.

[***Note : There should be a provision requiring diversion of freight containers containing incoming mailbags to a biosecurity mail holding area***.]

Declaration as regards regulated articles: outgoing international mail

29B (1) Notwithstanding any provision in the *Postal Service Act*, the Postmaster General may refuse to handle any outgoing international mail item if it has not attached to it a declaration that:

(a) the mail item does not contain any regulated article; or

(b) the mail item contains regulated articles identified in the declaration.

(2) A declaration under subsection (1) must be made by the sender of the mail item in such form and attached to the mail item in such manner as the Director of Biosecurity may specify.

(3) A person who, in purported compliance with subsection (1), makes a false declaration which he knows to be false or has no reason to believe to be true commits an offence.

Declaration as regards regulated articles: incoming international mail

29C Notwithstanding any provision in the *Postal Service Act*, the Postmaster General may refuse to handle any incoming international mail item sent from a country specified in Schedule [2] if it has not attached to it a declaration that:

(a) the mail item does not contain any regulated article; or

(b) the mail item contains regulated articles identified in the declaration.

[***Note : This section is to commence after arrangements have been made with other countries***.]

Inspection of mail items

29D (1) Subject to subsection (2), a biosecurity mail inspector may, for the purpose of ascertaining whether any incoming international mail item or outgoing international mail item contains any regulated article, open and inspect the mail item in a biosecurity mail holding area.

(2) The power under subsection (1) may not be exercised in relation to a letter:

(a) the length of which does not exceed 220 mm;

(b) the width of which does not exceed 150 mm;

(c) the thickness of which does not exceed 5 mm;

(d) which appears to be addressed to an individual whose name is written, printed or otherwise marked on the envelope;

(e) in respect of which the postage is paid by affixing postage stamps on the envelope; and

(f) which does not bear any mark or word which suggests that the letter is sent for business purpose,

unless the biosecurity mail inspector has reason to believe the letter poses a biosecurity threat within the meaning of section [ ].

(3) The Postmaster General must ensure that all mail items opened under subsection (1) are restored, after they have been inspected, as far as reasonably practicable to the condition they were in before they were opened.

[***Note : The general power to inspect exports or imports should be subject to this section***.]

Power of the Director as regards undeclared regulated article

29E If upon an inspection under section 29D any regulated article which is not identified in a declaration referred to in section 29B(1) attached to an outgoing international mail item is found in the mail item, the Director of Biosecurity may:

(a) confiscate the article and dispose of it in such manner as he sees fit; or

(b) where he is satisfied that the failure to identify the article in the declaration is due to inadvertence, notify the addressee of the mail item and take possession of the article pending biosecurity clearance conducted on application of the addressee.

Restrictions in relation to biosecurity holding area or biosecurity mail holding area

30 (1) A person, other than a biosecurity officer acting in the course of his duty, must not enter a biosecurity holding area unless the person has:

(a) the permission of a biosecurity officer for that holding area; or

(b) written permission of the Director of Biosecurity.

(1A) A person, other than a biosecurity mail inspector acting in the course of his duty, must not enter a biosecurity mail holding area unless the person has:

(a) the permission of a biosecurity mail inspector for that holding area; or

(b) written permission of the Postmaster General or the Director of Biosecurity.

(2) A person who does any of the following commits an offence:

(a) contravenes subsection (1) or (1A);

(b) damages, interferes with or in any way reduces the effectiveness of measures taken to secure a biosecurity holding area or biosecurity mail holding area or any regulated article or other item in the holding area;

(c) removes, or attempts to remove, from a biosecurity holding area or biosecurity mail holding area any regulated article without obtaining biosecurity clearance for the article.

Exceptions from biosecurity control restrictions

31 (1) The Minister may, by order, provide exceptions to the restrictions that apply under this Division.

(2) Before making an order under subsection (1), the Minister must consult with:

(a) the Director of Biosecurity; and

(b) where the order relates to restrictions that apply to incoming international mail items or outgoing international mail items, the Postmaster General.

[***Note : Application of rules regarding biosecurity clearance to mail containing regulated article should be dealt with in those rules***.]

Version 4 — Presented by John Wilson

Draft BIOSECURITY (AMENDMENT) BILL 2007

Arrangement of clauses

[OURCOUNTRY]

(Bill No. of 2007)

A BILL
for

AN ACT to amend the Biosecurity Act [2006].

[Commencement: 200…]

ENACTED by the Parliament of OurCountry as follows -

Short title and commencement

1. (1) This Act may be cited as the Biosecurity (Amendment) Act 2007.

(2) This Act comes into force on […….][a date appointed by the Minister by Order].

Section 1 amended

2. Section 1 of the Biosecurity Act [2006] is amended by inserting the following new definition (in its appropriate alphabetical position) —

"***mail exchange***" means a place where incoming and/or outgoing postal items are held for sorting, in accordance with the *Postal Services Act;"*.

New section 27A

3. The Biosecurity Act [2006] is amended by inserting after section 27 the following new section —

"Mail exchanges

27A. (1) The Minister may, by order, do the following:

(a) designate any mail exchange as a point of entry for the purpose of allowing the entry of regulated articles into OurCountry;

(b) designate any mail exchange as a point of departure for the purpose of allowing the export of regulated articles from OurCountry;

(c) designate any part of a mail exchange that has been designated as a biosecurity point of entry or departure as a biosecurity postal holding area for incoming or outgoing postal items.

(2) A biosecurity postal holding area is one where incoming or outgoing postal items may be held for biosecurity inspection pending biosecurity clearance or other disposition under this Act.

(3) A mail exchange may only be designated as a biosecurity point of entry or departure in respect of regulated articles that at the time of entry or departure are in a mail bag or other container that conforms to the requirements of the Postal Services Act.

(4) A designation under subection (1) may be limited in relation to one or one or more of the following:

(a) particular types of regulated articles;

(b) entry from particular countries;

(c) export to particular countries.

(5) Before making an order under subsection (1), the Minister must consult with the Director of Biosecurity and the Minister responsible for the administration of the Postal Services Act."

Section 28 amended

4. Section 28 of the Biosecurity Act [2006] is amended in subsections (1), (2), (3) and (4) by deleting "a biosecurity point of entry" and substituting "an airport or seaport that is a bisoecurity point of entry".

Existing provisions of the OurCountry Biosecurity Act

Designation of biosecurity officers

AA. (1) The Minister may in writing designate any public officer or employee of a statutory authority to be a biosecurity officer for a particular purpose or at a particular location.

(2) (a) The powers of a biosecurity officer are as prescribed by or under this Act.

(b) A biosecurity officer must perform such duties, not inconsistent with this Act, as are assigned to the officer by the Director.

(c) The Director may limit the functions to be performed by a biosecurity officer to those within the officer's technical sphere of competence;

(d) The functions assigned to an officer designated under subsection (2) must be consistent with the terms of the designation.

Inspection of documents

BB. (1) A biosecurity officer may —

(a) open and inspect at a biosecurity point of entry any incoming document, including mail, in order to ascertain whether the document contains or relates to a regulated article;

(b) open and inspect at a biosecurity point of departure any outgoing document, including mail, if the officer reasonably suspects that the document contains or relates to —

(i) an uncleared regulated article that requires biosecurity export clearance; or

(ii) a regulated article that could pose a serious biosecurity threat to the country of destination of the document.

(2) The powers relating to mail in subsection (1)(b) and (c) must only be exercised in respect of personal letters if the officer reasonably suspects that a letter contains or relates to a biosecurity threat.

