COMMONWEALTH ASSOCIATION
OF LEGISLATIVE COUNSEL

# THE LOOPHOLE


OCTOBER 2007

# COMMONWEALTH ASSOCIATION OF LEGISLATIVE COUNSEL

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# THE LOOPHOLE

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**CONTENTS**

# Editor's Notes

With this issue we present the final instalment of our 2005 CALC conference papers. My particular thanks to Gayle Moore, Legislative Program Coordinator in our office, for her assistance in preparing this issue.

Daniel Greenberg's paper on the court's approach to "legislative intention" may be familiar to some of us, as it was published last year in the *Statute Law Review*. In correspondence to arrange for publication permission from Oxford University Press, Daniel indicated that there have been a number of important *Pepper* v. *Hart* developments since the paper was prepared, and that we can expect further on this in the next edition of *Craies on Legislation*, which he is presently preparing.

The trio of presentations on "consolidation, revision and rewriting" starts with Neil Adsett's paper outlining the methodology he applies when preparing statute revisions for smaller jurisdiction s in the Commonwealth. (Perhaps not as entertaining as his speech at the conference, but of good practical guidance for approaching such projects.) Duncan Berry's paper provides an overview of the challenges in keeping to statute book up-to-date and the responses taken by various jurisdictions to those challenges, while my paper describes the benefits (and luxury) of having a long-established general statute revision process, and British Columbia's new approach to statute-by-statute revision.

As a bonus, we also have Steven Argument's paper presented earlier this year at the Australia–New Zealand Scrutiny of Legislation Conference. With its intriguing title, "Straddling a barbed wire fence" looks at parliamentary scrutiny of legislation through the eyes of someone who has one foot on the drafting side of the fence and the other on the legislative review side.

Steven's paper reminds us of the limited but important policy role of legislative drafters – not in deciding what a particular policy should be, but ensuring to the best of our abilities that the instructors understand the legal and practical implications of the legislation they are asking us to prepare.

Which brings me to my final note, by way of an announcement about the next CIAJ Legislative Drafting Conference to be held in Ottawa, Canada, September 11-12, 2008.

While most of the professional development programs presented by the CIAJ (Canadian Institute for the Administration of Justice) are directed at the judiciary and administrative tribunal members, they also present a bi-annual conference for the other writers of the law – legislative drafters. In the past these conference have focussed on drafting issues. Next year's conference will widen the perspective, to look at the intersecting roles of those involved in determining the wording of legislative texts, including policy analysts, instructing officials, legal advisors, translators, jurilinguists, editors, and (last in my list, but of course not least) parliament and its law-making delegates. The conference theme: *Who* Really *Writes the Law?* Questions to be considered by conference speakers include: What are the distinctive roles of the various participants? Are there overlaps or conflicts? Are these roles evolving in response to changes in the political culture or environment for law-making?

Having had the opportunity to work with the Australian Office of Parliamentary Counsel, and having others from my office report on their experience drafting in other jurisdictions, I believe the issues will be of interest beyond the Canadian framework. Perhaps we will see some of our Commonwealth colleagues there.

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# The nature of legislative intention and its implications for legislative drafting

***Daniel Greenberg***

## Introduction

It is one of the most ancient principles of the law of England and Wales that in applying legislation the courts and any other reader should aim to construe it "according to the intent of them that made it"[1]. But while this trenchant aphorism is initially and superficially satisfying, like many an epigram the more one thinks about it the less it appears to mean.

Who are "those who made the legislation"? In the case of an Act of Parliament, it was notionally made by that shadowy concept "The Sovereign in Parliament", being neither the Sovereign, nor the Houses of Parliament, but a notional agglomeration[2]. To suggest that the Sovereign personally had any intention as to what was to be achieved by the legislation when giving Royal Assent to it would be patently absurd. Equally, to suggest that both Houses, or even either House, actually had a single intention in relation to the construction of the Act would be to defy obvious reality. And as soon as one arrives in the search at individuals who might be reasonably expected to have had actual and ascertainable intentions as to the construction of the legislation – such as the draftsman of the Bill, the departmental administrators or lawyers with responsibility for the content of the Bill, the Minister in charge of the Bill in either House, or individual Members of either House participating in consideration of the Bill – one has left the class of persons whose intentions can without constitutional impropriety be treated as the intentions of Parliament.

In the case of subordinate legislation, the fact that there will often be a single individual making the legislation in a formal sense[3] might suggest that it will at least be sufficiently clear whose intent is to be considered (even if there were difficulties in establishing what the intent was). But as soon as one examines the reality of the process by which subordinate legislation is made it becomes clear that the position is no better than in the case of primary legislation and may be worse. In most cases, it is as absurd to attribute to the Minister making an instrument any actual intentions in relation to its meaning as it is to attribute intention to the Sovereign in granting Royal Assent to an Act. There are three or four thousand statutory instruments made each year nowadays, and a departmental Minister might expect to sign several each week: as a general rule

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This paper was presented to the CALC Conference, London, September 2005 and was originally published in the *Statute Law Review*, Volume 27, No. 1, 2006, pp. 15 – 28.

[1] 4 Co. Inst. 330.

[2] One could argue at length about whether an Act passed under the Parliament Act 1911 (c. 13) is enacted by the Queen in Parliament or, as the special enactment formula might seem to indicate, by the Queen "in", or together with, the House of Commons. But the argument would probably be inconclusive and futile.

[3] That will not, of course, be true for Orders in Council, in connection with which the notion of the Sovereign in Council will raise the same difficulties as the notion of the Sovereign in Parliament. Orders of Council will be not much better, since the Council meeting that made the Order will have been attended by a number of Councillors, often selected more or less at random so far as the content of the instrument is concerned. Even in the case of rules, regulations and orders, it will often be the case that more than one Minister is jointly responsible for making the instrument.

they will be either too lengthy and complicated to permit of the Minister acquiring much understanding of the detail or too trivial to make it feasible to brief the Minister on the content in detail.

Even if it were possible to establish whose actual intentions at the time of enacting legislation were relevant, it would still of course be difficult or impossible to ascertain what their intentions were. In the case of an Act of Parliament the only contemporary records likely to be of assistance are those set out in Parliamentary records. But although the courts now permit themselves in certain cases and subject to significant constraints to look at material of that kind in construing legislation, the fact remains that, as Lord Oliver of Aylmerton said in *Pepper (Inspector of Taxes)* v. *Hart* [4] (the case in which the House of Lords decided that Parliamentary material could be considered for the purposes of resolving ambiguity)—

> … experience shows that language – and, particularly, language adopted or concurred in under the pressure of a tight parliamentary timetable – is not always a reliable vehicle for the complete or accurate translation of legislative intention.

The same is true of a Minister or group of Ministers making subordinate legislation.

Of course, one could ask the Ministers who proposed primary legislation to Parliament, or who themselves made subordinate legislation, what their intentions were (if their intentions were established as being determinative or even relevant): but the Ministers themselves would often have only a hazy idea of what their original intentions had been, while to allow them to substitute their present intentions in relation to the application of the legislation would be in effect to permit them an unrestricted, unaccountable and wholly informal power of continuous legislating.

### Irrelevance of subjective intention of legislature

The practical difficulties adumbrated above are sufficient to show that it would be difficult or impossible in most cases to take the aim described in Coke's aphorism literally and discover the actual intention of the legislature. Even were it possible, however, it is clear that the process of discovering the actual subjective intention of the legislature – whoever they are – is not the same as the process of discovering the legislative intent as that process is traditionally approached by the courts.

The point was made recently by Lord Nicholls of Birkenhead in *R* v. *Secretary of State for the Environment, Transport and the Regions, ex parte Spath Holme Ltd*— [5]

> Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context. The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the "intention of Parliament" is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members or even of a majority of individual members of either House. These individuals will often have widely varying intentions. Their

[4] [1993] 1 All ER 42 HL.

[5] [2001] 2 AC 349, 395 HL.

> understanding of the legislation and the words used may be impressively complete or woefully inadequate. Thus, when courts say that such-and-such a meaning "cannot be what Parliament intended", they are saying only that the words under consideration cannot reasonably be taken as used by Parliament with that meaning.

An older but equally helpful exposition of the same point is found in the judgment of Lord Watson in *Salomon* v. *A. Salomon & Co. Ltd*— [6]

> "Intention of the Legislature" is a common but very slippery phrase, which, popularly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the Legislature probably would have meant, although there has been an omission to enact it. In a Court of Law or Equity, what the Legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication.

More epigrammatically, Lord Reid said in *Black-Clawson International Ltd* v. *Papierwerke Waldhof-Aschaffenburg AG*— [7]

> We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used.

So even in the case, for example, of an order made by a single Minister in a matter in which he took a personal interest and as to the meaning of which he could therefore reasonably be expected to have an actual intention, the courts would not concern themselves with discovering that actual intention for the purposes of construction. They would not summon the Minister to give evidence as to his or her intention, nor, subject to what is said below, would they admit evidence from the Minister to that effect.

The reasons for this are obvious. In *Spath Holme* Lord Nicholls referred in passing to two reasons why subjective intention is not the aim of the courts' search in construing legislation.

(1) First, there are generally a large number of persons whose subjective intentions would have to be considered if subjective intention were relevant at all.

(2) Secondly, and relevant even in the case of legislation made by a single mind, the individual's conception of the "true" meaning of the legislation that he or she makes may be, as Lord Nicholls puts it, woefully inadequate.

A third reason, not directly mentioned by Lord Nicholls, is that inviting a Minister who made legislation to assist in its construction by giving evidence as to his or her intention at the time would be perceived as giving the Minister two bites at the cherry, so to speak, even if the Minister could be trusted not to substitute his present aspirations for his original intention: the Minister has an opportunity to express his or her intention in the words used, and ought not to seek to repair any lack of clarity or felicity in the choice of words by making subsequent statements about the state of his or her mind at the time.[8]

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[6] [1897] AC 22, 38 HL.

[7] [1975] AC 591, 613 HL.

[8] Governments will, of course, seek to construe legislation after its enactment or making, by issuing guidance on how it is to be interpreted or applied. But while there is nothing inherently unlawful or improper in that, there is no reason why a government should expect particular deference to be paid to its observations or entreaties; and whether and to what extent they will be admissible in and considered by the courts is an open question – see *Evans*

### What is objective intention?

All this makes it easy to understand why the courts have been careful not to equate legislative intention with the actual or subjective intention of any one or more persons involved in the making of legislation. But what is more difficult is to understand precisely what the search for legislative intention then becomes. What is the precise nature of the "objective concept" identified by Lord Nicholls, the "meaning of the words used" referred to by Lord Reid or the legitimately ascertained intention alluded to by Lord Watson?

The concept of a subjective intention of the legislature would, at least, be a clear concept, even if difficult or impossible to establish in individual cases. But having rejected that concept it must be replaced with something that has a sufficient degree of certainty and consistency to avoid the dangers inherent in the following powerful and troubling assertion made by the author of a paper on construction of legislation in the Canadian courts— [9]

> A careful study of cases involving statutory construction makes it appear that "legislative intention" is little more than a meaningless mantra that is invoked by judges who wish to justify holdings that are reached by intuition or other ill-defined means. By chanting 'legislative intention', the judge calms his or her nerves and casts responsibility for a case's outcome on the drafters of a statute. Statutory interpretation can be a frightening exercise, but judges seem to feel that all will be well if they discover and rely on the 'legislative intention'. Unfortunately, no one seems to know what the phrase 'legislative intention' really means.

One attempt to spell out what "objective intention" means might be along the lines of "the intention that a reader could reasonably impute to the legislature by reference to the words used". But the obvious problem with this approach is that what it is reasonable to impute to a legislature depends on who or what that legislature is and what its state of mind can reasonably be taken to have been: which takes one straight back to the impossibility or undesirability of identifying one or more particular individuals and construing the legislation by reference to the state of their minds at a particular time.

Another approach would be to define "objective intention" as being that intention which may reasonably be inferred having regard only to, as Lord Reid puts it, "the meaning of the words which Parliament used", looking at the literal meaning unflavoured by any underlying policy or surrounding circumstance. The principal problem with this is that it simply does not describe the process that the courts undertake or a process that it would occur to anybody as being sensible to undertake. Whatever a judge's position in relation to the academic debates the matter of literal or

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v. *Amicus Healthcare* [2004] 3 All E.R. 1025 C.A. And note the following observations of Chief Master Hurst in *Sharratt* v. *London Central Bus Co Ltd* [2003] 1 All ER 353 on the admissibility of evidence from the Lord Chancellor's officials – "Certainly in my judgment neither her letter nor any views which she may have expressed to Mr McCulloch can be regarded as 'official statements'. Thus, although her letter throws some light on the way in which the Lord Chancellor's Department might hope that conditional fees would develop, I do not take her views as persuasive authority on the meaning of the legislation." Note also, in a similar but not precisely parallel vein, Lord Woolf CJ in *R (Gillan)* v. *Metropolitan Police Commissioner* [2004] EWCA Civ 1067 (para. 30)— "The interpretation of the [Terrorism Act 2000] is a matter of law for the courts. There is no question of this Court showing deference or respect to the views of the respondents because of the subject matter of the legislation. On the contrary, as the statutory power enables the appropriate senior police officer to authorise interference with the freedom of the citizen, backed by a criminal sanction to support compliance, the power has to be restrictively construed."

[9] R.N. Graham, *Good Intentions*, (2000) 12 S.C.L.R. (2d) 147 to 185.

purposive construction, nobody has ever doubted that the context and purpose of legislation is crucial to interpreting it. As Lord Blackburn put it in *Direct US Cable Co.* v. *Anglo-American Telegraph Co.*, [10] long before the present general acceptance of purposivism—

> The tribunal that has to construe an Act of a legislature, or indeed any other document, has to determine the intention as expressed by the words used. And in order to understand these words it is natural to inquire what is the subject-matter with respect to which they are used and the object in view.[11]

### The objective reader rather than the objective legislator

The difficulty in establishing the intention of the legislature is, to some extent, softened by applying an objectivity more to the consideration of the reader than to the consideration of the legislature. When in *Spath Holme* Lord Nicholls referred to the "objective concept" of "the intention which the court reasonably imputes to Parliament in respect of the language used", he was referring not to an imputation on objective grounds as to the actual intention of Parliament – which as noted above simply recreates the question of whom one means by Parliament in the context of actual intention – but to an imputation along the lines of the following assertion made by Lord Nicholls in a recent lecture: "the words of a statute are intended by Parliament to convey the meaning they would reasonably convey to a reader of the statute assisted where necessary by a suitable professional adviser". [12]

In the commercial context Lord Nicholls put the point as follows in the same lecture—

> In everyday life we seek to identify what a speaker or writer *actually* intended by the words he has used. As we all know, the law proceeds on a different footing: words are taken as intended to convey the meaning, that is, the idea, they would *reasonably* convey to the hearer or reader. The question posed by the law when interpreting a contract is thus: what would a reasonable person *in the position of the parties* understand was the meaning the words were intended to convey?

This, of course, creates its own difficulties: but they are of a much lesser order and more open to practical resolution in individual cases than the search for the subjective intention of the maker of legislation. The principal difficulty with this approach is to identify the typical profile of the reader of a particular legislative provision. A subsidiary difficulty is to determine in what circumstances it will be appropriate to assume that the typical reader will necessarily be assisted by professional advice, and, in cases where he will be assisted, to determine the degree of expertise and specialist knowledge that the typical adviser is likely to have.

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[10] (1877) 2 App. Cas. 394, 412 HL.

[11] Equally, and at the other extreme, however purposive the approach that a particular judge likes to take, it is accepted by all that he is constrained in his purposivism by the clear linguistic limits of the text. So, for example, in *Capper* v. *Baldwin* [1965] 2 QB 53, 61 per Lord Parker CJ – "[Counsel's] argument comes down to this, that if he is wrong and you cannot exclude such a machine as this, it really is driving a coach and four through section 33 itself and what, he maintains, must have been the plain intention of Parliament, namely, an intention not to permit such a machine to be operated for private gain in a public-house. I agree that it is very odd, but the intention of Parliament must be deduced from the language used, and it may well be that Parliament expected the necessary limitation to be imposed by the permit which is a condition precedent to the operation of such a machine in such a place. But be that as it may, I am quite unable to construe the words in such a way as to exclude this machine."

[12] *My Kingdom for a Horse: the Meaning of Words*, Chancery Bar Association Annual Lecture, 16th March 2005: text taken from the website of the Association.

Nor does the approach of looking for an objective reader entirely eliminate the difficulties of considering the nature of the legislature. As Lord Nicholls says, the question is what the reasonable reader would understand the speaker as having meant to convey. And the point is expressed similarly in the following passage of the opinion of *Lord Hoffmann in R (Wilkinson)* v. *Inland Revenue Commissioners*— [13]

> It may have come as a surprise to the members of the Parliament which in 1988 enacted the statute construed in the *Ghaidan* case that the relationship to which they were referring could include homosexual relationships. In that sense the construction may have been contrary to the 'intention of Parliament'. But that is not normally what one means by the intention of Parliament. One means the interpretation which the reasonable reader would give to the statute read against its background, including, now, an assumption that it was not intended to be incompatible with Convention rights.

While this is objective in one sense, the fact that one has to consider reasonableness re-introduces an element of subjectivity. And since what is reasonable for the reader to assume will or may require the reader to consider the nature and circumstances of the speaker, the determination of the reasonable reader's impression has the potential to take us full-circle back to the impossibility of identifying who Parliament actually is. In reality, however, the return is not quite full-circle: the typical reader will have an imprecise but generally serviceable image of the nature of the legislature, and it will be sufficient to imagine what the reader would have expected that imaginary legislature to be intending to convey.

### Equating objective intention with the "mischief"

The centuries-old mischief rule has traditionally, without expressly distinguishing between a subjective approach and an objective one, been phrased more by reference to the objective appearance of the law taken in its full context than to a search for a subjective intention on the part of its makers[14]. Clearly, the concepts of the mischief at which the legislation is aimed and the intention of the legislature are very closely related; and they have sometimes been equated. So, for example, in *Building Societies Commission* v. *Halifax Building Society* [15] Chadwick J said—

> Browne-Wilkinson V-C (as he then was), giving judgment in the Abbey National case, had described s 100 (8) as 'obscure'. That provided some base from which to embark on an examination of the relevant parliamentary material. It was only after such an examination that I could tell whether the material clearly discloses the mischief aimed at or the legislative intention lying behind the obscure words. …
>
> It follows that I am satisfied that, when Browne-Wilkinson V-C in the Abbey National case—without access to the consultative paper or the Parliamentary material—identified the mischief at which s 100 (8) was aimed as being the need to prevent those who became members of the society only when the conversion was in the air from being able to take a quick advantage, he was substantially correct. I am also satisfied

[13] [2005] UKHL 30, para. 18.

[14] See, for example, as well as the original formulation of the rule in *Heydon's Case* (1584) 3 Co. Rep. 7a, the following expression of the rule by Lindley MR in *Re Mayfair Property Co.* [1898] 2 Ch 28, 35 – "In order properly to interpret any statute it is as necessary now as it was when Lord Coke reported *Heydon's Case* to consider how the law stood when the statute to be construed was passed, what the mischief was for which the old law did not provide, and the remedy provided by the statute to cure that mischief."

[15] [1995] 3 All ER 193 Ch.

> that there is no clear statement of the legislative intention lying behind the words 'in priority to other subscribers' in s 100 (8).[16]

### Evidence

It is not within the remit of this paper to assess the state of the law on the nature of the materials that the courts will and will not permit themselves to consider in determining the legislative intention. But three brief points may be worth making in the context of the present discussion.

First, there is nothing in the decision in *Pepper* v. *Hart* [17] (permitting the courts to have regard to Hansard for the purpose of resolving ambiguity in statute) that necessarily implies that the search for legislative intention is a subjective one by reference to the minds of the members of the Houses of Parliament. The decision can certainly be understood, and is perhaps best understood, as mere acknowledgment that in the search for background evidence of the context of an Act for the purpose of construing its probable intentions statements by Parliamentarians at the time of the passage of the Bill for the Act may be a relatively fertile source of illumination (although practice shows that the fertility is only relative, and judged objectively in itself is consistently disappointing[18]).

