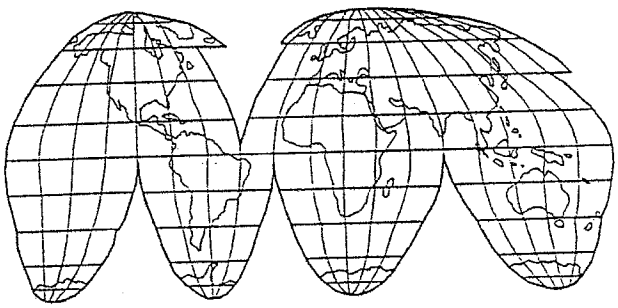
THE LOOPHOLE

The Newsletter of the Commonwealth Association of Legislative Counsel (C A L C)

Please ensure that a copy of this issue is circulated to each CALC member in your jurisdiction



MARCH 1997

General Meeting of the Association

Vancouver

26th and 27th August 1996

The general meeting of the Association was held in Vancouver, in conjunction with the Commonwealth Law Conference, during the last week of August.

Surrounded by the waters of a fine natural harbour and with a backdrop of spectacular mountains, there can be few settings for an international conference as attractive as Vancouver. The welcome from our hosts was generous and warm and those members of the Association who were lucky enough to attend the conference will have taken away with them fond memories of a most enjoyable stay. Our thanks go to Peter Pagano and his colleagues for organising our general meeting and to the Canadian Bar Association as a whole for making the conference such a success and our stay in Vancouver so memorable.

The Association's meeting was spread over two days. The first was devoted to the presentation and discussion of papers which are included in this issue of *The Loophole*. The second began with an informal open session at which several issues of common interest to the drafting profession were discussed. That session was followed by "housekeeping" business, including in particular the election of a new Council.

Apologies for their absence were received from Mrs Rama Devi, the Association's outgoing President, and from Council member Dennis Murphy.

DEPARTMENT OF JUSTICE
LAW DRAFTING
DIVISION
HONG KONG

The following members attended one or both of the two days devoted to the Association's general meeting:

Nalin Abeyesekere
Legal Draftsman, Legal Draftsman's Department, Colombo
SRI LANKA

Siosaia Tupou Aleamotua
Deputy Secretary of Justice, Ministry of Justice, Nuku'Alofa
KINGDOM OF TONGA

Bob Allcock
Legal Department
HONG KONG

Mark Audcent
Acting Law Clerk and Parliamentary Counsel, Senate of Canada, Ottawa
CANADA

Duncan Berry
Law Drafting Division, Attorney General's Chambers
HONG KONG

Edward Caldwell
Parliamentary Counsel, London
UNITED KINGDOM

Gordon Carnegie
Office of the Legislative Counsel, Government of Manitoba
CANADA

Sherman Chan
Legislative Counsel, Law Drafting Division
HONG KONG

Ken Chutskoff
Office of Legislative Counsel, Ministry of Attorney General, Victoria BC
CANADA

Warren Cole
Manager, Drafting Unit, Wellington
NEW ZEALAND

Janet Erasmus
Legislative Counsel Office, Ministry of Attorney General, Victoria BC
CANADA

Allan Fenske
Deputy Judge Advocate General, Advisory and Legislation, Department of National Defence, Ottawa
CANADA

Brian Greer
Legislative Counsel Office, Victoria
CANADA

James F H Hamilton
(*Observing non-member*) Kenya Law Reform Commission, Nairobi
KENYA

Richard Humphrey
Office of Legislative Drafting, Attorney-General's Department, Canberra
AUSTRALIA

Walter Iles
335 Main Road, Tawa, Wellington
NEW ZEALAND

Christopher Jenkins
First Parliamentary Counsel, London
UNITED KINGDOM

Kerry Jones
Parliamentary Counsel, Canberra
AUSTRALIA

Gregor Kowalski
Scottish Parliamentary Counsel, London
UNITED KINGDOM

Lionel A Levert
Chief Legislative Counsel, Department of Justice, Ottawa
CANADA

Hyacinth Lindsay
Chief Parliamentary Counsel, Kingston
JAMAICA

Jimmy Y T Ma
Legislative Counsel Building
HONG KONG

Elizabeth McAra
Chief Law Drafter, Wellington
NEW ZEALAND

Veronika Maddock
Office of Parliamentary Counsel, Tasmania
AUSTRALIA

D L Mendis
No 35, Alfred Place, Colombo 3,
SRI LANKA

Stephen A Miller
Attorney General's Chambers, Port of Spain
TRINIDAD

Mohanpuria K L
Legislative Department, Ministry of Law and Justice, Government of India,
New Delhi
INDIA

Pam Nadarasa
Commonwealth Secretariat, London
UNITED KINGDOM

Richard Nzerem
Commonwealth Secretariat, London
UNITED KINGDOM

Margaret N Nzioka
Senior Parliamentary Counsel, Attorney-General's Office, Nairobi
KENYA

Peter Pagano
Chief Legislative Counsel, Edmonton, Alberta
CANADA

Hilary Penfold
First Parliamentary Counsel, Canberra
AUSTRALIA

Makhiba Raphuthing
Second Parliamentary Counsel, Attorney-General's Chambers, Maseru
LESOTHO

Claire Reilly
Senior Legislative Counsel, Ministry of Attorney General, British Columbia
CANADA

Donald L Revell
Chief Legislative Counsel, Toronto, Ontario
CANADA

Clare K Roberts
Attorney General, St John's
ANTIGUA

David Saunders
Parliamentary Counsel, London
UNITED KINGDOM

Ann Sheppard
Legislative Counsel, Department of Justice, Ottawa
CANADA

John Sopinka
Justice Supreme Court of Canada, Ottawa
CANADA

Rob Walsh
Director General, Legislative Counsel Committees Parliamentary Associations, Ottawa, Ontario
CANADA

Anthony Watson-Brown
Senior Assistant Law Draftsman, Attorney General's Chambers
HONG KONG

John F Wilson
Localisation & Adaptation of, Laws Unit, Law Drafting Division
HONG KONG

Stephen Kai Yi Wong
Legal Policy Division, Attorney General's Chambers
HONG KONG

PROCEEDINGS ON 26TH AUGUST

The proceedings of the Association's general meeting began with a welcoming speech by the Honourable Allan Rock, Minister of Justice and Attorney General of Canada. The Minister was introduced by Lionel Levert, the Chief Parliamentary Counsel of the Federal Government. The Association is grateful to the Minister for making time, in a hectic schedule, to address us and for his encouraging remarks about the value of the drafting profession. Unfortunately, pressure of business prevented the Minister from staying with us for the rest of the day's proceedings.

Peter Pagano, Chief Legislative Draftsman of Alberta and a member of the Council, took the chair for the remaining sections of the Association's general meeting.

Papers published in this issue of *The Loophole* were read. Each paper was followed by questions from the floor and a lively discussion. It is always unfair to pick out any one contribution for praise but I hope that the other contributors to the proceedings will not mind it being said that Duncan Berry's weighty and scholarly contributions deserve particular thanks.

PROCEEDINGS ON 27TH AUGUST

The second day's proceedings started with an informal open forum, chaired by Peter Pagano.

Several topics were discussed in a wide-ranging and informative session. For many members this was the high point of the week in Vancouver. It showed vividly the value of the Association as a vehicle for the exchange of views and the discussion of common problems. Your Secretary, for one, left Vancouver with valuable information about recruiting techniques which was subsequently drawn on in London during a recent recruitment exercise.

Contracting out

Christopher Jenkins began the session by giving a brief account of the background to the United Kingdom government's experiment in contracting out to the private sector parts of the 1996 Finance Bill. In general, the result had not been a great success. There did not seem to be any strong feeling that the private sector's product was notably better. Indeed, in one journal it was said that if that was the best that the private sector could do "come back the parliamentary counsel: all is forgiven". One aspect of the Finance Bill was singled out for praise by a professional journal – the provisions introducing a new landfill tax. But the writer of the article was wrong in believing that the new tax had been drafted by the private sector. Although it was in the group of subjects for which tenders were invited, it was not taken up by the private sector but was drafted by parliamentary counsel.

Perhaps the most significant feature of the experiment was that although only some 10% of the Finance Bill was drafted by the private sector that 10% accounted for around 90% of the overall cost of drafting the Bill.

In the discussion that followed concern was expressed about the problem of satisfactory quality control of contracted-out drafting. The experience of one Canadian jurisdiction was that drafting done in the private sector almost always had to be redone by the state drafters. Nevertheless, the private sector in Canada was showing a growing interest in drafting legislation – though the interest came for the most part from legislative counsel who had returned to the private sector.

Christopher was asked about how costs were calculated and whether the figures which emerged were sound. He explained that the costing was done by the Treasury who tried to produce a realistic comparison of real costs. In the discussion that followed doubts were expressed about the ability to produce sound comparisons between private and public sector costs.

The problem of judging the quality of private sector drafting was also discussed. Christopher described the mixture of academic lawyers, practising lawyers and advocates of plain English who were asked by the Treasury to give their views about the value of the experiment. In general, it was felt that the assessment of the experiment was performed quickly and superficially.

Confidentiality was another aspect of contracting-out that was discussed. It was pointed out that the strict rules about confidentiality imposed by the Canadian courts would mean that requiring private sector drafters to agree to only a two-year confidentiality rule (as was adopted in the UK experiment) would probably not work in Canada. Viewed from Kenya, the main problem with contracting-out appeared to be confidentiality, the maintenance of secrecy where that was important and the scope for leakage.

The New Zealand experience suggested that private sector drafters behaved in general as though they were playing the usual client/solicitor role. In other words, they tended just to do what they were asked.

In many jurisdictions private sector drafting was not an immediate problem. In Hong Kong, for example, there was an acute shortage of private sector Bill-drafting resources. And in Jamaica Parliament would not consider any privately drafted Bills – everything had to be drafted in the Attorney-General's chambers, including Bills drafted for private interests.

It was pointed out that contracting-out presented particular problems in bi-lingual jurisdictions.

The discussion of privatised drafting ended with general agreement that members would be interested in learning about any further instances of contracting-out. It was felt that this was a matter which might be dealt with in future issues of *The Loophole*.

If members do have information about contracting-out to the private sector which they feel may be of general interest the Secretary would welcome a note for inclusion in The Loophole.

Training

The next subject discussed was training. It was generally agreed that training was a difficulty faced by all drafting offices. Although courses aimed at teaching drafting were available around the world they were sometimes patchy and there was in the end no real substitute for training on the job. It was noted that the University of Ottawa course on drafting had been shut down but it was suggested that it might be revived in September 1997. Members were reminded of the courses run in London by Keith Patchett at RIPA International and by Sir William Dale at the Institute of Advanced Legal Studies.

The methods followed in the Commonwealth varied widely. Hong Kong, for example, had undergone a huge expansion in the last few years, from 13 to 43 members which imposed a strain on their training resources. They did not operate in pairs but did have a system of vetting. Manitoba has been using Elmer Driedger's 6 volume manual (described engagingly by another member from Canada as "the pits").

It was mentioned that two drafters in Hong Kong had taken the Commonwealth Distance Learning Course on Legislative Drafting organised by RIPA International. It is hoped that a future issue of *The Loophole* will include a report on the course.

Some comment was made about the need for training to place more emphasis on the intellectual content of the job of a drafter. One member disagreed with the modern fashion of thinking that it was only the language that mattered. In his view, it was important to train drafters to recognise that getting your concepts right is the most important aspect of the job.

It was suggested that *The Loophole* should be used as a means of distributing information about the courses on drafting and other training materials available in the Commonwealth.

Recruiting

The discussion then turned to the problem of recruiting, and in particular how best to set about selecting recruits. The point was made that the different skills required of a legislative drafter meant that it was not possible to steer by paper qualifications alone. Members from Australia and Canada mentioned the value of getting applicants for drafting posts to take a written test. It was suggested that the main purpose of such a test would be to see how good applicants were at attending to detail.

Employment of para-legal staff

Attention then turned to the subject of para-legal staff. There was pressure in Ottawa for the employment of para-legals because of a shortage of drafters. It was suggested that para-legal staff could be employed in connection with statute law revision or Law Commission work. The appointment of an editor by the Manitoba drafting office was described as "the most cost-effective appointment that we have ever made". Alberta had also appointed an editor who had been a phenomenal success. An editor can deal with many of the detailed chores that have to be tackled in the preparation of legislation and a good editor can also be useful in spotting conceptual problems.

Hong Kong was using para-legal staff in connection with translation.

It was suggested that *The Loophole* could be used to canvas opinions about the use of para-legal staff in drafting offices.

Performance appraisal schemes

Hilary Penfold mentioned that Canberra had finally produced a set of indicators for training drafters. But assessing the performance of qualified and experienced drafters was a different, and much more difficult, proposition. She asked if any drafting offices had put together criteria for assessing the performance of qualified drafters and said that she would be grateful for any information on this subject that could be provided by her Commonwealth colleagues.

The Secretary reminded members that there had been changes in the membership of the Commonwealth, with South Africa, Mozambique and Cameroun joining. It had proved difficult to make contact with our drafting colleagues in those jurisdictions but it looked as though progress was about to be made. The Secretary said that he had been working on the assumption that although Nigeria had been suspended from membership the Association would wish its members in Nigeria to continue to receive *The Loophole*. One of the aims of *The Loophole* was to provide a sense of mutual support for colleagues in the world of common law drafting.

There were a number of constitutional matters which needed attention. One of them was the imminent return to Chinese jurisdiction of Hong Kong. It appeared that the Commonwealth Law Society would be offering associate membership to lawyers in Hong Kong. The constitution of our Association confined membership to persons in the Commonwealth but many of the Hong Kong members would wish to continue being members. If it was felt that a new category of associate membership should be created to accommodate our colleagues from Hong Kong, the Association might wish to decide to establish such a category of membership immediately and deal with the necessary consequential changes to its constitution in due course.

Other constitutional issues that needed to be addressed before the next general meeting were the period of notice required for a proposed change to the constitution. At present it is five months but that has proved to be too long. The result is that changes to the Association's constitution (for example the addition of another member to the Council agreed at the previous general meeting in Cyprus) and the current meeting's agreement that there should be a new category of associate member were on a weak constitutional footing.