Inspection of articles

CC. (1) A biosecurity officer may at a biosecurity holding area inspect any incoming regulated article, and any conveyance, container or baggage in which the article is carried, in order to assess the biosecurity risk presented by the article, conveyance, container or baggage.

(2) A biosecurity officer may at a biosecurity point of departure inspect any article, which requires biosecurity export clearance, in order to facilitate such clearance.

Directions

DD. The Director may give written directions to biosecurity officers as to the manner in which their functions are to be performed, consistent with this Act and the regulations.

Obstruction, false information etc.

EE. A person who —

(a) makes a false or incomplete statement, whether orally or in writing, in relation to any matter under this Act, intending to mislead a biosecurity officer in the performance of functions under this Act,

(b) for purposes of this Act knowingly or recklessly —

(i) makes a false or misleading biosecurity declaration; or

(ii) issues any false or misleading certificate;

(c) knowingly or recklessly gives false or misleading information to a biosecurity officer while the officer is performing functions under this Act,

commits an offence.

Regulations

FF. (1) The Minister may make regulations not inconsistent with this Act for the effective implementation of this Act and the performance of the biosecurity functions of the Government.

(2) Without limiting subsection (1) or affecting any other regulation-making power in this Act, regulations made by the Minister may —

(a) – (o)

(p) prescribe any other matter which this Act requires to be prescribed or which is necessary for carrying out or giving effect to this Act.

Specifications

GG. (1) The Director may in writing specify —

(a) documents and forms for use in connection with this Act, including the format of documents transmitted by electronic means;

(b) the procedures for applying for and issuing permits and other documents;

(c) all other matters that can or must be specified, as provided for in this Act.

(2) If a matter is prescribed by regulations or an order, the regulations or order take precedence over a specification on the same matter.

(3) Specifications must be entered in a biosecurity register maintained under section 79(2) and do not take effect until so entered.

Drafter's Commentary

Background

1. This Masterclass drafting exercise is based on a Biosecurity Bill that I have drafted under the auspices of the Secretariat of the Pacific Community (SPC). It has been

developed as a model for English-speaking developing jurisdictions of the region and is now called the "regionally harmonised Biosecurity Bill."

2. There are 13 jurisdictions involved in the Pacific regional exercise and they range from Niue, with only 4,000 people, to Papua New Guinea with over 3 million. They include the former US mandated territories (Palau, Federated States of Micronesia, Marshall Islands). Some are federal or have a strong provincial government; some are small unitary islands. They are all members of the Pacific Islands Forum.

3. The model Bill combines animal and plant quarantine measures; it deals with both border controls and internal controls and includes emergency powers; it provides administrative machinery (though some countries will be having a separate statutory authority); it also aims to implement various international obligations that balance freedom of trade with agricultural, environmental and health interests...

4. The drafting problem for this exercise was chosen by Janet Erasmus from a few that I suggested. Janet also worked up the Drafting Instructions and produced the OurCountry extracts. My Bill is not the same, so I have had to work out the solutions afresh, like other participants in the Masterclass. However, the "other relevant sections" are extracted from my model Bill so I have not had to draft those afresh. Many thanks to Janet for her work — what a pity she could not be with us in Nairobi.

Drafting Instructions

5. The DIs. say that a decision has not been reached as to whether holding areas for mail should be part of a mail exchange or adjacent to an existing point of entry/departure. My submission adopts a different approach, by empowering the Minister to designate mail exchanges as points of entry/departure, not just as holding areas. This means that mail bags are taken direct from a vessel or aircraft to a mail exchange, and treated as not having landed until they reach there. So there is a distinction between points of entry that are seaports or airports and other points of entry. This requires an amendment to section 28, which makes rules about the landing of ships and aircraft.

6. The alternative approach is to deal with mail exchanges only as holding areas for inspection and release of incoming/outgoing packages. I will be interested to know how other participants tackle this issue.

7. The Drafting instructions require flexibility as to who the inspecting officials are. This is already achieved by section AA. of the OurCountry Biosecurity Act as attached. That section is based on a clause in my model Bill and enables the Minister to designate e.g. postal officers as biosecurity officers. Sections BB and CC then provide the necessary powers of inspection.

8. The Drafting instructions call for forms of declaration relating to outgoing postal items to be prescribed. Section FF of the OurCountry Biosecurity Act enables the Minister to make regulations, which could include a requirement for such a declaration. The regulations could also prescribe the form. However, section GG of the Act, based on clauses in the model Bill, introduces the concept of the specification as a kind of quasi-legislative instrument. This has been introduced in order to achieve greater flexibility in determining the conditions for import of animals and plants, but it can equally well be used for such things as forms etc.

9. As regards creating offences of false declarations etc., such offences already exist

in the OurCountry Biosecurity Act — see section EE. There is also a general offence of perjury and false documentation under the Penal Code.

10. Random inspections of outgoing mail, as called for by the Drafting instructions, can be achieved by a combination of the existing powers to inspect, as in sections BB and CC, and the Director's power to issue directions, as in section DD. The holding of regulated articles pending clearance is provided for in section 30.

11. Establishing a contents declaration procedure for incoming mail will require consultation with other countries before it can be implemented legislatively. If there is to be a rule requiring such a declaration for incoming mail, it can be imposed by regulations made under section FF. However, it might be appropriate to amend that section to specifically confer such a power once the scheme is ready.

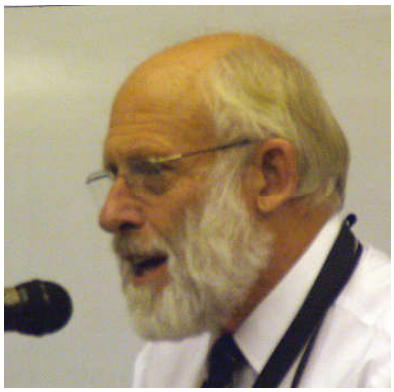
12. A restriction on the inspection of personal mail is already in the Act - see section BB(2).

13. The Drafting instructions do not deal expressly with the rights of recipients/senders of mail to be present during inspections at a holding area. There is a mention of agents, but in the Act, these are only contemplated for attendance at seaports and airports. These and other matters remain to be clarified with the administration.

Conclusion

14. In working on a drafting exercise based on an actual Bill I have drafted, I have had the advantage of knowing one possible solution; but the disadvantage of "tunnel vision" as to other solutions.

Keeping the Statute Book up to date — a self-help guide[1]



Jeremy Wainwright[2]

1. Introduction

Prompted by a suggestion by a member with experience drafting in poorly-resourced jurisdictions, my purpose here is to build upon three papers delivered at the 2005 CALC Conference in London[3] by offering some practical suggestions, based on experience in legislative drafting offices in Australia (both the Commonwealth and Tasmania), Fiji and Ireland, for maintaining the statute book without resort to proprietary IT solutions or resource-intensive programs of law revision.

The suggestions that follow are directed primarily at smaller jurisdictions that employ the direct textual amendment method of drafting. However, they have relevance also for larger jurisdictions, since they reflect in large measure current practice with respect to the legislation of the Commonwealth of Australia. Likewise, as appears later in this article, they can have application also to those jurisdictions with a continuing body of "heritage" legislation affected by referential amendment.

While, as indicated above, they are not dependent on sophisticated IT applications, they

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1 An expanded version of a presentation made at the CALC Conference, Nairobi, Kenya, 13-15 September 2007, in tandem with the paper "One Giant Leap —The Ultimate Legislation System, Available Now" by Ed Hicks, published at p. 70 of this issue of *The Loophole*.

