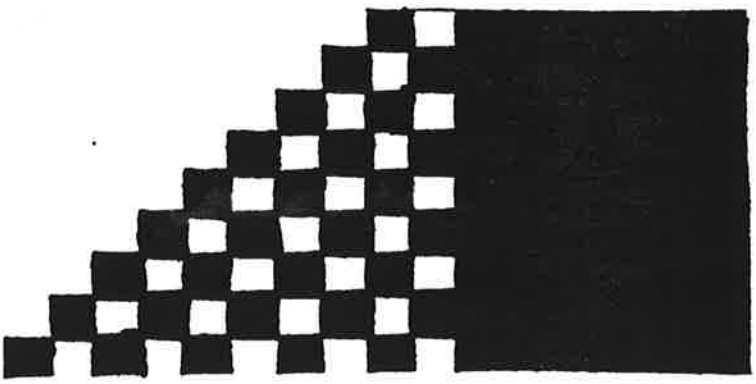
The Loophole

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



Volume 2, Issue 4

MARCH, 1989

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

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

Mr. Walter Iles (President)	NEW ZEALAND
Mr. Justice Gerry Nazareth (Vice President)	HONG KONG
Mr. Peter Pagano (Secretary)	CANADA
Mr. Arthur Buluma (African member)	KENYA
Mr. N.J. Abeyesekere (Asian member)	SRI LANKA
Ms. Hyacinth Lindsay (Caribbean member)	JAMAICA
Mr. Neil Adsett (Pacific member)	TONGA

TABLE OF CONTENTS

COMMENTS FROM THE SECRETARY

Welcome to Volume 2, Issue 4 of the LOOPHOLE, the Newsletter of the Commonwealth Association of Legislative Counsel.

There are a few matters that I would like to bring to your attention:

1 I am pleased to advise you that Mr. Neil Adsett of the Kingdom of Tonga has been appointed by the Council as the representative of the Pacific Region. As you will recall Mr. George Harre resigned after the Coup in Fiji. One of the articles in this issue is an article written by Mr. Adsett for the Queensland Law Society Magazine - Proctor.

2 CALC's Annual Meeting is near. In about 1 year from now we will be meeting in Auckland, New Zealand during the Commonwealth Law Conference. The exact date of our meeting has not yet been determined. I will advise members of the exact date of the meeting and the proposed topics for discussion. For further information about the Commonwealth Law Conference you can write to the following:

Commonwealth Law Conference
P. O. Box 12-442
Auckland, New Zealand

On the matter of topics for the Association's meeting, I have yet to receive any suggestions.

3 As you have noticed, I am producing only 2 Newsletters a year. The main reason is the cost. It costs about $500 (Canadian) to send out each issue. In addition, I am not receiving many contributions to justify more than 2 issues.

4 Our membership now consists of about 500 members. In order to be able to keep in touch with all of you, please ensure that you forward any change of address. In a few cases, issues of the LOOPHOLE are being returned to me as "address unknown".

5 I would like to take this opportunity to apologize for any errors or omissions contained in the last membership list. I've rectified any errors and omissions brought to my attention. If you are aware of others, please advise me.

6 On a substantive note, Mr. Iles sent me a copy of the Law Commission of New Zealand's Preliminary Paper No. 8 - Legislation and Its Interpretations. One of the articles is on the Revision and Consolidation of Statutes. I have reproduced it in this issue. In subsequent issues I will try to reproduce other portions of this Paper.

7 Also in this issue is an article by Maurice Kelly of the Attorney General's Department in Australia. Please note that in the article the reference to "Commonwealth" is meant to be a reference to the Federal Government of Australia, as Australia refers to itself as "The Commonwealth" when speaking "Federally".

8 In addition, I have included an article entitled "Legislative Lexicography".

9 I would be pleased to print any comments both for and against "Plain Language" drafting.

10 If you would like to have the phone number or FAX number of your office included on the membership list, please advise me.

LIST OF NEW MEMBERS

Mrs. Eva V. Jhala	Lusaka, The Zambia
Mrs. Doris K.K. Mwinga	Lusaka, The Zambia
Ms. Barbara Zulu	Lusaka, The Zambia
Mrs. L. Masua	Nairobi, Kenya
Mr. S.M. Mwenesi	Nairobi, Kenya
Ms. T. Nyimbae	Nairobi, Kenya
Ms. Anna J. Fried	Nova Scotia, Canada
Ms. Elizabeth Baldwin	Ontario, Canada
Mr. Jean Brunet	Ontario, Canada
Mr. Paul Chappel	Ontario, Canada
Mr. Evans Girard	Ottawa, Canada
Ms. Susan Klein	Ontario, Canada
Ms. Marilyn Leitman	Ontario, Canada
Ms. Margaret MacKinnon	Ontario, Canada
Ms. Lucinda Mifsud	Ontario, Canada
Mr. Miles H. Pepper, Q.C.	Ottawa, Canada
Ms. Louise Senechal	Ottawa, Canada
Mr. A. Sidney Tucker	Ontario, Canada
Mr. Frank Williams	Ontario, Canada
Mr. Michael Wood	Ontario, Canada
Mr. Russell Yurkow	Ontario, Canada
Mr. Kenneth A. McKenzie, Q.C.	Alberta, Canada

Dato' Haji Abdul Malek Bin Haji Ahmad	Perak, Malaysia
Mr. Ian Brown	Saskatchewan, Canada
Mr. Ken Chutskoff	Saskatchewan, Canada
Mr. Robert D. Cosman	Saskatchewan, Canada
Mr. Garnet Holtzman	Saskatchewan, Canada
Ms. Jane Sather	Saskatchewan, Canada
Mr. Alexander Fyfe	Northwest Territories, Canada
Ms. Linda Tarras	Northwest Territories, Canada
Mr. Mark Aitken	Northwest Territories, Canada
Ms. Janet Drysdale	Northwest Territories, Canada
Mr. Vidy Cheung	Hong Kong
Mr. Mo Gilbert	Hong Kong

ADDRESS CHANGES

Ms. L. Hopkins (formerly Ottawa, Canada)	Legislative Counsel Office Toronto, Ontario, Canada
Mr. Gerard Bertrand, Q.C. (formerly Ontario, Canada)	University of Ottawa Faculty of Law Graduate Studies and Research 57 Copernicus Ottawa, Ontario, Canada K1N 6N5
Mr. Clive Borrowman (formerly Victoria, Australia)	Office of Parliamentary Counsel G.P.O. Box 1409P Hobart, Tasmania 7001 Australia
Mr. W.M. McGregor (formerly Fiji)	The Greffier of the States Jersey, Channel Islands
Ms. Dorothy Kitching (formerly Norfolk Island)	Australian Law Reform Commission Sydney, Australia
Mr. Lebrecht Hesse (formerly The Gambia)	P.O.Box 1489 St. John's, Antigua
Mr. Gottfried Nikoi (formerly Ghana)	Attorney General's Chambers P.O. 578 MBABANE Swaziland
Mr. Henry A. de B. Botelho	No. 2, Tai Hong Road, Top Floor HONG KONG
Mr. Francis Cheung	A4 Verdun Villa, 8 Ede Road Kowloon Tong KOWLOON, HONG KONG

V.C.R.A.C. Crabbe
(formerly Zimbabwe)

Faculty of Law, U.W.I.
Cave Hill Campus
Barbados

ADDRESSES UNKNOWN

Ms. Jacquier
Mr. N. Thurm
Mr. B. Shaffer

Miss Monica Barnes

OMISSIONS

Mr. Brian Russell-Davis - his name was inadvertently left off the last membership list. Mr. Russell-Davis is with the Parliamentary Counsel's Office in Australia (NT)

Mr. G.G.D. de Silva - his name was inadvertently left off the last membership list. Mr. de Silva is a legal draftsman for the Republic of Seychelles

MEMBERS SEEKING EMPLOYMENT/CONTRACTS

Susan Krongold is interested in contract work drafting legislation.

She spent seven years in the Public Service of Canada in various capacities close to the legislative process. She drafted Private Members' Bills at the Parliamentary Counsel's Office in the House of Commons, briefed the Prime Minister and the Cabinet on legislation proposed for introduction in Parliament as an officer of the Privy Council, and vetted regulations at the Privy Council Office (Department of Justice).

Since 1985 she has worked as a legal writing consultant helping federal departments and agencies develop and draft statutes, regulations and policy manuals.

She may be contacted at:

351 Summit Avenue
Ottawa, Ontario
CANADA K1H 5Z7

Telephone (613) 521-0637
Facsimile (613) 739-0035

Merrilee Rasmussen and Bonnie Ozirny are both interested in contract work drafting legislation. Ms. Rasmussen was formerly the Chief Legislative Counsel and Law Clerk for the Government of Saskatchewan, Canada.

Both have extensive experience in legislative drafting.

They may be contacted at:

Rasmussen Ozirny
Barristers and Solicitors
2816 Victoria Avenue
REGINA, Saskatchewan
CANADA S4T 1K5

Telephone (306) 584-7702

III ACCESS TO THE STATUTE LAW – THE CONSOLIDATION AND REVISION OF LEGISLATION

THE PRESENT

Beth Bowden (Manager, Legislation and Marketing, Government Printing Office) began by explaining the statutory framework for the Government Printing Office. She noted that although the students' association in the case of *Victoria University of Wellington Students Association* v. *Shearer* (1973) 2 NZLR 21 had attempted to force the Government Printer to make available copies of the Code of Civil Procedure, the legislation did not impose an absolute obligation upon the Government Printer to make all legislation available. Nevertheless it was obviously important that all legislation should be as accessible as possible.

The Government Printing Office held regular consultations with government departments and Parliamentary Counsel but there was a need for better liaison, particularly with departmental publicity officers.

In order to make legislation more readily available the Office was developing new methods of distribution – for example the freephone system, the use of facsimile material, and the development of a database which would eventually encompass all public Acts, Bills and Hansard.

THE FUTURE

Moira Collyns (of the National Library) explained the development of Kiwinet, a computer database which was commenced by the National Library in February 1988. Subscribers to this service could gain access to the Government Printing Office database, and in addition lists of holdings in all New Zealand libraries and an index of New Zealand periodicals. As the number of subscribers increased, there were plans to increase the service to cover more areas, for instance unreported judgments, and information on the Companies Register.

COMPARATIVE EXPERIENCE

David Elliott
Law Drafting Officer, Law Commission[1]

This paper describes how other jurisdictions, notably England and Canada, have attempted to keep their statute law "accessible". The word "accessible", as it is used in this paper, includes both "up to date" and readily found. The paper comments in particular on English and Canadian experience with consolidations of and revisions to the statute law.

The first part summarises the process of consolidating and revising legislation in England and Canada and provides some comment on the process. The second part of the paper discusses how overseas experience may assist in making decisions about the proposed computerisation of New Zealand statutes.

ENGLISH EXPERIENCE

In England consolidation of statutes is common. There are three kinds of consolidation:[2]

(a) The "pure" consolidation
This is virtually a verbatim re-enactment, in one Act of Parliament, of law scattered in several Acts. In its usual form no material change in the law is made. The organisation is improved and the law is presented in a more coherent manner. In the course of a consolidation sections may be combined and provisions relating to past transactions are generally omitted.

(b) Consolidation with corrections
Consolidations falling in this category are authorised by the Consolidation of Enactments (Procedure) Act 1949. The corrections that are permitted under this procedure include: resolving ambiguities, removing doubt, removing unnecessary provisions.

(c) Consolidation with amendments
These are consolidations prepared by the English Law Commission which include changes to the law to give effect to Law Commission recommendations.

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1 This paper expresses the personal views of the writer.
2 For a fuller description of the work of consolidation and revision in England see *Legislation* by David Miers and Alan Page.

All consolidation Bills go through the same process. After Second Reading they are referred to a Joint Committee of both Houses of Parliament. If the Bills are approved by the Committee the rest of the parliamentary stages are usually a formality.

The demand for consolidation Bills is greater than the supply: even so, the output is considerable. Of the 21,000 pages of Acts passed by the Parliament of the United Kingdom in the past ten years, over 7,000 have been contained in consolidation Acts.[3] The work of consolidation is carried on both by the Office of the Parliamentary Counsel and by the English Law Commission. Consolidation in the Law Commission is undertaken by Parliamentary Counsel seconded from Parliamentary Counsel Office.

In England there are "reprints" of Acts. This is the publication of the original Act with amendments incorporated in it. It is similar to the New Zealand "reprint" system. The reprint system works relatively well when the original Act is amended by the "textual amendment" method (e.g. s.2 is struck out and the following section substituted ...). When the textual amendment system is not used consolidation Acts become virtually essential.

