Commonwealth Association of Legislative Counsel

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Editorial Policies

The Loophole is a journal for the publication of articles on drafting, legal, procedural and management issues relating to the preparation and enactment of legislation. It features articles presented at its bi-annual conferences. CALC members and others interested in legislative topics are also encouraged to submit articles for publication.

Submissions should be no more than 8,000 words (including footnotes) and be accompanied by an abstract of no more than 200 words. They should be formatted in MSWord or similar compatible word processing software.

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Disclaimer

The views expressed in the articles contained in this issue are those of the contributors alone and do not necessarily reflect those of the CALC Council.

Contents

Editor's Notes

This issue of the Loophole is rather eclectic. The articles it contains are all based on presentations at the Edinburgh Conference in April of this year and demonstrate the wide-ranging subjects encompassed by the Conference theme of *Catalysts of Democracy and Keepers of an Effective Statute Book.*

We begin with Siti Rahmah Mohammad's account of managing drafting clients in Brunei. Her article dovetails with the gentle firmness of her presentation in Edinburgh and its insistence on a combination of teamwork, creativity, planning and patience.

The next article takes us to the United States where Doug Bellis embodies the finest traditions of our discipline in a course he teaches to initiate university students to the world of legislative drafting. His article recognizes the limits of traditional pedagogy, but also emphasizes the potential for a university course to introduce students to the intricacies of constructing legislation.

From one of the world's largest democracies, we turn to one of its smallest: the Isle of Man. Howard Connell updates us on what has transpired over the past 25 years since the publication of William Cain's article on drafting in a "small jurisdiction". These jurisdictions far outnumber the large ones and his article will no doubt resonate widely among our members.

Far too little attention is paid to subordinate legislation given its volume and significance in the lives of citizenry. Adam Bushby takes a step towards redressing this neglect in reviewing the interplay between drafting primary and secondary legislation in the Australian State of Victoria. His article raises fundamental issues about maintaining the content of the law in formal legislative instruments and controlling recourse to informal instruments that escape legislative scrutiny and publication.

Finally, Daniel Lovric takes us into the parallel interpretive worlds of legislative counsel and judges. Both interpret legislation, though from somewhat different perspectives. Legislative counsel interpret in the abstract, envisioning the future application of legislation they draft. Judges are rooted in the facts of the cases that come before them, but must be conscious of the larger implications of their decisions through the doctrine of precedent. Ideally, these two perspectives match each other. But do they? I will leave you to read Daniel's article to discover his answer to this question.

This issue concludes with a review of Professor Helen Xanthaki's most recent contribution to legislative drafting: *Drafting Legislation: Art and Technology of Rules for Regulation*.

So much food for thought!

John Mark Keyes

Ottawa, October, 2015

Managing the Expectations of Clients

Siti Rahmah Mohammad[1]

Abstract

This article describes the process for legislative drafting in the Government of Brunei Darussalam and how the Legislative Drafting Division of the Attorney General's Chambers manages the expectations of instructing officials in the departments it serves. The discussion focuses on three techniques: (1) transparency on roles,(2) gaining control over the actions of the clients, and (3) building an effective workforce. The principles underlying these techniques are teamwork, creativity, planning and patience.

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Introduction

I know that all my colleagues in legislative drafting have had their share of experiences when dealing with our clients. In Brunei Darussalam we are also faced with challenging expectations from our clients. I have summarised them into three main points -

1. To advise on legal and non-legal matters.
2. To produce draft legislation expediently upon instruction.
3. To see their proposal become law within a year.

AGC – the central drafting office in Brunei Darussalam

The Attorney General's Chambers ("the AG's Chambers") is considered the central drafting office for Brunei Darussalam. Therefore, all twelve Ministries and departments under them,

[1] Senior Counsel, Attorney General's Chambers, Brunei Darussalam.

including the statutory bodies, submit their legislative proposals to the AG's Chambers. Except for a few of them, these authorities do not have their own legal unit in their organisation, nor do officers from the AG's Chambers, who are seconded to their organisation. The Legislative Drafting Division of the AG's Chambers has a total of eleven legislative drafters to serve these authorities. The officers of the AG's Chambers are also legal advisers and therefore hold dual responsibilities.

No legislative timetable or plan

It is a norm for the legislative officer to be pressed for time to produce the desired draft legislation. There is no legislative timetable to be followed so the office can receive a legislative proposal at any time labelled as a priority. Amongst the common reasons given is because they need the legislation before they can proceed to the next stage as part of a complex programme to fulfil the commitment they have made or to comply with their international obligation by a specific date.

Unreasonable policy decision

This in itself is not without other challenges. Clients may submit drafting instructions based on unreasonable policy decisions or even expect the legislative officer to use our magic wand (as if we have one, and how I wish we did) and make a miracle happen based on drafting instructions that are not clear or even non-existent.

Ignorance of the law-making process

At the end of the day, the office always becomes the focus of the blame from the perspective of those who were not involved in or never do understand the law-making process, no matter how we try to explain to the client what we require from them or what they should do beforehand or the reasons why the desired draft cannot be prepared in the manner or form or time frame they wish it to be, and despite indicating their understanding of the shortcomings in the preparation and information they have provided.

I am sure we are all in the same boat and have had our share of experience. It can be frustrating at times but I believe our passion for the job allows us to persevere in spite of the demands and expectations of our clients.

Let me quote a poem composed by a colleague of mine, Madam Hasnah Hasan,[2] that strikes a note on this point:

> Drafters present, drafters past
> Legislations drafted and legislations passed,
> Policy translated of utmost class

[2] Madam Hasnah is one of the team who prepared the instructions manual for the office.

Into legislation the quality unsurpassed …

Instructions given for us to draft
Indeed we draft but enough it's not
Skilled as we are in that craft
Nay can we escape from such a tight spot …

"Please, please", our cries to be heard
Give us your all, the complete rigmarole
Let us paint the canvas that goes the whole yard
And paint we will a picture so perfect with no hole …

After years of going through the same experience or hearing fellow colleagues in the same predicament, what are we to do differently? We applied the theories of modern management as a way of managing the expectations of our clients. I do not wish to elaborate on the theories of management to you but only to give a snapshot of what we have implemented based on those theories.

The belief that law is a must or is the solution to all problems

First and foremost, we must place ourselves in the shoes of the clients. What makes them behave in such a way? I believe by understanding where the client is coming from and their work environment, including their functions and challenges, the legislative officers can appreciate their circumstances. With no legal background, legislation is the one document they wish not to be involved in because they do not understand its content. However, their lack of understanding of the legal principles and implications also leads them to believe that any problem or issue can be solved by creating new laws.

Like anyone else working in any organisation, the officers we deal with are also pressured by their superiors to ensure the draft legislation is expedited in order to keep up with a pre-determined schedule. The superiors are only interested in the results and not the intricacies of specific practical details from a legal and legislative perspective.

As a result of the ill-preparation and unclear policy presented to us by the client, we repeat the same legal advice in every meeting we attend only to find the client had not made much progress from the last time we met. On some occasions, they even expect the legislative officer to come up with the policy decision and solution to the non-legal problems they are facing.

As Einstein once said, the definition of insanity is doing the same thing over and over again and expecting different results.

So what changes do we need to make? The answers are found in -

1. transparency on roles,

2. gaining control over the actions of the clients, and
3. building an effective workforce.

Transparency on roles of authorities, stakeholders and legislative officers

We have a tell-the-client policy to educate them on matters that may seem trivial but if understood can reduce time and cost for all concerned, not only for the officers, but our organisations.

Killing the "disease of ignorance"

Ignorance of the different roles and responsibilities of everyone in the law-making process is one of the reasons for the client's misconception about what and who causes the delay with the result that there have been a number of pieces of legislation which remain "untouched" for years, only to "resurface" with us finding out that the earlier discussions are no longer relevant. One recurring comment from the client and other stakeholders is that it sometimes takes years between the time they attend meetings to discuss the proposal or draft until the time the draft legislation finally becomes law.

Making reference materials available on-line

It was also common practice for legislative officers to attend preliminary discussion meetings where the policy had still not been finalised. The legislative officers have to endure listening to lengthy discussions among officials from different sections within the client's organisation which would often result in the officials not making any definite conclusions concerning the policy.

This prompted our office to prepare the *Drafting Instructions Handbook* and a diagram on the workflow of the law-making process. The Handbook not only lists the required information, but also explains the challenges encountered by the legislative officer. It is hoped that this will allow the client to plan ahead and understand the respective roles and responsibilities in the law-making process.

The objective of creating the diagram, which shows the separate processes of policy-making and legislative drafting, is to send the message in a picture to attract that attention of clients and stakeholders. With this diagram, they can appreciate that the years of discussions held at the beginning of the process are not part of the legislative drafting process, which only starts when an official instruction has been submitted to the Attorney General's Chambers with the requisite legislative scheme.

The diagram also assists with putting an end to the misconception that the legislative officer needs to prepare draft legislation promptly once an idea to legislate has been made. This also allows the client to appreciate the fact that they need to come up with the legislative scheme and discuss in further detail the proposal, together with its practical and other

implementation issues, within their own organisation and with outside stakeholders before they write in to our office. We give maximum publicity to the diagram by organising a series of presentations for officials from all Ministries and departments.

As a supplement to these two documents, the *Practical Approach to the Preparation of Initial Draft Legislation* was also prepared, which provides simple step-by-step procedures for the client to follow. It also helps the legislative officer to understand the clients' intentions in their initial draft proposal.

These documents are now available on the AG's Chambers website[3] The diagram and *Practical Approach* are also available in leaflet-form and distributed in all preliminary meetings and any visit to the AG's Chambers. One Ministry informed us that it has distributed the documents to all the departments under it for reference. We also submit them to clients who convey their proposal for a new law and have request AG's Chambers to initiate the legislative drafting process without specific drafting instructions. Thus instead of embarking on any piece of work blindly, we make the client study and deal with this task first.

Guiding and advising client through correspondence

Another attempt towards transparency is to make our correspondences more informative. The guidance and information to the client are given as we progress along the legislative drafting process. Upon receiving instructions, our initial response is to inform the client of which officer has been assigned to deal with the matter. In the same correspondence, we seek the names of their officials and their contact numbers. This approach was highlighted by Mr Peter Quiggin (the CALC President) some years ago. We received positive responses from this, and as a result, clients now provide the necessary information in advance for subsequent assignments.

We also remind clients to look into matters concerning logistics and resources and getting stakeholders' opinions on the draft legislation as part of their preparation towards implementation of the law. This initiative has resulted in a positive outcome.

We also changed our rules of engagement with the client. In the past, we would wait for the client to respond, that is, either to direct us to the officer in charge or to provide the information we require; the client would frequently never respond. Nowadays, during the legislative drafting process, if the legislative officer does not think the draft can be proceeded further without the client's additional input we either call up our client for a discussion and then proceed further with the drafting, or, if we are comfortable with the initial draft, we submit it for the client's urgent consideration, with notes or questions highlighting our opinions and queries.

[3] http://www.agc.gov.bn/Theme/Home.aspx.

We find that responding this way not only updates the client on the progress of the legislative drafting process and involves the client in the problem-solving process, but it is also a way to buy time for the legislative officer to deal with their other assignments on a parallel basis. The outcome from this procedure is also a way for the office to ensure the client has a good understanding of the policy.

Our effort to guide the clients does not stop here. To save time, the legislative officer will write to the client to explain the legal advice and opinions. Previously we simply submitted the draft for consideration, leaving our views only to be conveyed and discussed at length during meetings. As I have indicated earlier, the previous approach seemed to have less impact on the progress of the draft, or no record was made on the status of the development or the progress made. When officials moved around, the draft got lost and it was left unresolved for years.

We notice that by putting extra effort into expressing our advice and opinion, we actually save time for the legislative officer. By providing advice in writing, we ensure that the information can be read by all concerned. This has successfully reduced the frequency of meetings and allowed the draft to be agreed upon expediently. There have also been circumstances where the client requests the advice to be in writing after we hold a meeting, for the purpose of conveying that advice to their seniors.

Similarly, we also discovered that instructing officers do not always convey the exact status of the legislative drafting process to their superiors. This has led the superior to believe that the Chambers is being difficult.

So instead of waiting for the client to reply to our correspondence, we proactively send follow-up correspondence to seek the status of our drafts sent four to six months earlier. If the client does not respond to such follow-up seven times, we conclude that the client does not wish to proceed with the matter. We also receive positive responses from the client with this approach. Comments vary but include clients finally stating that they agree to the draft, or merely providing an update that they are still interested in pursuing the draft legislation and are looking into the matter.

We also inform clients in advance of things they could do that they might otherwise consider trivial, such as writing the dates on which the legislative document and the gazette forms are signed. Previously, the legislative officer would spend time completing those tasks, which included contacting the clients to get the information and interrupted the legislative officer's routine work.

Since the office is responsible for the preparation of legislation in two languages, the office also seeks the assistance of the instructing authority to study the texts prepared by the office. This approach allows the client to have the same responsibility for ensuring that the texts have been translated properly and accurately and are acceptable to them.

At the end of the process, the office also provides the client with a complimentary gazette copy of the law upon publication. This closes the chapter on our correspondence with the client concerning the particular assignment.

Gaining Control

Meetings to achieve objectives only (not as a habit!)

Legislative officers spend too much time in meetings. Some meetings give no added value to the process. The clients have the impression that it suffices to explain the justification for each provision of their draft proposal verbally to the legislative officer and expect the officer to draft the relevant provisions there and then, with the hope that this exercise can somehow expedite the legislative drafting process. At the end of the meetings, we end up wondering what exactly were the client's instructions and did the meeting assist us to clear the confusing state of affairs?

