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Just for the record: CALC 1999-2011

Duncan Berry[1]

I had thought this issue was going to be the first for 2011. However, much to my surprise the now immediate past President, Eamonn Moran, and a few other conspirators upstaged me by surreptitiously producing a special commemorative issue for me! This was a magnificent tribute and I would like to take this opportunity of thanking the former CALC President, Eamonn Moran, and John Moloney and Jeremy Wainwright for organising and editing the issue and Lionel Levert, John Mark Keyes, Sandra Markman, Stephen Laws, Nick Horn, Peter Quiggin, Daniel Greenberg, William Robinson, Kieran Mooney, Walter Iles, Helen Xanthaki and Lauren Brennan for their most excellent contributions. For those of you who have not yet read them, I urge you to find time to do so.

This will very probably be the last issue of *The Loophole* that I will produce.[2] This issue contains five articles. One is by the Sri Lankan Legal Draftsman, Therese Perera, on legislative drafting in Sri Lanka. Kiron Reid, who teaches law at the University of Liverpool in England, has produced a most interesting article on the English Law Commission's consultation paper on alternative mechanisms for enforcing regulatory legislation. A further article is an updated version of the paper I gave on purpose sections at the 2009 CALC conference in Hong Kong. Bill Kosar, an expatriate Canadian, who has been assisting the embryo South Sudan Government with its legislative program has written about his experiences in Juba, the capital of the new republic that is expected to achieve full independence on 9 July this year. Finally, the ubiquitous David Hull, former Attorney-General and High Court Judge of several jurisdictions and erstwhile legislative counsel, reminisces about the New Zealand *Statutes Drafting and Compilation Act 1920,* and its contribution to legislative drafting in New Zealand in the 20th and the early part of the 21st centuries.

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1 Recently retired CALC Secretary and Editor of *The Loophole* and the CALC Newsletter.

2 Except in the event of my being invited to produce a further issue as guest editor.

As many of you will know, at the last CALC general meeting I stepped down from the position of CALC Secretary and editor of CALC publications. After serving as Secretary for five terms and 11½ years, I felt it was time for a younger person to assume the role. I am sure the new Secretary, Fiona Leonard (a Senior Parliamentary Counsel in the New Zealand Parliamentary Counsel Office) will do her utmost to take CALC to even greater heights.

In the late 1990s, I along with former CALC Presidents, Walter Iles and Denis Murphy, became concerned that CALC was not progressing and needed to be revitalised. Considerable difficulty was encountered in organising a CALC conference at Petalang Jaya, Malaysia, in September 1999, which as usual was to be held during the Commonwealth Law Conference. As far as CALC conferences have gone, this was a nadir for the Association with only 29 members attending. It was with this in mind that I offered myself as Secretary. With the support of Lionel Levert, Walter Iles, Jeremy Wainwright, Dawn Ray, Claire Reilly and some of the other members who were present at the CALC general meeting, I was duly elected as Secretary.

To revitalise CALC was a daunting task. I along with the other members of the new CALC Council identified a number of issues that required action. These included the following:

- The membership records were very much out of date;
- Publication of *The Loophole* was a comparative rarity;
- The organisation of CALC conferences left much to be desired (as the poor attendance in Malaysia showed).
- The CALC website was hopelessly out of date and the "owner" of the site could not be located. (It still showed Mrs Rama Devi as CALC President, and Peter Pagano as CALC Secretary)
- Resolutions passed at earlier CALC general meetings could not be implemented because the then CALC constitution required a motion to amend it to be supported by not less than two-thirds of *all* of the members.
- To establish or improve relations with other Commonwealth organisations

From 2000 onwards, every effort was made to address these issues.

The CALC website

Despite every effort, it proved impossible to locate the person who administered the then existing CALC Website, so the decision was made to abandon the site and establish a new site within that of the Australian Commonwealth Office of Parliamentary Counsel. That Office continues to host the CALC site to this day and has provided an extremely important focus not only for CALC members but others who have an interest in legislative drafting issues and topics.

The membership records

With the co-operation and assistance of former Hong Kong Law Draftsman, Tony Yen and some his support staff, the membership records were revised and computerised. However, before revising the records, I sent all who were believed to be members a letter asking whether they

wished to continue their CALC membership. Many of the letters were returned 'address unknown'; several had notes written on them to the effect that the member had died, in some cases several years before! By the end of 2000, the process was complete, with those members who had not responded to the letters, being placed on a 'dormant members' list. Since then, only three members on that list have re-emerged to claim their membership status. In 2008, thanks to the assistance of Jeremy Wainwright, the membership records were once more redesigned and updated. In 2010, a further change was made when, under the direction of the First Parliamentary Counsel, Peter Quiggin, staff of the Commonwealth Office of Parliamentary Counsel transferred the records to a new database. That Office now administers the records in conjunction with the CALC Secretary.

CALC publications

One of the first decisions to be taken after the 1999 CALC conference was to produce two publications rather than just the one (*The Loophole*). In future, *The Loophole* was to be for erudite articles on legislation and legislative drafting (along similar lines to the *Statute Law Review*) while a new publication, the *CALC Newsletter*, was to be for information and short items on topical issues and news of interest to CALC members about legislative counsel and legislative drafting offices in Commonwealth countries and territories. The first *CALC Newsletter* was published in 2000 and in most years since then at least two issues have been produced. Likewise, *The Loophole* has been published on a regular basis, with at least two issues and sometimes three being published each year, except for one.

Formerly, *The Loophole* was available only in paper form, but since 2000, both that publication and the *CALC Newsletter* have been produced in electronic as well as paper form. Because not all members have computers or have ready access to the Internet, it has been necessary to continue the publication of paper copies and send them by ordinary mail so that those members can continue to receive those publications. Towards the end of 2009, it was decided to publish the publications on the CALC website and send members a message containing a hyperlink to the website. A click on the hyperlink was able to provide members with immediate access to the new issue of *The Loophole* or *CALC Newsletter*. Although initially I was sceptical about the efficacy of this means of publishing the publications, it seems to work and to my knowledge no member has complained about this method of publication. However, as far as I am aware CALC members have not yet given any feedback on this method of publication, so until members have been surveyed the jury must be still out on how effective it is.

CALC conferences and general meetings

CALC 2003

The next CALC conference after the one in Petalang Jaya was to be held in 2001in Harare in conjunction with the Commonwealth Law Conference. However, with the instability that occurred in Zimbabwe after the people of that country rejected the new constitution put forward by Robert Mugabe and his ZANU cohorts, the Commonwealth Lawyers Association (CLA) decided to postpone the Commonwealth Law Conference. Accordingly, the CALC Council followed suit. As

the CLA decided to delay its conference till 2003, the President, Hillary Penfold, and I, with the assistance of Eamonn Moran (who was then the Chief Parliamentary Counsel of the Australian State of Victoria) had plenty of time to prepare the ground for the next CALC conference.

From many points of view, this conference was probably the most successful since CALC was established at the Commonwealth Law Conference in 1983. The attendance was excellent, with the attendance passing the century mark for the first time. The papers were not only interesting but also engendered quite a lot of healthy debate. For the first time, a legislative drafting master class was held. It was to say the least quite an experience to witness some of our most experienced legislative counsel trying to solve legislative conundrums "on the run". For the first time since the conference in Auckland in 1990, a CALC dinner was held. This was greatly enjoyed by all. The outgoing president, Hilary Penfold, produced a most witty and entertaining after dinner speech (the text of which is to be found in the *CALC Newsletter* published in October 2003). That the conference was so successful was largely attributable to her efforts and those of Eamonn Moran, the Chief Parliamentary Counsel of Victoria.

Before the conference, I had drafted a new constitution, which was to be discussed at the CALC general meeting. That discussion proved to be controversial and consumed so much time that the meeting had to be adjourned to the following day. I return to this topic below.

CALC 2005

The 2005 conference, held in London, was probably even more successful, thanks largely to the efforts of the then CALC President, Geoffrey Bowman (the UK First Parliamentary Counsel) and UK OPC staff members, Linda Fraser and John Gillooly. They put together a truly excellent program for the conference, with a wide range of topics of relevance to CALC members. Most of the proceedings were held in Beveridge Hall in University College, London, an excellent venue.

A special tribute is due to Linda Fraser and John Gillooly, who ensured that the proceedings ran like clockwork. But all those who participated in the organisation of the conference and general meeting can be proud of the result. A total of 133 members attended, which at the time was a record.

The conference opened with a most enjoyable reception, which was hosted by the London Parliamentary Counsel Office at Admiralty House in Whitehall. After two days of first-rate presentations, the participants then moved on to a truly delightful reception held in the historic Dover House in Whitehall and hosted by the then First Scottish Parliamentary Counsel, John McCluskie, and his colleagues in the Office of the Scottish Parliamentary Counsel. John, who is a renowned raconteur, regaled those present with a hilarious story about an 18th century divorce case.[3] The third day's proceedings concluded with a truly enjoyable dinner held in the dining room at the historic and very elegant Lincoln's Inn, which as most members will know is one of the four London barristers' Inn of Court.

CALC 2007

[3] This can be found in the CALC Newsletter published in October 2006.

Considering the minimal local support, the 2007 conference held in Nairobi was extremely successful. It was the first time CALC had held its conference on the African continent and it was never expected that the turnout would be as high as for the conference held in London 2005. Nevertheless, 88 CALC members attended, a number that I have to admit exceeded my expectations. However, given that the conference was held in Kenya, it was disappointing not to have any representation from Nigeria, Ghana, Zambia and several other African Commonwealth countries.

For our keynote speaker, we were fortunate to have Dame Mary Arden, a member of the Court of Appeal of England and Wales, who spoke about the impact of judicial interpretation on legislation. As all (but two) of the excellent papers presented at the conference have since been published in *The Loophole* and are available on the CALC website, I will not dwell on them further, except to say that, as was the case with the ones presented at the 2003 and 2005 conferences, the papers were not only of high quality but also engendered considerable healthy debate.

The conference and general meeting were held at the Fairview Hotel, an oasis close to the Nairobi CBD.[4] It proved to be an inspired choice and I like many of the conference participants found it to be one the nicest hotels we have ever stayed at. The conference facilities were superb and satisfied our needs perfectly. The social events, which were a source of great enjoyment to all those who attended, were—

- the pre-conference reception, which was held at the Fairview Hotel;
- the CALC members' dinner, also held at the Fairview Hotel; and
- the excursion to the Nairobi Game Reserve.

The CALC general meeting was particularly lively. For the first time in CALC's history there were more nominations for CALC Council positions than the number of positions to be filled.[5] Consequently an election had to be held. Fortunately, three associate members (John Moloney, Deirbhle Murphy (Ireland) and Toby Dorsey (US)) were present at the meeting and volunteered to act as an electoral committee to scrutinise the election. The committee, under John Moloney's chairmanship, carried out their duties with aplomb. I recall that John's announcement of the results of the election was highly amusing. This defused what might have become a volatile situation. [6]

That the conference was so successful was in no small measure attributable to the support provided by my former colleague and then fellow CALC Council Member, Jeremy Wainwright.[7]. Other

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4 On the recommendation of the organizers of the Commonwealth Law Conference, the original choice of venue had been the Hotel 680. However, fortunately some members checked Trip Advisor as regards this hotel, which raised doubts as to its suitability. As a result, Jeremy Wainwright and I took an executive decision to change the venue to the Fairview Hotel.

5 Three nominations were from the Cayman Islands!

6 The experience gained from the election let me to propose the formalisation of the convention that each region of the Commonwealth should be represented on the CALC Council and to provide that there should be no more than one nomination from a country or territory unless there was a shortage of nominations for the region concerned.

7 Former Chief Legislative Counsel in the Office of Legislative Counsel and Publication in the Australian Commonwealth

very helpful assistance came from John Moloney (from Dublin, Ireland), and Sam Keter and Jeremiah Nyegenye (both of whom were legislative counsel working in different offices in Nairobi).

CALC 2009

The 2009 CALC conference and general meeting were held in Hong Kong, where CALC had been founded at the 1983 Commonwealth Law Conference. This proved to be an excellent venue from my point of view not only because I happened to be running a legislative drafting training program there during the months leading up to the conference but also because the recently appointed Hong Kong Law Draftsman, Eamonn Moran, had been elected CALC President at the 2007 general meeting in Nairobi. Eamonn was able to drum up plenty of resources to share the responsibility for organising the conference. A number of possible venues were considered, but, at the suggestion of former Hong Kong Deputy Director of Prosecutions, John Reading, we approached the Hong Kong Police to see if the conference facilities in its headquarters could be made available for the conference. Luckily, the approach was successful and the facilities proved to be the perfect venue, particularly as excellent lunch and refreshment facilities were available there.

In terms of numbers attending, the CALC conference in Hong Kong easily holds the record for attendance with over 150 participants. They came from the far-flung reaches of the Commonwealth, including the United Kingdom, Ireland, Canada, the Caribbean, Africa, Australia, and New Zealand, with 24 (mostly Commonwealth) countries being represented in all.

The theme of the conference was "Whose law is it?" and an impressive array of presenters examined this theme from a number of perspectives. In all, the conference included 22 sessions conducted over 2 1/2 days, including a lively CALC general meeting on the second afternoon. As with the three preceding CALC conferences, the presentations were of the highest quality. We were particular fortunate to have papers from Justice Bokhary, a member of the Hong Kong Court of Final Appeal, and Dr Margaret Ng, a legal journalist and member of the Hong Kong Legislative Council.

At the CALC general meeting, the "new" CALC constitution was amended to increase the number of Council members and to formalise the practice of electing them on a regional basis (two from Europe; two from the Americas; two from Asia; two from Africa; and two from Australasia and the Pacific. A further amendment limited nominations for election to one per jurisdiction unless there were insufficient nominations for the region concerned.[8]

The social program easily surpassed that for previous CALC conferences. On the evening before the conference, a splendid reception, hosted by the Hong Kong Secretary for Justice, Wong Yang Lung was held at the Hong Kong Club, a bastion of the Hong Kong establishment. The following evening two optional functions were held: one a dinner cruise on the magnificent Victoria Harbour; the other a dinner at the Cafe Deco, which is located on the Peak on Hong Kong Island and overlooks the Harbour. The conference dinner was held at the Jumbo Floating Restaurant, which is

[8] The amendment was designed to overcome a problem that came to light during the 2007 CALC general meeting, but was not adopted.

located in the Aberdeen typhoon shelter on the southern side of Hong Kong Island. This restaurant has been a Hong Kong institution for over 30 years and can be reached only by one of two ferry shuttles from the Aberdeen waterfront. All agreed that the food and entertainment were excellent.[9] Afterwards, I escorted a group of night owls on a tour of some the night spots to be found in Hong Kong's Soho district. On the Saturday, many participants took a turbojet day trip to Macau, which I gather was thoroughly enjoyed by those concerned. (I did not join the tour as I had visited Macau many times before). The program concluded with two optional excursions. One was a junk trip to Sok Kwu Wan on Lamma Island where participants enjoyed a superb seafood lunch, which was followed by an impromptu visit to a nearby floating fishing village. Others hiked from the top of the Hong Kong Peak to Stanley, a buzzing, picturesque village on one of the two southern peninsulas forming part of Hong Kong Island. There are no prizes for guessing which excursion I joined (even though I do enjoy hiking)!

The social activities provided a great opportunity for people to get together and continue conversations from the conference, and also the opportunity to farewell those who were not staying on in Hong Kong for the Commonwealth Law Conference the following week. A number of participants later remarked that CALC 2009 was the best organised conference they had ever attended, which is great tribute to everyone involved in its organisation.

CALC 2011

The 10th CALC conference and general meeting was held in Hyderabad, India from 9 to 11 February 2011. Hyderabad is India's 6th most populous city and one of India's major hubs for information technology (hence its nickname, Cyberabad). Despite the long flying distances to get to Hyderabad, the conference was well attended with 95 delegates from 32 countries being present. Participants included associate members from non-Commonwealth countries such as the USA, Ireland, and the Netherlands. On the first day of the conference, the attendance included 62 lawyers who were participating in the 26th International Training Programme in Legislative Drafting conducted by the Bureau of Parliamentary Studies and Training and the Lok Sabha (House of People) Secretariat at New Delhi. The participants were involved in a field programme that included a visit to a state legislature.

During the conference, it was a pleasure for some of the long-standing CALC members to meet the former CALC President, Dr Rama Devi (whom I had previously met at the CALC conference held in Auckland in 1990).

As for the 2009 conference, the then President, Eamonn Moran, assembled a number of subcommittees to organise the proceedings. Along with Eamonn, I took responsibility for trying to obtain the co-operation of CALC members and influential legal luminaries in Andhra Pradesh (of which Hyderabad is the capital) and Delhi, the Indian capital. In this we were singularly unsuccessful, and I have to confess that this was one of the most frustrating experiences of my time as CALC Secretary. The fact that the conference turned out to be relatively successful in the end was due to the good fortune of being put in contact with Total Holiday Options (a New Zealand

[9] Not sure about the wine though!

travel company) and, in particular its Asian representative, Amaan Khan and his team. CALC had to enter into some potentially risky commitments to secure the company's services, but fortunately all went all in the end and, with a few minor frustrations, the Taj Krishnan proved to be an excellent venue.

The theme of the conference was "Legislative Drafting: A Developing Discipline?" The various presenters spoke on a number of topics within this theme. In all, the conference included 10 sessions conducted over 2 ½ days as well as the CALC general meeting and the various social events. As with the CALC conferences held during the noughties, the presentations were generally of a high standard, although I have to confess to a feeling of 'déjà vu' about one or two of them. I will not dwell further on the papers as they will in due course all be published in *The Loophole*.

The social program although substantial was nowhere near as extensive as that for CALC 2009 in Hong Kong. After the first afternoon's session delegates attended a cocktail reception in the foyer of the conference venue, the Taj Krishna Hotel. The following evening conference participants embarked on an excursion to attend a sound and light show at the ancient Golconda Fort, the seat of the former Qutb Shahi dynasty that ruled the Hyderabad region for several hundred years during the Middle Ages. This was followed by an excellent dinner that featured south Indian cuisine. I have to say that this was the best food I encountered during my week in India. The social program concluded with a buffet dinner at the Taj Krishna Hotel. It was a great night and a fitting way to conclude the conference proceedings. I personally did not leave the hotel until after 4.30 a.m. but I was by no means the last of the revellers to leave! It was great to meet many old friends at the conference and make many new ones.

New CALC constitution

It was decided at the Council meeting held at Petalang Jaya, Malaysia, in September 1999, that a new constitution should be prepared and that it should supersede the existing one. As I mentioned earlier, previous general meetings had passed resolutions that were incompatible with the original constitution. If those resolutions were to be implemented, it was therefore necessary either to amend the existing constitution or to replace it with a new one. But either way amending or replacing that constitution required two-thirds of *all* the members to support the change.

Because it was thought that it would be impossible to get two-thirds of the total membership to vote for a new constitution, a majority of the Council felt that the existing constitution should simply be bypassed and replaced with a new one.

Although I had misgivings about this proposal, I nevertheless supported it because I thought that it would not be possible to pass the 440 member threshold. I therefore proceeded to draft a new constitution. The proposed new constitution, which largely followed the original one, included provisions—

- for the Secretary to approve applications on behalf of the Council,
- for associate membership,
- making it easier to amend the constitution,

- slightly widening the eligibility for full membership,
- specifying further objects for the Association, and
- making it easier to lodge proxies at general meetings.

Most of these items had been the subject of ordinary resolutions passed at previous general meetings of the Association or were proposed as amendments to the Constitution at the meeting held in Petalang Jaya, Malaysia in1999 but were not passed.

When the new draft constitution was discussed at the CALC general meeting held in Melbourne in 2003, it was proposed that it should simply be adopted and the existing one should be by-passed. However, many members had misgivings about doing this and I recall Jeremy Wainwright offering to drum the support necessary to obtain the majority needed to adopt the new constitution. The meeting eventually decided to give this a try.

The only way I could see that the required majority could be achieved was by convening an extraordinary general meeting and persuading sufficient members to give proxies to those attending the meeting to enable the necessary resolution to be passed. The upshot was that an extraordinary general meeting was convened for the adoption of the new constitution to be held on 30 January 2004 at the New South Wales Parliamentary Counsel's Office in Sydney, Australia. The Council deputed the NSW Parliamentary Counsel, Don Colagiuri to chair the meeting. Those CALC members who could not attend the meeting were invited to lodge proxies indicating whether they were for or against the new constitution.

As at the date for the extraordinary general meeting, 660 members were eligible to vote. This meant that, to attain the requisite two-thirds majority, the motion had to be supported by at least 440 members. But by the time of the meeting the number of proxies gathered was well short of the number needed to obtain the required two-thirds majority. The meeting decided that more time should be allowed for the gathering of proxies, and so the chairperson therefore adjourned the meeting until 15 March 2004.

Although many more proxies had been lodged by the time the meeting was resumed on 15 March, there was still a shortfall, so those present at the meeting resolved that further time should be allowed in order to enable those members who had not done so to lodge proxies. The chairperson therefore once again adjourned the meeting, this time sine die.

After considering the options, a majority of the CALC Council decided that a further campaign to gather proxies from members should be attempted and that the adjourned extraordinary general meeting should reconvene on Friday, 3 June 2005. [10] As a result of this campaign, an additional 134 CALC members lodged proxies. When the motion for the adoption of the new constitution was put at the reconvened meeting, the chairperson declared the motion carried. Out of 660 members eligible to vote, 497 were in favour of the motion and none against, which exceeded the number required for a two-thirds majority by a wide margin.

[10] I recall that the then President, Geoffrey Bowman, felt that when insufficient proxies were obtained for the extraordinary meeting, the project should be abandoned, but I along with a majority of other Council members thought we should persevere.

From a personal point of view, the fact that we were eventually able to get well over two-thirds of the membership to support the adoption of the new constitution was both a triumph and a relief, bearing in mind the enormous amount of time myself and other members of the CALC Council devoted to this matter. I should particularly like to acknowledge the help given by Jeremy Wainwright, Janet Erasmus, Clive Borrowman, Tony Yen, John Mark Keyes and Lionel Levert in assisting in gathering the proxies required for the constitution to be adopted. I should also like to pay tribute to Don Colagiuri for his perseverance in organising and chairing the three sessions of the extraordinary general meeting which eventually passed the resolution for the adoption of the constitution.

Relations with other Commonwealth organisations

One of the things that the 1999 CALC Council wanted to achieve was to establish or improve relations with the Commonwealth Lawyers Association (the CLA) and the Commonwealth Secretariat (ComSec). So soon after the 1999 CALC conference and general meeting, I got in touch with Claire Martin, the Executive Director of the CLA to see if CALC could become affiliated with the CLA. At that time there was no provision in the CLA constitution for such an arrangement. I therefore got in touch with the Chairman of the CLA Executive Committee to see if the CLA constitution could be amended to accommodate organisations like CALC. To that end, in 2003, I attended the CLA general meeting to argue our case. As a result the CLA constitution was in due course amended to provide for corporate membership. However, the terms of corporate membership involved the payment of a membership fee, which at the end of the day a majority of Council members were not prepared to pay. As a result, the Council decided against applying for corporate membership of the CLA.

Later, about 5 years ago, the CLA sponsored the establishment of a CALC Legal Forum, which comprises a number of Commonwealth legal organisations and groups. The Forum has met regularly in London but unfortunately I was never in a position to attend any of its meetings. In 2009 however, at the suggestion of Peter Quiggin, I approached Stephen Laws, the First Parliamentary Counsel at the UK Office of Parliamentary Counsel, and he agreed to be CALC's representative on the Forum. After the CALC conference in Hyderabad, Stephen indicated that he wished to stand down from this position. The upshot is that Edward Stell, another member of that office, has taken over as the CALC representative on the Forum.

The CALC Council also wished to establish closer relations with ComSec. I made several efforts to see what could be done through the Directorate of Legal Services, but either my letters were not answered or, when they were, they did not lead anywhere. However, about 2 years ago, I contacted David Lalete, the secretary of the Commonwealth Accreditation Committee, who advised that, if CALC were able to satisfy the Committee's requirements, it would be possible for CALC to be accredited to the Commonwealth. Last year, with Peter Quiggin's assistance, I submitted an application for CALC to be accredited to the Commonwealth. In February this year, CALC finally received notification that its application had been accepted.