Access to the statute law in England has improved in the last decade and continues to improve. But much remains to be done. There are few, if any, lessons for New Zealand in the English experience except perhaps to guard against statute law becoming as inaccessible as it has become in England.

Publication of Statute Law

The systematic publication of statutes as "Statutes Revised" in England started in 1870. There have been three editions. A new publication called "Statutes in Force", based on a classification of statutes by subject matter, was completed in 1981. The publication and editing of Statutes in Force is under the direction of a committee chaired by the Lord Chancellor.

While there have been calls for a computerisation of English statute law no specific plans to do so have been announced.

CANADIAN EXPERIENCE

It is dangerous to generalise with a country having ten provincial legislatures, one Federal parliament and two territorial legislative councils, each having lawmaking capacity.

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3 British and French Statutory Drafting – Proceedings of the Franco-British Conference, 7–8 April 1986. Institute of Advanced Legal Studies (University of London), Comments by Mr Christopher Jenkins, Parliamentary Counsel, pp. 72–78.

Each of those jurisdictions has their own way of making the statute law "accessible", but there are common threads. During most of this century there have been attempts by most of the provinces to prepare what in Canada are called "revisions" of the statute law every ten to fifteen years or so. The Federal government's revisions have been produced less frequently.

Simply put, legislation authorises a person or group of persons to prepare a revision of all the Acts in force in the jurisdiction authorising the revision. Once complete, the revised Acts replace the "originals" and all the amendments made to them. The revised statutes become the statute law of the jurisdiction. Canadian revisions take different forms, but they will invariably involve:

- correcting references to outdated offices, departments and Ministers;
- correcting cross references to sections and the names of Acts;
- incorporating improvements to the presentation of the statute book which may involve a new style of print, line length, marginal or head notes to sections.

Revisions will usually go much further than cosmetic changes. They can also include:

- modernising outdated or antiquated language;
- splitting up large blocks of type into two or more sections and dividing sections into subsections and paragraphs to make them easier to read and understand;
- resolving conflicts between Acts;
- changing sex biased language to sex neutral language;
- omitting provisions the effect of which is spent;
- generally making such amendments as are necessary to bring out more clearly what is considered to be the intention of the Legislature.

Sometimes sections from one Act which can be more conveniently located in another are moved to the other Act. On occasion, two or more Acts are combined into one or the provisions of an Act that do not conveniently fit together may be split into two or more Acts.

The revision process

The process of revising statutes, simply stated, is as follows:

- a revising officer or officers will be appointed – in most cases this is a Legislative Counsel (equivalent to a New Zealand Parliamentary Counsel);

- the policy of the revision is settled – this involves a determination of the nature and extent of the revision, what is to be revised and how it is to be done; a manual of standard provisions will usually be prepared;

- the original Act and every amendment made to it are provided to the revising officer;

- the revising officer will create a consolidation of the original, "cutting and pasting" the amendments into it;

- the revising officer will then mark up the changes to the consolidated text that are necessary;

- the revised text is typed up and proof read;

- the typed up revised text, together with the consolidated version with the changes made by the revising officer, are sent to the department responsible for administering the Act;

- the department checks the consolidation and revisions and returns it to the revising officer with appropriate comments;

- the text is checked again (usually by a second revising officer); further revisions are made as required and rechecked by the department if necessary.

This process continues until all the Acts are in a revised form. Ultimately a "Revised Statutes Act" is prepared. It is usually prepared after the revision is virtually complete so that any changes the revising officers have made can be authorised by legislation.

The revised statutes are printed in alphabetical order in a set of volumes and enacted as the law, usually coming into force on Proclamation. The revised statutes replace the existing statute law.

Comments on the Canadian system

Most jurisdictions in Canada either have their statutes on computer or are in the process of establishing a computer database. The result of computerisation of statutes in Canada is that, in most jurisdictions, the statute law is now available in three forms:

- the form in which it is passed on the date the revised statutes are proclaimed (normally a set of volumes printed in alphabetical order) plus the annual volumes of Acts passed, which are published each year;

- a looseleaf system which enables the reader to see the current state of the statute law;

- the statute law on computer.

While most jurisdictions now have their statute law as a computer database, it is not yet readily available outside Legislative Counsel Offices although some commercial statute law databases are available. Computerisation has allowed comprehensive indices to be prepared of the statute law. These are proving a valuable tool in providing access to the statute law.

In the past ten years access to the statute law has also been helped by the establishment of looseleaf systems of the statute book. Looseleaf systems are now available in a number of Canadian jurisdictions. After the end of each session of a Legislature, looseleaf pages are issued replacing those that have been changed by amending Acts. It is a simple task for the amended pages of the statute book to be removed and the new pages inserted. Subscribers to the looseleaf version then have access to up-to-date versions of the statute law within weeks of the end of a Legislative session. Annual volumes of the statutes are still published. When the annual volumes are used with the revised statutes the reader is able to determine the state of the statute law as at any given time. The combination of computerisation of the statute book and looseleaf systems probably means that the day of the ten-year revision in Canada is over. That is the view of the leading reviser in Western Canada, W. E. Wood QC. In his view once the statute law is on a computer having sufficient search capacity, cross references, names, and other phrases that need to be changed as a result of new legislation will be found easily, and those changes will be made completely when an amending Act or new Act is passed. Consequently it will no longer be necessary to periodically check all the statutes to ensure they are up to date. A computer facility, coupled with the speed with which Acts are repealed and replaced, means that wholesale revisions to the statute book may be a thing of the past.

Only if there were large scale changes proposed for the statute book as a whole would another revision be required. Perhaps the State of Victoria will lead the way in this regard. The Law Reform Commission of Victoria has proposed an undertaking to revise the statutes by rewriting them in plain English. Although not called "a revision" but rather a "consolidation", all the elements of a "Canadian revision" are there.

Personal observations

If periodic revisions are a thing of the past it would be a pity. A periodic objective review of the statute law is healthy and constructive. The state of the Canadian statute book is a credit to those who have undertaken revisions in the past. If there has been anything lacking in the past it has been the reluctance of revisers to

look to the expertise of others in assisting them in a revision. An Act is a communication from the legislator to the persons affected by it. Communication can be aided by the means by which the Act is presented in written form. Obviously the style of language is a major component in communicating the law, but there are other components. These include the type style, headings and marginal notes, line length and margin lines for subsections and paragraphs. Revisors have not taken sufficient account of these aids to communication. It is time that all the available expertise is pooled to provide the best possible communication of an Act to the reader.

While the Canadian system is relatively simple, comparatively cheap, and it works, improvements could still be made to it.

APPLICATION OF OVERSEAS EXPERIENCE TO THE NEW ZEALAND STATUTE BOOK

New Zealand is poised to computerise its statute law. It is an appropriate time to consider change – change both in the cosmetic "look" of the statute book and in the style of drafting. In this part of the paper questions arising from the proposed computerisation of New Zealand statute law are considered.

COMPUTERISATION OF NEW ZEALAND ACTS

Major objective

The major objective of putting all Acts on a database is to be able to pick up the published version of the database (whether in electronic or written form) and be sure that it is an authoritative and up to date statement of the statute law. "Up to date" means that the original Act would have incorporated in it all amendments, in their appropriate place, as part of the text.

How can the objective be achieved?

There are two principal ways of achieving the major objective:

The first is to type onto the database everything that is now in the Reprint Series started in 1979 (the "brown volumes"), plus everything that has yet to be added as part of the "brown volumes" including the annual statutes for 1986–88. This in effect would give the user a "reprint" in electronic form which would duplicate what is now available in written form. There would be no change to the law. The original print of the Act would remain in effect and could be referred to as necessary. This process would not meet the major objective.

To meet the objective of having an up to date version of the law available, further work would be still required. This work would involve incorporating all the amendments into the Acts they amend. Once that had been achieved (and assuming all future amendments were incorporated into the Acts they amend) the electronic database would provide an up to date version of the Acts of New Zealand as amended. The major objective would then be achieved.

(Another method would be to go back to the original Acts themselves and type them in to the database, type in the amending Acts and subsequently insert amendments into the original text. This approach seems counter-productive and does not make use of the work already complete through the reprints in the "brown volumes". In saying this it is assumed that the office of the Compiler of Statutes has already taken the original Act and inserted amendments that have been made to it in preparing reprints.)

The second way to achieve the major objective would be to manually take the reprint Act (plus any that are not yet "reprints") and cut and paste into them all amendments (essentially doing an annotators' job). The result of that "cut and paste" job would then be typed to form the database. This would meet the major objective.

Which is the better route to follow?

The essential work of inserting amendments into the original Act to obtain an up to date text is much the same whether the amendments are incorporated before being typed onto the database or after they are on the database.

Should the project be considered "a reprint" or could it be a more significant "revision" of the Acts of New Zealand?

If the project is a reprint –

- Should changes to the text be considered in the same way that changes have been considered in the past when a reprint has been undertaken (e.g. modernisation of spelling, obvious errors corrected; inserting amendments; citations of new Acts; plus other changes described earlier)?

- Should more be done with the text to take into account research into presentation of text e.g. differently presented headings, margins and other "layout" matters? If more is to be done it would be best if those changes could be agreed upon now and incorporated into the project at this stage.

- The result of the work should be authorised by statute, replacing the existing statute law.

If the project is a revision –

At this stage it is clear that the project is not a revision. The question is really, should it be?

The question of "reprint" v. "revision" was mentioned in the 1931 reprint. At that time a consolidation (i.e. revision) was considered but rejected in favour of a reprint of the statutes of New Zealand. The Foreword to the 1931 reprint said (pp.vii–viii):

> "... the preparation of a consolidation could not satisfactorily be undertaken except by a body of men familiar with the law and, at the same time, skilled in the art of draftmanship. Moreover, no matter how careful and competent such a body of men may be, a general consolidation and re–enactment must always be attended by the grave danger of the law being unintentionally altered, for a consolidation can never be effected by a mere repetition of the terms in which the law to be consolidated is expressed. A reprint of statutes, as distinguished from a consolidation, does not present these difficulties. An exact repetition of the law is the aim of such a reprint, and this can be secured by the exercise of a high standard of care, and difficulties of draftmanship are in no way involved. If, notwithstanding the exercise of such a standard of care, an error were to find its way into the work, the law would not thereby be affected. Such an error might cause inconvenience but could not alter any rights or obligations; these, notwithstanding such error would continue to be determined by the law as enacted by the Legislature. For these reasons alone, a reprint such as is contained in the present series of volumes has obvious advantages over the more ambitious scheme that would be involved in a consolidation and re–enactment of the statute law."

Subsequent reprints have not indicated whether any consideration was given to preparing a revision (or consolidation) as distinct from a reprint. (But perhaps the Compiler of Statutes has considered this matter in connection with past reprints.)

Now would be an appropriate time to consider a modest revision. The 1895 Reprint of Statutes Act is included with this paper (Appendix, pp. 116–117). That Act authorised the appointed Commissioners, amongst other things, to "revise, correct, arrange, and consolidate" Acts and omit enactments of a temporary character or Acts that "have expired, become obsolete, been repealed, or had their effect"; in Canadian terms, a revision. Also included with this paper (Appendix, pp. 118–120) is an extract from the subsequent 1908 Consolidation of Statutes Act. That Act enacted the results of the consolidation, and repealed former Acts. A recent example of a Canadian Act authorising a revision is also included (Appendix, pp 121–123).

The "revision" experience of other jurisdictions could be helpful in determining what form of changes should be considered for New Zealand.

Accessibility after the Project

It hardly needs to be said that establishing a database is only sensible if the end result is something that can be used by a wide variety of people. The following needs are apparent:

- the system should be capable of providing an up to date statement of the law (i.e. the original text with amendments incorporated in it);
- there should be a means of keeping track of amendments to and repeals of Acts;
- there must be a wide capability of searching the Acts;
- there should be an index to the Acts as a whole, and to most individual Acts;
- the system should be capable of producing a printed version of what is seen on the screen;
- the basic text must be absolutely secure – no one can be permitted to tamper with the database except in accordance with proper authority;
- there needs to be a facility whereby copies of all or part of the database can be provided to users in electronic form so that those users can manipulate the text of the copy provided or annotate the database copy for the subsequent use of clients;
- arrangements should be made to provide (i) annual volumes of the statutes (which when combined with earlier Acts allow the law to be found as at any given past date); (ii) a looseleaf service; (iii) the computer service.