Secondly, the courts will be alive to, and utterly resistant of, any attempt by the Government to adduce Hansard or any other material as a way of remedying defects in the drafting of statute, by impressing upon the courts that a particular construction was what the Government had subjectively intended to provide for and should therefore be given precedence over other possible constructions. See, for example, the following passage of the joint judgment of Thorpe and Sedley LJJ in *Evans* v. *Amicus Healthcare*— [19]

> Although no formal objection was taken before us to the admission of this evidence, [Counsel] was pressed from the bench about its admissibility. In the absence of any intractable ambiguity of the sort contemplated in *Pepper* v. *Hart*, it seemed at first sight an endeavour by the department of state responsible for drafting the legislation to introduce its own intentions as an aid to construction, something which is no more permissible in the construction of legislation than it is in the construction of contracts.

Thirdly, if it is accepted that Hansard is admitted not because of any intrinsic authority of Members of either House to direct or control how legislation is to be construed but merely in so far as it provides illumination of the political context against which the reasonable reader would consider it, two propositions follow—

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[16] Note also that, perhaps less helpfully, in the same case Chadwick J at least terminologically appeared to return to the subjective-search approach of determining legislative intention, when he said "My impression from the material which has been put before me is that those words reflect the preferred route proposed in the consultative paper published in December 1985—that conversion by transfer to a specially formed company should be effected through an issue by the successor of shares for cash in relation to which shareholding members would have exhaustive or priority rights to subscribe. I doubt whether the draftsman of sub-s (8) had the issue of free shares in mind."

[17] [1993] AC 593 HL.

[18] See, for example, the following observation of Lord Hoffmann in *R (Quintavalle)* v. *Human Fertilisation Authority* [2005] UKHL 28 (para. 34) – "As is almost invariably the case when such statements are tendered under the rule in *Pepper* v. *Hart*, I found neither of any assistance." That was a case in which Counsel for opposite sides had each found something in Hansard to adduce in support of their construction.

[19] [2004] 3 All E.R. 1025, 1039-1042 CA.

(1) The extent to which the observations of Ministers or others in Hansard are relevant to establishing the context within which legislation will be read may depend in part upon how far the general political aspirations of or background to the legislation were known outside Parliament. In the case of a Bill of no general political importance, however revealing the speech of a Minister may be as to what was in the executive's minds when proposing the legislation, it may be of little or no value in determining what the reasonable reader would expect the legislation to have been intended to mean; the speech probably deals with recondite concepts and policy of which the primary expected audience would have been wholly unaware. Of course, in the case of a technical Bill, its primary audience may be a class of technical experts who will be expected to have been familiar with the policy objectives, in which case the Hansard references will have their usual weight. But not so in the case of a Bill which, while intended for a general audience (in the sense of not being of particular relevance to any particular class of reader) is intended to make a change in the law of a slight or technical nature of which the general public is unlikely to have any knowledge.

(2) Other contemporary evidence that illuminates the background against which the primary audience would have been expected to consider the legislation will be no less pertinent than Hansard. As well as departmental guidance and other documents, that could include evidence or observations from the draftsman[20].

### Stretching the fiction: section 3 of the Human Rights Act

While the notion of the legislative intention is a fiction, it is clearly a convenient and reasonable one, and its focus on the natural meaning of the words used means that the courts appear generally comfortable about discovering the legislative intention of a particular provision.

In certain contexts, however, the courts are required not to look for the legislative intention by reference simply to the natural meaning of the words used in the context of the legislation and its political background, but to have regard to that intention as qualified by some other specified consideration.

The first obvious example was section 2 (1) of the European Communities Act 1972 [21]. A more recent and possibly even more powerful example is section 3 (1) of the Human Rights Act 1998 [22]. As to that, Lord Nicholls of Birkenhead said in *Ghaidan* v. *Mendoza*— [23]

> [30] … the interpretative obligation decreed by section 3 is of an unusual and far-reaching character. Section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear. In the ordinary course the interpretation of legislation involves seeking the intention reasonably to be attributed to Parliament in using the language in question. Section 3 may require the court to depart from this legislative intention, that is, depart from the intention of the Parliament which enacted

[20] See further discussion below.

[21] 1972 c. 68.

[22] 1998 c. 42 – "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

[23] [2004] UKHL 30.

> the legislation. The question of difficulty is how far, and in what circumstances, section 3 requires a court to depart from the intention of the enacting Parliament. The answer to this question depends upon the intention reasonably to be attributed to Parliament in enacting section 3.
>
> [31] On this the first point to be considered is how far, when enacting section 3, Parliament intended that the actual language of a statute, as distinct from the concept expressed in that language, should be determinative. Since section 3 relates to the 'interpretation' of legislation, it is natural to focus attention initially on the language used in the legislative provision being considered. But once it is accepted that section 3 may require legislation to bear a meaning which departs from the unambiguous meaning the legislation would otherwise bear, it becomes impossible to suppose Parliament intended that the operation of section 3 should depend critically upon the particular form of words adopted by the parliamentary draftsman in the statutory provision under consideration. That would make the application of section 3 something of a semantic lottery. If the draftsman chose to express the concept being enacted in one form of words, section 3 would be available to achieve convention-compliance. If he chose a different form of words, section 3 would be impotent.
>
> [32] From this the conclusion which seems inescapable is that the mere fact the language under consideration is inconsistent with a convention-compliant meaning does not of itself make a convention-compliant interpretation under section 3 impossible. Section 3 enables language to be interpreted restrictively or expansively. But section 3 goes further than this. It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it convention-compliant. In other words, the intention of Parliament in enacting section 3 was that, to an extent bounded only by what is 'possible', a court can modify the meaning, and hence the effect, of primary and secondary legislation.
>
> [33] Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not convention-compliant. The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must, in the phrase of my noble and learned friend Lord Rodger of Earlsferry, 'go with the grain of the legislation'. Nor can Parliament have intended that section 3 should require courts to make decisions for which they are not equipped. There may be several ways of making a provision convention-compliant, and the choice may involve issues calling for legislative deliberation.

One could distil from this approach the suggestion that whereas one is normally required to inquire what meaning can reasonably and objectively be imputed to the words used, in applying section 3 one is required to think what words might have been chosen, consistently with the principal intentions of the legislation, had a particular issue of compliance with the European Convention on Human Rights been brought to the attention of the legislature. One can consider this as a form of search for the intention of the legislature only in so far as one takes section 3 of the 1998 Act as establishing a presumption that the legislature always intend to comply with the Convention, so that words used whose natural meaning inevitably conflicts with the Convention

must be regarded as an unintended slip which disturbs rather than reveals the "true" intention[24]. While the courts appear reasonably comfortable in applying this presumption in this way, it certainly stretches the notion of the search for the legislative intention one step further away from anything that might be recognised as the actual intention of the legislature[25].

### Implications for legislative drafting

It has always been axiomatic that legislation should be drafted with the ease and convenience of the reader in mind, and that what is convenient for the reader will depend upon the nature of the legislation. In the enduring and salutary words of Sir Alison Russell KC— [26]

> The draftsman should bear in mind that his Act is supposed to be read and understood by the plain man. In any case, he may be sure that if he finds he can express his meaning in simple words all is going well with his draft: while if he finds himself driven to complicated expressions composed of long words it is a sign that he is getting lost, and he should reconsider the form of the section.

So who are our readers? While in one sense Parliament is our primary client and the courts are our "ultimate" client, in another sense we should consider the citizen – the professional or lay individual who may have to consult our statute daily for years – not only as our principal client but also as, ideally, the ultimate client. A pellucid product may be able to avoid the attention of the courts forever. As the Renton Committee put it in their report— [27]

> On the other hand, the draftsman must never be forced to sacrifice certainty for simplicity, since the result may be to frustrate the legislative intention. An unfortunate subject may be driven to litigation because the meaning of an act was obscure which could, by the use of a few extra words, have been made plain. The courts may hold, or a Government department be driven to conclude, that the Act which was intended to mean one thing does not mean that thing, but something else. Where this occurs, the draftsman's discomfort is considerable, and he will instinctively guard against its happening to him a second time.

Equally of course, what is convenient for the reader will depend upon his nature and purpose in consulting the legislation, which will in turn depend upon the nature of the legislation. As Sir Alison Russell continued—

> Of course, in Acts of a technical kind, he may find it necessary to use technical expressions: but such Acts will usually only affect readers who are qualified to understand them.

The reflections above about the meaning of the objective intention of Parliament make careful consideration of who the "target audience" of the statute is likely to be not merely a matter of good practice for the ease of citizens, but actually an essential part of ensuring that the search for the legislative intention, whether by the courts or by the citizen, will produce the right result. To

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[24] An argument that will not, of course, be relevant to pre-1988 enactments: but in relation to them one can say that the 1988 Act has by an exertion of its legislative intent modified the legislative intents of the pre-1988 legislatures.

[25] As Lord Nicholls put it in his lecture mentioned above, "Interpretation of a statute in accordance with section 3 is not interpretation in the ordinary sense of that expression."

[26] *Legislative Drafting and Forms*, 4th ed., 1938, p. 13.

[27] *The Preparation of Legislation*, Report of a Committee Appointed by the Lord President of the Council, May 1975, Cmnd. 6053, para. 11.5.

the common sense requirement to have regard to the nature of the most likely readers of our legislation and to consult their convenience can be added the fact that we must take into account that in construing our legislation the courts will consider what impression we could reasonably have expected to make on the minds of those who were most likely to form our primary audience.

If the courts will have regard to what the reasonable reader will reasonably assume Parliament to have meant, the courts will have to consider what knowledge and interpretive skills that reasonable reader was likely to have. A statute drafted on the assumption of expert knowledge as to the meaning of a technical term will, therefore, produce the wrong result if the courts search for the objective legislative intention by reference to a lay reader with no technical knowledge.

Finally, it has already been suggested that evidence and observations from the draftsman could be of relevance in discovering the primary audience of legislation and their likely understanding of it. The suggestion that a letter from the draftsman could be adduced in aid of construction of legislation was made and rejected in *R.* v. *Hinks* [28]. But that was a suggestion that the draftsman might exert an influence upon construction, to be rejected in much the same way and for much the same reasons as the suggestion of construction by reference to departmental guidance in *Evans*. It is conceivable, however, that evidence from the draftsman as to the nature of the primary audience for whom he was intending to write, or as to the known policy and legal constraints upon him at the time of writing, might be useful to a court in determining how the reasonable reader might construe the legislation. And while the presentational and political objections to admitting evidence of that kind might be unconquerable in some contexts, they might not be so in all.

### Conclusion

The concept of the legislative intent is neither as straightforward as it might appear at first glance nor as elusive as one might fear on closer examination. As traditionally understood by the courts it is a concept that is capable of being discovered by reference to objective criteria. Its nature, and the nature of those criteria, require to be borne in mind by the draftsman in order to ensure that

[28] [2000] 3 W.L.R. 1590, 1596 H.L. See, in particular, the following passage of the speech of Lord Steyn — "While this anecdote is an interesting bit of legal history, it is not relevant to the question before the House. Given Counsel's use of it, as well as aspects of Sir John Smith's writing on the point in question, which have played such a large role in the present case, it is necessary to state quite firmly how the issue of interpretation should be approached.

"In *Black-Clawson International Ltd* v. *Papierwerke Waldhoff-Anschaffenburg AG* [[1975] A.C. 595, 613 HL] Lord Reid observed—

> 'We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used. We are seeking not what Parliament meant but the true meaning of what they said.'

"This does not rule out or diminish relevant contextual material. But it is the critical point of departure of statutory interpretation. It also sets logical limits to what may be called in aid of statutory interpretation. Thus the published *Eighth Report of the Criminal Law Revision Committee on Theft and Related Offences* [(1966) (Cmnd 2977)], and in particular paragraph 35, may arguably be relevant as part of the background against which Parliament enacted the Bill which became the 1968 Act. … Relevant publicly available contextual materials are readily admitted in aid of the construction of statutes. On the other hand, to delve into the intentions of individual members of the Committee, and their communications, would be to rely on material which cannot conceivably be relevant. If statutory interpretation is to be a rational and coherent process a line has to be drawn somewhere. And what Mr Fiennes [The Parliamentary Draftsman, later Sir John Fiennes K.C.B., Q.C., First Parliamentary Counsel] wrote to the Larceny Sub-Committee was demonstrably on the wrong side of the line."

his draft will be given the meaning that he intends. In particular, the nature of the objective search for legislative intent requires the draftsman to determine the nature of his primary target audience and the facilities likely to be available to them in applying and construing the legislation.

# Aspects of law revision in the Commonwealth

***Neil Adsett***

## Arrangement



## 1. Introduction

In this paper I focus mainly on smaller, less sophisticated Commonwealth jurisdictions and the ways in which they may keep their body of statute laws organized and under review.

## 2. The law revision problem in some places

2.1. I see everywhere that in many smaller jurisdictions the statute book is becoming obscure – many of the laws are out of date, very hard to find, out of print, often unindexed and overlain with new and conflicting provisions.

In many such countries they are fortunate if they have one experienced drafter in the chambers, and the Attorney General has to try to provide the government with their ever increasing quota of new legislation, as well as run the country's legal services and appear in the legislature and even the courts.

So they need help and with money tight that may mean doing it or organizing it themselves.

When nothing is done about the difficulties with legislation the problem compounds with time so that the rule of law could break down –

- lawyers and judges just guess at what the law may be,
- citizens cannot work out what law applies and are left in the dark or reliant on lawyers if they can afford them,

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- legislatures find it easier and safer to enact new laws hoping to smother the problem but often creating confusion around the edges and problems with consistency and compatibility.

An answer to this problem is to conduct a complete law revision exercise and publish a new revised edition of the laws of the country.

2.2. This is an old practice within the Commonwealth and everywhere I go I find old sets of revised editions on the shelves that resulted from successive law revision exercises – formerly regularly organized by the colonial authorities in London for Britain's distant colonies, and continued by them after independence.

Many smaller Commonwealth countries need to resume this process but few now get around to it because of lack of people to do it and money to pay for it. Larger jurisdictions have also had difficulty undertaking entire law revision exercises, in part because of the huge increase in the size of their statute book.

5 or 6 years ago I visited most of the English speaking Caribbean countries and reported to the Commonwealth Law Ministers on legal resources in the various countries, including the state of their efforts to revise their laws, and these reports are on the website I refer to later. At least in the Caribbean there are legislation indexes still being maintained by the University of the West Indies – in the Pacific and elsewhere there is no such regional resource.

2.3. Drafters in small jurisdictions are in the front line of this problem – often I find that they are the only ones in the country who have all the books and perhaps marked up annotations or an internal Index.

Of course any drafter who points out the problem and offers a solution is likely to be welcomed and invited to do something about it – but often there will be trouble getting resources allocated and always the steady stream of new laws to draft and establish will demand top priority.

To assist in efforts to organize law revisions or at least to do something about the problem, I propose now to mention the law revision process that I have developed over the last 20 years and indicate some alternative approaches.

## 3. What sort of "law revision"?

3.1. Authority for law revision

This work was typically done under statutory authority and in the countries that I have worked in we have continued this practice – before the project starts we foster and enact a law that authorises the law revision, defines the powers of the Law Revision Commissioner and the status of the resulting revised edition. The old schemes were virtually the same everywhere and the modern empowering Acts enable the same whilst also catering now for regular updating, computer versions and the internet.

3.2. Consolidation

The law revision I am talking about is a re-organisation of the statute book – in its simplest form you find all the existing law, incorporate the amendments and publish a new revised edition as the official law.

The empowering law allows you to produce one consolidated law out of the original and its direct and indirect amendments.

A consolidation is really the starting point, but if that cannot be organized at least the existing original laws should be made available.

3.2.1. Existing laws

There are annual volumes of enacted laws (Acts and subsidiary) and now easily created websites of the same. These make the law accessible in a sense but they do not actually set out what the law now is – you still need to hunt around and find all the amendments and wade through the morass of no longer relevant provisions which are a trap for the inexpert. A comprehensive index with the full database of laws will largely answer the problem if that is the best that can be provided – the users can themselves each time compile their own consolidation of that part of the law that interests them.

3.2.2. Ancillary material

In any event a consolidation will just reveal the applicable statute law and you still need to know how the courts have interpreted that legislation, what common law the courts have decided applies alongside the statute law, and also how the law is administered in practice. I am only seeking to throw some light on the applicable statute law – it awaits a Halsbury type publication to evolve and provide these further materials – if the user base for that body of law is large enough.

Often court decisions are also not available. In a law revision project plans can be made to ensure that at least the most important decisions are collated and perhaps published. I imagine that eventually we will have the means to integrate court decisions with the revised edition and provide annotations and hyperlinks between them.

3.3. Statutory powers

The consolidation is the *sine qua non* and beyond this there are the usual statutory powers to rectify, correct, tidy up, combine related laws or remnant stand alone provisions, to treat as spent any such provisions that are no longer relevant, modernise the language, substitute current names, offices etc. This is useful but it all stops short of actually changing the meaning of the law. Even creating sense out of existing nonsense can change the meaning sometimes and this cannot be done without parliamentary approval.

You could do a consolidation without corrections and tidying up and still arrive at the existing law, but if you have serious lawyers making the consolidation (and this is never

clerk's work alone) why not go beyond this to find, raise and fix the problems that emerge?

3.4. Amendments

When carrying out a law revision it is useful to establish a system for identifying areas where changing existing law is desirable or necessary. Usually in my projects we have created a high powered cabinet sub-committee that ideally will include representatives from the opposition, judges and private lawyers. The committee meets to consider problems that are found, devise a solution (often a direct amendment), foster this through cabinet and the legislature and if enacted we can reflect the change before the revised edition is published. Often this is by a series of miscellaneous amendment Acts that tweak the laws to make them conform and be workable and correct. Often if there is a large area of the law that should be reviewed and changed this will be beyond the mere law revision exercise and we will try to include the work in the general legislative programme or even recruit external drafting resources to foster new Acts when possible.

3.5. Input from lawyers and public

I have found it useful when reviewing the law to seek public input – advertise in the press for the public, or the legal or other professions or the civil servants to report any areas of the law which are unworkable or wrong or in apparent confusion. Some Attorneys General have not wanted to do this but it seems to me that if there are skeletons in the closet then let them be exhumed and dealt with – indeed the law revision process is a good opportunity for such problems to be "discovered" afresh and for troublesome political thorns and logjams to be dealt with by the broadly based committee under the banner of housekeeping and lawyers' *force majeur*.

3.6. Status of the revised edition

You will need to address in the empowering legislation, the status of the law revision.

The traditional answer is to make it authoritative – "without any question, in all courts, the one and only true law of…[the country]" is a usual old formula that gets the point across. This then does lead to a fresh start that will not still require the lawyers to dig out the old texts just to confirm what is stated. One Canadian province I recall went even further and repealed all the existing laws and replaced them with the revised edition. I would baulk at this further step and take solace in the certainty that if we made a glaring mistake the courts would surely find that exercise of statutory powers to be *ultra vires* and they would correct it.

There have also been examples of a revised edition (more a mere consolidation really) being given advisory or *prima facie* status only – in theory this would mean that a careful lawyer may still have to wade through the originals, but I wonder if in smaller jurisdictions this would make much practical difference?

An interesting new combination can now arise if a revised edition is published on the internet. The revised edition of the laws is made official by the authentication Orders of the Attorney General or President and as printed or placed on a website that is official, – but what if the country has the ability to update that website regularly with amendments shown and new laws included? This can be done daily but usually such changes to the

officially authenticated revised edition cannot practically become immediately part of the "official" laws – usually and practically I have found that this cannot be done more often than annually.

So what is the status of the revised edition as updated daily on the website? One way is to provide that the authorised version is that last officially signed off as such, but that the website version updated daily or weekly has advisory status – and I suspect that as users become secure in the process and the caution of the drafters controlling the website, they will rely on the website regardless of its official status.