One matter which had occupied successive Councils was whether the Association should charge a fee for membership. There were arguments for and against, but for the time being there seemed to be a general agreement that so long as the Association could function without any income there was much to be said for continuing with the present arrangements. The Secretary confirmed that, for the time being at least, he would be able to secure the preparation and distribution of *The Loophole*

Finally, the Secretary ended his informal report by thanking the Commonwealth Secretariat, and in particular Richard Nzerem and Pam Nadarasa, for their help and support.

FINANCIAL STATEMENT

The following statement of the Association's financial affairs was prepared by Mr Peter Moore.

(Financial statement at 20th November 1995 - the date of the last transaction).

Balance at 21st April 1993		£114.12
Money received and banked:		
10th May 1993	£40.00	
19th July 1994	£5.00	
13th October 1995	£16.50	
20th November 1995	£6.50	
	£68.00	£68.00
		£182.12
		+ £3.82 interest
		- £0.95 tax
Balance at 20th November		£184.99

P J Moore

2nd August 1996

ELECTION OF A COUNCIL

The business of the triennial general meeting was completed by the election of the new Council. The meeting agreed to hold the next general meeting of the Association in conjunction with the Commonwealth Law Conference in Kuala Lumpur, Malaysia. It was felt that, if possible, a member of the Association in Malaysia should be elected to the Council with a view to assisting in the arrangements for the next general meeting. As there was no member from Malaysia present in Vancouver it was decided to leave one seat on the Council vacant for the time being. The precise details as to how the Association would set about electing the remaining member were left for the incoming Council to determine.

The following were elected to the Council:

President	Dennis Murphy QC	Parliamentary Counsel The Parliamentary Counsel's Office Goodsell Building 8-12 Chiffley Square Sydney NSW 2000 AUSTRALIA
Vice-President	Peter Pagano QC	Chief Legislative Counsel Department of Justice 2nd Floor 9833-109 Street Edmonton, Alberta T5K 2E8 CANADA
Secretary	Edward Caldwell	Office of the Parliamentary Counsel 36 Whitehall London SW1A 2AY UNITED KINGDOM
African Member	Margaret N Nzioka	Senior Parliamentary Counsel Attorney-General's Office PO Box 40112 Nairobi KENYA
Asian Member	K L Mohanpuria	Legislative Department Ministry of Law and Justice Government of India New Delhi - 110001 INDIA
Caribbean Member	Hyacinth Lindsay	Chief Parliamentary Counsel Office of the Parliamentary Counsel PO Box 604 Kingston JAMAICA
Pacific Member	Walter Iles QC	335 Main Road Tawa Wellington NEW ZEALAND

CONCLUSION

Following the election of the new Council, the meeting expressed the Association's gratitude to Mrs Rama Devi for all the hard work that she had done on behalf of the Association during her terms as President.

The Secretary was also asked to record the Association's thanks to Mr Abeyesekere and to Mr Mendis (neither of whom had stood for re-election to the Council) for their contributions as Council members.

The session ended with a vote of enthusiastic thanks to Peter Pagano and his colleagues in Canada for the hard work that they had clearly put in over many months. The general meeting of the Association had been well organised, extremely interesting and above all thoroughly enjoyable.

WHEN DOES AN INSTRUMENT MADE UNDER PRIMARY LEGISLATION HAVE "LEGISLATIVE EFFECT"?

Duncan Berry

Introduction

According to constitutional theory (as propounded by Dicey (1959)), legislatures are assumed under the Westminster system of government to be the supreme law-making authorities, but, even if Dicey's theory were ever valid, the reality is now different. All the evidence shows that legislatures have only limited control over legislation they have enacted once they have delegated to executive governments and their agencies power to make subsidiary legislation. An obvious manifestation of this development has been increased use of powers to make "quasi-legislation". The use of these powers has enabled the executive and its agencies to circumvent scrutiny and control by the legislature.

In most if not all Commonwealth countries statutory provision is made for the publication of subsidiary legislation. Similar provision is made for subsidiary legislation to be tabled in the legislature within a specified number of sitting days after the subsidiary legislation is made and most enable motions for disallowance to be moved within a further number of specified sitting days. In at least three Commonwealth jurisdictions, New Zealand, Western Australia and Hong Kong, the legislature cannot only disallow subsidiary legislation, but it can amend that legislation as well.

Despite various legislative changes that have taken place in recent years to enhance the accountability to legislatures of the exercise by executive governments and their agencies of powers to make subsidiary legislation, significant problems remain, most of which have implications for the accountability to legislatures of executive governments and their agencies for the exercise of delegated legislative authority. One such problem is the question of whether or not an instrument made under primary legislation has legislative effect. Many instruments are made under the authority of primary legislation, but whether, in the Hong Kong context, instruments are "subsidiary legislation" is by no means always clear as I shall demonstrate. An instrument that does not have legislative effect is not subject to scrutiny and control by the legislature, so the question is by no means an academic one[1]. The purpose of this paper therefore is to consider this question and to suggest a possible solution to it. It is taken as given that executive governments and their agencies should be accountable to the relevant legislature, as representing the people.

Subsidiary legislation in Hong Kong

All subsidiary legislation made under Hong Kong Ordinances is required to be published in the Hong Kong Government Gazette[2] and then to be tabled in the Hong Kong Legislative Council when it next sits[3]. When any such legislation has been tabled, the

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[1] At least not in Hong Kong. The question is also important in some Australian jurisdictions, which have tabling requirements and disallowance provisions for statutory rules and whether or not an instrument is a statutory rule is determined by whether or not it has "legislative effect".

[2] Section 28(2) of the Interpretation and General Clauses Ordinance.

[3] Section 34(1) of the Interpretation and General Clauses Ordinance.

ıl can, within 28 days after the date on which it was tabled[4], amend it. Section 34(2) ıe Interpretation and General Clauses Ordinance provides as follows:

> (2) Where subsidiary legislation has been laid on the table of the Legislative Council under subsection (1), the Legislative Council may, by resolution passed at a sitting of the Legislative Council held not later than 28 days after the sitting at which it was so laid, provide that such subsidiary legislation shall be amended in any manner whatsoever consistent with the power to make such subsidiary legislation, and if any such resolution is so passed the subsidiary legislation shall, without prejudice to anything done thereunder, be deemed to be amended as from the date of publication in the Gazette of such resolution.

(It should be noted that section 3 of the same Ordinance defines "amend" as including "repeal, add to and vary".)

But what is "subsidiary legislation" in this context? Section 3 of that Ordinance defines "subsidiary legislation" as "....any proclamation, rule, regulation, order, resolution, notice, rule of court, bylaw or other instrument made by virtue of any Ordinance *and having legislative effect*". Unfortunately, as an examination of the relevant cases will show, it is far from clear what the italicised words mean. But, in the Hong Kong context and also in the context of many other Commonwealth jurisdictions, it is crucial that the phrase should have a precise meaning. If an instrument is made under an Ordinance:

- it must be published in the Hong Kong Government Gazette;
- it must be laid before the Legislative Council within the prescribed period; and
- it is subject to scrutiny and possible amendment (including repeal) by that Council.

If the instrument, despite being called a proclamation, rule, regulation, order, resolution, notice or bylaw, does not have "legislative effect", then none of those requirements apply. This means that, if a person who has authority to issue an instrument mistakenly assumes that an instrument does not have legislative effect when the reality is that it does have that effect, the instrument may be void or at least ineffective[5].

Recently, the question arose as to whether a commencement notice was subsidiary legislation and thus capable of being amended by the Hong Kong Legislative Council. Section 1(2) of the *Disability Discrimination Ordinance* provided for the Ordinance to come into operation on a day to be appointed by the Secretary for Health and Welfare by notice in the Gazette. It further allowed different days to be appointed for the commencement of different provisions. Section 1(2) of the *Sex Discrimination Ordinance* was to similar effect, except that responsibility for making the commencement notice was given to the Secretary for Home Affairs. Commencement notices were made under section 1(2) of the *Disability Discrimination Ordinance* and section 1(2) of the *Sex Discrimination Ordinance*, but these commenced only some of the provisions of those Ordinances. Those provisions were of a machinery nature and the substantive provisions, which were intended to create legally enforceable rights and obligations, remained uncommenced.

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[4] Section 34(3) of the Interpretation and General Clauses Ordinance to be extended if the period ends after the end of Legislative Council session or after the Council is dissolved.

[5] The position in Hong Kong is far from clear. Section 46A of the Acts Interpretation Act 1901 (Commonwealth) makes it clear that, if a statutory rule (the Australian equivalent of subsidiary legislation) is not tabled in Parliament within the requisite period, the rule is void.

Although it had been the practice for over 29 years for commencement notices to be laid on the table of the Legislative Council, no member of the Council had ever sought to take any legislative action on a commencement notice. In accordance with the usual practice, the notices were tabled in the Council. A member of the Council then sought to move amendments to the commencement notices[6]. The amendment sought to bring the substantive provisions of the two Ordinances into force on the same day as the machinery provisions.

So were the commencement notices "subsidiary legislation"? In order to be subsidiary legislation an instrument had to be a "proclamation, rule, rule, regulation, resolution, notice, rule of court, bylaw or other instrument made under or virtue of an Ordinance". The instrument also had to have *legislative effect*. Commencement notices are clearly instruments within the definition of that expression because they are made "under or by virtue of an Ordinance" but the question still remains: do they have legislative effect?

The relevant cases

There are relatively few cases that provide guidance on the point, but it may be reasonably assumed that in enacting the definition of "subsidiary legislation" the Hong Kong legislature did not intend instruments that had an administrative or judicial effect to be subsidiary legislation[7]. The distinction between instruments that have a legislative, administrative or judicial effect is often blurred. Judicial bodies can make instruments (such as rules of court) that have a legislative effect and executive bodies can make instruments that may have a legislative effect. In *The Queen v Wright: ex parte Waterside Workers Federation of Australia* (1955) 93 CLR 528, at 521, the High Court noted that the orders made by the Australian Stevedoring Board and the Industrial Court under sections 13 and 34 of the Stevedoring Industry Act 1949 "may be general so that they govern the conduct to which they apply of persons at large". The Court held that, even though made by "a court", orders under section 34 were not "curial orders" and said that the power to make such orders might be described as administrative, but "it is rather one of subordinate legislation".

The question of whether an instrument has a legislative effect is of particular relevance in Australia[8]. This is for two reasons. An instrument of a legislative character is disallowable under section 46A or Part XII of the *Acts Interpretation Act 1901* of the Commonwealth. The question could also be relevant to determining whether a decision to make an instrument may be a decision of an administrative character that can be reviewed under the *Administrative Decisions (Judicial Review) Act 1977* of the Commonwealth.

In *Minister for Industry and Commerce v Tooheys Ltd* [1981] FLR 325, the question arose as to whether a refusal of the Minister to make a determination under section 273 of the *Customs Act 1901* of the Commonwealth relating to the admission to Australia of certain goods was "a decision of an administrative character" within the meaning of the

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[6] The member also sought to amend the District Court Equal Opportunities Rules which had been tabled in the Legislative Council on 5 June 1996, but there is little doubt that the rules were "subsidiary legislation".

[7] In *Lim Chin Aik v The Queen* [1963] AC 161, the Privy Council in discussing a contention that an order of a Minister against a person was the exercise of delegated legislation with certain results maintained that there was a difference between the exercise of a legislative function of the Minister as distinct from his executive or administrative functions.

[8] There appears to be no material difference between the expressions "instrument having legislative effect" and "instrument of a legislative character" (which is the expression mostly used in Australia).

Administrative Decisions (Judicial Review) Act 1977. If it was, did the Minister's decision "making, or forming part of the process of making, or leading up to the making of .... calculations of.... duty" under the *Customs Act 1901* within the meaning of paragraph (e) of Schedule 1 to the 1977 Act and therefore not a decision to which that Act applied. The appellant argued that the refusal of the Minister to make a determination under section 273 of the 1901 Act was not a decision of an administrative character. Subsection (3) of that section provided that, where the Minister made a determination under the section that an item or proposed item of a customs Tariff should apply to goods, the item applied as if the goods were specified in a bylaw made for the purposes of that item. The failure of the Minister to make a decision meant that no bylaw was made for the purpose of the relevant item. The parties agreed that, because of section 273(3), a determination by the Minister that an item should apply to goods had the same effect as a bylaw. At first instance, the judge held that the refusal of the Minister to make a determination under section 273 was "a decision of an administrative character" within section 3(1) of the 1977 Act. In dismissing the appeal, the Full Court of the Federal Court of Australia held that the Minister's decision was such a decision. Although that expression is not defined in the 1977 Act, its very use indicated that the Commonwealth Parliament intended to exclude from the 1977 Act other kinds of decisions, such as those having a legislative or judicial character. The Court rejected the appellant's submission that the decision involved in the present case was of a legislative and not of an administrative character. The Full Court found that a determination under section 273 of the 1901 Act was not a legislative act which the Commonwealth Parliament could have done itself but chose to delegate to the Minister. It also ruled that a determination under that section did not have the effect of changing the relevant law. The Full Court declared that the distinction between legislative and administrative acts is essentially between -

- *the creation or formulation of new rules of law having general application,* and
- *the application of those rules to particular cases.*

The decision of the Minister under the 1901 Act did not amount to changing the law: he was simply applying the law to a particular set of circumstances. Although the Court acknowledged that, by exercising his powers under the Act, the Minister may have been doing the work that Parliament might have done if it had been equipped to specify in advance all of the goods that it intended the law to apply to, it did not follow that the Minister's decision was of a legislative character. Thus the decision of the Minister not to make a determination under section 273 of the 1901 Act did not fall within paragraph (e) of Schedule 1 to the 1977 Act because that paragraph was directed to the process whereby the liability to customs duty was calculated in a particular case, whereas a decision to make a bylaw or determination was a decision that affected liability. It was not a decision involving the calculation of liability. The Court also held that the purpose of paragraph (e) was to exclude from the classes of decisions that could be reviewed under the 1977 Act decisions that were reviewable by courts or by boards of review or both. (This was designed to prevent aggrieved citizens from having "two bites of the cherry".)