Some concluding remarks

There were three main reasons why some months ago I decided not to stand for re-election as Secretary. One was that, bearing in mind that an effective Secretary is crucial to the effectiveness of CALC, I felt having held the position for over 11 years it was time for a younger person to assume the role and responsibilities of Secretary. Secondly, to be fully effective, the Secretary needs good logistic support. While I was working in the Hong Kong Department of Justice and the Irish Office of Parliamentary Counsel, this support was always forthcoming.[11] However, on leaving the IOPC at the end of April 2010, I no longer had such support. The third reason was that for some years I have been trying to find time to write a book focusing on communicating the law, but the time consuming responsibilities of being CALC Secretary have precluded this. But, although I am still a member of the CALC Council, I might at last have time for this project!

At times being CALC Secretary has had its frustrations. One is the failure of some CALC members to notify their changes of address when they retire, resign or move to another job. Another was the difficulty in securing the number of votes sufficient to pass the current constitution. On the other hand, there have been many satisfying and rewarding experiences. Just as signing off on a new Bill is satisfying, so has been sending off yet another issue of *The Loophole* or the CALC Newsletter for distribution to members. And what a relief it was when finally the new CALC constitution was finally passed!

All of the CALC conferences I have attended as Secretary[12] have been thoroughly rewarding and enjoyable experiences, in particular in meeting old friends and making new ones. It is difficult to single out any one conference as standing out above the others. I will single out just a few highlights

- Being elected as Secretary for the first time at the CALC conference in Petalang Jaya, Malaysia.
- The resurgence of CALC and Hilary Penfold's memorable speech at CALC 2003 in Melbourne.
- The reception at Dover House at the 2005 conference in London and the subsequent conference dinner held in Lincoln's Inn.
- Seeing the CALC conference in Nairobi being brought to a successful conclusion, with a close second being the pleasure in receiving from the then CALC President and good friend, Lionel Levert, a commemorative pewter plate commemorating my period as CALC Secretary from 1999.

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[11] In this regard, I would particularly like to acknowledge the support provided by the former Hong Kong Law Draftsman, Tony Yen, and his secretarial staff and the former Chief Parliamentary Counsel of Ireland, Kieran Mooney, and the staff of the PC support group in the IOPCG.

[12] As well as the ones I attended in Hong Kong (the inaugural conference), Jamaica (Ocho Rios), New Zealand (Auckland) and Canada (Vancouver) before becoming Secretary.

- Being involved in CALC 2009 in Hong Kong, which is probably the most successful CALC conference to date. (It certainly produced the best social program, with the highlight for me being the junk cruise to Lamma Island for a superb seafood lunch!)
- And last but not least, the great honour in being presented with the special commemorative issue of *The Loophole* at CALC 2011, plus the incredible birthday dinner that followed the opening reception at the Taj Krishna Hotel, in Hyderabad.

As I mentioned at the outset, when I undertook the role of Secretary in 1999, I had certain objectives in mind for our association. I like to think that those objectives have been achieved least in part), but whether they have or not is for others to decide. As most of you will know, the next CALC conference and general meeting will be held in Cape Town in 2013. I plan to be there and look forward to once again meeting many of my CALC friends there.

Outgoing CALC President, Eamonn Moran, presenting outgoing CALC Secretary, Duncan Berry, with the special commemorative issue of *The Loophole*

Legislative drafting in Sri Lanka

Therese Perera[1]

"The words of a Statute speak the intention of the Legislature"[2]

Functions of the Legal Draftsman's Department

The Legal Draftsman's Department is the Department the Government Department mandated to draft principal and amending legislation and to draft and revise subsidiary legislation in order to facilitate the successful implementation of the Government's legislative programme. The Department is also called upon to express opinions with respect to draft legislation and subsidiary legislation and has also to co-ordinate with Parliament for the successful enactment of legislation drafted in conformity with the provisions of the Constitution. In the context of today, the Consolidation and Revision of Legislation and the translation of the volume of pre-1972 Laws and the drafting of Statutes for the Provincial Councils (created in 1987) are also part of the functions of the Department. [3]

The Government's legislative programme is structured in such a manner so as to successfully implement the policies of the Government, which are embodied in the decisions of the Cabinet of Ministers. It is therefore the primary duty of the Department of the Legal Draftsman to provide the necessary legal infrastructure required to facilitate such implementation. The Department of the Legal Draftsman is also constitutionally required in the discharge of its functions relating to the drafting of

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1 Legal Draftsman , Department of the Legal Draftsman , Sri Lanka

2 Tindal C.J. in *Warburton v. Loveland* (1832)

3 The Legal Draftsman's Department is one of the Departments assigned to the Minister of Justice in Sri Lanka as are the Attorney – General's Department, the Department of the Law Commission, the Government Analysts Department and a few others. The Ministry is assigned to a Minister and there is a Secretary to the Ministry who is almost always a lawyer and who is the administrative head of the Ministry; the position is the equivalent of a Permanent Secretary. The Legal Draftsman's Department is not a part of the Attorney – General's Department and is an independent Department functioning under the Ministry with separate and distinct functions and a separate budget.

legislation, in both official languages, i.e. Sinhala and Tamil, as well as in English which is referred to in the constitution as the link language.[4] Sri Lanka maybe the only country in the world where legislation is required to be in three languages. Drafting in two languages is difficult but I can tell you that drafting in three languages can be a veritable nightmare. Further, what is unique in Sri Lanka is that all three texts are required to be faithful translations of each other. The Translators and the drafter concerned have the very arduous task of checking every draft to ensure that the texts are the same.

In carrying out the function of drafting legislation the Department is governed by the provisions of the *1978 Constitution of the Democratic Socialist Republic of Sri Lanka* and the *Administrative Regulations* which have been framed for such purpose and which are embodied in the Establishments Code, which Code is issued under the directions of the Cabinet of Ministers by the Ministry of Public Administration.

Article 75 of the Constitution states that Parliament shall have the power to make laws. Articles 76 to 80 set out the procedure applicable to the exercise of the legislative power of Parliament. The *Establishments Code in* Chapter XXXIII **2:1** to **2: 3** deals with Draft Legislation and it states that—

> "a request for a draft of legislation should in all cases be accompanied by a Memorandum containing the fullest possible instructions for the assistance of the Legal Draftsman, in the preparation of the draft" and upon the Cabinet making a determination on the government's programme of legislation, such conclusion shall be communicated to each Secretary in charge of a Ministry and the Legal Draftsman. In relation to subordinate legislation it is stated that such "subordinate legislation should drafted by the Ministry or Authority which requests the same, and thereafter be forwarded to the Legal Draftsman for revision and be in duplicate and in all three languages".

The legislative process in Sri Lanka

The three arms of governance in Sri Lanka as recognised in the Constitution are involved in the Legislative Drafting Process in Sri Lanka. They are the *Executive*, the *Legislature and* the *Judiciary*. Each of these three organs of government is required by the constitution to perform distinct functions in this respect.

The initial function in connection with the legislative process, which culminates in the drafting and enacting of legislation, is vested in the Executive. This is the identification of the policy, which makes it necessary to have the laws enacted. Therefore it is correct to say that the Legislative Process in Sri Lanka commences with the Making of the Policy relating to the legislation required. This is done by the relevant Ministry. The policy is framed by them, essentially for the purpose of addressing certain pressing issues in their sector. These can be the necessity to prevent the occurrence of certain activities, the grant of benefits to certain persons, the remedying of certain inequalities and so on. This policy is then prepared in the form of a Cabinet Memorandum. The Memorandum sets out the need for the legislation and the manner in which it is to be provided and it required the Cabinet of Ministers to approve the request and to authorize the Legal Draftsman to draft the proposed Legislation. Thus the

[4] Article 18 of the *Constitution of the Democratic Socialist Republic of Sri Lanka* 1978.

policy for every law enacted in this country has to be approved and authorised by the Executive arm of the Government, which is the Cabinet of Minister.

From that point we move to the involvement of the legislature. Parliament, which is the Legislative arm of governance, is the body, which is empowered by the constitution to enact or pass all legislation of the country. Thus Parliament makes Laws, which are based on the policy, which is approved by the Cabinet. Parliament ultimately takes ownership for all laws enacted by it.

The involvement of the Judiciary in the legislative process in Sri Lanka is when Bills are challenged in the Supreme Court. The Court pronounces on the legality of legislation and on many an occasion changes have to be made to bring the draft legislation into conformity with the decision of the court.

For Parliament to Enact Laws, there is a process, which has to be followed. This is where the Department of the Legal Draftsman comes into the scene.

Role of legislative counsel

'Paper, pencil and eraser' were the traditional tools of a legislative counsel. These together with 'words, clarity of thought, precision of execution, unambiguous language and a well designed structure' are the ingredients essential to producing what is "almost" good legislation. Armed with these tools the legislative counsel then proceeds to fashion and shape the necessary laws in keeping with the policy that has been forwarded to him. The creation of an accurate, clear and effective legislative text is demanding and difficult.

In days gone by the job of a legislative counsel was often in jest referred to, as "a scissor and paste job." This is a very unfair reference and disparaging view which in no way reflects the hard work and the effort that the legislative counsel contributes to the process of drafting legislation. Very early in his career, a legislative counsel realises that in no way can the previously used draft be adopted and fashioned for the next. What has been previously done will always be a very useful guide, but each legislative proposal needs to be drafted separately. The role of the legislative counsel therefore can be said to lie somewhere between two extreme positions, i.e. the view that a legislative counsel merely chooses the words of a previous draft and puts it in a semblance of order to suit the present need; the other being that the legislative counsel is expected to develop and produce a complete draft from incomplete proposals received.

The above situation bears out the position in Sri Lanka too: but neither of two extremes represents the reality of the situation prevailing today. The draftsman is not and never should be responsible for the development of policy although it is advisable in certain instances for the legislative counsel to be associated with the development of policy in order that he may better understand the need for the legislation, which is required at the end of such exercise. The proper role of the legislative counsel could therefore said to be to convert a 'fully developed legislative policy' into 'legislative shape'. In reality a legislative counsel should never be called upon to develop policy in the process of drafting, by filling the gaps in an incomplete policy document, which has been forwarded to him.

A legislative counsel is expected to possess and use "skills and knowledge" which are not generally possessed by *the policy makers*. He is in effect an architect whose vision and design must seek to provide a solid but versatile structure in the form of a composite draft by which the policy is

transformed into the perfect implementing tool. Much injustice is done to a legislative counsel and the profession of legislative drafting if the policy maker and the target audience of the end product do not recognize the expertise, analytical skills and knowledge and experience of the legal framework with which the legislative counsel is possessed.

In the world over legislative counsel are having to face up to the fact that the most difficult part of the drafting process is in finding out what the policy maker really wants by disseminating what little information is made available to him. In Sri Lanka too incoherent or incomplete proposals on policy are the greatest drawback that faces the Legal Draftsman's Department. The legislative counsel therefore is required to embark on a voyage of search and discover prior to commencing the drafting process. Once this is done finding the words to express the policy is a relatively easy task for a skilled legislative counsel.

A legislative counsel is always given inadequate time for the writing of laws. There often is a deadline which the policy maker has indicated. Drafting instructions often arrive late, the policy may be incomplete and in most cases it may be that the need for the legislation is an unexpected problem, which needs to be urgently set right. This ensures that the legislative counsel is always short of time.

Free expression of ideas is another problem that faces the legislative counsel. Complex concepts and ideas are often incapable of being written in simple and clear language. This does not in any way mean to say that the legislative counsel needs to be verbose and complex to the extreme. Our Statute books are full of this type of legislation. It is part of out colonial inheritance. We have a classic example of section 2 of the *Wills Ordinance*, which is one sentence and which runs into more than a page. This is a style, which is to be avoided. Legislation is written for the target audience and the policy maker and has to be easily understood by them. Obscurity of principles in a law is not advocated. The law must be clear and simple and be capable of communicating the principles of law enunciated in the proposal.

In Sri Lanka and in other jurisdictions there has been much criticism on the way the legislative sentences are constructed. Most of these criticisms highlight the obscure language, long sentences, and the indiscriminate use of the verbs "shall: and "may". The presence of long sentences, at least in old statutes, is undeniable: but a conscious effort is being made to simplify the language used in statutes. We are now trying to write statutes in plain words so that everybody can understand them. I quote here a comment of Professor Elmer Driedger, which is very apt in this context:

> "Statutes are laws. They are supposed to settle the rights and liabilities of the people, and they are enforced by the courts. They must be so far we can make them, precise. They are serious documents. Like all other serious works of literature, they must be read and studied with care and concentration. Every word in a statute is intended to have a definite purpose and unnecessary words are not intentionally used. Of course, the ordinary reader will not be able to grasp its full implications and he will have difficulty in applying the statute to an actual case. But that situation he must accept. Statutes cannot be written that no dispute or difficulty in construction could ever arise".[5]

[5] E.A. Driedger, *The Composition of Legislation*, (2 ed.). See also E.A. Driedger, *Legislative Forms and Precedents* (2nd ed.)

The legislative counsel cannot make a complete and abrupt change in the language used in legislative drafting. It has to be a carefully planned gradual process of change, which will permit the present laws and the future laws to stand side-by-side without incongruity. The target audience should gradually be introduced to simplified language in laws. Having to draft legislation with the provisions of the Interpretation Ordinance guiding you, keeping in mind the fact that the Constitutional provisions must be strictly adhered to in order to prevent the law that you are writing from being observed by the Attorney-General as being unconstitutional, or that the courts could strike down the entire law as being unconstitutional greatly inhibits a legislative counsel. The Constitution of Sri Lanka does not provide for the review of legislation by the courts after a Bill has been enacted. However, the Constitution does provide that once a Bill has been placed on the Order Paper of Parliament it can be challenged within one week of its being so placed[6]. This power is vested in the Supreme Court and is an exercise by such court of its jurisdiction in respect of constitutional matters.[7]

Despite all the problems and challenges enumerated above the job of a legislative counsel is very rewarding. He has created something out of the mass of information placed before him. Not all will agree that the end product is something good. Despite this drawback the job of a legislative counsel is very satisfying and I cannot think of any other legal position which provides so much variety nor the opportunity to deal with a vast range of areas of the law. Thus the legislative counsel is placed in a somewhat privileged position.

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[6] Article 121 of the 1978 Constitution of the Democratic Socialist Republic of Sri Lanka

[7] Article 118

A technical review of the Pakistan Constitution (Eighteenth Amendment) Act 2010

Mohsin Abbas Syed[1]

Introduction

The Constitution of a country reflects the aspirations of its people. A citizen owes allegiance to the Constitution. In this sense, the Constitution is a social contract between the State and its citizens. It is the country's fundamental law, which defines the State and the extent to which the State may exercise its authority.

The preamble to the Constitution of the Islamic Republic of Pakistan says:

> 'we, the people of Pakistan……through our representatives in the National Assembly, adopt, enact and give to ourselves, this Constitution'[2]

The Constitution is the peoples' document, and so it belongs to the people of Pakistan.

This constitutional spirit has been reflected for the first time after the making of the Constitution in 1973, when the Parliamentary Committee on Constitutional Reforms developed a broader agreement on major constitutional issues. The Committee and especially its Chairman have done a marvellous job in developing the broader political consensus in an otherwise fragmented society.

The inclusion in the Constitution of the fundamental rights of fair trial and due process[3], access to information[4], and free and compulsory education[5] will make a huge contribution

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1 Director (Legislation), Law and Parliamentary Affairs Department, Government of the Punjab, Pakistan

2 Last paragraph of the preamble of the Constitution of the Islamic Republic of Pakistan.

3 Article 10A of the Constitution.

4 Article 19A of the Constitution.

5 Article 25A of the Constitution.

to developing the nation. The restoration of parliamentary form of Government[6], enhancement of Provincial autonomy,[7] the defence of the Constitution[8] and reforms in the appointment of members of the judiciary[9], the Chief Election Commissioner and members of the Election Commission[10] are the notable policy objectives of the reforms included in the 18th Amendment Act. The Amendment Act is based on these excellent policy parameters but regrettably it is not without technical errors. The Constitution and its various provisions are frequently cited in various writings and forums of the world. Even a small error, such as the omission of a comma or full-stop, is in my view unacceptable.

Drafting errors in the 18th Amendment

What follows are some of the technical drafting errors in the 18th Amendment Act that I believe require attention of the Parliamentarians and national leaders.

Modern legislative drafting favours the use of active and not the passive voice in structuring a legislative sentence.[11] 'Who does what' should be the basic rule for structuring a legislative sentence.[12] The Act predominately uses the passive voice in the structure of legislative sentences, so that in most provisions of the Act do not answer the question 'who is the actor?[13]

The expression 'provided that'[14] has no clear meaning in the English language and it only confuses the reader[15]. Hardly any modern legislative drafter uses this expression and use of separate legislative sentence as exception, condition or explanation brings clarity to the language of the law. This archaic vague legislative expression has frequently been used in the Act. There are about 46 provisos in the 18th Amendment Act.

The laws especially the Constitution reflect the will of the people. They should have the ability to ascertain the precise date on which a new law or legal provision becomes operative[16]. If there are provisions in an Act that become operative retrospectively or

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6 Sections 15, 17, 28, 29, 31, 35, 36, 37, 38, 40, 42, 43 & 46 of the *Constitution (18th Amendment) Act 2010*.

7 Sections 12, 34, 35, 37, 38, 42, 43, 46, 49, 53, 54, 55, 56, 57, 58, 59, 60, 61, 65 & 101 of the *Constitution (18th Amendment) Act 2010*.

8 Sections 4 of the *Constitution (18th Amendment) Act 2010*.

9 Sections 67, 68, 69 & 74 of the *Constitution (18th Amendment) Act 2010*.

10 Sections 77 & 80 of the *Constitution (18th Amendment) Act 2010*.

11 At pages 238 & 273 'Legislative Drafting for Democratic Social Change: A Manual for Drafters' 2004 edition by Ann Seidman, Robert B. Seidman and Nalin Abeysekere.

12 Ibid, at pages 234 – 237.

13 These are generally known as 'truncated passives'. [Ed]

14 This phrase usually introduces what is usually referred to by lawyers as 'the proviso', grammatical form that does not exist outside the legal lexicon. [Ed.]

15 Ibid, at page 249.

16 Ibid, at page 323.

prospectively, the addition of a schedule is my preferred mode for specifying the date on which the law or provision is to come into force. It relieves the law from unnecessary burden of commencement provisions cluttering up the substantive provisions. This convention has not been followed in drafting the 18th Amendment Act. The provisions of Articles 59, 63A, 92, 130, 215, 267, 267B, 270B and 270BB unnecessarily burden the Constitution. Some of these provisions will become redundant after passage of requisite time.

In the Amendment Act, expressions such as 'mutatis mutandis', 'such', 'said', 'thereon', 'thereof 'and 'hereby' are repeatedly used and the words 'each', 'any', 'every', and 'all' are often inappropriately used or over used, contrary to modern legislative drafting conventions. Many of these expressions are either not commonly understood by non-lawyers or do not enhance the clarity of a legislative sentence.[17] Many of these expressions are 'legalese', a form of legal jargon used only by lawyers and members of the judiciary.[18]. As the language of the Constitution belongs to the people, surely it should be as simple as possible?

Clause by clause review of the 18th Amendment Act

A clause by clause review of the Amendment Act reveals many more drafting errors. The use of the word 'and' between 'Supreme Court' and 'a High Court' in Article 6(2A) would mean both the Courts jointly and not severally prohibited from validating an act of high treason. The word 'or' should have been the choice of the drafter of the Act to bring clarity in the provision. In Article 63(1)(c), the use of the word 'or' disqualifies a Pakistani from being elected as member of the Parliament if he has, at any time, acquired citizenship of a foreign State but it does not disqualify a citizen of a foreign State who has become a citizen of Pakistan. If this is declared policy of the Committee then both such persons should have been disqualified.

Article 63(3) makes the Election Commission the only and final arbiter in case of alleged disqualification of a Member of Parliament. There is no right to even a single appeal against the decision of Election Commission. This is surely contrary to the fundamental norm of fair procedure for determining the rights enshrined in our legal system.

Article 63A(1)(b) does not specify how a Parliamentary Party will issue directions to its members. In the explanation, expression 'political party' should have been used instead of the word 'Party' while defining the term 'Party Head'. These defects in this Article may not achieve the desired objective of eradication of defections of sitting Members of Parliament to another political party.

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17 Ibid, at pages 240 & 274.

18 Ibid, at page 274.

The proviso of Article 91(5) could have been avoided by repealing the law that imposes restriction on the number of terms for the office of the Prime Minister.[19]. The amendment in Article 122(2) omits proviso without substituting the colon with a full-stop. The Constitution consistently uses the words 'Election Commission' but the drafter of the Act has preferred to write 'Election Commission of Pakistan' in the Article 140A(2). Even the Article 218, under which Election Commission is established, does not call it 'Election Commission of Pakistan' but merely 'Election Commission'. Article 1(2)(b) confines the description of Islamabad Capital Territory to the words 'Federal Capital'. These words are also used in Articles 51, 59, 62 etc. to describe the Islamabad Capital Territory. The use of this description should have been preferred in the amendment in Article 175(1).

The terms 'Treasury Benches', 'Opposition Benches', 'Leader of the House' and 'Leader of Opposition' are not defined in the Constitution but used in the Article 175A(10). Two separate sentences with a full-stop have also been combined in this clause which is unusual in numbering separate legislative sentences.

In Article 198, name of a High Court has been used like Lahore High Court, High Court of Sind, Peshawar High Court and High Court of Baluchistan but for the Islamabad High Court, the words 'High Court for Islamabad Capital Territory' have been used.

The spellings of the Provinces of Baluchistan and Sind have been changed in Articles 1, 51, 106 and 246 to 'Balochistan' and 'Sindh' but the spellings of the names of these Provinces occurring in other Articles of the Constitution (including Articles 192 and 198) have not been changed.

The amendments in Article 213 use the terms 'Treasury Benches', 'Opposition Parties' and 'Parliamentary Leaders' without defining them. These amendments do not provide solution in case of a deadlock in the Parliamentary Committee. They have also failed to complete the chain as the appointment of the Chief Election Commissioner has to be made by the President, on the advice of the Prime Minister, but no provision is made for the Parliamentary Committee to forward its recommendation to the President or Federal Government. Similarly, clause (2A) of Article 213 does not require the Parliamentary Committee to confirm one person from the names forwarded by the Prime Minister in consultation with the Leader of Opposition in the National Assembly.

After the amendment in Article 216(2) takes effect, proviso (a) will remain without there being a proviso (b) or (c).

In consequence of the insertion of Article 140A (2), the words 'local governments' should also have been specifically mentioned in the Article 218(1), which specifies the purpose for having a permanent Election Commission. The retired Judges of High Courts have been made eligible to be appointed as members of the Election Commission without specifying their terms of appointment and method or the procedure for their removal or resignation. The amendment in Article 218(2) requires inclusion of additional provisions to address

[19] The *Qualification to Hold Public Offices Order, 2002* (Chief Executive's Order No.19 of 2002).

these. The word 'and' occurring at the end of paragraph (b) of Article 219 should have been omitted if the new paragraphs (d) and (e) are to be inserted.

The amendments in Article 224 disqualify the family members of the care-taker Prime Minister, the Chief Minister or a member of the Cabinet. This effectively penalises a person who may not be the beneficiary of the care-taker Government. This could have been avoided by disqualifying a member of a care-taker Cabinet from holding the position if a family member contests an election while the member is holding office. The amendments, while making the Prime Minister and Chief Ministers Chief Executives, do not address the circumstances flowing from their absence from office due for whatever cause.

The President or a Governor can summon a session of the National Assembly or Provincial Assembly only on the advice of the Prime Minister or Chief Minister even for the election of the Prime Minister or Chief Minister.

It seems that a Federal or Provincial Government Cabinet cannot exist without there being a Prime Minister or Chief Minister. This situation also needs to be addressed if the Constitution is to work.

Article 267B should have been made part of clause 2 'repeal' instead of inserting the provision in the body of the Constitution.

Numerous entries from the Concurrent Legislative List have been transferred to the Provinces by omitting this List altogether. There are number of laws under those entries which currently exist as Federal laws. These laws prescribe the territorial extent of the laws of Pakistan as a whole. Article 141 of the Constitution provides that a Provincial Assembly can only legislate for the Province or a part of it. Similarly, there are repeated references to the Federal Government in these laws. A provision similar to Article 268(4) for adaptation[20] of these laws by the Provinces within a prescribed time period is required to smoothly implement transition of these laws from being Federal to Provincial. Article 270AA(8) only provides the process of devolution of the matters mentioned in the Concurrent Legislative List but does not authorize adaptation of the Federal laws made in pursuance to those matters.

