SHORTER PARLIAMENTARY ENACTMENTS AND LONGER EXECUTIVE REGULATIONS — PROS AND CONS

The Hon. Mr. Justice Crabbe, V.C., Ghana

An Act of Parliament is the crystallization of Government policy expressed as law. That policy may be the outcome of many ideas. It may come from interested persons or groups of people. It may originate with the manifesto of the political party forming the government of the day. It may be initiated by a government department. It may be the result of the recommendations of a commission of inquiry. It may have been pressed by a parliamentary committee. The outcome of the doings of a pressure group within the lobbies of Parliament. In the main government departments implement Government proposals. In the process, departmental officials discover the defects of implementation which lead to amendments. Perhaps the law has become obsolete.

Whatever promises a political party seeking office in government may make to the electorate, its legislative policy, once it is in Government, will have to be ironed out with departmental officials. "Yes Minister" and "No Chancellor" express in light-hearted vein the inner workings of the machinery of government. It is difficult to rule out the part that **advice** by departmental officials plays in the determination of the final policy of the Government as regards any particular idea that eventually becomes an Act of Parliament. And when Parliament shall have done its work, implementation of the law, in the majority of cases, lies with departmental officials. The machinery of government cannot work without the departmental officials.

How much then of the **content** of an Act of Parliament shall be **left** to Parliament? How much of this content should be **left** to the departmental officials? An appreciation of the processes leading to the enactment of an Act of Parliament will put the question in its proper perspective.

Proposals by, say, the National Association for the Advancement of White Bearded Persons would be forwarded to the appropriate Minister. The appropriate department of the Ministry takes over. They examine the Proposals. They hold consultations within the Ministry, with other departments of government and with the Association that submitted the Proposals. They **advise** the Minister. That advice will determine what would happen to the Proposals. Should the departmental officials come to the conclusion that the Proposals are from a bunch of senior citizens suffering from senile dementia the Association will be courteously informed that:

> "...the Minister has given very serious consideration to the Proposals submitted by the Association and has directed that due to the very important and weighty issues raised in the Proposals a departmental committee has been set up to deal with the issues and make recommendations to the Minister..."

That may be the end of the Proposals.

Should the departmental officials advise the Minister in favour of the Proposals, the necessary meetings, consultations, and conferences will take place. Eventually Parliamentary Counsel would be instructed to draft the necessary legislation. The draft of the proposed legislation will be ironed out with departmental officials before it sees the light of day as a Bill in Parliament — on its way to the Statute Book.

The province of Parliament in the science — or art — of government is to enact laws. As the assent is given to a Bill the functions of Parliament, in respect of that Bill, ceases. At least for the moment. Until departmental officials bring an amendment. Until that day, Parliament's work is done in respect of that piece of legislation. Up to a point, that is. Until subsidiary legislation under that Act comes before Parliament. The administrative functions of Parliament do not extend to the administration of Acts enacted by it. The administrative functions of the Executive do — through departmental officials.

Parliament is that superior authority that exercises the legislative power of the State. It is an assembly of the representatives of the people. In theory at least. In that wise, what Parliament declares is supposed to express the sovereign will of the people. How fictional that sovereign will is does not, for the moment, concern the theme of this paper. Parliament may be established by a written constitution. It may be part of the development of democracy having assumed many of its powers in the course of the constitutional development of a country.

Whatever its origin Parliament is a political institution having as its main function the making of laws. But then legislation is also primarily the function of Government. Parliament may be, in some instances, a more rubber stamp. A Government faced with a strong opposition to a piece of legislation may, none the less, get that legislation through Parliament exactly as it presented the Bill to Parliament by recourse to the three line whip. There is, in these matters, a yawning gap between the appearance and the reality, between the theory and the practice. There may be exceptions. They are exceptions which prove the rule!