Whatever decisions are made about "reprints" or "revisions", the existing Acts should be put on the database in a form which will enable these basic needs to be met.

It is to be hoped that in the preparation of this undertaking advantage will be taken of research into how a writer communicates with his or her audience. Research has shown that the lay–out on the printed page can improve communication. The results of that research should be incorporated into the presentation of the statute book.

CONCLUSION

Creating the statutes of New Zealand as a database is a major undertaking. The way in which it is done will affect statute law for decades to come. There are two major options that should be considered. The first is to continue to tread the same reprint route

that New Zealand has followed since 1931. The second is to use the database undertaking as a revision of New Zealand statutes culminating in re-enactment of the statute law following the revision.

There are three reasons why it is suggested that a modest revision would be the better route:

(a) *Cost* – The cost of a set of annotated New Zealand statutes is about $4000. The cost of a set of Canadian Federal and Provincial statutes combined would be about half that amount.

(b) *Size* – The size of the statute book. The bulk of the statute book would be reduced to about a third of its present size.

(c) *Accessibility* – a revision of the statute book could improve the readability considerably. Not only could revisors take advantage of the latest research into the kinds of lay out that assist in communicating the message on the page, but other improvements described earlier could be incorporated.

If advantage is not taken of the opportunity presented by the computerisation of statutes another opportunity may not occur for decades. Access to the statute law of New Zealand can be improved and now is the time to do it.

With the experience of the office of the Compiler of Statutes in the preparation of reprints, and with the commitment to computerisation of the statute book, there is every reason to look forward to an improved statute book in the future. The improvement will also facilitate improvements in the drafting and updating of legislation, improvements which in turn help make the law easier to use. The result of this undertaking will unquestionably be greater access to the statute law of New Zealand.

New Zealand

ANALYSIS.

1895, No. 24.

AN ACT for compiling an Edition of the Enactments in Force in New Zealand of a Public and General Nature. Title.

[20th September, 1895.

WHEREAS it is expedient that an edition of the Public General Statutes in force in this colony should be prepared in the manner hereinafter set forth: Preamble.

BE IT THEREFORE ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:—

1. The Short Title of this Act is "The Reprint of Statutes Act, 1895." Short Title.

2. The Governor may issue a Commission under the Seal of the Colony to not more than three persons, appointing such persons Commissioners for the purposes of this Act. Governor to appoint Commissioners.

The Governor may also appoint some fit person to be Secretary to the said Commissioners; and the Commissioners may employ such clerical assistance as they, from time to time, may find necessary. Secretary and clerical assistance.

3. The Commissioners so appointed shall have the following powers, duties, and functions:— Powers and duties of Commissioners in preparing and arranging laws for publication.

(1.) They shall prepare and arrange for publication an edition of all the Public General Acts:

(2.) They shall revise, correct, arrange, and consolidate such Acts, omitting all such enactments and parts thereof as are of a temporary character or of a local or personal nature, or have expired, become obsolete, been repealed, or had their effect:

(3.) They shall omit mere formal and introductory words, and all enactments repealing any matter, and shall make such alterations as may be necessary to reconcile the contradictions, supply the omissions, and amend the imperfections of the existing Acts:

(4.) They shall also report upon such contradictions, omissions, and imperfections as may appear in the existing Acts, with the mode in which they have reconciled, supplied, and amended the same:

(5.) They may indicate such Acts or parts of Acts as in their judgment ought to be repealed, with their reasons for such repeal, and may recommend the passing of such new enactments as may, in their judgment, be necessary:

(6.) They may indicate in any report such enactments or proposed measures of the Imperial Parliament as, from their general interest and importance, the Commissioners may think it desirable should be adopted and made applicable to the colony:

(7.) They shall from time to time report to the Governor their progress and proceedings, and in every such report shall show any proposed new matter in different type from that which shows the existing law; and, when they shall have completed the revision and consolidation of the Acts relating to any separate branch of the law, they shall cause a copy of the same to be submitted to the Governor.

Governor to transmit reports of Commissioners to Legislature.

4. The Governor shall from time to time transmit to the Legislature the said reports, together with the Acts so revised and consolidated as aforesaid, in order that the said Acts may be enacted by the Legislature and the force of law given thereto, if the Legislature shall think fit.

Expenses of carrying Act into operation.

5. The Governor may appoint such honorarium to be made to the Commissioners, and such sum to be paid to the Secretary to be employed by the said Commissioners, as he may deem a reasonable remuneration for their respective services; which sums, together with all other necessary charges and expenses incurred in carrying out the provisions of this Act, or which have been incurred or become chargeable under the Act hereby repealed, shall be paid by the Colonial Treasurer out of any moneys appropriated by the General Assembly for that purpose.

Repeal.

6. "The Revision of Statutes Act, 1879," is hereby repealed.

WELLINGTON: Printed under authority of the New Zealand Government, by Samuel Costall, Government Printer.—1895.

New Zealand.

ANALYSIS.

1908, No. 4.

AN ACT to enact certain Public General Statutes prepared by the Commissioners appointed under "The Reprint of Statutes Act, 1895." [*4th August, 1908.* Title.

WHEREAS pursuant to "The Reprint of Statutes Act, 1895," Commissioners were appointed by His Excellency the Governor to prepare and arrange for publication an edition of the Public General Statutes of New Zealand: And whereas the said Commissioners have prepared and submitted to His Excellency a revised and consolidated edition of two hundred and eight Acts, the Short Titles of which are set forth in Appendix A hereto, and the full text of which is set forth in Appendix B hereto: And whereas for reasons stated in the report of the said Commissioners the edition so prepared does not include certain Acts the Short Titles of which are set forth in Appendix C hereto: And whereas the enactments specified in Appendices B and C together comprise all the Public General Acts of New Zealand printed as such in the statute-books up to and including the close of the last session of Parliament and then not specifically repealed: And whereas, in further pursuance of the above-recited Act, the report of the Commissioners, together with the aforesaid revised and consolidated edition, has been transmitted to the Legislature by His Excellency in order that the said edition may be enacted by the Legislature and the force of law be given thereto, if the Legislature thinks fit: And whereas it is expedient that the Acts so revised and consolidated as aforesaid should be enacted in manner hereinafter appearing: Preamble.

BE IT THEREFORE ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:—

Short Title.

1. The Short Title of this Act is "The Consolidated Statutes Enactment Act, 1908."

Enactment of consolidated Acts.

2. The Acts numbered one to two hundred and eight, the Short Titles of which are set forth in Appendix A hereto, and the full text of which is set forth in Appendix D hereto, are hereby enacted as public general statutes of New Zealand.

Provisions respecting such Acts.

3. With respect to each of the said Acts the following provisions shall apply:—

(*a.*) The Act shall operate and be construed as a separate Act with the Short Title named therein.

(*b.*) The Act shall be deemed to be a consolidation of the enactments mentioned in the Schedule thereto, or if there are more Schedules than one, then in the First Schedule thereto.

(*c.*) In the construction of the Act the enactments of which it is expressed to be a consolidation shall be deemed to be repealed by it, and, except where the Act otherwise provides, it shall be deemed to come into operation simultaneously with this Act.

(*d.*) The saving provisions (specific and general) contained in the Act shall be construed in aid of one another, and shall receive large and liberal interpretation, to the intent that the Act may, without gap or omission of any kind, extend and apply to the offices, appointments, things, and circumstances arising or existing under the enactments thereby consolidated as if the same had originated under the Act itself; and in particular, but without limiting its generality, the term "acts of authority" shall be construed to cover everything the validity of which depends on any of the said enactments.

Acts Interpretation Act to apply.

4. Without limiting the generality of the application of "The Acts Interpretation Act, 1908" (being Act No. 1 in Appendix D hereto), it shall apply to all the Acts in that appendix.

Repeal of Acts consolidated.

5. The enactments specified in Appendix B hereto (all of which are consolidated in the Acts set forth in Appendix D hereto) are hereby repealed:

Provided that in the case of "The Shipping and Seamen Act, 1908," which is reserved for the signification of His Majesty's pleasure thereon, the repeal of the enactments thereby consolidated shall not take effect until that Act comes into operation:

Provided further that in the case of section forty-two of "The Immigration Restriction Act, 1908," the repeal of the Act mentioned in subsection three thereof shall not take effect until as provided by that subsection.

Temporary provision pending circulation of Acts.

6. In order to facilitate the conduct of business and meet the convenience of the public pending the circulation of the consolidated Acts and the preparation of the rules and forms thereunder for general use, it is hereby declared that for the period of three months after the coming into operation of this Act, or such extended period as the Governor by Order in Council gazetted directs, references to any of the enactments hereby consolidated shall, in all proceedings and instruments, be construed and have effect as references to the corresponding Consolidated Act.

APPENDICES.

Appendices.

APPENDIX A.

Short Titles of Consolidated Acts.

1. Acts Interpretation Act, 1908.
2. Accident Insurance Companies Act, 1908.
3. Administration Act, 1908.
4. Agricultural and Pastoral Societies Act, 1908.
5. Aliens Act, 1908.
6. Animals Protection Act, 1908.
7. Apiaries Act, 1908.
8. Arbitration Act, 1908.
9. Arms Act, 1908.
10. Auctioneers Act, 1908.
11. Banking Act, 1908.
12. Bankruptcy Act, 1908.
13. Beer Duty Act, 1908.
14. Beet-root Sugar Act, 1908.
15. Bills of Exchange Act, 1908.
16. Births and Deaths Registration Act, 1908.
17. British Investors' Rights Act, 1908.
18. Building Societies Act, 1908.
19. Cemeteries Act, 1908.
20. Charitable Gifts Duties Exemption Act, 1908.
21. Chattels Transfer Act, 1908.
22. Civil List Act, 1908.
23. Civil Service Act, 1908.
24. Coal-mines Act, 1908.
25. Commissions of Inquiry Act, 1908.
26. Companies Act, 1908.
27. Contagious Diseases Act, 1908.
28. Cook Islands Government Act, 1908.
29. Copyright Act, 1908.
30. Coroners Act, 1908.
31. Counties Act, 1908.
32. Crimes Act, 1908.
33. Crown Grants Act, 1908.
34. Crown Suits Act, 1908.
35. Customs Duties Act, 1908.
36. Customs Law Act, 1908.
37. Dairy Industry Act, 1908.
38. Death Duties Act, 1908.
39. Deaths by Accidents Compensation Act, 1908.
40. Deeds Registration Act, 1908.
41. Defence Act, 1908
42. Demise of the Crown Act, 1908.
43. Dentists Act, 1908.
44. Designation of Districts Act, 1908.
45. Destitute Persons Act, 1908.
46. Distillation Act, 1908.
47. Distress and Replevin Act, 1908.
48. District Courts Act, 1908.
49. District Railways Act, 1908.
50. Divorce and Matrimonial Causes Act, 1908.
51. Dogs Registration Act, 1908.
52. Education Act, 1908.
53. Education Reserves Act, 1908.
54. Employers' Liability Act, 1908.
55. English Laws Act, 1908.
56. Evidence Act, 1908.
57. Explosive and Dangerous Goods Act, 1908.
58. Extradition Act, 1908.
59. Factories Act, 1908.
60. Family Protection Act, 1908.
61. Fencing Act, 1908.
62. Fertilisers Act, 1908.
63. Fire Brigades Act, 1908.
64. First Offenders' Probation Act, 1908.
65. Fisheries Act, 1908.
66. Foreign Insurance Companies' Deposits Act, 1908.
67. Friendly Societies Act, 1908.
68. Gaming Act, 1908.
69. Gas-supply Act, 1908.
70. Gold Duty Act, 1908.
71. Government Accident Insurance Act, 1908.
72. Government Advances to Settlers Act, 1908.
73. Government Life Insurance Act, 1908.
74. Government Railways Act, 1908.
75. Harbours Act, 1908.
76. High Commissioner Act, 1908.
77. Hospitals and Charitable Institutions Act, 1908.
78. Immigration Restriction Act, 1908.
79. Impounding Act, 1908.
80. Imprisonment for Debt Limitation Act, 1908.
81. Industrial and Provident Societies Act, 1908.
82. Industrial Conciliation and Arbitration Act, 1908.
83. Industrial Schools Act, 1908.
84. Industrial Societies Act, 1908.
85. Inebriates Institutions Act, 1908.
86. Infants Act, 1908.
87. Injurious Birds Act, 1908.
88. Inspection of Machinery Act, 1908.
89. Judicature Act, 1908.
90. Juries Act, 1908.
91. Justices of the Peace Act, 1908.
92. Kauri-gum Industry Act, 1908.
93. Labour Department and Labour Day Act, 1908.
94. Land Act, 1908.
95. Land and Income Assessment Act, 1908.
96. Land Drainage Act, 1908.
97. Land for Settlements Act, 1908.
98. Land Titles Protection Act, 1908.
99. Land Transfer Act, 1908.
100. Law Practitioners Act, 1908.
101. Legislature Act, 1908.