2 Consultant legislative drafter, Canberra, Australia (nomography@hotmail.com); formerly Principal Legislative Counsel, Office of Legislative Drafting, Attorney-General's Department, Canberra, Australia, and, at the time of presentation of the abstract of this paper, Consultant Parliamentary Counsel, Office of the Parliamentary Counsel, Dublin, Ireland.

3 They were—

- Adsett, Neil, "Aspects of law revision in the Commonwealth", *The Loophole*, October 2007, p 18
- Berry, Duncan, "Keeping the Statute Book up-to-date — a personal view", *The Loophole*, October 2007, p. 33
- Erasmus, Janet, "Statute Revision in British Columbia: recent developments from a jurisdiction with a long history of statute revision", *The Loophole*, October 2007, p. 50.

are compatible with them. Again, while they can be put into practice using old-fashioned physical "cut-and-paste" methods, they encourage reasonably, but not extremely, sophisticated use of readily available "shrink-wrapped" software (e.g. Microsoft Word).

2. Comparison of updating methods

It is helpful, at the outset, to review the methods commonly (and not so commonly) used to update the statute book:

(1) Consolidation[4]

This is the traditional approach, in response to the unwieldy results of the repeated application of the referential-amendment technique. It relies on formal re-enactment and is usually applied to a single "title" — the classic "Act to consolidate enactments relating to …", which repeals earlier statutes on a subject and makes new provision combining their respective elements and, usually, new material in (for the time being) a single, coherent package. This approach was also used in Victoria, Australia, from 1890 to 1958, for periodic "big-bang" up-dates of the whole statute book.[5]

(2) Revision

In widespread use throughout the Commonwealth (except Australia, New Zealand and the UK), this approach, which is applied in one hit to the whole statute book, relies on enabling legislation that authorises extensive re-arrangement and editorial revision, but not change in substance, and, since re-enactment is not involved, providing for a future effective date to be fixed by instrument. Initially (and still, I believe, in some jurisdictions), revised editions were issued as a collection of fixed-leaf volumes. Towards the end of the "paper era", some (for example, those of Hong Kong, Trinidad and Tobago and Fiji) were issued in loose-leaf format in an effort to maintain currency by the issue of annual sets of revised pages.

(3) Re-publication with amendments incorporated ("reprinting")

Fundamental to this approach is acknowledgement of the existence, in ethereal form (evidenced by printed texts of the constituent pieces of legislation), of an ascertainable legal text that is derived from the application of the textual-amendment technique. It is not essential that there exist any form of supporting legislation, although, in a number of jurisdictions, there is legislation dating from the "paper era" authorising (or even compelling[6]) the reprinting of laws with amendments incorporated. In some cases, that

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4 This term has commonly been misused in Australia to refer to the process of re-publication with amendments incorporated, mentioned below.

5 Unlike traditional single-subject consolidations, there was no scope for the introduction of new material in the Victorian "super-consolidations", the object being to reproduce the existing law accurately but coherently. The elaborate arrangements and herculean efforts involved, which eventually led to the abandonment of this approach, are worthy of a *Loophole* article in their own right.

6 The *Amendments Incorporation Act 1905* of the Commonwealth of Australia (accessible at

legislation also authorises some non-enacted editorial revision, along the lines of, but not as extensive as, the changes permitted by laws authorising the preparation of revised editions.[7]

In Australia and New Zealand, during the "paper era", single-title reprints were generally produced as stand-alone pamphlets and also, in some jurisdictions, as supplements to sessional volumes. It was also the practice for "big-bang" reprints of the whole statute book to be produced from time to time but, from the 1960s, they were generally replaced by "loose-pamphlet" binder systems. This development led naturally, if rather too slowly, to emergence of systems of prompt electronic re-publication of individual titles.

(4) Restatement

The Statute Law (Restatement) Act 2002 (Ireland)[8] authorises the preparation of integrated texts of amended laws in a manner analogous both to the preparation of a title within a revised edition and to the drafting of a consolidation. A restatement, after being formally authenticated in accordance with the Act, is accorded judicial notice. However, the process does not result in a text that is susceptible of direct textual amendment. While the restatement procedure is capable of being applied in relation to both referential and direct textual amendments, I suggest that there is no call for it in relation to laws the amendment of which has been solely by means of the direct textual technique.

3. What to do?

(1) The best is the enemy of the good — the trap of relying on revised editions

The quest for completeness, worthy as it is in principle, is inimical to the attainment of significant benefits in the short term, because "big bang" exercises are prone to lengthy lead times as a result of their sheer size.[9] This is a problem that is exacerbated by the

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www.comlaw.gov.au) provides, in subsection 2 (1):

"When any Act has, before or after the commencement of this Act, been amended by:

(a) the repeal or omission of certain words or figures, or

(b) the substitution of certain words or figures in lieu of any repealed or omitted words or figures, or

(c) the insertion or addition of certain words or figures,

then in any reprint of the Act by the Government Printer the Act shall be printed as so amended by all such amendments … as were made before a day specified in the reprint."

The Act extends also to legislative instruments (regulations, etc.) but, while it requires the reprinted version to include legislative history, makes no provision as to authenticity.

7 For example, Part 4, *Reprints Act 1992* (Queensland — accessible at www.legislation.qld.gov.au). The scope of the Part is indicated by the extract from the Act's table of provisions that is set out in Appendix A.

8 Accessible at www.irishstatutebook.ie.

9 For instance, the final volume of the 1951 Reprint of the Acts of the Commonwealth of Australia appeared in 1955 and the 1978 Revised Edition of the Laws of Fiji took effect in March 1982, some

inclusion of many titles that are of low priority for various reasons, such as their sheer unimportance, the limited audience to which they are addressed and their uncomplicated legislative history.[10]

It is more effective, therefore, to deal with "bite-size" chunks, with priority being given to titles most in need of attention, having regard, in particular, to their relative importance to the public and the extent to which they have been amended, but not losing sight of the desirability of holding the line with titles that are already up-to-date. Just as jurisdictions using the reprinting approach have been able to move away from the periodic fixed-leaf, multi-volume reprinting of the complete statute book, through the replaceable-pamphlet stage, to electronic re-publication, there is no good reason why a jurisdiction that has relied in the past on the revision system cannot make use of readily available technology to move over to piecemeal re-publication with amendments incorporated, eventually building up the complete corpus of its statute book in a form that is permanently up-to-date.

(2) Who should do it?

Legislative drafting offices have such a vital interest in the maintenance of an up-to-date statute book that, in my view, it is axiomatic that it should be their responsibility.[11] It is central to the efficient working of a legislative drafting office that it have access to accurate, up-to-date texts of all of the written laws of its jurisdiction. Near enough might be good enough for many users but, for those who have to draft laws, the platform on which they work has to be totally secure and there is no better way of ensuring that than by applying the rigor of drafting practice to the task.

This is not to say that all the work needs to be done by lawyers and, indeed, the experience in Canberra is that, with close integration of all steps in the production process[12] for new legislation and the rigorous application of editorial standards, up-

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38 months after the cut-off date for the restated law (31 December 1978). Nowadays, with electronic publication, that delay could be significantly reduced but not entirely eliminated.