[20] Adaptation order is a device historically used for adaptation of laws after distribution or redistribution of powers between Federation and Federating Units in Pakistan. Section 293 of the *Government of India Act 1935* provided for issuance of adaptation order due to federal structure of the Act. Section 18 of the *Indian Independence* Act 1947 envisaged adaptation order for new Dominions. Article 224 of the *Constitution of Pakistan 1956* protected the existing laws subject to necessary adaptation. Article 225 of the *Constitution of Pakistan 1962* provided for the adaptation of the existing laws by the President and the Governor of the Province in relation to the Federation or the Province respectively. Article 19 of the *Province of West Pakistan (Dissolution) Order*, 1970 also envisaged adaptation of laws. Article 268 of the *Constitution of the Islamic Republic of Pakistan* (1973) provides for adaptation orders and the adaptation orders have been made in 1975.

A special procedure for amendment in the Constitution (Eighteenth Amendment) Act has been prescribed in Article 267A. A joint sitting of the Parliament may, within a year, make appropriate changes to this procedure by means of a simple majority. In my view, this special dispensation is not only an unnecessary burden on the Constitution but it also overrides the general requirement for a two-thirds majority of the total membership of both the Houses of the Parliament to pass an amendment to the Constitution. If such a procedure is absolutely necessary, a sunset clause for this provision to expire at the end of 365 days could and should have been provided for in the Act. Another option would have been to make this provision part of the Amendment Act and not part of the Constitution.

To sum up

All in all, the Act is an example of poor drafting that has the potential to reduce the effectiveness of one of the best policy measures in the constitutional history of Pakistan. In my view, it provides great scope for much litigation for years to come. This could have been avoided by more careful drafting.

A bonfire of the criminal laws? A review of Law Commission Consultation Paper no195: Criminal liability in regulatory contexts?

Kiron Reid[1]

Introduction

The Law Commission in the UK has called for a principled approach to creating new criminal offences and for unnecessary minor offences to be scrapped. This is very welcome and I will argue in this paper that the principles it sets out are correct. There can of course be discussion over the detail and that will be particularly relevant to legislative counsel[2]. The proposals and debate in the Commission's Paper are worthy of a wide discussion in the common law world. Indeed, the editor of the UK Criminal Law Review has gone so far as to state:

> "This Paper takes a radical look at the relationship between regulation and the criminal law, and comes up with a battery of far-reaching proposals. This major review should be read by all criminal lawyers with an interest in this important subject".[3]

In my commentary, I refer (unless stated otherwise) to the Commission's Overview Paper (which is 19 pages long) rather than directly to the full Consultation Paper (which is 244 pages long). Law Commission papers are usually very thorough and well written, a great resource for reference, for teaching (and for students), and for analysis of flaws in and explanation of the current law, but time will not usually permit detailed perusal of the full Consultation Paper.[4]

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1 Liverpool Law School.

The author wishes to thank you to Nicholas Willmott MA for comments on a draft of this article, improving the English, and the clarity of some specific arguments. Errors remain my own.

2 In the UK and Ireland, almost all lawyers who draft legislation are called parliamentary counsel.

3 Ian Dennis, Editorial: 'Regulating (and) the criminal law' [2010] Crim LR 735.

4 The full Consultation Paper includes three papers as appendices. Appendix A: A Review of Enforcement Techniques – Professor Julia Black; Appendix B: Corporate Criminal Liability: Models of

The core proposals were summarised in a press release (25 August 2010):

- "regulatory authorities should make more use of cost-effective, efficient and fairer civil measures"
- "a set of common principles should be established to help agencies consider when and how to use the criminal law" and
- "existing low-level criminal offences should be repealed where civil penalties could be as effective."

I specifically agree with these, but will comment on background issues relating to over-criminalisation and poor quality criminal law; on the rationale for the focus on the regulatory context (that is largely relating to businesses), and on some specific proposals and consultation questions. My main interest is how the criminal law affects natural persons, while also being concerned about effective action against harm caused by businesses.[5] Therefore I will argue on the need for both consistency of principles as they apply to corporations (this consultation) and natural persons (largely outside the scope of this consultation), and on the prospective benefits of the Law Commission carrying over the principles set out in this article to its projects on the criminal liability of natural persons. The principles set out in this Paper should be used to inform the Commission's work to help improve both the general principles of criminal law and specific categories of offence.

Background[6]

The British Labour Governments of 1997 to 2010 were obsessed with creating new crimes to appear tough on crime, but it is questionable whether this is an effective way to solve social problems or change behaviour.[7]

Intervention and Liability in Consumer Law – Professor Peter Cartwright; Appendix C: Corporate Criminal Liability: Exploring Some Models – Professor Celia Wells.

5 Many sources relevant to this field will be found in other fields of law and various disciplines of social science and business. Relevant starting points can be found in 'Corporate crime: opening the eyes of the sentry', Celia Wells (2010) 30 *Legal Studies* 370; *An Introduction to Law and Regulation*, Bronwen Morgan & Karen Yeung (Cambridge, 2007); For sources on environmental regulation Colin Reid 'Regulation in a Changing World: Review and Revision of Environmental Permits' (2008) 67 *Cambridge Law Journal* 126 at 126 - 7. Half of the chapters in a new collection are directly or indirectly relevant to topics discussed in this paper: *Regulation and Criminal Justice* H. Quirk, T. Seddon & G. Smith eds. (Cambridge, Cambridge, 2010).

6 Debate about the law is inherently political and this critique will touch on political context in places, while acknowledging that political comment is outside of the role of those who recommend law reform or draft legislation. By contrast the Law Commission's full Consultation Paper does contain a useful discussion of criminal prohibition, moral wrongdoing and harm (Part 4).

7 There is evidence of an improvement when Gordon Brown became Prime Minister and the pace of criminal justice legislation slowed, particularly in relation to new and amended police powers, June 2007 – May 2010.

Lord Judge in the Supreme Court recently declared "that for too many years now the administration of criminal justice had been engulfed by a relentless tidal wave of legislation. The tide was always in flow: it had never ebbed."[8]

The statistics at para. 1.17 of the Overview Paper are telling. "Since 1997, more than 3000 criminal offences have come on to the statute book." Also "more than 2 and a half times as many pages were needed in Halsbury's Statutes to cover offences created in the 19 years between 1989 and 2008 than were needed to cover the offences created in the 637 years prior to that."

Peter Glazebrook has commented pointedly on this trend in successive editions of his *Blackstone's Statutes on Criminal Law* (for example in the preface of the 2010-11 edition, OUP, Oxford, 2010, p. v). Many examples can be given of the concern or criticism expressed directly or implicitly by eminent judges, peers, lawyers, and politicians concerned for civil liberties.[9] There has likewise been much compelling critique of the incoherent rag-bag style of much Government-inspired criminal legislation since 1994.[10] The Commission correctly cites Ashworth's analysis, among others; Spencer has been particularly frank - an "unhappy practice of our present Government is to reform the law in demagogic dialogue with the tabloids".[11]

While the Commission disagreed with my specific suggestion that a code of low level administrative 'offences' should be created (as in France), taking them outside the criminal law (see paras. 3.27 and 3.30 full report) the emphasis of the Commission's proposals leads to a similar effect in relation to the liability of businesses. The thrust of the Commission's Paper agrees with the sentiment of Professor Richard Macrory (quoted at p. 2):

> "there may be a case for decriminalising certain offences thereby reserving criminal sanctions for the most serious cases of regulatory non-compliance" (for regulatory 'offences' involving businesses).

The Consultation Paper argues that "the criminal law can and should be used for the most serious cases of non-compliance with the law."[12] Its analysis concludes that reliance on the criminal law

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8 *R. (Noone) v Governor of Drake Hall Prison* [2010] UKSC 30, (2010) Times Law Reports, 2 July, SC, para. 80.

9 A few are cited at K. Reid 'Strict liability: Some Principles for Parliament' (2008) 29 *Statute Law Review* 173, n. 27. For a lively argument critiquing complaints of 'too many new offences' see 'Is it simply a question of numbers?' (Full Consultation Paper paras. 3.16 – 320).

10 For example see 'Inaccessible and Unknowable: Accretion and Uncertainty in Modern Criminal Law' Candida Harris and Kim Stevenson (2008) 29 *Liverpool Law Review* 247; J. R. Spencer 'The drafting of criminal justice legislation – need it be so impenetrable?' (2008) 67 *Cambridge Law Journal* 585. For background refer to Michael Zander *The Law-Making Process*, 6 ed. (Cambridge University Press, Cambridge, 2004), chap. 2 'Legislation - the Westminster stage'. Thank you to Jeremy Marshall for assistance with legal system references.

11 J. R. Spencer 'Legislate in haste, repent at leisure' (2010) 69 *The Cambridge Law Journal* 19. Thanks to Sally Goodhall for this quote.

12 Para. 1.5.

by regulators may "be an expensive, uncertain and ineffective strategy" "as the main means of deterring and punishing unwanted behaviour".[13]

The Consultation Paper explains what the Commission mean by 'regulatory' contexts:

> "A regulatory context is one in which a Government department or agency has (by law) been given the task of developing and enforcing standards of conduct in a specialised area of activity."[14]

The Consultation Paper expressly explains that the project is not concerned with the use of criminal law to improve standards of behaviour by the public at large. This is because that is "not the responsibility of an expert regulatory agency".[15] Regulation of business areas has often involved a licensing approach that includes a mixture of civil law measures and criminal law offences.[16] For example the Law Reform Commission of Hong Kong supported a licensing approach, based on their study of several other jurisdictions, in their 2002 report *The Regulation of Debt Collection Practices*.[17]

It is impossible to disagree with the argument that "the introduction of rationality and principle into the creation of criminal offences, when these are meant to support a regulatory strategy"[18] is vitally important. That view heeds Lord Windlesham's plea that: "Dispensing justice is more than a rhetorical slogan: it should be accepted as an indispensable requirement at every stage in the criminal process".[19] The piecemeal UK approach to legislation designed to tackle social problems is well illustrated by a quotation from Sidney Webb. In the 1910 preface to Hutchins and Harrison's *A History of Factory Legislation* he wrote:

> "This [past] century of experiment in factory legislation affords a typical example of English practical empiricism. We began with no abstract theory of social justice of the right of man. We seem always to have been incapable of taking a general view of the subject we were legislating upon. Each successive statute was aimed at remedying a single ascertained evil. It was in vain that objectors urged that other evils, no more defensible existed in other trades, or amongst other classes, or with persons of ages other than those to which the particular Bill applied. Neither logic nor consistency, neither the over-nice consideration of even-handed

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13 Para. 1.8.

14 At para. 1.9. The reasons for concentrating on this area are set out at paras. 1.9 and 1.11 – 1.12.

15 Para. 1.11.

16 R. Glover 'Regulatory Offences and Reverse Burdens: The Licensing Approach' (2007) 71 JCL 259.

17 The report proposed a mixture of criminal and civil measures to deal with the problem of abusive debt collection, including ones aimed at alleviating the level of bad debts in the first place. [2002] HKLRC 4 (July 2002), Conclusion, para. 10.101. Accessed via the Hong Kong Legal Information Institute database HKLII.

18 Para. 1.13.

19 *Responses to Crime*, Vol. 4 'Dispensing Justice' p. 308 (Clarendon Press, Oxford, 2001).

> justice nor the Quixotic appeal of a general humanitarianism, was permitted to stand in the way of a practical remedy for a proved wrong.[20]"

A piecemeal or incremental approach to law reform can have both negative and positive aspects, but coherence and adherence to principle cannot be numbered among the latter.

The Commission's Paper says it is not "concerned with the merits of techniques of regulation, or of securing what is in the public interest, that do not involve using the criminal law".[21] However, if the Law Commission is suggesting restricting the use of criminal law, it has to consider alternatives; it is not working in a vacuum, as its citation of a wide range of sources shows. While the Law Commission is dealing with principles, Government and Parliament will be concerned with practicalities, including the effectiveness of alternatives, such as licensing, inspection, remedial notices, taxation, or public information campaigns (listed in the Paper). Government and Parliament will also be greatly concerned with enforcement, following the lead of Macrory's report under the last Government this is about more effective enforcement. (The measures in the *Regulatory Enforcement and Sanctions Act 2008* are described, including stop notices). If more cost-effective civil methods are used there will have to be more emphasis on enforcement by regulators to ensure compliance. Dave Whyte and Steve Tombs recently published research showing that health and safety inspections have fallen dramatically potentially putting workers at risk at a time of cost cutting. Whyte decried a "collapse in inspection, investigation and enforcement".[22]

Although the new coalition Government's 'bonfire of the QANGOS' may reduce the exponential growth of secondary legislation (see para. 1.20), it is also likely to lead to pressure on the budgets of regulators.[23] MPs and peers on all sides should be concerned that regulatory bodies and, potentially, local authorities have the training, staff and legal support to do their jobs when their role is enhanced. Reference is made in the full Consultation Paper to the important role of local authorities and specifically to trading standards. One would expect their umbrella body, Local Authorities Co-ordinators of Regulatory Services (LACORS), to have significant input into the consultation process.

Critics of the over-implementation ('gold plating') of European Union (EU) law will welcome the emphasis that "there is too much reliance on direct criminalisation to implement European law" and that other strategies to ensure compliance will be explored.[24] The Commission, using a consumer protection example, give a short and incisive critique of using direct criminalisation to

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20 B. Hutchins and A. Harrison *A History of Factory Legislation*, 2nd ed. (King, London, 1911) p. ix - x. I am grateful to John Anderson for this quotation.

21 Note 10.

22 'Workplace safety at risk due to deregulation of health and safety policies' University of Liverpool Press Release, 13 July 2010. The report is 'Regulatory Surrender: death, injury and the non-enforcement of law' (Institute of Employment Rights, Liverpool, 2010). Hereafter Tombs & Whyte 2010a.

23 The scale of the growth in regulatory agencies set out was not appreciated by this writer. "There are now over 60 national regulators with the power, subject to certain limitations or checks, to make (criminal) law." Para. 1.21.

24 Full Consultation Paper, para. 3.20.

enforce EU regulations.[25] Another example could be "translation of the Temporary or Mobile Construction Sites Directive (92/57/EEC) of 24 June 1992 into the Construction (Design and Management) Regulations 2007." Health and safety expert John Anderson pillories the UK result "in translating 17 pages of the Directive into 119 pages of UK legal text".[26] This reining in of British Government reliance on criminalisation to enforce EU measures could also in part alleviate concern that there are inadequate constitutional safeguards at both EU and UK level over the creation of criminal legislation by the European Union.[27]

Specific reform ideas and suggestions for improvement will be discussed below. The content regarding quality of legislation (at proposal 12) appears naive. Suggesting that the Ministry of Justice is the authoritative source of guidance on the law after Parliament (with no mention of the courts) appears to ignore the basis of the British legal system. But perhaps, in 'the real world' of the British civil service, the writers are correct; maybe in practice Government departments see the Ministry of Justice as the place they should go with their legal queries. This may save on costly fees for legal advice but appears rather to overstate the role of the Ministry.

Principles and consultation questions

The Commission's Paper is based on the principle "that criminal offences should be created to deter and punish only serious forms of wrongdoing". By serious wrongdoing is meant "wrongdoing that involves principally deliberate, knowing, reckless or dishonest wrongdoing."[28] In other words, wrongdoing is regarded as serious if *mens rea* is required. Although I would agree with that principle, I question whether it is sufficient as a definition of serious wrongdoing. The level of harm caused or potentially caused must also surely be an element in considering whether wrongdoing is serious—that is, potentially serious harm accompanied by a fault element unless specifically and deliberately legislated for otherwise. (Whether serious wrongdoing includes

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25 Full Consultation Paper p. 50 – 51 and conclusion at para. 3.106. The example is the Consumer *Protection from Unfair Trading Regulations 2008*. These regulations implement the *Unfair Commercial Practices Directive* (Directive 2005/29/EC) and article 6.2 Directive 1999/44/EC. The official position is set out and explained in detail in the 125 page long *Explanatory Notes* to the Regulations, along with background evidence.

26 Draft LL.M dissertation 'Critique of the UK health and safety legislation with international comparisons' October 2010, para. 4.4.14. This is one of two 'case study' examples of over-implementation of two EU Directives. The other is a detailed deconstruction of the much derided "Work at Height Directive" (Section 4.4.1). Also see the Davidson Review on simplifying EU legislation: *Implementing EU legislation* (Better Regulation Executive, London, 2006). I am grateful to Frank Wright for this reference.

27 For example Bleddyn Davies's PhD thesis 'Fit for Purpose? A legal analysis of the European Union's constitutional arrangements in the field of criminal justice' (University of Liverpool, June 2010).

28 Para. 1.14. These categories of fault, known as *mens rea*, are considered to ensure moral blameworthiness.

conduct with a serious potential of causing more minor harm is a possible area for further discussion).[29]

Proposal 1 basically sets out the above principle and proposal 2 does indeed broadly relate the justification for criminalisation to a level of harm (based on potential penalty). Proposal 3 says—

> 'Low-level criminal offences should be repealed in any instance where the introduction of a civil penalty (or equivalent measure) is likely to do as much to secure appropriate levels of punishment and deterrence.'[30]

This is appropriate in relation to regulatory measures where an alternative method could be used, such as a penalty notice but with breach or repeat conduct leading to a criminal offence. These are described as two-step prohibitions or indirect criminalisation (full Consultation Paper para. 3.105) similar to the much overused, but not inherently objectionable, harassment, ASBO (Anti-Social Behaviour Order) or Penalty Notice for Disorder (PND) model.[31] A 'non-crime' example is an enforcement order for breach of a provision of the *Consumer Protection from Unfair Trading Regulations 2008*, under Part 8 of the *Enterprise Act 2002*. One argument in favour of Proposal 3 is that the criminal offences created are often punished by low fines and are not 'worth it' on a cost-benefit analysis. It should be noted that this consideration is outside of the control of the draftsmen charged with drawing up legislation. Para. 1.35 highlights the flexibility of measures available under the *Regulatory Enforcement and Sanctions Act 2008*. "It is only if these measures are not complied with that criminal prosecution will be contemplated: breach of a stop notice is itself a criminal offence".[32] This is welcome, but a key concern is that there should be adequate safeguards for recipients if these regulatory measures are used. In addition, the possible relationship to the point made about the decline of enforcement, above, is self-evident. There is also a concern that

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29 For example, in the inappropriately named 'Assault Guideline: Professional Consultation' (the paper covers the main range of serious offences under the *Offences Against the Person Act 1861*), the Sentencing Council for England and Wales determines the "offence category by assessing the offender's culpability in committing the offence and the harm caused, or intended to be caused" (Sentencing Council, London, October 2010) p. 15. This follows the structure set out in s. 121 Coroners and Justice Act 2009 'Sentencing ranges'.

30 Subsequently in a submission to the Commission, Tombs and Whyte argued: "There is little evidence that there is a need for the criminal law to narrow its focus, not least because regulators are currently only able to use the law to respond to a very small minority of cases. In the vast majority of cases, potential offences are not even investigated to establish their seriousness." 'The Law Commission Consultation Paper No 195 *Criminal Liability in Regulatory Contexts*: A response by Steve Tombs & David Whyte', Institute of Employment Rights, Liverpool, p. 6. Available at <http://www.ier.org.uk> as at 12/01/2011. (Tombs & Whyte 2010b). They also specifically dissent from many of the Law Commission's starting assumptions, set out above, see p. 3. Their views can be contrasted with Sally Simpson *Corporate Crime, Law, and Social Control* (Cambridge University Press, Cambridge, 2002).

31 Commentators on their development include Geoff Pearson, 'Hybrid Law and Human Rights - Banning and Behaviour Orders in the Appeal Courts' (2006) 27 *Liverpool Law Review* 125. See *passim* the sources referred to in the debate between Simon Hoffman & Stuart Macdonald, and Peter Ramsay at [2010] Crim LR 761-66 'Substantively Uncivilised ASBOs' and the earlier article by Hoffman and Macdonald at 457.

32 Para. 1.36.

fixed penalties would not adequately take account of the greatly varying size and resources of businesses. "The regulator will not be able to exercise discretion in determining the amount of the fixed monetary penalty in any individual case."[33] Tombs and Whyte call for a unit fines system which would take account of "both the gravity of the offence *and* the ability to pay on the part of the defendant".[34] There can therefore be legitimate concerns both about safeguards for businesses as the targets for civil measures, including fixed penalties, and whether such penalties would be punitive enough compared with a fine after prosecution.

The Commission's Paper argues logically that new specific inchoate offences should not be created when these are already covered by existing general legislation on conspiracy, attempt or assisting and encouraging crime (proposal 4). That is not to deny that the law of conspiracy itself in England is greatly confusing and could do with being rewritten to modern standards. Similarly (Proposal 5), the Commission rejects the need for new fraud offences. The wide-ranging recent *Fraud Act 2006* provisions should cover both pre-existing offences and any conceivable areas where new specific offences might be required.

Halfway through the Law Commission's Overview Paper is, for me, one of the three key principles that should be adopted from this report. (The others are Proposals 1 and 3). Proposal 6 declares:

> "Criminal offences should, along with the civil measures that accompany them, form a hierarchy of seriousness." (Para. 1.44).

This should be adopted by the Law Commission as a principle in its criminal law work for both corporations and natural persons. Preferably this hierarchy should be set out in a Code (or, as I would prefer, separate but related Codes). However, if not in a coherent planned Code, the Law Commission and parliamentary counsel could implement the principles in new legislation as the opportunities arise.[35]

Due process is highlighted in Proposal 7. Regulators should have to formally "warn potential offenders that they are subject to liability" and courts should be granted a power to stay proceedings until after non-criminal regulatory steps have been taken. While a power of the court to stay proceedings in appropriate cases is not objectionable, this appears to miss the point. What is needed is a clear and simple process of regulatory enforcement rather than recourse to court actions. For example, a simple and effective enforcement process needs to guard against frequent changes of staff, lack of proper handover when staff change, sometimes lack of direction from management, the need for training, and the need for the procedures (on enforcement, including the safeguards for subjects) to be cost-effective. The full Consultation Paper points out that since—

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33 *Regulatory Enforcement and Sanctions Act 2008* explanatory notes on s. 39.

34 Tombs & Whyte 2010b, p. 4 – 5.

35 I will not rehearse the arguments in favour of a criminal Code here. Suffice to say I could construct a whole lecture series from elegant arguments on this topic, from Lord Bingham downwards, and would be fairly rich if I had a pound for every good quote from an eminent jurist or scholar in favour. Obviously there are also eloquent arguments against from purist supporters of the Common Law tradition. A summary can be found at Zander, *op. cit.* chap. 9.

> "... the *Regulatory Enforcement and Sanctions Act 2008*, there are now clearer duties on regulatory authorities to warn offenders ... This can be through the use of warnings, enforcement undertakings or stop notices".[36]

As a matter of best practice, enforcement officers often do warn before taking action and, in many cases those prosecuted are ones who have a degree of *mens rea* (see Reid 2008, p. 180). Putting this into statute generally would formalise Horder's recommendation (summarised by Reid, *ibid.*) "that courts should take account of the prosecution policies of enforcement agencies." For example, there is discussion about truancy and prosecution of parents as a method to target poor school attendance by children.[37] On this issue, the Commission's Paper takes a balanced view. It says—

> "We broadly commend the approach to offence construction in this field, and the way in which it has been related to the regulatory element. On this approach, an Act creates an offence ladder."[38]

It also says "the introduction of the more serious offence casts serious doubt on the value of continuing with the less serious one … not simply because there is already a range of non-criminal regulatory steps that the authorities can take [but] also because there may be scope in this area for the introduction of formal [civil measures]."[39]

I believe that there is nothing wrong in principle with prosecution and that those dealing with welfare and enforcement on the ground probably have a better insight as to what is appropriate in a particular case. The need to have clear procedures and mechanisms to try to solve problems before recourse to the criminal law is important. There must be coherent and consistent policies across the country and work by co-ordinating bodies to encourage a uniform approach at local levels to avoid "the risk of widely varying justice in different areas". At the same time, local inter-agency cooperation in problem-solving for public agencies and partners should also take account of differing local circumstances. The criminal offences themselves should require an appropriate level of fault, with punishment related to fault and potential harm.

The Law Commission's crime team bury an important statement of principle for legislators on page 13 of the summary paper:

> "The creation of a criminal offence should be regarded as a law-creating step of great (arguably, of something approaching constitutional) significance. That significance can only

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36 Para. 1.47.

37 See the full discussion in full Consultation Paper 'Context 1: truancy and the *Education Act 1996*' paras. 3.53 – 3.71. Section 444(1) provides that the parent commits an offence if a school-age child who is a registered pupil fails to attend regularly at school. A more serious offence was added in 2000, 444(1A). The new offence is committed if "the parent knew that the child was not attending school regularly but failed without reasonable justification to cause the child to do so." (Para. 3.61).