CHAPTER 109 OF THE 1979 STATUTES

An Act to provide for the Consolidation and Revision of the Statutes

Assented to December 20th, 1979

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

Commissioners, appointment

1.—(1) Arthur Norman Stone, one of Her Majesty's Counsel, Senior Legislative Counsel, and Jack Allen Fader, Legislative Counsel, and such other person or persons as the Lieutenant Governor in Council may appoint, are hereby appointed commissioners under the direction of the Attorney General to consolidate and revise the public general statutes of Ontario in accordance with this Act.

Remuneration

(2) The commissioners and such persons as may assist them shall be paid such remuneration for their services under this Act, out of the moneys voted by the Legislature for the purposes of this Act, as the Lieutenant Governor in Council may fix.

Duties

2. The commissioners shall examine the public general statutes of Ontario enacted before the 1st day of January, 1981 and shall arrange, consolidate and revise such statutes in accordance with this Act.

Powers

3. In the performance of their duties under this Act, the commissioners may omit any enactment that is not of general application or that is obsolete, may alter the numbering and arrangement of any enactment, may make such alterations in language and punctuation as are requisite to obtain a uniform mode of expression, and may make such amendments as are necessary to bring out more clearly what is deemed to be the intention of the Legislature or to reconcile seemingly inconsistent enactments or to correct clerical, grammatical or typographical errors.

Supplementary revision of statutes passed between Jan. 1, 1980 and time when R.S.O. 1980 is proclaimed

4. Where, in an Act that is passed after the 31st day of December, 1980, and before the Revised Statutes of Ontario, 1980 come into force, a reference is made to an Act or provision that is to be included in the Revised Statutes of Ontario, 1980, the

reference shall be deemed to be a reference to the corresponding Act or provision in the Revised Statutes of Ontario, 1980 and the commissioners shall, accordingly, cause appropriate changes to be made in the publication of Acts passed during that period.

Printed roll

5. As soon as the commissioners report the completion of the consolidation and revision authorized by this Act, the Lieutenant Governor may cause a printed roll thereof, signed by the Lieutenant Governor and countersigned by the Attorney General, to be deposited in the office of the Clerk of the Assembly.

Appendices

6. There shall be appended to the roll,

(*a*) an appendix marked "Appendix A", similar in form to Appendix A appended to the Revised Statutes of Ontario, 1970, containing certain Imperial Acts and parts of Acts relating to property and civil rights that were consolidated in the Revised Statutes of Ontario, 1897, Volume III, pursuant to chapter 13 of the Statutes of Ontario, 1902, that are not repealed by the Revised Statutes of Ontario, 1980 and are in force in Ontario subject thereto; and

(*b*) an appendix marked "Appendix B", similar in form to Appendix B appended to the Revised Statutes of Ontario, 1970, containing certain Imperial statutes and statutes of Canada relating to the constitution and boundaries of Ontario.

Schedules

7.—(1) There shall be appended to the roll,

(*a*) a schedule marked "Schedule A", similar in form to Schedule A appended to the Revised Statutes of Ontario, 1970, showing the Acts contained in the Revised Statutes of Ontario, 1970 and the other Acts that are repealed in whole or in part from the day upon which the Revised Statutes of Ontario, 1980 take effect and the extent of such repeal;

(*b*) a schedule marked "Schedule B", similar in form to Schedule B appended to the Revised Statutes of Ontario, 1970, showing the Acts and parts of Acts that are repealed, superseded and consolidated in the Revised Statutes of Ontario, 1980 and showing also the portions of the Revised Statutes of Ontario, 1970 and Acts passed thereafter that are not consolidated; and

(*c*) a schedule marked "Schedule C" containing references to all the provisions passed by the Ontario Legislature

after the 1st day of July, 1867 that are unconsolidated and still have effect.

Effect of inclusion or omission of an Act in schedules

(2) The inclusion or omission of an Act or a part thereof in a schedule shall not be construed as a declaration that the Act or part was or was not in force immediately before the coming into force of the Revised Statutes of Ontario, 1980.

Proclamation

8.—(1) After the deposit of the roll under section 5, the Lieutenant Governor may by proclamation declare the day upon which the roll will come into force and have effect as law by the designation "Revised Statutes of Ontario, 1980".

Effect of proclamation

(2) On and after the day so proclaimed, the roll shall be in force and effect by the said designation to all intents as though the same were expressly embodied in and enacted by this Act to come into force and have effect on and after that day, and on and after that day all the enactments in the several Acts and parts of Acts in Schedule A thereto shall be repealed to the extent mentioned in the third column of the schedule.

References to repealed Acts in former Acts

9. Any reference in an unrepealed and unconsolidated Act or in an instrument or document to an Act or enactment repealed and consolidated shall, after the Revised Statutes of Ontario, 1980 come into force, be held, as regards any subsequent transaction, matter or thing, to be a reference to the Act or enactment in the Revised Statutes of Ontario, 1980 having the same effect as such repealed and consolidated Act or enactment.

Publication by Queen's Printer to be evidence

10. The publication of the Revised Statutes of Ontario, 1980 by the Queen's Printer shall be received as evidence of the Revised Statutes of Ontario, 1980 in all courts and places whatsoever.

Distribution of copies

11. The Revised Statutes of Ontario, 1980 shall be distributed as the Lieutenant Governor in Council directs and the Lieutenant Governor in Council may fix the price at which copies may be sold by the Queen's Printer.

This Act to be printed with R.S.O. 1980

12. This Act shall be printed with the Revised Statutes of Ontario, 1980 and is subject to the same rules of construction as the Revised Statutes of Ontario, 1980.

How Acts may be cited

13. A chapter of the Revised Statutes of Ontario, 1980 may be cited and referred to in any Act, proceeding, instrument or document whatever either by the title with which the chapter is headed or by using the expression "Revised Statutes of Ontario, 1980, chapter ", or the abbreviation "R.S.O. 1980, c. ", adding in each case the number of the particular chapter.

Short title

14. The short title of this Act is *The Statutes Revision Act, 1979*.

The drafter and the critics

by Maurice Kelly[1]

The quest for straightforward drafting is not new. How keenly it is pursued is closely related to fashions in language. Macaulay's Indian Penal Code emphasised clarity and certainty — but also reflected the rotund eloquence of his historical essays. Hegel's tortured periods were paralleled in the cumbersome legislation of 19th century German states. And now, as drafters, we shall (or must) all be Hemingways.[2]

Professional drafters are not hostile to that aspiration. They are not pallid anchorites in crumbling catacombs, fussing over musty manuscripts by the light of a guttering candle. By their educational formation and community attachments, they share the living language and contemporary language preferences. But it is easier to reach the Holy Grail conceptually than in the workaday world of those who are obliged to try. In the thick of things, it is also possible to doubt whether the prescribed destination is the Holy Grail at all.

Commonwealth drafting style has evolved significantly in accordance with contemporary language preferences. A few changes, taken at random, will illustrate:

- long provisions including complex qualifications, internal definitions and provisos are, in principle, abandoned;
- a rule of one provision to each proposition is in general adopted;
- paragraphing and other layout features improve presentation and the readability of the text;
- marginal notes have been replaced by headings which signal rather than summarise the material to which they relate;
- superfluous reference matter is excised;
- ceremonious rituals, including preambles, are largely dispensed with;
- inflated and archaic words and expressions, including unnecessary terms of art, are not now used;
- sentence structures like those of standard English prose are, as a general rule, preferred;
- vocabulary in common usage, and current abbreviations and formulas, are substituted for older forms;
- conceptual and linguistic economy are persistently aimed at;
- the minatory tone of much older legislation has been softened to the needs of the modern democratic community.

Developments of this kind are speeded and supported by extrinsic influences such as progressive amendment of the *Acts Interpretation Act* 1901 (C'th.).[3]

THE DRAFTER AND THE LEGAL CULTURE

There are numerous reasons for the continuing gap between the aspirations of the theorists and the performance of the drafters. One is that some drafts are not very good. The critics, it may be added, like critics of the judges, wait for the bad shot, with the luxury of correcting it on the replay.

Leaving aside that question and the important issue of time constraints,[4] there are other reasons, to goad the plain English lobby for a moment, why the drafter is not *deus ex machina* of the drafting process. The drafter, in fact, is just one element in a culture which is, to characterise generally, unimaginative, ritualistic and not well disposed to innovation or the prospect of supposedly inessential costs.

In the preparation of legislation, the supreme objective is to achieve a result that precisely matches the legislative intention and is legally unassailable. That means a result that will survive the scrutiny of the courts. If the subject matter of legislation could be kept simple, that would simplify the drafter's task. In societies of explosively increasing complexity, it cannot. If courts passed judgment in terms of broad principle, that would be a good safety net. But even if judges were not disposed to sophistication and technicality, they are constrained to listen to counsel who are. And the judges must give judgment accordingly. The drafters are bound to accommodate themselves to the culture of the courts.

Behind the courts stands the Greek chorus of the law. It is a massive chorus, perceptive and sometimes hypercritical. Historically gross academic communities, numerous law-related institutions and a burgeoning miscellany of other interested bodies ensure abundant professional commentary. On the basis of remarkable advances in educational standards since World War II, the media give some prominence to legal issues, not always with integrity or in depth. The hackneyed question has, in this sense, a very clear contemporary answer. There is no lack of judges of the judges.

Superior courts, moreover, are much less occupied than formerly in laying down the common law. Some 80 per cent of cases concern statutory construction. Between the courts and their camp followers, therefore, the drafter's work is exposed to unprecedented possibilities of scrutiny. The threat may concentrate the mind, but concentrates it most on achieving a legally effective result. Literary issues, to speak generally, attract the attention of the drafter's audiences only where style and expression are to blame for law that is ambiguous or unreasonably tortured or obscure.

This drafting ambience does not encourage adventure. Provisions in accordance with settled legal convention have one reassuring virtue: they will run the gauntlet successfully. Novel approaches attract attention and foster suspicion as to their legal effect. Drafters, the epitome of modesty, do not crave that kind of prominence. They are tempted or impelled to play safe, which doubtless inhibits the formal evolution of the law. The standing of the drafter is not much prejudiced as a result, for rapid innovation would inspire the disfavour of the formalists as well as the plaudits of the avant garde. Gradual organic development, a familiar process in the law, thus serves the drafter as an effective political strategy, ensuring compatibility with the current legal culture.

Policy-makers, the promoters of legislation, exert the influence of a rather different culture. Administration emphasises convenience and efficiency and the now clamant principle of husbanding

Maurice Kelly has been drafting with the Commonwealth Attorney-General's Department since 1981. He is also author of *Sport and the Law: An Australian Perspective.*

scarce resources. It is not notably sympathetic to the law. One aspect of the problem is that very little legislation allows a completely fresh start, for most new law arises from existing schemes. Shop-soiled stratagems, even, may be dredged up from the administrative underworld for legislative legitimation. In such stituations, a preferred method will be favoured by the promoters and nearly every detail may be fought for. For complex licensing schemes, or migration procedures followed in a dozen capitals, many thousands of brochures and instructional manuals may already sanctify a form of words. As well as the administrator, the taxpayer has a stake in the survival of the status quo. Even if the status quo is a legal quagmire, the drafter must still find safety. The way forward may well be a Pilgrim's Progress, by way of the Slough of Despond.

Settling for safety prescribes boundaries in a more specific and legal sense. In Commonwealth law, at particular times, some issues have particular sensitivity. A scheme setting out powers of arrest, or a form of warrant, for example, may emerge at the congruence of a complex process of advice and argument, especially if addressed to imminent practical use. The drafter is unlikely to retain full control of the process. But once the resultant law runs the gauntlet successfully before the Parliament and the courts, it might as well be graven in stone. A provision which soon wears out its welcome among literary purists may thus become firmly entrenched in the law. Sleek or corpulent, clear or opaque, drafters will seize on it gratefully and repeat it, possibly many times. Only a rash drafter would alter a later generation occurrence, and a drafter who altered them all would have to be idle and mad.