10 Despite containing much material of this kind, the 1978 Fiji Revised Edition nevertheless omitted some laws that remained in force. Among them were laws of limited application, such as those governing pension schemes that were closed to the admission of new members, and laws expected (but not guaranteed) soon to be replaced. An outstanding example of the latter class was the Traffic Act, for which, in fact, no wholesale replacement has yet eventuated. It was reinstated (as Cap. 176) by the 1985 "mini-revision" (replacement pages for the loose-leaf 1978 edition), which took effect in 1987, but is not one of the Acts currently available on line.

11 This article was being prepared for publication after the conclusion of the 2009 CALC Conference, the theme of which was "Whose law is it?". The papers presented examined the "ownership" of other stakeholders (and the relative evanescence of the stake of the lawmakers) but made little express reference to this tacitly-agreed continuing proprietary interest of drafters.

12 For example, the passing of the same MS Word document in electronic form (with a set suite of Styles for its textual elements) from OPC to the Parliament and on eventually to the Office of Legislative Drafting and Publication. Along the way, hard copy is generated for consultation during the drafting process, for distribution in the two chambers of the Parliament, for the production of Assent copies for signature by the Governor-General, and for the printing of copies of the Act for

dated texts can be produced to an extremely high standard by clerical staff, with minimal supervision by professional legislative counsel. In small jurisdictions, the closer involvement of legislative counsel themselves is almost inevitable.

(3) How?

(a) Standardised camera-suitable copy using defined Styles

Assuming that a legislative drafting office is using computers and a word-processing package such as Microsoft Word to prepare drafts, the first step is to adopt, for use at the drafting stage, a standardised approach to the lay-out of legislation, using defined word-processing Styles,[13] rather than rely on the official printer to apply the house style to less disciplined "typewriting" (albeit computer-produced).

The Styles adopted should reflect the ultimate appearance of the text as intended to be finally officially printed, so as to facilitate the retention by the drafting office of control over the electronic text while making it possible to pass to the official printer acceptable copy either as a PDF file or as camera-ready hard copy. If possible, the opportunity should be taken to make improvements to the current house style, e.g. changes (say, in font sizes) to improve legibility and replacing marginal notes with provision headings (preferably incorporating the provision number).[14] The number of Styles created should be sufficient to deal with all commonly used lay-outs in use and even a few not so commonly used, so as to discourage the unnecessary cobbling together by individual legislative counsel of *ad hoc* variants, but they should not be so

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purchase. The electronic text is also published on the ComLaw website and, where it contains amendments of existing laws, it is used for the production of up-dated versions of those laws, which are published as soon as they are effective on the ComLaw website and are available for hard-copy publication. All hard-copy printing is done on the basis of PDF files provided to the printer. (It will be noted that what is done in Canberra is not exactly what I recommend for other jurisdictions, in that it is not OPC which produces the up-dated texts. In 1973, the then Attorney-General, in an effort to improve OPC's ability to produce Bills for the ambitious legislative program of a reformist government, relieved it of its obligations to draft subordinate legislation and reprints, and gave those functions to a new Division within the Attorney-General's Department, now known as OLDP. OLDP itself has complete control of the texts of Regulations and other legislative instruments made by the Governor-General.)

13 The term "Styles" is used here (capitalised) with the meaning ascribed to it in the context of Microsoft Word, i.e. a combination of formatting commands applicable to a particular "Paragraph" (passage ending in a "hard line-feed" or, in typewriter terminology, a carriage return).

14 The substitution of provision headings for marginal notes greatly simplifies document lay-out, expediting the efficient production of both drafts and up-dated texts. It is nowhere seriously disputed that the incorporation of the provision number in a provision heading assists the reader and the Australian experience over the last couple of decades is that, even in the face of interpretation law provisions declaring marginal notes and provision headings not to form part of the law, no harm is done by making this change without legislative backing. Another advantage of incorporating the provision number in the heading is that, if the Styles adopted for the headings for Parts, Divisions, sections, etc., are created as modifications of the built-in MS Word heading Styles (Heading 1, Heading 2, etc.), Word's Outline facility can be used to automatically produce a table of provisions.

numerous as to be confusing.

In a number of Australian jurisdictions, adoption of the approach outlined above was facilitated by government-initiated moves away from the maintenance of fully-fledged government printing offices.[15] In jurisdictions where resistance to the encroachment by drafting offices on the preserve of the printers is encountered, it is still worthwhile to apply the discipline of the "styled" lay-out to the drafting process, even if, for purposes of compiling texts with amendments incorporated, resort has to be made, at least in the short term, to the output of the printing agency.[16]

(b) Ad hoc compilation of updated texts as part of the drafting process

When instructions to draft amendments of a particular law are received, the legislative counsel concerned should compile an integrated text of that law as it presently stands or have one compiled on his or her behalf by reliable support staff. Only in the most exigent circumstances should this be dispensed with. The time spent, while apparently costly in the short term, will be repaid in abundance in the long term.

Where the source material is available in electronic form, the first step is to capture it in the word-processing format used for drafting. This might necessitate conversion from another format, e.g. PDF or HTML, which will almost certainly involve some re-formatting (in particular, elimination of unwanted line-feeds) before having the drafting Styles applied. After that, the integrated text should be assembled, using the word-processing "cut-and-paste" facility. In cases where there has been a high level of "wastage" of material (e.g. successive substitutions of blocks of material, such as the repeated annual replacement of a lengthy schedule), it may be found to be more effective to postpone at least some of the refinement of formatting until after the text is assembled. However, adopting this short-cut approach works against building up of an electronic library of laws as made.

Where the source material is not available in electronic form, it will need to be captured by scanning (using optical character recognition) or by re-keying. Whether this is done before or after the assembly of the integrated text is a matter for decision based on the value that is placed on having an electronic collection of laws as made.

In either case, the compilation should be made strictly in accordance with the literal text of the amending laws. In the absence of enabling legislation for the purpose, the compiler should not presume to apply the "slip rule" to an unincorporable amendment. Instead, attention should be called to it in a note appended to the affected provision and, since the updated text is being prepared in connection with the drafting of new amendments, the opportunity should be taken to include among the new amendments one that overcomes the deficiency. The compilation should be annotated to indicate the

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15 To the extent that, in New South Wales, the statutory office of Government Printer is held by the Parliamentary Counsel.

16 In compiling updated texts for my own use while working in Ireland, I have converted to Word format material (in HTML) from the Electronic Irish Statute Book (www.irishstatutebook.ie) and material (in PDF) from the Oireachtas website (www.oireachtas.ie). Although the process is tedious, the converted text accurately reflects the source.

legislative history of each provision.[17] While notes of this kind have very little use in the ordinary day-to-day use of the updated text (and, for that reason, should not take a form that is distracting), they are extremely helpful in answering questions such as "How did this provision come to look like it does?" or "Is what is written here correct?".

(c) Drafting to assist in the compilation process

As noted above, the adoption of standardised Styles and the use of provision headings incorporating provision numbers are of great assistance in creating texts that are easily manageable for updating purposes. To further simplify the task of compiling updated texts and avoid error, particularly if the compilation task is to be performed by support staff, I suggest adoption of the following drafting practices:

Standardised numbering for provisions:

Use the same form of symbol for each particular level of indent. Specifically, in "sandwich provisions" (when unavoidable), refrain from moving to the numbering convention for the next lower level of indent. Instead of —

"Introductory words —

(a) first paragraph;

(b) second paragraph;

return to margin —

(i) third paragraph;

(ii) fourth paragraph.",

write —

"Introductory words —

(a) first paragraph;

(b) second paragraph,

return to margin —

(c) third paragraph;

---

[17] The manner and level of annotation is a matter of editorial discretion. When Australian Commonwealth legislation was printed with subject-matter marginal notes, reprints included a table of constituent legislation (footnoted to the citation provision), together with marginal notes, beside each individual subsection (or equivalent), setting out its legislative history. Upon the adoption of provision headings, the "history notes" were gathered together in a further table, at the end of the reprint, along with other notes relating to commencements, amendments not yet in force, unincorporable amendments, etc. At the same time, the level of annotation was simplified, being henceforth carried down only to the section (or equivalent) level. While I consider that a retrograde step, I am also of the view that, with the possible exception of individual definitions in an interpretation provision, it is unnecessarily complicated to annotate at the level of paragraph or lower and that the annotation of the legislative history of individual words is a distraction.