3.7. An alternative to the full law revision is to attack the problem piecemeal.

This may be considered necessary if the statute book is so large and complex that the full task has become beyond the practically achievable.

Any improvement will surely be better than nothing, so even if all that is done is the research of obsolete statutes and their eventual repeal then that is of some value. Likewise if there are only resources to revise single laws or areas of law then that also is of great value.

Nevertheless, even for the largest jurisdictions I would recommend having the final product of a wholly revised statute book; a fresh start, as the master goal with all the interim partial revisions seen as steps along the path. Thus there are quick welcome results and even if the whole overall process fails then light has been shone onto previously obscure areas of the law – and if the jigsaw of changes does all fall into place in time then you will have the coherent statute book and fresh start.

3.8. So that is a law revision as I conceive it. Usually over 2 or 3 years we work on this intensively and then print the new books in hardcopy or on CD, or preferably now develop a website, and publish the revised edition as the new authoritative version of the law of the country.

## 4. A methodology

I would like to look more at the details of the law revision process now, as a guide and also to enable me to mention options and alternative approaches.

This is the procedure I have developed and it more or less works for me and delivers the product that is designed – but this will differ in each place so you may adopt any of these ideas and take aboard what you want.

In the legal sphere Commonwealth countries have many similarities and I see many of the same Acts and procedures that were inherited, borrowed or produced by international agencies. But every law revision or drafting undertaking must be tailored uniquely for the particular circumstances in each country.

### The Detail

4.1. Firstly find all the law. Usually I go back to the last revised edition as the starting point. If anything was omitted from that then I leave it omitted and list the omissions. Find and read every new law – Acts as well as subsidiary legislation; and I also look in the government gazette at the general notices in case something of legislative effect has been

published in the wrong place. I always look for the official copies signed by the Governor in case there is a difference in versions. Be especially careful of computer files apparently of the final law – unless there was a foolproof system in place at the time there is always the chance that an earlier version is the one saved on computer or of some late change in the parliament that resulted in an amendment by the government printer without reference to the drafters and their computer files.

4.2. With all the law in front of you create a working Index of the current law – put in commencement dates, amendments, comments etc. as you come across them. I try to work forwards – so start with the last Index from the previous revised edition (or go back to the first received or enacted laws if need be) and build it up. This may result in wasted effort in, e.g., noting up the 1970 Traffic Act and all its amendments until 1990 when it was repealed and replaced with another, but if I keep saved an annual version of the Index then it sometimes helps to go back and see what became of a provision and what law applied from time to time.

**Sample of working Index**

**AERODROMES (ADMINISTRATION) LAW 1952**
L.17/1952 in force 21.6.52
Amended by L.19/1967
*[inserts Articles 4A-4B]*
Amended by L.10/1982 in force 9.7.82
*[amends Articles 4A-4B]*
Amended by L.5/1991 in force 10.5.91
*[General change "Airport Commandant" to "Airport Director"]*
Amended by L.21/2001 in force 17.08.01
*[substitutes Articles 4(2), 4A(1) and 4B]*
**Aerodromes Regulations 1965** R&O.4629
Amended by R&Os 5023, 6880, 7542, 60/2001

**AFFIDAVITS (ADVOCATES AND SOLICITORS) LAW 1992**
L.8/1992 in force 14.8.92

**AIRPORTS ACT 1986 ORDER 2000**
*(Applies Airports Act 1986 (UK))*
OinC.13/2000 in force 19.4.00

Airports *see* Aerodromes *and* Civil Aviation

Air transport *see* Carriage by Air

**AIR TRANSPORT PERMITS LAW 1998**
L.7/1998 in force 1.1.99
Amended by L.30/2002 in force 02.07.02 (Article 5(2)) and
09.08.02 (remainder)
*[amends Articles 1, 2, 6, 8; inserts Article 16A, Schedule]*

4.3. Also at the same time I will be preparing a disposition Table to show the history of the Acts so that you can go back and see e.g. that the 1970 Act and its amendments were repealed by what, when.

**Sample of disposition table**

| | | |
|---|---|---|
| Law 30 of 1997 | Companies (Amendment No. 3) Law 1997 | Incorporated in Chapter 13.125 |
| Order in Council 31 of 1997 | The Broadcasting Act 1996 (British Broadcasting Corporation Transmission Network) Order 1997 | Chapter 06.090 |
| Order in Council 32 of 1997 | The Food and Environment Protection Act 1985 (Amendment) Order 1997 | Chapter 20.150 |
| Order in Council 33 of 1997 | The Merchant Shipping (Salvage Convention) Order 1997 | Repealed by S.I. 1284 of 2004 |
| Law 34 of 1997 | Explosives (Amendment No.2) Law 1997 | Spent, omitted |
| Law 35 of 1997 | Health Insurance (Amendment No.12) Law 1997 | Incorporated in Chapter 26.500 |
| Law 36 of 1997 | Nursing and Residential Homes (No.2) Law 1997 | Omitted |
| Law 40 of 1997 | Prison (Amendment No. 4) Law 1997 | Not in force at revision date |
| Order in Council 42 of 1997 | The Transfer of Prisoners (Restricted Transfers) Order 1997 | Not included in revised edition |

4.4. This involves skim reading the laws looking for amendments to other Acts etc. that should be noted in the Index and that may be buried in the body and not just in the separate ("Repeals, amendments") sections.

4.5. You must work on computer. Ideally yourself directly and not just through marked up hardcopy delivered to a secretary – perhaps that would work but would be slow and the necessary computer searches would be lost (e.g. searching the database for certain words or provisions).

For drafters used to writing directly into their computer it is hard to imagine the old days when you had to write everything out in biro and have it typed for you when somebody got around to it. In most of the drafting offices I have visited in the Commonwealth (about 15 different countries) most of the drafters did not themselves use computers for drafting. That situation is probably changing fast but since it is often the senior (even semi-retired) drafters doing this law revision work, then I suggest that if you plan to undertake a law revision and are one of those not using a computer, you spend the first 3 months of the law revision project taking courses in Microsoft WORD and becoming

familiar with working in it. Everyone had to learn it once and many of us are 2-finger typists rattling along merrily.

I try to avoid long typing exercises and will have this done by a typist or scanned in and proofread; but in the end I still do a fair bit of slow typing myself.

4.6. So when I have compiled an Index that I am happy with, I know a fair bit about all the laws we need to deal with. I would then convene a meeting of the government committee and propose what we should include, and how and what we could omit (try to avoid processing hundreds of pages of customs regulations etc. which you know will be replaced regularly or will be repealed soon, or laws that are private in nature, spent, impliedly repealed or completely useless). If there are only resources to do the principal legislation, or some of it, then deal with that and devise a law revision project that will work and conclude in a reasonable time.

Mostly I will work intensively with the laws of a certain jurisdiction for 3 years and then finish, publish and move on. Many of the law revision projects I came to had a failed project in the fairly recent past – usually expensive, long and productive of nothing – so beware of starting something that is beyond what is practically achievable. I also presume that nobody else will co-operate at all – even by replying to queries, and I suggest that you just finalise the laws on that basis so that the work does conclude – rather than bog down waiting on replies and instructions. If the departments etc. do reply then that is a bonus and if not then the law as it stands is what must go into the revised edition.

4.7. In a big jurisdiction, once you have taken stock of what is on the statute book, you can then decide what you want to achieve and how to attack it. At this stage it would be useful to send up to the cabinet or relevant sub-committee the options – with resource, time and cost implications.

4.8. Now you need to capture this large number of relevant pages in computer form. I outsource to a large data capture firm to have it all typed (double compared entry) into word processing files I can use. I use WORD and it does everything I want – with a few macros tacked on here and there by a specialist computer expert. I know that in larger sophisticated jurisdictions the IT people will have you through the hoops with very complicated systems that lock you in to reliance on the IT experts and particular systems – that is fine but I am dealing with getting a practical sustainable result in places where there are just a few people ever likely to be involved and where the staff changes regularly.

4.9. In compiling the Index I will have named every piece of law (e.g. Law 18/1998) consistently and marked this on the set of hardcopy laws itself, along with marks on the pages that I want photocopied and sent to the data capture firm. So you will get back from data capture hundreds of files named consistently (e.g. a 1999 folder with Laws 1 to 35 and SROs 1-60).

Often it is most convenient to group laws into subject groupings, e.g. Criminal Law and Financial Services, and to arrange them so into chapters. The advantages are –

- You then work on one group of related laws at a time and so ensure that they are consistent and cover the whole field,
- Users coming to the revised edition looking for the law on a certain subject can find it all in one place, and if the names of laws are unfamiliar in an alphabetical arrangement (e.g. Acts Interpretation Act or Interpretation Act?) they can be found in the relevant subject grouping,
- If the revised edition is published in book form, then 1 or 2 volumes may include all the laws that e.g. police prosecutors need to have or take to court.

An alphabetical list of laws should also be compiled and will enable users to find the law they want if they do know the exact name – this is easy to do with computers' sort facility and should be done at the very end to avoid duplicating late changes and corrections.

4.10. When the data has been captured in computer form, it will be just about perfect if you specify styles and protocols with the computer operators and work on early samples. Whether to have them e.g. enter Tables of Contents from fields embedded in the text and other wizardry is up to the level of sophistication required – you have to be aware that when you hand over the revised edition, someone in that country has to keep it up to date and work with it – in many of the smaller jurisdictions there is nobody. Leaving simple WORD files consistently styled that will print just like in the book is OK.

4.11. So you have these files and now commences the great fun task of doing a cut and paste on screen to do a consolidation. I also used to enjoy doing the consolidation by physically cutting with scissors and pasting with glue and then sending manuscript to printers, before computers and desk top publishing made that process redundant.

4.12. I find it useful to start with a handful of the most important Acts as a dry run – this way you can tease out the decisions on formatting early and also produce an interim result that will be of great use (and help secure support and funding for the rest of the project).

4.13. At this stage you actually have to get your head into each law and its related laws. I try hard to only do this once in a project as it takes time to suspend perhaps a dozen different provisions in your head to work out what the resultant current law may be.

4.14. I enjoy doing this on-screen consolidation but if there is a lot to do and I have reliable legal assistants, then other lawyers can actually make most of the consolidations. This all needs checking and proofreading and at each version of the WORD file I save a copy – e.g. "Firearms Act 1988 version 3B", and usually end with perhaps 20 versions of a law for the revised edition. That way you can always go back a level or two if there is a temporary problem, and you know the law went through the procedure of checking, proofreading, revisiting etc. arrived at –this is necessarily different for every job and dependent on the empowering law, resources available etc. but in each case devised to ensure correctness.

4.15. At this stage you need to have sorted out such issues as –

- The degree of footnoting – (what to do, endnotes?); the use of cross referencing and noting (be careful that you leave in place a system to ensure that these are also

always updated – it is better to keep it very simple than run the risk of the note later being wrong). See the sample in Appendix 2 to this paper;

- Renumbering sections – traditionally in a revised edition the laws have been renumbered so that the numbering is consecutive with no gaps where sections have been repealed and no sections e.g. 15AB where several new sections have been inserted. To do this you need to be sure that all cross references are similarly changed and this requires detailed proofreading and checking – computer searches and macros will help with this but if you are not sure that you can get it exactly right every time then I suggest that you do not renumber;
- Rendering the language gender neutral;
- Changing proscribed words (e.g. "lunatic"), spellings, drafting formulae (e.g. penalties and adopting penalty point system), capitalisation, italics for latin etc.;
- The consolidator needs to be consistent and everyone involved needs to communicate almost daily on how certain instances are to be dealt with.

4.16. Also at the close reading and consolidation stage I will be in constant touch with –

- The government agency giving me instructions on e.g. implied amendments, actual meaning and reason for provisions, problematic commencements etc. (hopefully one senior person in the legal department can be found who will reply promptly);
- The government committee supervising and advising my work as Law Revision Commissioner – I prepare regular papers raising issues for policy decision (e.g. if parts of 2 Acts are inconsistent; mistake found etc.) that give me direction in the preparation of the revised edition and that lead to amendments to the law. I often prepare Miscellaneous Amendment Bills to accompany the law revision committee paper and as approved it goes up to Cabinet and the Legislature and if enacted we can show the changes in the final revised edition version of the relevant law.

When a policy decision is made you must apply this consistently in exercise of statutory law revision powers.

## 5. Format of the Revised Edition

5.1. If you are doing a partial law revision or just revising certain laws, then they would be published (in accordance with any empowering legislation) in the same manner as any new law being brought into force.

5.2. A complete new revised edition always used to be published in book form in however many volumes were necessary. This format is good as a permanent record and even now it is usual to have a number of sets bound as books for formal and archiving purposes. The drawback is that books cannot be updated and so the loose leaf editions became more common.

5.3. These loose leaf publications can be updated regularly by the removal of superseded pages and the insertion of replacement pages showing the law as now amended and also including new laws subsequently brought into force. The problem with this format is that unless users are diligent loose pages will become lost and new pages not inserted

correctly or at all; so we found that loose leaf publications were often losing their value in a short time.

5.4. A variant of these is the publication of loose leaf pamphlet versions – whereby you would discard the entire affected law and replace it with the current revised edition pamphlet – thus there is less risk of loose pages being lost or misplaced but there is more wastage as many unaffected individual pages have to be replaced. This is now my preferred format for paper versions of revised editions.

5.5. Now in some jurisdictions the revised edition is also published in electronic format on a CD – this is useful as the CD can be replaced entirely for little cost and the user can search and carry the laws efficiently. Often the government will want to make some money out of the sale of the revised edition and so will sell the books. The CDs can also be sold but there is the problem that they can be copied easily and hence revenue is lost.

5.6. Publication of the revised edition on the internet is the ultimate – any amended or new laws can very quickly be included at very low production cost, electronic searches are enabled, there can be a point in time facility built into the database whereby users can find the law as it applied at certain different dates, and the government can still make money by charging for access to or usage of the website.

5.7. These format options can be decided and changed at any time really – the laws are prepared in computer form and whether they are then printed or worked into an internet site is just a technical consideration depending on what the government decides from time to time. At the start you need to ensure that the files are based on consistent styles and then the WORD files can later be converted easily into any required format by the IT people – be it html, xml, pdf, frame or any other format decided upon.

5.8. The IT experts will in my experience try to run the show and have you working within a straight jacket both as a drafter and as a law revisioner – I think that the lawyers should remain firmly in control and work in the way that will suit their professional considerations first. When the drafters have finished let the IT people hone that professional product to what they then need to deliver their output. Do not be bamboozled by the IT jargon – in this field the drafters are the experts and the IT people, wizards that they no doubt are, should be able to take what we give them and turn it into what they need, provided that we can agree on the initial formatting.

## 6. General

6.1. So basically that is how I would go about organizing a law revision project in a small jurisdiction. Often you will need to deal also with every practical issue leading to getting new books on everyone's shelves such as printing, binding, buying the paper, advertising, and also the organizing of experts to establish a website, deciding what price the government will charge for the books or access to the website or CDs.

6.2. There are various Indexes and lists that are prepared and published with the revised edition –

- Table of contents,
- Chapter list,

- Title list,
- Volume contents,
- Index,
- Historical Index,
- List of omitted laws,
- Disposition Table,
- General notes.

6.3. Finalising these for print is a good time to cross check everything yourself – as you progress through the entire statute book and get into the law as a whole, your views may change so that something treated early in the job may need to be redone.

6.4. The matters raised in the law revision committee papers are crucial. There may e.g. be whole rafts of very out of date legislation that can be included in the revised edition, but it would be useful if the problem could be raised and decided in cabinet and new laws drafted – by inclusion in the legislative programme, by consultant drafters, or even placement on the long term government wish list is better than nothing.

It is good to raise these issues because nobody but the drafters may even be aware of the problem at that level – e.g. the post office workers may bemoan the archaic postal system, and the public also complain about the service, without realising that a revision of the old postal laws (usually so) could solve the problems. This housekeeping may also be of most use to drafters in their daily work – e.g. not having to process long old regulations etc. where that administration could better be dealt with by internal guidelines, or where a simple change to the Interpretation Act can avoid repeating provisions in every single Act.

## 7. Computer tips

Many of you will know much more about computers than I do, but for some it may still all be a mystery that you haven't dabbled in. I would like now to mention a few of the simple tools in WORD that I find useful in drafting and law revision work. Have a look at the examples in Appendix 1 to this paper – This is just what I have found and am comfortable with – no doubt others will come at these tools from different angles –

- Document compare – you can compare a consolidation with the original law and so confirm just what changes have been made, and you can also use this tool to confirm that the final version is in fact the latest you have worked on in the event of some confusion that can emerge,
- Comments – many different reviewers can place colour coded comments in a document for you to note and perhaps act upon, and then you can delete some or all comments,
- Track changes,
- Word find.

## 8. Conclusion

I hope that this paper will be of interest to some of you at some stage.

If nothing else, I hope that I have indicated, to drafters and others faced with a shambles of statutes all over the place, that they can be organized and you can get a fresh start within a reasonable time frame.

If you want to see the text of this paper and other material referred to, you may find them on my website www.lawsconsolidated.com.

## *Appendix 1 – Sample of Document Track Changes and Comments*

**1 Interpretation**

In this Law, unless the context otherwise

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"associate", in relation to a company or person entitled to exercise or control the exercise of voting power in relation to, or holding shares in, a body corporate, means –

(a) the wife or husband or son or daughter ~~or stepson or step-daughter~~ of that person;

(b) any company of which that person is a director;

(c) any person who is an employee or partner of that person;

(d) if that person is a company –

(i) any director of that company,

(ii) any subsidiary of that company, and

(iii) any director or employee of any such subsidiary; and

(e) if that person has with any other person an agreement or arrangement with respect to the acquisition, holding or disposal of shares or other interests in that body corporate or under which they undertake to act together in exercising their voting power in relation to it, that other person;

"auditor" means a person qualified under Article ~~113~~117 of the Companies (Jersey) Law 1991[i] for appointment as auditor of a company under Article 109 of the Companies (Jersey) Law 1991;[ii]

## *Appendix 2 – Sample of Endnotes*

**ENDNOTES**

**Table of Legislation History**

| Legislation | Year and Number | Commencement |
|---|---|---|
| Banking Business Law 1991 | L.19/1991 | 1 October 1991 (R&O.8272) |
| Banking Business (Amendment) Law 1993 | L.2/1993 | 8 January 1993 |
| Finance (No.4) Law 1995 | L.21/1995 | 6 December 1994 |
| Limited Liability Partnerships Law 1997 | L.3/1997 | 9 September 1998 (R&O.9233) |

**Table of Renumbered Provisions**

| Original | Current |
|---|---|
| PART I | PART 1 |
| 1(1) | 1 |
| 1(2), (3), (4) | spent, omitted from this revised edition |
| PART II | PART 2 |
| 6A | 7 |
| 7 | 8 |

**Table of Endnote References**

[1] chapter 13.125
[2] Article 1(1) definition "auditor" substituted by L.2/1993

# Keeping the Statute Book up-to-date—A personal view

***Duncan Berry***

## Introduction

Since legislation incorporates the norms by which society operates, its availability in an up-to-date, accessible and coherent form is crucial for the orderly and effective functioning of society and in particular for the rule of law. From the perspective both of the state and its citizens, it is vital that up-to-date versions of legislation relevant to an issue that concerns them are capable of being identified and accessed. If legislation is not readily and immediately accessible, finding it will prove to be a task that is beyond not only lay people but also competent and experienced lawyers.

Ideally, legislation should be published in a manner that will facilitate its being identified and located by members of the public. Ensuring this outcome should be relatively straight forward. Unfortunately, this is by no means always the case, as I shall try to show in this paper.

An initial problem faced by someone searching for the relevant legislation on a particular topic is that it is not necessarily to be found in one Act. In many cases, the relevant provisions are scattered among a number of statutes and statutory rules[1] and, quite probably, judicial decisions.