38 Para. 3.70.

39 At para. 3.66.

> adequately be reflected in a commitment to create criminal offences in primary legislation (statutes)."[40]

Their Proposal 8 is that "Criminal offences should be created and (other than in relation to minor details) amended only through primary legislation." This would presumably assist legislative counsel by reducing the need for some secondary legislation. The adoption of this approach would reflect the urging of Andrew Ashworth and show a commitment to act on the well-intentioned and coherent answer of Lord Williams of Mostyn (then a Home Office Minister) to Liberal Democrat peer Lord Dholakia early on in the British Labour Government.[41]

> "In considering whether new offences should be created, factors taken into account include whether—
>
> - the behaviour in question is sufficiently serious to warrant intervention by the criminal law;
> - the mischief could be dealt with under existing legislation or by using other remedies;
> - the proposed offence is enforceable in practice;
> - the proposed offence is tightly-drawn and legally sound; and
> - the proposed penalty is commensurate with the seriousness of the offence.
>
> The Government also takes into account the need to ensure, as far as practicable, that there is consistency across the sentencing framework." This principle seemed to have been followed only rarely during the succeeding 10 years.

While the debate and references in this article are about the position in the UK, I would argue that this is a fourth principle from this English and Welsh Consultation Paper that could have much wider relevance for other countries with legal systems based on both freedom and the rule of law. It may assist legislators to concentrate on what is and what is not important in a penal statute, and give breathing space to resist populist proposals by considering whether or not they will make good law.[42]

With lofty aims the Commission's Paper tries to ensure fairness by recommending that court action not be restricted in challenging the new civil penalties suggested.

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[40] Para. 1.49. See also discussion of this issue in 'editor's notes' *The Loophole* August (2010), pp. 4 – 6 (Journal of the Commonwealth Association of Legislative Counsel), including discussion of views by Irish broadcaster, Vincent Browne, law lecturer Tom O'Malley (NUI Galway), and then Lord Chief Justice of England and Wales, Lord Judge.

[41] Andrew Ashworth, 'Is the Criminal Law a Lost Cause?' (2000) 116 Law Quarterly Review 225; question by Navnit Dholakia at HL Debs Vol. 602, Col. WA58, 18 June 1999 brought to my attention by Janet Dine & James Gobert *Cases & Materials on Criminal Law* 4 ed., (OUP, Oxford, 2003) p. 5, themselves citing Ashworth.

[42] The issue of criminalisation is discussed in the introductory chapters of very many good criminal law textbooks and case books. Some of the best arguments and sources are summarised in Jonathan Herring *Criminal Law: Texts, Cases, and Materials*, 4 ed. (OUP, Oxford, 2008), chap. 1 'An Introduction to Criminal Law'.

> "A regulatory scheme that makes provision for the imposition of any civil penalty, or equivalent measure, must also provide for unfettered recourse to the courts to challenge the imposition of that measure, by way of re-hearing or appeal on a point of law."[43]

This could lead to bureaucratic and costly delay. This system might mean justice for large firms that can afford specialist lawyers, not for small ones. Challenge by way of a hearing of the allegation that was made subject to the penalty etc. would appear to be the reasonable way forward. This is not a rehearing but, instead, a recipient choosing, rather than accepting a civil penalty, to face a court with potential criminal consequences. An appeal on a point of law or judicial review if appropriate always remain options, but these should be exceptional, not the norm. At the same time the safeguards suggested above will be more important in practice if a comparison is accurately made with natural persons and PNDs. Natural persons almost never challenge receipt of a PND from a police officer. Therefore safeguards are vitally important (but hardly exist) at the stage at which a PND is given. Perhaps businesses will be more likely to challenge a civil measure imposed by a regulator, given possible financial or other adverse implications, such as poor publicity.

Along with Proposal 7, perhaps the reason for these overt statements of reliance on the court system is the Commission making plain that it is not proposing a civil system of penalties that will restrict free access to the courts; it is seeking to head off criticism in advance with these recommendations. The label of a penalty as 'civil' (or regulatory or administrative) and not 'criminal' will not, of course, prevent the application of European Convention on Human Rights (ECHR) requirements for a fair trial if the substance is that the penalty is a criminal one. Under Article 6 the European Court of Human Rights will consider the substance of a measure as to whether it is classed as criminal law (requiring more safeguards) or civil law, regardless of how domestic law says it is categorised.[44]

In setting out *General principles [on] fault in offences supporting a regulatory structure*, we can see stepping stones for what legislation should include, and most of them are welcomed by this commentator. These include—

> 'Fault elements in criminal offences that are concerned with unjustified risk-taking should be proportionate' (Proposal 10)
>
> 'In relation to wrongdoing bearing on the simple provision of (or failure to provide) information, individuals should not be subject to criminal proceedings—even if they may still face civil penalties—unless their wrongdoing was knowing or reckless' (Proposal 11).

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[43] Proposal 9, para. 1.50.

[44] App. No. 5100/71 *Engel v Netherlands* (1996) 1 EHRR 647. Davies has discussed this in analysing EU competition law as criminal law enforcement, *loc. cit.*, chap. 'Criminal Law Enforcement and the Community Pillar', pp. 152-153. See *Stennuit v France* (1992) 14 EHRR 509 on French competition law amounting to a criminal charge, *Garyfallou AEBE v Greece* (1999) 28 EHRR and *Schmautzer v Austria* (1996) 21 EHRR 511 confirming that labelling a provision as administrative does not automatically prevent it from being considered a criminal charge. This is analysed extensively by Arianna Andreangeli *EU Competition Enforcement and Human Rights* (Edward Elgar, Cheltenham, 2008).

Proposal 10 should also be adopted as a general principle across the law, not just for this area. My interpretation of what the Commission is saying about the justification for this is, the greater the harm the less fault (*mens rea*) that is required. The Commission says (para. 1.54) that criminalisation of remote harm with an appropriate fault element can be justified. This is not necessarily simple. Does the Commission mean that a low level of fault can be required if the risk is of serious harm (albeit remote) because of the potential damage of the consequences, or that it is proportionate to penalise the actor only if the risk of the result is serious? If someone takes a risk of serious harm occurring, albeit a remote risk, it appears reasonable to penalise them under the criminal law if there is no good reason for taking that risk.

The Consultation Paper's concern in Proposal 11 "is with the simple provision of the wrong or incomplete information, and so forth, to a regulatory agency."[45] Its argument at the end of para. 1.56 is particularly compelling:

> "Businesses and others who faithfully seek to comply with regulatory requirements to provide information should not be penalised by the criminal law simply because they fall short of the precise requirements."

Again, I would extend this principle to cover other areas, not only business's dealings with regulators. There is no reason why the same principle should not apply generally. However, the Commission's Paper makes clear that those who deliberately or knowingly mislead could be liable to prosecution under the *Fraud Act 2006*.

Under these proposals, the travel agent in *Wings v Ellis Ltd*[46] would now not be prosecuted, for a false description under the *Trade Descriptions Act 1968* when supplying a travel brochure with false information in that it thought it had corrected. Although there is today a defence in the current provisions, and the trader would also now have a defence under the Commission's default 'due diligence' defence recommendation (below), this solution is clearer.[47] It is a more principled solution that a trader who had made an accidental mistake should not have been exposed to potential criminal liability in the first place. This proposal would achieve that. In my initial reading and my response to the consultation I thought the provision was intended to be narrower; no offence would be committed if the trader had not been negligent. In fact, Proposal 11 would itself put into practice the restriction that criminal offences be reserved for serious wrongdoing and therefore even a negligent mistake may not lead to criminal liability (but could lead to a civil penalty, which arguably would provide adequate protection for consumers). Consequently, a person who was negligent, although not liable for a criminal offence, could be liable for a civil penalty. As an aside we can ask: 'Does *mens rea* in this context include constructive knowledge,

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45 Note 32.

46 [1985] AC 272, HL.

47 The Consumer Protection from Unfair Trading Regulations 2008 replaced most of the Trade Descriptions Act 1968 in May 2008. See advice leaflets 'Accurately describing goods and services' and 'A guide to the Consumer Protection from Unfair Trading Regulations 2008' Gloucestershire County Council March 2010 and July 2009 respectively, accessed via the website of the Trading Standards Institute 29/12/2010 <http://www.tradingstandards.gov.uk/cgi-bin/glos/bus1item.cgi?file=*BADV670-1111.txt> See also full Consultation Paper p. 50 – 51.

'wilful blindness' 'closing his mind' and other similar formulations? I do not agree that these are the same as knowledge or are the equivalent of recklessness but *Smith & Hogan*, Ashworth[48] and many others take the contrary view.[49] Although the Law Commission does not express a view on this, neither does it dissent from the general consensus.

Paragraph 1.57 highlights the blameworthiness of businesses that give untrue or misleading information. In effect, they gain an unfair advantage over those businesses that try in good faith to give honest information. As a matter of drafting, any requirement to provide information should be framed as a direct duty on the business to avoid management being able to escape liability by blaming a junior employee. This meshes with the broader discussion on the forms of business liability below.

Doctrines of criminal liability applicable to businesses

In the regulatory context, the Commission considers the appropriateness for the 21st century of legal doctrines created piecemeal during previous centuries. There is much political and popular support for small businesses which are a significant element of countries' economies and provide a very large proportion of the jobs.[50] Therefore the Commission's evaluation of "whether or not particular doctrines of liability applicable to businesses are unfair to [them], and in particular, whether or not they are unfair to small businesses" is both topical and economically important.[51] Jeremy Horder has highlighted that strong support for strict liability against businesses is often based on the image of 'big corporations' and ignores the different situation of small businesses.[52]

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48 *Smith & Hogan Criminal Law, Cases and Materials* 6th ed. (Butterworths, London, 1996) 117, Ashworth *Principles of Criminal Law* (5th ed 2006), p. 191 cited by the full Consultation Paper at p. 191.

49 Sir John Laws doubts whether the 'ought to know' category is sufficient: "It may be doubted whether the condition of a person who merely belongs to the common law's comfort zone, where all that can be said is that he *ought to know* the likely consequence of his act, can really pass muster as a mental state. Does not the very idea of a mental state imply the presence of *consciousness*?" Lord Justice Laws 'Mental States and the Law', lecture at the Royal Society of Medicine, 25 May 2010, para. 40. See also paras. 13, 19. (Link courtesy of the Inner Temple website as at 19/10/2010).

50 For example *The path to strong, sustainable and balanced growth*, HM Treasury & Department for Business, Innovation and Skills, November 2011. "The UK's 4.8 million small and medium-sized enterprises (SMEs) are vital to the economy. They provide 60 per cent of private sector jobs and account for half of all private sector turnover. The Government is committed to ensuring that the UK has an environment where it is easier for new companies and innovations to flourish and where people who aspire to be entrepreneurs are encouraged." Para. 1.6, see also para. 1.7. In the US "small firms ... account for about 41% of total employment" 'The perils of being small: New data confirm that small firms are dragging on the job market' *The Economist*, 11 May 2010 viewed online 17/01/2011 at: <http://www.economist.com/realarticleid.cfm?redirect_id=16113306>

51 John Anderson has noted that in Denmark there are less onerous health and safety requirements for small businesses and more rigorous ones for big companies, draft LL.M by research, dissertation, above, p. 61.

52 J. Horder 'Strict liability, statutory construction, and the spirit of liberty' (2002) 118 LQR 458 at pp. 472 – 5.

Much needed clarity is recommended in laws spelling out the basis of fault for companies.

> "Legislation should include specific provisions in criminal offences to indicate the basis on which companies may be found liable" (proposal 13).[53]

Legislative counsel may need to give direct advice to ensure that the legislation is in fact suitably clear with specific wording.

Paras. 1.64 and 1.65 set out a very clear and compelling short critique of the identification principle. "This doctrine requires a controlling officer of the company him or herself to be proved to have had the fault element of the offence" before the company can be found liable.[54] A key problem with the 'identification principle' is that the controlling mind and will of a company are said to be the directors, but large companies delegate management to subordinates. Consequently, a problem of fairness arises involving discrimination against small companies. Because, according to Simester & Sullivan, boards of large companies do not in most cases have 'hands on' management of the business,[55] serious defects in procedures can occur without any individual being at fault in terms of specifically being at least reckless. The identification principle transfers the *mens rea* doctrine of personal liability to the corporate body with an analysis of the conduct of the corporate entity as a whole, but without considering the totality of blameworthiness.[56] There is no 'aggregation' principle in common law, by which I mean that if several managers or directors of a company were at fault to some extent that the blameworthiness of each of them could be added together to form the total *mens rea* for the offence (irrespective of whether each of them individually had sufficient *mens rea).* A director, individually, has to have the *mens rea* for the offence.[57] Therefore, for the emotive crime of manslaughter, for example, there have been successful prosecutions only against small companies. While the law has been reformed for corporate manslaughter by the British Labour Government in 2007, the difficulties in principle remain in establishing liability for all other offences.[58]

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53 I have recommended that this be done generally in relation to whether liability is strict or not, (K. Reid, 2008, p. 188, discussed further below.

54 Para. 1.63. This writer has lectured regularly and written about the flaws of the identification principle but will adopt this summary from now on. See also the concluding point made at the end of para. 1.66 (although there is no empirical evidence for the specific concern in the paragraph).

55 Simester & Sullivan, as cited by Zhou, below. The legal problem is best illustrated by *A-G's Reference (No. 2 of 1999)* [2000] 3 All ER 182, CA, the Southall rail crash case.

56 The basis of this passage is adapted from Xuanyu Zhou LL.M dissertation 'Shaping corporate manslaughter liability: a hard and unfinished task', Sept. 2010.

57 See further Smith & Hogan *Criminal Law* 8th ed. (Butterworths, London, 1996) p. 189. The same principle applies in Scotland: Pamela Ferguson 'Corporate culpable homicide' (2004) *Scots Law Times* 97 at p. 101.

58 *Corporate Manslaughter and Corporate Homicide Act 2007:* As of December 2010 there have not yet been any successful prosecutions. While prosecutions for corporate manslaughter will be rare, the use of imprisonment for health and safety offences has potentially been extended. Under the Health and Safety Offences Act 2008 nearly all offences under the Health and Safety at Work Act can, in serious cases, be dealt with by up to 12 months' imprisonment. This may render health and safety law more of a deterrent.

Careless language appears to creep in with the idea that "the courts should treat the question of how corporate fault may be established as a matter of statutory interpretation". I originally read this proposal as drafted as potentially letting companies 'off the hook'. However I realise that that is not what is intended. The courts would assume under existing doctrine, if a statute was silent, that the identification doctrine applies with all its flaws. Ideally, to avoid this, the basis of liability – or this proposed anti-presumption - needs to be clearly spelt out. This could possibly be included in the Act that would put into place the proposed general defence of due diligence. The suggestions made in the Paper to achieve this are too vague to have the desired effect.[59] A clear statement in legislation is needed or, at the very least, a clear statement by the Minister responsible in Parliament in introducing legislation. This is similar to the point made about ensuring clear statutory words if Parliament creates actual strict liability offences. An argument can be borrowed from Glanville Williams that he deployed talking about omissions:

> "First…, omissions liability should be exceptional, and needs to be adequately justified in each instance. Secondly, when it is imposed this should be done by clear statutory language."[60]

Further parts of Williams' argument about omissions could also be applied by analogy to strict liability: a statutory provision that creates an offence of strict liability should contain a clear statement to this effect, and penalties for such offences should be rethought in each case. The latter point is similar to various arguments by the Commission, in effect that penalty should reflect the level of blameworthiness and harm.

A general defence of due diligence

One of the most far-reaching, simple and persuasive reforms advanced is that the courts should be given a power to apply a due diligence defence to any statutory offence that would otherwise be strict liability (Proposal 14). There would be a reverse burden of proof (the burden of proof would be on the defendant to establish the defence). This idea had previously been proposed by Horder, prior to his becoming the Criminal Law Commissioner responsible for this paper.[61] This "would make the law more principled. In effect it would make negligence the default *mens rea* requirement in English law." (Reid, *ibid.*). This should be clearly put in statute. The detail of how to frame the defence is a little trickier and the paper discusses technicalities that may be of more interest to CALC members than to the general reader.

The proposal would modernise and rationalise the law and help provide consistency.[62] The criminal law team highlight that modern statutes usually include a due diligence defence but that

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59 At para. 1.67: the court should look at the underlying purpose of the statute to decide "on the right basis on which to hold companies liable for offences committed relating to that scheme".

60 Glanville Williams, 'Criminal Omissions – The Conventional View' (1991) 107 *Law Quarterly Review* 86. Thank you to the City University London criminal law team for this quotation.

61 See reference to Horder and discussion at K. Reid (2008) p. 180.

62 Para. 1.77, see reasoning in paras. 1.75 – 1.76. On the form of the defence, proposal 15 questions 1 and 2, see below. For the current law in Ireland see Marc Coen 'Whither strict liability' (2007) 25 Irish Law Times 77.

there are a large number of statutes created before this policy became common. Clarkson & Keating highlight that steps ameliorating the harshness of strict liability were developed in both Canada and Australia, some similar to those proposed for England and Wales.[63] The Commission criticises the common law presumption in favour of *mens rea* if a statute is silent (the presumption of fault). This is misplaced. There is nothing wrong with the presumption of fault *per se*, what is wrong is that it is inconsistently applied and lacks objective criteria. "The presumption thus adds persistent uncertainty to the process of interpreting the scope of criminal offences".[64] Therefore the wording of statutes about fault should be clearer, as it suggests. The examples in the full Consultation Paper of when the courts have interpreted some cases as strict liability and others as not illustrate the inconsistency very clearly. The Commission incisively illustrates the absurd nature of the distinction drawn between 'true crime' and 'merely regulatory' offences. It does this by using examples of well known cases to highlight the illogical nature of the accepted distinction between offences requiring *mens rea* and those where strict liability may be appropriate.

> "We suggest that there is in fact nothing in principle to distinguish these cases. It does not seem likely that what drives the distinctions the courts have drawn between 'true' crime and 'regulatory' crime has been some intrinsic factor present in one but absent in the other."[65]

Although in my work I have called for clear statements about whether strict liability should be applied or not (the default to be generally not) and have critiqued the 'true crime' distinction, I did not myself articulate this point that the authors make obvious of the inconsistency in criteria and application (except in relation to the extreme example of liability for individuals in drug possession cases).[66]

The consultation authors are alert to the risk of management being able to escape liability by blaming a junior employee, in relation to the due diligence defence proposed.[67] Their solution, that the courts have a discretion not to apply the due diligence defence, risks creating just as much uncertainty.

> "... the concern is that the company may officially tell managers not to enter into prohibited restrictive agreements and they might yet have an unofficial policy of turning a blind eye to such practices." (Para. 6.85)

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63 See C. Clarkson & H. Keating, *Criminal Law: Text and Materials*, 5th ed., (Sweet & Maxwell, London, 2003) p. 235, 246. Their conclusions foreshadow several of the Law Commission's recommendations (at p. 246). The discussion and sources cited throughout the second half of their section on strict liability are useful background to the debate (found in 5th ed. pp. 232-246).

64 Para. 1.72.

65 Full Consultation Paper, para. 3.50.

66 K. Reid (2008), at 185. Reed, Fitzpatrick & Seago comment "it is extremely unlikely that the drafters of nineteenth-century legislation had any clear cut views that the use of certain words in statutes would lead the courts to impose strict liability." *Criminal Law* 4th ed. (Sweet & Maxwell, 2006) p. 86.

67 They show this using discussion based on the case of *Director General of Fair Trading v Pioneer Concrete (UK) Ltd* [1995] 1 AC 456, see full Consultation Paper paras. 6.81-6.85.

In such situations "the case for a defence of due diligence in all the circumstances would be weak because it would undermine the protection the relevant legislation gives to the public from restrictive trade practices." (Para. 6.84)

Even if it is "too difficult in practice for any company to police the conduct of local managers with a view to ensuring that offences concerned with restrictive trade practices were not committed" this is surely a matter that the court can evaluate as a question of fact in distinguishing genuine from dishonest cases and give a defence if all reasonable precautions have in fact been taken. The courts would presumably take a commonsense view on the facts.

It is assumed that courts could invoke the defence where they felt that imposing strict liability would not help to achieve the purpose of the statute. However, on grounds of fairness, it surely would have to apply to a particular statute or not – rather than apply to a defendant in one case but not another. There could of course be more complex arguments about different interpretations in different sections of legislation as in the well known *Licensing Act 1872* cases.[68] The Law Commission would leave it to the court to decide taking account of the statutory context.

Some argument may be clear to those who deal with this type of criminal law every day or those who deal with the precise meaning of words. Proposal 15 is that "the defence of due diligence should take the form of showing that due diligence was exercised in all the circumstances to avoid the commission of the offence." The authors explain by contrast that modern statutes—

> "... commonly have a narrower version of it, less favourable to the defendant, a defence of having taken *all* reasonable precautions and having exercised *all* due diligence to avoid commission of the offence. We believe that this is somewhat stricter than is really necessary". (Para. 1.79).
>
> Is this really different? I defer to experts on these areas of law, but can see little difference myself. The two alternative formulations sound the same. If one has taken some reasonable steps but not others, would a court really conclude that the defendant has taken reasonable steps when some reasonable steps were not taken? If you have taken steps that are due diligence, how is all due diligence different? If one must take *every* step, is that not unreasonable? Or might it be the case that some steps are more reasonable than others and therefore interpretations of all reasonable precautions will vary, even for the stricter defence? Maybe relevant case law could be supplied to explain the difference.[69]

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[68] The cases of *Sherras v De Rutzen* [1895] 1 QB 918, and *Cundy* v *Le Cocq* (1884) 13 QBD 207 are famously contrasted. The full Consultation Paper notes this issue at para. 6.14, and discusses the former case. *Sherras* is on s. 16(2) supplying liquor to a police constable on duty, *Cundy* is on s 13, unlawfully selling liquor to a drunken person.

[69] There is discussion in the full Consultation Paper at pp. 116 – 30 including examples from Australia and Canada. Important cases on a similar concept, 'reasonably practicable' in the health and safety context are: *Commission of the European Communities v United Kingdom* (C-127/05) ECJ (Third Chamber), [2007] 3 CMLR 20 (14 June 2007) and *R v Chargot Limited (t/a Contract Services)* [2008] UKHL 73. The latter is noted by Celia Wells at C.49. I am grateful to Professor Frank Wright for these references.

The Consultation Paper asks whether for some statutes Parliament should prevent or restrict the application of the defence (Question 2). This respondent specifically agrees with an exclusion in relation to road traffic offences, the example given in the Paper (para. 1.80). Too many people who break the law, and too many immoral lawyers, waste too much time with legally spurious defences in such cases as it is.[70] Lord Hoffman was recently scathing about the human rights bandwagon in a different context: "This case is another example of the regrettable tendency to try to convert the whole system of justice into questions of human rights."[71] Clarity in the law may help prevent unmeritorious appeals.[72] For new statutes it should clearly state in the text if the defence is *not* to apply. For completeness a criminal statute should either clearly set out the fault required, or specify whether a due diligence defence will apply, or specify if any offence created is strict liability if that is what is required by the legislature.

In responding to the consultation paper I put forward contradictory views, that the due diligence defence "should be clearly put in statute. This would modernise and rationalise the law" (as stated above) but subsequently "that the proposal to introduce a general due diligence defence should not abolish or replace the presumption of fault required except for business liability in the contexts of this report." This confusion on my part reflects overlapping issues of principle. For the avoidance of doubt, for penal statutes involving 'general' individual criminal liability the presumption should definitely apply.[73] Where there is a risk of imprisonment, mens rea[74] should be required unless Parliament has clearly specified otherwise. The Law Commission's proposal would apply largely to offences aimed at companies so this concern is likely to be rhetorical in relation to the proposals under consideration. At the same time, there is no reason why Parliament could not improve the law generally by enacting that such a defence would apply in other statutes generally where the statute is silent on *mens rea*. If the statute would not require mens rea a due diligence defence would be available. That could give a defence to an individual who tried to avoid committing a crime, but ensure others could not escape liability for minor offences by their own inadvertence. Such defences by no means ensure that only those who are blameworthy are convicted – they seem seldom to succeed in relation to drugs, public order or knife crime offences. However that may be because magistrates or juries simply do not believe defendants' stories of innocent reasons for possession, allegedly violent behaviour etc. and therefore reject the defence.

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70 Specifically, regarding a speeding driver, *O'Halloran v United Kingdom* (2008) 46 EHRR 21 summarised by the *Times Law Report*: 'Compulsion to identify driver does not prejudice right to fair trial' *The Times* 13/07/2007.