The computer is a recent recruit to the administrative culture and may impede efforts to create sound and straightforward law. Problems arise, for example, in regulatory schemes where forms and schedules are computer-programmed. The programming usually requires a considerable lead time. Instructions may reach the drafter only when that phase is over — which results in intended or fortuitous pressure to produce computer-compatible law. Even if not forestalled, the drafter is impelled to compromises; his or her brand of intellectual rigour and that of the programmer may not make a good fit. Computer-compatible forms, for instance, do not necessarily follow a layout, use a mode of expression or exhibit the particular brands of clarity and economy which conventional or born-again drafters would prefer. The gap between the two languages and conceptual systems appears to be widening.

Back in the legal culture, there are influential groups on which attention has not so far focused. Courts, to begin with, have an administrative as well as a judicial role. In that character they make their own legislation, as in the form of rules of court. The mainly conservative stance of judges and the pronounced preference of court officers for settled formulas contribute to legislative results that are not necessarily very consistent with a modern mode. Because of the prestige of the courts, nevertheless, the results are widely taken by profession and public as a model of how the law should speak. Drafters are not free to banish such precedents from contemplation, or the preference they illustrate and create.

Judges and other legislators who put the brakes on may display good political instinct, for consumers of the law are not all captives of the plain English lobby. Lawyers, probably, are the most significant consumer group, and also the most influential. Consciously and at times instinctively, it is suggested, the legal profession leans towards formalism. The language of the law is its special preserve. A Lutheran approach is not guaranteed its enthusiastic favour. Lawyers are a key constituency of the drafter and one the drafter must effectively serve. An instinct for the preferences of that constituency is a necessary ingredient in the drafter's art.

The ordinary citizen may dislike lawyers but also venerates the law. The veneration extends to form. Questioned or questionnaired, the citizen might well plump for law that is "immediately comprehensible" — but is unlikely to have much expectation of that outcome or to have weighed up the implications. The public, it is suggested, see law (and medicine) as pursuits and institutions rather apart from ordinary life, and the law is not necessarily less respected for being a trifle remote. No less than the lawyer, the citizen may not really want law that reads like an evening tabloid and would appear to be conditioned to a fairly traditional approach.

A drafting establishment, therefore, is not an information agency and should have an instinct for the *zeitgeist* — or the expectations of the consumer. The consumer, nevertheless, is not abandoned to inscrutable complexity as a result, since knowledge of much important law can be acquired otherwise than directly from legislation. When new schemes are enacted, expert administrators are well aware that they must provide crutches for their audience, not least because so much contemporary law is directive. In fact, the citizen is very nearly engulfed in instructions in relation to what he or she must do and what someone else will do if he doesn't — tax guides, rates guides, insurance guides, traffic codes, customs and export control instructions, cultural heritage handbooks and announcements such as those appearing in government gazettes. In the late 20th century all this information is, effectively, the law of the common man. An army of helpful people has made it all possible. That task is indispensable, and leaves legislation to its proper function.

Though their sources are wider, those who make the law become familiar with it in much the same way. Except for a special purpose or occasion, parliamentarians do not subject Bills and subordinate legislation to intensive personal study. In the time available to them, it would be folly to expect that. In default of specialist training among most, the results would be mixed if they did. Like the common man, in part because he or she is the common man, the politician depends on the translators, if that is the word. Explanatory statements and memoranda, committee and expert reports, staffers' summaries, the findings of in-house research groups, the views conveyed by interested parties — many such sources acquaint the politicians with impending laws.[5] So armed or educated, many prove very capable at debating the technicalities. Most, I believe, accept their dependence gracefully in the knowledge that there is no remedy.

Legislative drafting cannot escape technicalities that are at times beyond the ken of the common man. Like the technology of garbage disposal, the law needs language of its own. There is not much evidence that its audiences resent that limitation and there is some evidence of attachment to ritualistic forms. Rituals, of

course, may become unacceptably onerous — but are not necessarily impervious to change. They may breed iconoclasm — but iconoclasm is a desperate remedy, and the legislative scene is not desperate. Great leaps forward, finally, are alien to the steady secular march of the law. In place of fairy-tale formulas for drafters, reformers might well concentrate attention on the exciting democratic task of improving the citizen's capacity to understand and handle the law.

SOME NOTABLE HERESIES

(1) *Restructuring legislation*

Among the Australian jurisdictions, the arrangement of legislation has been fairly uniform. Preliminary material which is the key to understanding operation and content goes first — including citation, commencement and definitions. If an organisation is to be set up with controlling functions, constitutional or structural provisions are likely to come next, together with a general statement of powers and functions. Detailed substantive material follows, arranged in accordance with subject matter. Offences, appeals and regulation-making powers are customarily dealt with at the end, unless included in provisions where they have a specific application.

These settled habits have three substantial advantages. In preparing legislation of any length and complexity, instructing departments and drafters have a difficult task of structural creation. How is the mass of material to be managed so that similar subject matter is kept together, connecting cables are discreetly laid, a logical sequence is maintained and access by the user is made as painless as possible? Judgment has to be exercised and the choices may not be easy. Structural conventions foreclose some difficulties, clearing the way for concentration on unique features of a scheme.

Structural conventions, next, are an essential element in the language of the law. They tell the user how to consult legislation with best effect. Conventions do not always conform to a nice logic and it is not really necessary they should do so. What is important is that they should be stable, certain and known. It is thus less important where regulation-making powers are placed than whether they are always placed there and whether the user knows where to find them. With a little tuition and practice, the rules of this game are within the reach of all. We could all find definitions or commencements just as confidently as, in our daily newspaper, we look for the sports section.

As travellers are aware, that comparison is a little ominous. Not much more than a generation ago, nearly all quality newspapers had a format that was much the same. Despite recent commercial concentration, all that has changed, and weekend newspapers, especially, have spread themselves in very different ways. Outside home territory, the latter-day newspaper reader is likely to be mildly bewildered or infuriated by the local product.

Divergent legislative practice within Australia would have graver effects. To an increasing extent, Commonwealth and State legislation must be consulted across jurisdictional boundaries and may need to be consulted very fast. Structural compatibility greatly simplifies the task. If various enthusiasms overtake some States without attracting others, this common foundation of Australian law could very soon be destroyed. For lawyers and other professional users, that could be a much greater inconvenience than is generally appreciated. For present trends to legal uniformity throughout the continent, the result could be a serious setback.

Critics of the conventions do not advocate structural anarchy. The complaint is that a couple of centuries of drafters have got it all wrong — legislation must be re-organised in order to make it more comprehensible. Under present procedures (for instance), the beginning of an Act or regulation is clogged up with formal and procedural provisions. The arrangement ought to be hierarchical, so that important material comes first. This contention needs to be examined.

The prescription in question would make legislation nearly unique among literary forms. Academic writing proceeds typically from a proposition, hypothesis or introduction, sets out limiting factors or applicable conditions, adduces and analyses evidence and then arrives at a conclusion or proof. In this regard, scientific, historical and legal methods are on common ground. And so is fiction. A novel that placed the murder and dénouement on p. 1 would quickly find its way to the remainders. Instructional manuals (with which legislation is cognate) follow a rather similar scheme: this is what we must tell you, this, by way of preliminary, is what you must know or be equipped with, and this is what you must do.

One man's meat, moreover, is another's poison. If there is to be a hierarchy, upon what criteria is it to be established? In the newspaper business, world affairs, national and local politics, bare breasts and the arts, sport and seamy scandals all have enthusiastic adherents. Priorities can only be subjective. Though its opportunities are less lurid, legislation raises similar difficulties. Thumbing casually through the *Income Tax Assessment Act* 1936 (C'th.), who is to say, on hierarchical tests, what is to go where?

There are many cases, of course, in which important information should be conveyed before trivia. A commencement provision, one might imagine, would be one of them. If a number of provisions within a Bill are to come into operation at different times, and all those times are different from the commencement date of the Bill as a whole, the solution would seem apparent — put the general before the particular. Most users, after all, will not be so interested in the exceptions. Despite their homage to the hierarchy principle, nevertheless, some critics would have us do it in the reverse way.[6]

The old religion in drafting partly avoids the dilemmas of hierarchy and conforms broadly to the literary taxonomy outlined. It is useful to be specific. What, for example, is to be said of definitions?[7] Drafters would see them as a crutch rather than a "hurdle," and one needs a crutch *before* attempting to walk. Definitions, it could also be argued, should not be written down as "procedural" because their conceptual role is fundamental.

Definitions are included in legislation to ensure precision, not as a kind of glossary of terms. A word or expression used in a limited or special sense, however common, should usually be defined. A word used in its dictionary sense, however arcane, is unlikely to be defined. Despite such alibis, definitions are difficult. The elaboration of a definition which is clear, precise and economical can be one of the most exacting features of drafting.

In definitions as in other matters, it is worth adding, opportunities for structural improvement are certainly taken. As well as main definitions at the beginning, legislation often carried, until recently, definitions heading up Parts or Divisions. The current view is that this is unnecessarily confusing to the marginal consumer and imposes an undue duty of care on the expert. In recent Commonwealth practice, definitions are mainly placed at the beginning, except if relating to one provision only. Highlighting, cross-referencing and other ancillary devices, as suggested by reformers, would cause much more technical difficulty than is allowed for and are not really necessary.

The definition section of legislation would nearly always win hands-down on a frequency of consultation test. Arguably, use should rate highly in determining placement. It is not just prejudice born of habit to suggest that definitions are well placed at the beginning. When the contents table of a volume of legislation is scanned, the reference to each law is to the first page. The seeker after definitions can go straight to it, knowing they will be adjacent. This argument also applies when the legislation is consulted. Working from a provision to a definition at the beginning is quite convenient. Despite respectable precedents in the other direction (including U.K. legislation), there would appear to be no sufficient reason for changing the practice generally favoured in Australia.

Structure is not exempt from processes of change and some recent development

does stem from the comment of the critics. Conventional design, notwithstanding, is based on quite solid criteria and substantive importance is no more than one. To elevate that criterion and apply it to complex drafts would surely tax the wisdom of a Solomon and the patience of a saint. Drafters, who wrestle with the devil, could not cohabit cosily with such exalted pretensions.

(2) *Early involvement of drafters in preparing legislation*

The essential job of drafters is to receive proposals setting out the detail of a legislative scheme and convert them into draft legislation. The proposals are supposed to be in settled form — though difficulties may quite properly be flagged for further consideration. This method is quite widely criticised, on the ground that participation of drafters in the development of proposals would forestall later difficulties and smooth the way to a better and quicker outcome.[8] The reproach arises from misunderstanding of the process.

Departments which generate a lot of law now have competent legislation units with professional expertise. As they develop drafting instructions, legal research and consultation both contribute. Policy and technical staff, I.D.C.s, public or private institutions in the relevant field and various interested groups may be indispensable sources of facts and attitudes that will mould the proposed law. This process may be very time-consuming and is bound to be sporadic. There is no cost-effective method by which outsiders such as drafters could be drawn in. But the knowledge and instinct acquired by consultation animate the proposals that emerge. Instructing officers, at this stage, are the obvious and sufficient authority.

"Pure law" questions could be more appropriate for early consideration by the drafter. Instructing departments, however, usually detect the questions that are obvious and are not without external resource. A particular question may involve constitutional or criminal or administrative law. In that event, consultation with relevant Attorney-General's Department experts is possible and encouraged. If such a question still lurks in the final instructions, the drafter is likely to suggest reference to specialists anyway. On this plane also, therefore, early involvement of the drafter has no very apparent purpose.

The suggested early function of the drafter would seem to be reduced, then, to general scrutiny and comment, mainly in relation to matters of law. At what stage should intervention take place? Since consultation of the kind outlined, and negotiation on detected legal issues, may bring about substantial alteration of instructions, not until those procedures are completed. Even then, the main focus of discussion is policy. Because policy is only marginally the concern of the drafter, involvement in such discussion would be a waste of time. Just to acquire background, it would be an unacceptable luxury.

On the drafting side, early involvement would seem not only unnecessary but dangerous. If drafts of instructions were discussed with departments and studied in an abstract way, the drafter could very well become committed to a result. Final instructions could be taken for granted, and that would be dangerous. The reason is that a static acquaintance with such material is most unlikely to disclose all the problems. The relationship to instructions is dynamic. The drafter, in short, picks up problems in the process of elaborating a draft. To do so most effectively, it is best to come to the task without preconceptions.

Initial instructions, in any case, are not definitive. Further instructions and subsequent negotiation are expected — in the case of Bills, depending on the Parliament, and possibly industry or public exposure. The evolutionary process may continue over a long period. In that situation, it is not as important as critics of present procedures imagine that the intervention of the drafter should take place before or at a particular stage. Initial instructions amount only to an intermediate step in the process. There is no Big Bang. Legislation develops by continuous creation.