In most common law countries, the practice has been to publish statutes and statutory rules in annual volumes. Normally, each volume will consist of public general Acts arranged in the order of enactment, with any private Acts being included separately at the end of the volume. The volumes are not updated or revised, although in some common law countries it has been the practice to issue annual publications containing annotations setting out amendments to earlier statutes. Statutes that are repealed, become spent or otherwise lose their force are not excised. Unless there is a mechanism for revising and republishing amended statutes,[2] users of those statutes are faced with considerable difficulty in finding out what legislative provisions are relevant to them. Moreover, having found what may appear to be the provisions that concern them, they cannot rest on their laurels. They still have to check to see whether, and to what extent, those provisions have been affected by subsequent legislation.

If legislation is not kept up-to-date, the task of researching it is unnecessarily difficult and mentally demanding, and requires much time, resources and enthusiasm. The problem is alleviated in those jurisdictions where indexes and annotations of statutes are maintained. And in recent years, the publication in most common law jurisdictions of electronic versions of statutes and statutory rules also makes it easier to access legislation.[3]

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[1] Statutory rules usually take the form of regulations, rules, bylaws or ministerial orders. In the United Kingdom and Ireland, they are called statutory instruments. Other terms used to describe this form of legislation are 'subordinate legislation', 'subsidiary legislation' and 'delegated legislation'.

[2] Along the lines of the British *Statutes Revised* or *Statutes in Force.*

[3] By means of word and phrase searches of the text.

## Some historical developments

### *The position in the United Kingdom*

The state of the English Statute Book attracted criticism as early as 1551. In that year King Edward VI, then only 14 years of age and a very precocious youth, wrote as follows:[4]

> "I have shewed my opinion heretofore what statutes I think most necessary to be enacted this session. Nevertheless, I would wish that beside them hereafter, when time shall serve, the superfluous and tedious statutes were brought into one sum together, and made more plain and short, to the intent that men might better understand them; which thing shall much help to advance the profit of the Commonwealth."

In a speech from the throne in 1609, King James I spoke of—

> "divers cross and cuffing statutes, and some so penned that they may be taken in divers, yea, contrary senses"… "and therefore would I wish both these statutes and reports, as well in the Parliament as common law, to be once maturely reviewed and reconciled; and that not only all contrarieties should be scraped out of our bookes, but even that such penal statutes as were made but for the use of the time (from breach whereof no man can be free) which do not now agree with the condition of this our time, might likewise be left out of our bookes, which under a tyrannous or avaricious king could not be endured."

In 1616, Sir Francis Bacon, then Attorney-general to King James I, submitted to the King a proposition "touching the compiling and amendment of the laws of England". He proposed that the work to be done should consist of two parts. One would comprise a digest or compilation of the common laws. The other would reform and recompile the statutes. Among the reforms he envisaged was the reduction "of statutes *heaped one upon another to one clear and uniform law*".[5] But despite his efforts, nothing seems to have come of them. After the restoration of the monarchy in 1660, the topic was raised again, but nothing came of it. It was another 130 years before the topic resurfaced. In 1796, two reports, presented by the committees of the House of Commons, drew attention to the unsatisfactory state of the Statute Book. This led to an improvement in the classification of statutes, and to the distinction now recognised by us between public general Acts, local and personal Acts and private Acts. However, in 1800, the UK Parliament passed resolutions that led to the appointment of the First Commission on Public Records. It was under the authority of this Commission that the edition of the statutes known as the "Statutes of the Realm" was prepared. A further attempt at reform was made in 1833 with the appointment of a royal commission to codify the criminal law and to ascertain how far it might be expedient to consolidate the other branches of the law then existing in England. However, the project was over ambitious and so yielded only limited success.

Since then the situation has improved appreciably, in that commercial publishers, such as Butterworths, produce very accurate edited versions of the Statute Book. Halsbury's Statutes provide the equivalent of a continuously revised Statute Book (though not for Scotland or Ireland). An official electronic statute law database is now available, which contains the Scottish statutes as well as those of the United Kingdom as a whole. This is accessible by members of the

[4] Discourse on the Reformation of Abuses.

[5] Which is symptomatic of non-textual amendments.

general public and allows them not to only to find out the current law is but also to find out what the law was on a given date.

Some of the statutes in the United Kingdom Statute Book go back as far as the 13th century. The fact that many of the older ones are written in an archaic style of English make them hard to understand. Even if consolidators are able to give meaning to those statutes, they are still faced with the difficulty of translating them into modern English. Moreover, United Kingdom statutes are now overlain with large tracts of European Union law, which frequently qualifies what on the face of them might otherwise be seen to be intelligible statutes.[6]

***The position in Australia***

*Victoria*

The need to keep the Statute Book up-to-date was recognised in Australia early on. Although, the colony of Victoria was established only in 1835, a full consolidation of the colony's Statute Book was undertaking as early as 1865. Further consolidations of Victorian legislation took place in 1890, 1915, 1928 and 1958. This has meant that the Victorian Statute Book has remained in reasonable shape from the outset.

*New South Wales*

Initially, the situation was not so good in New South Wales. The first New South Wales statute was passed in 1824. However, by 1893, the condition of the Statute Book had deteriorated to the extent that there were calls for reform. Between 1824 and 1893, except for two or three topics, no consolidation was attempted. Furthermore, amendments, partial repeals, re-enactments, implied repeals, repeals of Acts in the formula "so much of the said Act as is inconsistent with the present Act is hereby repealed," adoptions of Acts with provisions quite inapplicable to New South Wales, and various other methods of legislation, had been piled one upon the other, and had brought the Statute law into a condition of confusion and entanglement.[7] This gave endless trouble to the judiciary and was a daily source of irritation and expense to all classes of the community. The position was only alleviated by the occasional publication of collections of New South Wales statutes.[8]

This led to a clearing of the Statute Book of the very large number of Acts that, for various reasons, had ceased to have any effect. By using a carefully drawn saving clause, no fewer than 602 Acts were repealed by the *Revision Act of 1898*. A further 122 Acts were repealed by similar legislation passed in 1902. Subsequently, a Royal Commissioner was appointed to make proposals for the consolidation of the New South Wales Statute Book. The Commissioner reported to the State legislature in 1902. One of the aims of the consolidation was to bring the language and arrangement of Acts as far as possible into conformity with the clearer and simpler methods of modern drafting. Preambles were to be omitted, long and involved clauses cut up, inaccuracies removed, and inconsistencies reconciled, and generally all the enactments on any

[6] A similar situation exists in Ireland.

[7] A sure sign that the non-textual method had been used to amend statutes.

[8] See the report of the Royal Commissioner, Charles Heydon, on Statute Law Consolidation, which was published by the New South Wales Legislative Assembly on 22 July 1902. Some official volumes of "statutes of practical utility" were prepared during the period between 1900 and 1914. In all, some 14 volumes were published concurrently with the annual volumes of 'Acts as passed'.

particular branch of the law arranged in as concise, clear and orderly a manner as possible, in one consolidating statute.[9] However, no amendments "which partook of the character of legislation ought to be ventured upon, and that all amendments, however, carefully limited to the bare necessity of the consolidation, should be noted and pointed out for the information of Parliament in the memorandum which was to accompany each bill."[10] According to the Commissioner, it would have been far easier, would have saved much time and an infinity of trouble, and would have avoided a great deal of risk, to repeat the clauses of the Act practically as they stood with their inaccuracies and inconsistencies. This in fact was the approach adopted in Victoria. However, in New South Wales, it was from the outset that a more thorough consolidation, with its great accompanying reduction in the bulk of the Statute Book, was desirable. In the event, this was accomplished.

It should be noted that the New South Wales legal profession considered the consolidation to be an inconvenience![11] Members of the profession were apparently content with a confused jumble of Acts with which they had become familiar and which they had carefully noted up with decided cases. However, every consolidation will cause this kind of inconvenience. According to the Commissioner, the preparation of a new edition of the statutes, with all the consolidations and a good index would go a long way to remove the difficulty, which in a short time would entirely disappear.

Not long afterwards, the New South Wales legislature enacted the *Amendments Incorporation Act 1906*. That Act specifically (and I would argue significantly) for the first time authorised the reprinting of New South Wales Acts with the textual amendments that had been made to them by other Acts. This Act remained in force until it was replaced by the *Reprints Act 1972*.[12] Since, 1906 non-textual amendments to New South Wales statutes have been extremely rare, being confined to savings and transitional provisions and some referential amendments of a global nature. But now even savings and transitional provisions that are consequent on the enactment of amending Acts are drafted as textual amendments to the relevant principal Act.

A full consolidation of the New South Wales Statute Book was carried out in 1937.[13] In 1957, a further full consolidation was undertaken.[14] Although the volumes comprising this consolidation were prepared under the auspices of the Law Book Company, they were published with official approval. Some interest was shown in undertaking a further revision in 1977, but in the event, it was decided to enhance the official reprints system rather than having a static set of bound volumes that would soon become out-of-date.

*Queensland*

In Queensland, a continuous interest had been shown in keeping the Queensland Statute Book in a clear and orderly state. Sir Samuel Griffiths[15] apparently did valuable work in the way of

[9] Which all sounds very modern!

[10] Ibid, pp. 4 and 5.

[11] Also see comments of Sir Courtenay Ilbert, *Mechanics of Law Making*, 1901, p. 40 regarding the resistance to change of Government officials.

[12] This was originally called the *Acts Reprinting Act 1972*.

[13] These were known colloquially as "the Green Statutes".

[14] And these were known colloquially as "the Red Statutes".

[15] Who was to become the first Chief Justice of Australia after Australia became a federation on 1 January 1901.

codifying and consolidating the Statute Book. In 1908, the Queensland legislature passed the *Statute Law Revision Act*, which authorised the publication of Acts as amended by any subsequent enactments. That Act made it clear that it was not necessary to reprint the amending Act.

*South Australia*

The position in South Australia was that, until the 1920s, that State's amending legislation consisted of a hotchpotch of textual and non-textual amendments. A major consolidation of South Australian statutes took place in 1936, by which time the use of the textual amendment method had become the norm. The South Australian legislature passed an *Acts Republication Act* in 1934. As one would expect from the title, this authorised the publication of amended Acts. A further full consolidation of the South Australian Statute Book was undertaken in 1976. Since all legislation is now kept on an electronic database, it is now the practice in that State to publish amended Acts to coincide with the commencement of the relevant amendments.

*Tasmania*

In Tasmania, the *Amendments Incorporation Act 1906* authorised the publication of amended Acts. However, even before 1906, some Acts were reprinted, but they were a compilation of principal Acts and amending Acts, with no attempt being made to incorporate the amendments. Since 1906, reprinted Acts incorporating amendments to them have been published periodically by the Government Printer. As with the other States, a reprinted Act has evidentiary value but is not conclusive as to the actual state of the law in question.

*Western Australia*

In Western Australia, the earliest Act authorising the reprinting and publication of amended Acts was the *Statutes Compilation Act 1905*.[16] Later, in 1923 the *Amendments Incorporation Act 1923* was passed. The Minister moving the second reading described the bill as a measure that "will make for the automatic consolidation of statutes."[17] Section 2 (1) of the Act provided that:

> When any Act has…been amended…then in every reprint of the Act by the Government Printer the Act shall be printed as so amended, under the supervision of the Clerk of the Parliaments.

The 1923 Act did not repeal the 1905 Act, but instead co-existed with it. The two Acts appear to provide different means of achieving the same end. However, the Minister who moved the second reading of the 1923 Act saw a distinction, saying "…but there is also a great difference between the Act he has quoted [*Statutes Compilation Act 1905*] and the Bill before the House. The latter is merely for reprints, while the former refers to any consolidation."

[16] Section 2 of that Act provided:

> From and after the passing of this Act, whenever both Houses of the Parliament shall, by resolution, direct the compilation, with its amendments, of any Act in force in the State, it shall be the duty of the Attorney General…to prepare a compilation embodying all the provisions of such Act and the amendments thereof, omitting all those portions of the text of such Act which have been repealed or altered by subsequent Acts, and inserting in the proper places all words or sections substituted for or added to the text of the original Act by such subsequent Acts….
>
> Section 3 required a compilation to be tabled before both Houses of Parliament.

[17] Western Australia Parliamentary Debates, 1923, p. 627.

The 1923 Act was repealed by the *Amendments Incorporation Act 1938*, while the *Statutes Compilation Act 1905* remained in place until repeal by the *Reprints Act 1984*, which is the Western Australian Act that currently authorises the publication of amended statutes.

However, it seems that Acts as amended were being reprinted in a consolidated form even before the passing of the 1905 Act. In moving the second reading of the Bill that led to that Act, the Minister commented that:

> In this State, we have adopted a procedure which will be found in the Justices Act, the Criminal Code, the Electoral Act, and a number of more recent statutes. The Government Printer, in printing subsequent copies of any statute that has been amended, is entitled to embody the amendments.[18]

*Australian Commonwealth*

The Commonwealth of Australia was established on 1 January 1901. One of the earliest amending Acts enacted by the Commonwealth Parliament was the *Commonwealth Franchise Act 1902*. This was a non-textual amendment. The following year saw the first use of the textual amendment method.[19] In 1904, The *Defence Act 1904* (an amending Act) required that all amendments of the *Defence Act 1903* be incorporated in any future reprints of the principal Act. This provision was a pre-cursor to the *Amendments Incorporation Act 1905*, which applied the same principle to all Acts and also required reprinted Acts to include notes.

In 1913, the Commonwealth published a reprint of all Commonwealth Acts in force on 1 January 1912, except Appropriation and Supply Acts. The publication included an index of all the Acts, and a table showing Acts enacted under the various provisions of the Australian Constitution. The *Statute Law Revision Act 1934* was the first general revision of Commonwealth statutes. The Act "tidied up" the Commonwealth Statute Book in preparation for a general reprint of Commonwealth Acts.

In 1936, the Commonwealth published a reprint of all Commonwealth Acts in force "as at 1 January 1936". The reprint was in 4 volumes, with the 4th volume being an index. The first three volumes contained 2,959 pages. Further volumes containing reprints of amended Commonwealth Acts were published in 1952 and 1974. In 1958, the Commonwealth published a reprint of all regulations in force as at 31 December 1956.[20] Since then, amended Commonwealth has adopted the 'rolling reprint' approach, which involves reprinting Acts when they are amended and providing loose-leaf binders in which to store them.[21]

***The position in New Zealand***

New Zealand departed from the English form of statutes at a very early date.[22] One major departure was the inclusion of an "Analysis" (in effect a table of contents). It was many years before this useful practice was adopted in Australia. The textual method of amendment was

[18] Western Australia Parliamentary Debates, 1905, p.146.

[19] The *Electoral Divisions Act 1903* textually amended section 19 of the *Commonwealth Electoral Act 1902*.

[20] There had not been a reprint of Regulations for almost 30 years.

[21] This is similar to the approach previously adopted in Victoria and subsequently in most other Australian States and Territories.

[22] See Walter Iles 'Legislative Drafting Practices in New Zealand', *Statute Law Review*, 1992, pp. 16-30.

adopted at an earlier date, although non-textual 'stand-alone' amending Acts were enacted on rare occasions.[23]

In 1908, a full revision of New Zealand statutes was undertaken. Consequently, it is almost unheard of to have to look for a New Zealand statute enacted earlier than that year. The first general reprint of the Public Acts was undertaken in 1931. A further general reprint of Public Acts began in 1957. The reprints were authorised by the *Statutes Drafting and Compilation Act 1920* (which is still in force in 2005). Reprinted versions of statutory regulations have been published under the authority of the *Regulations Act 1936*.

***The position in Ireland***

Although no general revision of the Statute Book has yet taken place in Ireland, as mentioned elsewhere, some major statutes have been consolidated in recent years and, since the millennium, it has become the practice to use the textual method for amending statutes. It is believed that a revision of pre-1922 [24] statutes is currently underway.

***The position in Jersey***

A full scale consolidation of statutes has just been completed in Jersey. This should now make it relatively easy for the Jersey Statute Book to be kept up-to-date even if statutes are extensively amended in the future.

***The position in Canada***

As early as the middle of the 19th century, what were then Canadian colonies recognised the need to completely update their legislation so that it would be in a form accessible to members of the public. The procedure developed for the purpose was called a 'statute revision'. In its ordinary sense, the term "revision" means the correction and rewriting of a text that is for any reason found to be unsatisfactory. Revision in this sense is quite different from the term "consolidation", which is defined and described elsewhere in this paper. In the Canadian context, the term "statute revision" has come to mean a combination of consolidation; rewriting whenever necessary; and rearranging the various statutes and their respective contents. In undertaking the revision of a statute, the revisers are usually empowered to modify the existing text, but only so long as they do not alter the substance of the law. Apart from correcting editing, grammatical, and typographical errors, the language of a statute may be altered in order "to preserve a uniform mode of expression" as long a the substance is not changed. Changes to reconcile "seemingly inconsistent enactments" are also allowed. If the different official language versions of a statute are incompatible, changes can be made to reconcile them. More recently, action has been taken to standardise the wording of frequently used provisions and to shortening long sections and subsections by splitting them into shorter and more readable provisions. Efforts have also been made to eradicate archaic expressions (including most Latinisms).

At the federal level, several general revisions of the statutes of Canada have been made since Canada was established in 1867. The first was in 1886, less than 20 years after federation. Further revisions of federal statutes were undertaken in 1906, 1927, 1952, 1970 and 1985. In

[23] E.g. *The Fisheries Amendment Act 1963*.

[24] 1922 was the year in which Ireland gained its independence from the United Kingdom.

each case, a statute revision commission was appointed under the authority of an Act of Parliament. The commission's brief was to examine, consolidate and revise all public general statutes. The revised statutes were then published in a series of volumes under the title 'Revised Statutes of Canada' with the addition of the year of publication. One way in which a statute revision in Canada significantly differs from a reprinted statute published in the various Australian jurisdictions is that the Acts authorising a revision of Canadian statutes provided that, after the revision was completed and the revised statutes had been deposited in the office of the Clerk of the Parliaments, they were to be brought into force by proclamation of the Governor General. The authorising Acts also provided that, on the coming into force of the revised statutes, the pre-revision versions of the statutes were to be repealed.

After the 1970 revision, a decision was taken to replace the system of appointing an ad hoc commission for each revision by establishing a permanent statute revision commission whose members and staff would be employees of the federal Department of Justice. However, those employees were required to be experienced in drafting and editing legislation. One of the principal reasons for appointing a permanent commission was to make it possible to undertake revisions of statutes on a continuing basis with a view to shortening the intervals between the years in which revised statutes were published.

As early as 1970, a computer database of all federal legislation was established and the Act establishing the 1974 Statute Revision Commission provided not only for the continuing revision of both statutes and regulations but also for the possibility for the institution of a loose-leaf system of continuous consolidation of statutes. The change to a system of continuous revision meant that it was no longer possible to repeal and replace the whole Statute Book at once. The current practice is for the federal Minister for Justice to lay drafts of revised statutes before the appropriate parliamentary committee for examination and approval. After the committee has approved the revised statutes, the Minister then introduces a Bill to bring them into force.

In the early years of the Canadian federation, the Canadian provinces were rather more assiduous than federal Canada in keeping their statutes up-to-date. The system for revision adopted at the provincial level is similar to that used at the federal level. Thus, Ontario has undertaken a number of general revisions entitled "Revised Statutes of Ontario", the first one being in 1877. In Quebec, the first revision was undertaken in 1888 and others have been undertaken at regular intervals since then. Similarly, the provinces of Alberta, British Columbia, Manitoba, New Brunswick, Nova Scotia, and Saskatchewan have all undertaken revisions of their statutes at regular intervals since the establishment of the Canadian federation.

### Why the Statute Book may not be up-to-date, accessible and coherent

A principal cause of the difficulty encountered by users of statutes and statutory rules in finding the law on a particular topic that concerns them is that often the relevant provisions are to be found not in one self-contained statute, but in a number of provisions scattered among a number of separate annual volumes. Often some of these provisions will deal with matters other than the one with which the user is concerned.