71 *R v G* [2008] UKHL 37 at para. 10. In this case the Law Lords threw out a challenge on behalf of a 15 year old boy to conviction of an underage sex offence.

72 By contrast in *Bulale v Secretary of State for the Home Department* [2008] EWCA Civ 806 Waller LJ praised a barrister for assisting *pro bono* with a test case while using human rights language to reject an appeal against deportation by a foreign criminal due to the necessity to protect society from his propensity to commit robbery.

73 A recent significant example is *Crown Prosecution Service v M and B* [2009] EWCA Crim 2615 regarding the Prison Act 1952. I am grateful to junior counsel for Ian Boyes for discussing this case with me. See also the arguments at K. Reid (*supra*) p. 193.

74 I .e. intention, recklessness or knowledge.

The final part of the Paper considers "the basis on which directors can be made individually liable for offences committed by their businesses".[75] Specifically the 'consent and connivance' doctrine is discussed. In certain circumstances "individual directors ... can themselves be liable for an offence committed by their company, on the basis that they consented or connived at the company's commission of that offence" (para. 1.82). It is proposed "instances in which the company's offence is attributable to neglect on the part of an individual director" should be excluded. While the type of offence is outside this writer's knowledge, some obvious questions come to mind that are put forward here.

Perhaps personal liability for negligence could act as a deterrent to offences being committed by companies if directors *know* about the existence of the type of offences. I do not like gross negligence as a concept as it is vague and ill defined, but if such offences were created then perhaps gross negligence as clarified by *Misra*[76] could work as the fault element rather than simple negligence? This would set the bar at a higher standard before criminal liability could be imposed. It is possible though that negligence itself is a clearer concept for courts to work with and sets the level for liability at an appropriate point where thought necessary. The Commission asks whether specific 'negligently failing to prevent' an offence by the company liability might be created instead (Question 3). This would be more principled (more clearly labelling the fault) and clearer overall but it may be difficult to decide when such offences should be created. My view is that such offences should not be the norm. They should be used only for specific problems and if the potential harm is serious enough; perhaps health and safety infringements, fraud, money laundering or (though not relevant for this consultation) complicity in violence. However, the underlying aim, which is to drive up standards of management and conduct in businesses, is laudable.

The Law Commission finally turns "to what we regard as an antiquated doctrine: the so-called doctrine of delegation." It summarises the delegation principle as follows:

> "where the running of a business is delegated from X to Y, X still remains liable to be convicted of an offence committed, in relation to the running of the business, by Y."[77]

It proposes abolition and replacement "by an offence of failing to prevent an offence being committed by someone to whom the running of the business had been delegated" (Question 4). The proposed solution is a more principled approach, and here, unlike the above, it is much more reasonable: that the owner or operator be liable on a negligence basis. They have, after all, deliberately chosen to delegate running the business and taken the risk of harm being caused by that decision. The penalty should be able to reflect serious cases that are more akin to complicity or wilful blindness, although these may already be covered by the Proposals or the scope of the existing law. The reasoning put forward for this proposed offence is persuasive and reflects a key aim of the law reformers in this Paper – to make the law more coherent and more rational.

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75 Para. 1.81. In full Consultation Paper, Part 7: Businesses and Criminal Liability.

76 [2005] Crim LR 234, CA, 'clarifying' the circular and unclear test set out by the House of Lords in *Adomako* [1995] 1 AC 171.

77 Para. 1.88. They give an absurd example of potential liability in para. 1.89.

> "It would be possible to focus on whether the original owner of the business (X) failed to prevent the offence being committed by the person to whom it was delegated (Y). A conviction for this separate offence would perhaps more fairly represent what X has done wrong than individual liability for the offence itself."[78]

Presumably the evaluation of this would include a regulator and perhaps a court considering what steps were taken by the original owner to prevent offences being committed, and whether they had actual knowledge or suspicion that they should have acted on.

Conclusion

I have elsewhere argued in favour of the following reform ideas, the first and last of which are discussed in detail in the full Consultation Paper: use of reverse onus clauses (similar to the types of liability discussed above); use of constructive liability; use of civil administrative penalties.

I argue that:

> "Parliament [should] clearly set out when strict liability was to be used for serious crimes and, in matters where the public interest can be achieved without the criminal sanction, to set out an alternative regulatory or administrative system, similar to the situation in France or Germany."[79]

The authors of this Paper highlight difficulties with this "generating as many problems as it solves".[80] I disagree with one specifically, their claim that the application of the ECHR would be problematic. ECHR fair trial rights in no way limit the use of strict liability or of administrative codes, as long as there are appropriate procedural safeguards in place.[81] For example, their use causes no 'human rights' difficulties in France.[82] I put that difference aside here. The due

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78 Para. 1.90. Curiously the principle of "extensive construction" (where the servant's act is regarded in law as that of the master) – well covered by *Smith & Hogan*, David Ormerod, 11 ed. p. 180-1 – is not mentioned. May it not be relevant to this area? However if the same principles were applied it may be too easy for the owner/manager of a business to avoid liability by absenting themselves from premises and simply leaving instructions to comply with the rules.

79 K. Reid 2008, pp 188-91. Another example of use of the latter is the Administrative Code in Moldova where, by chance, much of this article was written, November 2010.

80 Full Consultation Paper para. 3.28. See paras. 3.28 – 30 for their arguments. Colin Scott's analysis of the law in Ireland is that "we may see further use of administrative penalties within regulatory regimes" but "whatever may happen with the development of administrative penalties we are likely to be stuck with the presence of a range of serious strict liability offences, policed by specialized agencies." 'Regulatory Crime: History, Functions, Problems, Solutions' (July 14, 2009). University College Dublin Law Research Paper No. 13/2009. Available at SSRN: http://ssrn.com/abstract=1433817 Accessed 10/02/2011.

81 A point explored more fully, using the example of young people and sexual offences, in K. Reid (2009) 'Strict Liability, Young People and the Sexual Offences Act 2003' Web Journal of Current Legal Issues issue 4, see '*R* v *G*: the Legal Arguments'. http://webjcli.ncl.ac.uk/2009/issue4/reid4.html viewed at 09/01/2011.

82 J. R. Spencer & M-A Brajeux 'Criminal liability for negligence: a lesson from across the Channel?' (2010) 59 ICLQ 1.

diligence defence put forward would certainly ensure compliance with required safeguards in appropriate cases.

Overall the Law Commission proposals are very welcome and I agree in general with the principles expressed and specifically with nearly every suggestion. The general aims that the burden on business should be reduced; the law made more effective; the law be rationalised; and that small and medium sized businesses face a reduced administrative burden where appropriate appear to be shared by the previous Government, the new one, and the Law Commission. This paper takes an innovative approach to the problem but arguably could go further in some respects. While specifically outside the scope of the consultation, the same principles should form a basis for the body's future criminal law work. The quote from para. 2.24 of the full Consultation Paper, below, illustrates that the links are equally obvious to the Commission team. After, as I would hope, these Law Commission proposals are implemented, the Government should ask the Commission to prepare a similar report on the over-use of criminal law against natural persons.[83] Better enforcement of the law is needed, not more law. Similar principles should be developed for non-business liability as well. I said at the outset that it is impossible to disagree with the argument that "the introduction of rationality and principle into the creation of criminal offences" is vitally important. The Commission itself recognises this in its 'Conclusion on public interest offences' (reproduced in full below due to its importance to the argument advanced in this article).[84] That must apply to both regulatory and general criminal law. The implementation of some rational and consistent principles would surely help legislative counsel also. Writing a hundred years ago, Frederick Pollock commented—

> "Both the matter and the form of legislation depend on the will of the legislator, and in almost all English-speaking communities legislative power has been exercised by assemblies which cannot well be learned as a whole, and which may or may not be disposed to take the advice of competent persons as to the workmanship of their productions."[85]

While for many issues in this article I would apply the same principles to natural persons, I would not do so in relation to the Commission's Proposal 3. That is because of the high degree of nuisance and detriment to people's quality of life caused by low level harm. I agree with the Commission that "Criminal sanctions should only be used to tackle serious wrongdoing" in the business-related areas covered but (and the Commission does not argue this) it cannot be inferred

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83 This could complement the present UK Conservative and Liberal Democrat Coalition Government's policy of a Freedom (Great Repeal) Bill to restore civil liberties. See 'Queen unveils coalition programme' BBC news online 25 May 2010.

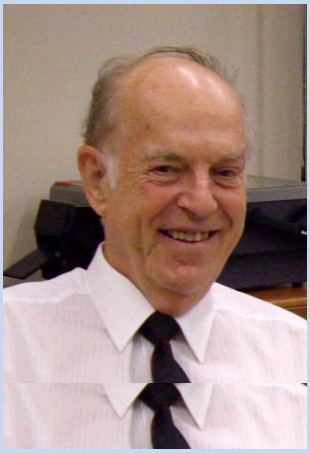
84 Full Consultation Paper, para. 2.24 "Public interest offences are not our main concern in this CP. However, it should be obvious that many of the issues we discuss are of equal relevance to such offences. That is important, given the overlap in many areas between such offences and a regulatory domain. For example, there may be just as strong a reason to have fault elements, or a due diligence defence, in a public interest offence as there is to have such elements in an offence that directly supports a regulatory scheme. Similarly, there may be just as much reason to adopt a civil penalty approach to wrongdoing in the public interest sphere as in the regulatory sphere."

85 *A First Book of Jurisprudence*, (Macmillan, London) here quoted from the 6th ed. (1929), p. 356 – 357. Pollock's chapter VII 'Ancient and Modern Statutes' repays re-reading.

about natural persons that the cost of prosecution, as against any fine levied, should be an overriding concern. Non-criminal penalties can be very useful in dealing with low level problems. Use of intrusive surveillance or anti-terrorist powers (such as the *Regulation of Investigatory Powers Act 1997*, RIPA) may not be appropriate, but people do want councils to tackle dog fouling and dumping of rubbish or benefit fraud. Penalty notices can help the police tackle nuisance behaviour but, with use of police powers, adequate safeguards are needed. My research suggests that the police may be giving penalty notices for disorder when no offence has been committed that could be proved in court. Heavy-handed use of laws (whether RIPA intrusive surveillance, or anti-terrorist stop and search powers) needs to be reined in, as has been promised by the Coalition Government. This returns us to the argument that criminal legislation should be based on principles, and new criminal offences should not be created unless genuinely needed. A little less criminal law might allow for better quality law-making.

Purpose sections: Why they are a good idea for drafters and users

Duncan Berry[1]



Abstract: In this article, I argue that purpose or objects are good for both drafters and users of legislation. They are good for drafters because they provide a basic focus that underpins or should underpin the drafting of the substantive provisions of a proposed Act. Drafters of primary legislation should have them continually in mind as they draft the Bill. They are good for users because they immediately provide them with an indication of the objectives that the Act is designed to achieve. And because legislation is now construed purposively, they provide judges and other interpreters with a clear indication of what the statute is intended to achieve, thus avoiding the need for those interpreters to second guess what the purposes of the statutes might be.

What are purpose sections and what do they do?

In the context of a statute[2], a purpose section[3] is a provision that explicitly states the social, economic or political objective or goal that is sought to be achieved, assuming that the provisions of the statute are implemented by those who are required or authorised to perform that function.

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2 It should be borne in mind that a general purpose section will normally not only govern the statute in which it appears but also all subsidiary legislation made under the authority of the statute.

3 In some jurisdictions, these provisions are called 'objects sections'. For all practical purposes, the terms are interchangeable. For example, a large number of New South Wales statutes have objects sections ("The objects of this Act are ...") but some have purpose sections ("The purposes of this Act are ..."). Despite the convention that when different words are used in a statute, different meanings are intended, I doubt that the use of the different terminology in these cases signifies an intention to convey different meanings.

Thus, a purpose section is about 'ends' and not 'means'. In contrast to a long title of a statute, which says in a succinct way *what* the statute does, a purpose section says *why* the statute has been enacted.

A purpose section of a statute sets the scene for the substantive provisions of the statute by stating what the statute is intended to achieve or to set out the principles or policies that it is designed to implement. Moreover, it illuminates the principles on which the statute is based and facilitates its interpretation, particularly when a provision of the statute is ambiguous or unclear. [4] Thus, a purpose section is not a substantive component of a statute, but an interpretative one.[5]

A purpose section will usually specify the policy objectives of the whole statute. However, in some statutes, particularly those that are of a complex nature or contain a large number of provisions, it is often useful to include a statement declaring the purpose of a particular Part, section or Schedule of the statute. A purpose provision relating to a particular segment of a statute, such as a Part, Division of a Part, or a section has the advantage of being more specifically targeted than a purpose provision covering the whole of the statute. Assuming that a statute contains both a general purpose section and purpose provisions governing particular segments of the statute, it is imperative of course that those provisions should be consistent with the general purpose section. For an example of an objects provision that relates to only a particular segment of an Act, see section 18 of the *Competition Policy Reform (Queensland) Act 1996*, which provides—

"**Object**[6]

18. The object of this Part[7] is to help ensure that the Competition Codes of the participating jurisdictions are administered on a uniform basis, in the same way as if those codes constituted a single law of the Commonwealth.[8]"

A good purpose section will give decision makers (whether they be administrators, law enforcement officers, courts or tribunals) a yardstick to which they may refer in making decisions under the statute concerned. Moreover, by setting out the objectives of the statute, a purpose or objects section will provide them with a context for the whole statute.[9] In at least one New South Wales Act this function of a purpose or objects section has been made explicit. For example, section 6 of the *Motor Accidents Compensation Act 1999* reads as follows:

"6 Interpretation and application of Act by reference to objects

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4 And thus, in the context of interpreting enactments purposively, assists judges in their quest for ascertaining the purpose of an enactment that they are called on to interpret. (R. Sullivan [2008] *Sullivan on the Construction of Statutes* [5 ed.]. LexisNexis Canada: Markham, Ontario, p.388)

5 Sullivan (Op. Cit, p.388)

6 This heading is unhelpful. In my view, it should have specified the Part to which it relates.

7 I.*e.* Part 5—National Administration and Enforcement of Competition Codes.

8 I.e. the Commonwealth of Australia.

9 See *Council of Canadians with Disabilities v. Via Rail Canada Inc* [2007] SCJ 51; 2007 SCR 287.

(1) In the interpretation of a provision of this Act or the regulations, a construction that would promote the objects of this Act or the provision is to be preferred to a construction that would not promote those objects.

(2) In the exercise of a discretion conferred by a provision of this Act or the regulations, the person exercising the discretion must do so in the way that would best promote the objects of this Act or of the provision concerned."

Another important function of purpose sections is to define the limits of discretion conferred by legislation. As Ruth Sullivan has demonstrated[10], this function is evident when a purpose or objects provision provides the focus for a statutory authority or tribunal to perform and exercise its functions and powers. Such a provision may confer powers that can be exercised generally[11] or for a specified purpose that is mentioned in the text of the enactment itself. For example—

"7 Objects of Trust

(1) The objects of the Trust are to propagate knowledge about the natural environment of Australia and to increase that knowledge.

(2) When acting in pursuance of its objects, the Trust shall give particular emphasis to propagating and increasing knowledge in the natural sciences of biology, anthropology and geology."

This function of purpose statements was discussed by L'Hureaux-Dube J in *Canadian Assn of Industrial, Mechanical and Allied Workers Local 14 v. Paccar of Can Ltd.*[12] The issue in this case was whether the Labor Relations Board of British Columbia had exceeded its jurisdiction under the provincial Labour Code. Section 27(1) of the Code contained a purpose section that required the Board to perform its powers and duties "so as to develop effective industrial relations" having regard to a number of specific purposes and objects set out in the section. The Judge found that because the Board had ignored the goals of its mandate as set out in its purpose clause, it had reached a patently unreasonable solution and so exceeded its jurisdiction.

The basis for purposes and objects provisions is to be found in the common law. In *Padfield v Minister of Agriculture, Fisheries and Food*, Lord Reid explained why the fundamental objects of the enabling legislation restrict the delegation of discretionary powers. In the course of his judgment in that case, he said—

> "... Parliament must have conferred the discretion with the intention that it should be used to promote the policies and objects of the Act; the policy and objects must be determined by construing the Act as a whole and construction is always a matter of law for the Court. ...".

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10 Sullivan (Op. cit. p. 388)

11 E.g. "For the purposes of this Act …".

12 [1989] SCJ No. 107: [1989] 2 SCR 983 (SCC).

Effect of purpose sections

A purpose provision is usually to be found near the beginning of the statute or at the beginning of the relevant Part, Division or section.[13] Some purpose sections are explicit and begin "The purposes [*or* the objects] of this Act are ..." or "The following principles are to be applied in interpreting this Act". In contrast to a preamble to a statute, a purpose section is invariably located after the enacting clause and so forms part of what is enacted as law. This means that that a purpose section has legislative effect. However, as Ruth Sullivan demonstrates, purpose and objects sections, as is the case with definitions and application provisions, "do not apply directly to facts but rather give direction on how the substantive provisions of the legislation are to be interpreted and applied."[14]

Extent to which purpose sections are used in different countries

Purpose or objects sections are now quite common in modern Australian statutes. All Victorian principal Acts begin with a purpose section. Most recent South Australian principal Acts have 'objects' sections and a substantial proportion of recent Queensland and Western Australian principal Acts also have contain 'objects' sections. Many recent New South Wales principal Acts contain either 'objects' or 'purpose' sections, with the former significantly outnumbering the latter.

The following is a sample of Australian statutes containing 'objects' or 'purpose' sections:[15]

Commonwealth of Australia Acts

- *Australian Insurance and Investment Commission Act 2001*, section 1
- *Competition and Consumer Protection Act 2010*, section 2
- *Indigenous Education (Supplementary Assistance) Act 1989*, section 7
- *Australian National Training Authority Act 1992*, section 3

New South Wales Acts

- *Anti-Discrimination Act 1977*, section 122C
- *Aboriginal Housing Act 1998*, section 3
- *Aboriginal Land Act 1989*, section 3
- *Administrative Decisions Tribunal Act 1997*, section 3
- *Agricultural Livestock (Disease Control Funding) Act 1998*, section 10 (Purpose of industry fund)

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13 See the examples listed above. Most of the purpose or objects sections are the first, second or third section of the Acts listed.

14 Sullivan (Op. Cit., p. 388).

15 In giving these examples, I make no judgment as to how useful or effective they have been. Except as specifically mentioned, all of the sections cited state the purposes or objects of the Act as a whole.

- *Agricultural Tenancies Act 1990*, section 3
- *Architects Act 2003*, section 3
- *Assisted Reproductive Technology Act 2007*, section 3
- *Associations Incorporation Act 2009*, section 3
- *Australian Jockey Club Act 2008*, section 3
- *Australian Museum Trust Act 1975*, section 7 (Object of Trust)
- *Bank Integration Act 1992*, section 3
- *Births, Deaths and Marriages Registration Act 1995*, section 3
- *Botany Bay National Park (Helicopter Base Relocation) Act 2004*, section 3
- *Business Licences Act 1990*, section 4
- *Casino Control Act 1992*, section 4A (Primary objects of Act)
- *Catchment Management Authorities Act 2003*, section 3
- *Centenary Institute of Cancer Medicine and Cell Biology Act 1985*, section 5 (Objects of the Institute)
- *Central Coast Water Corporation Act 2006*, section 5 (Principal objectives of the Corporation)
- *Charitable Fundraising Act 1991*, section 3
- *Child Protection (International Measures) Act 2006*, section 3
- *Consumer, Trader and Tenancy Tribunal Act 2001*, section 3
- *Motor Accidents Compensation Act 1999*, section 5
- *Police Integrity Commission Act 1996*, section 3

Queensland Acts

- *Native Title (Queensland) Act 1993* (which interestingly not only specifies the objects of that Act but also recites those of the corresponding Federal statute.)
- *Victims of Crime Assistance Act 2009*, section 3
- *Whistleblowers Protection Act 1994*, section 3
- *Workplace Health and Safety Act 1995*, section 7

South Australian Acts

- *Workers Rehabilitation and Compensation Act 1986*, section 2
- *Professional Standards Act 2004*, section 3

- *Petroleum and Geothermal Energy Act 2000*, section 3

Victoria Acts

- *Coroners Act 2008*, section 1
- *Bus Safety Act 2009*, section 1
- *Public Sector Employment (Award Entitlements) Act 2006*, section 1

Western Australia Acts

- *Architects Act 2004*, section 3
- *Dangerous Sexual Offenders Act 2006*, section 4
- *Waste Avoidance and Resource Recovery Act 2007*, section 5
- *Mines Safety and Inspection Act 1994, section 3*
- *Rural Business Development Corporation Act 2000, section 3*

Although I believe that the inclusion of purpose or objects sections in principal statutes in Australia is laudable, an analysis of those sections reveals that they are not always what they seem. In a few cases they state what the relevant statute does rather than what its objective is. Section 3 of the *Consumer, Trader and Tenancy Tribunal Act 2001* (NSW) exemplifies this.

Modern New Zealand principal Acts now include purpose sections, but according to Sullivan, purpose sections are less common in Canadian principal Acts.[16] Similarly, purpose and objects sections are rarely found in UK or Irish statutes, but some exceptions[17] are—

- *Legal Aid Act 1988 (c.34)*, section 1
- *Arbitration Act 1996 (c.23)*, section 1
- *Courts and Legal Services Act 1990(c.41)*, section 17 (applies only in relation to part of the Act)
- *Nuclear Safeguards and Electricity (Finance) Act 1978* (c.25), section 1

Some other UK Acts state the Act's purpose in terms of statements of principle; e.g. see section 1 of the *Children Act 1989*. Purpose sections are not generally included in Jersey statutes, but there are exceptions. The Isle of Man does not have a policy on the use of purpose sections and rarely uses them. However, purpose sections are to be found in the *Children and Young Persons Act 2001* (the overriding objective in proceedings about children and young people being to promote their welfare) and in the *Financial Supervision Act 2008* (in which the regulator is required to have

[16] "Purpose statements are a relatively recent innovation in Canada and are not referred to in either the federal or provincial interpretation Acts." Sullivan, (Op. cit. pp 387-8).

[17] All are UK statutes.

regard to the reputation of the Isle of Man as a centre for financial services). Although purpose sections have been proposed for inclusion in Gibraltar statutes, the proposal did not prosper.

In Pakistan, a very brief statement is made in the long title and preamble to describe the object of the statute, but these do not form part of the law. Parliamentary rules of procedure also require a statement of objects and reasons to be attached to every Bill but such statements do not of course form part of the resultant statute. This also applies not only to federal statutes but also to ones enacted by a Provincial Assembly.[18]

Sri Lanka has recently begun putting an objects section near the beginning of a principal Act, with a view to providing guidance to the courts on the direction of the Act.

In Singapore purpose sections are included in some statutes, but the practice has not yet been institutionalised as a drafting convention. However, Singapore legislative counsel are, it seems, open to using them if they provide a useful aid to interpreting statutes. Singapore has a purposive interpretation provision in its Interpretation Act since 1993, partly to give legislative effect to *Pepper v Hart* [1992] UKHL 3. For example, section 3 of the *Electronic Transactions Act 2010* sets out the purposes of the Act. Similarly, section 11 of the *Chemical Weapons (Prohibition) Act* and section 105B of the *Income Tax Act* (Cap. 134) sets out the purposes of the Parts of the Acts in which those section appear.[19]

A search of Hong Kong statutes revealed only five Ordinances containing purpose or objects sections. The situation is little different, in many Commonwealth countries, with purpose and objects sections being comparatively rare.

In South Africa, preambles and objects and purpose sections are often included in principal Acts, but it is understood that this has more to do with the country's apartheid past, rather than specifically to comply with any requirement to include such clauses.[20] In Ghana, it is the general practice to have an objects clause in all principal Acts. In the past, the objects have been combined with the functions in the same section, but more recently the preference seems to be to keep the two be separated. A search of the statutes of other Commonwealth African countries[21] revealed that the inclusion of purpose or objects sections was either non-existent or only spasmodic[22].

As far as I could ascertain, it is not the general practice in Commonwealth Caribbean countries to include purpose or objects sections in new principal statutes. However, one exception is the Cayman Islands *Freedom of Information Law*.[23] According to an authoritative source in the

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18 Mohsin Abbas Syed, Director, Law & Parliamentary Affairs Department, Government of the Punjab.

19 Source: Charles LIM Aeng Cheng, Singapore Law Reform Commission.

20 Source: Enver Daniels, Chief Legal Adviser to the South African Government.

21 Relatively few statutes of African countries are available on the Internet.

22 E.g. purpose sections are occasionally included in Kenyan statutes, but there is no consistent policy on the issue.

23 The drafter informed me that the precedent he was using had a purpose section and so he could see no reason to remove it!