We decided to approach and handle our clients differently. We have adopted a stricter approach to the frequency of meetings. We now do not entertain all requests for a meeting. Instead of allowing clients to arrange when meetings will be held, sometimes, depending on the circumstances, we agree to them if there is new information or development in the status of the draft proposal. We encourage clients to express further drafting instructions or development in writing. We try to ensure meetings are held only after the first initial draft has been prepared for consideration. When we do this we explain to the clients the reasons for doing so and provide them with the proposed plan of action. In most cases, the client understands, agrees to the plan and appreciates the guidance provided.

Effective Workforce

Wide-ranging courses

We used to focus training solely on the technical disciplines of the legal profession. In order to increase the quality of the services and legislative drafts as well as accomplishing the volume of work in the office, we now introduce the legislative officers to modern management, trained in other skills such as negotiation, effective management, team work, quality control, time-management and leadership, to name a few, in order to develop their emotional Quotients or Emotional intelligence (EQ).

In every organisation, including our AG’s Chambers, our human resource is the biggest asset. The combination of these skills with legislative drafting skills builds an effective workforce and helps legislative officers reach their full potential. A effective workers are leaders in their respective disciplines and will also become the 'thinkers' for the organisation and come up with ideas for improvements. They plan and manage their respective work strategy to the advantage of the organisation. The end result is that success is owned

together for the organisation and not for the individual's own achievement. That is why legislative officers are trained to apply empowerment and always encouraged to utilise the available human resources and delegate clerical tasks to others to speed up drafting. An effective workforce from all levels and disciplines is trained to implement quality in their duties, that is, doing things right the first time.

An effective team of legislative officers appreciates the challenges of clients and provides the necessary legal advice and recommendations to guide clients towards an acceptable policy direction and legislative scheme. An effective workforce sees the client as "a friend" in need who requires them to provide the legal assistance according to the circumstances but also skilful enough to get a "buy-in" from clients who may have a different view of the matter.

An effective team also has a high EQ (emotional intelligence) and adopts a positive mind-set - positive in guiding their fellow team members and accepting comments as a challenge to move forward and improve the organisation. This eases the implementation of a flexible work assignment where the legislative officers are exposed to handling various kinds of legislation. This allows the office to move drafting files around to manage the unpredictable legislative demand of the Government. Legislative officers with greater expertise are empowered to supervise and mentor other officers with less experience to provide guidance in their daily work. In cases where large and complicated drafts have been submitted to the office, a dedicated and focussed team is set up to work on it. The team will meet constantly, going through each provision together. This teamwork approach requires dedication on all team members and has helped the office to meet the deadline set by the client and their expectations.

Business process re-engineering

The creation of an effective team also included re-engineering the internal processes of the Legislative Drafting Division. This involved re-structuring, additional manpower, evaluating the internal processes and making clear the roles of everyone in the Division.

Key performance indicators

Another approach taken to show the legislative officer's commitment towards a joint effort with the client is imposing a key performance indicator for each assignment. This effort made by the legislative officer to keep the client informed of the progress of the draft allows the client to put effective plans in place because they will have an idea of the time frame within which to expect to receive updates from the legislative officer.

Instead of commenting that we cannot be rushed into submitting the draft or cannot commit to the time when we respond to clients, now a definite period of time is given to the client, which has been set at six months from the time the drafting instruction is received or from

any subsequent correspondence received. This prevents any unnecessary alarm on the part of the client and allows them to focus on a shorter time period before they hear from us again.

With this commitment, the client hopefully can appreciate the efforts of the legislative officer and can provide the necessary cooperation and understanding, and effectively play their part in the legislative drafting process, as part of a joint effort.

Quality control

The office also implemented quality control to ensure the draft texts in Malay and English are consistent before being sent to the client. This procedure involves another person who has not been involved in the drafting or translation process of that draft to verify the content of both texts.

In-house legal team

Another one of our efforts includes encouraging our client to establish an in-house legal team with whom we can work closely. We believe their legal background would enable them to better appreciate the legal advice and legislative drafting requirements and be able to relate the advice to the practical procedures and functions of the organisation. This would better equip the legal team to explain legal principles to their colleagues in their own office on a routine basis.

BruLaw Project

The office is also currently working on the introduction of a legislation online system incorporating the consolidation, publishing and editing processes of the legislative drafting process. We hope this will expedite the research, production and publication of laws of Brunei Darussalam for the benefit of the officers, stakeholders and our organisations.

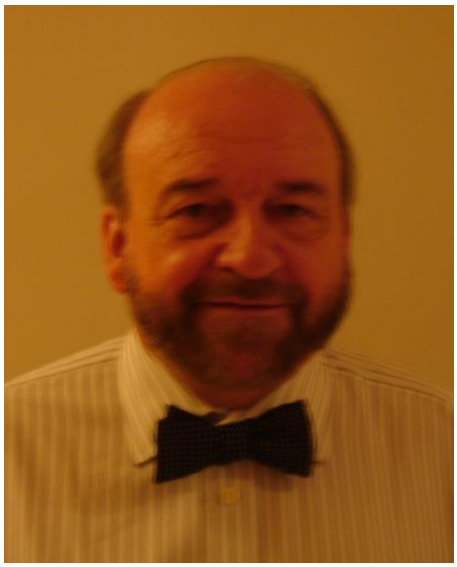
Conclusion

The efforts to manage our client are not without challenges. The lessons from these exercises tell us that we should understand the client and that the client is willing to work with us for the interest of both sides. All we have to do is educate and guide them to what we want from them. This requires teamwork, creativity, planning and patience.

As a way forward, we strive to continuously to improve ourselves and our organisation by removing non-value added processes to speedily and effectively deliver the best legal service to our clients.

Is It Possible to Teach Legislative Drafting in a University Setting?

M. Douglass Bellis[1]



Abstract

This article considers whether legislative drafting can be taught in a university setting. It is based on the author's experience in teaching a course on this subject at George Washington University's Graduate School of Professional Studies in Washington, D.C. The article suggests it is possible to do so, but not by relying on the traditional teaching tools of lectures, practice exercises, and tests. It instead suggests recreating in the classroom the circumstances most drafters work under, and giving students a taste of what it is like to draft legislation. This can be done by dividing a class into two groups that take on the roles of instructing officials and drafters relative to each other. The students are also required to read and take notes on up to date drafting textbooks (or manuals and other on-line resources) and then take a traditional test on them. So far, this approach has been successful in introducing students to the drafting process, in which many of them will engage, if only indirectly, as lobbyists and legislative staff.

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Parsing the Question

If by that question we mean, "Is it possible to train completely competent legislative drafters in some reasonable period of time merely by giving them lectures about drafting and assigning some exercises to them?" the answer is clearly no.

[1]Professorial Lecturer at George Washington University and Senior Counsel in the Office of Legislative Counsel, US House of Representatives (work affiliations given for identification purposes only: Neither institution is responsible for, or even probably very much aware of, my views on all this).

Now that I have relieved what I am sure would otherwise have been a cliff hanger of suspense, I can proceed to the "but" part of my article.

No, you can't turn people into legislative drafters by the traditional aspects of university education, but you can go rather far in preparing them to assume that role by trying as much as possible to duplicate the conditions and circumstances under which drafters must operate. This will give them something very like a real experience of drafting.

It also might be a reasonable part of a good liberal arts degree for non-legislative drafters to have some appreciation for what, after all, is an essential aspect of modern government. In a democracy, there might even be an argument that every person should have some ability to understand the laws that govern their lives and how they are produced.

The means through which such an educational task can be undertaken, both for specialists and non-specialists alike, and why it probably should be undertaken more often, is the burden of this article.

First, though, we should notice that our received belief that drafting cannot be learned in any meaningful way, other than by direct experience, is itself somewhat open to question. I will, somewhat paradoxically, support that belief, though I confessed I received it originally more as a matter of faith rather than through experiential trial.

Our System of Law and Legal Education Shapes our Approaches to Drafting

I come from a country that derives many of its institutions from its period of colonization by Great Britain (originally in the case of the United States more by England, actually). Our system of government, no matter how unrecognizable it now is to those mainly familiar with the modern Westminster model, was in many ways unselfconsciously derived from the English concepts as they existed, or as we imagined them to exist, at the time of our separation from Great Britain. We were especially influenced by the tenets of the Whig tradition. The structure of our Federal legislature, the Congress, is in some detail that of the British parliament as it existed in the early to mid-18th century (or maybe even more that of the English parliament as it existed in the last half of the 17th century). Even to this day the United States Congress has quaint forms relating to conferences between the Houses on amendments by one to the bills of the other that have long since disappeared in the Mother Country.[2] Indeed, in the Mother Country, the conferences themselves no longer exist. Conferences may be heading toward a similar extinction as a practical matter in the United States as well, for rather different reasons.

[2] For the details, you may consult Thomas Jefferson's Manual of Procedure, originally written by him for the use of the United States Senate. They were later adopted, and are still in effect, as part of the Rules of the House of Representatives. See his section XLVI, modern section 530 et seq..

The United States also structured its courts, and much of its law, on that of England some centuries ago. At the Federal level, as well as in most of the States, the terms and structures of the common law were, and to some degree still are, the idiom of our law. Some of those terms and structures are imbedded in our Federal law by the Constitution itself.

One aspect of the common law tradition is the importance of court cases. The decisions of our courts, Federal and State, were considered as the only authentic source of what the law required well into the 20th century. This may seem particularly odd since, at the Federal level, we have no "common" or purely judge-made law at all. Our courts, always on the Federal level and usually today on the State level as well, make their decisions by interpreting texts, whether those texts are statutes or constitutions (or rarely treaties).

Nonetheless our legal education (which in the United States takes place normally in the pursuit of a post graduate degree) is based on the premise that the study of cases is the basis for understanding our laws. This applies to courses in legislation as well as to other courses. It is in those courses on legislation that whatever teaching there might be about legislative drafting usually occurs.

Law school textbooks, until very recently, mainly organized by topic the principal court opinions from past litigation pertaining to the subject to be covered in a given course. A lecturer would then teach from those court opinions. This resulted in a somewhat disjointed approach to the interpretation of legislation, not to mention to the law in general. The student was expected to extrapolate backwards from court cases to decide how to interpret or draft legislation so as to avoid the pitfalls that led to litigation. Or perhaps the student was led to reproduce those pitfalls, because the poor wording that caused the litigation in the first place had resulted in a dependable verbal formula to get the same results in later litigation. Of course that wording was still ambiguous and perhaps unintelligible in English to normal people. If it were not, it probably would not have been litigated in the first place.

About pitfalls that did not lead to litigation, or that did so only indirectly, little or nothing was said or taught. The conventions of drafting were likewise left to the imagination, which probably explains the rather confusing diversity of drafting styles in American legislation. That diversity in turn led to litigation. And that litigation in turn tended to cement in place the diversity.

Under a mainly case law system, the law becomes a bewildering and seemingly random collection of more or less arbitrary rules, without any particular order or structure. So it is not surprising perhaps that most law students graduate from law school with little ability to handle any practical matter, no understanding of any overarching principles in the law, and probably unable to pass the relevant bar exam, which is a prerequisite to law practice, without taking an intensive bar review course.

But that matters little, as passing the bar exam in no way prepares one for any practical legal work, either. Increasingly, the real training in law now comes from early on-the-job practice.

Most law offices, whether public or private, consist of lawyers, or units of lawyers, who work in some very narrow practice area. So the new lawyer is trained by the first employer only in those precise and limited skills that are relevant to the practice area concerned. Among other things, this means that future employment opportunities are determined almost entirely by a new lawyer's first job. Most such lawyers soon forget any legal concept not employed in their specialty. As the saying goes, they know increasingly more about less and less until they know everything about nothing.

In keeping with this reality, drafting offices in the United States had little use for a student fresh out of law school, whether the student had taken a course in legislation or in any other aspect of law. It was the received and unanimous conviction that only through long experience in actual drafting projects on the job, under the tutelage of an experienced legislative drafter, could one hope to become adept at legislative drafting.

I might mention that this view, strongly held in our House Office of the Legislative Counsel, came to us directly from London, where, a little more than a century ago, the founder of our Office, Professor Joseph Chamberlain, sat at the feet of the British Parliamentary Counsel and then attempted to reproduce that Office at the Federal level in the United States. It was said our founder succeeded in doing so, down to a characteristic sense of humour that lawyers in both Offices shared. While the sense of humour may still be similar, in other respects the two Offices now seem quite different, mainly because the differing political systems of the two countries frustrated even shameless emulation on our part.

A crack in the historical façade

The members of the sacred priesthood of legislative drafters, though, do still have many things in common besides, perhaps, what they find funny. One of the reasons it took so long to get the hang of legislative drafting was that many of the conventions and forms governing good drafting existed only in an oral tradition, known only to the initiates. Much like the common law judges and lawyers from whom they sprang, the legislative drafters developed a rather arcane, but rigid, system for distinguishing the unwashed from themselves, the pure elect. They thus maintained a remarkable monopoly on the tasks assigned to their profession. They largely still do in common law countries.

But during the 20th century, and especially at its end, renegade members of the House Office of Legislative Counsel began writing and publishing books and articles detailing the conventions and forms governing legislative drafting in Congress. In an even greater *trahison des clercs*, some of them became either full- or part-time professors at universities. (Here I must confess, not altogether shamelessly, to being a part-time professor at George Washington University in Washington, and yes, I have written occasional articles on the subject as well.)

Luckily, legislative drafting, like other forms of writing, evolves over time and the books of yesteryear soon become amusingly, or horrifyingly, out of date. So these books did not

really let the torch-bearing peasants fully enter through the gates of the gild, since the mysteries changed faster than the books could reveal them. But the books did open a small crack in those gates through which outsiders could peek at the guardians within. As we shall see, a couple of these books have proven very useful in a university setting, though not used, perhaps as originally intended, as texts for a law school course not very different in form from other law school courses.[3]

Precedent, even Foreign Precedent, for Teaching Legislative Drafting in Universities

As an aside for people from countries with a civil law tradition, we recognize that the idea of teaching law, including legislative drafting, at a university is not so strange in those countries. This follows from the fact that law, in civil law countries, is openly derived primarily from statutory sources. The ostensible job of the judges in those countries is simply to expound and apply those sources.