The recognition that Parliament finds it necessary — and perhaps convenient — in the nature of things

to give subsidiary and ancilliary powers to Ministers — in effect to departmental officials — came as long ago as the Statute 11 Edward 3, c. 1 of 1337 — that is, some 650 years ago. Then came the Statute of Staple of 1386 followed by the Statute of Sewers of 1531 and again the Statute of Proclamations in 1539. The technique fell into desuetude for the next two centuries. In 1717 the Mutiny Act gave the Crown power to legislate in respect of the Army without recourse to Parliament. The nineteenth century certainly seized upon this. The practice became increasingly common. Today, in a single year, in all countries where Parliaments exist — and even where men in uniform persist — delegated legislation is getting to twenty times the number of Acts of Parliament.

The power to delegate is now recognised as a constitutional element of the legislative power of Parliament. Governments now face immense problems which are socio — economic in character. But — and it is a very big BUT — should Parliament delegate its essential functions, that is to say, the power to legislate, to subordinate authorities? The answer is a qualified yes. Parliament cannot entirely abandon its legislative powers in favour of subordinate authorities. It can lay down the legislative policy and the principles embeded in the policy. It can give guidance for the carrying the law into effect. It can, and should, control the exercise of the delegated legislative powers.

We have, however, to contend with two types of delegated legislation. One, the exercise of delegated legislative authority by means of the "Henry VIII clause". Two, the exercise of other delegated legislative authority. The first type deals with the power to amend Acts of Parliament. it arose out of Henry VIII's persuasion of Parliament "to enlarge his power to make law by means of proclamations" (**Craises on Statute Law 7th Ed. p. 293**) The object of an Henry VIII clause is to make it easy for minor amendments to be made to the Act — and perhaps to other Acts of Parliament. Today the device of the Henry VIII clause is confined in most cases to the amendment of the Schedule to an Act. Perhaps the time has come to give even this type of delegated authority its quietus.

The other type of subsidiary legislation is the more common. It is the power conferred by Parliament on subordinate authorities to put flesh and blood on the skeleton of an Act of Parliament. To put beef into it. It has given rise to a lot of criticism. This led to the appointment of the Committee on Ministers' Powers in 1929. Its Report — ((1932) Cmd 4060) — confirmed, in effect, the statement in **R.v. Burch** (1878) 3 App. Cases 889,906 that:

> "Legislation, conditional on the use of particular powers, or on the exercise of a limited discretion entrusted by the legislature to persons in whom it places confidence is no uncommon thing and in many circumstances it may be highly convenient".

In 1893 Sir Henry Jenkyns — a worthy predecessor of our worthy Chairman — had written:

> "Statutory rules are in themselves of great public advantage because the details... can thus be regulated after a Bill passes into an Act with greater care and minuteness and with better adaptation to local or other special circumstances than they can possibly be in the passage of a Bill through Parliament. Besides, they mitigate the inelasticity which would otherwise make an Ac unworkable and are susceptible of modications... as circumstances arise"

In the end do we agree with Ilbert (**Legislative Methods and Forms**) that

> "The increasing complexity of modern administration and the increasing difficulty of passing complicated measures through the ordeal of parliamentary discussion, have led to an increase in the practice of delegating legislative power to executive authorities."

The nature of the power thus delegated becomes important. Should Parliament delegate to a subordinate authority

(a) a general power to legislate;

(b) a power to legislate

(i) for a particular purpose

(ii) for a particular subject-matter; or

(c) particular powers to legislate?

General Powers

There is often found in legislation power conferred on an authority to make:

Regulations for the better carrying into effect the purposes and principles of this Act.

What are the **purposes** of the Act? What are the **principles** of **the Act**: Has a provision such as this conferred power to make Regulations which in effect could alter substantive rights? Is it a power authorising the making of purely administrative regulations? Is a wider power conferred where a subjective test of necessity is prescribed, if the Minister is required to make Regulations **he**, the Minister **thinks** appropriate for carrying out the principles or purposes of the Act?