(d) fourth paragraph.".

Standardised amending formulae:

Adopt agreed formulae for use by all legislative counsel, preferably identifying the "where" before the "what".

Rationalisation of indents:

Eliminate artificial indents in amending formulations. The easiest way to do this is to use schedules for all amendments, as is now New South Wales and Australian Commonwealth drafting practice.

Avoidance of quotation marks in amending formulations:

This overcomes the complication of quotes within quotes.

Avoidance of hidden amendments:

All textual amendments made by an Act should be "advertised" in the long title by reference to all Acts that are amended. It is also helpful to corral them in separate Parts or Schedules or under distinctive headings within Schedules.

Avoid "inferential" amendments:

It is more helpful both to general readers and to compilers of updated texts to be excruciatingly explicit than to rely on inference. For example, when inserting a subsection (2) into a previously undivided section, it is better to amend the existing text to insert the requisite "(1)" at the beginning of what will become subsection (1) than to assume that it will spring up out of necessity.

An example of recent amendments prepared in the Office of Legislative Drafting and Publication in Canberra, set out in Appendix B, illustrates a number of the above propositions.

(d) Following through

Once the amending law is made, the amendments should be applied, as they take effect, to the amended law. Once a particular title has been brought up to date, it should not be allowed to again get out of date.

Likewise, on those rare occasions when pressure of work allows, the opportunity should be taken to compile updated texts of titles that are not the subject of current drafting projects.

Even if the updated texts produced by the application of the principles outlined above are used only within the confines of the drafting office as aid in the preparation of new laws, the effort in doing so will have been worthwhile. However, the law is for all, and the resource should be made more widely available. While it is not the purpose of this paper to deal at length with the matter of publication, it is in order to make a few basic observations:

- Web publishing and demand printing are more economical than comprehensive hard-copy printing.
- Hard-copy publication should be the by-product of timely electronic

publication.[18]

- It is more useful to users to make the texts of laws (either as made or as amended) available promptly in merely readable form than to make them available only after they have been embellished with hypertext links.[19]
- If it is beyond the capabilities of a jurisdiction to maintain its own legislation website, earnest consideration should be given to disseminating its laws through one of the websites of the free access to law movement, e.g. that of the Pacific Islands Legal Information Institute.[20]

(e) Dropped catches

As indicated above (paragraph (b)), when errors in amendments (or, indeed, in the drafting of the base text) are detected when compiling an updated text in preparation for the drafting of amending legislation, the opportunity should be taken to correct them in the amending legislation.

Errors that are detected in the course of applying amendments in the immediate aftermath of their making (paragraph (e)) are a different story. Without more, they should be indicated by appropriate annotation of the new update and kept under review for the next opportunity for amendment (to which, if serious enough, they may give rise). Otherwise, there is a need for standing legislation, either authorising editorial correction (as in typical revision measures and in legislation such as the Queensland *Reprints Act 1992*) or authorising the use of subordinate legislation (subject to whatever parliamentary review processes are in place) to directly amend primary legislation for the purpose. Such legislation could be of very limited compass, such as section 65 of the Interpretation Act (Fiji)[21] or more along the lines of Part 4 of the Queensland Act, dealing with errors and also with other desirable up-dating changes (e.g. changes of names of institutions).

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18 Updated texts of Australian Commonwealth legislation were, for a number of years, only uploaded to the then SCALE database after the publication of a hard-copy reprint. Nowadays, all titles are maintained in up-to-date form (within a day or two of the taking effect of amendments) on the ComLaw database, from which hard copy can be demand printed at any time and from which conventional printed versions are derived when sufficient (i.e. commercially viable) demand exists.

19 ComLaw typically offers texts in HTML, MS Word, RTF and PDF formats, without inter-textual hypertext links.

20 Accessible at www.paclii.org.

21 Rev. Ed 1985, Cap. 7 (accessible at www.itc.gov.fj/lawnet and www.paclii.org):

"65.—(1) The Attorney-General may, by order published in the Gazette**,** rectify any printing error appearing in any written law (other than in an applied Act).

(2) Every order made under the provisions of this section shall be laid before Parliament without unreasonable delay and if a resolution is passed at the next meeting of Parliament held after the meeting at which the order is so laid that the order be annulled, it shall thenceforth be void, but without prejudice to the validity of anything previously done thereunder, or to the making of any new order."

(f) Authenticity

An objection that may be made to the proposals in this article is that, while they may are adequate to produce an in-house "paste-up", they are not sufficient to provide the public with texts that can be produced in court unless they are issued in hard copy over the imprint of the government's official printer. In the absence of knowledge of the evidence laws of all jurisdictions, it is impossible to provide a single, definitive answer to that objection.

However, in light of experience in Australia over recent years, the basis for that objection would appear to be more apparent than real. This is, perhaps, demonstrated most forcefully by the alacrity with which in many jurisdictions (including Australian jurisdictions while official reprint programs lagged behind the fast-flowing tide of amendments), compilations prepared by independent legal publishers have been (and in many jurisdictions, continue to be) relied upon in the court room as well as the board room.

Nevertheless, there is comfort to be had from legislative provisions that require judicial notice to be accorded to texts on official websites: see, for example, ss. 24 and 26 of the *Legislation Act 2001* (Australian Capital Territory)[22]. Similar provision is made by the combined effect of section 45C of the Interpretation Act 1987 and section 143 of the Evidence Act 1995 (New South Wales).[23]

4. Application of above principles to jurisdictions having a referential-amendment heritage

The proposals set out above are readily applied to modern, textual-amendment legislation of a jurisdiction (such as Ireland) that also has a legacy of referentially amended legislation. Indeed, in relation to legislation of that sort, there seems to me no reason at all for an Act such as the *Statute Law (Restatement) Act 2002*. In the few instances where a modern Act has been subjected also to some referential amendment, an updated text could be annotated to indicate the nature of the referential amendment (rather like the annotation that might be used for a misdescribed textual amendment that, on that account, is unincorporable) and the earliest opportunity taken to regularise the situation by direct textual amendment.

Unless the *Statute Law (Restatement) Act 2002* is amended to give a restatement the status of a newly enacted Act that is thenceforth capable of being subjected to direct textual amendment, Ireland would be better served by having the text arising from a restatement exercise re-enacted as a coherent whole, in much the same manner as Acts were re-enacted in the course of the Victorian wholesale consolidation of 1958. After that, the way is (comparatively) easy.

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22 Accessible at www.legislation.act.gov.au. S. 24 (Authorised electronic version) is set out in Appendix C.

23 Accessible at www.legislation.nsw.gov.au.

5. Conclusion

To benefit most from the direct textual amendment technique, both in the performance of the drafting task and in the delivery to all stakeholders of an authoritative statement of the law in force, it behoves any drafting office labouring under the impediment of an unruly statute book to take charge of the situation itself and to forswear the allure of the "big-bang" revision.