True, the judges may on occasion have recourse to scholarly commentary for authority as well as to statutes. Indeed, this is a pretty long tradition, going back to Roman law and its codification under the name of Justinian, but in reality by scholars and commentators. Even before that time, and certainly since then, learned commentators, often in university settings, have had a strong influence on the development of the civil law tradition. In that tradition, court decisions might cite those commentators as authority, but in theory never rely simply on the authority of other court decisions.

Even those of us who have largely Anglo-Norman legal systems are not wholly without some history of university professors invading the sacred precincts of the law. Blackstone starts his commentaries on the laws of England with a defense of the study of law,[4] even English common law, in universities (at least English universities such as his own, Oxford). He seemed to agree with us that any reasonably educated person in a free society might benefit from learning something about the basis of that person's rights, the law.

The role of Blackstone's Commentaries in structuring and popularizing the common law perhaps saved the common law from its own pettifogging obtuseness and ultimate obsolescence. Some people say we owe it to Blackstone that we still have common law systems in a number of countries today. His belated appointments as a judge (and it seems he was not an entirely successful one) on a couple of English courts was in practice little more than a fig leaf for a posterity who preferred to think that a mere university professor could not be a fit source of legal authority in court. I understand that, even as a judge, Blackstone was regularly overruled on appeal.[5]

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[3] Tobias A. Dorsey. *Legislative Drafter's Deskbook.* The Capitol Net. 2006. Lawrence E. Filson, Sandra L. Strokoff. *The Legislative Drafter's Desk Reference, Second Edition.* CQ Press. 2008..

[4] Blackstone's Commentaries on the Laws of England, Introduction.

[5] See http://en.wikipedia.org/wiki/William_Blackstone for background on William Blackstone.

However, his books exerted a strong influence on the law in England in the late 18th and early 19th century. They perhaps had an even greater influence on the law of the United States, both State and Federal, well into the 20th century. (Apparently the Americans never fully realized Blackstone was a virulent political Tory.) Blackstone was directly cited in United States cases as decisive authority until about my grandfather's time in the late 19th century, despite our emphasis on case precedent.

American lawyers in the 18th through the 19th centuries rarely had any formal training in law at all, much less at university. They simply apprenticed themselves to attorneys already admitted to the bar and read the relatively few law books then available in law offices. In many cases Blackstone was about the only such book. So Blackstone, an advocate of university law study, became a substitute for it in the United States.

Blackstone's (now former) importance in the United States may be indicated by the fact that there is still a statue of Blackstone at the Federal courthouse near the Capitol in Washington. It is the only statue I have seen of a judge of any court, domestic or foreign, in outdoor downtown Washington. There was at one time also an outdoor statue of John Marshall, our most important early chief justice of the Federal Supreme Court. It used to sit outside the back door of the Capitol building. That statue was the only statue of any actual person on the Capitol grounds themselves (as opposed to inside the building). Now, interestingly, the statue of Marshall has been moved to the interior of the Supreme Court building across the street from the Capitol grounds. Could this be a commentary on the current fate of the rule of law in the United States? Or perhaps it is simply a commentary on the popularity of the Supreme Court among Representatives and Senators? Blackstone still stands outdoors in the elements.

How I Joined the *Trahison des Clercs*

But let us return to our main topic, the teaching of legislative drafting in universities. Given the general skepticism about the possibility of that sort of teaching being useful, which I have said I share, how is it that I am now teaching exactly such a course at George Washington University's Graduate School of Professional Studies?

The short answer is that I was asked to do so. I was also encouraged because, as I mentioned earlier, a couple of fairly recent books, written by members of my Office, partly lifted the veil on the conventions of drafting.[6] I would not have to try to remember all those conventions in the abstract and organize them into a book myself. More importantly, I thought of a way that might create something more like the real drafting experience we give our new attorneys as they apprentice in the Office. My students are rarely lawyers, but they are likely to be present or future politicians and lobbyists. They have a practical need to understand how policy ideas can be turned into laws.

[6] Above n. 3.

Learning the Basic Rules and Conventions of Drafting

At the first meeting of the class, I divide it into two groups as nearly evenly as possible. Each group will, during part of the class meeting, function as a Congress-like committee, with a chairman, chosen by that group, wielding a gavel. Each committee has its own flag, a blue flag (currently that of the EU) for the blue committee and a red flag (currently that of a small country in central Asia) for the red committee. These gavels and flags were suggested to me by a university official who advises professors on how to be effective as teachers.[7] He suggested lengthy lectures, with nothing more, were unlikely to hold the attention of students who now have their Internet-connected laptops before them at all times as an alternative to listening to the professor. By engaging their wandering attention through involving them in actual discussions that moved the class forward, I might be more likely to succeed in teaching them something useful, something they might even remember after the end of the semester.

During this part of the class meeting time, each group formulates a Federal policy on some topic chosen by the majority of them. Each group has a more than academic interest in the deliberations of the other, as each will also function as a group of drafters for the other. Just as in the real Congress, each group (or committee as we call them), after their policy begins to jell, will consult with their drafters, both in group and one-on-one meetings, to discuss the policy and answer questions the drafters ask to assist in drafting. The members of each committee will also politick informally among themselves outside the class to set the scene for the formal committee meetings, where final argument and votes on the policy will take place. During this period the policy evolves much as it does in the course of policy making in the real, or at least non-academic, world.

In this way, each member of the class comes to understand the differing perspectives of policy makers and drafters, and why it is advantageous to separate the two functions. Since most of my students will do relatively little drafting after they complete the course (though some do draft as lobbyists, politicians, or civil servants) they learn some practical skills in arriving at political consensus as a group. These skills, I might say, are rather rare in the United States currently. They also learn how to read drafts and how to discern those drafts that are confusing because of their poor drafting from those whose confusing aspects are due to a complex and perhaps half-baked policy.

More importantly from our perspective as legislative drafters, they learn to think like drafters in a realistic situation where they are handed a set of politically determined

[7] Jack Prostko, Associate Dean for Learning and Faculty Development in the College of Professional Studies, George Washington University, encouraged me to liven up the proceedings with props. I also got useful hints about how to teach from Steve Billet, Director of Legislative Affairs Master's Degree and PAC Management Graduate Certificate in the Graduate School of Political Management at George Washington University.

decisions and are asked to turn that set into a practical draft law, using the normal conventions that apply to such drafts in our country.

Now you may well ask, "How do they learn all the subtle conventions of formal legislative drafting?" During the other part of each class period during the first half or so of the semester, the students do not act as policy making committees. Instead, they are considering the two most recent and commonly used law school textbooks (which I have referred to previously) for legislation and legislative drafting classes.[8] Each of these was written by a colleague or two of mine in the House Office of Legislative Counsel, so can be relied upon to toe the Office line, or at least be influenced by it.

My tactic for these textbooks is to require the students each week to outline the readings for that week. In that I am not very inventive, because that is the usual process for law students in lecture courses. I divide both books into weekly readings, usually comparing that part of each book with the part of the other that treats the same subjects. The students must send this outline to me the night before class, so I can see if they are putting the right emphasis on things. I then hit the high points in class.

The Halfway Point and the Exam that Marks It

Their incentive to do these outlines is the greater because midway through the term I give a time-limited open-book test on the contents of both books. I make it clear a single semester is not enough for me to lecture on all the points covered by the texts, but that they will be tested on all of them, so their outlines, if well done, will serve as a key to finding quick and correct answers to questions on the tests. There are also a very few questions on the tests derived from our class discussions, so anyone absent from class should consult with others, who were there, about those discussions.

Without a good outline and some familiarity with the material through having read it, there is little likelihood a student can do well on the test. And, a further incentive for turning in the outline is that a student who fails to turn it in on time each week also loses points on the class participation portion of their final grade. The students seem to learn more from making their own outlines than from just reading the books without outlining or listening to me lecture about them in class. It is easy to zone out while reading or listening, but not as easy to do so while creating an outline.

The exam also includes opportunities (unavoidable requirements) to use on-line resources for finding existing laws and current and past bills before Congress. Many of these skills most of the students already know from other graduate school classes they are taking or from their jobs as lobbyists or political consultants. But it is important that all students have a full set of all these skills.

[8] Above n. 3.

Luckily, pretty much all Federal law is on the Internet and available to everyone in the world at no charge, both in its official statutory form and in other less authoritative but more commonly consulted compilations, such as those maintained by my own Office.[9] They are searchable by topic as well as by full text search. One may also search for any specific provision by its section number. The same on-line availability also exists for all legislation introduced in Congress for at least the last 20 years or so, and all the versions of that legislation reported from committee or passed either House. In addition most floor amendments and even some amendments intended to be offered in committee are available pretty much in real time, usually before they are debated.

These are invaluable resources for professional drafters and for my students both to determine what laws you might have to amend, and to see how others may have suggested amending them.

If a student is not successful on the first exam, that student gets an opportunity to take another toward the end of the semester and substitute the score on that one, if it is better, for the score on the first. This encourages those who were not as assiduous to begin with to make up for lost time. Increasingly few students need to avail themselves of this opportunity in recent years. This means that the book reading and outlining part of the course for most students is over about half-way into the semester.

I really do not want to pass any student out of the class who will embarrass me later by making some elementary mistake relating to drafting conventions, such as not knowing the names of the subdivisions of a section. These names are entirely arbitrary, it is true, but a lobbyist, staffer, or Member of Congress who does not know them can hardly discuss the text of a bill. In any case, this bit of trivia is highly prized among many of those actors and a person who appears ignorant of it may not be taken seriously on other matters. At a minimum, I know my students have some familiarity with these conventions half-way through the course.

Applying What has been Learned

The course can then, in the second half of the semester, concentrate on the students' application of the rules and conventions they have learned, through their practical efforts to draw up each other's bills. Since their drafts will be graded down if they fail to apply any of the conventions they should have learned, this gives them still more incentive to learn them and not forget about them once the exam has been passed.

Each succeeding part of the course depends on the earlier parts. If a student does not keep up with their outlines, they will do poorly on the exam. If they cannot look up the rules and

[9] Links to both the United States Code and selected statutes may be found at http://legcounsel.house.gov/ .

conventions in the books in order to answer the questions on the exam, they are also unlikely to be able to look up and use those rules and conventions in their drafts.

But it is also clear that even those who do well on the tests at first have a hard time applying their knowledge to actual drafting. It takes real experience and repeated redrafting after consultation with me to achieve anything like a professional quality draft. This is why I remain convinced that capable legislative drafters cannot be produced in a standard university or law school class alone. It always surprises me how students that do very well on the exam in finding and repeating the standard rules of drafting somehow often fail to follow them when they start drafting.

In this second part of the course, though, we are reproducing something of what it is like to be a new employee in a legislative drafting office, under the tutelage of an experienced drafter. I work with each student as they revise their drafts, giving them individualized analyses of their drafts in progress. You might be surprised at my student's persistence in overusing the passive voice. But after many drafts, they usually have reluctantly departed from that habit. I do not simply tell them the specific corrections they need to make to their drafts, however. Instead I identify trouble areas and give hints on how to think through the solution for themselves. My goal is to have the students understand the reasons for the rule as well as be able to look up the rule. Those two are in fact related skills. Some students would of course prefer just to repeat back to me more or less verbatim whatever changes I might suggest. That hardly would help them after the course is over.

It usually takes a least a month before the developing drafts take anything like satisfactory shape. In the process, through trial and error, the students learn something of what a professional quality draft must look like and get practice in using their textbooks to look up the rules and conventions to apply during actual drafting rather than only to answer questions on a test. They usually work in groups on a draft, and each student in the group will get the grade given the draft overall. With luck, that encourages them to correct each other's work as well as perfect their own.

The Final Grade

In all there are 3 components of a student's final grade in my course, each carrying about 1/3 of the grade. The first one is the exam I described above, which lends itself to an objective numerical score. The second is the final draft in which the student participated in drafting, which also lends itself to a numerical score. Deductions are made for each departure from the usual rules of drafting, and for failures to have a logically consistent and workable policy. Overall, because of the many redrafts each student undertakes, the final drafts typically would be presentable in Congress as introduced bills or discussion drafts for negotiations.

Class participation is the third portion of each student's final grade. Class participation consists of the timely submission of outlines and drafts, class attendance, and the

contribution of the student to the policy-making process and the working discussions among the drafters. I keep records of attendance and the quality of participation as I go along, so this part of the grading process is relatively easy to tabulate at the end of the course.

I explain to each student in a personal email how their individual overall final grade was calculated, as well as the basis for each component.

This is an admittedly time-consuming class, both for me and for the students, especially considering the relatively few credit hours offered toward their master's degree and the fact it is an elective course. But in some cases they find the time spent enjoyable, and at least a few of them find the skills gained useful.

Any student who learns the requisite skills and does well enough on the test and final draft will get a good grade, assuming reasonable compliance with the attendance and class participation requirements. I do not use any sort of curve in grading. The student either can do the work, or cannot. It is up to the student, though I will make every effort with each individually to help that student do well. The standard for a high grade requires a high numerical average combined score of its components. Because I have few enough students to work with them individually, most students get relatively high grades most years. Even having 20 students in a semester pushes the limits of the possible, however. Between 10 and 15 is better.