Cayman Islands legislative drafting office, the issue of whether or not purpose sections should or should not be included in principal statutes of that jurisdiction has never been considered.

According to a reliable source in the House of Representatives Legislative Counsel Office (HOLC)[24], the practice of including purpose or objects sections in United States statutes is generally discouraged. One of the reasons for this is that purpose statements tend to get out of kilter with the Bill as it goes through the amendment process, thus presenting judges with inconsistent evidence of the intent. However, this rationale applies mainly to statutes that are likely to be litigated. On the other hand, such statements can sometimes be useful in legislation that gives broad discretionary authority to some executive agency but without much direction about how to use it. It is understood that the kind of US statutes in which a purpose or object statement is considered to be useful are ones involving making grants to finance infrastructure and other programs: e.g. "The Secretary shall make grants to worthy recipients for worthy purposes." As the HOLC source points out, without some statement as to purpose, there would be no constraint on the purposes for which the Secretary might expend the money that has been granted.

A phenomenon often found in US statutes that is generally unknown in the legislation of Commonwealth countries is that of "findings". These are usually self-serving political statements, sometimes appearing as factual statements. It is understood that US legislative counsel discourage such statements. As with purpose sections, the problem seems to be with the amending process. It was at one time thought (apparently through a misreading of US Supreme Court cases) that such findings were required in order to uphold the constitutionality of certain kinds of laws, especially some of those dealing with interstate commerce and the 14th Amendment to the US Constitution.[25] However, the actual requirement is that Congress (through factual hearings or legislative history, or perhaps even in the legislation itself) must establish the factual basis for some legislation or demonstrate the relevance of other legislation to its constitutional underpinnings. It is normally safer to do that elsewhere than in the legislation itself. The HOLC view is that findings are acceptable (even if unaesthetic) in legislation that is expected to have little legal effect and not to be the subject of litigation.

Because of the very plural nature of the US legislative process, it differs significantly from the much more controlled Westminster model. While some States of the US have rules relating to the long title, the US House of Representatives has in the House a germaneness or relevance rule,

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[24] Douglass Bellis, Deputy Chief Legislative Counsel in the US House of Representatives. He says there is no "official" United States position, but it can be said, though, that the consensus runs along the lines he has indicated, but with some exceptions.

[25] The 14th Amendment to the Constitution was ratified on 9 July1868, and granted citizenship to "all persons born or naturalized in the United States," which included former slaves recently freed. In addition, it forbids states from denying any person "life, liberty or property, without due process of law" or to "deny to any person within its jurisdiction the equal protection of the laws." By directly mentioning the role of the states, the 14th Amendment greatly expanded the protection of civil rights to all Americans and is cited in more litigation than any other amendment.

which means that amendments must be "germane" to the subject matter of the Bill as so far amended.[26]

However, the reality is that every Bill involves achieving some sort of deal. If the political will is there, a Bill will eventuate and some way or other can usually be found to avoid points of order, even when they would otherwise limit the drafter's course of action.

According to the HOLC source, there are many ways to get a statement of purpose into a draft if one is thought to be needed without resorting to a non-operative and perhaps duplicative provision: an explicit command governs no matter how poorly drafted to carry out the real intent.

Why purpose sections are good for legislative counsel

I have found that many (perhaps even a majority) of legislative counsel are sceptical about the value of purpose sections. They claim that, if a statute is well drafted, the statute's purposes or objectives should be readily apparent from a reading of the substantive provisions of the statute themselves. They claim that the inclusion of a purpose or objects section is liable to introduce inconsistent and confusing language. For reasons stated below, I think these arguments are not valid.

Some legislative counsel also claim that it is extremely difficult to draft a useful purpose or objects section. They maintain that there is a tension between the general nature of a purpose or objects section and the more focused substantive provisions that follow. They also claim that a purpose or objects section will usually end up being no more than a list of grandiose statements that would not be out of place in a party political election manifesto. Admittedly there is a danger that a purpose or objects section may be drafted too widely or too narrowly. However, a good legislative counsel will always keep a proposed purpose or objects section under continual review during the drafting process to ensure that the substantive provisions are consistent with the purpose or objects section and that that section is not drawn more widely or narrowly than is warranted by the substantive provisions of the statute. So I think these claims are largely unfounded.

The sceptics sometimes also claim that that the objectives of a proposed statute are so diffuse or extensive that no useful statement of purposes is possible. But if this the case, then surely there is something wrong with the policy proposals? Any legislative counsel worth their salt will surely point out the inconsistencies to the policy formulators or instructing officers at an early stage in the drafting process to ensure that the policy objectives of the legislative are reconsidered in order to ensure that they are both coherent and consistent?

So why are purpose or objects sections a good idea for legislative counsel? In my view, the purpose or objects section should be the first "substantive" provision to be drafted, because it should provide the focus for the drafting of the remaining substantive provisions of the proposed statute. The legislative counsel should keep it under continuous review both during the policy analysis stage and throughout the beginning of the drafting process. It should certainly not be an

[26] It is understood that the long title means nothing for the purpose of this analysis.

afterthought. A legislative counsel who begins with the purpose or objects section will (or should) always have it in mind throughout the drafting process. In other words, the legislative counsel should be constantly using the draft purpose or objects section to check each of the other substantive provisions in order to ensure that they are capable of giving effect to the purpose or objects set out in the purpose or objects section, or more specifically the policy objectives that are to be attained. The purpose or objects section should thus provide the legislative counsel with a mental guide for subsequent drafting. When drafting a substantive provision, the legislative counsel should be continually asking him or herself whether it is likely to contribute to the attainment of the policy objectives of the proposed legislation. If it is not likely to do so, then the provision should either be redrafted so that it does or be discarded. A good legislative counsel will use the content of the purpose section to test the substantive provisions against the policy objectives of the proposed statute as expressed in that section.

It may of course become apparent during the drafting process that, because of the content of particular sections, the purpose section is too wide or too narrow, in which case it will be necessary for the legislative counsel to adjust the content of that section accordingly.

Some guidelines for drafting purpose sections

In drafting a purpose clause for a principal Bill, legislative counsel should have regard to the following precepts:

- The policy objectives to be attained (the 'why') should not be mixed with the means by which they are to be attained (the 'what'). However, although unusual, it is possible that the 'means' may be so closely entwined with the 'ends' that to mention them in the purpose section may be warranted. So the following purpose section taken from the *Tobacco Sales to Young Persons Act 1993* [Can] would be justifiable:

  > "The purpose of this Act is to protect the health of young persons by restricting their access to tobacco in light of the risks associated with the use of tobacco."

- If there are multiple policy objectives, steps should be taken to ensure that those objectives do not conflict with each other or, if they do, to specify which of those objectives are to prevail. (Failure to do this is liable to render the legislation difficult and perhaps even impossible to implement effectively). The purpose section of the *Extradition Act 1979* (Barbados) included a statement that one purpose of the Act was to make extradition proceedings 'as uniform as circumstances permit irrespective of whether a fugitive is from a Commonwealth country or a foreign state' However, another purpose was—

  > "... to adopt the principles relating to the rendition of fugitive offenders within the Commonwealth as formulated by the Law Ministers of the Commonwealth in their London Conference of 1966 and generally to accord with current international practice regard the return of fugitives".

Clearly there is a possibility of conflict between these two purposes, which arguably the drafter of the Act should have addressed.

- In the case of a principal statute that is to contain both a long title and a purpose or objects section, steps should be taken to ensure that the two provisions are consistent with each other. See the *Integrity in Public Life* Act *1989* (Barbados), which contains both a long title and a purpose section. In that Act, the long title and the purpose section are inconsistent, with the former referring to avoiding conflicts of interest by "persons engaged in governing, guiding or administering the public affairs of Barbados", whereas the latter refers to "persons in public life to whom this Act applies". And while the long title refers to establishing a body to monitor "the assets of persons in public life", the purpose section refers to monitoring "the personal income, expenditures, assets and liabilities" of those persons.[27]
- The inter-relationship between the purpose section and the provisions that specify how and by whom the policy objectives are to be attained should be made clear.
- Consideration should also be given as to whether (and if so to what extent) the policy objectives are to be implemented and interpreted independently of the Executive or whether the Executive (e.g. perhaps a Government Minister) should have some role in that implementation.

It perhaps goes without saying that it will not usually be appropriate to include a purpose section in an amending statute, particularly when all the amendments are textual ones. This is because the amendments will normally be governed by the general purpose section contained in the principal statute. However, it is essential that the drafter of the amending statute should review the purpose section in the principal statute to ensure that the amendments are consistent with it or, if they are not, that that section is amended to make it consistent with the amendments.

It is rare to find a purpose 'section' in a statutory instrument[28]. This is because the statutory instrument will be governed by the general purpose section in the parent statute (assuming that it contains such a section). Because of the possibility of inconsistency, it would in any case be inadvisable to include a purpose section in a statutory instrument. Such an inconsistency is likely to render the provision being held to *ultra vires*.

What pitfalls are there in drafting purpose sections?

- Sometimes a purpose section might consist of a statement of high principle. The danger with such a section is that, although it might look good, insufficient consideration may have been given to its likely effect.
- Although a purpose section may be 'good public relations', the ramifications could be unfortunate if a decision maker under the relevant statute fails to establish that all matters

[27] See Bennion F. (1983) *Statute Law* (2 ed), Oyez Longman, London, p. 99.

[28] I.e. one made under the authority of a parent statute.

required to be taken into account have been considered.

- Although providing a yardstick for the making or implementation of decisions under a statute provides a flexible tool for decision makers its value is likely to be dependent on its specificity.
- The purposes (i.e. the objectives to be attained) should be distinguished from principles and steps should be taken to ensure that the latter are kept separate from the purpose section. The following provisions taken from the *Sugar Loaf Islands Marine Protected Area Act 1991* (NZ) illustrates the approach that might be followed in drafting a statute that contains both a purpose section and a statement of principles.

> "**Purpose of Act**
>
> **3.** The purpose of this Act is to ensure that the scenery, natural features, and eco-systems of the Protected Area that should be protected and conserved by reason of their distinctive quality, beauty, typicality, or uniqueness are conserved.
>
> **Principles**
>
> **4.** The Protected Area shall be administered and maintained so as to ensure that, so far as is practicable,
>
> (a) the area, and its scenery, natural features, and eco-systems are protected and conserved in their natural state:
>
> (b) the value the area has in providing natural habitats is maintained:
>
> (c) members of the public have access to the area for recreational purposes and for studying, observing, and recording any marine life in its natural habitat:
>
> (d) the provisions of any relevant management plan for the time being in force under the *Fisheries Act 1983* or the *Conservation Act 1987* are complied with."

"For the purposes of this Act"

Many statutes contain provisions prefaced with the phrase "For the purposes of this Act", "For the purposes of this Part" or "For the purposes of this Schedule" without stating anywhere what those purposes are. This in my view is extremely unhelpful. It leaves the reader who wants to know what those purposes are with the tedious task of reading the whole statute to ascertain those purposes. Even when the readers have undertaken this task, they cannot be sure that the conclusion they have reached will equate with that which the drafter might have specified had he or she gone to the trouble of including a purpose or objects section in the statute. To exemplify the problem I randomly did a search of a recent UK statute, the *Equality Act 2010*. The Act contains 218 sections and 29 Schedules and runs to just under 400 pages. The search revealed one provision that included the phrase "For the purposes of this Act" and several provisions that included the phrases

"For the purposes of this Part" or "For the purposes of this Schedule", but nowhere was there to be found explicit statements of what those purposes are. I believe the statute user deserves better, particular with a statute as socially significant and as complex as the Equality Act.

Why purpose sections are good for users of statutes

So why are purpose sections good for users of statutes? Before answering that question, we need to identify what is meant by 'users'. Users are the people who comprise the audiences of a document and so, in this paper, I use the term to refer to the people who either need or wish to consult particular legislation in order to find out how it affects either themselves or other people. For example, a person may wish to consult the relevant legislation on wills to find out what formalities must be observed in making a will. A tax consultant will need to consult the relevant income tax legislation in order to determine whether or not a particular deduction applies to his or her client. A police officer will need to consult the relevant provisions of statutes relating to the criminal law and the law of evidence, in particular those relating to powers of arrest and other enforcement powers. A law student who is studying trade practices or consumer protection law will want to consult the relevant legislation relating to trade practices or consumer protection. A judge who is hearing a case involving the interpretation of a particular statute will need to consult the statute and so on. The term refers not only to real users but also to anyone who is looking for a particular legislative provision and to anyone who wants to try to understand the provision[29] or simply wants to read it.

Returning to the initial question, a purpose section of a statute is good for users because it provides a beacon to guide them through the substantive provisions of the statute. It provides them with a context within which they can engage with those provisions. In my view, a statute user who is aware of the objects that the statute is intended to achieve is better able to understand the means by which those objects are to be attained. Furthermore, an understanding of the totality of what a statute is seeking to do helps users to recognise the significance of the parts of the statute both in relation to the law as a whole and in relation to one another.

Decision makers generally—In so far as users are decision makers, a purpose section of a statute provides them with a yardstick or benchmark to which they can (and indeed should) refer when making decisions under the statute. A decision maker who makes a decision under the statute without taking into account its purpose will be liable to have the decision questioned by judicial review or, in the case of a judicial decision, by appeal to a superior court.

Often, a statute[30] will require decision makers to state reasons for their decisions. Irrespective of whether the statute requires a particular decision maker to have regard to specific purposes in making a decision under the statute, the decision maker will be required to make such a decision that is consistent with the purposes of the statute, whether they are explicit or implicit. Decision makers who ignore this requirement do so at their peril, since they will leave themselves exposed to judicial review.

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29 For instance, as a law student.

30 Or any other kind of legislative document for that matter.

Sometimes a provision of a statute will require a decision maker to "take into account" or "have regard to' specified purposes or objectives when making a decision. By directing decision makers to address specific purposes, the provision will contribute to the attainment of the objectives of the statute.

Judicial interpretation—Now that a purposive approach to statutory construction is routinely taken by the courts in many jurisdictions, there is an increased obligation on legislative counsel to make the aim and object of legislation clear on the face of it. The readiness of courts in some jurisdictions to look at *Hansard* and other legislative materials increases the need for legislative counsel to make the purposes of legislation clear in the legislation itself.

The statutory interpretation statutes of many common law jurisdictions include a section directing courts to give every enactment "such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".[31] Thus, the courts are expected to interpret a statute or other legislative document in a way that will achieve its objects.

In Australia, New Zealand and Ireland, a different form of words is used. Section 15AA of the *Acts Interpretation Act 1901* (Cwlth) provides as follows:

> "In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object."[32]

New South Wales, Victoria, Tasmania and Western Australia have enacted similar provisions with a similar wording.[33] Queensland and South Australia have also enacted legislative provisions requiring courts to interpret purposively the legislation of those States, but with a somewhat different wording. Section 5(1) of the Interpretation Act 1999 (NZ) provides:

> "The meaning of an enactment must be ascertained from its text and in the light of its purpose."

Some disagreement exists as to the effect of section 15AA and its Australian State counterparts. Some judges have assumed or decided that the provisions are applicable only where the provision to be interpreted is ambiguous.[34] Nonetheless, it seems clear that section 15AA and its State

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[31] See the Canadian Interpretation Act RSC 1985, c. I-21, s. 11. The Interpretation Acts of Canadian provinces contain similar provisions. See RSA 1980, c. 1-7, s9: RSBC 1979, c. 206, s. 7; RSM 1987, c. I-80, s. 7; RSNB 1973, c. I-13, s. 12; RSN 1990, c. I-19, s. 10; RSNS 1989, s. 235, s. 9(1); RSO 1990, c. I-11.1, s. 10; RSNWT 1988, c. I-8, s. 9; and RSYT 1986, c. 93, s. 5(1). Also see the Ghana *Interpretation Act 1960*, s. 19, and the *Interpretation and General Clauses Ordinance* (Cap 1)(HK), s. 19.

[32] It has never been clear to me why this subsection is expressed as a truncated passive.

[33] New South Wales - Interpretation Act 1987, s. 33; Victoria – Interpretation of Legislation Act 1984; Tasmania - Acts Interpretation Act 1931, s. 8A; Western Australia – Interpretation Act 1984, s. 18.

[34] For example, *Campbell v. Epping* [1970] Tas SR 215 at 225. Also see paper given by Bryson J of the New South Wales Supreme Court, *8 Aust Bar Rev*, 1991-92, 187.

counterparts require courts, when interpreting a legislative provision, to adopt an interpretation that promotes the purpose[35] of the statute in preference to one than would not.

Bearing in mind the directive that, in some common law jurisdictions, the courts are required to interpret a statute in a manner that will achieve its objects and that, in others, the courts are required to interpret a statute in a manner that is likely to promote the purposes or objects of the statute, it seems to me inexcusable not to include a section that expressly states the purposes or objects of the statute. I do not think that judges should have to second guess the purpose of a statute by "reading it as a whole" in order to ascertain the objectives that the statute seeks to achieve. The judges' difficulty is exacerbated when a statute (such as a taxing statute) has multiple objectives. Assuming a statute has more than one objective, judges are likely to find it difficult to weigh up the significance of the objects in relation to each other and may in fact treat a secondary object as being more important than the primary object.

Both happened *in Re Trustees of St Peter's Evangelical Lutheran Church and City of Ottawa* (1983) 140 DLR (3d) 577. In the Ontario Court of Appeal, the purpose of the Ontario Heritage Act had been defined as ensuring the protection for the benefit of the citizens of Canada of a collective resource, including buildings of historical and architectural significance. However, the Supreme Court of Canada identified an additional purpose, which was the protection of landowners. And for a majority of that Court, that additional purpose was decisive in interpreting the relevant provisions of that Act despite the fact that they were unable to show how the Trustees were prejudiced by a failure to comply with a notice requirement. So not only did different judges in different courts have difficulty in weighing up competing objects of the relevant statute[36], but a majority of judges in the Canadian Supreme Court arguably treated a secondary object (the protection of landowners' property interests) as being more important than the primary object (the protection of buildings of historical and architectural significance for the benefit of Canadian citizens).

What support is there for including purpose sections in a statute?

Among the early advocates of purpose sections was Henry Thring, the first Parliamentary Counsel of the United Kingdom Parliamentary Counsel Office when it was established in 1869. His successor, Courtenay Ilbert, was also an advocate of purpose sections. Later First Parliamentary Counsel were less enthusiastic about purpose sections. In giving evidence before the Renton Committee[37], the then First Parliamentary Counsel, Sir Anthony Stainton, expressed the view that "in many cases the aims in the legislation cannot usefully or safely be summarised or condensed. A purpose clause might be no more than a manifesto … which may obscure what is otherwise precise, and exact." He went on to say that "amendments to a Bill may not merely falsify the accompanying proposition but may even make it impracticable to retain any broad proposition".

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35 Or object.

36 See the *Heritage Act 1974* (Ont).

37 Renton, Lord (1975), *The Preparation of Legislation*, report of a committee appointed by the Lord President of the Council, Cmnd 6053.

Another UK parliamentary counsel said that "the Act should in general explain itself'"[38]. However, as I argued earlier, a purpose section should be drafted very early in the drafting process and should provide the foundation and focus for the substantive provisions that follow. As the drafting progresses, the purpose section should be kept continually under review to ensure that it and the substantive provisions are mutually consistent.

In its report on the preparation of UK legislation, the Renton Committee considered purpose clauses and strongly advocated the inclusion of purpose sections in all new UK principal Acts.[39]

Judges have rarely commented on purpose sections, but to the extent that they have, they seem to find them helpful. In commenting favourably on section 2[40] of the *Water and Soil Conservation Act 1981* [NZ](a purpose section), the President of the Court of Appeal had this to say:[41]

> "Parliament reduced the difficult by taking the unusual step of declaring a special object for the 1981 Amendment Act: the object of this Act is declared by section 2 to be to recognize and sustain the amenity afforded by waters in their natural state. A statutory guideline is thus provided; and I think that the code enacted by the Amendment Act is to be administered in its light. With all respect to the contrary arguments, to treat section 2 as surplusage or irrelevant or mere window-dressing would be, in my opinion, as cynical and unacceptable a mode of statutory interpretation as that which was rejected in *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641. The duty of the Court must be to attach significance to and obtain help from this prominent and unusual feature of the Parliamentary enactment."

As already mentioned, it is now the practice for purpose sections to be included in all statutes enacted by the Parliament of the Australian State of Victoria. In at least two fairly recent cases, the Victoria Court of Appeal seem to have found section 47 of the *Road Safety Act 1986* (Vic) (a purpose section) helpful in interpreting sections of the Act relating to breath testing of drivers of motor vehicles whom police officers have suspected to be drunk.[42]

More recently, a member of the Hong Kong Court of Appeal, Mr Justice Bokhary, has expressed support for the inclusion of purpose or objects sections in statutes. In the course of a paper delivered[43] at the 2009 conference of the Commonwealth Association of Legislative Counsel, he had this to say:

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38 Ibid, Renton, para 11.7.

39 Ibid, Renton, para 11.7.

40 The section provided as follows:

> **Object of this Act**
>
> 2. The object of this Act is to recognize and sustain the amenity afforded by waters in their natural state.

41 Ashburburton Acclimatisation Society v. Federated Farmers of New Zealand Inc. [1988]1 NZLR 78.

42 See *DPP v Foster*; *DPP v. Bajram* [1999] 2 VR 643; *Wright v Morton* [1998] 3 VR 316.

43 Paper published in *The Loophole*, 2010, Issue no. 1, pp. 26-40; see p. 36.

> "In Hong Kong, it has been clearly understood since 1972 (when the Court of Appeal's predecessor the Full Court decided *Elson-Vernon Knitters Ltd v. Sino-Indo-American Spinners Ltd*[44]) that the Objects and Reasons (nowadays called the Explanatory Memorandum) annexed to a Bill may be looked at for the purpose of ascertaining the mischief which the proposed legislation was intended to remedy. Such memoranda can play a useful role, and the *Elson-Vernon* case has twice been applied by the Court of Final Appeal twice (in *Director of Lands v. Yin Shuen Enterprises Ltd*[45] and *Secretary for Transport v. Delight World Ltd*[46]). *But if the mischief to be remedied is worth stating, I consider it preferable that it be stated in the Bill itself*, so as to become part of any resultant statute." [Emphasis added]

Later in the same paper[47], he went on say:

> "Both in the selection of a legislative drafting style and in the interpretation of legislation however drafted, due regard must be had both to wording and to ascertainable purpose. As Judge Learned Hand said, "the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing [but it must be remembered] that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning"[48]."

Other judges (including a former Lord Justice of Appeal in Court of Appeal for England and Wales) have privately expressed support for purpose sections "as long as they are well drafted".[49]

In *R. v. T (V*[50]*)*, the Supreme Court of Canada has suggested that it is prepared to take purpose statements seriously. It rejected the view that a purpose section is merely a preamble that does not carry the same force as a substantive provision. However, as Sullivan suggests, the weight given to a purpose section depends on a number of considerations. These include—

- how specific the goals, principles or policies are,
- their relation to one another,
- what criteria (if any) the legislature has provided regarding their use; and
- whether there are other indicators of legislative purpose.

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44 [1972] HKLR 468 at pp 474-476.

45 (2003) 6 HKCFAR 1 at p. 15B.

46 (2006) 9 HKCFAR 720 at pp 730J-731B.

47 At p. 37.

48 *Cabell v Markham* 148 F 2d 737 (1945) at p.739.

49 The judges concerned asked to remain anonymous.

50 [1988] SCJ No. 6; [1988] SCR 217 (SCC).

Because a purpose section forms part of the relevant statute, it carries significant weight. However, because it is interpretive in character, it seems that it will carry less weight than a substantive provision.[51]

Conclusion

On balance, I would advocate the inclusion of a general purpose section in all principal statutes, unless for some obvious reason such a section is unnecessary or inappropriate. For example, a purpose provision is not really needed for an Appropriation Bill. The main reasons why I think purpose sections are a good idea are because they—

- provide legislative counsel with a foundation and a focus for drafting a principal statute,
- provide a beacon that helps to give users of such a statute an immediate understanding of what the statute is seeking to achieve, and
- give those charged with the responsibility for making decisions under the statute a guide as to how the statute should be interpreted and applied.