As anyone who is familiar with the Statute Book of any common law jurisdiction will be aware, the bulk of legislation amends existing legislation and it seems to me that a major source of the problem lies in the method by which statutes and statutory rules are amended. In essence, two

methods are available for amending legislation. One method is the non-textual or indirect method. The other is the textual or direct method.[25]

A non-textual amendment does not alter the text of the old law but consists of a discursive statement or narrative of the effect of the amendment on the old law. Because the text of the law that is to be amended remains unaltered, the amendment operates indirectly. With this technique, the amending law does not merge with the Act being amended. Nor does it lose its separate identity in the Statute Book. As Thornton[26] points out, use of the method involves legislating referentially. The ultimate effect is a cumulative one as statute is piled on statute, with the result that comprehension becomes more and more difficult.

An example of a non-textual amendment is to be found in section 1 (4) of the *Infanticide Act 1949* (Ire), which states as follows:

> Section 60 of the *Offences Against the Person Act 1861* shall have effect as if the reference therein to the murder of any child included a reference to infanticide.

Another example is to be found in section 37 of the *Town and County Planning Act 1968* (UK), which non-textually amends section 149 of the *Town and County Planning Act 1962*, section 37 (3) provides as follows:

> For a person to be treated under section 149 (1) or (3) of the principal Act (definitions for the purposes of blight notices provisions) as owner-occupier or resident owner-occupier of a hereditament, his occupation thereof at a relevant time or during a relevant period, if not occupation of the whole of the hereditament, must be, or, as the case may be, have been occupation of a substantial part of it.

The perceived advantage of a non-textual amendment is that it should make sense when standing alone, although that is clearly not the case with the example taken from the *Infanticide Act 1949*. The user should be able to ascertain the effect of the amendment, a matter of convenience that is claimed to be important from a legislator's perspective. One advantage that non-textual amendments can have is that of effecting, in one measure, the blanket amendment of a number of different provisions.

Non-textual amendments are often used to make global changes. For example, on a change of currency, it is necessary to convert all statutory references from the old currency to the new currency. When Ireland changed to decimal currency in 1970, this was achieved by section 9 (1) of the *Decimal Currency Act 1970* (Ire) which provided a general formula for amending existing references to outmoded shillings and pence. Likewise, the *Euro Changeover (Amounts) Act 2001* (Ire) achieved the same purpose, when the euro replaced the Irish pound.[27]

A consequence of over-reliance on the method of non-textual amendment is that a set of cross-references, interpretations and qualifications develops which adds to the complexity and lack of intelligibility of the Statute Book - it becomes exceedingly difficult to collect the text of legislation on a particular topic in a single instrument. For this reason, the current view is that

[25] In this paper, I use the term non-textual method and textual method rather than indirect method and direct method, but they more or less amount to the same thing.

[26] G.C. Thornton, *Legislative Drafting* (4th ed.), 1996, at 405.

[27] Arguably, the same result could have been achieved by legislation that was drafted in the form of textual amendments.

textual amendments are to be preferred for their relative simplicity.[28] For instance, section 1 (4) of the *Infanticide Act 1949* (Ire) would have been as effective had it directly amended the text of section 60 of the *Offences Against the Person Act 1961*. A textual amendment in that case could have said:

> Section 60 of the *Offences Against the Person Act 1861* is amended by inserting "or infanticide" after "murder of any child".

This would have been a tidier method of amendment and would have facilitated the subsequent consolidation of the 1861 Act. As it now stands, section 60 has to be read as if the words 'or infanticide' are to be implied into the section but they do not form part of its text. Thus, the Statute Books of those jurisdictions where non-textual amendments are used are a curious mixture of textual and non textual amendments. Thornton's observations on this are apposite:

> The traditional … style, therefore, produced a pottage comprising direct amendments, indirect amendments and provisions incorporating both techniques. The effect, at least to one not nurtured from his early years on English statutes, is confusing, particularly so as it rests on a stream of consistently invidious and inevitably inconsistent decisions as to which amendments should properly be effected by one method, which by the other, and which of both.[29]

On the other hand, a textual amendment is one that amends an existing enactment or statutory rule by repealing words or provisions; by substituting new words or provisions for existing ones; or by inserting into the enactment or rule additional words or provisions. When this method is used, the problem faced by the legislator or user is that the change made to the law is not immediately intelligible. In order to understand the amendment and what it does, it is necessary for the legislator or user to read the text of the amended enactment or rule with the amendment incorporated into it. In some jurisdictions, parliamentary counsel include in their amending Bills a note showing what a provision will look like when the amendment is incorporated.[30]

However, in most jurisdictions a comprehensive explanatory note is provided so that the legislator or user can immediately see what the existing law is; what the amendment does to that law; and what effect the amendment has on the existing law. In some cases, in order to provide a complete explanation of the amendment, the explanation has to be longer than the amendment. In most legislative drafting offices, these notes are prepared by the parliamentary counsel responsible for drafting the relevant Bill.[31] But even in cases where explanatory notes are prepared by government officials, the final responsibility for their contents should remain with parliamentary counsel who drafted the Bill.

In my view, the advantages of the textual amendment method greatly outweigh the non-textual method. Thornton has listed a number of them.[32] These are as follows:

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[28] G.C. Thornton, *Legislative Drafting* (4th ed.), 1996, p. 407; Miers and Page, *Legislation* (2nd ed.), 1990, pp. 195-196.

[29] G.C. Thornton, *Legislative Drafting* (4th ed.), 1996, pp. 406-407.

[30] In the United Kingdom, this device has been adopted on some occasions by means of what are known as Keeling Schedules. A Keeling Schedule shows, in a Schedule to the relevant Bill, how the law will look once it is amended. It is also makes it clear in the text of the Bill itself how the law is being amended. See paragraphs 13.21 and 13.22 of the Renton Report.

[31] However, in the United Kingdom and Ireland, explanatory notes are usually prepared by government officials.

[32] G.C. Thornton, *Legislative Drafting* (4th ed.), 1996, p. 407.

- The [textual] method produces law that is simpler and easier to understand, provided that the reprints, revisions or consolidations are produced frequently.
- The [textual] method reduces the proliferation of statutes.
- To some extent, [the textual method] makes consolidation a running exercise thus facilitating the production of consolidated reprints or revisions without the need for specific legislation.
- By encouraging the integration of new and modified provisions with the old, [the textual method] encourages a view of the law on a particular subject as a whole rather than as a series of interwoven but separate parts.
- By directly integrating the new provisions with the old, [the textual method] reduces the potential for repeal by implication.
- [The textual method] facilitates annotation.
- Not least, [textual] amendments are easier to draft.

I would add two further advantages. Because textual amendments are relatively easy to incorporate into the relevant principal enactment or statutory rule, the resources involved in keeping the law up-to-date are much reduced. This is because the incorporations can be made by skilled clerical staff, whereas the services of experienced, specialist lawyers are required in order to prepare consolidations of laws that are a mixture of non-textual and textual amendments. Moreover, if a principal statute or statutory rule is amended only by textual amendments, it becomes unnecessary to include provisions such as the following: [33]

> This Act and the *National Treasury Management Agency Act 1990* shall be construed together as one and may be cited as the *National Treasury Management Agency Acts 1990 and 2000*.

### Tidying up the Statute Book

So how should the responsible authorities keep their Statute Books accessible and coherent? A number of approaches can be adopted. One is to enact statute law revision legislation that clears the Statute Book of deadwood. Such legislation repeals those statutes that have become obsolete and have no practical value. The usual practice is expressly to provide that the revision does not affect any existing rules or principles. But, statute law revision is only a partial solution as old statutes that are still in operation are left untouched. Moreover, the physical state of the Statute Book remains intact. The old statutes that have been repealed, and therefore no longer form part of the law, remain in the official volumes of statutes. The user still has to check whether a particular provision is in force or not.

Another approach is the periodic re-publication of statutes in their revised form, incorporating the amended text and purged of repealed and spent provisions. As already mentioned, this kind of approach is adopted in the Australian Commonwealth and its States and Territories. Each of those jurisdictions has special legislation that facilitates the periodic reprinting of statutes and statutory

[33] I have found that it is not unusual for these collective citations not to be kept up-to-date.

rules.[34] The process involves publishing a statute in a single updated text that takes account of all amendments that have been made to it since it was first enacted.

A reprinted Act is thus simply a means of providing an up-to-date accessible and coherent version of existing legislation. Although the process is an administrative one, the publisher[35] is usually allowed to make certain styles changes, such as changing numbers or dates from words to figures or changing long-form cross references to short-form ones. This method not only ensures that accessible and coherent statutes and statutory rules are available to users, but it also obviates the need to take up the time of the legislature, which is at best a scarce resource. Although a reprinted statute or statutory rule does not of itself normally have the force of law, it is prima facie evidence of the law contained in the provision to which it relates.

In Australia,[36] New Zealand and Hong Kong, electronic versions of statutes are now normally publicly available within hours after the amendments have taken effect. Also in Australia, pamphlet copies of updated versions of statutes and statutory rules are also published on a periodic basis. The Hong Kong Department of Justice, which produces consolidated versions of Hong Kong statutes and statutory rules in a loose leaf system, publishes replacement pages for legislation shortly after it has been amended. In Canada, the Department of Justice publishes electronic versions of updated versions of federal statutes and regulations.[37] Up-to-date electronic versions of statutes and statutory rules of Canadian provinces are similarly available.[38]

However, the effectiveness of the reprint or compilation system as used in Australia and other Commonwealth countries is closely tied to the use of the textual method of amendment. If the public is to have access to up-to-date, accessible and coherent revised versions of amended statutes and statutory rules, it is essential that the amendments should be effected *only* by the textual method. As the Renton Report makes clear,[39] to the extent that there is a conflict between the needs of the legislator and the statute user, the needs of the user should prevail. The report goes on to say:

> Many statutes are already difficult enough to understand in themselves without making their sense even more abstruse by amending them in a manner which further perplexes the user. There is no doubt that the non-textual amendment of existing

[34] The *Amendments Incorporation Act 1905* requires the Australian Government Printer to publish reprinted updated versions of amended statutes and statutory rules. However, this work is now undertaken in the Office of Legislative Drafting and Publications in Canberra. In New South Wales, the *Reprints Act 1972* authorises the Parliamentary Counsel to issue updated versions of statutes and statutory rules. Similar legislation operates in Queensland (the *Reprints Act 1992*); in South Australia (the *Legislation Revision and Publication Act 2002*) in Tasmania (the *Legislation Publication Act 1996*); in Victoria (section 21A of the *Interpretation of Legislation Act 1984*); and in Western Australia (the *Reprints Act 1984*). In New Zealand, compilations of amended statutes are prepared under the *Statutes Drafting and Compilation Act 1920*. In Hong Kong, section 99 of the *Interpretation and General Clauses Ordinance* authorises the Government Printer to print copies of Ordinances with all amendments made by amending Ordinances. Such copies are treated as authentic copies of the amended Ordinances.

[35] The official designated to be the publisher will normally be the Government (or Queen's) Printer, the Attorney General or the Parliamentary Counsel.

[36] Both at the federal and state levels. For example, for compilations of Australian Commonwealth Acts, see http://www.comlaw.gov. au/ComLaw/legislation and for consolidated versions of New South Wales statutes and statutory rules, see www.legislation.nsw.gov. au.

[37] E.g. see http://laws.justice.gc.ca/ .

[38] E.g., see http://www.e-laws.gov. on.ca/DBLaws/Statutes/ for the legislation of Ontario and http://www.qp.gov. bc.ca/statreg/default.htm for the legislation of British Columbia.

[39] *The Preparation of Legislation*, 1975, Report of a committee appointed by the Lord President of the Council and chaired by (then) Sir David Renton. See paragraph 13.17 of the report.

> legislation often adds to the burdens of the user, particularly when the consolidation of heavily amended legislation is held up for one reason or another.

I could not agree more!

So why has use of the non-textual method been so prevalent in past amending statutes? The following extract from Sir Courtenay Ilbert's work *The Mechanics of Law Making* seems to provide the answer: [40]

> In the first place, it [i.e. an Act that textually amends another Act] is absolutely unintelligible without the text of the enactments which it is proposed to amend, and even if these objections can be removed by means of an explanatory memorandum, a bill thus drawn is, as any one who has watched attempts to frame parliamentary amendments will readily understand, extremely difficult to amend, and thus presents unreasonable obstacles to legitimate discussion in committee. For these reasons, this technical method of amendment is hardly ever adopted in England except in the case of non-contentious measures.
>
> In these circumstances, the ordinary mode of amending an Act is to state in the amending bill the effect of the amendment proposed to be made. This is the commonest mode, and for English parliamentary purposes is the most convenient, because under it every Member of Parliament who knows anything of the subject learns at once the nature of the amendment proposed. And in some cases, where the amendment virtually overrides a large portion of the existing enactment, it is practically the only possible method.

Regrettably, this view subordinates the needs of statute users and the long-term coherence of the Statute Book to the short-term needs of parliamentarians. And, as Ilbert concedes, there are other ways of communicating the effect of proposed amendments to parliamentarians. He also expresses with approval the approach adopted in the Indian legislature. Having stated that ideally amendments should be made by repealing and replacing the whole of the section or part affected, he goes on to say:

> … the next most convenient course, from the point of view of administration, is to express the amendments in a technical form, like notices of amendments to bills in Parliament, or like errata or addenda in books; that is to say, in the form of directions to strike out particular words or sentences from an enactment, and to add others. This it is the form frequently adopted by the Indian legislatures. It enables a clerk to note up, almost mechanically, the alterations in the statue law, by simple striking out or writing in the necessary words.
>
> Thanks to this method of amendment, the Legislative Department of the Government of India is able to issue periodically revised editions of the most important Indian Acts, which embody the amendments up to date, and thus, for many purposes, take the place of repealing and consolidating Acts. But for purposes of practical administration such reprints are of great convenience.

One cannot help getting the impression from this that a system that was good enough (and even desirable) for India was not appropriate for the United Kingdom! In my view, the approach adopted in India (probably as a result of the influence of the British jurist, Sir James Stephen)

[40] At p. 129.

was the right one.[41] The adoption of a similar approach in Australia, Canada and New Zealand has certainly helped to ensure that each jurisdiction in those countries has a Statute Book that is up-to-date, accessible and coherent.[42]

Although the Renton Report favours the textual method of amendment, it nevertheless concludes that its adoption will never eliminate the need for consolidation, if only because there can be no rigid rule that amendment must always be effected textually and so there is bound to continue to be some flow of legislation having non-textual effects on earlier legislation on the same matter. However, I have to disagree with this conclusion. Even on the rare occasion when non-textual amendments are necessary,[43] this should only be regarded as a stopgap measure. I believe it should always be possible[44] to convert those amendments to textual ones shortly after the enactment containing them.

A third method for alleviating the problem is to enact consolidating legislation.[45] A consolidating Act is one that re-enacts all the relevant provisions on a particular subject in one statute, making, at most, only minor amendments to the existing law.[46] Many Parliaments in common law countries have special parliamentary procedures to expedite the enactment of such legislation. For example, in Ireland several Acts have been passed using such procedures.[47] The *Taxes Consolidation Act 1997* (Ire) exemplifies the benefits associated with consolidation. It consolidated the law on income tax, capital gains tax and corporation tax and, in the process, reduced its bulk. Provisions that were formerly contained in 40 separate statutes are now found in a single Act, with over 2000 different sections being reduced to 1104 sections and 50 schedules being condensed to 32.[48] The consolidated Act was drafted and structured with users (principally taxation officers, taxpayers, tax practitioners and accountants) in mind. There is no doubt that the Act's more coherent format eases the task of finding the relevant Irish law on taxation. However, despite the Act having been quite extensively amended since 1997 and those amendments having been made textually, no up-to-date version of the Act is currently available.

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[41] Stephen served (1869–72) as the legal member of the Viceroy's Council in India, preparing a draft codification (later adopted) of the law relating to contracts, crime, and evidence. He later drafted a codification of English criminal law, but the United Kingdom Parliament never enacted it.

[42] Likewise in Hong Kong, where the Law Drafting Division of the Department of Justice maintains up-to-date sets of loose-leaf reprinted statutes and statutory rules.

[43] Such as was the case with the *Reunification Ordinance* enacted by the Hong Kong Provisional Legislative Council during the early hours of the morning of 1 July 1997 in consequence of the resumption of the sovereignty of Hong Kong by the People's Republic of China. However, the various non-textual referential amendments were later converted to textual ones by means of a systematic program of amending legislation.

[44] E.g. by means of a Statute Law (Miscellaneous Provisions) Bill.

[45] See Lord Simon of Glaisdale and Webb, *Consolidation and Statute Law Reform*, 1975, PL 285.

[46] Sir Courtenay Ilbert, *The Mechanics of Law Making*, 1901, pp. 36 and 37, described consolidation in the following terms:
"By consolidation I mean the combination into a single statute of several statutes or parts of statutes dealing with the same subject. …. Consolidation deals with statute law alone as interpreted and explained by judicial decisions. ….. In consolidating statute law, you have to consider and reproduce, unless you determine to alter, the effect of judicial decisions. You also have to consider the reciprocal bearing of the statute law and of the rules of common law on which it is based, which it presupposes and which it may or may not vary."

[47] E.g. See the *Fisheries (Consolidation) Act 1959*, the *Income Tax Act 1967*, the *Social Welfare (Consolidation) Act 1981*, the *Social Welfare (Consolidation) Act 1993*, the *Taxes Consolidation Act 1997* and the *Stamp Duties Consolidation Act 1999*.

[48] Hennessy and Moore, *Taxes Consolidation Act 1997: the Busy Practitioner's Guide, 1997*, p. 3.

A fourth method is to carry out statute revisions as is the practice in all Canadian jurisdictions. A revision will normally go further than a consolidation. In the Canadian parlance, "statute revision" has come to mean a combination of consolidation, rewriting where necessary and rearranging the order in which provisions appear. As is with the case with a pure consolidation or a reprint, the only modifications that are permitted are ones that do not change the substance of the statute or regulation under revision.

A fifth method is a codifying statute, which enacts in one statute all the relevant provisions on a topic, often making major changes to the existing law.[49] Common law jurisdictions have tended to be hostile to codification. But there are exceptions. Queensland, Tasmania and the Northern Territory of Australia have all codified their respective criminal laws, as has New Zealand. And in Ireland, the *Succession Act 1965* can be cited as an example of a codifying measure. These measures help to reduce the bulk and cumbersome nature of the Statute Book, but they are of limited assistance. Due to the time and effort involved in their drafting and preparation and competing demands on the parliamentary agenda such legislation tends to be infrequent.

If a country's Statute Book is not systematically kept up-to-date on an ongoing basis, the task of revising it and making it accessible and coherent will be a monumental one. If the country's laws have not been consistently amended by the textual method, it will mean that the reprint method will not work and they will have to be consolidated as part of a comprehensive program of consolidation. Such a program will involve a commitment of financial and human resources (through, for instance, the recruitment of additional legislative drafters) which historically Governments have been notoriously reluctant to approve. Moreover, it would require the allocation of time on the legislative agenda, at times when the Government might consider other proposals more desirable or politically important.

As part of the process, the manner in which legislation is published needs to be addressed. Legislative reform and statute law revision in itself does not reduce the actual physical bulk of the volumes of statutes that retain amended and repealed legislation. Statute users want to be provided with the up-to-date text of legislation, not to be presented with the opportunity to engage in a fascinating intellectual challenge of navigating backwards and forwards through volume after volume of statutes. The publication of legislation in its current, as well as its historical, form is crucial and to this end the production on regular basis of a revised Statute Book is desirable. The publication on a commercial basis of the loose-leaf consolidated statutes and statutory rules[50] would certainly help. And, with the advent of modern computer technology, it is now feasible (as indeed has been frequently demonstrated in Australia and Canada) to produce electronic versions of updated statutes and statutory rules within days of their being amended. And of course, electronic versions of legislation are much, much easier to search than hard copies are.

[49] Ilbert (ibid) pp. 36 and 37 has described codification in the following terms:

> "By codification I mean the reduction into a systematic form of the whole of the law, statute law or common law. … Codification deals both with common law and with statute law. … In codifying common law, you have to incorporate rules which have already been reduced to statutory form."

[50] E.g. like the reprinted laws of Hong Kong.