The Last Hurrah

There is at the end of the term each year, normally in early December, a final meeting of the class. That meeting takes the form of a dinner and drinks reception at my home on Capitol Hill for the members of the class and their guests. At the reception we sometimes have a final formal meeting of each committee to vote on which draft best expresses their policy, if there were more than one such drafts presented as final drafts by the drafters of that policy. The formal committee room is my dining room, which as it turns out has portraits of obscure persons (in this case of me and my ancestors). This lends it a bit of the ambiance of Congressional committee rooms, which generally have portraits of former chairs of the committee, some of whom are less than universally familiar figures. But the real point of the "meeting" is to celebrate the (so far) successful conclusion of the course and more often than not we dispense with the formal meetings of the committees.

Envoi

And that also brings me to the conclusion of this discussion. Have I created fully fledged drafters though my course? As I said in the beginning, I have not. But I do think my students have a real taste of what it is like to create legislation. From that, they have at least the beginnings of tools that could lead to drafting proficiency with practice. More importantly for most of them, they have a more nuanced understanding of the legislative process and how to read statutes and bills. Most of the master's degree in the program in which I teach is

aimed at how to get and keep public elective office. Maybe my class can boast it will help the students gain the skills they will need in order to be effective once they succeed in getting that office.

Legislative Drafters in a Small Jurisdiction – 25 Years On

Howard Connell[1]

Abstract

25 years after William Cain wrote "The Legislative Draftsman in a small jurisdiction" this article looks at the areas Cain considered and identifies what has changed, and what has not, in his own jurisdiction, the Isle of Man.

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Introduction

The background to this short talk is to be found with a little spring cleaning. Our office librarian was clearing out what she considered redundant material in order to free up library space. That itself resulted from the need to squeeze quarts into pint-pots: our present office accommodation is among the most expensive in the whole of the Isle of Man Government. The librarian had come across copy of an article from 1990 written by William Cain QC, then Attorney General of the Isle of Man entitled "The legislative draftsman in a small jurisdiction", which had been published in the *Statute Law Review*.[2] The article was about drafting in a jurisdiction of less than 250,000 and identified some of the difficulties facing the drafters.

As this year marks the quarter century since the article was published, the current Chief Legislative Drafter (David Bermingham) and I wondered whether others might find it

[1] Legislative Drafter, HM Attorney General's Chambers, Isle of Man.

[2] (1990), 11 *Statute Law Review* 77.

helpful to understand how things had changed in a small jurisdiction and how they had remained the same. We thought it would be fun to revisit to see how much/little the position has changed. This article briefly considers each of the subjects which Cain considered in his article. This is, I would emphasise, not a piece of academic research – it is simply our impressions which arise from our experience of working in the Manx office.

There are four developments of note since Cain wrote the original article,[3] and I will touch on each of these as we consider his subject headings, but it may help if I summarise them first.

First, our Bills are increasingly bespoke – in the 80s and 90s there was a tendency for much of our legislation to be a copy out of UK provisions with necessary Manx adaptations. Now our focus and needs are different from those of the United Kingdom. In contrast to the UK, for most purposes the Island functions as a unitary state. So there is generally no need for the policy-maker to provide in law for the direction which the operational body must pursue (because he would simply be telling himself to do something).

Second, modern life is much more complex: the fact that we are a small part of a truly global village has had its impact. Our volume of Statutory Documents (SDs – Manx secondary legislation) has dramatically increased (820 in 2000 to 1093 in 2010 when we took action to reclassify some of the more mundane road traffic instruments). We have taken a number of measures to counteract this, for example by reclassifying documents which are truly administrative and removing them from the SD category. Although in a number of comparable jurisdictions such documents are drafted by the legislative drafting team, in the Isle of Man the limited Legislative Drafting Division resources mean that Departments draft many SDs. The quality and the complexity of these are truly variable covering everything from a road closure order at one end of the spectrum to detailed rules on the functioning of our Financial Services Tribunal.

Third, there is an increasing sense of autonomy. Although the Island's formal constitutional position has not changed since 1990, a repeat of the Radio Caroline problem, when, in the 1960s, the Wilson government in London used an Order in Council to override domestic broadcasting legislation to close down a pirate radio station, seems inherently unlikely. The constitutional convention now is that the UK will not legislate for the Island without Tynwald's consent. The UK retains responsibility for international relations, defence and immigration. Occasionally a UK Bill will include what is referred to as a "permissive extent clause", enabling an Order in Council to be make provision for the Island. Even this tends not to happen except in relation to those areas for which the UK retains exclusive competence.

There is also the location of the drafting team. There have been a number of changes in the structure of the Isle of Man Government itself, with the introduction of the term "The

[3] These developments are in addition to a significant terminological change from "draftsman" to "drafter".

Cabinet Office" to describe the Minister and those officers who provide direct support to the Chief Minister. The drafting function, for the moment at least, remains within the Attorney General's Chambers. There are now 4 drafters (the Chief Drafter, 2 full drafters and 1 Legal Officer (Legislation)) on the permanent complement although this is supplemented on an *ad hoc* basis by the occasional use of consultant drafters. The permanent establishment in 1990 was 2 full drafters, but this was supplemented by occasional forays in drafting on the part of Cain himself. I am told by someone who worked with him then that, with a modesty which still typifies the man, he insisted the specialist drafters check his work.

For much of the recent past, the available drafting resource has been far too low. We are about to acquire an additional Legal Officer and hope to recruit another full drafter, presumably from outside the Island in the near future.

Unusually for a drafting team, we have quite a heavy input to the formulation of policy underlying a Bill and also in determining the priorities between Bills. Our Civil Partnership Bill had languished on a shelf for several years until my arrival, and my own involvement in legislating for the fiscal consequences of such partnerships in the UK was the trigger for dusting off the Manx Bill. Colleagues from larger jurisdictions will be used to being supported on drafting projects by Bill teams which include policy advisers and lawyers. This is a luxury not normally afforded to us, although very occasionally a consultant will be engaged to frame instructions for us. Secondary legislation is generally drafted by lay "legislation officers" and usually vetted by us (our limited involvement in secondary legislation appears to be atypical).

Finally how legislation is produced and how it is read has changed. Although hard copy versions of the statutes are still produced for record purposes, the majority of readers will never see an official hard copy version. Most will access Manx statutes via the Internet on www.legislation.gov.im and Manx secondary legislation via http://www.tynwald.org.im/links/tls/SD/Pages/default.aspx. The need to facilitate Web delivery and to ensure that printed and Web versions are visually identical has necessitated the creation of a drafting template which produces PDF text usable (and visually identical) in both printed and electronic forms.

With those preliminaries, I turn to the article. Cain addressed a series of issues and I reflect on them in the order in which he listed them.

Lack of proper instructions

Sir Alison Russell KC in his book *Legislative Drafting and Forms* quotes the exchange between a fictional Government Secretary in one of the colonies and his Attorney General to show the form (or lack of it) which instructions may take.[4] This was set out in Cain's original article and encapsulates the problem neatly. Those who instruct drafters never

[4] (Butterworths & Co.: London, 1931).

provide enough detail. This remains a constant problem. It is also one of the joys of the job for the creative drafter: tired of waiting for detailed contributions from the policy client, the Manx drafter will often sketch something out as a ranging shot, and then find that the client rather likes it.

Overall drafting instructions are much improved since 1990 – but still variable. Generally we are no longer just asked to fill policy vacuum, but it can still happen.

Improvement is partly down to the training we provide**.** We run two courses regularly: "Instructing the Drafter" and "Drafting Statutory Documents", which are intended to give new legislation officers the confidence to draft.

Breadth and subject matter

In a small international finance centre such as the Island, the key driver for legislation has tended to be change which will promote economic growth and make that financial centre a more attractive place to do business than comparator jurisdictions, or at any rate maintain its competitive position in relation to those jurisdictions. This remains a key driver for the Island's fiscal and economic policies, and consequently in the make-up of our Statute Book, although there is now a more diversified economy than many comparator jurisdictions.

A unique feature of the Island's economy is of course the Tourist Trophy (TT) motorcycle races and we have bespoke legislation to cope with that aspect too! For a small jurisdiction we have a large amount of legislation dealing with motoring.

In these respects, at least, the position is not really changed, although there are certainly challenges ahead in terms of the regulation of tax information across the globe, changes to the structure of international banking, and differing approaches to taxation itself.

Use of Legislation Officers (non-lawyers)

In many small jurisdictions the people who provide instructions, even for primary legislation, often have no legal training. They have learnt about their particular area of responsibility on the job, and have often become legislation officers without necessarily knowing (and in extreme cases without having any interest in) the legal context for their particular area of responsibility. On the Island many such officers draft secondary legislation themselves, although as mentioned earlier that depends a little on the importance of the legislation.

Lack of legal materials and the production of Bills

When Cain wrote, drafters were heavily reliant upon printed text of statutes. Producing Bills reflecting the law in other jurisdictions (usually that of England and Wales) involved large amounts of copy typing by secretaries. The text thus produced was often amended in manuscript, retyped and then sent to external printers for typesetting from scratch.

Inevitably the Internet changed that, although not as quickly as one might imagine. When I arrived in 2008 we were still sending hard copy to the printers for typesetting (albeit now using our raw unformatted text rather than rekeying it) until 2011.

The position is now much improved. In recognition of the global nature of the commercial world Manx legal resources are now available online, as noted above. Judgments of the High Court of the Isle of Man are also online at http://www.courts.im/. The Internet has not merely increased the public availability of our legislation; it has also made access to the laws of comparator jurisdictions easier, as many are now online too. Our legislation website has a limited, but increasingly useful, point-in-time utility. For any date after 1 September 2012 it is now possible to identify the exact state of primary legislation, for free.

In terms of drafting legislation we are much more dependent upon web-based research, which was in its infancy 25 years ago. All lawyers in Chambers have access to Westlaw. This is particularly useful when we do wish to consider changes which have been made in England and Wales.

Our paper-based library is rapidly contracting, not only in its physical size but also its content. In these days of financial restraint we no longer have the luxury of being able to purchase books pertinent to the subject matter of Bills being drafted. This is in contrast to the position 25 years ago when money was really no object. That all changed of course with the global financial crisis in late 2008, which still has an impact on the way we do business.

The drafter's other duties

Here we don't think the position has changed much since 1990. As members of Chambers with experience in other fields (David in commercial law, I in tax, benefits and constitutional law) we are invariably asked to assist other members of Chambers with their work. The office is too small to become precious about demarcations.

But pace of modern life has increased.

One issue worthy of note is that increasingly drafters in the Island are responsible for conducting the human rights analysis which now forms part of the advice to the Governor and the Lord Chancellor as part of the process for Royal Assent. The arrival of the UK's *Human Rights Act 1998* (and our own 2001 Act[5]) means that there is a requirement for the analysis of every Bill's compatibility with the *European Convention on Human Rights*. This is an issue ultimately for the insular courts, and not for those of the United Kingdom. In *R. (on the application of Barclay) v. Secretary of State for Justice*,[6] the UK Supreme Court held that, whilst the English High Court had jurisdiction to review prerogative acts of the

[5] Availalble at http://legislation.gov.im/cms/images/LEGISLATION/PRINCIPAL/2001/2001-0001/HumanRightsAct2001_1.pdf.

[6] [2014] 3 WLR 1142.

Sovereign in England in relation to the granting of assent,[7] it should refrain from exercising that jurisdiction because the courts of the bailiwick itself had jurisdiction.

Use of legislative precedents

Although there was some use of precedents from elsewhere in framing Manx legislation when Cain wrote, they were never followed slavishly. Then if a precedent were to be followed it would usually have been English (because that was what could be accessed readily). Now when drafting we look at examples from a much wider range of jurisdictions: some of our commercial legislation has antecedents in warmer climes: our *Companies Act 2006*[8] drew on ideas in legislation from the British Virgin Islands.

But the underlying trend is that we write more and more bespoke Manx legislation. There is a lot more "free drafting" than used to be the case. We often still look for models but, thanks to the Internet we obviously have a greater choice from where to cherry pick.

Bespoke drafting places more pressure on the drafter who is expected to exercise the same skills as a counterpart in a large jurisdiction but without the infrastructural support.

Recruitment and training

In 1990 most training was learning on the job: now almost all of it is. In the days before the 2008 financial crisis, David and one other recruit to the team attended the Sir William Dale course in London. These days we tend to recruit into the full drafter positions those who have experience from other jurisdictions. By contrast our junior appointments have come from the local Manx Bar.

Breadth of the role

We tend to be the only lawyer involved in a drafting file. Part of our role, unlike colleagues elsewhere, is that we also need to consider and, as mentioned above, provide formal advice on the compatibility of our draft with human rights and international obligations to the Attorney General, the Governor and through them, the Ministry of Justice. We will also occasionally be involved in providing balanced advice on the pros and cons of particular policy solutions, and not merely on the competing merits of different drafting solutions.

In practice, we still take a major stake in policy formulation, although perhaps not as much as we did when Cain wrote.

In 2014 we drafted Bills which dealt with company law, the constitution, copyright, criminal justice, foreign companies, health care, postal services, taxation and terrorism. (20 Bills enacted, mostly amending existing Acts).

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[7] Albeit limited to making a declaration of incompatibility and not striking down the legislation itself.

[8] Available at http://legislation.gov.im/cms/images/LEGISLATION/PRINCIPAL/2006/2006-0013/CompaniesAct2006_3.pdf.

Terms of service

As regards recruitment, we have conducted several exercises in the last few years. There is no shortage of applicants, many of whom appear suitable. Salaries are broadly comparable with those elsewhere, especially when one allows for the variation in tax rates.

Limited-term appointments are easier to organise and manage. If a drafter with experience from a big jurisdiction comes here, there is a symbiotic effect and it is good for both sides. We have had several recent instances of antipodean drafters coming on limited-term appointments. One of the most tangible instances of this symbiosis has been the evolution of new interpretation and procedural legislation, namely the Legislation and Interpretation Bills 2014, both of which are awaiting Royal Assent. These were the brainchildren of an Australian drafter on a limited term appointment, and represent a major piece of legislative spring-cleaning.