The decision in *Tooheys Ltd.* followed the earlier decision of the High Court of Australia in *Commonwealth v Gruneit* (1943) 67 CLR 58. In that case, the Minister for the Army, in accordance with the power conferred by regulation 8 of the *National Security (Aliens Service) Regulations*, directed that every male refugee alien of a particular class should perform a specified service (not being service in the Armed forces) that the alien was, in the opinion of the Minister, capable of performing. Section 5(4) of the *National Security Act 1939-40* of the Commonwealth provided for certain provisions of section 48 of the *Acts Interpretation Act 1901* of the Commonwealth to apply to "orders, rules and bylaws, which are of a legislative character and not of an executive character, in like manner as they apply

to regulations". Those provisions included section 48(1)(c) and (3), which respectively required regulations to be laid before each House of Parliament within a specified time and provided that, if they were not so laid, they should be void. The Minister's direction was not laid before either House of Parliament and so the plaintiff claimed that the direction was void. Section 5(4) of the Act of 1939-40 was based on the proposition that a distinction could be drawn between orders, rules and bylaws that had a legislative character and those that had an executive character. As the Court acknowledged, it is not always easy to discern the difference. Although, generally speaking, describing an instrument as a rule or bylaw suggests that the instrument is of a legislative character, this is not always the case as can be seen from *Minister for Industry and Commerce v Tooheys Ltd.* Moreover, it was clear from section 5(4) that those instruments could be executive rather than legislative. In the case of orders, some would be clearly executive, as, for example, where under a legislative power a particular person was ordered by another person to perform a specified act. As the Chief Justice pointed out (at p. 82):

> The general distinction between legislation and the execution of legislation is that legislation determines the content of a law as a rule of conduct or a declaration as a power, right or duty, whereas executive authority applies the law in particular cases.

In the course of his judgement, the Chief Justice also referred to an American decision, *J.W. Hampton Jr & Co v United States* (1928) 276 US 407. In referring to the distinction between a legislative, executive and judicial power, it was stated that "The true distinction, therefore, is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law."

The upshot was that the Court held that the direction was of an executive, and not a legislative, character and, therefore, did not fall within the ambit of section 5(4).

In *Hamblin v Duffy* (1981) 50 FLR 310, another case concerned with determining whether or not a decision was a "decision of an administrative nature" within the meaning section 3(1) of the *Administrative Decisions (Judicial Review) Act 1977* of the Commonwealth, Lockhart J. expressed the view that legislative acts usually involved the formulation of new rules of law having general application. He admitted though that the earlier cases illustrated the difficulty of expounding definitive meanings of "legislative", "judicial", "ministerial" or "administrative". The difficulty, he said, was compounded by the fact that a particular category of decision tended to overlap or merge with another. The circumstances surrounding the notices commencing provisions of the Hong Kong *Sex Discrimination Ordinance* and the *Disability Discrimination Ordinance* are surely manifestations of this difficulty.

The High Court of Australia has, in two other cases, addressed the question of whether an order made under legislative authority is executive, and not legislative, in character. Those cases were *Arnold v Hunt* (1943) 67 CLR 429 and *Arthur Yates & Co Pty Ltd v the Vegetable Seeds Committee and others* (1946). However, neither of those decisions adds anything significant to what I have already said. In *Arnold v Hunt*, the Court merely stated that the relevant orders were executive in character without analysing the basis for doing so. Nevertheless, the case does highlight the confusion surrounding the expression "legislative character" because the court disagreed with the judge at first instance who found that the relevant instrument was of such a character! In *Yates*, on the other hand, the High Court seemed to think that the determining factor was the nature of the authority in whom

the power was reposed rather than on the characteristics of the power to be exercised[9]. However, although the principal roles of the executive, the legislature and the judiciary may be to exercise executive, legislative and judicial powers respectively, those organs of government also exercise other kinds of powers[10], so any attempt to classify an instrument as being of an executive, legislative or judicial character by reference to those functions alone is clearly doomed to failure[11].

The question was also canvassed in *McEldowney v Forde* [1971] AC 633, but the House of Lords, by a majority, merely held that the making of the relevant regulations (proscribing named organisations) was a legislative act that fell within section 1(3) of the *Civil Authorities (Special Powers) Act 1922* and not an executive act within the meaning of section 1(1)[12]. Again, the majority did not specify reasons for their finding, presumably because it was thought that they were self evident.

In the New Zealand case of *Fowler & Roderique Ltd v the Attorney General* [1987] 2 NZLR 56, one of the issues was the status of a notice published in the New Zealand Government Gazette declaring a fishery to be a controlled fishery and limiting the number of boat fishing licences for the fishery to the number existing at the time of the notice. The Court of Appeal (at p. 74) said:

> In the instant case the Gazette notice is ex facie general in its terms. It extends to all who propose to dredge for oysters in the area which it defines. *It had effect against the whole world* notwithstanding that it significantly protected the 23 boats previously fishing once the policy directive was made. In short, the notice was a general piece of delegated legislation.

So the fact that an instrument "has effect against the whole world" seems to be a factor in determining the instrument's status as a legislative instrument.

More recently, the decision of the House of Lords in *R v Secretary of State for the Home Department, ex parte Fire Brigades Union and others* [1995] 2 All ER 244 was directly concerned with the status of commencement orders[13]. Sections 108-117 of, and Schedules 6 and 7 to, the Criminal Justice Act 1988 provided for the establishment of a new criminal injuries compensation scheme. Those sections and Schedules did not come into operation immediately but section 171 of the Act provided for them to come into force on a day to be appointed by the Secretary of State for Home Affairs by order made by statutory instrument. In the meantime, the Secretary of State decided that the scheme was too expensive to

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[9] See dictum of Dixon J. at p. 60 where he said: "it will depend rather upon the nature of the authority in whom the power is reposed and upon the measure and extent of the power, its subject matter and its limitations and the conditions in or upon which it is exercisable".

[10] For instance, the executive and the judiciary both make subsidiary legislation and the legislature issues instruments of an administrative nature.

[11] Also see Whitmore and Aronson, 12.

[12] Accordingly, the proviso to section 1(1) of the Act (which directed that the ordinary course of law and avocations of life and the enjoyment of property were to be interfered with as little as may be permitted by the exigencies of the steps required to be taken under the Act) was not applicable.

[13] It may be assumed that nothing turns on the fact that in Hong Kong the day for commencing an Ordinance is usually fixed by a notice, whereas in the United Kingdom the day for bringing into operation an Act is often by order. In some Australian jurisdictions, the day on which an Act is to commence is fixed by proclamation.

operate and purported to establish another criminal injuries compensation scheme under the royal prerogative. The Fire Brigades Union and some other trades unions applied for judicial review of the Secretary of State's decision, claiming that the decisions of the Secretary of State not to bring into force the relevant provisions of the 1988 Act and to implement the non-statutory scheme were unlawful. Relief was refused at first instance but on appeal to the Court of Appeal that Court, by a majority, held that the Secretary of State had an unfettered discretion to decide when to bring the relevant provisions into force. However, he was not, while those provisions remained unrepealed, free to exercise prerogative powers to introduce a different scheme. On appeal from the Court of Appeal, the House of Lords affirmed that Court's decision, holding that the courts could not intervene to compel the Secretary of State to bring those provisions into operation since they would then be interfering in the legislative process. It could not be right, their lordships said, that the Secretary of State was under a duty, irrespective of any change in circumstances since the passing of the legislation, to bring into operation legislation that might then be inappropriate[14].

So what light do these decisions throw on the status of the commencement notices under section 1(2) of the *Disability Discrimination Ordinance* and section 1(2) of the *Sex Discrimination Ordinance*? In *Tooheys Ltd*, it was stated that an act was legislative in character if it involved the creation or formulation of new rules of law having general application. On the other hand, application of those general rules to *particular cases* was to be regarded as an act of an administrative nature. A commencement notice clearly does not have the effect of applying the relevant statutory provisions to particular cases. And, although such a notice does not itself formulate statutory provisions, it can be said to create them by bringing them into effect.

Similarly in *Grunseit*, the High Court of Australia held that legislation determines the content of the law as a rule of conduct or declares a power, right or duty whereas, as in *Tooheys Ltd*, the execution of legislation involves the application of the law in particular cases. Although a commencement notice does not itself contain the content of the law, it has a direct effect on determining its content because legislation cannot exist in a vacuum. Legislation can only exist as law when either the legislature or a delegate of the legislature has acted to bring the legislation into force. A commencement notice is just one way of bringing enacted legislation into operation. The legislature could just as easily have retained responsibility for commencing the legislation. And if it had done so, surely no one would suggest that this was not a legislative act?

It will be recalled that in the New Zealand decision in *Fowler & Roderique Ltd* the crucial attribute of whether an instrument was of a legislative, rather than an administrative, character was whether or not it had effect "against the whole world". There must surely be little doubt that a commencement notice has such an effect.

In *Ex parte Fire Brigades Union*, whether or not a commencement order had legislative effect was only indirectly in issue. However, it is clear that the House of Lords would not, in the absence of some indication from Parliament that the courts should do so, intervene to require the Secretary of State for Home Affairs to commence the operation of the provisions of the Criminal Justice Act 1988 that prescribed the criminal injuries compensation scheme. This was because by doing so the courts would be interfering with

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[14] However, the House of Lords (Lords Keith and Mustill dissenting) further held that the Secretary of State's discretion was not unfettered and he was, while the relevant statutory provisions remained unrepealed, required to keep the question of when they were to be brought into operation under review. It was, the majority held, an abuse or excess of power for him to exercise the prerogative power in a manner inconsistent with that duty. It followed that his decision not to implement the statutory scheme but to implement a non-statutory scheme instead was unlawful.

the legislative process. As Lord Mustill pointed out[15], Parliament has its own special means of ensuring that the executive, in the exercise of delegated functions, performs in a way which Parliament finds appropriate. He went on to say that, ideally, it was those latter methods which should be used to check executive errors and excesses, because it was the task of Parliament and the executive in tandem, not the courts, to govern the country[16]. One must conclude from this that their lordships were of the view that a commencement order was an instrument having a legislative effect[17]. The comments of another law lord, Lord Nicholls, are also apt. At p. 275, he had this to say:

> .... a court order compelling a minister to bring into effect primary legislation would bring the courts right into the very heart of the legislative process. But the legislative process is for the legislature not the judiciary. The courts must beware of trespassing upon ground which, under this country's constitution, is reserved exclusively to the legislature. Clearer language, or a compelling context, would be needed before it would be right to attribute to Parliament an intention that the courts should enter upon this ground in this way.

The comments of Lord Mustill and Lord Nicholls are equally relevant to the Hong Kong environment, with the Hong Kong Legislative Council having its own mechanisms under the Interpretation and General Clauses Ordinance (Cap.1) to ensure that the Government exercises the functions delegated by the legislature in a manner that the Council considers to be appropriate.

The ruling of the President of the Hong Kong Legislative Council

After careful consideration, the President took the view that the well established practice in the Legislative Council, whereby commencement notices were treated as subsidiary legislation, should not be overturned. In arriving at this conclusion, he took into account that the Commonwealth of Australia's *Legislative Handbook* stated that a commencement notice was of an executive rather than of a legislative character. However, he preferred the view expressed in Erskine May[18] that "the commencement of a statute may be more conveniently provided for by delegated legislation". He also took into account that Francis Bennion[19], the English guru on legislation, had classified commencement orders as delegated legislation.

Having decided that commencement notices were "subsidiary legislation", the President then had to rule on the question of whether the motions to amend the two sections

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[15] Ibid at p. 268.

[16] I.e. the United Kingdom

[17] See dictum of Lord Browne-Wilkinson at p. 252 where he said: "In my judgement it would be most undesirable that .... the court should intervene in the legislative process by requiring an Act of Parliament to be brought into effect. That would be for the courts to tread dangerously close to the area over which Parliament enjoys exclusive jurisdiction, namely the making of legislation". Also see dictum of Lord Mustill at p. 263 where he said: "For the courts to grant relief of this kind would involve a penetration into Parliament's exclusive field of legislative activity far greater than any that has been contemplated even during the rapid expansion of judicial intervention during the past 20 years".

[18] Erskine May (1938, 38).

[19] However, having searched Bennion's Statute Law (1983) assiduously I found nothing to support this statement.

providing for the commencement of the *Disability Discrimination Ordinance* and the *Sex Discrimination Ordinance* by bringing all of the provisions of those Ordinances into force on the same date were in order. The motions would quite clearly extend the effect of the original notices tabled in the Legislative Council which provided only for the commencement of those provisions establishing the Hong Kong Equal Opportunities Commission. It will be recalled that section 34(2) of the *Interpretation and General Clauses Ordinance* (so far as material) enables the Legislative Council to amend subsidiary legislation "in any manner whatsoever consistent with the power to make such subsidiary legislation". The President ruled that this phrase had to be interpreted in the context of the making of *the* subsidiary legislation, so that, if the delegate had not exercised the power to fix a commencement day for particular provisions of the relevant Ordinance, it was not in order for the Council to use section 34(2) to amend the commencement notice by adding further provisions of that Ordinance to the notice for the purpose of commencing those provisions on the same day as the provisions originally specified in the notice. His interpretation was based on the notion that the Legislative Council consciously gave itself no powers to determine a commencement day for a provision of the relevant Ordinance until a commencement notice was made in respect of that provision. Consequently, if a commencement notice brought into operation only some of the provisions of that Ordinance, the Council did not *thereby* acquire the power to extend the notice to the other provisions. The amendments were thus out of order and could not be considered by the Council.

Criticism of the ruling

I believe that the President adopted an unduly narrow view of section 34(2) of the *Interpretation and General Clauses Ordinance*, particularly bearing in mind that section 19 of that Ordinance requires an Ordinance to "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Ordinance according to its true intent, meaning and spirit". This phrase must surely mean that the Legislative Council can take such action as it thinks appropriate so as to put itself in the same position as the delegate and to exercise the power in any way in which the delegate could have exercised it. I suggest that the purpose of section 34(2) must be to enable the Legislative Council to amend[20] the subsidiary legislation by:

- omitting any of the text of the subsidiary legislation;
- substituting for any of the existing text any text that the delegate could have included in that legislation; or
- adding to that legislation any text that the delegate could have included.