### Reforming an out-of-date Statute Book: What needs to be done

On the assumption that a Statute Book has become out-of-date, inaccessible and jumbled, here are what I believe are the measures that need to taken to rectify the situation so that an up-to-date, accessible and coherent Statute Book is available to both the organs of government and the citizens who are expected to comply with the law.

If the Statute Book of a country is not currently in an accessible and coherent form, it is necessary to put institute a systematic program of consolidation.[51] If the existing Statute Book consists of legislation that is a hotchpotch of principal Acts, stand-alone amending Acts and non-textual amendments, it will be necessary to recruit a team of people experienced in drafting and editing legislation to systematically prepare consolidated versions of the existing statutes. As far as possible, this should be undertaken on the basis of one statute per topic. For example, there should be one statute dealing with companies; one statute dealing with road traffic; one statute dealing with animal welfare; one statute dealing with criminal law; and so on.

A single authority should be designated to oversee the program of consolidation. Its function should be to set targets and priorities and to check the appropriateness of draft consolidations. It should be empowered to ordain that particular legislation should be included in the program, irrespective of the wishes of government departments, some of whom are notoriously reluctant to promote consolidations of legislation for which they have administrative responsibility. In most Australian jurisdictions, the parliamentary counsel office has assumed or been accorded responsibility for this kind of function and this has proved successful. Because few people understand legislation than those who write it, arguably parliamentary counsel are the best placed people to fulfil this role.

As is the case with Canadian revisions and Australian reprints, the consolidation team should be authorised to make changes such as—

- removing obvious inconsistencies between different provisions,
- standardising the wording of frequently used provisions,
- shortening long sections and subsections by splitting them into shorter and more readable provisions,
- ensuring the consistent use of gender-neutral language,
- shortening long sections and subsections by splitting them into shorter and more readable provisions, and
- eradicating archaic expressions (including Latinisms).

In conjunction with the consolidation program, a firm decision needs to be taken to ensure that all amendments to statutes and statutory rules are made by the textual method. This should even extend to savings and transitional provisions contained in amending legislation. In the rare occasions where non-textual global referential amendments are required, they should be converted to textual amendments at the earliest opportunity.

Once the consolidation program is completed, the Statute Book will then be in a form that will allow statutes and statutory rules to be made available to the public in an updated, accessible and

[51] I use the term ‘consolidation’ in the way used by Sir Courtenay Ilbert. Ibid.

coherent form immediately after they are amended. I envisage that special legislation authorising a designated authority to published updated statutes and statutory rules as and when appropriate. This legislation could be on the lines of the *Reprints Act 1972* (NSW), but it could equally be on the lines of Canadian legislation authorising the revision of statutes.[52] Although, if the reprints method is adopted, the preparation would become a largely mechanical exercise that can be undertaken by competent clerical staff, I would again argue that the most competent people for overseeing the preparation of reprints of statutes or statutory rules are parliamentary counsel, on the grounds that no one knows their way round statutes and statutory rules better than those who were responsible for drafting them. If the reprint method is adopted, the reprinted statutes or statutory rules should include historical notes containing a table of amending statutes or statutory rules; and a list showing the provisions that were amended and the dates on which the amendments came into effect.

Last but not least, if a program along the lines is to be implemented it has to be properly funded. Unfortunately, there are few votes in undertaking a reform of the Statute Book. This is compounded by the difficulty in getting consolidation legislation through the legislature, even there are special rules to ease its way over the legislative hurdles. Nevertheless, the benefits of having an up-to-date, accessible and coherent Statute Book must surely be obvious. Apart from the removal of the frustration, the cost savings to both the state and the private citizen in both time and effort are surely immense. Moreover, no longer will the government official, lawyer or ordinary citizen have to hunt for the law scattered among umpteen different statutes and statutory rules that are often inconsistent with one another. The money would surely be money well spent!

[52] E.g. The *Statute Revision Act*, Revised Statutes of British Columbia 1996, chapter 440.

# Statute Revision in British Columbia

## Recent developments from a jurisdiction with a long history of statute revision

***Janet Erasmus***

British Columbia has a relatively long history of statute revision. Our first was produced in 1877, six years after we joined Canada in 1871. Thereafter, statute revisions have been done at variable intervals ranging between 9 and 19 years. Our most recent general statute revision was the Revised Statutes of British Columbia 1996.

In the past, these have always been revisions of all public Acts of general application. The latest revision encompassing 494 Acts. As will be described in the following, this may change — and we may never do another general statute revision.

### What this paper is about

This paper will —

- briefly describe the historical development in revision authority for British Columbia,
- discuss key concepts and choices that went into our current *Statute Revision Act*,
- describe the organization and techniques used in our 1996 general statute revision and now being applied to our on-going statute revision process, and
- indicate how we are now using the innovative "limited revision" authority, with its potential for never again needing a full statute revision.
- (More complete information regarding the history of our statute revisions is provided in the Appendices to this paper, including the complete text of our current *Statute Revision Act*.)

## *B.C. statute revision — developments in authority*

### What do we mean by a statute revision

In British Columbia we use the terms "consolidation" and "statute revision" for distinctly different processes.

A ***consolidation*** is —

- a statement of the current state of a statute,
- prepared by applying textual amendments to the statute as enacted or, if applicable, as most recently revised.

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Consolidations are a part of the regular work of the British Columbia Office of Legislative Counsel.

Since 1960, we have worked in conjunction with the Queen's Printer to produce an on-going looseleaf consolidation of public Acts. Under our *Evidence Act*, this printed version has official status in our courts. The Queen's Printer also produces an on-line searchable consolidation that, at this point, is not an official version — although it is certainly one used by counsel in preparing materials for presentation in court.

Consolidations of individual private and local Acts are also prepared by our Office, as occasion demands (such as when one of the drafters needs to work on amending legislation) or by outside request if resources are available.

A ***statute revision*** is —

- made under the authority of a Statute Revision Act,
- at a historical minimum, a consolidation that renumbers provisions of a statute to eliminate and insertions gaps in numbering,
- often rearranges provisions to improve logic, and
- from very early in our history, included authority to make stylistic changes in language and minor clarifying amendments.

#### The expanding authority to do more than renumber and rearrange

Authority for the first statute revision (1877) was limited to consolidation and renumbering. The second (1888) included a law reform mandate, with authority to make recommendations for substantive change. The third (1911) returned to consolidation and renumbering.

It was the fourth revision (1924) that saw the basic broad authority that continues into our current *Statute Revision Act*:

> 4. In carrying out his work under this Act the Legislative Counsel
>  – shall prepare and arrange the said Statutes for publication, and
>  – may make such alterations in their language as are requisite in order to preserve a uniform mode of expression, and
>  – may make such minor amendments as are necessary
>  – to bring out more clearly what is considered to have been the intention of the Legislature, or
>  – to correct clerical or typographical errors, ....

Stylistic changes *and* minor amendments for substantive clarification were authorized. The authority for the latter was further expanded for the fifth revision (1936) to include:

> …such minor amendments as are necessary
>  – to bring out more clearly what is considered to have been the intention of the Legislature or
>  – to reconcile seemingly inconsistent enactments, or
>  – to correct clerical or typographical errors, ….

Broad authority existed, but it remained unused for over 50 years. Then, with the 1979 statute revision, a number of significant changes relying on these powers were made.

As examples of 1979 revision changes —

- The distinction between short and long titles was eliminated — all became short.
- Provisions that were, in effect, duplications of the *Interpretation Act* were not continued.
- Marginal notes, which had been formatted as such, were now presented as bold section headings.
- Capitalization and italics were generally avoided. (For example, "the Minister of Finance" kept its capitalization as a title, but "a minister" was the generic form).

## *The 1996 Statute Revision*

By 1989, the Office of Legislative Counsel was providing drafters with computers and working on developing a searchable database of the on-going consolidation. It was discussing and adopting plain language drafting techniques. And it was also thinking towards the next statute revision.

A former legislative counsel who had worked on the 1979 Revision was engaged to plan and coordinate the revision project. His work was supported by a Statute Revision Committee consisting of Chief Legislative Counsel, other drafters, legislative editors and the Registrar of Regulations.

The coordinator and committee worked together to develop a new *Statute Revision Act*. It continued the core authority that had been in place since 1924, but had a number of innovations.

The following is a discussion of some of the key concepts and decisions that went into the 1992 *Statute Revision Act* —

- who conducts statute revisions
- plain language rewrite authority
- dealing with outstanding not-in-force amendments
- dealing with forms and schedules
- the enactment process
- corrections by regulation
- limited revisions.

### Who is responsible for conducting a statute revision

The choice: Legislative Counsel or someone else, with the "someone else" usually being a Commissioner or Commission.

The first few British Columbia statute revisions were conducted by Commissioners. Change came with the 1924 revision where, in addition to broadened authority, responsibility was transferred to Legislative Counsel. This continued until 1973, when the 1966 *Revised Statutes Act* was amended to transfer this responsibility to a Commissioner.

There is a history behind this move back to the Commissioner model. Dr. Gilbert Kennedy, a former law professor-turned-Deputy Attorney General, was now making a transition towards retirement by being appointed as Statute Revision Commissioner. As described above,

Dr. Kennedy's 1979 statute revision was the first to engage with the expansive powers provided by the authorizing Act.

From the next revision, it was decided this responsibility should be returned to the Office of Legislative Counsel. The benefits of commission independence were more than balanced by the benefits of keeping the revision in-house, particularly as the Office would be living with the results for many years to come:

- A committee allowed discussion of how to approach the aim of applying plain language drafting techniques to the revision, including standardized word replacements ("must" for "shall" being the most debated), list format paragraphing and informative marginal notes to create searchable tables of contents.
- A revision would establish styles and format that Legislative Counsel would need to follow in the future. By working on this aspect within the Office, we were able to use a number of Legislative Sessions leading up to the 1996 to test different format. (I will admit that my now-aging eyes preferred the 12 point Times Roman of one Session's experiment, but the final format went with a smaller font size in the interests of reducing length and paper use.)
- We used the revision to work with Queen's Printer in developing a new process for statute publication, both print and electronic, and in choosing new publishing software that would be shared between our offices.
- Every drafter in the Office worked on revision as time permitted. Each Act was given an initial revision by one drafter (often the Revision Coordinator), then reviewed by another drafter. Sharing the work allowed efficient use of resources. It also meant that each of us kept current on standard revision changes, which could then be incorporated into new Acts that were in process.
- If we came across an apparent ambiguity or uncertainty in current language, we might sometimes be able to go directly to the legislative counsel who drafted the provision, or at least to a drafter who had worked with the legislation and might be aware of contextual information that could assist in clarifying the issue.

**Plain language rewrite authority**

We wanted a new *Statute Revision Act* for the next revision, one that would provide a clear mandate for plain language changes. That is, we wanted a stronger direction than the 1924 "uniform mode of expression" authority. We also wanted a clear mandate for gender neutral drafting — equality was now expressly protected by the Canadian Constitution *and* (as I had the opportunity to explain to the Legislative Assembly committee that was receiving our revision at the end of the process) gender neutral drafting is plain language drafting: if the law is written as if it only applies to half the population, it is not communicating effectively with its audience.

As all drafters will appreciate, when it comes to legislation, clarity is more important than easy readability. The Act was written to provide its plain language authority in the following terms:

> 2 (1) In preparing a revision, the Chief Legislative Counsel may do any or all of the following:
>
> (d) alter language and punctuation to achieve a clear, consistent and gender neutral style;

> (e) make minor amendments to clarify the intent of the Legislature, to reconcile inconsistent provisions or to correct grammatical or typographical errors; ....

The 1996 revision made a substantial number of general changes, a number of which were described in a 1997 article for the plain language journal *Clarity*.[1] The benefits of information technology were particularly important in these changes. By 1992 we had a searchable electronic database of our consolidated statutes. We used Microsoft Word with its "Track Changes" function (as it is now known) to be prepare the revision while recording all changes. As an initial revision process for each Act, it would be run through a series of macros that highlighted a number of the identified language change candidates, including "shall", gender specific terms and archaic legalisms.

Intense revision relying on this new authority was limited to a few targeted Acts that were particularly difficult to read and had high public use. Examples of such legislation included the *Municipal Act*, the *Estate Administration Act* and the *Social Service Tax Act*. This last is our sales tax legislation, and its revision was described in *The Loophole* article "The B.C. statute revision experience: tax law rewrite on a shoestring".[2]

For these intensely revised Acts, the responsible ministry and their advising Legal Services Branch solicitor were involved throughout the revision process. We also used confidential private bar consultation as described at the 1996 CALC conference.[3] By this process, members of the appropriate section of the Canadian Bar Association were asked to provide comments on an almost complete (not renumbered) draft of the proposed revision changes. Their responses were carefully considered in finalizing the revision.

#### Dealing with outstanding not-in-force enactments

In the history of British Columbia's legislation, it is not uncommon to have the commencement section for an Act provide that the Act or some portion of it comes into force by regulation. The result was that, with changing governments and changing priorities, the revision was faced with a substantial amount of enacted legislation that had never been brought into force.

The issue then was how to include these not-in-force provisions in the revision, particularly as they would require substantial rewriting to parallel the plain language revisions aimed at the in-force provisions.

The solution was to include these provisions in a separate "Supplement" to the revision:

> 2 (1) In preparing a revision, the Chief Legislative Counsel may do any or all of the following:
>
> (g) include in the revision a supplement containing those Acts or provisions that, although enacted, have not been brought into force, and indicate how they are to come into force; ....

[1] J. Erasmus, *Cleaning up our Acts: B.C. statute revision makes room for plain language changes*, Clarity, No. 38, January 1997.

[2] J. Erasmus. *The B.C. statute revision experience: tax law rewrite on a shoestring*, The Loophole, June 1999.

[3] A. McLean and J. Erasmus, *Confidential review of draft legislation by members of the private bar: a brief discussion of the British Columbia experience*, Commonwealth Association of Legislative Counsel Conference, August 1996, Vancouver, Canada.

In the Supplement, an entire Act was not in force would simply be the original Act as revised. For an Act that had outstanding amendments, the Supplement would look like an amending Act.

The Supplement worked, but it has a special citation and many provisions remain unproclaimed today. We are currently looking at a different approach for the continuing limited revision authority.

### Dealing with forms and schedules

The problem: many older Acts had forms and schedules that today they would be considered more appropriately dealt with by regulation.

The solution: move them to regulations.

As authorized by the *Statute Revision Act*:

> 2 (1) In preparing a revision, the Chief Legislative Counsel may do any or all of the following:
>
> (j) omit forms or schedules from an Act.
>
> (2) If a form or schedule is omitted under subsection (1) (j), a power to prescribe the form or schedule by regulation may be added to the appropriate Act.

The drafter preparing the revision that omitted a form or schedule would also prepare the regulation that would replace it.

### Approval and enactment procedure

The enactment process used from 1924 to 1979 was moderately complex. The new one was streamlined while retaining parliamentary supervision —

- The finalized revision is given to the Clerk of the Legislative Assembly.
- The Clerk arranges for it to be presented to the Select Standing Committee assigned this responsibility by the Legislative Assembly.
- If the Committee approves the revision and recommends that it be brought into force, a copy will be deposited with the Clerk as the official copy.
- The revision will then be brought into force by regulation.

Our *Revised Statutes of British Columbia 1996* was a revision of the public Acts to December 31, 1996. Its 15 volumes were considered and approved in a single morning sitting by the Select Standing Committee on Parliamentary Reform, Ethical Conduct and Private Bills on February 28, 1997. It was brought into force by regulation on April 21, 1997.

### Correction by regulation

With over 10 000 pages of legislation, our Legislative Counsel may be perfectionists but we are not perfect — there were bound to be a few revision errors. For past revisions, these would have had to wait until the next legislative session before anything could be done to address the problem.

The proposed solution was to allow immediate correction of a revised Act by regulation, with the possibility of retroactivity to the date of revision —

Interim corrections to revision

10 (1) The Lieutenant Governor in Council may make regulations to correct, in a manner consistent with the powers of revision in this Act, any error in a revision.

(2) A regulation under this section may be made retroactive to the coming into force of the revision.

(3) A regulation under this section ceases to have effect after the last day of the next session of the Legislative Assembly after the regulation is made.

Five regulations were made under this authority, four of these in the two years after the revision. They made just over 50 corrections, with about half of these being cross reference corrections and a number of others being spelling. The regulations were then given continuing effect by statutory validation — see, for example, section 1 of the *Statute Revision Correction and Miscellaneous Amendments Act, 1998*, S.B.C. 1998, c. 19.

## *The limited revision authority — the end of general revisions?*

Our 1992 *Statute Revision Act* introduced a concept we had never seen used elsewhere:

Preparation of revision

1 The Chief Legislative Counsel may prepare

(a) a general revision consisting of the public Acts enacted before a date chosen by the Chief Legislative Counsel together with those other Acts considered advisable, or

(b) a limited revision consisting of an Act or a portion of an Act.

### What is a "limited revision" and why it was proposed

The "general revision" concept paralleled the standard revision authority to deal with the entire statute book of public Acts. The new "limited revision" concept allowed revisions of single Acts or even part of Acts.

What thinking went into this limited revision concept?

- Our experience was that certain Acts are subject to far more amendment than others (tax statutes spring immediately to mind), and that many of these are also statutes that are subject to much public use. In other words, they are in need of revision long before the general statute book and they would provide far greater public benefit from revision.
- We hoped that, if good choices were made in terms of language and formatting, our revision would stand the test of time — that is, there would be less need for general revisions to provide a "uniform mode of expression".
- General revisions focussed on public Acts, but we also had a number of private Acts that could benefit from revision.
- Only a few of our public Acts would be given intensive treatment in the general revision. A limited revision authority would permit such work to be done in the future as time permitted.

Most aspects of the *Statute Revision Act* could apply to both general and limited revisions. A couple of matters needed specialized provision for limited revisions.

First, there was the problem that other Acts containing cross-references to the newly revised Act would need change. This was accommodated by authority to make necessary consequential amendments as part of the revision:

> 2 (1) In preparing a revision, the Chief Legislative Counsel may do any or all of the following:
>
> (f) for a limited revision, make minor amendments to other Acts required to reconcile them with a revised Act as if the minor amendments were consequential amendments to the revised Act; ....

Second, there was the difficulty that the usual publication and citation rules could not operate. The solution for this one was to have the revision included in an appropriate annual statute volume and assigned a chapter number for that legislative session:

> (2) A limited revision may be given a chapter number as if it were enacted in the current session of the Legislative Assembly or, if the Legislative Assembly is not then in session, in the next session, and the limited revision may be published in the volume of Acts enacted in that session.

**Private Acts benefited from first use of the limited revision authority**

The first use of the limited revision authority came about in relation to a private Bill for amending the *Vancouver Foundation Act*, S.B.C. 1950, c. 94. (The Vancouver Foundation is one of the major charitable foundations in Canada.)

Under our Standing Orders, such Bills are forwarded to Legislative Counsel who will assist the sponsor in bringing it into conformity with current B.C. legislative drafting style. As you might imagine, much had changed in this regard since the Foundation was established some 50 years earlier. After discussing the possibility with Chief Legislative Counsel, I suggested to the Law Clerk of the Legislative Assembly and the sponsor that we might offer a statute revision of the Act.

The nature of this being a private Act presented a few challenges that would not be faced in a general revision. As to content, the Vancouver Foundation wanted to retain a sense of its history within the legislation continuing, for example, to identify the first directors of the Foundation. As to timing, matters did not proceed as quickly as they might in government: legal counsel for the Foundation were acting in a *pro bono* capacity and the Foundation board needed to be consulted for its approval.

But the Foundation did get their revised Act, cited as the "*Vancouver Foundation Act* [Statute Revision], S.B.C. 2000, c. 21", and seem well-pleased with it. Certainly the Law Clerk has taken up the idea, and has since asked us to do more revisions of private Acts.

**Dealing with public Acts under the limited revision authority**

We are now engaging with the limited revision authority to deal with public Acts.

Some initial work was done in 2000-2001 in the relative quiet before an anticipated general election. The new government that came into power in the late spring of 2001 established a fixed election date for the next general election (May 17, 2005), so we knew in advance when our next quiet time might be.