But what we really want are people who want to come and make the Island their permanent home. We do also want to grow our own drafters. We have done this on 4 occasions recently – with varying degrees of success.

Training now tends to be "on the job" only. In the past we might have sent new drafters on the Sir William Dale course. While external courses are helpful, funding is now an issue and our experience is that external training is *not* an essential building block.

Conditions of service

In the 1990 article Cain referred to David Hull's research, which showed a continuing and substantial shortage of drafters in developing countries. Interestingly some of the countries to which British drafters went then are now providing candidates for posts on the Island, although none has yet been appointed.

Service conditions remain remarkably good. Although until recently every lawyer in Chambers had a room of his or her own, that luxury has now gone, because financial pressures have increased and the only available budget which could realistically be cut was that on accommodation. But no-one is suggesting (yet!) that drafters should hot-desk.

What of the future?

It is difficult to predict where changes in technology and other fields will take us. Although recently we have successfully managed having a member of the drafting team work remotely in Brussels and another in Jersey, the need for personal interaction with politicians on the Island means there are limits to the capacity to be flexible. I say this even though the drafter in question gave evidence on one of her Bills to a Tynwald Select Committee via a Skype connection. As Cain concluded, recruitment and retention of good drafters are critical areas. Fortunately we do not at present appear to have problems with either.

Role of Legislative Counsel in Making Subordinate Legislative Instruments in Victoria

Adam Bushby[1]

Abstract

The main functions of legislative counsel are to draft primary legislation and to draft or settle secondary or subordinate legislation, or at least draft the necessary powers providing for its making. This paper discusses the legislative instruments scheme in the Australian State of Victoria, the interaction of the scheme with other types of subordinate legislation, and the role of legislative counsel when drafting primary legislation. A number of issues regarding the scheme are examined. The paper also briefly discusses the author's secondment to a government department as an instructing officer and the department's focus on subordinate instruments as well as various non-binding but influential tertiary documents like guidelines and directions. This article also raises issues of access to the statute book, and the need for consistent and clear language in legislation.

Introduction

Subordinate legislation is law made by the executive branch of government under powers conferred by primary legislation, namely an Act of Parliament. Subordinate legislation is

[1] Parliamentary Counsel, Office of the Chief Parliamentary Counsel, Department of Premier and Cabinet, Victoria, Australia. Thank you to Jayne Atkins and Paul O'Brien for providing some very useful comments on a draft of this paper.

also referred to as "subsidiary", "delegated" or "secondary" legislation. In the Australian State of Victoria there are two main categories of subordinate legislation.

The first category is "statutory rules". This includes regulations made by the Governor in Council[2] on the recommendation of the responsible Minister, and rules made by a court or tribunal.[3] Court rules are not made by the executive but are regarded as statutory rules for the purposes of Victorian legislation. In addition to drafting Bills for the Parliament, the Office of the Chief Parliamentary Counsel settles and occasionally drafts statutory rules, mainly regulations but also court rules for various rules committees of the courts.

The second category is "legislative instruments". This means instruments made under an Act or under a statutory rule that are of a legislative character, but does not include statutory rules or certain other instruments.[4] One of the main differences between a statutory rule and a legislative instrument is that only the former requires a certificate issued by the Chief Parliamentary Counsel before its making, specifying whether the proposed statutory rule meets certain criteria such as appearing to be within the powers conferred by the authorising Act.[5]

The term "subordinate instrument" is also defined but is a broad term encompassing statutory rules, legislative instruments and other instruments such as by-laws.[6] My focus here is on the second category of subordinate legislation, legislative instruments.

Subordinate instruments of this type have been made for a long time, but were formalised relatively recently. Since 1 July 2011, provisions in the *Subordinate Legislation Act 1994* (*SLA*)[7] dealing with the preparation, tabling, publication and scrutiny of legislative instruments have sat alongside the more established provisions dealing with the first category of subordinate legislation, statutory rules.

The *Subordinate Legislation Amendment Act 2010*[8] was made in response to a report prepared a few years earlier by a Joint House Committee of the Parliament called the Scrutiny of Acts and Regulations Committee.[9] The Scrutiny Committee has a number of functions, including considering whether a Bill inappropriately delegates legislative power, or insufficiently subjects the exercise of legislative power to parliamentary scrutiny.[10] In the

[2] The Governor acting with the advice of the Executive Council, consisting of Ministers. The quorum of the Executive Council is two Ministers.

[3] Section 3(1) of the *Subordinate Legislation Act 1994*, 104/1994 (Vic).

[4] Section 3(1) of the *SLA*.

[5] Section 13 of the *SLA*.

[6] Section 38 of the *Interpretation of Legislation Act 1984*, 10096/1984 (Vic).

[7] Parts 2A, 3A and 5A of the *SLA*.

[8] 78/2010 (Vic).

[9] Scrutiny of Acts and Regulations Committee, *Inquiry into the Subordinate Legislation Act 1994*, 2002.

[10] Section 17 of the *Parliamentary Committees Act 2003*, 110/2003 (Vic).

United Kingdom, the Delegated Powers and Regulatory Reform Committee and the Joint Committee on Statutory Instruments perform similar functions.

Essentially, the Scrutiny Committee was concerned that a number of subordinate instruments that were legislative in character were being made but not formally as statutory rules, and were therefore outside the scope of the *SLA*, and were not being published in a readily accessible manner. In other words, instruments that should have been made with public consultation, a high degree of scrutiny and subject to disallowance by the Parliament, were not. Accordingly, the legislative instruments provisions are largely based on the statutory rules provisions to align with the making of that more established category of subordinate instrument.

For example, under section 21 of the *SLA*, the Scrutiny Committee may report to each House of the Parliament if the Committee considers that a statutory rule laid before the Parliament fails to comply with certain criteria, for example by appearing to have been made outside the powers conferred by the authorising Act, or if it includes significant things without clear and express authority, like penalties or further powers of sub-delegation.

Section 25A of the *SLA* confers similar powers on the Scrutiny Committee in relation to legislative instruments and repeats some, but not all, of the criteria applying to statutory rules. Legislative instruments must also be laid before the Parliament, and published in the Government Gazette (if publication is not required by the Act or statutory rule under which the instrument is made).

This does not mean, however, that all instruments that are legislative in character are subject to the additional requirements. As will be discussed, the legislative instruments scheme includes a mechanism for government departments to be exempted from the scheme by regulation.

"Deeming" subordinate instruments to be statutory rules

The first issue regarding the legislative instruments scheme is to acknowledge the practice of "deeming" subordinate instruments to be statutory rules that existed before the commencement of the scheme. Primary legislation would often deem instruments like declarations to be statutory rules within the meaning of the *SLA*, and thereby pick up the publication, tabling and disallowance provisions in the Act. An instrument would be deemed a statutory rule in circumstances where the public should be made aware of its making, such as if the instrument affects the public at large or includes offences for its contravention.

The form of the deeming provisions differs slightly across the existing Acts, but most cross-refer to section 15 of the *SLA*, which requires statutory rules and related documents to be laid before the Parliament, as well as Part 5 of the Act, which provides for the scrutiny, suspension and disallowance of statutory rules. Section 5(4) of the *Radiation Act 2005* is an

example.[11] The Secretary to the relevant department has the power under section 4 of the Act to make certain declarations. Section 5(4) has the effect of deeming a declaration to be a statutory rule within the meaning of the *SLA*.

The deeming provisions have also been used in the context of national schemes.[12] This is where uniform legislation is applied across the Australian States and Territories and at the Federal level by each jurisdiction separately rather than by one jurisdiction unilaterally, although it is not always that straightforward. If Victoria wishes to ensure that an instrument made under a national scheme is covered by the *SLA*, then deeming the instrument to be a statutory rule might make sense.

What happened to this practice after the commencement of the legislative instruments scheme? One approach has been to adjust the deeming provisions by substituting the references to statutory rules with references to legislative instruments. Section 4.3.32 of the *Education and Training Reform Act 2006* is an example.[13] Under section 4.3.30 of the Act an Authority may issue declarations regarding universities. Similar to the previous example, it cross-refers to Part 3A of the *SLA*, which provides for the tabling and publication of legislative instruments, as well as Part 5A of the *SLA*, which provides for their scrutiny, suspension and disallowance.

Deeming a subordinate instrument to be a legislative instrument is not strictly necessary. The preferred approach is to simply draft the power to make the instrument but not the accompanying deeming provisions, remaining silent as to whether the instrument is a legislative instrument within the meaning of the *SLA*. The relevant department would then determine whether the instrument is legislative in character and consider the process set out in the *SLA*. This is what the legislative instruments scheme contemplates (and besides, it is not entirely clear that the process set out in the *SLA* is adequately picked up by deeming provisions like these).

Efficacy of the legislative instruments scheme

What, exactly, is a legislative instrument? Essentially, it is a subordinate instrument, other than a statutory rule (that is, an instrument made by a Minister or Secretary rather than an instrument made more formally by the Governor in Council on the recommendation of a Minister) that is legislative in character as distinct from an instrument that is purely administrative in character. Is this distinction always clear? Not really.

The *SLA* does not expressly define what is legislative in character and therefore relies on the common law. Put very simply, an instrument that is legislative in character is an instrument

[11] 62/2005 (Vic). See Example 1 in the Appendix.

[12] Section 8 of the *Co-operatives National Law Application Act 2013*, 9/2013 (Vic), is an example.

[13] See Example 2 in the Appendix. Section 63(6) of the *University of Melbourne Act 2009*, 78/2009 (Vic), is another example.

that sets out laws or rules of general rather than specific application, and which confer rights and impose obligations on persons and bodies.[14] To some extent the Act defines a legislative instrument *negatively* by specifying things that are clearly not legislative instruments, such as statutory rules and instruments of purely administrative character.[15]

An instrument that is purely administrative in character is neither a statutory rule nor a legislative instrument and is therefore outside the scope of the *SLA*. It includes things like instruments of delegation, changes to the conditions of appointments, or imposing new conditions on permits and licences.[16] In other words, things of specific instead of general application but nonetheless resulting from an exercise of executive power.

It is one of the legislative counsel's main functions to distinguish between matters suitable for inclusion in a Bill, such as powers to arrest and any other matters which have a significant impact on individual rights and liberties, from matters more suited to statutory rules or regulations, such as setting out the particular details of a scheme, or prescribing application forms and so on.

While departments must determine whether an instrument is legislative or administrative in character, it is something that should be contemplated by the legislative counsel when drafting primary legislation too. Is it appropriate for a person or body to make a legislative instrument? Or should an instrument that is legislative in character be made more formally as a statutory rule?

If there is doubt as to whether a subordinate instrument constitutes a legislative instrument for the purposes of the *SLA*, there is a regulation-making power to prescribe an instrument or a class of instrument to be a legislative instrument under section 4A.[17] Equally, however, it may be decided that an instrument, despite being legislative in character, is nonetheless not a legislative instrument for the purposes of the legislative instruments scheme. The purpose is to presumably exclude certain instruments from some or all parts of the legislative instruments scheme. There is the power to make regulations prescribing an instrument that is legislative in character not to be a legislative instrument, or to be an exempt legislative instrument. An exempt instrument must still be published.

If the Minister or relevant department that is responsible for making a subordinate instrument seeks an exemption from some or all of the legislative instruments scheme, the Minister responsible for making these regulations must agree. The assumption is that departments will comply with the scheme unless the Special Minister of State agrees to any

[14] Dennis Pearce and Stephen Argument have described the established case law in this regard, pointing out the general distinction between legislative and executive acts: Pearce and Argument, *Delegated Legislation in Australia*, 4th ed. (Lexis-Nexis Butterworths: Chatswood, 2012) at 1-3.

[15] See Example 3 in the Appendix.

[16] Section 3(2) of the *SLA*.

[17] See Example 4 in the Appendix.

exemptions and makes regulations setting out those exemptions. The Special Minister of State has various functions including government and public sector administration. The current set of regulations prescribes dozens of instruments to be legislative instruments, or not to be legislative instruments, or exempt legislative instruments.[18]

Expressly providing that instruments are not legislative instruments

Despite this mechanism within the *SLA* there are one or two examples of Acts expressly providing that an instrument is not a legislative instrument for the purposes of the legislative instruments scheme: a "statutory override", in other words. Section 26 of the *Inquiries Act 2014*,[19] for example, gives power to a commissioner to make an order restricting the publication of information regarding a Royal Commission.[20] Subsection (5) provides that an order made under section 26 is not a legislative instrument within the meaning of the *SLA*.[21]

The explanatory memorandum for the Bill states that this and other similar provisions ensure that instruments may be made in a timely manner without having to comply with the administrative requirements relating to the making of legislative instruments imposed by the *SLA*, including the obligation to prepare a regulatory impact statement. As a Bill, these provisions were of course agreed to by Cabinet, but their purpose and effect is to circumvent the legislative instruments scheme, despite the scheme itself establishing a clear mechanism to seek an exemption. This does not happen very often and is exceptional.

Regulatory impact statements – "appreciable" and "significant" burdens

Allowing instruments that are of a legislative character to be exempted from the legislative instruments scheme by regulation, or circumventing the scheme by express statutory provision, should be considered carefully in light of another, minor amendment made as part of the *SLA Amendment Act*.[22]

Section 7 of the *SLA* provides that, unless an exemption certificate is issued by the Premier, a regulatory impact statement must be prepared in respect of a proposed statutory rule. Obligations regarding the preparation of these statements have been in place for years. Regulatory impact statements necessarily delay the making of a statutory rule, but are said to improve the quality of regulation because each statement is independently assessed and the public is given the opportunity to consider the proposed change in the law and make submissions to the government.

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[18] *Subordinate Legislation (Legislative Instruments) Regulations 2011*, 52/2011 (Vic).