However, it is essential that the drafter of a purpose or objects section should—

- draft it early in the drafting process;
- keep the section under continual review during the drafting process to ensure consistency between it and the following substantive provisions;
- avoid mixing the objectives to be attained (the ends) with the means of attaining those ends;
- state accurately and unambiguously the objectives sought to be attained by the statute;
- ensure that, if the section specifies more than one such objective, either those objectives are consistent with each other or, if they are not, specify which of those objectives is to be given priority in the event of an inconsistency;
- ensure that the section and other provisions of the statute (including the long title (if any)) do not say the same thing in different words;
- ensure that the heading to the section accurately communicates to users the content of the section.[52]

In conclusion, I would endorse the sentiments expressed by Mr Justice Bokhary in the paper referred to above. "Legislative drafters construct statutes for the purpose of embodying the legislature's intention. Judges construe statutes purposively. Drafting and interpretation have the same objective. Both are vital to the rule of law."[53] I believe that the inclusion of purpose or

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51 Sullivan, op. cit., p. 390.

52 In this regard, a heading that simply states "Objects" is not regarded as adequate.

53 Op. cit., p. 40.

objects clauses in statutes and parts of statutes make a useful contribution towards attaining this objective.

Legislative Drafting in South Sudan

William E. Kosar[1]

Introduction

Africa is about to witness the birth of the world's newest nation: the Republic of South Sudan. If, as expected, the new Republic is declared in July this year, it will become Africa's 54th nation. It will comprise the southern portion of what is now the Republic of Sudan, which is currently the largest country on the African continent.

I have spent the past 3 years in Juba, which is expected to become the capital of new republic, engaged in legal work, including drafting legislation. I have recently completed my assignment there and have now returned to my base in Nairobi, Kenya.

Overview of South Sudan

Southern Sudan has been almost continually at war since before independence from the Anglo-Egyptian condominium on 1 January 1956. The most recent conflict lasted 23 years and ended with the signing of the Comprehensive Peace Agreement[2] on January 9, 2005 and was the longest-running civil war in Africa.

In accordance with the CPA, a referendum on independence was held from 9-16 January 2011. The final results were released shortly afterwards on 7 February. Over 98 percent voted in favour of independence with over 90 percent of registered voters voting. Independence is widely expected to occur on 9 July 2011, which is the end of the CPA period.

The conflict in the South is to be distinguished from the ongoing conflict in Darfur, another part of Sudan. According to the latest census held in 2008, Southern Sudan has a population of 8.26 Million. Most of the inhabitants are black African and either Christian or animist. Only about 10

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1 Consultant legislative counsel, Juba, South Sudan

2 The "CPA".

percent of the population is Muslim, with most of those people living in the northern part of what is expected to form the new Republic.

Shari 'a law was first imposed in Sudan in September 1983 along with forced Arabisation[3] and was one of the reasons why the southerners returned to war. The embryo Government of Southern Sudan has adopted English as its language of government and business and has embraced the English common law.[4] Although the Interim Constitution of Southern Sudan guarantees that English and Arabic are the official languages of the Government of Southern Sudan, English is the de facto language of government. Although almost every public servant speaks Arabic, very few can actually read or write it.

The Government of Southern Sudan had been primarily focused on establishing itself and stabilizing the security situation in the run-up to the recent elections and referendum. It is now starting to pay attention on developing and promoting private sector activity. The business environment is not conducive to foreign investment. Laws are not transparent; and processes and institutions that are conducive to encouraging the development of the private sector are largely non-existent.

However, this cuts both ways. The existing lack of an institutional framework for entrepreneurs, means no stifling bureaucracy, and it is for that reason that many entrepreneurs have come to Southern Sudan. The dangers of unregulated environment are of course manifold. These dangers include—

- the possible exploitation of workers;
- the absence of safety and health protection for workers and others;
- the lack of legal protection for shareholders and other investors;
- the failure to protect property rights;
- the tendency of tribal relationships to dominate contracts; and
- concerns about the willingness of the Government to observe the rule of law.

The fundamental pieces of legislation supporting business start up and basic corporate governance are in place. However, the private sector is not sufficiently well organized to become an effective partner to the provisional Republic in establishing policy or providing input and recommendations on legislation.

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[3] 'Arabisation' means that the people were forced to take up the Islamic faith and adopt Arabic cultural norms (including the Arab language).

[4] Judicial Circular No. 1/2007 dated July 12, 2007: The "application of the principles of justice, equity, good conscience and judicial precedents of the English Common Law may further require the Court or Judge to apply the provisions of—

(i) International Treaties & Conventions; and

(ii) the general principles of other different legal systems provided they are in conformity with the local values or conditions in the Southern Sudan.

Mandate of the Directorate of Legislation, Gazette, Publication and Printing

The Ministry of Legal Affairs and Constitutional Development was created by its own Act in 2008.[5] It replaced the former Attorney General's Chambers of the New Sudan. The Directorate of Legislation, Gazette, Publication and Printing is one of eight directorates within the Ministry.

Section 9 of the Act defines its functions as follows:

(a) Drafting Government legislation including subsidiary legislation, as requested by GoSS and the State legislatures and executive branches;

(b) Overseeing the progress of legislation, and provision of legal opinions thereon;

(c) Printing and publishing the Southern Sudan Gazette and any other necessary government publications;

(d) Translating legislation and any other legal documents from English to other languages, as necessary;

(e) Publishing written laws;

(f) Reviewing, refining and improving the legislative drafting process in Southern Sudan;

(g) Conducting research and proposing legal reforms; and,

(h) Performing any other duty or function that may be assigned to it, or which is reasonably related to the forgoing activities.

Capacity of the Directorate

The Directorate has a staff of about 15 headed by the Director. In addition to perceived management problems, a lack of computer literacy hampers the drafting process.

Most of the legal counsel in the Directorate of Legislation, attended law school in Khartoum and studied Shari' a law in Arabic and are rather challenged by the English language. Drafting of laws in both English and Arabic is a constant hurdle.

Very few of the legal advisers have computers and the 3 laptop PCs that were recently provided to the Directorate are kept under lock and key. Lack of computer literacy severely hampers the Directorate as there is a lack of consistency between the various laws that should share a common theme. Even at the top level much of the drafting is done in pencil, with existing Sudanese laws being translated, often poorly into English. The Director has a non-legally trained secretary who then transcribes these laws into a poor form of English. This is despite the fact that the Director's knowledge of English vocabulary and grammar is excellent.[6]

Technical assistance

Technical assistance has historically been offered by USAID, the Government of Kenya and the International Finance Corporation of the World Bank. The latter focused on mercantile laws that

[5] The Ministry of Legal Affairs and Constitutional Development Organization Act, 2008

[6] He was trained prior to the imposition of Shari'a law in 1983.

are designed to promote the business environment. Other donors have promised assistance but so far none has been forthcoming.

Technical assistance took the form of direct drafting in the early years but more recently has evolved into just reviewing and editing the Bills drafted by the Director. More recently, there have been suspicions that technical assistance that used to be gladly accepted has been refused, but I have been unable to confirm that.

In 2008, five members of the Directorate received 3 weeks of training in legislative drafting. This, however, seems to have made little impact as whatever skills were learned were not put into practice; nor were they shared with other members of the Directorate, which like most of the Ministry's Directorates has a high turnover as well as low productivity.

The Gazette Office

The Gazette Office is also under the direction of the Directorate of Legislation. Much needs to be done to improve the efficiency of that Office. Laws and regulations are not being properly printed on a timely basis. In addition, they are not gazetted in a timely and efficient cost basis thereby delaying the implementation and dissemination process. In essence, the Gazette Office does not function in any meaningful way. High quality equipment (a server, 4 workstations and a Ricoh High Speed Colour printer) costing approximately US$800,000 was installed in January 2009 in a project funded by the US International Narcotics and Law Enforcement Bureau, but this equipment has been barely used.

Almost immediately, the Gazette Office ceased to function due to technical and administration failures and lack of expertise in the use of the equipment. In addition, those chosen as staff to produce the Gazette are reported to have had little IT training[7] or experience. The situation has been exacerbated by the departure of some of the more competent people, who have left to start their own IT businesses.

Only some degree of copying is being undertaken and key laws are being printed outside either in Juba or in Kampala, Uganda.

Technical assistance is urgently needed to properly train the staff and the capacity of the existing staff needs to be increased to professional print house standards

The laws of the Government of Southern Sudan

In both 2009 and 2010, only two Bills in each year (one of which was the Appropriations Act) were passed by the Southern Sudan Legislative Assembly.[8] The problems will be explored more fully below.

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7 One of those chosen was night watchman who was chosen more as a result of tribal affiliation rather than expertise.

8 These were the Southern Sudan Police Services Act, 2009 and the Emoluments and Privileges of Constitutional Post Holders and Members of Legislative Assemblies Act, 2010,

Provisional Orders

On 9 January 2011, the President of the Government of Southern Sudan signed 17 Provisional Orders. Article 86 of the Interim Constitution of Southern Sudan, 2005 provides as follows:

> "Such provisional order shall be submitted to the Assembly as soon as it is convened."

At that point, a Provisional Order has to go through the normal legislative process at the Southern Sudan Legislative Assembly. Sixteen Provisional Orders were presented to the Assembly in late January.[9] The Assembly can reject, adopt or adopt the Order with or without changes. As a general rule, the Assembly will accept and pass a Provisional Order and, with independence looming, it is expected that the Assembly will be under intense political pressure to pass these laws.

The Transitional Constitution

On 21 January 2011, a committee called the Technical Committee was appointed[10] by His Excellency the President Salva Kiir Mayardit to review the Interim Constitution of Southern Sudan, 2005, and convert it into a Transitional Constitution. The next step will involve the drafting of a permanent Constitution, which is expected to follow public consultations after the anticipated independence in July of this year. Leading constitutional experts from around the region and the world will be assisting in the 2 phase process.

Article 208(7) of the Interim Constitution currently provides as follows:

> "(7) If the outcome of the referendum on self-determination favours secession, this Constitution shall remain in force as the Constitution of a sovereign and independent Southern Sudan, and the parts, chapters, articles, sub-articles and schedules of this Constitution that provide for national institutions, representation, rights and obligations shall be deemed to have been duly repealed."

What this means then is that those items of national competence contained in Schedule A of both the Interim Constitution and the Interim National Constitution would now be the exclusive legislative competence of an independent South Sudan. Currently, an exercise is underway to insert those Schedule A provisions from the Interim National Constitution of Sudan into the appropriate places in the Interim Constitution of Southern Sudan to create a Transitional Constitution.

The historic first sittings of the Technical Committee for the Transitional Constitution took place on 2 and 3 February 2011. Noted constitutional scholars Professor Yashpal Ghai, Professor Jill Cottrell and Professor Frederick Ssempebwa gave presentations. Professors Ghai and Ssempebwa were members of Kenya's Committee of Experts that recently redrafted Kenya's Constitution[11]. The Technical Committee was led through an early draft prepared by the Public Interest Law &

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9 Only the Fire Brigade Provisional Order has not been submitted owing to the fact that it has been misplaced.

10 Presidential Decree No. GOSS/PD/J/002/2011

11 This was promulgated in August 2010.

Policy Group, which incorporated certain articles of the Interim National Constitution into the draft Transitional Constitution.

The Technical Committee was planning to meet 4 times each week until the end of April 2011, by which time they were due to deliver up the draft Transitional Constitution to the President. It has a mandate to consult with outside experts. However, the whole process has become politicised. The initial Presidential Decree named 20 members to the Technical Committee with 4 advisors who are law professors and now out-of-work Government of National Unity Constitutional Court judges. This raised a great outcry from the other political parties who felt that the Committee was "stacked" with Sudan People's Liberation Movement ("SPLM"[12]) appointees. Indeed it was, but all of these people were chosen not only for their technical expertise but also for the fact that many, if not most, had worked on drafting the Interim Constitution.

The President yielded to political pressure and on 17 February 2011 appointed 12 additional members to the Technical Committee.[13] The next day, he, appointed 3 "faith based" members to the Technical Committee.[14] Three days later, he appointed 17 additional members to the Committee, all of whom were members of the ruling SPLM party.[15] The Committee had grown from an already bloated committee of 24 to one consisting of 56 members!

From what was intended to be a strictly technical exercise, the work became extremely politicised. Indeed, on 7 March, the non-SPLM members withdrew from the Technical Committee. Despite this intrigue, the Technical Committee still believes that it will be able to complete its work on time, even though it seems likely that the Committee will exceed its original jurisdictional mandate.

Secondary legislation

There are no implementing regulations for the few laws that have been passed. Article 92 of the Interim Constitution provides that the Legislative Assembly has the final say with regards to the passage of regulations. Given the problems of passing primary legislation, it is hardly surprising that no secondary legislation (much of which would be highly technical) has been passed.

The legislative process

I worked for several years on a tripartite process that included the development of a legislative tracking mechanism, which involved the improvement and streamlining of the legislative process as well as establishing a method of tracking the legislative agenda for the Government. This involved the removal of the Governance Cluster of the Council of Ministers from the legislative process.

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[12] The dominant political party and the organisation which led Southern Sudan to its present state along with the Sudan People's Liberation Army ("SPLA")

[13] Presidential Decree No. GOSS/PD/J/08/2011

[14] Presidential Decree No. GOSS/PD/J/09/2011

[15] Presidential Decree No. GOSS/PD/J/10/2011

Although there is no constitutional provision for the Clusters, they were introduced a number of years ago by Presidential Decree. The Governance Cluster operates as a clearing house for all legislation prior to it being forwarded to the larger Council of Ministers for deliberation.

The current method of processing legislation is not provided for in the Interim Constitution of Southern Sudan, 2005, and is in fact a result of custom that has developed over 3 years ago. Indeed, it is noted that the system we had proposed (which was to remove the role of the Governance Cluster to conduct a line-by-line review of the draft legislation) was exactly the method that the Government had initially used.

Articles 84 and 85 of the Interim Constitution describe the flow of legislation. Under the Interim Constitution, either a Minister or the President can introduce legislation.

Procedures for presentation and consideration of Bills

The Interim Constitution sets out the procedure for the presentation of Bills to the Legislative Assembly. Article 84 reads as follows:

> "84. (1) Bills presented to the Assembly shall be submitted for the first reading by being cited by title. The bill shall then be submitted for a second reading for general deliberation and approval in principle. Should the bill be passed in the second reading, there shall be a third reading for deliberation in detail and introduction of, and decision upon, any amendment. The bill shall then be submitted in its final form for the final reading, at which stage the text of the bill shall not be subject to further discussion and shall be passed section by section and then passed as a whole.
>
> (2) After the first reading, the Speaker shall refer the bill to the appropriate committee of the Assembly, which shall make a general evaluation report for the purpose of the second reading. The committee shall also present a report on the amendments that the Committee might or might not have endorsed in the third reading for the decision of the Assembly; the Speaker may also refer the bill once again to the appropriate committee to prepare a report in a final draft in preparation for the final reading.
>
> (3) The Speaker of the Assembly or the appropriate committee may seek expert opinion on the viability and rationale of the bill; an interested body may also be invited to present views on the impact and propriety of the bill.
>
> (4) The Assembly may by a special resolution, decide on any bill as a general committee or by summary proceedings.

Assent of the President of the Government of Southern Sudan

The Interim Constitution further requires Presidential Assent before a Bill can become a law. Article 85 reads as follows:

> "85. (1) Any bill approved by the Assembly shall not become law unless the President of the Government of Southern Sudan assents to it and signs it into law. If the

President withholds assent for thirty days without giving reasons, the bill shall be deemed to have been so signed.

(2) Should the President of the Government of Southern Sudan withhold assent to the bill and give reasons within the aforementioned thirty days, the bill shall be re-introduced to the Assembly to consider the observations of the President of the Government of Southern Sudan.

(3) The bill shall become law if the Assembly again passes it by a two-thirds majority of all its members, and the assent of the President of the Government of Southern Sudan shall not be required for that bill to come into force."

Part Six of the Interim Constitution deals with the Southern Sudan Executive and Chapter 1 deals with the Southern Sudan Executive and its powers. Article 115, in particular, deals with the Functions of the Council of Ministers and provides as follows:

"115. The Southern Sudan Council of Ministers shall have the following functions:

…

(b) approval of the general policies initiated by the respective ministries;

…

(f) receiving reports on matters that are concurrent or residual and deciding whether it is competent to exercise such power in accordance with Schedules E and F herein. If it so decides, it shall notify the respective state in Southern Sudan of its intention to exercise such power. In case a state in Southern Sudan objects thereto, a committee shall be set up by the two levels concerned to amicably resolve the matter before resorting to the Southern Sudan Supreme Court;

...

(m) implementing Southern Sudan legislations [sic] and applicable national legislations in Southern Sudan;

(n) formulating and implementing government policies;

(o) coordinating the functions and reviewing the performance of the ministries, departments and administrations of the Government of Southern Sudan;

(p) initiating legislative bills before the Southern Sudan Legislative Assembly;"

Originally there were 6 permanent Ministerial members of the Governance Cluster. These were—

- Legal Affairs
- Cabinet Affairs
- Parliamentary Affairs
- Public Service

- Interior
- SPLA Affairs

Now there are 12. These are—

- Minister of Peace and CPA Implementation
- Minister of SPLA and Veterans Affairs
- Minister of Regional Cooperation
- Minister in the Office of the President
- Minister of Legal Affairs and Constitutional Development
- Minister of Internal Affairs
- Minister of Parliamentary Affairs
- Minister of Finance and Economic Planning
- Minister of Labour and Public Service
- Minister of Information
- Ministry of Human Resources Development
- Secretary General to the Government of Southern Sudan.

Indications are that since the beginning of this year that the Clusters are once again sitting regularly. There was much criticism levelled against the Governance Cluster by the former Minister of Legal Affairs that they seldom met and when they did, a quorum was often not present.

There are also indications that the Southern Sudanese ambassadors who are being recalled by Khartoum are being interviewed to act as policy advisors to the Clusters. Their new role is expected to start in May.

Resolution No. 160 from extraordinary meeting of the Council of Ministers No. 3/2010 held on 1 November 2010 states:

> "Approved the proposed improvement to the Government of Southern Sudan Legislative mechanism which would increase transparency and productivity of all involved in drafting, vetting and passage of legislation and holding these parties responsible through regular reports to the Council of Ministers as per memo no. GoSS[16]/MOLACD/MO/J/1.a.1/2010 dated 29th Sept 2010 of the Ministry of Legal Affairs and Constitutional Development presented to the council of Ministers on his behalf by the Minister of Parliamentary Affairs."

My colleagues and I lobbied most of the Council of Ministers regarding the simplified legislative process. All of those whom we lobbied told us they would support the initial proposal to do away with the role of the Governance Cluster. When it got down to the vote, several key Ministers voted against the proposed simplification of the legislative process.

[16] Government of South Sudan

What in fact happened was that a subcommittee of the Governance Cluster was created to vet all legislation bound for the Governance Cluster. This subcommittee is composed of the Ministers of Cabinet Affairs, Legal Affairs and Parliamentary Affairs along with the line Minister sponsoring the legislation.

The subcommittee approved 17 bills as Provisional Orders which were ultimately[17] signed by the President on 9 January 2011, so it would appear that the new system might in fact be working.

Legislative tracking

During late 2010, I developed an Excel based legislative tracking system. The tracking mechanism will allow the Minister of Legal Affairs and Constitutional Development, and indeed the Council of Ministers, to know at any time the status of a Bill within the Government legislative process. Initially, monthly reports will be generated through to the end of the CPA after which time, reporting can be made every other month. Ultimately, the summary produced by the legislative tracking mechanism is intended to be posted to the Ministry's website.[18]

The mechanism is expected to increase the flow of legislation from inception through to the Legislative Assembly by making the responsible parties accountable. However, of the 2 legal counsel assigned to update the system, one has left to enter private practice and the other is on extended leave back in Canada. This has considerably slowed the updating process and, along with a lack of responsiveness from line Ministries responsible for drafting laws, has left the project in limbo.

Legislative priorities

The Government has demonstrated no discipline in prioritising and adopting legislation, resulting in very few laws being promulgated since 2005. With independence looming, apart from key laws that need to be drafted for there to be a fully-functioning government, other new laws within the exclusive legislative competence of the Government of National Unity (such as banking, currency, and aviation) will also be needed for that purpose. So far, I have identified over 130 laws that will be required by the time of independence or shortly afterwards.

The way forward

The situation in Southern Sudan is still rather uncertain. On the one hand, there is no deep history or regime that must be unwound, so we are starting with a *blank page*. However, if the new Republic is to be a success, the following challenges remain to be addressed:

- The shortage of legislative counsel at the Ministries of Legal Affairs, Cabinet Affairs, the line ministries, Legislative Assembly, and other key government agencies. Despite Article 155 of the Interim Constitution, the Council of Ministers lacks the ability to ensure that draft laws accord with government policy.

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17 As noted above.

18 www.molacd-goss.org

- The lack of prioritisation: Line Ministries continue the practice of tabling laws that are of interest to them only and not for the greater good of a new State that will needs essential legislation to be in place before independence.
- The fact that the Minister of Legal Affairs is now solely focused on the Transitional Constitution and is not interested in setting legislative priorities.

One of the bright prospects for the future is the return of the Diaspora.[19] A number of legal counsel trained in Khartoum speak only in Arabic, insisting it is their right to do so. Whatever their rights might be, they will not progress far in Southern Sudan, where the Minister of Legal Affairs and Constitutional Development has made it very clear that those who cannot draft even a letter in English (and this is a serious challenge for some legal counsel) will not progress far in their careers within the Ministry.

However, the previous Minister has also made it clear that those returnees from the Diaspora will become the future leaders of the Ministry. They can speak and write in both English and Arabic and they have been trained in the Common Law. These efforts will save the Ministry and its donors significant training costs. Certainly they will be able to progress far more quickly in their careers. However, Southern Sudan is in danger of losing these bright lawyers. The payment of salaries is often delayed for months. Many of those from the Diaspora have returned to South Sudan out of a sense of patriotism. Others never succeeded in gaining bar admission in Canada or elsewhere and have practised as paralegals or have embarked on government careers. They left their families back in their new countries and are hearing their cries to return to the stable jobs that they previously held to support their families. This will truly be a loss to the new nation.

While Southerners are optimistic about the future independent Republic of South Sudan, I am fearful that the new nation will not be able to deliver on the expectations of their people, particularly the returnees from Khartoum who may have been born and raised in a modern capital now being repatriated to an often rural existence. Already students who have returned from studying in the North are turning up at university campuses in Juba and expecting to attend lectures automatically. There will be similar issues with Southern civil servants in the Government of National Unity who had until now made up 24 percent of the national civil service.

In addition, there have recently been defections from the senior ranks of the SPLA to those of a renegade general who has threatened to attack Juba before the declaration of independence, widely anticipated to be announced on 9 July of this year. Although these defections were not uncommon during the years of the struggle for independence, it does not bode well for a new nation.

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[19] The Diaspora includes Southern Sudanese lawyers who had been educated in Canada, US, UK, India and Australia have returned. Some of them had been educated in more than one Common Law jurisdiction and have a good grasp of the relevant subject matter.

The Virtue in an Old Act [1]

David Hull [2]

Abstract: *It is more than 90 years since New Zealand's law drafting service was made an independent office of Parliament, and its functions defined, by statute. A Bill now before Parliament proposes changes. While keeping its independent statutory status, it would again become (as before 1920) an instrument of the executive government instead of a parliamentary office. Moreover, the professional staff of the office (other than the Chief Parliamentary Counsel) would, as a matter of law, cease to be "principal officers". The changes are intended to take account of modern circumstances in the New Zealand office - in particular, its growth in size.*

This article considers the contribution of the existing Act to legislative drafting in New Zealand in the 20th century, and its continuing value as a template of ideas for small jurisdictions.

A Legislation Bill that is now before the New Zealand Parliament seeks to change the character of its law drafting office. During the first part of the 20th century, the office established a reputation for excellence. The new country already had a political habit of legislative innovation, going back to the 1890s and earlier. But for its own part, under four exceptional leaders - Sir John Salmond, followed by James Christie, Dartrey Adams and eventually Denzil Ward - the office developed a strong tradition of professional independence, expertise and authority. On arriving in Christchurch on 16 July 1951 as a guest of the University of New Zealand, to visit its four constituent college law faculties, Dean Griswold of the Harvard Law School reportedly said:

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[1] The author wishes to express his gratitude to Ross Carter, Parliamentary Counsel, Wellington, for so readily providing this and much of the other material used for this article about the history of the New Zealand Parliamentary Counsel Office. The author emphasises that the responsibility for the accuracy of the article is his alone.

[2] The author is a consultant legislative counsel, based in Jersey, Channel Islands. He was formerly a Parliamentary Counsel in New Zealand; Attorney-General of Gibraltar; and Attorney-General of Western Samoa.