The power here conferred would make it possible, would it not, for the Minister **as the sole judge of necessity** to do what **he** likes — aided, of course, by departmental officials"? Would the Courts in such a case question the decision of the Minister? I doubt that. Bad faith may be the only condition, perhaps, on which the Courts in such a case would question the Minister's exercise of his powers. There is thus a distinction — however subtle it may be — between

(a) the power to make Regulations **as may be necessary to carry into effect the provisions of this Act;** and

(b) the power to make such Regulations **as the Minister thinks fit to make for the purpose of carrying into effect the purposes of the Act.**

In (a) Regulations which cannot be related to any provisions of the parent Act would clearly be **ultra vines.** In (b) the Minister may well have a free for all:

Particular purposes

For a particular purpose power may be conferred on a minister to make Regulations

for the purposes of prohibiting the export or import of agricultural products

Here Parliament has authorised the making of Regulations for a particular purpose. Does this not mean that a free hand has been given to the Minister to provide for the main principles of the Regulations as well as the details? It does mean that. The whole fabric of the law, as it were, has been delegated to a subordinate authority to determine not only the details. That authority can determine the main principles regarding the importation or exportation of agricultural products. And there can be no successful challenge in so far as the Regulations fall squarely within the ambit of the stated particular purpose.

And when expressions such as the Minister **thinks necessary** for the stated particular purpose are used even greater power is conferred.

Subject-matter

The situation is no better when we are dealing with the subject-matter. Power conferred on a subordinate authority to make Regulations

in respect of the use or operation of transport facilities

would embrace any regulation for any purpose falling within the ambit of the defined subject-matter.

Particular Powers

Here neither a legislative purpose nor a subject-matter is defined. The power given is for the making of a specific regulation. This has two aspects. Power conferred to make Regulations

for the purposes of restricting or prohibiting the export of tobacco

has set out in full the objective to be attained. A regulation which has as its purpose the restriction or prohibition of tobacco exports would be **intra vires.** Ancillary matters could thus be dealt with.

But when the power conferred is for

prohibiting the export of tobacco

then we have the definition of the specific power. The Regulations can only **prohibit.** They cannot request those concerned to supply returns, for example, of available stock of tobacco.

And Driedger — to whom I am very, very much indebted — put it in **The Composition of Legislation** (Second REvised Ed. p. 193)

> "The distinction between purposes or subjects, on the one hand, and powers on the other, is also relevant in relation to sub-delegation. For example, if a Minister had power to make regulations **respecting tarriffs and tolls** he could authorise some other person to fix a tarriff or toll; such a regulation would clearly be one respecting tarriffs and tolls. But if the Minister's authority is to make regulations prescribing **tarrifs and tolls** then the Minister must himself prescribe, and cannot delegate that authority to another"

It will be seen from the above analysis that much also depends upon the draftsman — and in these days of women's liberation much depends also upon the draftswoman or the draftswoperson or the draftswoperdaughter! And from now on the masculine includes the feminine. His acute awareness of his responsibilities as a lawyer first and as a draftsman second — who must keep watch and ward over the human values of the respect for the rights and interests of the individual — would enable him to draft discretionary power in such a way that departmental officials would not get away with it. The legislative draftsman needs to be an expert in the adjustment of human relations. He must not forget his status as a specialist — and all that this implies. Jesus Christ gave us the injunction:

> "But I say unto you, that every idle word that men shall speak, they shall give account thereof in the day of judgement. For by thy words thou shalt be justified, and by thy words thou shalt be condemned"

As Aldous Huxley said, (**Words and their Meaning** p. 35 — 36), this is not "a merely magical theory of the significance of language." Our Lord may also be referring to "the psychological magic of words, their power to affect the thinking, feeling and behaviour of those who use them"

Huxley continued

> "... To learn to use words correctly is to learn, among other things, the art of foregoing immediate excitements and immediate personal triumphs. Much self-control and great disinterestedness are needed by those who would realise the ideal of never misusing language... When Cotama insisted on Right Speech, when Jesus stressed the significance of every idle word, they were not lecturing on the theory of semiosis; they were inculcating the practice of the highest virtues. Words and the meaning of words are not matters merely for the academic amusement of linguists and logisticians, or for the aesthetic delight of poets; they are matters of the profoundest ethical significance to every human being"

And I would add the more so to the legislative draftsman. And in framing the provisions conferring power on Ministers — in effect on departmental officials — to make subsidiary legislation, the legislative draftsman must appreciate that there is an ethical as well as the technical aspect of his work. The trust resposed in him is immense. He is a very, very poor draftsman who would sing

"I am the Parliamentary Draftsman
I compose the country's laws
And of half the litigation
I am undoubtedly the cause"!