[19] 67/2014. (Vic).

[20] Section 126(3) of the *Major Transport Projects Facilitation Act 2009*, 56/2009 (Vic), is another example.

[21] See Example 5 in the Appendix.

[22] Above n. 8.

The Amendment Act expanded the regulatory impact statement requirements to cover legislative instruments, in addition to statutory rules. This attempted to address the concerns of the Scrutiny Committee, referred to earlier, of ensuring that more instruments that are legislative in character be made with public consultation and with greater scrutiny.

One of the main grounds for issuing an exemption certificate is where the proposed legislative instrument (or proposed statutory rule) does not impose a "significant" economic or social burden on a sector of the public.[23] Before the legislative instruments scheme commenced, the threshold requiring the preparation of a regulatory impact statement was set, slightly differently, as an "appreciable" economic or social burden. This seemingly minor amendment is, in fact, potentially substantive because it determines whether a regulatory impact statement is prepared or not. It therefore goes to the heart of the amendment Act itself, which was made for the purposes of greater transparency and accountability.

The change in terminology was considered so important that a transitional period of two years was inserted into the *SLA* to ensure that no legislative instrument could be invalidated on the basis of an incorrect assessment of legislative character.[24] Why, then, was it considered necessary to amend the threshold from an appreciable burden to a significant burden? And what is the difference between the terms, if any?

The *SLA* does not define or otherwise describe what constitutes a significant burden. Nor did the explanatory memorandum for the Bill to enact the Amendment Act, which acknowledged "a change from the threshold of an appreciable economic or social burden", but do not include any further explanation. The Second Reading Speech, however, states that the terminology was being "modernised" and indicates that guidelines will be made to "provide support to the interpretation of what constitutes a significant burden".[25]

Before the scheme commenced, the responsible Minister had the power to make and publish guidelines for or with respect to statutory rules. The scope of that power was expanded to include matters in relation to the preparation, content, publication and availability of legislative instruments, as well as the procedures to be implemented for the purposes of consultation, and so on.[26]

In other words, the scheme includes a broad power to make and publish guidelines in relation to legislative instruments. The current guidelines concede that a "significant burden" cannot be defined prescriptively because there are too many different types of burdens. A burden could be financial or affect another resource like a person's time. The guidelines state that "Whether a burden is significant should be determined in accordance

[23] See Example 6 in the Appendix.

[24] Section 3A of the *SLA*.

[25] Robert Hulls MP, *Hansard*, 2 September 2010.

[26] Section 26 of the *SLA*. See Example 7 in the Appendix.

with the ordinary English-language meaning of the word".[27] It goes on to give some rules of thumb and other guidance.

Non-government members expressed concern at the time that substituting an appreciable burden with a significant burden imposes a higher threshold, and correspondingly lowers the likelihood that a legislative instrument would require the preparation of a regulatory impact statement.[28] It is difficult to determine whether this has been the case, but I suspect that any change has been negligible. The more interesting point from the perspective of a legislative counsel is to consider the active role played by the guidelines in purporting to clarify the meaning of a term used in primary legislation. Is it helpful to the reader of legislation to be directed to a tertiary document like guidelines? Or should an attempt be made to establish clearer criteria in the Act itself?

Departmental Perspective

Two years ago I was seconded to a government department for a period of three months as a Manager of Legislation. The department was large and possessed characteristics that made it challenging to work for, namely having three responsible Ministers with related yet diverse portfolios. I gave general legal advice, assisted in the preparation of legislative proposals, and drafted subordinate instruments that were legislative in character, like Ministerial Orders, and some that were purely administrative in character, like instruments of appointment.

All sorts of issues were covered, including the engagement of rights under the *Charter of Human Rights and Responsibilities Act 2006*.[29] The Charter Act imposes obligations on government bodies to exercise their powers consistently with a number of basic human rights. Like the UK *Human Rights Act 1998*,[30] the Charter Act allows the Supreme Court of Victoria to issue a declaration of inconsistent interpretation, but does not create any rights to commence legal proceedings. A human rights certificate must be prepared in respect of a proposed legislative instrument (or proposed statutory rule).

My time on secondment gave me some empathy for instructing officers in departments. Instructors must consult with numerous stakeholders, each possessing their own particular needs and wants. All of these competing interests can be very difficult to balance. However, while legislative counsel and other lawyers focus on primary or subordinate legislation and the identification of clear statutory powers, I observed that departments often rely on myriad tertiary documents like guidelines and directions. Some of these documents were made

[27] *Subordinate Legislation Act, 1994 Guidelines*, s. 221.

[28] Gordon Rich-Phillips MLC, *Hansard*, 12 August 2010.

[29] 43/2006 (Vic).

[30] 1998, c. 42 (UK).

under Acts and statutory rules, while others were merely internal and not binding, but highly influential.

The legislative instruments scheme provides departments with an opportunity to consider all of their instruments and tertiary documents. The scheme includes a requirement that the maker of a legislative instrument must ensure that a *consolidated* version of the instrument is made publicly available.[31] Instead of posting multiple amendments to instruments online, departments must consolidate those amendments into existing instruments and publish them. This makes it clearer for people to access the law.[32]

Conclusions

The legislative instruments scheme in Victoria promotes transparency and accountability in government by establishing a statutory process by which subordinate instruments (other than statutory rules) that are legislative in character, can be made with public consultation and scrutiny and are subject to disallowance by the Parliament. The Scrutiny Committee has acknowledged that is considers more legislative instruments every year. However, the reader of the *SLA* is faced with difficulties, including the absence of a clear definition of legislative instrument (or the inclusion of a "negative" definition) as well as the absence of a definition of "significant" economic or social burden, which is relegated to guidelines.

Although the regulations list those instruments prescribed to be legislative instruments, or not to be legislative instruments, or exempt legislative instruments, the list is not exhaustive. A department may have determined that an instrument is clearly a legislative instrument, in which case prescribing it as such is unnecessary. Or, an Act "deems" an instrument to be a legislative instrument. Or, an Act expressly provides that an instrument is not a legislative instrument. There is, I think, discord between the practical aims of the legislative instruments scheme and some of its "legalistic" aspects discussed in this article. These issues could be considered further.

[31] Section 16F of the *SLA*.

[32] See Example 8 in the Appendix.

Appendix

Example 1 – "deeming" instruments to be statutory rules

5 Tabling and disallowance of declarations under section 4

…

(4) Part 5 of the *Subordinate Legislation Act 1994* applies to a declaration under section 4 as if—

(a) a reference in that Part to a "statutory rule" were a reference to a declaration under section 4; and

(b) a reference in section 23(1)(c) of that Act to "section 15(1)" were a reference to subsection (1).

Example 2 – "deeming" instruments to be legislative instruments

4.3.32 Disallowance of notices

…

(3) Parts 3A and 5A of the *Subordinate Legislation Act 1994* apply to a notice under section 4.3.30 or 4.3.31 as if the notice were a legislative instrument within the meaning of that Act laid before each House of the Parliament under section 16B of that Act.

Example 3 – the efficacy of the legislative instruments scheme

3 Definitions

…

(2) For the avoidance of doubt, but without limiting paragraph (g) of the definition of *legislative instrument*, instruments of purely administrative character for the purposes of this Act include, but are not limited to, the following—

(a) an instrument of delegation;

(b) an evidentiary certificate;

(c) an instrument of appointment …

Example 4 – the efficacy of the legislative instruments scheme

(1) The Governor in Council may make regulations—

(a) prescribing an instrument or a class of instrument for the purposes of paragraph (h) of the definition of *legislative instrument*;

(b) prescribing an instrument or a class of instrument to be, or not to be, a legislative instrument or class of legislative instrument for the purposes of this Act or any specified provision or provisions of this Act, whether or not subject to conditions;

(c) exempting an instrument or a class of instrument that is a legislative instrument from this Act …

Example 5 – using primary legislation to exempt a subordinate instrument from the legislative instruments scheme

26 Restriction on publication of information relating to Royal Commission inquiries

…

(5) An order made under this section is not a legislative instrument within the meaning of the Subordinate Legislation Act 1994.

Example 6 – "appreciable" and "significant" burdens

12F Exemption certificates—legislative instruments

(1) The responsible Minister may issue an exemption certificate in writing certifying that, in the opinion of the Minister—

(a) the proposed legislative instrument would not impose a significant economic or social burden on a sector of the public; or

…

(k) … instrument is made under a statutory rule and the regulatory impact statement for that statutory rule has adequately considered the impact …

Example 7 – "appreciable" and "significant" burdens

26 Guidelines

(1) The Minister may make guidelines for or with respect to—

(a) the preparation, content, publication and availability of statutory rules; and

(ab) the preparation, content, publication and availability of legislative instruments; and

(b) … steps to be undertaken for the purpose of ensuring consultation, co-ordination and uniformity in the preparation of statutory rules and legislative instruments.

Example 8 – consolidation of legislative instruments

16F Instrument maker to ensure consolidated version of legislative instrument is available

(1) Subject to subsection (3), as soon as practicable after a legislative instrument which amends an existing legislative instrument is published in the Government Gazette under section 16A, the instrument maker must ensure that an up to date consolidated version of the legislative instrument being amended by that amending legislative instrument is prepared incorporating those amendments.

Legislative Counsel and the Judiciary: Divergences in Statutory Interpretation?

Daniel Lovric[1]

Abstract

Statutory interpretation is a key element of the rule of law, as it provides an important connection between the drafting and implementation of legislation. For the most part, legislative counsel and judges share a common understanding how the principles of statutory interpretation are applied in practice. However, this common understanding is not complete.This paper explores some areas where there is a heightened risk of misunderstandings between legislative counsel and judges concerning statutory interpretation. The author suggests that legislative counsel publicise their drafting practices more widely, in order to minimise such misunderstandings.

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Introduction

Statutory interpretation is important for the rule of law. It is the ultimate means of applying the policy of democratically elected governments so as to resolve real life problems. The importance of statutory interpretation is increasing, as more and more litigation focuses on the meaning of legislation.

The importance of statutory interpretation also means that legislative counsel need to know how judges think – and to some extent, it means that judges need to know how legislative

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counsel think. For the system to work, there can be only one set of the "rules of the game" of interpretation. This paper asks whether there is only one such set of rules. Do legislative counsel construct legislation in the same way that judges interpret it?

The answer is, in most cases, yes. Judges are keen to point this out. According to a recent statement of the High Court of Australia, the "rules of construction … are known to parliamentary drafters and the courts".[2] In 1971, Lord Simon spoke of a "common code of juristic communication by which the draftsman signals legislative intention".[3]

This is a tidy principle – that judges and legislative counsel apply the same rules of statutory interpretation – but as is the case with many legal principles, the details of reality around their edges can be messy. Judges know many of the practices of legislative counsel, but not all of them. Legislative counsel are aware of the ways in which judges interpret legislation, but probably not as well as the judges themselves. In some cases there are divergences between the judges and legislative counsel. These divergences are usually only minor. However, even minor divergences are significant and deserve our attention.

Divergences between legislative counsel and judges in statutory interpretation

There are many factors that contribute to such a divergence. Many of them arise simply from different working environments. The average judge tends to be far more experienced in the law than the average legislative counsel. An average judge has a few decades of legal experience, while the average legislative counsel has around one decade of such experience (this may vary between drafting offices). Judges also have a greater level of support, at least in appellate courts, where they are assisted by experienced senior counsel. Legislative counsel rarely have this kind of backup, especially in smaller jurisdictions. Furthermore, judges usually deal only with a narrow range of issues in a given piece of legislation. The legislative counsel, while drafting the text, needs to consider every issue in that legislation. When the written law comes into contact with reality, inevitably issues arise that the legislative counsel did not consider. For this reason, legislation has to be smarter than the person who wrote it.[4] Judges and barristers have to take on the role of providing that extra

[2] *Lacey v Attorney-General (Qld)* [2011] HCA 10; (2011) 242 CLR 573; (2011) 275 ALR 646 [43].

[3] *Ealing London Borough Council v Race Relations Board* [1971] UKHL 3; [1972] AC 342, [1971] UKHL 3, [1972] 2 WLR 71.

[4] Gustav Radbruch said that "the law can be smarter than its authors – in fact, it must be smarter than its authors" (Rechtsphilosophie, 8th ed. 1973, p. 207, quoted in Fleischer, H., "Comparative Approaches to the Use of Legislative History in Statutory Interpretation", Max Planck Private Law Research Paper No. 11/11 (2011), http://ssrn.com/abstract=1920184 (visited 27 April 2015)). It is not therefore not surprising that judges often identify a broader range of interpretive issues than legislative counsel. I remember working on one statute that became the subject of litigation in the Full Court of the Federal Court of Australia. I had given a lot of thought to the wording of the relevant provision. The judgement produced the "correct" result (from my perspective, at least). However, it identified several minor interpretive issues that I had not considered. I am not particularly surprised about this (nor am I particularly concerned about it, as the extra issues were minor in nature). In the litigation, the provision was the focus of intense scrutiny by several senior counsel and 3 appellate judges. However, for me, the provision was just one of several dozen issues

"smartness". Furthermore, legislative counsel are writing not just for judges, but for politicians and for the entire legal community – and this creates an extra dimension of difficulty in determining the meaning of words that judges rarely face.[5]

Despite their considerable advantages, it is fair to ask how much judges know about the way legislation is drafted. In the 14th century, English judges knew everything because they wrote the statutes.[6] Nowadays, judges still know a lot, but perhaps not every day-to-day technicality of drafting. Occasionally, this can lead to misunderstandings. A former UK First Parliamentary Counsel, commenting on judges' approach to using side notes and headings in interpretation, complained that this approach was "merely farcical to anyone who knows how these things arrive in statutes".[7]

Another potential misunderstanding concerns the use of dictionaries. Many senior judges use dictionaries regularly when interpreting legislation, among them Justice Scalia of the US Supreme Court. My own impression is that legislative counsel are less likely to do so. In a recent article in the Stanford Law Review, the authors surveyed the attitudes of Congressional counsel towards principles of statutory interpretation. One respondent to the survey said, (while laughing), "Scalia is a bright guy, but no one uses a freaking dictionary".[8] This may be a dramatic overstatement, but there is a lot of truth to that remark. Legislative counsel are too busy with more pressing issues than to apply the dictionary to every word of a Bill.[9]

A third, and perhaps more important potential misunderstanding arises from the use of precedent in drafting legislation. Judges know that legislative counsel use precedent, but I sometimes wonder if they are fully aware of the extent of that use, or the conditions under

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I had to consider in the project. It was almost inevitable that litigation produced several interpretive issues that I had not considered in the drafting process.