> "We have always heard that New Zealand leads the world in law draftsmanship. That probably goes back to the days of Sir John Salmond, who is, I suppose, your leading legal figure. He is really a world figure, but you have built up a tradition for careful and effective draftsmanship. We at Harvard often take down your statutes from our shelves as an example."[3]

Born in the north-eastern England town of North Shields in 1862, John Salmond emigrated with his family to New Zealand when he was aged 14. Having graduated with an arts degree from the University of Otago, he won a scholarship to study law at University College, London. On his return to New Zealand, he practised for some years as a country lawyer in the small township of Temuka in the South Island. In 1897, he was appointed and distinguished himself as professor of law at the University of Adelaide in South Australia. Then, in 1906, he again returned to New Zealand, this time as the first professor of law at Victoria University College in Wellington.

The following year, he became Counsel to the New Zealand Law Drafting Office. This was a new position. It appears that until then, law drafting was being undertaken within the Crown Law Office which, under the leadership of the Solicitor-General of New Zealand as its permanent head, was responsible for the provision of legal services to the executive government. The Crown Law Office was part of the public service, though by various orders the Solicitor-General and the law drafting posts were exempted from some of the enactments that ordinarily applied to civil servants. When Salmond took over, the Law Drafting Office moved to its own premises.[4]

Four years later, Salmond was promoted to Solicitor-General. He took silk in 1912, and was knighted in 1918.

When he moved to the Crown Law Office, the Law Drafting Office was amalgamated with it. He continued to draft some Bills himself, while his eventual successor, James Christie, acted as Law Draftsman from 1916 under his guidance and direction. Christie was confirmed as Law Draftsman in 1918.

In 1920, Salmond became a judge of the Supreme Court. In the same year, New Zealand passed the *Statutes Drafting and Compilation Act*.

It has been suggested on at least one occasion that the Act was personally drafted by him. But Christie, and the Attorney General of the day (Sir Francis Bell, KC), also prepared major legislation. What does seem clear is that Salmond was one of the principal architects, and probably the leading architect, of the new Bill. Christie, in a letter to the Attorney General in 1928, said "some of the most important legislation was drafted by the then Solicitor-General (Sir John Salmond)" and that an official memorandum written by Salmond in 1916 "discussed a proposal that the Law Drafting Office should be established as an office separate from the Crown Law Office".

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3 Dr Erwin Nathaniel Griswold (1904-1994), Dean of Harvard Law School 1946-1967, Solicitor-General of the United States of America 1967-1973.

4 See Appendix B to the Report of the New Zealand Law Commission (2009) "Review of the Statutes Drafting and Compilation Act 1920" (NZLC, R.107).

Of course, in the way of things, institutions benefit from their icons. It is not a reflection on Christie, who served with distinction as Law Draftsman and then as Counsel to the Law Drafting Office for 20 years, that the Act of 1920 is often attributed to Salmond and is seen by many as his legacy to the office he once worked in. He was a famous man, the author of seminal textbooks on jurisprudence and torts and widely regarded as one of the great common law jurists of the 20th century.

Section 2 of the new Act declared—

> "(1) There shall be an office of Parliament to be called the Law Drafting Office.
>
> (2) The Law Drafting Office shall be under the control of the Attorney-General. If during any period there shall be no Minister of the Crown who is Attorney-General, the office shall during such period be under the control of the Prime Minister."

The office was to consist of a "Bill Drafting Department" and a "Compilation Department". The Act gave statutory recognition to its professional members. The chief officer of the Bill drafting division was to be called the Law Draftsman. There were also to be one or more Assistant Law Draftsmen. The other division was to have, as its chief officer, a Compiler of Statutes. All were constituted "principal officers" of the Law Drafting Office. They were to be appointed by the Governor-General on the advice of the Prime Minister and to hold office at pleasure.

Section 4(1) stipulated that the duties of the officers in the Bill Drafting Department were –

> "(a) to draft such Government Bills as the Ministers of the Crown may direct to be prepared for the consideration of Parliament, and such amendments of such drafts as may from time to time be required by Ministers of the Crown during the passage of such Bills in Parliament……".

The section also required the Bill drafting officers to supervise the printing of bills, to examine and report on local Bills, to report on private Bills if required to do so, and to undertake other duties in respect of statutes and subordinate regulations if so required.

So the new Act, prosaically named though it was, had the following distinctive features:

(a) The Law Drafting Office was given a separate, statutory identity.

(b) Unlike the Crown Law Office, it was made a parliamentary office.

(c) Its functions were defined by statute.

(d) Each of its professional members was given statutory status as a principal officer.

(e) The Office was to be controlled directly by a Minister of the Crown.

(f) The first of the Bill Drafting Department's functions was to prepare Government Bills.

(g) It was to do so at the direction of Ministers of the Crown.

(h) It was to do so for the consideration of Parliament.

The Act was a template for a law drafting service in at least three pivotal ways. It recognised that the preparation of legislation is by its nature politically important, and that an executive government must have direct control of law drafting facilities to enable it to secure its policies; that in a Westminster system, the executive branch is responsible to the legislature; and that, on a mature understanding of the process, preparing a Bill – big or small - is always business for senior officials.

This template provided a statutory foundation for a coherent and authoritative doctrine of legislative drafting as a specialized legal discipline.

The Act reinforced—indeed by implication it required—a professional philosophy that legislative counsel owe a duty to the legislature and its members. It did not do so by requiring or permitting counsel to explain or justify executive policy. Nor did it contradict a Minister's right to have a Bill worded in a way that might be the most advantageous to him politically. But, for example, if asked in a Select Committee as to the intended effect of the wording of a Bill, counsel could and would consider himself duty-bound to give a candid answer to any Member of Parliament, regardless of party. In this respect, as in others, an office doctrine could sustain bipartisan confidence in the integrity of its function, while avoiding tensions that might otherwise develop between the Office and the Ministers for whom it prepared draft legislation.

Combined with the requirement to draft to the direction of Ministers, the constituting of all of the legislative counsel as principal officers enhanced the professional independence and authority of the Office. It was, and remained at least until the early nineteen-seventies, organized on the lines of English chambers. The Law Draftsman was nominally first among equals, and the ambience of the office reflected this. After an initial period of supervision for newcomers, each of the legislative counsel was responsible for his own Bills. Instructions for legislation were always delivered by senior civil servants and on occasion, by very senior civil servants. Legislative counsel nevertheless spoke with authority on standards of expression and presentation of Bills and on law drafting practice. They could insist that points of legal principle were properly addressed, and confidently invite instructing officers to consider the practicability of their proposals. If necessary, they could assert a right of audience with the minister promoting a Bill – and, if it involved legal principle, a right to take the matter to the Attorney General. It was in practice rarely necessary to do so: the real virtue of the Act was that it set out a framework in which the participants—all senior officials—understood their respective functions and could work together accordingly.

Despite something of a shift in emphasis so far as reference to ministers is concerned, the guidance notes for the assistance of persons working with the office today (since 1973 called the Parliamentary Counsel Office) continue to reflect that doctrine.[5] Paragraph 3.1 says—

> "3.1.1 Responsibility

[5] "Working with the PCO" (Edition 3.3.1, updated October 2010): see www.pco.parliament.govt.nz

The apparent shift in emphasis seems no more than that: the Law Commission's view appears to imply is that parliamentary counsel does have direct access to the minister promoting a Bill: see paragraphs 2.20, 3.2, 4.8 and 5.1 of its Report.

> In broad terms, the drafter is responsible for the way that legislation is expressed and presented, while responsibility for policy lies with the department. In practice, policy and drafting are not mutually exclusive but form a continuum.
>
> 3.1.2 Independence
>
> Drafters also have a wider responsibility. They are counsel to the Government and Parliament in their legislative capacity. This can occasionally lead a drafter to take a different view on the implementation of policy decisions from that of your department. If necessary, the drafter may ask for an assurance from you that the instructions reflect the Government's or Minister's intentions.
>
> If the drafter believes there is a serious conflict with good drafting practice or general legal principle, which discussion between you and the drafter has not resolved, the drafter may submit a memorandum to the Attorney-General setting out the drafter's concerns.
>
> The PCO's independence can be useful if differences arise between departments. The drafter can help to resolve the conflict in an impartial and unbiased way."

And paragraph 4.2, describing legislative counsel's position at a parliamentary Select Committee, states:

> "The drafter's role remains as outlined in section 3.1, both in terms of drafting and in providing independent advice on the legal implications of provisions."[6]

If passed in its present form, the Legislation Bill will repeal the Act so closely associated with Salmond. It will replace it with one Part – the last in a Bill consisting in all of four – that deals with the constitution and functions of the PCO.

As explained at the outset (in clause 3(g) in Part 1), the Bill's purpose in this respect is to replace the 1920 Act with "modern" legislation that "facilitates" the drafting of "high-quality" legislation.

Part 4 provides for the continuance of the Parliamentary Counsel Office. It begins –

> **57 Parliamentary Counsel Office continues as separate statutory office**
>
> (1) The Parliamentary Counsel Office continues as an instrument of the Crown and a separate statutory office under the Attorney-General's control.
>
> (2) During any period when there is no Minister of the Crown who is Attorney-General, the Parliamentary Counsel Office is under the Prime Minister's control."

After nearly a century, the PCO would thus cease to be a parliamentary office, and become again an instrument of the Executive Government. The new Bill also describes what is in practice the main work of the parliamentary counsel— the drafting of Government Bills—more shortly than its predecessor: the references to their preparation "at the direction of Ministers of the Crown" and for "the consideration of Parliament" are removed. Clause 58 simply begins—

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[6] It is also apparent from the Law Commission's Report (see, e.g. paragraph 4.8) that this is current PCO doctrine.

"(1) The functions of the PCO are—

(a) to draft government Bills and amendments to them;".

The responsibility of the office for the performance of its functions is dealt with in a new clause 63, which begins—

"(1) The Chief Parliamentary Counsel is the chief executive of the PCO and is responsible to the Attorney-General for—

(a) carrying out the functions, responsibilities, and duties of the PCO; and

(b) the general conduct of the PCO; and

(c) managing the activities of the PCO efficiently, effectively, and economically."

The Chief Parliamentary Counsel (as the Law Draftsman of New Zealand has been styled since 1973) would continue to be appointed by the Governor-General (on the "recommendation" of the Prime Minister).

The other parliamentary counsel would no longer be, in law, "principal officers". They would also cease to be appointed by the Governor General. The Bill provides, in clause 64—

"(1) The Chief Parliamentary Counsel may appoint such people to be parliamentary counsel as he or she thinks necessary for the efficient exercise of the functions, responsibilities, duties, and powers of the Chief Parliamentary Counsel and the PCO.

and

(3) A parliamentary counsel is an employee for the purposes of the Employment Relations Act 2000."

These changes apart, the new Bill retains several of its predecessor's features. New Zealand's law drafting service would continue to have a statutory identity. It would remain under direct ministerial control, outside the core public service.

The proposed changes reflect recommendations made by the New Zealand Law Commission in its 2009 Report "Review of the *Statutes Drafting and Compilation Act 1920*" (NZLC, R.107).

Despite the recommendations, this was not at all a critical report. If anything, like Dean Griswold's earlier comments, it might well have provoked a blush or two in the office: in the foreword, the President of the Commission (the Right Honourable Sir Geoffrey Palmer, himself a former parliamentarian and Prime Minister) had this to say:

> "Those who are familiar with the processes of drafting laws in Westminster style Parliaments have long valued the role of Parliamentary Counsel. The professional expertise of Parliamentary Counsel is the essential quality control that is required in the production of statute law.

> There is nothing quite like the institution of Parliamentary Counsel in other systems, even in common law systems such as the United States. We have managed to get the essential elements of law drafting right in New Zealand. There is no need to change in any fundamental way at all.
>
> But because the existing New Zealand statute governing these matters is old it needs to be brought up to date, with a few tweaks here and there.
>
> This is a conservative report. There is no case that can be made, in the view of the Law Commission, that big changes are required. This report aims only to make what is already an excellent institution within the New Zealand Government better."

The Commissioners considered that, as one of the most important checks and balances in the legislative process, the PCO performed what amounted to a constitutional role. It provided a wide range of advice to departments in the development of policy, the pre-instruction stage and the drafting phase, as well as at other times if required. The advisory role was critically important. It required objectivity and independence. The PCO's functions affected both the executive government "as instigator of the initial product" and Parliament "as the owner of the final product". Counsel had to be able to give free and frank advice, distinct from that of the policy makers.[7] The office's functions should be set out clearly and it should be seen to be independent. For those purposes, the PCO should continue to be constituted by statute.

Nevertheless, the Commissioners thought it no longer necessary to make it an office of Parliament - and no longer appropriate that the professional staff other than the Chief Parliamentary Counsel should be principal officers.

On the first point, they noted that in moving the second reading of the 1920 Act in the upper chamber of the day, the Attorney General had said that it was desirable that the law drafting office should be made an office of Parliament and removed from the public service. But while endorsing the view that the PCO should remain outside the public service, they thought that today "things have moved on", that the description as an office of Parliament "is not really an accurate description" and that it is "difficult (though not impossible)" to assert that the PCO now has the primary function of an office of Parliament.

Their view as to the appropriate status of parliamentary counsel was expressed more unequivocally. They noted that the office was much smaller in 1920, and "that the concept then seems to have been that of a small number of colleagues of equal standing, each appointed at the highest level". They considered that for his part the Chief Parliamentary Counsel should continue to be appointed by the Governor-General—in the same way as judges, the Clerk of the House of Representatives, the Solicitor-General, the Commissioner of Police and some others. But they went on to say—

> "However, the position of all other Parliamentary Counsel is very different.
>
> A modern organisation needs to be effectively managed. Chief Parliamentary Counsel should be able to determine who is appointed and on what terms. The only constraint, we

[7] Although the Law Commission recommended that this should be a specific statutory provision (see paragraph 8.12 of its Report), the Bill does not include it.

> believe, is that a person appointed as Parliamentary Counsel should be a lawyer, or have a legal qualification. Appointments by Governor-General should not continue."

As recently as the early 1970s, the PCO was in fact effectively organized as legal chambers. The core of senior members certainly regarded and treated each other as professional equals. No doubt looking to the future, the office had begun to recruit a new generation, and the younger members were (as indicated above) accorded a similar courtesy. The absence of hierarchy, civil service fashion, was a very significant factor in morale.[8] But it is not the point of this article to argue against the merits of the Report or the Bill that has followed it. Since 1920, the PCO has grown substantially in size. Circumstances do change; and as the Commission had readily acknowledged, the authority and reputation of the PCO are firmly established.

In a small jurisdiction, there is also a strong case—a very strong case—for clearly defining the identity, function and status of the law drafting service and its legislative counsel. Whether as a statute to be copied or a handbook of ideas, the 1920 Act remains a valuable model.

The preparation of legislation puts strains on policy resources that are at least as great as those on the law drafting service. Few small administrative cadres have any real depth of experience in the process of making law. In practice, instructing officers more often than not look to legislative counsel to play the leading role. This is not to confuse policy and drafting, but it is important that the service not only has the necessary expertise but is also seen and acknowledged as authoritative.

Another aspect of it is that many small societies practise consensus politics. This approach usually reflects strongly held cultural views about the way in which public business should be conducted. It is therefore also desirable that the law drafting service should have and be seen to have obligations to the legislature.

In the end, it may be too optimistic for a very small legislative drafting office to expect that, as a matter of course—rather than from time to time in particular instances—it will retain experienced legislative counsel in post. A more realistic policy may be to create a service in which members feel professionally fulfilled while they do remain. Identity, independence, the ambience of chambers, and consciousness of expertise and authority in the provision of a professional service all engender high morale—even, ideally, a positive sense of élan.

But law drafting is also, if a public lawyer wishes it to be so, a mobile discipline. It is one of a combination of skills that equips him or her for a successful and rounded career in public law. Arguably it is the most relevant. Experience in legislative drafting will not displace a need for the experience in the practicalities of applied law that must be acquired in advocacy, advisory and criminal work. But none of the other disciplines provides quite the same bridge between the particularity of case lawyers and the creative generality of public administration, policy-making and the affairs of politics. Salmond himself is of course a stellar example of this: several years' experience at the outset in rural private practice, complemented by several more years in the reflectiveness of academic work, and eventually by legislative drafting—all leading on to high office as the principal permanent legal adviser to his government.

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[8] As a former New Zealand Assistant Law Draftsman, I can vouch for this [Ed.]

Book review—"Executive Legislation" (Second edition) by John Mark Keyes[1]

Reviewer: Duncan Berry

The author

This is the second edition of this book. At almost 600 pages, it is almost twice the length of its predecessor. In producing the second edition, the author has, after considerable soul searching, stayed with the original title "Executive Legislation". Although most of us are more familiar with the terms "subordinate legislation", "subsidiary legislation", "delegated legislation" and "secondary legislation, the author justifies his decision on the grounds that the 'rule maker' of the kind of legislation dealt with in his book is in all cases the executive arm of government. As not all legislation made by the Executive falls into the category of "subordinate", "subsidiary" or "delegated", the author is on balance justified in his choice of label.

The author identifies a number of characteristics that an instrument needs to have to constitute "executive legislation". These include the following:

- The authority to make the instrument must be founded in clearly identifiable legislation or in the prerogative;
- The instrument has to have the force of law (i.e. it should have binding legal effect);
- The instrument should be of general application;
- The maker of the instrument should have a broad discretion as to the contents of the instrument;
- The maker of the instrument must be the Executive or a member of the executive branch of the government;
- The instrument must be accessible, a minimum requirement being that it be published.

As the author points out, law-making in the modern state is carried out primarily by the executive branch of government, with authority to make "executive legislation" being conferred either directly by the country's constitution or, more commonly, through primary legislation enacted by

[1] Publisher: LexisNexis, Canada

the country's legislature. As someone who has been drafting primary and secondary legislation for over 45 years, I have no hesitation in supporting the author's view that the impact of "executive legislation" is at least as important as primary legislation or the common law.

The new edition is particularly valuable because it analyses in a most erudite and logical way this important but neglected area of law. Like the first edition, it reviews the relevant case law of Canada, Australia and the United Kingdom, focusing in particular on how this case law responds to the two fundamental legal norms recognised by western democracies: democracy and the rule of law.

Despite the case law on executive legislation being relatively sparse, the author has managed to dredge up a table of cases running to no fewer than 26 pages to illustrate the various aspects of his chosen subject. This alone is a tremendous accomplishment. Added to the cases discussed and analysed in the first edition is a vast array of new ones, which the author painstakingly scrutinises and analyses.

Books dealing with the author's chosen topic are few and far between. Although most books on legislative drafting have something to say about executive legislation, I know of only one other substantial work that is totally devoted to the subject, *Delegated Legislation* by Pearce & Argument.[2] This makes the decision of the author to take the trouble to update his first edition particular welcome.

Some years ago, Sir William Dale suggested that the detailed style in which 'common law' legislation was drafted should be simplified. Others have made similar suggestions. However, as the author maintains, this would shift the complexity of primary legislation elsewhere, either to court decisions or to subordinate legislation. Like some other commentators and legislative counsel, I have misgivings about going down this route, being of the view that all fundamental issues should be covered by the relevant primary statute. That said, it has to be conceded that some issues have to be left to be delegated to the Executive. The legislature simply does not have the time or the will to flesh out complex legislative schemes. So I agree with the author when he argues that it is unrealistic to expect legislatures to make all the law and that delegation of the legislative power allows this task to be shared.

The author has expanded his second edition[3] to five parts, comprising 15 chapters. Part I deals with the basic concepts necessary to understand the topic. Chapter 1 tells what is meant by "executive legislation" while chapter 2 deals with the constitutional foundation that underpins the topic.

Part II, comprising chapters 3 to 5, deals with the requirements for making, promulgating and processing "executive legislation". Chapter 3 covers the process requirements to be observed in making executive legislation. These are normally to be found either in the legislation that

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2 Pearce, D. C. & Argument, Stephen. (1999) *Delegated legislation in Australia* Butterworths, Chatswood, NSW.

3 The first edition contained only three Parts.

authorises the making of the instrument concerned or in general legislation that governs the making of executive legislation.[4] Chapter 4 focuses on the participation requirements for making and giving legal effect to executive legislation, while chapter 5 covers the requirements for promulgating this kind of legislation, which includes ensuring that the public has access to it, bearing in mind that ignorance of the law is not an excuse.

Part III, comprising chapters 6 to 8, deals with the substantive scope of "executive legislation" and covers the constraints on making this kind of legislation; the provisions that authorise its making; what happens when executive legislation is inconsistent with other provisions; and how inconsistencies are resolved. In chapter 6, the author identifies three different constraints that limit the effect of executive legislation, unreasonableness; improper purpose (including bad faith[5]); and discrimination.[6] Chapter 7 deals with the primary provisions that authorise the making of executive legislation and, as the author indicates, limit the scope of an instrument made under those provisions. The judiciary clearly has a big part to play here by interpreting the instrument to ascertain whether it will attain or is likely to attain those purposes. The author's main concern in chapter 8 is to address the inconsistencies that may arise between executive legislation and other provisions made by or under the authority conferred by the legislature that authorised the making of that legislation.

In Part IV, comprising chapters 9 to 12, the author covers such diverse subtopics as the obligation to make executive legislation and to bring statutes into force, uncertainty and vagueness; subdelegation of the legislative power; and the controversial subject of incorporating material (both legislative and non-legislative) by reference. Chapter 9 considers three questions concerning 'rule-making'. These are—

- Does the relevant law-making authority have an obligation to actually exercise a power to make particular executive legislation and, if it does, will the courts order the authority to perform the obligation?[7]
- Can a statute function in the absence of executive legislation that appears necessary to give effect to the statute?
- How might the absence of executive legislation affect the absence of administrative powers?

In chapter 10, the topic of uncertainty is considered in the context of the operation of executive legislation. By uncertainty, the author is not only referring to the uncertainty that arises with respect to the meaning of the legislation, but also to the legislation being ambiguous in some

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4 E.g. see the Legislative Instruments Act 2003 [Cwlth]; the Subordinate Legislation Act 1989 [NSW]; and the Subordinate Legislation Act 1994 [Vic], just to mention a few.

5 Which limits the purposes for which such legislation may be made.

6 This may limit the effect that executive legislation has.

7 For example, does a delegate (such as a Minister) have an obligation to bring an enactment into force when the relevant provision says "This Act comes into force on a day or on days to be fixed by the Minister by notice published in the *Gazette*"?

respect. Chapter 11 deals with attempts by the rule-making authority to subdelegate the legislative power, which generally the delegate can only do if there is specific authority in the parent statute. In chapter 12, the author discusses the somewhat controversial topic of incorporating a legislative or non-legislative document or text into a legislative instrument without actually setting it out in the instrument.

The final Part, which is new, comprises chapters 13 to 15 and deals with the questions: "how and when does executive legislation come into operation?" and "how and when does it cease to have effect"? In chapter 13, the author deals with the commencement and repeal of executive legislation and such issues as the retroactive and retrospective operation of such legislation.[8] Chapter 14 covers the review of executive legislation by the legislature, including legislative provisions relating to the taking effect of executive legislation[9] and the circumstances in which it ceases to have effect.[10] In the last chapter, the author discusses various aspects of the judicial and quasi-judicial review of executive legislation, including the jurisdiction of courts to interpret executive legislation and review its validity. He also considers whether administrative tribunals and other quasi-judicial bodies have any role in deciding those questions. The chapter concludes with a discussion of the interpretative and evidentiary presumptions applying to questions involving the validity of executive legislation and by considering the possible remedies available when executive legislation is found to be defective.

The author's erudite and scholarly analysis has undoubtedly produced a thorough and insightful account of the functions of and constraints on executive legislation in legal systems that follow the Westminster system of government. After reading this book, albeit cursorily given the time constraints, I have difficulty in thinking of any aspect of his chosen topic that the author has overlooked.[11] If not least because of the dearth of other books on the topic, *Executive Legislation* should form an essential part of the library of every legislative drafting office and should be read, not only by those who may specialise in drafting executive legislation but also by all those engaged in drafting primary legislation.

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8 The author draws a clear distinction between retrospectivity and retroactivity.

9 Such as affirmative resolution procedures that have to be observed before executive legislation takes effect.

10 Such as procedures for the post-commencement disallowance of executive legislation.

11 One question that I am not sure the book answers, at least not directly, is the status of notices, orders and other instruments that commence primary legislation. This was at one time a controversial topic in the former Hong Kong Attorney General's Chambers, with many lawyers being of the view that such instruments were administrative and not legislative in nature. However, applying the criteria that the author identifies as characteristics of executive legislation, I have little doubt that instruments that commence primary legislation have legislative effect and thus are "executive legislation".

Commonwealth Association of Legislative Counsel

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