Applying this reasoning to the motions to amend the commencement notices, since the Legislative Council could, when passing the legislation, have specified particular dates for the commencement of all of the provisions of the legislation, it must have been lawful for the Council to amend the notices by adding commencement days for provisions other than those specified in the notices by the delegates. It is surely irrelevant that, when passing section 34(2), the Legislative Council (surely the legislature?) consciously gave itself no powers to interfere with a commencement day for a provision of an Ordinance until a commencement notice was made with respect to that provision. The purpose of section 34(2) is to confer on the Legislative Council a power that will enable it to supervise the exercise by delegates of the power to make subsidiary legislation, so that, if in relation to a particular Ordinance the Council is not satisfied with the action that the delegate has taken with respect to subsidiary legislation made under that Ordinance, it can take control of the

[20] Section 3 of the Interpretation and General Clauses Ordinance defines "amend" as including "repeal, add to or vary".

situation by exercising its power to amend that legislation. The use of the phrase "in any manner whatsoever" in section 34(2) in my view makes it doubly clear that this was the way that the legislature must have intended that provision to operate.

Should "legislative effect" be defined?

It is apparent from the cases and from the circumstances surrounding the notices commencing the two anti-discrimination Ordinances that there is considerable uncertainty as to when an instrument has legislative effect or not.

There are (at least) three possible approaches that might be taken to address the first issue. Firstly, the definition of "subsidiary legislation" might, as is now the case in some Commonwealth jurisdictions[21], be based on a formal description of the instrument ("regulations, rules, bylaws, ordinances, etc) - the so called "key word" tests. Apart from regulations, rules, bylaws and ordinances, other instruments include proclamations, orders, tariffs and determinations, as well as those documents mentioned above that fall within "quasi-legislation".

Another approach would be to simply redefine "subsidiary legislation" as any instrument made under an Ordinance that is of a legislative character, unless expressly excluded by its enabling provision. The expression "legislative" would not be defined, but to assist the Executive and Government agencies in deciding whether an instrument is "legislative", the essential characteristics of legislative instruments would be set out in a legislation handbook. This approach was proposed by the Australian Administrative Review Council ("the ARC") in its report "Rule Making by Commonwealth Agencies" (1992). Presumably it would be left to the courts to determine borderline cases.

A third approach would be based on the substantive character of the instrument. If this approach were to be adopted, subsidiary legislation might be defined as any instrument that lays down a rule of conduct by conferring a legally enforceable right on members of the public or members of a specified section of the public or that impose a legally enforceable obligation on them. Alternatively, it might be defined as an instrument made under an Act that:

- has the effect of determining the content of the law (as opposed to actually applying the law) or declares a particular power, right or duty[22]; and
- establishes a rule or rules of a binding nature (as opposed to mere guidelines that may be disregarded at the discretion of the person or body to whom they are directed);
- is of general application (rather than applying in a particular case)[23].

The problem with the first approach is obvious. It is virtually impossible to prevent the invention of new labels for "legislative instruments" that are not covered by a wider definition of "statutory rule" (or some equivalent term). The use of this approach would (and

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[21] Such as the Australian Commonwealth and some Australian states, such as New South Wales.

[22] See dictum of Latham CJ in *Commonwealth v Grunseit* (1943) 67 CLR 58 at 82.

[23] See *Ministry for Industry and Commerce v Tooheys Ltd* (1982) 42 ALR 260 at 265. In that case, the Federal Court said: "The distinction between legislative and administrative acts is essentially between the creation or formulation of new rules of law having general application and the application of those rules to particular cases."

in those jurisdictions where the "key word" approach is used, there is evidence that it does) enable the executive and its agencies to avoid being accountable to the legislature by the use of instruments that do not fall within the key word test.

A label that has been applied to legislative instruments that fail the "key word" test is "quasi-legislation". Megarry (1944) identified two forms of what he called "administrative quasi-legislation".

> First, there is the State-and-subject type, consisting of announcements by administrative bodies of the course which it is proposed to take in the administration of particular statutes[24]. The second category of administrative quasi-legislation is the subject and subject type, consisting of arrangements made by administrative bodies which affect the operation of the law between one subject and the others[25].

Examples of common quasi-legislation include codes of practice, guidance notes, guidelines, directions, declarations, orders, technical standards determination, standards, arrangements[26], circulars[27], principles, White Papers, development control policy notes, memoranda, authorisations, designations, practice statements, taxation rulings, codes of conduct, codes of ethics and conventions. Generally speaking, quasi-legislative instruments consist of those documents that are made by persons or bodies who are authorised by the primary legislation to "direct", "determine", "notify", "order", "instruct", or "declare" that particular action must be taken in particular circumstances.

Quasi-legislation has recently been the subject of severe criticism by Justice McHugh of the High Court of Australia[28]. After warning that executive government may be supplanting Parliament's law-making function, he pointed out that many Acts granted Ministers and their officers "quasi-legislative" powers, which meant that they, and not Parliament, were exercising the law-making role. He acknowledged that Ministers could not lawfully exceed the powers conferred by Parliament, but in most cases the discretions given to them were so open-ended that it is they and not the Parliament who are really making the rules that bind the citizen. While recognising that Parliament did not have time to legislate for every detail of a policy that it sought to implement, he nevertheless thought that Parliament should closely monitor the way in which Ministers and others prescribed rules that have the force of law. It was, he thought, a short step from the granting of these wide powers to the abrogation by Parliament of its role as the body democratically responsible for the creation of substantive law. I share Mr Justice McHugh's sentiments.

One of the fundamental problems with quasi-legislation can be its relative inaccessibility. This is mainly because instruments that do not have a legislative effect do

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[24] As examples of this first category, Megarry mentioned "practice notes" issued to explain how certain provisions of the War Damage Act would be interpreted and pronouncements by the British Inland Revenue Commissioners as to the circumstances in which particular tax concessions would be allowed.

[25] As an example of the second category of quasi-legislation, Megarry referred to an agreement which the Home Office had negotiated with private insurance companies under which the companies agreed that they would not raise a particular defence in proceedings seeking workers' compensation.

[26] For example, see the Coal Compensation Arrangements 1985 (NSW). Although clearly a legislative instrument, it is neither required to be published nor subject to parliamentary disallowance.

[27] See dicta of Scott LJ in *Blackpool Corporation v Locker* [1948] 1 KB 349.

[28] Delivering the 1994 Sir Ninian Stephen Lecture at the University of Newcastle's Law School.

not have to comply with the publication requirements applicable to subsidiary legislation[29]. This makes it difficult to know who made the law or why and, even if one did know, it is even more difficult than usual to know what the law actually is. Consequently, as much of this law is not properly published, members of the public will have great difficulty finding out the current state of the law,[30]. However, this is not a major problem in Hong Kong where, in a case of a doubtful instrument, there is a tendency to publish it in the Hong Kong Government Gazette rather than not publish it.

It has been suggested that the increased use of quasi-legislation is part of a plot to avoid parliamentary scrutiny[31]. Robert Wiesse (1991), a member of the Western Australian Parliament's Joint Standing Committee on Delegated Legislation, has expressed similar sentiments. At the third biennial conference of Australian delegated legislation committees, he said:

> .... it is a matter for real concern that government departments will knowingly seek to reduce a parliamentary committee's jurisdiction by adopting forms of statutory instrument that are not caught by the definition "regulation" in the empowering Act.

In England, concern about the tendency, whether by design or otherwise, to avoid parliamentary scrutiny was expressed as long ago as 1948. In the course of giving judgement in the celebrated case of *Blackpool Corporation v. Locker* [1948] 1 KB 349, Scott LJ had this to say:

> I am tempted to wonder whether someone in the Ministry of Health thought the name "circulars" would save them from recognition as delegated legislation!

Argument (1993) has rather cynically described quasi-legislation as a "Trojan Horse", a "devious tactic by the bureaucracy, which has developed it for its own ends". The real reason for the growth of quasi-legislation in the Australian federal jurisdiction is, he suggests, that it is the Australian Government bureaucracy's response to the increased scrutiny which the so-called "new administrative law" has brought to bear on bureaucratic decision making since the late 1970s. The theory is that, with the enactment of the *Administrative Appeals Act 1975*, the *Ombudsman Act 1976*, the *Administrative Decisions (Judicial Review) Act 1977* and the *Freedom of Information Act 1982*, the Australian government and its agencies have become much more accountable for their decisions. Not only were they to be more exposed to scrutiny by the legislature and the public but there was a much greater possibility that they could and would be challenged in legal proceedings.

The difficulty with the second approach is that, although the word "legislative" has a core of certainty, it also has a penumbra of uncertainty. The ARC recognised the difficulty

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[29] See the Statutory Rules Publication Act 1903 (Commonwealth); section 41 of the Interpretation Act 1987 (NSW); sections 40 and 41 of the Legislative Instruments Act 1992 (Qld); section 11 of the Subordinate Legislation Act 1978 (SA); section 47 of the Acts Interpretation Act 1931 and the Rules Publication Act 1953 (Tas); section 4 of the Subordinate Legislation Act 1962; section 41 of the Interpretation Act 1984 (WA).

[30] Whalan (1990).

[31] Senator Ian Wood, Chairman of the Senate Standing Committee on Regulations and Ordinances, who warned the Senate about "instruments in writing" being used in preference to regulations or ordinances in order to evade the Committee's scrutiny. There is substantial evidence that high ranking members of the Australian federal bureaucracy are not satisfied with the way in which administrative law has developed in recent years. They claim that the principles of administrative law are incompatible with the so-called "new managerialism" in the Australian Public Service in that it is a barrier to "can do" managers who in essence are told "you cannot do that!".

and recommended in its report on rule making by Australian Commonwealth agencies that the Commonwealth *Legislation Handbook*[32] should be amended to include criteria on which to determine whether or not an instrument is in fact "legislative in character". This recommendation is problematic, bearing in mind that it would be left to the bureaucracy to determine whether a particular instrument should become subject to the onerous requirements that would (assuming that the report were to be implemented) be imposed by the proposed *Legislative Instruments Act*. In attempting to address this point, the report said that a comparable issue had already arisen under the *Administrative Decisions (Judicial Review) Act 1977*, which applies to all decisions of an *administrative character*. The meaning of that expression, the report points out, has been partly elucidated by case law. The report claimed that, by extension, this elucidation had helped to develop the meaning of the corresponding expression "legislative character". Unfortunately (and the report acknowledged this), failure to recognise that a particular instrument was of a legislative character would have substantive consequences (assuming the instrument had not been exempted from the operation of the proposed *Legislative Instruments Act*). Any action taken under the instrument would be rendered ineffective. This is because, not having been published in the proposed legislative instruments register, the instrument would never have come into operation. The ARC, however, did not believe that this would be a problem in practice. Nevertheless, it is difficult not to conclude that the ARC was being unduly optimistic, particularly having regard to the findings of the Pearce Report (1993). Moreover, it is unlikely that Government agencies, even if benevolently motivated, could be reasonably expected to determine correctly in every case whether or not the relevant instrument was in fact "legislative in character" merely on the basis of recent Australian Federal Court decisions[33]. Furthermore, there would be the difficulty that possibly invalid instruments would retain their validity for as long as they remained unchallenged, leaving those who questioned the instruments to take the initiative by means of court proceedings. While this may be acceptable in the case of proceedings involving wealthy industrial undertakings, it is rather less so when those proceedings involve people with few means.

In 1994 the Australian Federal Government adopted the third approach. In that year a *Legislative Instruments Bill* was introduced into the Federal Parliament. Clause 4(1) of this Bill provided as follows:

> 4.(1) Subject to subsection (3) and to section 6, a legislative instrument is an instrument in writing:
>
> (a) that is or was made in the exercise of a power delegated by the Parliament; and
>
> (b) that determines the law or alters the content of the law, rather than stating how the law applies in a particular case; and
>
> (c) that has the direct or indirect effect of imposing an obligation, creating a right, varying or removing an obligation or right; and
>
> (d) that is binding in its application.

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[32] The *Legislation Handbook* is an Australian Commonwealth publication that deals with the process of preparing legislation for introduction into the Federal Parliament. It is prepared by the Department of the Prime Minister and Cabinet for use by Commonwealth Government agencies concerned with the development of legislation. A similar handbook is being prepared for New South Wales legislation, but I am not aware that any other Australian jurisdiction produces a similar document.

[33] For example, see *Queensland Medical Laboratory and others v. Blewitt and others* (1988) 54 ALR 615; *Austral Fisheries Pty Ltd v. Minister for Primary Industries and Energy* (1992) 37 FCR 463; *Re Sanyo Australia Pty Ltd and the Comptroller of Customs* and *Latitude Fishers v. Crean* (unreported) but see (1992) 32 *Admin Review* at p. 68 and 85 *Australian Administrative Law Bulletin* 2986.

(2) Without limiting the generality of subsection (2), each of the following instruments is, subject to subsection (3) and section 6, a legislative instrument:

(a) an instrument:

(i) made in the exercise of a power delegated by the Parliament before, on or after the commencing day; and

(ii) described as a regulation by the enabling legislation;

(b) an instrument:

(i) made in the exercise of a power delegated by the Parliament before, on or after the commencing day in an Act providing for the government of a non self-governing Territory; and

(ii) described in that Act as an Ordinance or as rule, regulation or by-law made under such an Ordinance;

(c) an instrument, other than a regulation:

(i) made in the exercise of a power delegated by the Parliament before the commencing day; and

(ii) required to be published as a statutory rule under the Statutory Rules Publication Act 1903 as in force at any time before the commencing day;

(d) an instrument made in the exercise of a power delegated by the Parliament before the commencing day and, in accordance with a provision of the enabling legislation:

(i) declared to be a disallowable instrument for the purposes of section 46A of the Acts Interpretation Act 1901 as in force at any time before the commencing day; or

(ii) otherwise able to be disallowed under Part XII of the Acts Interpretation Act 1901 as in force at any time before the commencing day;

(e) a Proclamation made under enabling legislation,

whether the instrument is made before, on or after the commencing day.