[5] Henry Thring in his famous *Practical Legislation*, 2nd ed., (… ,1902) at 57 pointed out the cynical (and in my view, incorrect) suggestion noted by Lord Justice Mathew in *Knill v Towse Law Reports*, 24 QBD 186 at 195-196 regarding the practice of drafting by reference:

> It has, indeed, been suggested that to legislate in this fashion, keeping Parliament in truth in ignorance of what it is about, is the only way in which at the present day legislation is possible. We know not whether the suggestion is correct; what we do know is that this procedure makes the interpretation of modern Acts of Parliament a very difficult and sometimes doubtful matter.

Nevertheless, political imperatives may sometimes impede an ideal technical approach to drafting. This is not necessarily a bad thing, as legislation is fundamentally a political creation, not a technical one.

[6] Hengham J famously said to counsel in *Aumeye v Anon* YB 33 & 35 Edw I 82 (1305-1307): "Do not gloss the statute for we know better than you, we made it".

[7] JS Fiennes, Comments on a draft Interpretation Bill, 23 September 1966, unpublished, on file with author, p. 40. Drafting practices regarding headings have changed considerably (at least in Australia) since 1966, and it may be that judicial attitudes to headings are now more consistent with this practice.

[8] Gluck & Bressman, "Statutory Interpretation from the Inside – An Empirical Study of Congressional Drafting, Delegation and the Canons" (2013) 65 *Stanford Law Review* 901 at. 938.

[9] Consider the position of legislative counsel from jurisdictions outside Australia who come to work in Australia. Does anyone seriously think that they will read the entire *Macquarie Dictionary* to ensure that they are familiar with Australian English – the variety of English that is employed by Australian judges?

which it takes place. When a provision based on precedent is tested in litigation, it is deconstructed in minute detail by highly experienced judges and barristers. However, the same provision might have been drafted under considerable time pressure, by a counsel of median experience who had to deal with a large number of precedent provisions simultaneously. In some cases, judges may place too high a weight on perceived differences (or similarities) between provisions in various statutes.[10]

Legislative counsel know better than anyone "how things arrive in statutes". But do they know "how things are received in statutes" when they are read by judges? Most legislative counsel do not have the same depth of knowledge of interpretation caselaw as the average judge. Bennion and Driedger (and their successors) are the exceptions that prove the rule. The reality is that a legislative counsel can draft complex legislation quite effectively without a comprehensive knowledge of the cases on interpretation. What is more important is a disciplined approach to analysis and the use of language, and ability to grasp the intricacies of policy. Legislative counsel need to have a robust working understanding of interpretive principles. They need to understand these principles better than the average lawyer, and to have an excellent knowledge of interpretation legislation. However, they don't need to be aware of every subtlety of interpretation that is debated in the courts and textbooks. The Stanford Law Review study mentioned above concluded that legislative counsel have an excellent knowledge of interpretative principles affecting their day to day work, and a reduced knowledge of other interpretive principles.[11] This reflects my own experience.

This might suggest that an in-depth knowledge of statutory interpretation is not very useful in practice.[12] Some senior judges have been quite sceptical about the value of the principles of interpretation. Chief Justice Barwick wrote that the "so-called rules of interpretation are but frail guidelines to which recourse is had as a last rather than a first resort".[13] Justice Frankfurter wrote that he came to statutory interpretation "empty handed", bringing no answers, and suspected that "the answers to the problem of an art are in its exercise".[14] Lord Reid advised young lawyers not to read textbooks on statutory interpretation, and to focus

[10] Compare the approaches of the various judges in *Taylor v The Owners - Strata Plan No 11564* [2012] NSWSC 842.

[11] Gluck & Bressman, above n. 8.

[12] Furthermore, it is sometimes difficult to say that interpretive principles actually affect interpretation. The English case of *Vacher and Sons Ltd v London Society Of Compositors* [1912] UKHL 3; [1913] AC 107 presents a striking example. The three judges each applied a different principles of statutory interpretation (the "golden rule", the "mischief rule" and the literal meaning approach) - but all reached the same outcome. (This was pointed out in Wilberforce, "The Judicial Viewpoint", *Symposium on Statutory Interpretation*, Canberra, 4 February 1983, Australian Government Publishing Service, 1983 at 6.) One may doubt whether the theoretical subtleties of statutory interpretation played a real role in the outcome of that case – the decisive factor most probably was the legislative text set in its context.

[13] See Pearce & Geddes, *Statutory Interpretation in Australia*, 8th ed., (…., 2014) at vi.

[14] Frankfurter, "Some Reflections on the Reading of Statutes" (1947) 2 *The Record of the Association of the Bar of the City of New York* 213 at 216-217.

instead on the words of the legislation.[15] Lord Wilberforce suggested that statutory interpretation is a "non-topic" which is "really about life and human nature itself" and too complex to be encapsulated in any theory.[16]

These views may be a touch too gloomy, as knowledge of the principles of statutory interpretation is a definite bonus in writing and reading legislation. This raises the question of whether legislative counsel should aim for a better understanding of interpretation as practiced by the courts. Francis Bennion wrote in the Preface to his famous textbook on statutory interpretation:

> Every lawyer and law student, from the Lord Chief Justice downwards, would become a better one if they embarked on a programme, as I did, of reading every word of this book from cover to cover (speed reading is permitted in certain areas). The benefit would come from imbibing the words not so much of the author as of those, mainly learned judges, whose wise words over the centuries are extensively quoted in suitable contexts.[17]

It is hard to disagree with this. In practice however, I suspect that few legislative counsel have read through the entire 1500 pages of that book (nor, I suspect, have many judges). Few counsel have the time to do so. Nevertheless, legislative counsel need to keep up to date with trends in interpretation, and need to read enough recent cases to maintain a real connection with the attitudes of courts. Thornton suggested that legislative counsel read their interpretation legislation every three months.[18] It would also be a good idea for them to read a few recent and representative cases at the same time. In this way, legislative counsel could strengthen their connection to the actual and current interpretive practices of judges.

Problematic areas

When I began to write this paper, I had in mind certain cases where the judge appeared to have got it wrong (from a legislative counsel's perspective, at least). However, after thinking about these cases more closely, I realised that most of them were examples of the judge and the legislative counsel playing by the same "rules of the game" – but reaching different outcomes. Several outcomes were reasonable by the application of conventional principles of statutory interpretation. These are the cases that legislative counsel fear, where the judge has come to the "wrong" result, but via a justifiable method of interpretation. It is only in very rare cases where it can be said that the two were not playing by the same rules of the

[15] House of Lords Debate on First Annual Report of the Law Commission, Official Report, 16/11/1966, col. 1278.

[16] Wilberforce, above n. 12 at 5.

[17] F. Bennion, *Bennion on Statutory Interpretation*, 5th ed, (Lexis Nexis: London, 2008) at ix.

[18] G. Thornton, *Legislative Drafting*, 4th ed., (Butterworth's: London, 1996) at 114. Henry Thring suggested much earlier that "it is the duty of every draftsman to know [the interpretation legislation] by heart and to bear its definitions in mind in every bill which he draws" (Thring, above n. 5 at 14).

game. Most often, the system is working fairly well, and there is, as Lord Simon said, a "common code of juristic communication".

There is, however, potential for trouble here. I will mention 3 general examples before moving on to a specific case.

The first potential trouble spot is the prevalence of opaque drafting practices. Eamonn Moran once wrote that "drafters have a tendency to indulge unnecessarily in coded communication".[19] This could be the result of tradition, which can be hard to modify, or of innovation, where the general legal community has not had a chance to become familiar with a new style of drafting. Legislative counsel have two choices here: either they can eradicate their "coded communications", or seek to publicise them. Both choices are difficult in practice.

The second potential trouble spot is the generalised way in which judges write about interpretation, and the risk that legislative counsel will overreact or underreact to such statements. A good example is the nature of judicial statements about the balance between text and context in interpretation. Judicial statements in this area tend to be quite broad, and rarely give specific guidance. In 1997, the High Court of Australia stated that interpretation must start with context.[20] In 2009, it stated that interpretation must start with text.[21] There is some debate as to whether this signalled a change of direction by the Court.[22] It probably doesn't, but this is not entirely clear. What is the legislative counsel to do in the light of such statements?

Here, they are is in a situation rather like that of an investor scrutinising the statement of a central bank. Central bank statements, like superior court statements about text and context, tend to be broad, and contain no guarantee of a particular future direction. Like an investor, the legislative counsel faces a risk of over-reacting to such a statement. Should we see the High Court's express preference for "starting with text" as a signal to prefer black-letter

[19] E. Moran, 'The Relevance of Statutory Interpretation to Drafting' in Law Reform Commission of Victoria (ed.), Drafting for the 21st Century: Conference at Bond University (Law Reform Commission of Victoria, 1991) 100 at 111.

[20] *Project Blue Sky Inc & Ors v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 at [69].

[21] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* [2009] HCA 41; (2009) 239 CLR 27 at [47]. In *Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 293 ALR 257; [2012] HCA 55 [39], the Court said that interpretation must not only "begin" with text, but also "end" with text. Nevertheless, very recently in *Independent Commission Against Corruption v Cunneen* [2015] HCA 14 [57], the majority quoted with approval an earlier statement (of Mason J in *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* [1985] HCA 48; (1985) 157 CLR 309 at 315; [1985] HCA 48) that "[t]he modern approach to interpretation insists that the context be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise".

[22] Kenny, S., "Current Issues in the Interpretation of Federal Legislation", speech, National Commercial Law Seminar Series, 3 September 2013, at. 5 (visited 27 April 2015); Moshinsky, M., "Current Issues in the Interpretation of Federal Legislation", speech, National Commercial Law Seminar Series, 3 September 2013, (visited 27 April 2015.

drafting? I do not think so, as I doubt that the High Court intended a fundamental change here. One needs to be attentive to the courts, but not to over-react to their statements.

The third potential trouble spot is the use of interpretive presumptions. A good example is the presumption that legislation will not affect fundamental rights (also known as the principle of legality).[23] A clear statement is needed to overcome such presumptions.

Judges apply these presumptions with a great deal of subtlety, balancing and weighing each relevant factor in the context of an actual dispute. By contrast, legislative counsel have a relatively blunt approach. They abhor risk, and eliminate ambiguity wherever possible. As a result, they tend to rebut interpretive presumptions with more clarity than is technically necessary. While judges approach presumptions with delicacy, laying each brick of their reasoning with great care, legislative counsel tend to smother presumptions in concrete in order to avoid any structural weaknesses.

This can lead to a certain amount of what I call interpretive inflation. Over time, as the enhanced level of clarity preferred by legislative counsel becomes entrenched in the statute book, judges will become used to it, and treat it as the new minimum of clarity. Perhaps "interpretive inflation" is a good thing, if it leads to better protection of fundamental rights. However, it also leads to longer and more complicated legislation. Perhaps for this reason, two judges of the High Court of Australia recently warned against applying the principle of legality so as to have a "sclerotic effect on legitimate innovation by the legislature".[24]

I don't wish to overplay the potential for divergences between judges and legislative counsel in statutory interpretation. In almost all cases, judges and legislative counsel share a very common understanding of the "rules of the game" – although they may sometimes disagree about the specific outcome.

Nevertheless, there are rare cases of disagreement about these basic rules of interpretation. The next part of this paper describes a case that, while not constituting an actual disagreement, shows (minor) signs of heading in that direction.

Drafting offences under the Commonwealth *Criminal Code*

In 1995, the Australian Commonwealth Parliament passed landmark legislation stating general principles of criminal responsibility applying to all Commonwealth offences.[25] Under the *Criminal Code*, the physical elements of an offence have been standardised into 3 main categories: elements of conduct, circumstance and result.[26] Furthermore, particular standardised fault elements apply to particular categories of physical element, unless a

[23] Interpretive presumptions cover a far wider field than just fundamental rights.

[24] Gageler and Keane JJ in *Lee v New South Wales Crime Commission* [2013] HCA 39; (2013) 302 ALR 363.

[25] *Criminal Code Act 1995*.(Cth). Schedule 1 to that Act comprises the *Criminal Code*.

[26] Section 4.1 *Criminal Code*.

contrary intention is expressed. Thus the fault element of intention applies to a physical element of conduct, while the fault element of recklessness applies to a physical element of circumstance or result.[27] It is possible to apply strict or absolute liability to a physical element by express statement to that effect.[28]

This new framework for Commonwealth criminal offences led to an intense examination of the method of drafting Commonwealth offences, which eventually resulted in standardised drafting practices. According to current practice, each physical element should generally be placed in a separate paragraph of the offence. This is done to make clear the identity of each separate physical elements of the offence. If strict or absolute liability is to apply to a particular physical element, a statement to that effect should be placed in a separate subsection. These practices are stated publicly in a document published on the Attorney-General's Department website.[29] While it has not been possible to redraft every Commonwealth offence following this practice, it is expected that every new offence provision is to be drafted in this way.

How have these practices been received by the courts? One recent case, *PJ v R*,[30] suggests that not all judges are wholly in agreement with the new drafting conventions.