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(3) The process of amendment

Critics of legislative drafting are inclined to create confusion by using "amendment" in two different senses. In drafting parlance, "amendment" refers to a change in existing legislation. For a change to a draft, the preferred term is "alteration".

Amendment may take many forms. If a new scheme is to be introduced, that may be done by inserting one or more self-contained Parts in an Act. At the other end of the scale, very minor amendments may need to be made, such as omitting "committee" (wherever occurring) and substituting "Board". In such a case, a Schedule or table may be the appropriate vehicle.

Criticism arises because the meaning and significance of an amendment may not be revealed on the face of the amending legislation. Very frequently, this is true. Parliamentarians and other consumers, it is said, must line up the amendment and parent legislation and go through them carefully together.[9] Patently, this is not true. Explanatory documentation is invariably provided to the Parliament and relevant committees. Where departments other than the sponsoring one are affected, prior discussion will have occurred and co-ordination comment will have been made. If outside groups or persons have a legitimate interest, prior consultation will have taken place. As widely as necessary, policy intentions will have been explained. These procedures are pretty well mandatory for the Commonwealth, whether primary or amending legislation is in question.

Amendments give effect to decisions in technical legislative form. If each amended provision had to be remade, much time would be wasted and the result could be long-winded in the extreme. With the approach taken, economy is the governing rule. Devices developed by the drafters may compress changes spread over many pages to formulas occupying a few lines.

The many keepers of legislation in the community warmly endorse this method. It reduces the chances of error and it certainly keeps down costs. Clerical staff in user organisations can keep paste-up legislation current with the least possible fuss. Law publishers such as CCH who quickly print off amended legislation find their task reduced to the minimum. An elaborate style of amendment would hamper them greatly. Their costs and prices would be higher, and delays would be longer.

The rule of economy thus has practical benefits. It is hard to see that anyone is disadvantaged. Before the event, interested parties have access to sufficient material on what is proposed. After the event, the same or similar resources of information may be consulted. And hard on the heels of the event, the loose-leaf updates follow. Criticism of amending methods largely rests on the fallacy that the amending legislation is, or should be, the effective information source. It does not purport to fulfil that role, and could not do so effectively.

Drafters encounter criticism in relation to the process by which drafts are altered. The difficulty is, in one suggestion, that drafts are not clear and straightforward at the outset. If they were, there should be little need for final (alteration). But, it is also contended, drafters too often tack material to the initial draft and end up with inflated language. As a commentary on method, this is drafting through the looking glass.

Legislation of any complexity involves complex instructions and complex development. Once any threshold legal problems have been dealt with, the drafter gets to grips with the instructions. A preliminary draft will emerge at a fairly early stage. That beginning will usually prove too complex. As the drafter penetrates the task, neater expressions and articulations will be found. Progressive departure from the letter of the instructions will occur. Only Mozart, it is said, got his first drafts perfect. Really satisfactory legislation may take three or four generations of drafts. Knitting it all more effectively and improving clarity and precision are the main objectives. The natural and obvious sequence is from complexity to simplification.

Only too often, time constraints abort the later generations but that, for the moment, is beside the point. How, and with what effects, is additional material taken in? To speak broadly, that may occur in either of two ways. If the material is simply an accretion, the accretion will be progressively refined and integrated into the existing text. Under conditions of ordinary competence, accretion does not involve a progression from the straightforward to the convoluted.

The other possibility is a change of concept. If the change is basic, the drafter scraps the original and starts again in the usual way. If the change is partial, insertion or interleaving may be more economical and save time. That may lead to a clumsy and possibly convoluted result, unless time for refinement and sufficient ingenuity are available. Simplicity, as in other genres of writing, is the art that conceals art.

Deterioration of language is another matter. Insertion, obviously, concentrates attention on legal issues. Does new material create needs in other provisions by a kind of buffer effect? Do fresh connecting cables have to be laid? Have unexpected ambiguities appeared? In these aspects, intensive examination of the existing provisions will be necessary. For this reason, the drafter may prefer not to carry the process of refinement too far. Once the legal result is secure, it will be safer and quicker to rest on it. Not much scope, incidentally, will be left for assessing the literary capacities or comprehension levels of an assumed audience. Since drafters habitually draw up all legislation in much the same way, that thought verges on the bizarre. In the result, the wording of inserted provisions may get rather less attention than would otherwise be the case. Language, nevertheless, is always a matter of careful selection. There is no real reason why insertion should cause stylistic defects to intrude.

Close examination of selected drafting procedures and their logic thus discloses a number of misconceptions among the plain English lobby. The examples taken are indicative only and could very easily be extended. A focus on particular issues, however, must not obscure the central significance of current pressures for change. The pressures relate to a whole set of assumptions, amounting possibly to an ideology of law, and not to methods only. At least inferentially, a kind of cultural revolution is aimed at. The drafting approach so threatened or targeted is rigorously professional, highly technical and bloodlessly asocial. It is founded on sophisticated expertise and incorporates unselfconsciously the mixed legacy of the law. Its criteria are habitually regarded as objective. By inference, quite powerful influences now impel the community to reflect that traditional drafting is the lingering excrescence of a vanishing bourgeois world. For practitioners of the trade, a spree of self-criticism is invited. If legislative Maoism is to sweep away all monsters, drafters will doubtless don fustian and have Red Guards at their elbow. □

Footnotes

1. Opinions expressed in this article are the personal views of the writer and are not necessarily those of the Commonwealth Attorney-General's Department or of any other Commonwealth department, authority or officer. 2. In Australia, Victoria has taken the leading role in the plain English movement in drafting. See Law Reform Commission of Victoria, Report No. 9, *Plain English and the Law*, Melbourne, 1987. The report is supplemented by: Appendix 1 — Guidelines for Drafting in Plain English: A Manual for Legislative Drafters; Appendix 2 — Takeovers Code; Appendices 3-8; Appendix 3 — Summons and Information: *Magistrates (Summary Proceedings) Act* 1975 (Vic.); Appendix 4 — Agreement and Covenant under ss.47 and 41 of the *Historic Buildings Act* 1981 (Vic.); Appendix 5 — Law Institute's Mortgage over Business; Appendix 6 — Format of Legislation; Appendix 7 — Legislation Rewriting Program (sic); Appendix 8 — Plain English Unit. 3. See *Acts Interpretation Amendment Act* 1984 (C'th.); *Crimes Legislation Amendment Act* 1987 (C'th.) and especially *Statute Law (Miscellaneous Provisions) Act* 1987 (C'th). 4. See L.R.C. of Victoria Report, paras. 73-79, and cf. Turnbull, I.M.L., "Problems of Legislative Drafting" in (1986) *Statute Law Review* 67 at p. 71 and Turnbull, I.M.L., "Legislative Drafting — Use of Plain English" in (1987) *Australian Current Law* 36047 at p. 36048. 5. Special acknowledgment should be made of the important work done by the Senate Standing Committee for the Scrutiny of Bills and the Senate Standing Committee on Regulations and Ordinances. The committees have professional staff and retain experienced academics as advisers. 6. See L.R.C. of Vic., Appendix 1, p. 31. 7. *Ibid.*, pp. 48-55. 8. See L.R.C. of Vic., *Report*, paras. 124-132. 9. *Ibid.*, paras. 73-79.

rietbok (reedbuck), *waterskaap* ('water sheep', kudu); by appearance — *dikkop* (thick head), *dikbeksysie* (broad beaked siskin), *swartwitpens* ('black and white belly', the sable antelope or Harris buck); by habit — *rainbird* (several spp.), *springbok* (jumping buck), *klipspringer* (rock jumper), *blaasop* ('inflate', used of a frog, a fish and an insect), *duiker* (diver, cormorant or an antelope called by some early travellers 'diving goat'); by some other quality such as weight, shape or hardness — *ysterbout* (iron wood), *hardekool* (lead wood), *kreupelboom* ('crippled tree', from its twisted branches); and, predictably, the birds by imitation of their calls — *tingtinkie* (warblers, Sylviidae fam.), *piet-my-vrou*, *diederik* (Cuculidae fam.), *Jan Frederik* (Cape robin, *Cossypha* spp.), *bokmakierie* (Laniidae fam.), and the raucous *hadedah* (an ibis of the Threskiornithidae fam.).

Most of these names are predictable, useful, and usually fairly uninspiring, and the taxonomy to which they are mere tags was undertaken in a systematic and careful manner, matching Northern and Southern hemisphere species where possible, and generally making the first efforts towards a tidy classification of the flora and fauna of South Africa — a task still under way and subject to frequent change.

While I acknowledge that we do owe to the eighteenth and nineteenth century naturalists the preservation of many original indigenous names of plants, birds and beasts, their arrival on the scene put an end to the naming, like that of the First Man by inspired guess, which has so much enriched our daily vocabulary.

from Stanley, E.G. + Hoad, T.F. (eds) Words: for Robert Burchfield's Sixty-fifth Birthday (London: D.S. Brewer, 1988) p81-90.

LEGISLATIVE LEXICOGRAPHY

Robert D. Eagleson

Lawyers do not see themselves as lexicographers, nevertheless the law is the scene of constant lexicographical activity. So many legal documents contain definitions or interpretation sections, that one without its list of defined terms appears almost incomplete.

Definitions sections can serve useful functions, especially in statutes. They can confine a word to only part of its range of meanings, a particularly valuable role given the polysemous character of most words, for example *oil* means any liquid hydrocarbon. Alternatively they can specify in what part of a document particular meanings are being used, for example:

> 'employee' means —
> (a) in relation to Part II — a public employee;
> (b) in relation to the remainder of this Act — a person appointed to the Public Service (including a Chief Executive Officer).
> — Government Management and Employment Act 1985 (U.K.).

The objective here is to obtain clarity, not to introduce new meanings or to break away from the ordinary usage of the community. If the usage is only partially established, for example *in vitro fertilisation*, *disflation*, *joint float*, the inclusion of the item may help to promote understanding, especially where a neologism is only just finding its way into dictionaries.

The definitions section can also be used to add precision where the ordinary meaning of a word is vague or loose, for example:

> 'serious offence' means an indictable offence, or an offence punishable by imprisonment for 2 years or more
> — Recodifying Criminal Law (Law Reform Commission of Canada Report 30: p. 10)

or to remove uncertainty, as in:

> ***spouse*** includes de facto spouse
> ***damage*** includes destruction.

From time to time legislative drafters turn the convention of the definitions section to their own advantage. It lets them invent a term or extend the use of an established one to make a document shorter and preferably more readable as well as by allowing a concept to be expressed in a single word or compound, for example:

> ***odd lot*** means a parcel of shares that is less than a marketable parcel — Companies (Acquisition of shares) (Victoria) Code: plain English version.

Documents could become even more cumbersome than they are without this facility.

Despite the valuable benefits to be had through definitions sections for precision, understanding and readability, the craft of lexicography is not practised as well as it could be by legal writers. The current thrust for plain English in legislation and in legal documents generally is bringing to light many inadequacies in definitions and exposing how practice fails to consider seriously the needs of readers. Too often interpretation sections give the appearance of being compiled for the convenience of the drafters rather than the readers and only end up complicating the task of comprehending documents instead of smoothing the way.

The force of this criticism is glaringly revealed by the definition of ***unmarried person*** in the Social Securities Act 1947 (Commonwealth):

> 'unmarried person' means a person who is not married.

Admittedly this has to be read in the context of the definition of married person which is presented earlier:

> 'married person' includes a de facto spouse but does not include —
> (a) a legally married person (not being a de facto spouse) who is living separately and apart from the spouse of the person on a permanent basis; or
> (b) a person who, for any special reason in any particular case, the Director-General determines in writing should not be treated as a married person.

This may be very neat, but only from the drafters' point of view. Are readers to be expected to remember that ***unmarried person*** has an unusual sense whenever they come across it in the 177 pages of the Act, especially when the term is not identified in the text in any special way to show that it is a defined term? The drafters needed to take a different approach altogether and one which attended more sympathetically to the way in which general readers used the term.

It would have been better for instance, if they had introduced some such category as 'eligible married person' or even coined a special term: this would have signalled a qualification to ***married*** and left ***unmarried*** undisturbed.

Perhaps even more remarkable is the definition found in Section 5 of the Fair Trading Act 1985 (Victoria):

> 'goods' includes —
> (a) ships, aircraft and other vehicles;
> (b) animals, including fish;
> (c) minerals, trees and crops, whether on, under or attached to land or not; and
> (d) gas and electricity.