Appendix A — Extract from table of provisions, Reprints Act 1992 (Queensland)

Appendix B — Extracts from amending regulations (Commonwealth of Australia)[59]

3 Amendment of Ozone Protection and Synthetic Greenhouse Gas Management Regulations 1995

Schedule 1 amends the *Ozone Protection and Synthetic Greenhouse Gas Management Regulations 1995*.

…

Schedule 1 Amendments

(regulation 3)

[1][60] Regulation 110, definition of *RAC industry permit*, paragraph (d)[61]

omit[62]

permit.

insert

permit;[63]

[2] Regulation 110, definition of *RAC industry permit*, after paragraph (d)[64]

insert

(e) a restricted refrigerant trading authorisation.

[3] Regulation 110, after definition of *relevant Board*

insert

restricted refrigerant trading authorisation[65] means an authorisation granted under paragraph 140 (1) (c).

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59 Ozone Protection and Synthetic Greenhouse Gas Management (Amendment) Regulations 2009 (No. 1), Select Legislative Instrument 2009 No. 4, accessible at www.comlaw.gov.au.

60 Schedule item numbers have their own distinctive format.

61 The "where" of the amendment is identified by "zooming in".

62 The use of italics for the "commands" is not essential but serves to clearly distinguish them. The insertion of a line feed between the "command" and the words to which it relates are integral to dispensing with quotation marks.

63 An explicit amendment, replacing the inference that formerly would have had to be drawn from the amendment made by item [2].

64 By making every amendment the subject of a separate item, artificial margins arising from paragraphing are avoided, allowing inserted material to be presented on its "natural" margin.

65 "Quoteless" definitions were adopted as part of Australian Commonwealth drafting before the move (by OLDP) to "quoteless" amending formulae. If the change in amending style had occurred

[5] After subregulation 113
insert

113A Offence — false representations

(1) A person commits an offence if:
(a) the person makes a representation …
…

(2) An offence against subregulation (1) or (2) is an offence of strict liability.

[6] Subparagraph 120(1)(e)(i)
omit

identified;

insert

identified, except as provided for in paragraph (ea);

[7] After paragraph 120 (1) (e)
insert

(ea) to keep and make available to the public … the following details for the holder of an RAC industry permit:

(i)…
…
(v) … of the holder of the permit;

[11] After subregulation 130 (4)
insert

(5) If the authority grants a licence it must …:

[14] Table 131, item 1, column 4, paragraph (d)
omit

UEE 31306

insert

UEE 31307

[22] Subdivision 6A.2.3, heading
substitute

Subdivision 6A.2.3 Refrigerant authorisations

[31] Subregulation 141 (1)
omit everything before paragraph (b), insert

(1) Subject to …, an authorisation … is subject to the conditions that the holder:

(a) keeps up-to-date records showing the amounts, if any, of refrigerant bought, recovered, sold and otherwise disposed of during each quarter;

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earlier, there would, in my view, have been no case for the alteration of the presentation of definitions.

and

[40] Paragraph 302 (1) (c)
omit

Appendix C — s. 24, Legislation Act 2001 (Australian Capital Territory)

24 Authorised electronic versions

(1) An electronic copy of a law, republication or legislative material is an authorised version if—

(a) it is accessed at, or downloaded from, an approved web site in a format authorised by the parliamentary counsel; or

(b) it is authorised by the parliamentary counsel and is in the format in which it is authorised by the parliamentary counsel.

Example of authorised electronic format

a locked pdf file

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see s 126 and s 132).

(2) It is presumed, unless the contrary is proved—

(a) that an internet site purporting to be an approved web site is an approved web site; and

(b) that an electronic copy of a law, republication or legislative material accessed at, or downloaded from, an approved web site and purporting to be authorised by the parliamentary counsel (however expressed) is an authorised version of the law, republication or legislative material; and

(c) that any other electronic copy of a law, republication or legislative material purporting to be authorised by the parliamentary counsel (however expressed) is an authorised version of the law, republication or legislative material; and

(d) that an authorised electronic version of an Act or statutory instrument correctly shows the Act or instrument; and

(e) that an authorised electronic version of a republication of a law correctly shows the law as at the republication date; and

(f) that an authorised electronic version of legislative material correctly shows the material.

Examples of an electronic copy of a republication purporting to be authorised by the parliamentary counsel

1 The republication has the words ‘Authorised by the ACT Parliamentary Counsel’ on the front cover and the words ‘Authorised when accessed at www.legislation.act.gov.au or in authorised printed form’ at the foot of each page of the republication.

2 The republication has the words ‘Authorised by the ACT Parliamentary Counsel’ on the front cover and the words ‘Authorised by the ACT Parliamentary Counsel—also accessible at www.legislation.act.gov.au’ at

the foot of each page of the republication.

Note A reference to an Act or statutory instrument includes a reference to a provision of the Act or instrument (see s 7 (3) and s 13 (3)). A reference to a republication includes a reference to part of a republication (see s 22A def ***republication***).

One Giant Leap — The Ultimate Legislation System, Available Now[1]

Ed Hicks[2]

Abstract: Laws are in many ways the most important products of governments, and yet until recently governments did relatively little to make their laws easily accessible to those who would like to consult them. Today, the technology exists to do this, and to do it very well, via the ultimate legislation system outlined in this presentation. The benefits that flow from providing world-class access to the laws of a jurisdiction are understandable and meaningful to legislators and other high-level decision makers whose support is needed.

Introduction

The presentation by Jeremy Wainwright[3] highlighted some of the things that, from a simplified technological perspective, can be done in a legislative drafting office in order to improve the efficiency of the drafting and publishing processes. I think it is reasonable to call this the "small steps" approach to improving these processes. While I fully agree that this approach is far better than doing nothing, it would indeed be a long and winding road to ever reach the destination that I think those involved in the legislative process would like to arrive at. I know because I walked that road with Justice Canada for many years — but I also led them on a different road.

This presentation is from the other end of the spectrum. Instead of small steps, it is now possible to make one giant leap — to go from wherever your legislation system is now to the ultimate legislation system. And to do so in an economically viable way.

Think of these two possible courses as two ways to get from Ottawa to Nairobi. You can take small steps, using primarily boats and trains, and reach your destination in roughly 2 weeks (barring mischances along the way). Or you can take one giant leap

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1 Presented at the 2007 CALC Conference, Nairobi, Kenya.

2 Business Development Director - LIMS, Irosoft Inc., Montreal, Canada, on interchange from the Legislative Services Branch, Justice Canada).

3 The oral abstract, presented at the Nairobi conference, of "Keeping the Statute Book up to date — a self-help guide" published in this issue of *The Loophole* at p. 55.

(OK, 2 with the stopover in London!) and fly to your destination in less than 24 hours. And you will quickly realize which one is not only more efficient but also less expensive and much less tiring.

Let's also put the choices in the context of building a house. You can do it yourself, with a sketchy half-baked plan and a little help from your (former?) friends — but beware of the morass of building requirements created by legislative counsel! Or you can hire a professional with the right experience and avoid most of the pains you would otherwise incur (and keep your friends!). Again, you will quickly realize which one is not only more efficient but also ultimately less expensive and much less tiring — and it also gives you a more valuable and satisfying result.

Whether travelling, building a house or building a legislation system, you need 3 things: a good plan, sufficient money and the right professionals to assist you. A good plan requires knowing your goal — what you want to achieve at the end of your work. All that I can do in this presentation is give you a brief overview of what the goal of an ultimate legislation system is by highlighting its main attributes.[4] I will then briefly discuss the other two important needs, sufficient money and the right professionals.