[Proposed subsection (3) specified certain instruments that were declared not to be legislative instruments for the purposes of the operation of the proposed Act. A similarly, proposed section 6 declared rules of court not to be legislative instruments for those purposes.]

The 1994 Bill was subsequently superseded by the *Legislative Instruments Bill 1996*, which lapsed with the dissolution of the previous Commonwealth Parliament in that year. Proposed section 4 of the 1996 Bill (which was modified as a result of recommendations of the Senate Standing Committee on Legal and Constitutional Affairs) provides (so far as relevant) as follows:

(1) Subject to subsection (3) and to section 6, a legislative instrument is an instrument in writing:

(a) that is of a legislative character; and

(b) that is or was made in the exercise of a power delegated by the Parliament.

(1A) Without limiting the generality of subsection (1), an instrument is taken to have a legislative character if:

(a) it determines the law or content of the law, rather than the applying the law in a particular case; and

(b) it has the direct or indirect effect of affecting a privilege or interest, or imposing an obligation, creating a right, or varying or removing an obligation or right.

Proposed sections 4(3) and (6) and proposed section 6 are essentially the same as the corresponding provision in the 1994 Bill. One of the significant changes to be noted is the omission from proposed section 4(1) of that Bill of paragraph (d) (that, in order to be a legislative instrument, the instrument had to be binding in its application). The effect of excluding that provision was probably designed to ensure that certain quasi-legislation (such as administrative rules, guidelines and codes or practice) would be brought within the definition of "legislative instrument".

A modified version of the third approach seems to offer the best way forward for Hong Kong. I would envisage the addition to section 3 of the *Interpretation and General Clauses Ordinance* of new subsections along the following lines:

(2) For the purposes of the definition of "subsidiary legislation" in subsection (1), an instrument made under or virtue of an Ordinance has a legislative effect if it determines the law or alters the content of the law, rather than applying the law in a particular case.

(3) An instrument referred to in subsection (2) includes, but is not limited to:

(a) an instrument that includes one or more provisions directly or indirectly creating or affecting the rights, freedoms or privileges of persons generally or of persons of a specified class;

(b) an instrument that includes one or more provisions directly or indirectly conferring powers or imposing duties that affect or may affect persons, or the interests of persons, generally or persons, or the interests of persons, of a specified class or regulates the exercise of those powers or the performance of those duties;

(c) an instrument that includes one or more provisions directly or indirectly imposing an obligation on persons or on persons of a specified class or varying or removing such an obligation or determining the manner in which such an obligation should be fulfilled;

(d) an instrument that includes one or more provisions directly or indirectly imposing a liability on persons generally or on persons of a specified class or determining the effect of such a liability;

(e) an instrument that includes one or more provisions prohibiting, either conditionally or unconditionally, persons generally or persons of a specified class from engaging in specified conduct or doing a specified act or thing;

(f) an instrument that includes one or more provisions imposing, or authorising a specified person to impose, a penalty for contravening or failing to comply with a provision of the instrument or of another instrument that has a legislative effect (including an Ordinance);

(g) an instrument that includes one or more provisions otherwise establishing norms of conduct that persons generally or persons of a specified class are expected to observe;

(h) an instrument that commences the operation of an Ordinance or part of an Ordinance, or of any other part of an instrument that has a legislative effect, or repeals or suspends the operation of an Ordinance, part of an Ordinance, or of such an instrument or part of such an instrument.

If a particular kind of legislative instrument were to be identified as one that should definitely be excluded from the definition of "subsidiary legislation", this could be specified in a further subsection which would be inserted in section 3 for the purpose.

It is important that executive government and its agencies should be able to identify all instruments that have a legislative effect. Although it would be impossible to remove the uncertainty entirely, the enactment of the proposed subsections would, I suggest, go a long way towards doing so. However, the proposed subsections should not define "instrument having legislative effect" exhaustively, because to do so would mean running the risk of not catching all the legislative instruments that were intended to be caught. Hopefully, this approach would provide the best of both worlds in so far as there would be reasonably specific guidance as to what instruments had a legislative effect and were thus "subsidiary legislation", but at the same time the door would be left open for the inclusion of any legislative instruments that were intended to be caught. I do not envisage that this would lead to significant litigation.

Finally, it is also important that delegates exercising powers delegated under primary legislation should be accountable to the legislature for the exercise of those powers. I believe that the inclusion of the proposed new subsections in section 3 of the Interpretation and General Clauses Ordinance would contribute to enhancing the accountability of those delegates to the legislature and facilitate the effective supervision of the executive by the legislature.

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TECHNIQUES FOR EVALUATING DRAFT LEGISLATION

Duncan Berry

Outline: This paper advocates selective usability testing of draft legislation and canvasses various methods by which testing might be carried out.

1 – Why usability tests of draft legislation are a good idea

People do not read legislation for pleasure. They read it only when they want to find out what the law is on a particular matter or when they want to solve a problem that has legal implications. When trying to understand a particular piece of legislation, readers need the information they are seeking to be presented clearly, precisely and in the first place they look. They judge the usability of legislation by how quickly it helps them find the information they are looking for or to solve the legal problem that is confronting them. If they cannot do this, they complain.

So how can legislative counsel optimise legislative documents so that their various audiences can better understand and make use of them? As I see it, a legislative document must meet three requirements.

- It must be sufficient, that is, contain the necessary information,
- It must be precise, that is, contain the correct information, and
- It must be usable, that is, be organised and written so that all those who have to use it can find what they need and can understand what they find in the time that they are willing to spend on it.

Usability is as important to a document as sufficiency and precision, because if the document's audiences cannot find or understand the information, they will not even get to find out whether it is precise or sufficient. Consequently, there must be ways to test the sufficiency, precision and usability of legislative documents. For usability, we need tests that show whether people who must use those documents can find what they need and can understand what they find.

In recent years, a number of methods have been developed for evaluating documents. What follows is an outline of these methods, with an indication of their respective advantages and disadvantages. The relevant research literature puts typical methods for evaluating text quality into three classes. These classes are-

- text-focused approaches,
- expert-judgement-focused approaches, and
- reader-focused approaches.

2 – Methods for evaluating text quality

(1) Text-focused evaluation

Text-focused methods function by asking a person (or a computer) to examine a text, attend to a set of text features and assess text quality by applying principles or guidelines that have been developed from ideas or research about how readers at a certain level and of a certain background will probably respond. There is little or no reader input. These methods include-

- readability formulae,

- computer based stylistic analysis programs,
- guidelines and maxims, and
- checklists.

Readability formulae

A readability formula is a mathematical equation that is applied to prose texts in an effort to predict how difficult the text will be for a given group of readers. When a readability formula is applied, you get a score, which is some number between 0 and 100 or a reading grade formula[1]. Formulae are commonly used to see if a text meets a predetermined numerical goal or to compare two versions of a text.

Readability formulae are easy to learn, easy to use[2] and inexpensive. They require no input from readers or testers and they provide an impartial and objective measure. So why are readability formulae not a good idea? After all, back in 1985, their use was enthusiastically supported by the Hon. J. H. Kennan, the former Attorney-General of Victoria, who said that in future all Victorian legislation would be subject to the "Flesch Test". The problem is that readability formulae are used in circumstances for which they have not been tested. Furthermore, they are used not simply as *a* measure of textual comprehensibility but as the *only* measure.

Studies have shown that readability formulae do not validly or reliably predict how intelligible documents are to their readers. One study[3], which involved rewriting some jury instructions so that they were more intelligible, found that improved comprehensibility did not always produce better readability scores. In fact, changes that improved comprehensibility often resulted in worse readability scores! Another study[4] showed that what mattered to readers was not the readability score but that the tested passage had fewer ideas in each sentence and that the connections between the ideas were clearer.

Now that computerised readability formulae are available, legislative counsel may be tempted to use them as guides when writing or editing a draft Bill or regulation. But even the advocates of readability formulae agree that this is an inappropriate use of readability formulae. Legislative counsel who merely shorten sentences and change words to get a better readability score miss the point. A readability formula only *correlates* certain features with reading difficulty: the features do not *cause* the difficulty. Readability formulae can seduce counsel into drafting short, simple legislative sentences, but, as many lawyers experienced in reading legislation may have suspected, sentences can be difficult to read simply because they are too short[5]. Very short sentences in fact inhibit the flow of ideas. It is not length that causes the difficulty in sentences: it is features such as passive

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[1] Usually this is a school reading grade. There are hundreds of kinds of readability formulae. The most common one is the Flesch Reading Ease Scale, which is based on sentence length and the number of syllables per 100 words. The higher the number, the easier the text should be to read.

[2] Computerisation makes formulae even easier to use.

[3] Charrow, R.P., and Charrow, V.M. Making legal language understandable: A psycholinguistic study of jury instructions", *Columbia Law Review* (1979): 1306-1374.

[4] Kintsch, W., and Vipond, D., "Reading comprehension and readability in educational practice and psychological theory", in *Proceedings of the Conference on Memory*, ed L Nilsson Hillsdale, NJ: Erlbaum, 1977.

[5] See study by P.D. Pearson, "The effects of grammatical complexity on children's comprehension, recall and conception of certain semantic relations, *Reading Research Quarterly*, 10(1974), 155-192.

verbs, noun strings and nominalisations[6]. A noun string, for example, is often shorter than the more understandable phrase that untangles the string. Similarly, sentences containing nominalisations are often shorter than the same sentences that use more understandable verb phases[7]. The basic problem with readability formulae is that they are mechanistic. They do not interpret context, meaning, grammar or content.

Another problem with readability formulae is that proponents assume that readers are text-processing machines. However, cognitive psychologists and psycholinguists have shown that readers read a text not from the bottom up but from the top down. Readers construct meanings on the basis of schemas that they bring to the text. They create expectations about the direction the text is taking and look for words and sentences that satisfy or negate those expectations. They also look for contextual material, such as signposts and explanatory introductions, to help them to construct those meanings.

Yet another major problem with readability formulae is that they measure only those features that can be counted. But many factors for which there are no objective measures influence how compressible a text is, factors that may be even more important than the length of sentences and the words used in the text. Three critical factors that readability formulae do not measure are content, organisation and lay out. In one study involving more than 50 life assurance policies, all of which satisfied a Flesch test, it was found that most still hide important information under obscure headings[8]. The sentences may be shorter but the reader does not know where to look for it. And because readability formulae can be used only to measure straight text, they provide no assistance on graphics or typography.

At best, readability formulae should be used as a screening device for an old document. If a text that was not created with a readability formula in mind gets a poor readability score, it almost certainly needs to be re-organised. It is probably not even a good idea to use a readability score as one of several criteria for developing a readable Bill. There are at least two reasons for this. Firstly, any particular score from applying a formula is arbitrary. Secondly, there is a danger that legislative counsel who are held to a readability requirement would end up writing a formula. When a readability formula is one of the yardsticks for a document, all other measurement tools tend to be ignored.

Computer-based stylistic analysis programs

Computer-based programs typically work by assessing readability using one or more standard formulae and by counting passive constructions, misspellings, and numbers of simple, compound or complex sentences and then by providing the evaluator with a statistical summary of the text problems by assigning particular features an average score through comparison of the use of the text feature (the number of passive verbs for example) against the proportion used in a "good text" template[9]. Most of these programs cannot address the kinds of grammatical problems that poor writers often create. The fundamental

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[6] i.e. nouns made out of verbs.

[7] See study by Flower, L, Hayes, J.R., and Swarts, H. "Revising functional documents", in *New Essays in Technical and Scientific Communication: Research Theory, Practice*, ed. P.V. Anderson, J. Brockman, C.R. Miller, Farmingdale, NY: Baywood, 1983, 90-108.

[8] Redish, J. *Beyond readability: How to write and design understandable life policies* Washington DC: American Council of Life Insurance, 1984.

[9] e.g. Unix's *Writer's Workbench* and the GM *Star* program. Two style checkers are worthy of note *Grammatik III* for IBM type PCs and *Macproof* for Macintosh PCs.

drawback of most of the programs is that "they rely too much on lookup tables instead of a parser to determine the role words play in a sentence"[10].

Guidelines and maxims

Guidelines and maxims are perhaps the most popular text-focused method in use. They are usually aimed at providing advice on the linguistic, stylistic or graphic features of text. From the legislative counsel's point of view, such guidelines as "omit needless words" or "use shorter sentences" are of little help. Either they are too vague and too generic as in the first example or require counsel to assume that all writing tasks are alike and involve the same simplistic prescriptions. Furthermore, counsel may have difficulty in deciding when and how to apply guidelines. Guidelines that are applied too rigidly can have the effect of stifling solutions to rhetorical problems. In sum, guidelines are not likely to help legislative counsel to adapt their drafts to the unique features of a given rhetorical situation.

Checklists

Another text-focused method, checklists, typically works in one of two ways. One is where the evaluator (i.e. drafter or editor) is prompted to consider certain specified issues. Many checklists depend on recommending visual or verbal text features to use or those that should be avoided or used sparingly. Other checklists are in essence additive weighting procedures that ask the evaluator to rank the text's features according to a quality scale and then to assign a score to the text.

A disadvantage with checklists arises because of the difficulty of deciding which text features are most important and of assigning weights or numerical values to text features. There is usually disagreement about the value to be attributed to any particular text feature. Moreover, checklists usually fail to ask evaluators to judge the use of text features in relation to the given rhetorical context. For example, some checklists caution against using the passive voice, even though there are many rhetorical situations when its use is the most effective and appropriate linguistic choice.

(2) Expert-judgement focused evaluation

Methods involving the application of expert judgement constitute another widely used set of evaluation procedures[11]. These methods include:

- peer review,
- editorial reviews, and
- external reviews.

The first and third of these methods have been used for a number of years in at least one Australian State Parliamentary Counsel's Office.

Peer Review

With peer review, people who share a common background evaluate texts for matters

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[10] See Richardson, S., Creed, W., and Chandler, R., "Critique as a teaching tool for writing classes", in *The Dynamic Text Guide, 9th International Conference on Computers and the Humanities (ICCH) and 16th International Association for Literary and Linguistic Computing (ALLC) Conference*, Toronto: University of Toronto, Centre for Computing in the Humanities, June 5-10, 1989, pp. 57-58.