This is certainly providing the drafter with a shorthand form but it can only be perplexing for readers. Frustratingly the drafter had a solution which did not involve ignoring the common meaning of *goods*, for it would have been valid to say that the Act applies to (a), (b), (c) and (d) in the same way as it applies to goods. This solution would have been immediately intelligible and more helpful for readers.

With these definitions of ***unmarried person*** and ***goods*** it is possible to detect some gain at least for drafters. Elsewhere the departure from the general meaning of a word seems aimless if not downright perverse. The Corrections Bill which was tabled in the Victorian Parliament in 1986 presented a strange sense of ***formal***:

> 46. (1) A person who wishes to enter or remain in a prison as a visitor must, if asked, submit to a formal search.
> (2) In this section **'formal search'** means a search to detect the presence of drugs weapons or metal articles carried out by an electronic or mechanical device.
> (3) If, when asked, a person does not submit to a formal search, a prison officer may prohibit the person from entering the prison or if the person is in the prison order the person to leave the prison immediately.

Not only does this definition wrench the word away from its accepted meanings, but the whole endeavour is a needless imposition on readers and a waste of time for the drafter. Subsection (1) could have appeared as:

> (1) If asked, a visitor to a prison must submit to a search by an electronic or mechanical device for drugs, weapons, or metal articles.

Subsection (2) could have been abandoned and Subsection (3) modified to:

> If the visitor does not submit to the search, . . .

The whole enterprise of introducing the concept of 'formal search' is unnecessary.

The defining exercise degenerates into a meaningless activity when *day* becomes 'four o'clock':

> 'Appointed day' means four o'clock in the afternoon of the day before the proclaimed day.
>
> — Accident Compensation Act 1985 (Victoria).

In other Victorian Acts *day* manages to preserve its generally accepted sense:

> 'Appointed day' is the day proclaimed as the appointed day for the purpose of Section 24 of the Principal Act.
>
> — Construction Industry Long Service Leave (Amendment) Act 1985 (Victoria).

The drafter has seemingly clung onto *day* because it was the traditional term to use. There can be no other justification for this break from commonsense.[1]

Legal drafters display violent swings in behaviour. When they are not being obscure as with *appointed day*, they descend into the obvious:

[1] Dickerson, R. *The Fundamentals of Legal Drafting* (Boston, 1965), 101, reports an American Act which declared:
'September 16, 1940 means June 27, 1950.'
This must have been even more puzzling for readers.

> 'unsolicited goods' means goods sent to a person without any request made by or on behalf of that person
>
> — Fair Trading Act 1985 (Victoria).

Fortunately most readers would not think of consulting the interpretation section when they come across *unsolicited goods* in the body of the Act, but if they did they could be perplexed by this definition. Readers try hard to cooperate with writers; they look for sense in statements. Confronted with a definition like this they could be misled into wasting time trying to discover some hidden meaning because they would not image that a writer would be so tritely obvious.

These needless definitions uncover an even more serious fault in the practice of defining in legislation. The endeavour is haphazard and unsystematic. There often seems little rhyme or reason behind the selection of terms. In the Credit Act 1984 (Victoria), for instance, *mortgage*, *mortgagee* and *mortgagor* are all defined, but *execute* (a document) and *consideration* miss out. *Chairperson* is constantly defined even though the Acts are referring to only one board or commission and there can be no possibility of misunderstanding. Meanwhile ordinary words with special legal senses, such as *action*, *instrument* and *information*, are neglected. Yet general readers need help with these words if they are going to come to a full understanding of a legal text. *Action*, for example, can be dangerously ambiguous in 'this is a criminal action'. It is not being argued that definitions sections should offer a complete coverage of every term used in a legal document, but the present undirected and arbitrary selection is most unsatisfactory. It bespeaks an uncertain perception of the function and potential of definitions.

This lack of thoroughness in recognising words which need attention if general readers are to be helped is matched by an abdication of responsibility. Definitions sections are generally introduced with the words 'unless the contrary intention appears' or equivalent disclaimer. This qualification is added in case drafters have overlooked the use of a word in a different sense somewhere in the text. The practice, however, does not help readers but only causes uncertainty: they are left each time to decide whether a word has the meaning indicated in a given definition or whether it is operating in one of its other meanings. While the qualification might have had some justification in the past — and even this is doubtful in most cases — it is completely unwarranted in these days of word processors and computer-generated concordances. Concordances make it possible to check speedily whether a word is being used in more than one sense and to substitute an alternative for it in some contexts so that it can be restricted to one meaning.

Legislative drafters appear to delight in definitions. They seem to be constantly creating opportunities to introduce them. The De Facto Relationships Act 1984 (NSW) offers a good illustration in Section 15:

> (1) A court shall not make an order under this Part unless it is satisfied —
> (a) . . .
> (b) that —
> (i) both parties were resident within New South Wales for a substantial period of their de facto relationship; or
> (ii) substantial contributions of the kind referred to in Section 20 (1)(a) or (b) have been made in New South Wales by the applicant.

Substantial period is too vague a term and so the drafter apparently comes to the rescue of readers by inserting a definition in subsection (2):

> (2) For the purposes of sub-section (1)(b)(i), the parties to an application shall be taken to have been resident within New South Wales for a substantial period of their de facto relationship if they have lived together in the State for a period equivalent to at least one-third of the duration of their relationship.

But this is a longwinded solution to the problem in which readers are left in suspense while they cope with paragraph (b)(ii) before they receive any enlightenment. The drafter would have served readers far better by abandoning the concept of 'substantial period' and its definition, and inserting the important information in paragraph (b)(i) as:

> (b) That —
> (i) both parties lived together in NSW for at least one-third of their relationship.

Commercial lawyers seem to have the same predilection for these one-off definitions which involve readers in taking two steps before they reach the full information. A draft insurance policy approached a clause in this way:

> We may refuse a claim, or cancel a policy, or do both if:
> . . .
> (c) you carry out building work on the building or at the site, unless you tell us in writing beforehand and we agree to cover you.

> *Note*: By 'building work' we mean work that involves the alteration or removal of all or part of any wall, foundation, roof or structural component of the building or the building of a new structure (including a swimming pool) at the site.

Again, this divided material could be combined into:

> (c) you alter or remove all or part of any wall, foundation, roof or structural component of the building, or build a new structure (including a swimming pool) at the site.

There was no need for the convoluted presentation of the material through a definition. Perhaps general lawyers have been influenced by all the statutes they have to read!

All these deficiencies in definitions in legal documents demonstrate the need for lawyers to study lexicography more systematically. It is clearly not satisfactory for them to be left to simply pick up the art over time: it rarely happens. Because definitions play a prominent role in their writing they need to be brought in touch with lexicographers and the knowledge and skills they have acquired as they have concentrated on compiling dictionaries.

Lawyers could get even more help from lexicographers than this. Lexicographers might be put to establishing authoritatively that *acknowledge* is the same as *confess*, and *fit* equals *proper*, that *cease* means no more than *desist*, that *give*, *devise* and *bequeath* amount to the same. This might at least eliminate from legal documents the time-honoured doublets and triplets which so frequently overburden them and deaden the senses of readers. Admittedly this information is already available in dictionaries and Melinkoff[2] has incisively exposed the worthlessness of so many conventional doublets and triplets, but the force of his information has not penetrated the consciousness of the legal profession. There is almost a need for a special task force of lexicographers to rescue lawyers from prolixity, to make them aware of what lexicographers have known for so long so that lawyers will feel safe in abandoning *null*, *force*, and *have* if they also intend to use *void*, *effect* and *hold*.

Lawyers are also unlike lexicographers in not keeping their documents up-to-date. Where dictionaries mark words for obsolescence or archaism, legal documents persist with the old. As a result tenancy agreements continue to refer to 'demised' rather than 'rented' premises

[2] D. Melinkoff, *The Language of the Law* (Boston, 1965).

and other contracts talk of being 'seised' of a property rather than 'owning' one. That some of these outmoded terms have been the subject of intense litigation should no longer be taken as a reason for persisting with them when they are meaningless to general readers. Instead lawyers should be devising methods to cope with change and to allow them to introduce plain English equivalents. Ironically the much beloved definitions section could provide a solution here. It could, for example, offer entries along the lines of:

> ***rented*** means demised
> or
> ***rented*** has the same legal force as demised.

If indexes were also associated with legal documents as a general rule, then these could provide users with a tool for tracking down current substitutes through a series of cross-references. Consequently an index to an Act might contain an entry:

> presents see DOCUMENT

In this way a lawyer used to an older term would have a means of finding information without too much trouble, while the member of the community affected by the document would be able to understand immediately by having its ideas expressed in current words. Guidance on what these current or plain English equivalents might be could conveniently be received from lexicographers.

The skills of lexicographers might also be called upon to help legal drafters arrive at a suitable generic term. All too frequently they resort to lists of closely related terms in the hope of covering all eventualities. Instead they only create uncertainty as this attempt in the Mental Health Act 1985 (Victoria) illustrated:

> 112 (3) (c) assaults, obstructs, hinders, threatens, intimidates or attempts to obstruct or intimidate a community visitor.

This use of five words does not produce tranquillity in readers; instead it raises questions about other potential terms. What of ***thwart***, ***curb***, ***impede***, ***block***, ***delay***, ***frighten***? Are they covered or has the drafter overlooked them? Does ***hinder*** fill the same semantic space between ***obstruct*** and ***threaten***? It is a case where a generic word, for example, ***interfere with***, would have been more satisfying than a string of words. By splitting hairs between ***threaten*** and ***intimidate***, the drafter is only encouraging readers to look for gaps between all the words, especially

when he or she has not continued the full set after ***attempts***. In effect this practice of drafters is self-defeating because it induces readers and judges into assigning limited senses to each of the words in a list, so that a provision which contains them does not become all-inclusive as the drafters intended. In the end it would seem safer to rely on the commonsense of the community and judges to cope with a generic word.

Even with mechanical matters legal drafters have not shown themselves to be particularly imaginative or considerate of readers. While they may decide to use a word in a particular way in an Act and enter it in the definitions sections, they make no attempt to identify it in any special way in the body of the Act. This means that readers have in effect to memorise the definitions section or continually refer to it. Neither of these operations is convenient, particularly in long Acts which may run to over 150 pages and which may contain 100 or more defined words. The task is made even more impractical by the fact that Acts are rarely read from beginning to end but are rather consulted a section or two at a time. There is thus not the opportunity to build up a real familiarity with the contents of the definitions section. The solution is simple: identify the defined words by some distinctive typographical device, such as italics or small caps, then readers would be warned to consult the definitions section. It is thoughtless to leave readers without a warning signal, especially when the words could be comprehensible in some other sense. Amazingly this simple aid is rarely practised.

Again while definitions sections are generally located towards the beginning of an Act so that readers who read it right through are given at least early warning that some words are being used with specified meanings, not all definitions are placed in the definitions section. Some may be inserted as well at the beginning of Parts and Divisions. This means that readers might have to look in 2 or 3 places before they find the relevant definition. In the meantime they are beginning to forget the context and so may have to start all over again.

Even worse is the practice of putting a definition at the end of a section, especially one with many long subsections. As consulting the definitions section brings no help, readers have to toil on in the dark, until they stumble at last upon the resolution of the mystery. This is just no way to handle critical information.

There is good reason that many of the current lexicographical activities in legal writing should continue. What is urgently needed is the development of sounder practices. Lawyers clearly need to know more of lexicography and to be brought into closer contact with lexicographers. The isolation of the two professions should not continue. It is a cause of satisfaction that our general dictionaries are improving in

quality and to this Bob Burchfield has made a significant and lively contribution. It is disturbing that these advances are not being witnessed in a special area which impinges directly on the rights and obligations of the community. Here is an area of endeavour in need of systematic professional attention.

'INTERDISCIPLINARY': THE FIRST HALF-CENTURY

Roberta Frank

> What a splendid book one could put together by narrating the life and adventures of a word. The events for which a word was used have undoubtedly left various imprints on it; depending on place it has awakened different notions; but does it not become grander still when considered in its trinity of soul, body, and movement?
>
> Honoré de Balzac, *Louis Lambert*[1]

'Interdisciplinary' was probably born in New York City in the mid 1920s, most likely at the corner of 42nd and Madison. The word seems to have begun life in the corridors and meeting rooms of the Social Science Research Council as a kind of bureaucratic shorthand for what the Council saw as its chief function, the promotion of research that involved two or more of its seven constituent societies.[2] 'Interdisciplinary' started out with a reasonably bounded set of senses. Then, subjected to indecent abuse in the 50s and 60s, it acquired a precocious middle-age spread. Now not only is the word everywhere but no one can pin down what people have in mind when they utter it.