The ultimate legislation system has the following primary components[5]:

- drafting system
- consolidation system
- publishing system (paper and website)

Nothing new so far. Your office already has a drafting system and a paper publishing system, even if it's only out-of-the-box Microsoft Word. That, combined with an intelligent operator, may also constitute your "consolidation system" (if you make consolidations, which some jurisdictions call "restatements" or "reprints"). You may also have an electronic publishing system that is as simple as posting Word documents (or PDF versions of them) on a website. This would constitute a "minimalist" legislation information management system, or LIMS.

So what more do you need? Well, at the least you need to adopt Jeremy's approach and make your drafting more efficient using styles and other built-in functions of your word processor. The next step would be to use the programming capabilities of your word

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4 In July 2007, The Law Reform Commission of Ireland published a Consultation Paper on Statute Law Restatement (see http://www.lawreform.ie/Restatement%20CP%20Final%20Printer%20Version.pdf). If you are interested in my topic, you should read this paper because it provides some good background information. (I think they should have given more attention to the XML-based point-in-time systems developed in Canada, but unfortunately they only mention them in passing.) While they couch their recommendations in careful terms, it seems to be clear where they think Ireland should go, and it is to the ultimate legislation system.

5 If the legislative counsel office also has responsibilities respecting the legislature or the Gazette, some other components such as a document tracking system or a Gazette publication system may be desired. My experience suggests that this is rare, but in any case these components could be readily added.

processor to automate more functions in the drafting and paper publishing processes.[6] Then set up a website and post your laws in word processor or PDF format, managing all the files manually. Then add a search engine that will allow users to search those files. Then start to make your website look more professional. Then try to make your website actually work better so that you (and your government and public users) don't waste so much time with an underperforming site.[7] Then upgrade your word processor to a new version and deal with all the problems resulting from that. And you still will be far away from the ultimate legislation system.

But guess what? You will have spent more time, money, energy and frustration than you would if you just took the giant leap to the ultimate legislation system.

The goal

So what more do you find in the ultimate legislation system? Here is a starter list:

1. Non-proprietary data markup[8] using international standards to ensure data intelligence, independence and longevity (primarily this means using XML)
2. Automated insertion and formatting of legislative provisions (section, paragraph, etc.), including numbering (with insertion numbering used between existing items of the same structural level)
3. Automated promote, demote and adopt functions (for example, promote a subsection to a section, demote a paragraph to a subparagraph, adopt a section into the preceding section, all with related structural and numbering changes done automatically)
4. User-controlled automated renumbering of legislative provisions, including cross-references in the text (that is, renumber only when you want to, and only within the scope you specify, such as paragraphs within a section)
5. Fully-formatted copying from the database to the drafting application with no need to modify markup
6. Templates and samples to make common or complex drafting needs easy for legislative counsel (for example, schedules, tables with header rows, various types of orders and notices)
7. Automated table of contents creation (if a table of contents is wanted)
8. Ability to deliver your data in different fashions from a single source, with no changes to the markup and no human intervention (for example, <MarginalNote> may be rendered in the margin on paper, but above its section on the website)
9. Very powerful yet easy browsing, including an active table of contents (for example, a hyperlinked table of contents for a statute on the left of your screen,

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6 Between 1993 and 1998, I developed two such systems on private contracts for Canadian provinces, and participated in a third for Canada, but I always knew there was a better way!

7 In the mid-1990s, I also lead all this sort of development for Justice Canada, starting with Folio Views and then through several versions of HTML-based websites. These were all rather frustrating "small steps" because it took many years to finally get the funding to build the ultimate legislation system that Justice Canada now has.

8 If you are unfamiliar with the term "markup", it means the tags or codes that occur in textual documents to identify different features of the document.

with the text shown on the right; click on a heading in the table of contents and get just the text that belongs under that heading shown on the right)

10. Regulations grouped under their authorizing statutes
11. Comprehensive search engine with high precision (for example, when searching for two or more words, find them only when they are in the same section)
12. Point-in-time search and delivery (search the law as it existed on a particular date, and deliver the whole document as of that date)
13. Standardized formatting for different print environments (for example, automated cover page changes for different stages of legislative consideration)
14. Automated creation of many hyperlinks
15. Annual "volumes" for both statutes and regulations (that is, legislation as passed, organized on a chronological basis within each year)
16. Automated creation of annual volumes and the legislative portions of Gazettes
17. Stable hyperlinks from other sites to arbitrary and precise legislative chunks (for example, a link from a departmental site to section 35 of the *XYZ Act* as it read on a specified date)
18. Ability to incorporate references outwards to other sites, or to documents not available on the Web (for example, a link from a provision of the *Copyright Act* to an explanation of it on the site of the department responsible for it, or to a court decision that interprets it)
19. Ability for the master database to become a corporate memory system (an extension of references to include information known by specialists that could serve highly important corporate memory purposes and save much research time)
20. Ability to easily superimpose any number of organizational structures on the legislation for both browsing and searching purposes (for example, one structure that provides an organization by Minister or Department responsible, another that provides an organization by topic such as banking, land use, motor vehicles, etc.)
21. User option for keyword-in-context (KWIC) search results
22. An assisted consolidation system with audit trails, providing fast updates that remain under human control (in some jurisdictions, "consolidation" is called "restatement" or "reprint"); note that the consolidation system is the key to point-in-time delivery of legislation
23. Access to "related provisions" (for example, what some jurisdictions call "non-textual amendments", or amendments that do not directly change the text of the law that they affect)
24. Access to not-yet-in-force (NYIF) provisions for each piece of legislation (NYIF provisions are generated as part of the consolidation system; where and when NYIF provisions are displayed is customizable)
25. Extensive features to support the needs of jurisdictions with bilingual legislation (for example, fully-automated side-by-side printing of legislation according to the alignment rules of the jurisdiction; hyperlinking between language versions; user interfaces in both languages)

I would like to highlight one aspect in particular of the ultimate legislation system — its point-in-time capabilities. Point-in-time refers to the ability to consult the legislative database as of a specified date. Thus, you can search the laws as they existed on a specified date in the past (back to as far as the relevant data was put into the system). This provides an archival search facility that a current consolidation system cannot provide, as well as an automated archival data source. Once implemented, its value will

continue to increase, and users of the system will benefit more and more as years go by.

There are many other features of the ultimate legislation system, but the above should give you a flavour for how much more extensive its capabilities are than any other legislation system you are likely aware of.

Obviously, part of the goal of the ultimate legislation system is to provide great drafting and paper publishing tools. However, I would say that the major goal of the ultimate legislation system is to provide top-quality access to the law. ***Laws are in many ways the most important products of governments***, and yet until recently governments did relatively little to make their laws easily accessible to those who would like to consult them. There was almost a paranoia against making them more accessible (particularly copyright issues, which have not entirely disappeared), and certainly little realisation that anyone other than lawyers would actually consult them. How wrong those ideas have been proven! The laws website of Justice Canada gets more hits than almost any other site in the Government of Canada! The experience in many other jurisdictions seems to be similar.

This is an appropriate point at which to turn the spotlight on Lionel Levert, the President of CALC and formerly my Chief Legislative Counsel at Justice Canada. In 1995, Lionel had the vision to recognize that access to the law, and specifically legislation, is not only highly important, but is properly within the mandate of the Chief Legislative Counsel. While he didn't understand the technical aspects of the ultimate legislation system that I proposed to go forward with, he didn't need to — he understood the primary goal of it, which was to improve access to the law. It is very largely due to Lionel's vision in this regard that Justice Canada now has an ultimate legislation system, and he deserves thanks for the support he gave to making it happen.