[11] By experts, I mean individuals who have a lot of knowledge about the text, its audience or, in this instance, legislative drafting.

of style, consistency, and the like. Peer reviews can be very informative in pointing out text problems, allowing the drafter to draw on the multiple perspectives of other counsel. Peer reviewers tend to be good at recognising stylistic issues at both the macro and the micro levels. Peers can also be helpful in making suggestions to solve problems involving organising the text.

One disadvantage of this method is that legislative counsel may receive divergent opinions about the problems that the text will create for readers. Another is that peer reviews can suffer from evaluators who work too frequently with texts of similar kinds and subject-matter. When evaluators always work with the same kind of texts, they can become insensitive to audiences' likely responses to texts of the same kind[12]. A further concern is that the method can be a way of socially constructing and institutionalising certain styles (as probably occurred with legalese for example).

Review by experts in the field

Reviews by subject-matter experts (SME) usually involve content evaluations of text, with a view to finding deficiencies in coverage, accuracy, authenticity of completeness. Such reviews are intended to provide detailed information about the ways in which the content of the text is inaccurate or misleading.

Although this method can provide valuable feedback about difficulties with a text, it is probably unwise to use it in isolation. It seems that research[13] is demonstrating that topic knowledge is sometimes a hindrance instead of an aid and that experts in the field are not always the best persons to ask about text quality. Readers with a high topic of knowledge were found to be very poor in judging how lay readers would understand the topic.

Editorial review

Editorial in-house reviews are typically carried out by editorial staff who check for such matters as style, consistency, specifications and use of conventions. Traditionally, editorial reviews focus on grammar and mechanical issues. Editorial reviews used to be quite mechanical and rule-oriented. However, in recent times their scope seems to have been expanded to cover organisation, presentation, readability, coherence and accuracy. Editors now tend to see their role as a complex hierarchy of skills and perceptual abilities. They have become much more concerned with ways of improving the text than before. It seems that the definition of editorial review is gradually changing from "editing" to "revising". Rather surprisingly, there does not seem to have been much research into the editorial review process. However, it is commonly believed that experienced editors are much more skilled than some writers in identifying audiences' needs and in making effective linguistic and rhetorical choices that meet those needs.

External review

In some circumstances it is impractical or even undesirable to use insiders to conduct an internal review. To overcome the problem, external reviews are sometimes conducted for

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[12] Bond, S.J., Hayes, J.R., and Flower, L.S., "Translating the law into common language: A protocol study", *Document Design Project Technical Report No. 8*, Pittsburgh: Carnegie-Mellon University, Communication Design Centre, April 1980.

[13] Hayes, J.R., Schriver, K.A., Baustein, A., and Spilka, "If it's clear to me, it must be clear to them: How knowledge makes it difficult to judge", paper presented to the American Educational Research Association Conference, San Fransisco, April 1986.

judging text quality. An organisation that wants critical feedback about a particular text may engage a document design or graphic design consulting agency to carry out a review of the text.

One kind of external review, known as *text features evaluation*, evaluates the relative goodness of a text by assessing the design of visual or verbal features. Text is analysed in terms of key features, such as style, tone, content, format, and so on.

Another kind of external review uses holistic rating methods to judge text quality. This method "is a quick, impressionistic, qualitative procedure for sorting or ranking samples of writing. It is not designed to correct or edit a piece, or to diagnose its weaknesses. Instead it is a set of procedures for assigning a value to a writing sample according to previously established criteria"[14]. Holistic rating refers to the set of methodologies used to arrive at a total impression of a text.

Further kinds of external review are *general impression marking* and *primary trait scoring*. General impression marking is a method in which the evaluator fits a writing sample into an ordered ranking on the basis of the total impression created by the document. The defining characteristic of this approach is that sample documents are weighed against each other rather than against a predetermined set of criteria[15]. The relevant criteria are arrived at inductively either by the test organisers or by the evaluators themselves. Often test organisers will select a set of "anchor" documents that represent the range of good to poor texts that the judges can expect to see. Evaluators are then trained to judge a text against the anchor documents.

Primary trait scoring[16] is different in so far as it provides testers with a scoring guide carefully adapted for the judging task. It thus uses a set of explicit criteria to judge text quality. Testers are then trained to evaluate texts using the agreed set of text features, such as style, organisation or coherence. Although the procedure seems quite straightforward, studies[17] show that it is very difficult, and sometimes impossible, for a group of evaluators to agree on a set of criteria and to invoke such criteria consistently and reliably. According to Charney, "in spite of training, readers' judgements are strongly influenced by salient, though superficial, characteristics of writing" (such as spelling, length and unusual words). Consequently, there are serious concerns about the reliability of holistic scoring procedures.

Yet another kind of external review is the consumer advocate review conducted by people who are concerned with judging the quality of text from the perspective of consumers. The evaluators are concerned with legal and other implications of poorly designed text. Consumer advocate reviews usually use weighted scoring models or scaled surveys.

A further kind of external review is what is known as *the gatekeeper review*. With this kind of review a text is evaluated by a group of individuals who are responsible for

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[14] Charney, D., "The validity of using holistic scoring to evaluate writing: A critical overview", *Research in the Teaching of English*, vol. 1(1984), pp.65-81.

[15] See Charney, ibid.

[16] Developed by Lloyd-Jones, R., "Primary trait scoring", in *Evaluating Writing*, C. Cooper and L. Odell (ed.), Urbana Il: National Council of Teachers of English, 1977.

[17] E.g. see Grobe, C., "Syntactic maturity, mechanics, and vocabulary as predictors of quality ratings!, *Research in the Teaching of English* (1981), pp. 75-86.

disseminating a text (such as health professionals for example). Gatekeeper reviews can be useful both when planning and revising text.

The document design process critique is yet a further method involving expert-judgement. The procedure focuses on identifying predictors of poor writing quality and is designed to help show up weaknesses in the ways in which text is created. The idea is to try to predict (and prevent) poor writing before it occurs. Evaluators examine the approach to planning, generating, revising and evaluating text. They consider the way people collaborate, the guidelines that writers follow and the kinds of feedback that is involved in shaping a document. The aim is to identify the strengths and weakness in the drafting process along with recommending education or research that will help to remedy the weaknesses.

(3) Reader-focused evaluation

Reader-focused methods are procedures that rely on feedback from intended audiences. There are two classes of testing that involve feedback from audiences: concurrent tests and retrospective tests.

(a) Concurrent testing

Concurrent tests evaluate problem-solving behaviours of readers while they are actively engaged in comprehending and using the text for its intended purpose. Concurrent testing methods include:

- cloze testing,
- behaviour protocols (which are sometimes called motor protocols),
- performance testing, and
- thinking-aloud verbal protocols.

The basic essentials for reader-focused evaluation are that:

- those tested are members of the target audiences and perform real tasks; and
- each test is conducted in the same way.

Cloze testing

The cloze test uses text that has had words systematically deleted. Readers are asked to try to fill in the gaps. The theory is that a good quality text should have a high degree of predictability and readers should be able to fill in the gaps if the text is of good quality. Cloze testing takes readers into account and in fact filling in the gaps seems to involve many aspects of the reading process, including word recognition, knowledge of syntax and semantics. The method seems to be best suited to narrative and expository texts and unsuited to reference and procedural texts, which means that it has limited value for testing the comprehensibility of legislation. A major drawback with this method is that it fails to provide any feedback about how text is functioning at the visual level.

Behaviour protocols

This method involves recording readers' actions and behaviours during the reading process. The main feature of behaviour protocols is that participants do not talk aloud while performing a task: they simply perform the task while their actions are recorded, either by a human evaluator or a computer program, or both. For example, an evaluator may observe where readers look for information in a lengthy document, such as an index, table of contents or list of definitions. Behaviour protocols include *keystroke logs, eye movement*

studies and *user edits*. Keystroke logs provide detailed information about users' errors and error recovery patterns and can be used to develop models of users' behaviour. Eye movement protocols have been used to find out how people read scientific texts involving prose and diagrams[18]. Another kind of behaviour protocol, the user edit, involves observing readers directly while they work and interact with a machine, using only its operations manual as a guide. The observer closely watches how readers use the text, when they use it and how the text helps or hinders understanding.

Performance testing

In performance testing, evaluators monitor factors such as readers' task performance, retrieval and access behaviours, error recovery strategies, cognitive load, and the general ability to use the text. Evaluators using performance testing are mostly concerned with obtaining benchmark information about speed and accuracy in coming to grips with the text. Performance testing has played a major role in text evaluation and is likely to continue to do so in the future. Talking or thinking aloud is not encouraged because it adds time to performing the task. However, it is often hazardous to infer problem-solving strategies without more explicit indicators of thinking, so evaluators therefore often supplement performance testing with think-aloud protocols.

Thinking aloud protocols

With the think-aloud protocol, an observer tests each participant individually and records the participant's responses, comment and behaviour. The participant is given one or more tasks to perform using the draft, such as finding information in it or solving a potential problem that the draft is designed to address.

Throughout the testing, participants are asked to think aloud. This provides information not only on what they do, but also why they do it, thus revealing the thought processes leading to their actions, the terms they find difficult to understand and the directions they find inadequate or confusing. As well as recording responses, comments and behaviour, the observer, in order to identify those problems that participants may find difficult to articulate, prompts participants to speak whenever they hesitate and asks them about any difficulties they encounter.

Whenever possible, testing involving this method should be conducted in participants' own surroundings, thus assisting legislative counsel to identify the steps that participants have to take to carry out the task and any constraints.

(b) Retrospective methods

Retrospective methods are the most commonly used of the reader-focused methods. They are designed to elicit feedback after readers have finished with reading and using the text. Retrospective testing methods include:

- comprehension testing,
- surveys,
- structured interviews,
- focus groups,
- critical incidents, and
- reader feedback cards.

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[18] See Hegarty, M., Carpenter, P.A., and Just, M., "Diagrams in the comprehension of scientific text", in Handbook of Reading Research, Vol. II, R. Bar, M. Kamil, P. Mosenthal, and P.D. Pearson (ed), New York: Longman.

The main disadvantage of retrospective testing is that it does not always reveal specific text features that need to be revised.

Comprehension testing

Comprehension testing has for some time been a widely used retrospective measure in evaluating text quality. This form of testing usually asks readers to paraphrase, recall, summarise, recognise or draw inferences about particular text items or textual features by having them engage in activities such as answering true or false or multiple choice questions or completing blank spaces. The value of comprehension methods lies in the quality of the test. Poorly constructed questions are likely to produce trivial results.

In assessing participants' performance on comprehension tests, evaluators typically use either criterion-referenced or norm-referenced tests. In criterion-referenced tests, the performance of all participants is compared to a pre-established criterion for success[19]. Norm-referenced testing, on the other hand, compares the performance of participants with each other, so that the relative quality of the text is judged by considering readers' performance in comparison to each other.

Surveys

With surveys, participants typically reply to a mixture of open-ended and close-ended questions that are designed to elicit opinions about the use of visual and verbal text features. The advantages of surveys are that

- they are relatively inexpensive,
- they do not require much time, and
- participants can remain anonymous.

However, a major disadvantage is that often the participants are self-selected, thus producing biased results. Moreover, if the participants rate the surveyed document poorly, evaluators have to carry out further tests to ascertain which text features caused the problems for the participants. The response rate may be low and participants tend to ignore open-ended questions.

The structured interview

With a structured interview, each participant is asked the same questions about the draft. The method is particularly valuable for ascertaining whether participants understand the language used in the draft. By asking participants to define terms or to explain a phrase in their own words, legislative counsel can determine whether users are interpreting the draft correctly and whether important information is being overlooked.

The structured interview seems to work well in conjunction with the think-aloud protocol and thus ensure that all potential problems have been identified[20]. If, for example, participants were able to carry out the task correctly, the think-aloud protocol might fail to show that they had not understood one of the terms. The structured interview on the other hand may well reveal this lack of understanding.

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[19] e.g. that readers should be able to perform all the tests with 85% accuracy.

[20] See Dumas.J. and Redish, J. *A Practical Guide to Usability Testing* Norwood, NJ: Ablex Publishing Corp., 1993.

Interviews are an extremely valuable way of finding out how a text is working. This is because participants tend to feel more comfortable answering interview questions than objective test items. Disadvantages are that interviews are time consuming to conduct and the data are often difficult to analyse, so that it may be hard to generalise from them.

Focus groups method

With focus groups, open-ended interviews are used to ascertain people's attitudes, perceptions and opinions about a particular text or group of texts. A focus group for testing a draft Bill could comprise a group of lawyers who are interested in the subject-matter of the Bill or a group of lay-people who are similarly interested.

The following are the advantages of focus groups:

- the method is a socially oriented research one that captures real-life data in a social environment;
- the method has flexibility;
- the method provides speedy results;
- the method is cheap to operate.

However, the use of this method has a number of limitations that affect the quality of the results. Limitations include:

- the method gives the evaluator less control than the structured interview,
- data are difficult to analyse,
- moderators need special skills,
- differences between groups can be troublesome,
- groups can be difficult to assemble, and
- discussion has to be held in a conducive environment.

Critical incidents method

This method involves asking participants to recall salient aspects of their interaction with a text. It is designed to elicit readers' memories of positive or negative experiences associated with reading or using the text. Sometimes, participants are given a scenario and asked to complete the "story" discussing how and when they might use the text.

A major disadvantage of the method is that it imposes a heavy burden on memory and may predispose participants to exaggerate, so that the resulting data may not be very accurate.

(4) A hybrid method

Prediction measures draw on a document's text features to predict readers' abilities to comprehend them. Two kinds of prediction measures are currently available. One is the readability formula, discussed under "text-focused methods". The other is what have been called "quality metrics". The steps involved in quality metrics are as follows:

- A number of expert document designers are asked to list the features that they regard as essential in reviewing the usability of the relevant document. (For example, "Is information easy to find?", "Does the document have a useful table of contents?", "Do headings comprise verb phrases relating to tasks that users would want to do?".)