Whoever coined 'interdisciplinary' never claimed paternity, the way Jeremy Bentham apologized for creating a new compound: 'The word *international*, it must be acknowledged, is a new one; though, it is hoped, sufficiently analogous and intelligible.'[3] Professor Robert Sessions Woodworth (1869 – 1962), the distinguished Columbia University psychologist and the first person I have caught using 'interdisciplinary'

[1] *Œuvres complètes de M. de Balzac. La Comédie humaine*, vol. 16.2 (Paris, 1846), 111.

[2] Founded in 1923, the Council was, according to Charles E. Merriam, its first President, ordinarily to 'deal only with such problems as involve two or more disciplines'. ('Report for the Year 1925 Made to the American Political Science Association by Charles E. Merriam, Chairman', *American Political Science Review* 20 [1926], 186.)

[3] *An Introduction to the Principles of Morals and Legislation* (London, 1780 [1789]), xvii, 25.

THE FIRST COUP

At 10.00 a.m. on 16 May 1987 I was in my office waiting for Ramesh to bring my cup of tea before I reluctantly headed off to sit in my little box near the Speaker on the floor of Parliament. Debate promised to be dull; the convention of not interrupting maiden speeches precluded even the occasional amusement of witty interjection.

Bill McGregor (a Scot, 12 years in Fiji) opened the door and said through clenched teeth, "There's been a coup". "Rubbish," said I. The blood drained from my face as, across the street, I saw hordes of soldiers entering the Radio Fiji building.

Everyone in the office was grinning and running around. The grin, I suspect, celebrated our release from the mundane and our personal safety. The grins were soon displaced – for the Indians by closed black looks redolent of cane knife caches in attics and for the Europeans by glum looks of hopelessness.

My first thought was to get cashed up before the banks shut. I went via Parliament. The government members had been removed. One Hansard reporter was left wondering whether to type out the last words of that session of Parliament, delivered by the Speaker as the soldiers poured in: "What the f.... is going on here".

Back in the library, gulping kava, our grins dissolved as we considered our position. "If the Government is locked up and there are soldiers on the roof, big tough ones with automatic rifles and machine guns, who is running the country?" On a personal level, we all agreed that each soldier, severally, was running the country if he said so. The wise modern Chinese proverb "All power flows from the barrel of a gun" seemed relevant.

THE FIRST RESPONSE

After an hour or two it sank in that if you altered the equation "Her Majesty's Government" by removing the Government part, then Her Majesty remained, inviolate in her far off palace, surrounded by her cavalry and corgis. Closer to home, her representative was up in Government House, perhaps waiting for his law officers to advise him.

We worked at the direction of Cabinet, but Cabinet no longer existed. We presumed that if we did nothing, then our next instructions to write laws would be from the Army, along the lines of "Give us a couple of quick military decrees to sort all this out".

After mulling over the matter with judges and others who wandered into the library for a drink, we concluded that the Constitution covered the situation. This wonderful document, the synthesis of the accumulated experience and general benevolence of the British Empire, was vague enough on the big issues to cover the present case.

An outsider to the post colonial system, looking at the constitution of say Australia or Fiji, would conclude that the Queen still ran the show. "Not so," say we on the inside. If the conventions are stripped away by force and you are otherwise staring into the wild face of anarchy, the constitutions work on another level: the literal level, which says, in Fiji's case: *The executive authority of Fiji is vested in Her Majesty.* s.72(1).

The constitution also provides for various consultations with the Prime Minister; but if he has been locked up, what court could ever say that it would be unconstitutional for the Queen or her representative to exercise that power?

Just the ticket, we thought, to bring back some law and order. So we drafted and had signed and published that first day a decree by the Governor General that a State of Public Emergency was in existence. The die was cast then for the next six months (if it worked). The monarch had cast aside the mantle of restraint under convention and inappropriate constitutional provisions, and as the fount of executive authority was radiating whatever legal power was necessary: the uncharted residual royal prerogative.

On the Monday we published the voluminous Public Emergency Regulations. These had been, in basic form, bequeathed to us in the form of Wang computer disks locked in the safe in case of necessity. From time to time parliamentary counsel had updated them – not that we had foreseen a coup. With some amendment they fitted the case and were churned out, engulfing the soldiers in a sea of sagacious lawfulness.

Next day the Governor General decreed the Parliament and Ministry abolished. The response was up to the Colonel. Printed words seemed puny enough, up against his real soldiers, but there was no longer a vacuum of lawful authority.

The physical aspects of the coup were

superb – the arrests, the strong military presence, power, phone and radio installations taken over on cue (they forgot the Government Printer however). But the central issue from a lawyer's point of view had not been thought through; namely, what was the law of the land after the coup.

That first weekend, we put up the hurricane shutters at our home, packed suitcases and dusted off our passports.

No-one knew whether the Indian population, armed with cane knives and a religion which welcomed death, would march on the capital. The quiz night at the Fiji Club was cancelled.

THE COLONEL REPLIES

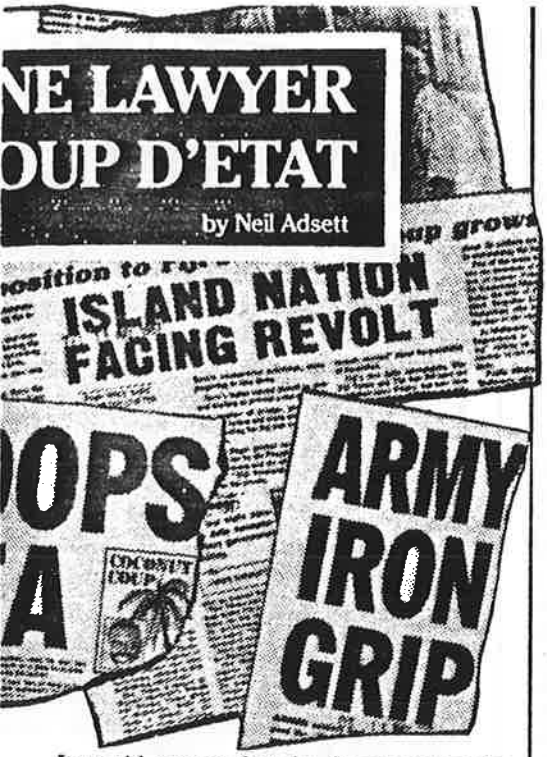
On the Sunday, three days after the coup, we were summoned to the Colonel's coup HQ. The Colonel is an impressive soldier, but three sleepless days and nights made him appear jumpy. I'm convinced that he is genuinely trying to do the right thing – as he sees it – for his people.

"Right, gentlemen," he said. "What are my options?" I was transfixed, struck dumb by the only answer which came to mind, a line from Shakespeare's Henry VI: "The first thing we do, let's kill all the lawyers".

Fortunately, Bill McGregor leapt in with "Option 1: Return to the barracks." The Colonel just grinned wryly. McGregor then explained the full legal effect of the coup and Rabuka later admitted that it was the first time anyone had told him just what his actions meant. The meeting was indecisive. We weren't going to draft a document abrogating the Constitution and the matter was left up in the air.

The clear message for any intending coupsters is that you must work out the legal implications before you call in the troops. In Fiji's case, that could have meant never calling out the troops because now, nearly a year later, the legal aspects are still not worked out.

The stalemate went on for another week.



It would appear that the Queen tipped the scales with her economically worded message: "In Fiji, the Governor General speaks for me." Unsure of whether his people would support the coup if it meant throwing over the Queen herself (no more Royal forces, or royal visits or OBE's), the Colonel accepted that the Governor General was in the driving seat until a permanent solution that he was happy with was worked out.

Australian republicans, take note: The institution of the monarchy came in very handy when Fiji got into big trouble.

WORKING FOR THE CROWN

The country couldn't be left without a rule of law: that was our pragmatic first axiom. The need for new laws was demonstrated almost immediately e.g. a mob of coconut suppliers were besieging a copra mill on Vanua Levu demanding the opening of the mill gates and payment for their coconuts. Without regulations setting up a subsidy, the miller refused. Such regulations could only be made by the Finance Minister who was now locked up.

If one group of Fijians, particularly those from the outer islands, started serious rioting, then we feared that blood would flow on the streets.

The answer to this and the myriad similar problems was that the Governor General had full executive authority, including power to legislate in an emergency. So I started writing the new laws with long preambles designed to give them the patina of legitimacy.

Searching for legal backing for the Governor General's assumed role, we found that the Doctrine of State Necessity as developed by the Privy Council seemed to extend as far as each occasion required – provided that there was no better alternative and that the necessary acts were towards an ultimately worthy end. There was very little authority and the Irish judges in our midst were predictably anxious to restrict the residual prerogative powers of the Queen.

My own general view of the law as developed by the judges has always been that it is essentially sensible. Thus I could not see any court (especially one as sensible and imaginative as the Privy Council) holding as unlawful acts of the Queen's representative designed to avert chaos and ultimately restore legality.

After my Sunday meeting with the Colonel, I drove my family through numerous road blocks to Nadi and a safe Jumbo flight home to Brisbane. They probably saw more of the ensuing riots and action on television than I saw on the spot.

One sobering sight I saw from my office window was a riot in the street. A large Fijian, armed with a long shovel, was standing in the middle of the road attacking any cars driven by Indians. A car approached, the Indian driver planted his foot, hitting the large Fijian squarely. The Fijian sailed over the bonnet, landed flat on the road with an audible thud, stood up, shook his head, recovered the shovel and carried on.

Another day, a group of Fijians in traditional dress with war clubs dug a pit in the grounds of the Supreme Court next door. They got a fire going and made it plain that the pit was a human oven for the cooking of the Irish judge if he decided against their cause. They guarded the smouldering pit all day while the case was being heard but in the event it was unnecessary for that vexed question to be decided by the court that day.

Fiji continued to operate as a law-abiding society for the next five months. My family returned and life more or less returned to normal. We were acutely conscious that the laws we were writing were tenuously legal, if that, and that the pressure was on us to move forward and write Appropriation Acts and other laws which would hammer the edge of compromise deeper.

A sore point was the extent of the residue of the royal prerogative after independence had been granted and a constitution entrenched. The official line became that proferred by an English silk and it went further than we could see. We accepted that, arising from the emergency and necessity, the Crown was able to exercise authority.

The official line was that, with the Constitution now unworkable, the full panoply of the Crown's prerogative powers (which are themselves uncircumscribed) remained intact. The ramifications of this line, especially when extended to, say, Australia, were alarming.

The writing was on the wall. Bill McGregor left for Scotland, the Solicitor General returned to Bristol, the only other draftsman went off to the Bench and so I was left – the last expatriate in the office.

I took the interim view that even though I didn't agree, as long as I wrote nothing that was not necessary in the circumstances, I could still aid in retaining the rule of law. If the Governor General was signing these laws, on advice from a Queen's Counsel, they could hardly be treasonable.

The Commonwealth Secretariat sent two "coup specialist" lawyers: Prof. Keith Patchett to try to patch up a one party state type interim arrangement and Billy Meneery, an Irish draftsman then en-route to Mauritius to help with their (constitutional) transition to republic status.

I spent the 28 September at Government House putting the finishing touches to a new political power-sharing arrangement and a neat decree "done under the state necessity of stress" drafted by Meneery. But the Army wasn't happy and the leaders were in their barracks deciding the future. The second coup was on.

OUT WITH THE SECOND COUP

The Governor General was out; the Army was in. The law? – Listen to the radio and do what you're told. So I resigned and left soon after. My greatest personal regret is that I wasn't evacuated on one of the Australian warships which were waiting just offshore.

Still wanting a bit more of the quiet life, we moved to Tonga, where as Law Revision Commissioner, I am revising and consolidating the laws of that stable Kingdom. There isn't much of a library here – just a Halsbury and what I managed to salvage from Fiji so my closing quote is not from a legal source but from Tom Weiskopf at a British Open in Scotland, one oft recalled during the coups: "I haven't got a club in my bag for this one."

Neil Adsett (admitted 4.3.75) retired from Nagel & Adsett in the Brisbane suburb of Mt Gravatt in September 1984 in order to take up a position as Parliamentary Counsel with the Crown Law Office in Fiji. In January this year, he moved to Tonga where he is presently working as Law Revision Commissioner.