His duty, his ultimate responsibility is not to promote litigation. Should he, by his use of words, corrupt those in power, and bring distress or deprivation to his fellow man?

The draftsman is, of course, often criticised. And why not? A draftsman who has not got an in-built shock-absorber for criticism — fair or foul — from every Lycurgus and Solon is in for a lot of trouble — physical and mental. There is value in criticism — even criticism made in bad faith. The draftsman needs to distil the goodness in evil critisicm. A competent draftsman appreciates that. He thrives on criticism. Indeed he may deliberately court criticism. By so doing he is able to determine the real motive behind his Instructions. And have a wider perspective of the subject-matter of his draft. And when he is **unfairly** criticised, many a draftsman had sang, with Geoff Kolts, our worthy Secretary,

"I'm a target for the critics,
And they take me in their stride —
Oh, how nice to be a critic
Of a job you have never tried"

"The truth" says the **Report of the Committee on Ministers' Powers** "is that if Parliament were not willing to delegate law-making power, Parliament would be unable to pass the kind and quantity of legislation which modern public opinion requires" (**Report of Committee on Ministers' Powers** (1032) CmD 4060 p. 23).

Our topic boils down to this, then, that do we, or do we not, agree with Lord Thring — again a worthy predecessor of our worthy Chairman — that for efficient drafting, procedure and matters of detail should be left to be prescribed and not included in an Act of Parliament? This was advocated in 1877: **Practical Legislation** Chapter 11 para 12. How far do we need to pay heed to that advise if not pay obeisance to it?

Pressure on Parliamentary time, the inability of Parliament to deal with technical matters, the need for flexibility and emergency situations are the arguments put forth in favour of Parliament dealing with the essential principles of legislation, leaving the administrative details to departmental officials.

Shorn of its power to make laws what does Parliament do? Debate. Debate what? The policies of the Government of the day. But then in the majority of cases these policies of the Government of the day result in legislation. Why make lengthy speeches during the passage of a Bill in Parliament and then complain that Parliament has no time for details? Why chase the shadows by scoring of debating points and leaving the substance to departmental officials in the name of technicality and administrative convenience? If departmental officials can utilise the lessons of experience, cannot members of Parliament do the same? If the draft of subordinate legislation is laid before Parliament would the members have the time to scrutinize the details? And the technical knowledge to deal with the technical problems? If they cannot, should they be in Parliament at all? In other words why should we pay members of Parliament to misgovern us if departmental officials can do the same?

It may well be argued that a Parliament of one hundred to six hundred and more members is too large a body to deal with the details. Well, why have a Parliament that large? Today, due to the advancement made in communications do we need that large a body? Are we not in danger of advancing old arguments to explain new conditions which demand a rethinking of the effective role of Parliament, that is to say, its role to scrutinise legislation brought to it by the Executive?

Richard O'Sullivan in **The Inheritance of the Common Law** (Hamlyn Lectures Series No. 2) quotes Douglas Jay M.P., as saying, in an answer to a Parliamentary question,

"Housewives as a whole cannot be trusted to buy all the right things where nutrition and health are concerned. This is really no more than an extention of the principle according to which the housewife herself would not trust a child of four to select the week's purchases. For in the case of nutrition or health the gentleman in Whitehall really does know better what is good for people than the people themselves".

Does the departmental official really know best what is good for me in the matter of nutrition? For one thing he may not be a vegetarian and thus know nothing of the nutritional requirements of a vegetarian. If he does and Parliament does not, is that not a case for larger executive regulations and shorter Parliamentary enactments? But then we should not forget that the place of Parliament as an essential element in the good governance of a country is firmly established. There is a case where a certain set of Regulations were amended without the knowledge of the Minister. Departmental officials, the legislative draftsmen, in league with their friends outside the Ministry had done this! And this, despite Crichel Down and its aftermath! It sounds very much like the Water works Bill, the Town Clerk and his matrimonial predicaments recorded in Megarry's **Miscellacy-at-law.** The Town Clerk's episode may be apocryphal. This instance was real! It happened in 1981 or 1982. And as we all know statutory powers are to be exercised in good faith. Does the principle and practice of the doctrine of **alter ego** extend to legislation? The interpretation Act of Guyana has a provision which forbids

"the President, any Minister or any specified public officer to delegate any person to make subsidiary legislation..."