- Based on this information, the evaluators develop a list of factors that they hypothesise would make a difference to users. This list may include a

number of factors (say 4) with several features for each one.

- Several versions of a sample document (say 5) are then created which systematically vary the treatment (good or poor) of the factors and features.

- A number of people who are likely to be users of the final document (say 50) are selected to participate in the study. Each participant (one at a time) does the same set of tasks. Each participant has only one version of the document, so that if there are 5 versions of the document and 50 participants, each version is used by 10 of the 50 participants.

- In analysing the results, statistical techniques such as regression analysis are used. (Regression analysis is a statistical technique for ascertaining the extent to which each of the different features contributes to the final result.)

- Based on the results, a multi-item questionnaire is prepared that operates like a checklist. A group of reviewers takes the draft of a document and answers the items in the questionnaire. Some items are binary: e.g. "In the table of contents, the headings are verb phrases that match tasks that users would want to do (practically all of the time [90%-100%]; most of the time [65-89%]; sometimes [20-64%]; or seldom [0-19%]".

- The questionnaire can be tested and refined with further documents so that evaluators can be sure that it is usable and that it will provide results that matched the review that experts gave of the same documents.

The practical goal of "quality metrics" is to predict the effectiveness of documents without the need to use costly criterion-reference measures (such as thinking-aloud protocols) for each document. However, it should be emphasised that "quality metrics" does not replace reader-focused usability testing. Rather the method is designed to help writers (such as legislative counsel) to prepare better documents for usability testing, documents that already incorporate the features that research shows makes a difference to users. The only true measure of usability (i.e. of quality in a document) is whether real users can use it for real situations.

The method has a number of advantages over such measures as readability formulae. For one thing, it takes into account a broader range of text features, many of which must be assessed through human judgement rather than through simple counts. In addition, unlike readability formulae that take into account only a very narrow range of verbal features, quality metrics have the advantage of including a wider range of "beyond the sentence" verbal features as well as some visual features. Furthermore, the method provides information about the strengths and weaknesses of the document by giving a profile of different dimensions of the text (such as whether the layout helps readers to find information quickly or whether the text has a high number of noun strings).

In developing this method, tricky problems could arise as to the choice of documents on which to construct a model of comprehensibility or usability, and the choice of participants in the usability phase of the design on which to construct a model of readers' performance. A potential threat to the adequacy of this method lies in the extent to which it is generalisable.

(5) Summary

Advantages of text-focused methods are that:

- they are inexpensive to use,

- some can be automated, and
- they can be helpful in detecting obvious classes of error.

However, the advantages of those methods are outweighed by their inherent weaknesses. Those weaknesses are that:

- the predominant focus of those methods is on the word and sentence level features of the text; and
- their output typically provides little, if any, useful information about how the document is working at the macro level; and
- they provide no information about readers' needs.

Research[21] shows that, when text-focused methods are used as the only guide for revision, the revised text may actually become worse.

Although expert-focused evaluations are useful and can provide a wealth of information for the counsel, they often suffer from the evaluators' being too close to the text or product the text describes. Because the only readers who participate in evaluating a draft legislative document may be other legislative counsel, the resulting text may work well for lawyers and those who are experts in the relevant field but may fail for the average reader. External reviews may be quite helpful in supplementing in-house evaluation methods. However, expert judgement focused methods should not be used alone: they should be supplemented by other evaluation procedures, in particular those that are reader-focused.

Retrospective testing can provide very useful data for revising text. However, most researchers[22] agree that concurrent methods provide the most reliable data. Retrospective methods should, therefore, be used in conjunction with concurrent methods so that greater reliability is achieved.

3 – What is the best approach for legislative counsel?

The research literature strongly suggests that reader-focused methods yield the best results. By eliciting information about a draft legislative document from representatives of the various audiences who have read the document, the legislative counsel concerned can find out whether or not it is truly "usable". Having found out what problems those representatives have, the counsel can address the problems before the document takes effect. As Martin Cutts has pointed out, "revised documents are never better or clearer until users' performance proves it". However, there are two disadvantages of reader-focused testing: it is expensive and it is time consuming. Nevertheless, there are at least three reasons why reader-focused testing might be seen as being cost-effective.

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[21] Swaney, J.H., Janik, C., Bond, S.J., and Hayes, J.R., "Editing for comprehension: Improving the process through reading protocols". *Document Design Project Report No. 14*, Pittsburgh: Carnegie-Mellon University, Communications Design Centre, 1981.

[22] Schriver, K.A. "Evaluating text quality: The continuum from text-focused to reader focused methods", *IEEE Transactions on Professional Communication*, vol. 32, no.4, 238-255.

These are:

(1) Testing a draft legislative document can help the drafter to work efficiently –

- by identifying the real problems of the proposed legislation, rather than the perceived problems,
- by helping to determine the extent of each problem, and
- by showing the legislative counsel possible ways of solving the problems.

(2) Testing can ensure that the document will meet the needs of intended audiences before it is enacted or promulgated.

(3) Testing can provide measurable proof that the enacted or promulgated document works, thus saving subsequent amendment.

Legislative counsel should not wait until a document is completed before submitting it to testing[23]. Dumas and Redish[24] claim that usability testing should be undertaken "early and often" not just at the end when it is often too late to consider making changes. What they say applies to draft legislation just as much as it applies to other kinds of documents.

Drafting legislation should be an iterative process in which the various parts are drafted, tested, revised and retested. By including testing early on in the drafting process, potential problems are discovered at an early enough stage to ensure that there is time to rectify them. It is important that the revised draft should be retested, because solving one problem can often create another one. And of course it is essential that all difficulties are identified and addressed if the draft is to end up as fully workable document.

In the early drafting stages, legislative counsel can ask any typical user (colleagues possibly) to test the draft text and provide feedback. However, it is important that the people selected for the test represent actual users, that they perform real tasks and that each test is conducted in the same way. So far very little draft legislation has been subjected to reader-focused testing. One piece of legislation that has is the Canadian *Fireworks Regulations*. An outline of how the testing was carried out and the result of the testing is set out in Appendix A below. Unfortunately, the testing of the Regulations was limited. But, although it would have been better if successive drafts of the Regulations had been tested iteratively and if testing procedures had been uniform in the different locations where testing was carried out, some testing is better than no testing at all. I understand that the current revisions of the Australian Income Tax Assessment Act and the Corporations Law are being subjected to reader-focused usability testing but I have not been able to obtain details of this as yet.

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[23] See Dumas and Redish, ibid.

[24] See note 23.

APPENDIX A

Testing the Canadian Consumer Fireworks Regulations

Why the testing was undertaken

The need for usability testing of the Regulations was based on the assumption that the vast majority of people in a sector to be regulated will comply with the law if they can read and understand it easily. Thus, non-compliance with a law can and no doubt often does arise because the people affected do not know and understand the law.

The starting point was to prepare draft Regulations using a plain language drafting approach and then to examine the effectiveness of the approach. The key features of the approach were –

- to identify the intended users;
- to know what information needed to be communicated;
- to choose words that intended readers could understand;
- to present the text clearly; and
- to test to find out if the legislative purpose was being achieved.

How the testing was carried out

At the outset, the drafting team consulted with representatives of the various stakeholders in the Canadian fireworks industry (e.g. importers, distributors, retailers, and explosives inspectors etc.) with a view to identifying compliance problems and communication problems. As a result of the consultations, the team –

- gained an understanding of the fireworks distribution process and the primary players in the industry;
- discovered that there was little data on fireworks accidents in Canada;
- discovered that, although importers and distributors understood the existing Regulations reasonably well, retailers and others further down the distribution chain did not;
- discovered that interpretation of the existing Regulations varied significantly;
- came to realise the need to conduct education campaigns about the Regulations directed at some of the stakeholders; and

- gained an appreciation of the difficulties of enforcing the legislation because of the small number of inspectors and regional variations arising from differing requirements of the various enforcement authorities.

In preparing the draft Regulations, the drafting team initially relied on academic texts on plain language and consultations with proponents of plain language and experts on usability testing. The plain language draft of the draft Regulations contained the following features to help users find information:

- a table of contents (but not forming part of the Regulations);
- marginal notes;
- additional headings;
- bolding of defined terms;
- the use of graphics and icons.

It also used or contained the following features that affected the structure and content of the text:

- elimination of unnecessary cross references;
- examples showing how the legislation was intended to operate;
- clear and concise expression and no legalese or unduly technical language;
- re-organization of the text to avoid unduly long or dense blocks of text;
- the use of "must" rather than "shall";
- elimination of the need for two titles;
- Schedules designed as ready-made instructions to facilitate use and ease of compliance.

Annexed to the draft Regulations were a background information note and summary designed–

- to accompany the Regulations when published;
- to establish where the Regulations fitted into the context of the *Explosives Act* and other subordinate legislation under that Act;
- to specify key definitions in that Act that could not be repeated in the Regulations; and
- to provide an address to enable interested people to get more information.

After the final draft of the Regulations was finished, interviewers tested the draft. It should be emphasised that the testing was designed not to find out whether users "liked" the Regulations, but to find out whether they were easier to use than the existing Regulations. The testing was carried out with four user groups (consumers, retailers, distributors and officials – including explosives inspectors, police officers and firefighters). Each group was tested on the Part of the Regulations that related to the group. Consumers were asked to explain in their own words what they thought each instruction meant and to match pictograms to each instruction. Retailers were asked questions based on Schedule 1 to the Regulations (which was relevant to them).

Distributors and officials received a copy of the whole draft and were asked questions on the draft based on situations relevant to their work. Each of those two groups also took part in group discussions, which were video taped. Members of the groups discussed how easy it was to find information, the wording of the draft Regulation and their opinions as to how difficult it was to follow the revised Regulations.

So what did the testing show? It showed that potential consumers found the instructions applicable to them were clear and fairly easy to understand. They understood the pictograms and matched them fairly well, but had some difficulty with the way the instructions were ordered. Some words caused them difficulties.

Retailers did not understand the purpose of Schedule I (Safe display and storage instructions) and were unable to differentiate satisfactorily between display instructions and storage instructions. They also found it difficult to understand some of the terms used, such as "storage unit", and in understanding the storage requirements.

Distributors and officials found the wording of the draft Regulations reasonably clear, but found they had to switch around the document to find the answers to the questions put to them. They also found the Schedules, table of contents and definitions very useful. However, they did not notice the background information note and had some difficulty with the storage information, not being able to find the correct sections. Issues that particularly concerned the distributors were the possibility of liability for something that a retailer failed to do and that the strictness of the requirements of the Regulations might result in more "trailer" sales. The major concerns of officials were that they did not have a power to search premises for illegal fireworks and to ensure that the Regulations were being complied with. They also thought that the lack of precision might make the Regulations difficult to enforce.

What the testing showed

The testing process showed that generally speaking interviewees found the draft Regulations reasonably clear. They liked the Schedules, table of contents and definitions. However, they preferred the background information to be located near the beginning of the document. They also thought that the organisation of the document could be improved.

How the document was modified as a result of the testing

As a result of the testing, the following changes were made to the draft Regulations:

- the second person "you" was replaced by the more familiar third person;
- the summary and background information were combined into a single note headed "Important Information" placed immediately before the Regulations so that it was not overlooked; and
- the text was reorganized so that the storage of fireworks was clearly distinguished from their sale. In other words, provisions relating to those subjects were grouped together for ease of reference and clarity, even though doing this made the document more repetitious.

Evaluation of the testing process

The initial consultations with stakeholders in the fireworks industry provided a lot of information. Such preliminary consultations seem to be an essential ingredient of any process designed to ensure optimum usability of proposed legislation. The inclusion of the drafters at this stage of the process provided them with an opportunity to familiarise themselves with the realities that had to be addressed by the legislation.

Apart from giving them more information, the drafters were able to put more pertinent questions about the matters with which the legislation was concerned, thus contributing to a better end product.

The proponents of the testing process claimed that the revision of the draft Regulations, using the plain language process, resulted in the final Regulations being easier to use and more realistic. They also claimed that the testing process went very well and was an important step in successfully revising the Regulations. One problem however was getting groups together for group sessions. Another problem was that the testing process took rather longer than was originally anticipated. It seems that more time should have been spent on preparing a test strategy, developing test questions, pretesting the questions, contacting participants in the testing process, conducting the testing and writing up the results. Nevertheless, the team considered that the research component of the project was most cost-effective and the testing should become a standard part of the drafting process.

CONFIDENTIAL REVIEW OF DRAFT LEGISLATION BY MEMBERS OF PRIVATE BAR

A brief discussion of the British Columbia experience

Janet Erasmus, Legislative Counsel, Ministry of Attorney General, Province of British Columbia
Ann McLean, Legislation and Law Reform Officer, B.C. Branch, Canadian Bar Association

For a number of years, members of the B.C. Branch of the Canadian Bar Association have assisted the Ministry of Attorney General by providing confidential reviews of draft legislation. The process is coordinated through the Legislation and Law Reform Committee, a standing committee of the B.C. Branch with a staffed position of Legislation and Law Reform Officer.

These reviews are provided without remuneration and the lawyers participating are bound by an undertaking of confidentiality which prohibits them from disclosing any aspect of their engagement, even to other members of their firm, without the government's consent.

The benefits

Both Legislative Counsel and the Canadian Bar Association consider the process provides good benefits.

Legislative Counsel receive thorough, knowledgeable and practical reviews of draft legislation. The assistance is all the more appreciated in practice areas that are not usual for government lawyers (for example, legislation relating to family law or wills and estates). We also receive the benefit of a third party test for clarity, helping us to avoid the "familiarity trap" that can come when our intimate knowledge of the policy intention leads us to assume that the draft legislation is understandable to all. All this without charge – a fine benefit in these days of pressure to improve quality without increasing cost.

The mandate of the Legislation and Law Reform Committee is to promote well-developed, practical laws. This includes encouraging the use of plain language in legislation. Through the confidential review process, the Bar is able to take direct action in response to this mandate, as well as having an opportunity to raise and seek some accommodation of practice concerns regarding proposed legislation.

The ultimate beneficiary is the public – with better, more readable laws.

The process

Is straightforward.