The Statute Revision Committee was revived in mid-2004. A permanent administrative support position for on-going revision coordination was established. Language change checklists and procedure flow charts were prepared. Criteria were set for selecting Acts that would be preferred candidates for revision: public use and extent of amendment came at the top.

A list of the top candidates was drawn up and drafters asked to volunteer to take on one or more as first drafter. Work has started as our usual drafting demands eased in the run-up to the election. The election is now past, but revision continues on a corner-of-the-desk basis.

We hope to have our first limited revisions of public Acts ready to place before the Legislative Assembly Committee in the spring 2006 session. We may never need to do a general revision again.

## *Appendix 1 – British Columbia Statute Revisions*

| | Revision Year | Years Between | Acts | Volumes | Pages | Responsibility | Authorizing Act |
|---|---|---|---|---|---|---|---|
| 1 | 1877 | ** | 176 | 1 | 815 | Commissioners | *Consolidated Statutes Act, 1877* S.B.C. 1877, c. 1 |
| 2 | 1888 | 11 | 121 | 1 | 989 | ? | (Acts consolidated) |
| 3 | 1897 | 9 | 195 | 2 | 2 213 | Commissioners | *Revised Statutes Act, 1895* S.B.C. 1895, c. 50 |
| 4 | 1911 | 14 | 247 | 3 | 3 197 | Commissioners | *Revised Statutes Act, 1909* S.B.C. 1909, c. 41 |
| 5 | 1924 | 13 | 279 | 3 | 4 106 | Legislative Counsel | *Revised Statutes Act, 1923* S.B.C. 1923, c. 62 |
| 6 | 1936 | 12 | 313 | 3 | 4 635 | Legislative Counsel | *Revised Statutes Act, 1936* S.B.C. 1936, c. 52 |
| 7 | 1948 | 12 | 371 | 4 | 5 391 | Legislative Counsel | *Revised Statutes Act, 1948* S.B.C. 1948, c. 79 |
| 8 | 1960 | 12 | 413 | 4 | 5 193 | Legislative Counsel | *Revised Statutes Act, 1960* S.B.C. 1960, c. 50 |
| 9 | 1979 | 19 | 437 | 6 | ~ 4 800 | 1966: Legislative Counsel<br>1973: Commissioner | *Revised Statutes Act* S.B.C. 1966, c. 42 |
| 10 | 1996 | 17 | 494 | 15 | ~ 10 000 | Legislative Counsel | *Statute Revision Act* S.B.C. 1992, c. 54 |
| 11 | ? limited revisions | | | | | Legislative Counsel | *Statute Revision Act* R.S.B.C. 1996, c. 440 |

** *British Columbia converted from British colony to a Province of Canada in 1871.*

## *Appendix 2 – Consolidated Statutes of British Columbia 1877*

Authority limited to consolidation and renumbering

***Consolidated Statutes Act, 1877***
**S.B.C. 1877, c. 1**

> **3.** The said Commissioners shall be and they are hereby fully authorized and empowered
>
> - to prepare and arrange for publication the said new edition of the Acts, Ordinances, and Proclamations in force in the Province of British Columbia at the time of the revision and consolidation thereof,
> - to omit
>   - all such Acts, Ordinances, and Proclamations and parts of Acts, Ordinances, and Proclamations which have expired, been repealed, or had their effect,
>   - and all Acts, Ordinances, and Proclamations, repealing any or any parts of any Acts, Ordinances, and Proclamations, as well as the Acts, Ordinances, and Proclamations, and parts of Acts, Ordinances, and Proclamations repealed, and the Schedules of all such repealed or repealing Acts, Ordinances, and Proclamations, and
> - to alter the numbers of the said Acts, Ordinances, and Proclamations, and the sections thereof.

## *Appendix 3 – Revised Statutes of British Columbia 1888*

Expanded authority: alteration of language to give better effect to spirit and meaning
recommendations for amendment

***Revised Statutes Act*, 1895**
**S.B.C. 1895, c. 50**

> **3.** The said Commissioner or Commissioners shall be and they are hereby fully authorised and empowered
>
> - to prepare and arrange for publication the said new edition of the laws of British Columbia and statute law of England as aforesaid,
> - to omit
>   - all such Acts, Ordinances, and Proclamations which have expired, been repealed, or had their effect, and
>   - all Acts, Ordinances, and Proclamations repealing any or any parts of any Acts, Ordinances, and Proclamations, as well as the Acts, Ordinances, and Proclamations repealed, and the Schedules of all such repealed or repealing Acts, Ordinances, and Proclamations, and
> - to alter the numbers of the said Acts, Ordinances, and Proclamations, and the sections thereof, and
> - to revise and alter the language thereof, not so as to change the sense, but so as to give better effect to the spirit and meaning of the law, and
> - to frame and draw new provisions and suggestions for the improvement of the law, and
> - to frame a comprehensive index of the entire work.

## *Appendix 4 – Developments in authority 1911 to 1948*

**1911: back to consolidation and renumbering**

**1924: alteration of language for uniform expression**
**amendments to clarify intention of Legislature**

***Revised Statutes Act*, 1923**
**S.B.C. 1923, c. 62**

**4.** In carrying out his work under this Act the Legislative Counsel …

- may make such alterations in their language as are requisite in order to preserve a uniform mode of expression, and
- may make such minor amendments as are necessary
    - to bring out more clearly what is considered to have been the intention of the Legislature, or
    - to correct clerical or typographical errors, and ….

**1936: amendments to reconcile seemingly inconsistent enactments**
**omit laws that have stopped having legal effect**

***Revised Statutes Act*, 1936**
**S.B.C. 1936, c. 52**

**4.** In carrying out his work under this Act the Legislative Counsel …

- may make such minor amendments as are necessary
    - to bring out more clearly what is considered to have been the intention of the Legislature or
    - to reconcile seemingly inconsistent enactments, or
    - to correct clerical or typographical errors, and
- may also omit from the said revision such public general Statutes and amendments to public general Statutes, whenever passed or however made, as are repealed or stopped from having the effect of law by competent authority under powers delegated by the Legislature or otherwise; and ….

**1948: omit laws that are spent**

***Revised Statutes Act*, 1948**
**S.B.C. 1948, c. 79**

**3.** In carrying out his work under this Act, the Legislative Counsel …

- may omit from said revision any Statutes or parts of Statutes that are spent …

## *Appendix 5 – Revised Statutes of British Columbia 1979*

Using the language alteration authority

***Revised Statutes Act***
**S.B.C. 1966, c. 42**

**Provisions governing the carrying-out of work of revision**

**3.** In carrying out his work under this Act, the Commissioner

- shall prepare and arrange the said Statutes for publication, and
- may alter their numbering, and the arrangement of the different sections thereof where considered necessary or advisable, and
- may make such alterations in their language as are requisite in order to preserve a uniform mode of expression, and
- may make such minor amendments as are necessary
    - to bring out more clearly what is considered to have been the intention of the Legislature or
    - to reconcile seemingly inconsistent enactments, or
    - to correct clerical or typographical errors, and
- he may omit from the revision any Statutes or parts of Statutes that
    - are spent or,
    - although printed among the public general Statutes, have reference only to a particular place or municipality, and have no general application throughout the Province; and
- may also omit from the revision such public general Statutes and amendments to public general Statutes, whenever passed or however made, as are repealed or stopped from having the effect of law by competent authority under powers delegated by the Legislature or otherwise; and
- shall prepare, or cause to be prepared, a comprehensive index for the whole.

**COMMISSIONER'S PREFACE**

HERE THEY ARE AT LAST, the Revised Statutes of British Columbia, 1979, consolidated to December 31, 1979. Earlier consolidations appeared in 1871, 1877, 1888, 1897, 1911, 1924, 1936, 1948 and 1960. Despite the revision powers in the Revised Statutes Acts in this century, changes in language have rarely appeared. This consolidation does include, for the first time, some of the authorized changes in an attempt to carry out the *Revised Statutes Act* mandate "to preserve a uniform mode of expression".

## *Appendix 6 – The modern revision authority*

Enacted as the *Statute Revision Act,* S.B.C. 1992, c. 54

### STATUTE REVISION ACT
### RSBC 1996, Chapter 440

*Section*



**Preparation of revision**

**1** The Chief Legislative Counsel may prepare

(a) a general revision consisting of the public Acts enacted before a date chosen by the Chief Legislative Counsel together with those other Acts considered advisable, or

(b) a limited revision consisting of an Act or a portion of an Act.

**Revision powers**

**2** (1) In preparing a revision, the Chief Legislative Counsel may do any or all of the following:

(a) combine Acts or provisions of them;

(b) alter the numbering and the arrangement of Acts or provisions;

(c) rename an Act or portion of an Act;

(d) alter language and punctuation to achieve a clear, consistent and gender neutral style;

(e) make minor amendments to clarify the intent of the Legislature, to reconcile inconsistent provisions or to correct grammatical or typographical errors;

(f) for a limited revision, make minor amendments to other Acts required to reconcile them with a revised Act as if the minor amendments were consequential amendments to the revised Act;

(g) include in the revision a supplement containing those Acts or provisions that, although enacted, have not been brought into force, and indicate how they are to come into force;

(h) omit Acts or provisions that are spent, are repealed or have no legal effect;

(i) omit Acts or provisions that do not apply throughout British Columbia;

(j) omit forms or schedules from an Act.

(2) If a form or schedule is omitted under subsection (1) (j), a power to prescribe the form or schedule by regulation may be added to the appropriate Act.

(3) A form or schedule omitted from a revision is repealed on the coming into force of the revision.

(4) A regulation prescribing a form or schedule may be enacted before a revision comes into force but the regulation has no effect until the revision comes into force.

**Revision to be submitted to committee of Legislative Assembly**

**3** The Chief Legislative Counsel must give a revision to the Clerk of the Legislative Assembly for presentation to a select standing committee of the Legislative Assembly designated by the Legislative Assembly to examine the revision.

**Approved revision to be deposited as official copy**

**4** (1) If the select standing committee approves a revision and recommends that it be brought into force, the Lieutenant Governor may direct that a copy of the revision be deposited with the Clerk of the Legislative Assembly as the official copy of the revision.

(2) The official copy must be signed by the Lieutenant Governor and countersigned by the Clerk of the Legislative Assembly.

**How revision comes into force**

**5** (1) The Lieutenant Governor in Council may specify by regulation when a revision deposited under section 4 (1) comes into force.

(2) A revision comes into force for all purposes as if it were expressly included in and enacted by an Act.

(3) A provision in a supplement to a revision comes into force as provided in the supplement.

(4) From the time a revision comes into force, the official copy deposited with the Clerk of the Legislative Assembly must be considered to be the original of the statutes of British Columbia replaced by the revision.

(5) The Clerk of the Legislative Assembly must keep the official copy of the most recent Revised Statutes of British Columbia until the next general revision comes into force.

**Title and publication of revision**

**6** (1) A general revision may be published with the title Revised Statutes of British Columbia and may include in the title the year of its publication.

(2) A limited revision may be given a chapter number as if it were enacted in the current session of the Legislative Assembly or, if the Legislative Assembly is not then in session, in the next session, and the limited revision may be published in the volume of Acts enacted in that session.

**Repeal of previous version of statutes**

**7** (1) When a general revision comes into force,

(a) the existing Revised Statutes of British Columbia, and

(b) all other Acts and provisions that are included in the general revision but were not included in the existing Revised Statutes of British Columbia

are repealed to the extent that they are incorporated in the general revision.

(2) When a limited revision comes into force, the Acts or provisions it replaces are repealed to the extent that they are incorporated in the limited revision.

**Legal effect of revision**

**8** (1) A revision does not operate as new law but has effect and must be interpreted as a consolidation of the law contained in the Acts and provisions replaced by the revision.

(2) If a revised provision has the same effect as a provision replaced by the revision, the revised provision

(a) operates retrospectively as well as prospectively, and

(b) is deemed to have been enacted and to have come into force on the day on which the provision replaced by the revision came into force.

(3) If a revised provision does not have the same effect as a provision replaced by the revision,

(a) the provision replaced by the revision governs all transactions, matters and things before the revision comes into force, and

(b) the revised provision governs all transactions, matters and things after the revision comes into force.

**How references are to be interpreted**

**9** (1) A reference in any of the following to an Act or provision included in a revision must be interpreted, in relation to any transaction, matter or thing after the coming into force of the revision, as a reference to the revised Act or provision having the same effect as the Act or provision replaced by the revision:

(a) an Act or provision that was enacted before the coming into force of the revision and that is not included in the revision;

(b) a regulation or other instrument enacted before the coming into force of the revision;

(c) a document existing before the coming into force of the revision.

(2) A reference in any of the enactments or documents referred to in subsection (1) (a) to (c) to the Revised Statutes of British Columbia must be interpreted, in relation to any transaction, matter or thing after the coming into force of a general revision, as a reference to the new Revised Statutes of British Columbia.

**Interim corrections to revision**

**10** (1) The Lieutenant Governor in Council may make regulations to correct, in a manner consistent with the powers of revision in this Act, any error in a revision.

(2) A regulation under this section may be made retroactive to the coming into force of the revision.

(3) A regulation under this section ceases to have effect after the last day of the next session of the Legislative Assembly after the regulation is made.

***Interpretation Act* applies**

**11** The *Interpretation Act* applies to a revision as it applies to other enactments.

# Straddling a barbed wire fence: reflections of a gamekeeper, turned poacher, turned gamekeeping poacher

***Stephen Argument***

## An explanation

I should begin by explaining the strange title to this paper. At a previous conference, I said that I felt like a "game keeper turned poacher", because I had recently left my position as Secretary to the Senate Standing Committee for the Scrutiny of Bills and joined an Australian Commonwealth department where, instead of scrutinising legislation, I was assisting in the development of legislation that ultimately found its way before the Committee.

Since that time, I have mostly worked on the side of the poachers. This changed in 2006, however, when I was pleased to accept the opportunity to work as Legal Adviser (Subordinate Legislation) to the ACT Standing Committee on Legal Affairs (performing the duties of Scrutiny of Bills and Subordinate Legislation Committee). From that point in time, I have had a foot squarely back in the gamekeeper's fold (though I still largely worked for the poachers in my "other" job).

Earlier this year, the situation became more complicated, when I accepted an opportunity to work, as a legislative drafter, in the Commonwealth's Office of Legislative Drafting and Publishing. This has meant that, in one role, I scrutinise delegated legislation made by ACT departments and agencies. In my other role, I draft legislation (for Commonwealth departments and agencies) that is scrutinised by the Senate Standing Committee on Regulations and Ordinances.

It is for that reason that I start with the (uncomfortable) proposition that I am currently "straddling a barbed wire fence".

## Drafters as "the first bulwark"

Poaching and barbed wire fences aside, I have been asked today to talk, in particular, about the role of drafters in legislative scrutiny. It is with some trepidation that I begin by disagreeing with something that the late Emeritus Professor Douglas Whalan (who was, I am sure well-known to many of the participants of this conference) wrote in 1990.

In its *Eighty-seventh Report*, the Senate Standing Committee on Regulations and Ordinances published a Special Report by its (then) Legal Adviser, Professor Whalan, on subdelegation of powers. In that Report, Professor Whalan suggested that the Senate Standing Committee for the Scrutiny of Bills was "the first bulwark" in certain aspects of legislative scrutiny.[1]

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This paper was presented to the Australia – New Zealand Scrutiny of Legislation Conference, held in Wellington, New Zealand, on 31 July to 2 August 2007, and is published with the kind permission of the organisers. Any views expressed in the paper are views of the author and not those of either the Committee or OLDP.

My primary contention today is that I believe that it is legislative drafters (and, by that, I mean persons employed in the offices of the various Parliamentary Counsel around Australasia) who are the first bulwark in legislative scrutiny.

In making this assertion, I concede that it is neither a novel nor a revolutionary proposition. I note, for example, that Ms Rowena Armstrong QC, (then) Victoria's Chief Parliamentary Counsel, told the Fourth Australasian and Pacific Conference on Delegated Legislation and First Australasian and Pacific Conference on the Scrutiny of Bills (held in Melbourne from 28 to 30 July 1993) that it is certainly the very existence of the Parliamentary Committee that often gives the drafter the sanction that is needed – you know what the Committee will say if you try that one.[2]

The point to note here is not the role of the Parliamentary Committee but the fact that the drafter would both refer to the Committee and rely upon it for authority in advising client agencies that legislation might offend the legislative scrutiny principles that our various committees seek to uphold.

A similar point was made by the Commonwealth's (then) First Parliamentary Counsel, Mr Ian Turnbull QC, at a seminar held in 1991, to mark the tenth anniversary of the Senate Standing Committee for the Scrutiny of Bills. Mr Turnbull said:

> I think it is safe to say that the provisions that get into Bills and that come before the Scrutiny of Bills Committee are the tip of the iceberg. I think that a far greater number that would have offended have not been put in Bills because we have advised the departments and the departments have had the sense to withdraw them. After all, when we say that the Scrutiny of Bills Committee does not like something, that is a very important weapon in our armoury.[3]

Mr Turnbull's point was acknowledged by the (then) Deputy Chair of the Scrutiny of Bills Committee, Senator Amanda Vanstone, who thanked the Office of Parliamentary Counsel for its role in assigning "certain unwelcome legislative practices … to the legislative equivalent of Siberia".[4]

How does this occur? It may assist to begin by considering the role of the legislative drafter.

### The role of the drafter

The current Commonwealth First Parliamentary Counsel, Mr Peter Quiggin, recently made the following statement about the role of a drafter:

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

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[1] Senate Standing Committee on Regulations and Ordinances, "Special report on subdelegation of powers" - Eighty-seventh Report (November 1990), p. 4).

[2] Armstrong, R.M., "Drafting: Should delegated legislation be drafted by a specialist drafting office?", p. 4.

[3] Turnbull, I, in "Ten years of Scrutiny – A seminar to mark the tenth anniversary of the Senate Standing Committee for the Scrutiny of Bills" (held on 25 November 1991 – available at http://www.aph.gov.au/Senate/Committee/scrutiny/10_years/report.pdf), p. 62.

[4] Vanstone, A, in "Ten years of Scrutiny" (note 4), p. 57.

- It is worthwhile articulating the parameters within which an Australian Commonwealth drafter works.
- The drafter's role is collaborative—the drafter is expected to work with the instructing area to analyse policy, flesh out alternatives and resolve problems. …….[5]

Speaking in 1991, one of Mr Quiggin's predecessors, Mr Turnbull, said (of drafters):

> We are boffins of a sort. Our primary role is to put into legal effect the policy proposals of the Government, and this means that we have no role whatsoever in the formulation of policy. We are part of the Executive described by Senator Vanstone but we are rather a part of the Executive with a difference. As we have no say in the formulation of policy, we tend to adopt possibly a more objective approach to the making of law.

Mr Turnbull then went on to say:

> However, we do regard it as part of our role to advise on the legal principles that are involved in legislation. In particular, since the arrival of the Scrutiny of Bills Committee, we regard it as our duty to advise the departments on the Scrutiny of Bills Committee's principles and also the way in which the Committee interprets those principles. At the end of the day, if we have given this advice and the department still wants to go ahead with a provision which we think may be criticised by the Committee, we are bound by the decision of the department, as our function really is to put into legislative form what they want. The result of this, anyway, is that in practice the Scrutiny of Bills Committee and Parliamentary Counsel work together for the same ends, but we do have different points of view.[6]

I will say some more about Mr Turnbull's "working together" point below.

While Mr Turnbull's comments were directed specifically at the role of drafters in the Commonwealth Office of the Parliamentary Counsel in relation to the work of the Scrutiny of Bills Committee, I believe that it is uncontroversial to say that this applies to drafters of both primary and subordinate legislation in the various jurisdictions in which legislative scrutiny committees operate. It is a fact of life that any drafter worth his or her salt will warn their clients against the potential difficulties for provisions that are likely to attract attention from a legislative scrutiny committee.

Indeed, that is my experience as both a drafter and as an instructor of drafters. In my experience as an instructor, I have received (literally) hundreds of comments from drafters about the likelihood of particular provisions attracting the attention of one or other of the Senate's legislative scrutiny committees. If anything, I have found drafters to raise matters out of an abundance of caution.