Can we take a leaf from the Congress of the United States of America and introduce legislative committees to conduct investigations into the necessity and scope of any subsidiary legislation before it comes into force? Such an inquiry would be "an essential and appropriate auxilliary to the legislative function" of Parliament. The predominant issue would be the furtherance of the legislative purposes. The powers would be stated with sufficient particularity. There would be the appropriate balance between the public need and the rights of the individual. The committee would require co-operation from all concerned in its efforts to obtain the facts needed for intelligent legislative action. There would be no vagueness. It would need a sharp degree of explicitness and clarity.

The procedures of affirmative and negative resolutions are admitted. So also are those related to the work of the Select Committees on delegated legislation. What is envisaged here is something more than those. There would be power vested in such a committee to impose punishment for contempt of its authority for failure to supply relevant information; to imprison, if need be, though not beyond a particular meeting. There would be power to obtain all relevant information needed for the committee to properly perform the functions of investigation. There would be no invasion of the private rights of individuals. Questions asked must be relevant to the inquiry.

Our problem then turns to the issue of the limits of discretionary power — wide administrative discretionary power. We do not deny that Government must govern. We do not deny that Parliament is the Legislative arm of government. We do not deny that legislation looms large as an important province in the science of government.

The limits that can be imposed would depend upon a high degree of an appreciation of human values — the scale of human values. Fundamental human rights are to the fore in many political issues these days. They are concerned with the protection of life and liberty. And legislation is, in all respects, somehow, an encroachment on our rights, and the basic values of liberty and property within a given socio-economic context. Can we stem the tide of the administrative legislative processes as an intolerable encroachment on the power of Parliament itself? In the fields such as national security, deportation, immigration and the like, what are the limitations that we can impose? If we favour wide administrative discretion in the area of legislation, especially in economic and social reform, can we condemn what latitude should accompany that discretion in the area of human rights? Liberty is a value. And so what do we say about subsidiary legislation like Regulation 18B and **Liversidge v. Anderson** (1942) A.C. 206. Obviously such decisions are open to serious objection. And they have been severely criticised.

The rule of law demands that governmental authority affecting the interests of the individual must have a legitimate foundation. The Executive does not have any inherent rule-making authority or regulatory powers except as regards purely internal administrative matters. Subsidiary legislation ensures that legitimacy. What values then should departmental officials consider worth protecting in our contemporary democracy? The answer is simple. They must be values enshrined in the legal system.

If that is done perhaps we can trust departmental officials to fill in the details of the basic principles of the law enacted by Parliament. If that is done we can allow the correct balance to take shape between the freedom of governmental authority — necessary in itself — and the protection of the basic rights of the individual — equally necessary in a democratic society.

There is a purpose in power. In that, all who exercise power must, their minds, repose For

"...all power is a trust... we are accountable for its exercise... from the people, and for the people, all springs and all must exist". Benjamin Disreali. **Vivian Grey** BK V1 Ch. 7.

STATUTORY INTERPRETATION: THE ROLE OF THE JUDICIARY

The Rt. Hon. Sir William Douglas, K.C.M.G.
Chief Justice, Barbados

In most of our jurisdictions judges are faced with an ever-increasing volume of statute law regulating more and more aspects of life in the community. This is in keeping with the concept, shared by both developed and developing countries of the Commonwealth, of the law as an instrument of social change. In developed and developing countries it is accepted that the process of social change requires the enactment of appropriate legislation, which in turn leads to litigation involving the interpretation of that legislation and the need for judges to re-state and clarify the rules they apply in the construction of statutes.