Legislative Counsel (or the responsible Ministry policy analyst working with Legislative Counsel) will identify draft legislation as a candidate for the review process. The primary criteria are subject area and available time. Is this legislation in which members of the Bar are often involved? Is there sufficient time for a review? (In fact, the Legislation and Law Reform Officer can usually find a member of the Bar with experience even in an obscure practice area, and there has always been cooperation in providing advice within extremely short time frames.)

The sponsoring Ministry will confirm that it is agreeable to the proposed review.

Legislative Counsel or the Ministry policy analyst will then contact the Legislation and Law Reform Officer. The Officer will discuss any specific criteria they may have regarding who is appropriate for conducting the review and determine the time frame for response.

Once this is done, the Officer will arrange contact with a Bar member, ensure the required undertaking is entered and arrange how the member will receive the draft. (A copy of the standard form of undertaking is attached.)

Responses usually come directly to Legislative Counsel. They may range from a single written response to on-going discussions between Legislative Counsel and the private member.

BRITISH COLUMBIA BRANCH
THE CANADIAN BAR ASSOCIATION

Details of Confidential Consultation Process For Consultation by the Government of British Columbia

A. Options for Levels of Confidentiality. The Legislation and Law Reform Officer (the "Officer") co-ordinates confidential reviews of policy and legislation on behalf of the Canadian Bar Association (B. C. Branch) (the "Bar"). A government representative who wishes to consult with the Bar on a confidential basis should contact the Officer, who will arrange for consultation as requested by the government. The confidential consultation process has worked successfully for many years. The type of consultation available is flexible, depending upon the needs of government.

1. A government representative may hold a preliminary discussion on broad issues with the Officer and this discussion can be kept entirely confidential. The Officer will not discuss the matter with other members of the Bar, including the Legislation and Law Reform Committee.

2. A government representative may consult with the Legislation and Law Reform Committee, and this consultation can be kept confidential. The Legislation and Law Reform Committee does not report confidential matters to the Executive or administration of the Bar.

3. A government representative may consult with one or several members of the Bar who are knowledgeable in the applicable area. The government may request that particular lawyers conduct the review or may approve lawyers suggested by the Legislation and Law Reform Committee. The project is kept confidential among the Legislation and Law Reform Committee and the lawyers requested to act. Example letters containing confidentiality undertakings are attached. The project may not be discussed by the chosen lawyers with other members of their firms or corporations. The Bar has members who practise in many different areas. A list of the sections of the Bar is attached.

B. Scope of Review. The terms of the consultation can be set by the government. Representatives of the Bar may be requested to provide input on policy issues at an early stage of policy development or may be confined to providing advice on technical issues or workability of ideas or draft legislation. The government sets the scope and timing of the review. The government representative then often deals directly with the lawyers conducting the review.

C. Timing. Consultation involving a limited number of lawyers can usually be completed quickly, often within one week, depending on the complexity of the project. In a situation with a very short time frame, the lawyers may provide verbal comments to the policy analyst or legislative counsel.

D. Cost. Representatives of the Bar provide their time on a voluntary non-remunerative basis.

EXAMPLE LETTER RE CONFIDENTIAL REVIEW OF DRAFT LEGISLATION FOR LEGISLATIVE COUNSEL

CBA (B.C. BRANCH) LETTERHEAD

Date

PERSONAL AND CONFIDENTIAL

Dear

Re:

Thank you for agreeing to provide comments to the Ministry of Attorney General, Legislative Counsel's office in respect of the above-noted draft legislation. In this regard, I am enclosing a copy of the letter from the Ministry and the draft legislation. Your comments should be confined to the workability and legality of the proposed legislation and should not discuss the merits of the policy behind it.

Under the terms of an arrangement between the Attorney General of British Columbia and the B.C. Branch of the Canadian Bar Association, Legislative Counsel is prepared to send to the Legislation and Law Reform Committee or its designated representatives copies of bills to be introduced by the government before they are given first reading. The bills are sent on a strictly confidential basis and can be released only to the Legislation and Law Reform Committee or Legislative Counsel. Members must undertake, and this undertaking has been given on their behalf by the Canadian Bar Association, not to make public any of the terms of the bill, either generally or specifically, nor any comments that they may have thereon until after the bill has been given first reading. Any comments made by the branch or its members should not reveal that confidential comments were made to the Attorney General before first reading. Further, this project has been sent to you individually and should not be discussed with other members of your firm.

Legislative Counsel has given us their deadline for response based on the projected date for introduction of the legislation in the House. As you are the only lawyer who has been requested to review the draft bill, your timely response is essential. Please feel free to contact Legislative Counsel by telephone to discuss your comments before sending them on. I would appreciate your sending your comments to me by **, (by fax if you like) and I will forward them to the Ministry. If you have any questions, please do not hesitate to contact me.

Yours very truly,

Ann McLean, Legislation
and Law Reform Officer

cc. **, Legislative Counsel
**, Chair, Legislation and Law Reform Committee

- it provides a resource for the giving of independent and dispassionate advice on legislative proposals (whereas private sector counsel are more likely to be vulnerable to "capture" by their clients and to compromise sound legal principle to satisfy the whims of the policy formulators).

Experienced legislative drafting talent (whether through lack of adequate training or for reasons of personal temperament) is generally in short supply. On the other hand, the legal talent for performing other kinds of legal work is much more readily available. It is therefore inefficient to squander a scarce resource.

Because of the difficulty of maintaining a "statute book" as a single coherent, cohesive and uniform system, it is desirable to concentrate the necessary man-hours of drafting in as few lawyers as possible. This facilitates training and reduces the administrative burden of all those who are responsible for maintaining that system.

The privatisation or contracting out of legislative drafting services would surely result in the provision of those services becoming more cumbrous and inefficient. It would also reduce the current flexibility in the provision of those services. For example, it is unlikely that a member of the private bar would be readily available to draft a committee stage amendment to a Bill requested at short notice. Furthermore, it would become administratively more difficult to transfer a project from a counsel who was temporarily overloaded.

Although lawyers in the private sector might have the opportunity to experience a wider variety of legal work, the advantages of specialisation to the community would be lost. From the community's point of view, maintaining a specialist legislative drafting office must surely be a more efficient and effective means of providing legislative drafting services to the legislature and other rule-making authorities than relying on the private sector.

However, like most things in this life, there is a downside. As with all monopolies, there is a danger that a centralised legislative drafting office may become complacent and hidebound by precedents, which may well become outdated. There is a further danger that the legislative counsel comprising the office may become unresponsive to the needs of those to whom its services are provided. These dangers can, however, be avoided by strong and effective leadership and by continually reviewing the way in which legislative drafting services are provided and asking whether the most effective and efficient means are being used. Ensuring that legislative drafting offices are fully accountable to the legislature and others for whom their services are provided will also assist in ensuring that these dangers are avoided.

But let's not put the clock back to the bad old days before 1869!

Plain Language in New Zealand Tax Legislation

Speech notes of Elizabeth A. McAra

BACKGROUND

In December 1994, the New Zealand Government, through the Inland Revenue Department, published a discussion document titled "Rewriting the Income Tax Act"[1]. This document was the culmination of a series of reports by the Valabh Committee and the Working Party on the Reorganisation of the Income Tax Act 1976. Broadly speaking the Valabh Committee was charged by the government in 1990 to examine the Income Tax Act 1976 with a view to simplifying the imposition of tax, examining the feasibility of a capital tax and reducing the cost of compliance. While the capital tax was shelved indefinitely, it became a theme of the reports of the Committee that the Income Tax Act itself should be reorganised and rewritten in such a way as to make it easier for tax professionals to use and understand. This included the recommendation that the Act be rewritten using "plain language".

At the same time, the Law Commission in New Zealand was working on a series of reports that dealt with the drafting of statutes. These included the report on a proposed new Interpretation Act (Report No. 17 in 1990)[2], the report on the format and layout of legislation (No. 27 in 1993)[3] and the report on a new drafting style for legislation (No. 35 in 1996)[4].

REORGANISATION

The Income Tax Act 1976 was reorganised and re-enacted in 1994 in 3 separate Acts; the Income Tax Act 1994, the Tax Administration Act 1994 and the Taxation Review Authorities Act 1994. The re-enacted Income Tax Act 1994 stated in the second section that:

> "The purpose of this Act is to re-enact the law, excluding certain administrative provisions, contained in the Income Tax Act 1976 in a reorganised form within soundly based and coherent structures of Parts and Subparts."

NUMBERING SYSTEM

The reorganisation adopted a new alphanumeric system of numbering the sections of the Income Tax Act 1994 as follows:

B	Part
BB	Subpart
BB 3	Section
BB 3 (3)	Subsection
BB 3 (1)(a)	Paragraph

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[1] A discussion document published jointly by the Treasury Department and the Inland Revenue Department in December 1994.

[2] A new Interpretation Act to Avoid "Prolixity and Tautology", published December 1990.

[3] The Format of Legislation, published December 1993.

[4] Legislation Manual, Structure and Style, published May 1996.

The letters are intended to let the reader know at all times the location of the section in the scheme of the Act. This aspect has worked and, when one has some familiarity with the Act, cross references begin to make some sense without further explanation. For example a cross reference in Part D (Deductions) to a section numbered "GB" should signal that the section referred to relates to tax avoidance.

One of the justifications for this new numbering system, given when it was proposed, was that it would more easily allow for the addition of parts, subparts and sections. To a certain extent this is true, in that it is easier to insert new provisions without doing the type of damage that is done to statutes with a conventional sequential numbering system. But it does not solve all the problems of numbering. Thus a section that would have been section 194A when added between sections 194 and 195 still becomes DE 14A when added between sections DE 14 and DE 15.

It is not always possible, as was suggested by the Valabh Committee, to add all new provisions at the end of the relevant subpart and have the subject make some sense. A major problem with tax legislation is that the sections themselves are too long. Breaking them down in the rewrite process into a more manageable size, with each being more specific, may help us to use the new numbering system to greater advantage.

DRAFTING GUIDELINES

A major part of the 1994 discussion document consisted of proposed drafting guidelines for the rewrite of the *Income Tax Act 1994*. It is these guidelines and their application in the *Taxation (Core Provisions) Act 1996* (which was assented to on 26 July 1996) that I want to spend some time on today.

The first paragraph in the drafting guidelines reads as follows:

> *These drafting guidelines have been developed in consultation with the Law Commission and based on their draft legislation manual. The guidelines are intended to be flexible to deal with the complexity of tax legislation. They are not exhaustive because it is important that they be free to develop over time.*

We have found the guidelines on the whole to be workable. Although we have not yet begun rewriting the very technical parts of the Act, their application as we rewrote the core provisions of the *Income Tax Act 1994* for the *Taxation (Core Provisions) Act 1996* was a positive experience.

I propose to touch on some of the guidelines very briefly in the order in which they appear in the discussion document, relating some of our experiences as they were applied.

1. SUMMARY OF CONTENTS AND TABLE OF PROVISIONS

At the beginning of the Act there will be a summary of contents, showing part and possibly subpart headings. This will be placed before a more detailed table of provisions.

A table of provisions will set out in sequence all headings, including section and schedule headings. It will include part, subpart, section and schedule numbers.

At the moment in New Zealand, each statute has an "Analysis" at the beginning which consists of the marginal notes for each section. This is the type of "table of contents" that occurs in most jurisdictions. For the next stage of the rewrite we are considering including a summary table of contents for each part of the Act as it is rewritten. The addition of a summary of contents at the beginning of the Act and at the beginning of each part is a positive move and it will probably be followed, but

Layout is an aspect of plain language drafting that we have not yet come to grips with. It was originally thought that layout would not have to be dealt with as part of the rewrite process. One of the reasons was because layout is being examined by the Office of the Clerk on behalf of Parliament and by Parliamentary Counsel's Office as a part of their role as compilers of statutes. To date we have not made major changes other than to create more white space around the marginal notes for the sections and subsections. These changes were not raised as creating problems by the Clerk and Parliamentary Counsel, and we will be augmenting them in later Bills.

The intention of the rewrite programme is always to make the statute more readable, and we will be relying on the Law Commission's report on format and legislation as a justification for some of the changes that are made in future. The final decisions on layout and format are to be made in time for the last Bill on the rewritten Act.

7. USE OF PROVISOS

The traditional form of legal proviso beginning "Provided that" is archaic and should be avoided. It may be uncertain whether the proviso is intended to be a true proviso derogating from a general provision or a co-ordinate supplementary provision.

Provisos are too ambiguous. They may create an exception, a limitation, a condition or an addition, and it is not always clear which is intended.

There are 200+ "provisos" in the Income Tax Act 1994, an Act with between 350 and 400 sections. When they are examined, they tend to be the result of "last minute change" syndrome common in income tax drafting. The instructing department comes up with "what about" changes at the last minute and they are included by way of a proviso rather than by restructuring the section. They also often include double and triple negatives and are very difficult to decipher. We intend to systematically eliminate these as we rewrite a part. However, it is a style of tax writing that is comfortable to practitioners and any changes made will have to be consistent, clear and obvious.

CONCLUSION

I have only been able to touch briefly on some of the plain language drafting that we are incorporating in the rewrite of the tax Act. We are, of course, applying all the standard principles of removing archaic words, shortening sentences, eliminating double negatives, eliminating ambiguities, using the active voice where possible etc.

It is not always easy to persuade analysts that the plain version of a section with which they are comfortable is going to be interpreted as they wish it to be. Nor is it easy to encourage them to make the leap of faith needed to believe that practitioners and judges will interpret provisions as intended, especially when the specifics and qualifications etc are reduced or removed. But the provisions that are the subject of legal challenge today are not predictably interpreted by judges today. In some cases the judges are figuratively throwing up their hands and accepting the logic of a barrister before them because there is no clear meaning to the provision as written, yet it must mean something in the context. This is especially the case if the provision is laced with jargon, provisos, exceptions and convoluted thinking.

There are risks in writing and interpreting tax. The risk when the Act is rewritten, as with any legislation, will still be there. We will never be able to eliminate it. However those of us involved in the rewrite are firmly of the opinion that the risk will be substantially reduced. That, and increasing the ability of users of the Act to understand the law, is our goal in this process.