One of the most prominent political issues in current Australia is that of people-smuggling, in particular, smuggling asylum seekers by boat without any form of visa. To address this issue, section 233C of the *Migration Act 1958* was enacted, including the following subsections:

> (1) A person (the ***first person***) commits an offence if:
>
> (a) the first person organises or facilitates the bringing or coming to Australia, or the entry or proposed entry into Australia, of a group of at least 5 persons (the other persons); and
>
> (b) at least 5 of the other persons are non-citizens; and
>
> (c) the persons referred to in paragraph (b) had, or have, no lawful right to come to Australia.
>
> Penalty: Imprisonment for 20 years or 2,000 penalty units, or both.
>
> (2) Absolute liability applies to paragraph (1)(b).

Two Indonesian citizens were intercepted on a boat in Australian territorial waters near Christmas Island in the Indian Ocean. The two men were charged with aggravated people-smuggling. However, they claimed that they did not know that their ultimate destination,

[27] Division 5 *Criminal Code*.

[28] Division 6 *Criminal Code*.

[29] Attorney General's Department (Cth), *A Guide to Framing Infringement Commonwealth Offences, Infringement Notice and Enforcement Powers* (September 2011), (visited 27 April 2015).

[30] *PJ v R* [2012] VSCA 146; (2012) 36 VR 402; (2012) 268 FLR 99.

Christmas Island, was actually part of Australia. Their factual claim was not entirely unreasonable. Christmas Island is an Australian territory far from the Australian mainland, but only a few hundred kilometres from Java.[31]

The defendants' claim thus raised the issue of whether section 233C required the prosecution to prove that the defendants had some degree of consciousness of the legal status of Christmas Island. The Victorian Court of Appeal (Maxwell P, Redlich and Hansen JJA) agreed with this argument, holding that the prosecution had to prove that the defendants had knowledge that their ultimate destination was actually Australia.[32] Critical to this holding was the existence of paragraph 233C(1)(c), which created the physical element that the persons being transported by the defendants had no lawful right to come to Australia. There was no real dispute that the fault element applying to this physical element was recklessness. The judges found that the existence of this fault element confirmed the fault element of knowledge for the relevant aspect of paragraph 233C(1)(a).

Of most interest for our purposes is an observation made by the judges about the drafting style of offences. They considered that the practice of dividing physical elements into separate paragraphs created the risk that subsequent interpreters would focus only on one part of an offence provision and neglect the remaining parts. In their view, the relationship between the separate paragraphs was important, and the separation created the risk that this relationship would be obscured. They then made the following observation:

> Parliament's intention may be more clearly exposed when the offence provision is read as one, that is, as if the separate parts constituted a single whole. Taking that approach, s 233C(1) can be read as follows (excluding fault elements):
>
> > A person commits an offence if that person organises or facilitates the bringing or coming to Australia, or the entry or proposed entry into Australia, of a group of at least five persons who are not Australian citizens and who had, or have, no lawful right to come to Australia.[33]

One should contrast this statement with the drafting approach expressly adopted by legislative counsel and publicised in an official Attorney-General's Department publication. According to that publication:

> The physical elements of an offence can be distinguished in a number of ways. One of the most common ways to achieve this is by placing each physical element in a separate paragraph. This is the approach that is generally used in the *Criminal Code* and is the preferred drafting model as it separates out each of the physical elements so

[31] A Victoria Legal Aid lawyer described one of the defendants as someone who was "approached by a man who recruited him to work on a boat [and] told very little about what it was that he was supposed to do": Wallace, "Case Note: Migrant Smuggling, Criminal Fault and the Legal Status of Australia: PJ v The Queen" (2013) 39(1) Monash University Law Review 246 at 248; (visited 10 February 2015).

[32] Above n. 30 at para. [50].

[33] Ibid. at para. [37].

> it is clear how the *Criminal Code* will apply. However, in other instances, it may be possible to ensure that the physical elements can be distinguished using different drafting methods. Your drafter will be able to advise you on the most effective way to achieve this.[34]

It is not the place here to discuss the pros and cons of this approach. The point here is that the judges' comments are striking, if they are seen as a rejection of the published drafting approach. However, it is unlikely that the judges meant to go so far; this would be too much to read out of one paragraph in a judgement. It is more likely that the judges were simply emphasizing that the separation of physical elements into separate paragraphs is not a panacea for all interpretive issues in offence provisions, and that relationships between such paragraphs remains important.

Conclusion

We should not draw too much out of the examples discussed in this paper. As I mentioned earlier, in the vast majority of cases, judges and legislative counsel are playing by the same "rules of the game". Nevertheless, there remains a risk that they will diverge occasionally in their approach to statutory interpretation. Such a divergence is in no-one's interest, and is damaging to an effective rule of law.

I will end with a fairly modest suggestion to address this problem. It is not an original suggestion. Legislative counsel need to become more visible, and to publicise their working methods. There are many ways to do this. The Australian Commonwealth Office of Parliamentary Counsel, for example, publishes its detailed *Drafting Directions* on the Internet.[35] Gradually, the legal profession and the courts are becoming aware of these *Directions*, and they may start to exercise a subtle influence on statutory interpretation more generally. Organisations such as CALC also play a major role here. I was interested to see in a recent High Court judgement a reference to an article published in the *Loophole*.[36] The reference illustrates how legislative counsel can become more visible in setting the rules of statutory interpretation: judges are interested in the way that they think and operate. By legislative counsel becoming more visible to the judges, the differences between the drafting and interpretation of legislation can be kept to a minimum.

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[34] Attorney General's Department (Cth), *A Guide to Framing Infringement Commonwealth Offences, Infringement Notice and Enforcement Powers* (September 2011) at 19 (visited 27 April 2015).

[35] http://www.opc.gov.au/about/draft_directions.htm (visited 27 April 2015).

[36] See *ADCO Constructions Pty Ltd v Goudappel* [2014] HCA 18, French CJ, Crennan, Kiefel and Keane JJ [31], quoting Morris, " Henry VIII Clauses: Their Birth, A Late 20th Century Renaissance and a Possible 21st Century Metamorphosis", The Loophole, March 2007 at 14.

Book Review

H. Xanthaki, *Drafting Legislation: Art and Technology of Rules for Regulation* (Hart Publishing: Oxford, 2014)

John Mark Keyes[1]

Professor Helen Xanthaki is one of those all too rare legal academics who deign to consider some of the more practical aspects of the practice of law, more specifically those relating to drafting legislative texts. Although these texts pervade modern legal systems, legislative drafting is a relatively obscure discipline. At best, those involved in legislative processes may have some awareness that it exists as a skill, and perhaps even that in jurisdictions based on the Westminster parliamentary model there are legal specialists called legislative counsel who draft legislation. But to those outside this small circle, including not only other legal practitioners but more generally members of the public who are affected by legislation, legislative drafting is the equivalent of plumbing. No one thinks about it until it fails and creates a mess. No one, that is, except Professor Xanthaki and the thousands of legislative counsel who practise their discipline around the world.

Professor Xanthaki's latest book on legislative drafting builds on her previous writing on this subject, combining two somewhat different perspectives.

The first is heavily influenced by Continental European and US work on legislative drafting, which differs from the Westminster model in that it does not to the same degree bifurcate the policy formulation aspects of preparing legislation from its more technical legal writing and publishing aspects. From this perspective, drafting legislation includes not only these technical aspects, but also the analysis and formulation of the policy to be drafted into legislation.

The second perspective, identified with the Westminster model, characterizes legislative drafting largely in terms of its technical aspects – notably legal analysis and the formulation of legislative text – as an exercise based on drafting instructions prepared by others who concern themselves with legislative policy and administration. This perspective is best illustrated by the 5th edition of *Thornton's Legislative Drafting*, which Professor Xanthaki published in 2013.[2] It is the definitive modern text on the Westminster model of legislative drafting, focusing on its technical aspects and the drafting of legislation from policy instructions.

With her new book, Professor Xanthaki re-thinks many of the technical aspects of legislative drafting on the basis of concepts that have been generally associated with the analysis of legislative policy. She begins by distinguishing "regulation … the process of putting government policies into effect" from "rule-making", the creation of rules, usually in

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[1] Sessional Professor, Faculty of Law (Common Law), University of Ottawa.

[2] H. Xanthaki, *Thornton's Legislative Drafting*, 5th ed. (Bloomsbury Professional Ltd: Hayward's Heath, 2013).

the form of legislation, as one of the principal means of regulation.[3] This use of "regulation" is current in the world of regulatory policy, but it may seem odd to those involved in the drafting of legislative texts since in their context it generally signifies a subordinate legislative instrument rather than a broad area of statecraft. Thus, from the outset, Professor Xanthaki attempts to reshape the discourse on legislative drafting using terminology from the policy world. There is merit in bringing these two worlds together, but it can be a daunting exercise for those who are not familiar with policy theory.

Professor Xanthaki goes on to identify the ultimate goal of regulation as *efficacy*: "the extent to which regulators achieve their goal".[4] She acknowledges that achieving this goal depends a range of factors, many of which are beyond the control of those who draft legislation, for example its implementation. Given the book's subject as drafting, she then attempts to isolate the factors over which drafters have some control, identifying them as *effectiveness*: "the extent to which legislation manages to introduce adequate mechanisms capable of producing the desired regulatory results".[5] She then proposes effectiveness as the measure of the quality of legislative drafting and elaborates its content in terms of activities that will achieve it: "efficiency, on the one hand, and clarity, precision and unambiguity on the other hand."[6] Although one might take issue with her use of *efficacy* and *effectiveness* given that they are largely synonymous, the concepts to which she attaches them are quite distinct and merit being differentiated.

This theoretical framework for assessing the quality of legislative drafting is admirable in attempting to provide a rational foundation for the myriad technical "rules" of legislative drafting. Drafting practices vary in many respects from one jurisdiction to another, and they have changed over time. And yet, within the constellation of jurisdictions based on the Westminster model, which also subscribe to the rule of law, one might wonder at this variation and change: is one practice better than another? What criteria are there for assessing them? Does it even matter to be concerned about the quality of legislative drafting?

Professor Xanthaki seeks to establish a theoretical framework for answering these questions. Her framework reflects the writing of a range of academics who have explored this question before her, although perhaps not with her focus on the technical aspects of drafting of legislation. The four elements she synthesizes from this literature – efficiency, clarity, precision and unambiguity – are qualities that both academics and practitioners alike would agree on. But they encompass concepts that require further elaboration to be meaningfully applied. It is also not altogether clear how unambiguity is distinct from clarity and precision. But the rest of the book is devoted to applying these concepts to the various aspects of

[3] Drafting Legislation at 3.

[4] *Ibid.* at 5.

[5] *Ibid*. at 7.

[6] *Ibid*. at 10.

legislative drafting. In the subsequent chapters, Professor Xanthaki proceeds to analyse the technical aspects of legislative drafting in terms of the standard categories found in the practical literature beginning with the role and analysis of drafting instructions through to the drafting of extra-territorial legislation and the interplay between drafting and statutory interpretation.

Professor Xanthaki's analysis of drafting technique is grounded in an extensive review of the literature discussing its various aspects. She goes well beyond Thornton's text to pull together a vast body of writing as a basis for her own analysis. At times, her account of this writing has the flavour of a shopping list of ideas that are not clearly connected to her own conclusions. For example, she devotes several pages to a summary of what various writers have said about the concept of "effectiveness" and the means for achieving it ("efficiency, clarity, precision and unambiguity"), and then simply concludes with a restatement of the concept and means.[7] But Professor Xanthaki more often does much more than assemble a useful compendium of literature on legislative drafting. She uses this literature and her own analytical skills to advance some quite innovative ideas about legislative drafting.

For example, her discussion of the structure of a legislative text in chapter 4 includes a suggestion for what she calls a "layered approach … to pitch the text to the specific abilities and requirements of the precise audiences of each provision".[8] She then demonstrates how this might be done in restructuring the UK *Succession to Crown Act 2013*[9] into three parts. The first part would address lay-persons and state the main messages of the legislation (removing gender and marriage to a Roman Catholic as factors relevant to succession). The second part would address officials responsible for administering the rules of succession (rules about obtaining the sovereign's consent to marriage). The third part would address constitutional lawyers and judges (commencement, transitional rules and consequential amendments).

Professor Xanthaki is to be commended for taking a now accepted precept of drafting with the intended audience in mind and applying it in a much more rigorous way. And in a later chapter on Plain Language, she clearly demonstrates the challenges of determining who should be the audience for legislation.[10] But one might question the assumption she makes in her suggestions for the *Succession to the Crown Act* that particular provisions can be identified with particular audiences. Surely, lawyers and judges are always a potential audience for every provision in a piece of legislation since all provisions are capable of coming before the courts in litigation. And amongst an audience of lay-persons, there may be many who are interested in technical details, such as how to determine which marriages the Act applies to. This of course is not to say that the layered approach can never work. To

[7] *Ibid.* at 6-10.

[8] *Ibid.* at 77.

[9] 2013, ch. 20.

[10] *Drafting Legislation* at 113-116.

some extent, this approach is already evident if one thinks of the statute book as a whole. Individual pieces of legislation are drafted for different audiences, for example legislation dealing with mining is drafted for those engaged in the mining industry. Thus, it is clearly possible to differentiate different audiences for different provisions and divide legislation accordingly. The granularity of this differentiation is the issue.

Although one might question the strength of Professor Xanthaki's analysis in some respects, and her text occasionally betrays the absence of a good editor, she has done a great service to the drafting community in bringing together an enormous body of literature on legislative drafting, providing a framework for analyzing it and performing that analysis on the many practical aspects of this discipline. This book is a valuable resource and stimulus for critically thinking about how laws should be drafted. Can there be any higher calling in the legal world?