My experience as a drafter is very slight, so I do not propose to say too much from that perspective. I do not think I am talking out of school, however, when I say that (in my limited experience) drafting manuals and check-lists highlight the work of the various legislative scrutiny committees and the kinds of issues that are likely to attract comment and that drafters are

[5] Quiggin, P, "Training and development of legislative drafters", The Loophole, July 2007, p. 14.

[6] Turnbull, I, "Ten years of Scrutiny" (note 4), p. 59.

required to consider legislative scrutiny committee issues in their drafting. I can also say (based on my recent induction into the dark art of legislative drafting) that discussion of the role of legislative scrutiny committees is a key component in the training of drafters.

None of this is new or revolutionary. It is common sense. It is about drafters doing what they can to assist in putting into legal effect the Government's policy proposals. Dare I say, it's about *good client service*??

### "Working together"

I would like to pick up on Mr Turnbull's point about drafters and legislative scrutiny committees working together. These comments relate to my role with the ACT Committee, rather than my role as a drafter for the Commonwealth.

As the title to this paper indicates, my initial thought about taking on, simultaneously, the role of a drafter of delegated legislation in one jurisdiction and the role of a scrutineer of delegated legislation in another was that I would be, in effect, straddling a barbed wire fence. Within the first few weeks of starting work at OLDP, one of my new colleagues put it slightly better. They suggested to me that I must feel "schizophrenic". Oddly, my immediate reaction was that, in fact, I *didn't* feel schizophrenic at all. On reflection, I realised that this was because, to a large extent, the ultimate goal of both roles was essentially the same: to produce "better" legislation.

Again, that seems like common sense but I wonder whether that is the case.

### "Better" legislation"

What do I mean when I refer to "better" legislation? From a legislative scrutiny perspective, I mean legislation that does not offend against the principles of the relevant legislative scrutiny committee. Taking the ACT Committee's scrutiny of subordinate legislation as an example, the Committee considers whether such legislation:

- is in accord with the general objects of the Act under which it is made;
- unduly trespasses on rights previously established by law;
- makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions; or
- contains matter which in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly.

The Committee also considers whether any explanatory statement or explanatory memorandum associated with legislation and any regulatory impact statement meets the technical or stylistic standards expected by the Committee. I will say more about the Committee's scrutiny of explanatory statements below.

As to the subordinate legislation itself, however, surely it is in everyone's interests if subordinate legislation is in accordance with the general objects of the Act under which it is made. Indeed, part of a drafter's responsibility is to draft only legislation that is within the relevant legal limitations. If legislation is not "within power", there is always the potential for the subordinate legislation to be found to be invalid. "Better" subordinate legislation, therefore, is within the general objects of the Act under which it is made.

Similarly, it is in everyone's interests that subordinate legislation not trespass unduly on rights previously established by law. While departments and agencies might not have quite the same interest in this issue as the Committee, a failure to pay heed to this principle might also be a potential basis for subordinate legislation being found to be invalid, particularly in jurisdictions (such as the ACT) with a Human Rights Act or equivalent.[7] So "better" legislation des not interfere unduly with existing rights.

In the same vein, legislation that makes rights, liberties, etc unduly dependent on non-reviewable decisions runs the risk of challenge in the courts, on the basis that the legislature could not possibly have intended that decisions in relation to significant rights, etc were not subject to review. So it is "better" that review is provided for.

It is a bigger stretch for me to make an argument about legal validity and the term of reference that relates to matters that are more appropriately dealt with in primary legislation. That said, from a legitimacy perspective (at least), surely it is "better" for all concerned if problematic initiatives are dealt with in primary legislation, rather than subordinate legislation, if only because, if the legislation is challenged, those defending the validity of the legislation can point to the *Hansard* and argue that, in fact, the legislature *did* intend to make legislation with that effect.

These elements of "better" legislation are not inconsistent with what a drafter is trying to achieve. From a drafter's perspective, "better" legislation is legislation that is within power (and that does not get challenged in the courts) and does its job, preferably in a way that everyone can understand. There is (of course) the added imperative that legislation not get slowed down or tripped-up by comments from a legislative scrutiny committee. The real point, however, is that (in my view) drafters do not want their legislation queried by a legislative scrutiny committee as much because they do not want to risk the legal consequences mentioned above as because they do not wish to attract the ire of a committee.

So we're all working towards the same general goals.

### Explanatory statements

I will now depart from my allotted topic and talk about some things that arise from my work with the ACT Committee.

First, I will say something about explanatory statements. As I have already noted, the ACT Committee has a role in ensuring that explanatory statements meet "the technical or stylistic standards expected by the Committee". In my work with the Committee, I have taken a keen interest in the content of explanatory statements, largely because I consider that not enough use is made of them, by the makers of subordinate legislation. The end result is that they are often of little or no use. Which makes them a waste of everyone's time.

In *SI bhnf CC* v. *KS bhnf IS*, Chief Justice Higgins of the ACT Supreme Court stated that a particular explanatory memorandum, "consistently with the apparent purpose of such documents of explaining as little as possible", merely stated the effect of the provision that he was

[7] See the decision of the ACT Supreme Court in *SI bhnf CC* v. *KS bhnf IS* [2005] ACTSC 125 (2 December 2005), in which Higgins CJ (among other things) used the ACT's Human Rights Act 2004 to determine the proper limits of certain legislation.

considering and did "little justice to the ambiguities and apparent draconic effect" of the relevant provision.[8] The Chief Justice's views on the helpfulness of explanatory material are not unusual. Nor are they inaccurate. As someone who reads more than his fair share of explanatory statements, I think I can speak with a certain amount of authority on this issue.

Part of what I am trying to do in my advice to the ACT Committee is to reverse this trend. As I discuss further below, my view is that it is in everyone's best interests if those who make subordinate legislation make proper use of explanatory statements. Furthermore, it should go without saying that properly-drafted explanatory statements have an even more important role in assisting those who have to use, comply with and interpret the legislation to which explanatory statements relate.

### "Gotcha!!"

One of the things that I decided early on in my tenure as adviser to the ACT Committee is that I *would not* be adopting a "gotcha!!" approach to legislative scrutiny. That is, I decided that it would not be a primary object of the exercise to catch the legislators out and to embarrass them. It remains my view that that approach does not help anyone.

Instead, I have taken an approach suggested by Mr Turnbull's "working together" comment. This has meant that a large part of what I do (through the Committee) is to point out mistakes (so that they can be corrected) and to suggest ways in which things can be done better.

There is a two-fold logic in my approach. The first limb is a recognition that (to a certain extent) we're all trying for the same thing. We're all trying to ensure that valid and effective legislation is produced that (as much as possible) is accessible and intelligible by everyone. The second limb is a recognition that we all make at least the occasional mistake and that no-one is right *all the time*. Not even governments. Not even legal advisers. Not even drafters. So my approach is, in some part, self-preserving. My theory is that if I don't say "gotcha!!" every time I think I've detected a stuff-up by the legislators then they won't do the same if/when I get something wrong.

I think this is just common sense and it seems to be working so far.

### Scorecards

Another element of the "gotcha!!" approach is what I might call the "scorecard" method of measuring the effectiveness of legislative scrutiny committees. Speaking at the 1993 conference, the then Victorian Chief Parliamentary Counsel, Ms Armstrong, said:

> Parliamentary Committees that review delegated legislation may sometimes measure their performance by the number of instruments upon which they have reported. Parliamentary Counsel or drafters of delegated legislation are not necessarily sympathetic with that measure of achievement. Indeed, one ought to be able to say that the less that is reported on, the better the achievements because the system is working well. Instructing departments are not trying to slip tricky provisions through or professional drafters are successful in ensuring that unacceptable concepts are not included.[9]

[8] [2005] ACTSC 125 (2 December 2005), paras 82-3.

[9] Armstrong, R.M. (note 3), p. 4.

Ms Armstrong makes a good point, picking up an issue that I have considered myself in my legislative scrutiny work over 15 years. Is a low number of "hits" necessarily a point of concern? Does it demonstrate that the committee (or the legal adviser) isn't doing its job properly? I think not. Indeed, I think that the continuation of negative comments at relatively high levels can, in fact, suggest that a committee **isn't** doing its job. While it may be a raw indicator that mistakes are being picked up, the bigger issue (in my view) is that the continuation of negative comments at high levels can indicate that agencies either aren't listening to a committee or that they aren't taking any notice of what the committee says. If that is the case, the committee isn't doing its job.

I should stress at this point that I do not believe that this is an issue for the ACT Committee and that, to the contrary, the Committee does from time to time observe that particular issues on which the Committee has consistently made comments have appeared to diminish in number.

### It's not rocket surgery

I have been at pains so far in this paper to point out that I do not regard anything that I say here as being new or revolutionary. Can I also stress that it's also basic common sense (or, as an Australian television presenter recently observed, "it's not rocket surgery"). If I, as a Legal Adviser to the ACT Committee, identify an issue in a piece of subordinate legislation, I write about it in my report to the Committee. If the Committee agrees with me, the issue goes into the Committee's Scrutiny Report. That then generates a letter to the Minister responsible for the subordinate legislation, seeking the Minister's views. Unavoidably, the Committee's comments make their way to the relevant area of the Minister's department, which must then prepare a response to the Committee's comments, for the Minister's signature.

Having worked in a government department, I know that the process that I have described above involves a significant amount of work. Letters for the Minister's signature are rarely drafted and cleared in one go and invariably must be accompanied by briefs, memoranda, etc. It is a painful process.

All this being so, my view is that departments should be doing their darnedest to avoid having their subordinate legislation commented on. To achieve this, departments should ensure that none of the things that the Committee doesn't like to see in subordinate laws are included in *their* subordinate laws and also to ensure that the Committee's (modest and logical) requirements in relation to what it likes to see in explanatory statements are met.

Sometimes, it is simply not possible for departments to avoid a Committee comment. Sometimes, the Government requires that things go into subordinate laws that legislative scrutiny committees do not like. I have no problem with that. It is in the nature of how governments and legislatures work.

In my experience, however, many of the comments made by the ACT Committee are eminently avoidable, if departments only follow the Committee's reports and educate themselves about the Committee's requirements. In a surprising number of instances, for example, the Committee makes a comment about a piece of subordinate legislation simply because of the omission of a paragraph (or even a sentence) from the explanatory statement to a piece of subordinate legislation.

### "This is not a public servant appointment"

The best example that I can give is in relation to statutory appointments. In the ACT, Part 19.3 of the *Legislation Act 2001* requires that most statutory appointments be made by disallowable instrument. As a result of these instruments of appointment being disallowable, they come before the ACT Committee.

There is a significant exception to the general rule that instruments of appointment are disallowable by the Legislative Assembly. Section 227 of the *Legislation Act* provides that the disallowance provisions, etc *do not* apply to the appointment of a public servant to a statutory position (whether or not the Act under which the appointment is made requires that the appointee be a public servant). This means that, in order to be sure that an instrument before the Committee is, in fact, disallowable under Part 19.3 the *Legislation Act*, the Committee (and, ultimately, the Legislative Assembly) needs to be sure that the person being appointed is *not* a public servant.

In a surprising number of cases, explanatory statements to instruments of appointment contain *no* indication as to whether or not the person being appointed is a public servant. In the absence of such an indication, the Committee is bound to ask the relevant Minister "Is this a disallowable instrument?" Without such an answer, the Committee has no way of knowing whether or not, in fact, the instrument of appointment is disallowable.

So the Committee writes to the Minister and the process that I have discussed above is set in train, leading (hopefully) to the Minister writing to the Committee to advise whether or not the person appointed was, in fact, *not* a public servant. I have often wondered about the person-hours involved in the Committee obtaining this answer. Whatever the number of hours, however, I can say with certainty that the time involved is a many-times-multiple of the amount of time involved in inserting in the explanatory statement to the instrument of appointment a sentence along the following lines:

> This is not a public servant appointment.

As I said, it's not rocket surgery.

### Outreach, etc

Part of the non-gotcha approach that I have set out above is that I think it is important to do a certain amount to assist departments and agencies in meeting the standards required by a legislative scrutiny committee. As part of this, the ACT Committee regularly commends departments and agencies for taking an approach that meets the Committee's requirements. The Committee regularly re-states its requirements in relation to particular issues (the content of explanatory statements is a prime example), so that departments and agencies cannot say that they are unaware of what it is that the Committee requires.

In addition, both Legal Advisers participate in a certain amount of "outreach", in that we have both been involved in seminars for the ACT public service, organised (mainly) by the ACT Parliamentary Counsel's Office, in which the operation and the requirements of the ACT Committee are described and in which we tell public servants what the Committee expects of them. This can only be a good thing and it is something which I encourage all committees to do as much of as they can.

This touches on a point that I have made in presentations to previous conferences. It has long been my view that legislative scrutiny committees need to do as much as they can to publicise the work that they do. The obvious reason for this is that it helps to make public servants aware of what they have to do to avoid having their legislation the subject of a negative comment by the committee. The less obvious reason is that it is a way of letting the wider community know about the tremendous amount of good (and largely unrecognised) work that legislative scrutiny committees do in protecting the interests of citizens.

I suggest that part of the reason why not much is known about the good work done by legislative scrutiny committees is that legislative scrutiny is far from being "sexy". This point is underlined in a 2003 editorial in *Statute Law Review*, where the editors stated that an obstacle to the greater involvement of parliamentary committees in the United Kingdom in legislative scrutiny was:

> …certainly…that technical scrutiny of legislation is more demanding and less politically rewarding for parliamentarians than evaluation of its underlying policy.[10]

Clearly, this is something that ought also to be addressed. The rewards of legislative scrutiny need to be appreciated and understood more widely.

I was struck by the importance of outreach earlier this year, when reading some comments by Professor George Williams, in the context of the ongoing debate about whether or not Australia should have a Bill of Rights. In an article in the *Sydney Morning Herald*, Professor Williams stated:

> A national charter of human rights could shape how all citizens understand their place in society and their relationship with government. This is one reason, around the world, charters have become a key part of what it means to have a modern democratic system of government.[11]

I do not propose to enter into the Bill of Rights debate here. The bottom line is that, realistically, for practical/political reasons, we cannot expect Australia, in the foreseeable future, to follow New Zealand's lead in this regard.

What I can say, however, is that if one of the objectives of a Bill of Rights is to "shape how all citizens understand their place in society and their relationship with government" then, surely, this is an objective that can be met without having to wait for a Bill of Rights. I would have thought that it was uncontroversial to say, in this forum, that a large part of what legislative scrutiny committees do is to safeguard human rights and to manage the relationship between governments and their citizens, insofar as those rights and relationships are expressed through and affected by legislation. If that is the case, why can't committees do more to make the general public more aware of that role and, in so doing, help citizens understand their place in society and their relationship with government, as Professor Williams asks?

### What about legislation that is drafted in-house?

If I can return (briefly) to the topic that I was asked to address, what I have said about the importance of drafters to legislative scrutiny begs the question as to what happens if legislation is

[10] Statute Law Review, 24 (3), p. iv.

[11] Williams, G, "Australia's freedom goes on trial", Sydney Morning Herald, March 31 - April 1, 2007, p. 32.

drafted other than by professional drafters. It should not be a surprise that I now put my drafter's cap very squarely back on and say that in-house drafting can have some significant draw-backs.

In demonstrating this point, I will again refer back to what Ms Armstrong told the 1993 conference. Ms Armstrong's topic was "Should delegated legislation be drafted by a specialist drafting office?" Unsurprisingly, Ms Armstrong concluded that it should. In reaching that conclusion, Ms Armstrong stated:

> In order to carry out the task [of drafting], the drafting office must have certain resources. It must have legally trained staff who specialise in constitutional and administrative law, statutory interpretation and who develop a particular and specialised knowledge of the statute book and of the scope of delegated legislation within the jurisdiction. The skills of this group of people will include a specialised knowledge of Parliamentary procedures.
>
> Most importantly, the members of a drafting office learn from each other. Certain aspects of drafting are skills that are acquired through experience and practice. Drafters are like any other professional group in their interchange with each other. They meet together, criticise each other, discuss current issues and problems and, at least to some limited extent, try to establish a national network in Australia and New Zealand. This also makes it easier to deal with uniform legislation, where that is required, and to address issues about drafting practices, including public comment and criticism.[12]

An even more flattering view on the role of drafters has been expressed by VCRAC Crabbe:

> The training given to parliamentary counsel, their vast knowledge of existing law, their experience of the probable consequences of a piece of legislation, all these matters place them on a pedestal from which they have to be consulted on policy issues and from which they have to advise and warn.[13]

In making her comments to the 1993 conference, Ms Armstrong did not rule out a role for in-house drafters. Indeed, she stated that the role of in-house drafters was, in certain circumstances, "particularly important".[14] I do not disagree with that proposition. I would, however, make two additional comments.

First, one of the advantages of a specialist drafting office that Ms Armstrong does not refer to is its tendency towards longevity. Drafters do not tend to be the most mobile of lawyers. The nature of drafting and the nature of people who are attracted to drafting is that drafters are ordinarily in it for at least the medium haul. This means that drafting offices can be great repositories of experience and "corporate knowledge". This is one of the reasons that they are so important to legislative scrutiny.

Instructors, on the other hand, come and go. Increasingly, they move from one project to the other. Among other things, this means that, in their dealings with instructors, drafters continually have to reinforce the kinds of principles that emanate from legislative scrutiny committees. Drafters cannot rely on their instructors to be aware of the committees' requirements because of

[12] Armstrong, R.M. (note 3), p. 2.

[13] Crabbe, VCRAC, Legislative Drafting, (1993).

[14] Armstrong, R.M. (note 3), p. 3.

previous experiences. This means that an added advantage of drafters is that they are, in effect, keepers of the faith.

My second point relates to the implications of all that I have said above in relation to legislation drafted outside of a specialist drafting office. It is quite unlikely that someone outside of a specialist drafting office will have the sort of knowledge of the work and requirements of legislative scrutiny committees that a drafter would have. Not impossible but quite unlikely. That being so, the kind of pre-legislative scrutiny that I have discussed above will not take place. The "first bulwark" is not there. This is less than ideal.

That leaves the question of how to ensure that there is a "first bulwark" if legislation is drafted in-house. It follows from what I have said above that I think it is unlikely that the same level of expertise and corporate knowledge will develop in departments as has developed in drafting offices. There are exceptions to this rule (the Civil Aviation Safety Authority, which has both a long history of using internal drafting resources and a high volume of output) but I think that it is generally unwise to rely on in-house drafters to do the same job as drafters in an office such as the one in which I currently work.

In her 1993 paper, Ms Armstrong suggested that specialist drafting offices could assist in-house drafters by being available to advise and to assist and by preparing drafts, where resources permitted. She suggested that drafting offices might also assist by preparing guidelines and setting standards.[15]

I agree. In the Commonwealth arena, this is not only done but it is required to be done, as a result of section 16 of the *Legislative Instruments Act 2003*, which gives the Secretary of the Attorney-General's Department a statutory responsibility to do the very things that Ms Armstrong suggests.

I think that the other part of the answer is "outreach". Legislative scrutiny committees need to make their work and their requirements known to everyone who produces legislative material that comes before them. Drafters need to do the same (and the office in which I work certainly does). Given the turnover of staff in departments, the information-sharing process needs to be repeated. Regularly.

### Back to bulwarks

I began this paper by disagreeing with one of New Zealand's (and legislative scrutiny's) favourite sons. I conclude by saying that I don't think we're really in disagreement at all. Scrutiny of bills committees *are*, as Professor Whalan said, an important bulwark against various types of legislative nasties. So too are legislative drafters. But drafters have the opportunity to weed out (at least some of) the nasties *before* they get to scrutiny committees. So I think drafters really are the *first* bulwark.

The real point, however, is that this is not a competition. We're all (more-or-less) on the same side. We're all trying to ensure that "better" legislation is made and passed.

[15] Armstrong, R.M. (note 3), p. 3.

# Commonwealth Association of Legislative Counsel

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