Let's now turn to the other 2 needs — sufficient money and the right professionals.

Sufficient money

In terms of sufficient money, one might first ask "How much does the ultimate legislation system cost?" My response is, that's not the appropriate question; instead, you should ask "Is the ultimate legislation system worth what it costs?" And my answer is framed in another bunch of questions such as the following:

- How much do you value the time that it will save for all the users of the system?
- How much will the point-in-time aspect be worth to users in 10 years and beyond?
- How much is it worth to the image of your government at home and internationally?
- How much is it worth to the economy of your jurisdiction?

The worth of the ultimate legislation system is as difficult to precisely evaluate as are the answers to these questions — but there is no doubt that it has a worth in all of these ways, and more. One method of finding sufficient money to acquire the ultimate legislation system is to develop some rational answers to these sorts of questions, and put them before the legislators and high-level decision makers who can appreciate them. These answers are much more important, and focus on much better sources of potential savings, than any pittance you might find in your paltry legislative counsel

office budget!

Another method is to be creative in how you implement the ultimate legislation system. While there is a definite synergy amongst the components of the ultimate legislation system, it is feasible to implement them over several years, starting with drafting and paper publishing — at least you would be building the right base for the future. Another method is to use different forms of financial structures, such as software rental or "rent-to-own". Yet another is to contract out some of the operations, such as consolidation or website operation — that way, you avoid the up-front costs of the most expensive parts of the ultimate legislation system. You may also be able to negotiate payment for some of these options on a form of annual per-user basis, such as $X per legislative counsel for the drafting software.

Creative thinking combined with flexibility on behalf of legislative counsel and the ultimate legislation system contractor can go a long way to resolving the issue of sufficient money.

The right professionals

Penultimately, a few words about the right professionals.

It should be obvious that, at each step throughout the process, the right professionals are the key. The right professionals are almost always ones with experience — ones who have already done the type of job you want done, ones who know as much as possible about your type of project, ones with whom you feel comfortable because of their knowledge of your type of environment. You don't have to spend a lot of time and money teaching them about these things — in fact, with their experience, they can often make highly useful suggestions to you for improving your environment.

The only substitute for past experience is future experience — at your expense. And at contracting rates of US $1,000 to $2000 or more a day per person, future experience adds up quickly!

Data conversion

Finally, there is one other thing that needs mention — data conversion. Conversion from your data's current format to XML must be done to implement the ultimate legislation system. Conversion is not really part of the ultimate legislation system, but it is a necessary prelude to it.[9] Depending on the current state of your data and your approach to verification of the conversion, this can be a large expense and a long process. Typically, there is very little difficulty with regular legislative text — headings, sections, paragraphs, etc. It's a situation where roughly 90% of the problems come from 10% of the data — principally tables, images and other non-standard data.

Here in particular the need for the right professionals is paramount. A lot of time and money can be saved by taking the right approach to conversion. That includes the right

[9] If drafting is decentralized and not all done with the ultimate legislation system drafting software, conversion would be an ongoing need and in that way might become part of the ultimate legislation system.

approach on your part as legislative counsel. I recommend that you recognize that the precise formatting of your data very rarely has anything to do with data validity or with the quality of your product from the perspective of 99% of the users of your data. Accept some legally insignificant formatting "problems" — if you ever deal with them, make it a long-term low-priority project for "down-times". Be insistent about validity, be flexible about formatting.

To borrow the Nike slogan, "Just do it".

go further
do more

LEGISLATIVE COUNSEL GRADE 5

REF: IRC2987
SALARY: £57,300 - £116,000 (under review)

DEPARTMENT: Office of the First Minister and deputy First Minister (OFMDFM)

LOCATION: Parliament Buildings, Belfast

An opportunity exists to join an expert team of legislative drafters working in the Office of the First Minister and deputy First Minister drafting Bills for introduction to the Northern Ireland Assembly.

The job involves working with all the Northern Ireland government departments in delivering the Northern Ireland Executive's legislative programme across a wide range of devolved responsibilities.

The restoration of devolved government is, not surprisingly, creating increased demand for primary legislation and we wish to recruit an experienced drafter to augment our team.

Further appointments may be made from this competition should NICS positions become vacant which have similar duties and responsibilities.

For an application form and more detailed information, including the duties and responsibilities of the post, and the criteria to be used during the recruitment and selection process, please write, email or telephone HRConnect at:

HRConnect, PO Box 1089, The Metro Building, 6-9 Donegall Square South, Belfast, BT1 9EW. Telephone: 0800 1 300 330. Email: recruitment@hrconnect.nigov.net

Applicants are encouraged to submit an online application at the following address: www.nicsrecruitment.gov.uk Requests for hard copy applications are accepted and all applications will be treated equally regardless of whether they are hard copy or online.

All requests must include your name, address and reference number IRC2987.

Completed application forms must be returned no later than 12:00 noon (UK time) on Friday 3 July 2009.

As Roman Catholics and women are currently under represented at this grade level within this occupational group in the NICS, applications from Roman Catholics and women would be particularly welcome.

The Northern Ireland Civil Service is an Equal Opportunities Employer.
ALL APPLICATIONS FOR EMPLOYMENT ARE CONSIDERED STRICTLY ON THE BASIS OF MERIT.

Northern Ireland CIVIL SERVICE

www.nicsrecruitment.gov.uk

United Nations

Nippon Foundation of Japan Fellowship Programme

Applications for 2010 Session

The Division for Ocean Affairs and the Law of the Sea (DOALOS) of the Office of Legal Affairs of the United Nations is now accepting applications for the 2010–2011 session of the United Nations — The Nippon Foundation of Japan Fellowship Programme. We are pleased to note that during the last five years, 55 awards have been made to nationals of 48 States. **The deadline for submissions has been set for 15 August 2009**.

The major objective of this Fellowship Programme is to provide funded opportunities for advanced training in the field of ocean affairs and the law of the sea, or related disciplines, to government officials and other mid-level professionals from developing coastal States so that they may obtain the necessary skills to assist their countries in the formulation of comprehensive ocean policies and to implement the legal regime set out in the United Nations Convention on the Law of the Sea (UNCLOS) and related instruments.

The Fellowship Programme consists of two phases, namely a six-month research and study phase, immediately followed by a three-month training phase. The first phase will be implemented through a university or research institution affiliated with the Programme and which has in-depth competence and expertise in the given field of studies. After completing the first phase, fellows will undertake a training phase with the Division for Ocean Affairs and the Law of the Sea in New York, or with an intergovernmental agency or organization competent in the chosen field.

With respect to required qualifications, candidates must be between the ages of 25 and 40, possess a first university degree or equivalent, and demonstrate an ability to undertake advanced academic research and studies. They shall also be mid-level administrators from national government organs, or other agencies, that deal directly with issues such as national ocean policy, establishment of maritime zones and the delimitation of maritime boundaries, coastal zone management, conservation and management of marine living resources, maritime transport and shipping, prevention of pollution, crimes at sea and their suppression, and the protection and preservation of the marine environment including marine sciences.

A detailed outline of the requisite qualifications, along with the application forms, additional Programme information, and the current list of participating institutions is available on the Fellowship Programme webpage:

http://www.un.org/Depts/los/nippon/index.

Candidates must use the **new simplified application** package which is available for download from this homepage.