The task of making sense of this tremendous volume of legislation is, indeed, daunting. In England in **Davy v. Leeds Corporation [1964] 1 W.L.R. 1218** the Court of Appeal had to construe the provisions for compensation in the Town and Country Planning Act, 1959. Lord Denning, M.R. observed —

> "I must say that rarely have I come across such a mass of obscurity, even in a statute."

Harman L.J. went further and said —

> "To reach a conclusion on this matter involved the court in wading through a monstrous legislative morass, staggering from stone to stone and ignoring the marsh gas exhaling from the forest of schedules lining the way on each side. I regarded it at one time, I must confess, as a slough of despond through which the court would never drag its feet...."

Diplock L.J. (as he then was) added —

> "This appeal from the Lands Tribunal raises a short point of construction under section 9 of the Town and Country Planning Act, 1959 but the route by which alone it can be approached is through a labyrinth of statutory provisions — if I may prefer a Minoan to a peregrine metaphor."

Perhaps some of the complexity of present-day statute law flows from the caution which Lord du Parcq in **Yelland v. Powell Duffryn [1941] 1 K.B. 519** considered the characteristic of the parliamentary draftsman. Certainly, in some branches of the law, especially in those where vested rights are involved, caution should be exercised by legislator and interpreter alike. In other areas, as for instance in so-called "promotional" legislation, the judge construing it is not subject to the same restraining influences.

A further dimension of the problem of interpretation is provided by the fact that Commonwealth countries have inherited laws and have adopted statutes from Britain which have to be applied in situations far different from those envisaged by the original framers. In more recent times, because of the closer links forged by the Commonwealth itself, draftsmen look to Australia for models for family law legislation, to Canada for banking law and to New Zealand for the law of succession. It is in the task of applying these laws to local conditions that Commonwealth judges have shown such remarkable courage and ingenuity. [See, e.g. Mr. Justice Fraser's monograph on Land Law in the West Indies with special reference to Chattel Houses].

In his 1975 Chorley Lecture reproduced at Volume 39 of the Modern Law Review, Lord Devlin said—

> ".....Judges, I have accepted, have a responsibility for the common law, but in my opinion they have none for statute law; their duty is simply to interpret and apply it and not to obstruct. I remain unconvinced that there is anything basically wrong with the rule of construction that words in a statute should be given their natural and ordinary meaning. The rule does not insist on a literal interpretation or require the construction of a statute without regard to its manifest purpose.... But in the end the words must be taken to mean what they say and not what their interpreter would like them to say: the statute is the master and not the servant of the judgment."

In this part of the world academic writers would probably find Lord Devlin's posture old-fashioned and reactionary. Dr. Francis Alexis in his treatise "Human Rights and the Courts in the Commonwealth Caribbean" trenchantly criticises Caribbean judges for their "judicial abstention from constitutional adjudication" and for "recoiling from determining constitutional matters on their substantive merits."

I think that in the matter of statutory interpretation, regard must be had to the subject-matter of the statute. It is clear that a statute promoting human rights commends itself to a certain degree of judicial creativity while a statute dealing with a specialised, technical matter does not. The organisers of this Conference recognise that different considerations apply in the interpretation of different kinds of

statutes, and have invited separate papers on judicial interpretation on constitutional law, on commercial law and on industrial law. The distinguished Chief Justice of India, who will deliver the first paper, in addressing the Third International Conference of Appellate Judges in New Delhi in 1984 stated —

> "The judiciary has a vital role to play in this task of delivery of social justice to the large masses of people. If the judiciary is to effectively meet this challenge of social justice, it must give up its old antiquated approach which believes in the policy of restraint and passive interpretation. It is this mechanical anti-goal-oriented approach which on occasions has made the judiciary an upholder of the status quo....."

In **Bandhua Mukti Morcha v. Union of India and Others (Writ Petition No. 2134 of 1982)** the Supreme Court of India considered the scope and intendment of the Bonded Labour System (Abolition) Act, 1976 and made orders providing for affirmative action to be taken to ensure compliance with the statute.

In ordinary commercial matters, it seems to me that a more guarded approach is necessary. Care has to be taken not to disturb retrospectively the basis on which contracts and fiscal arrangements have been entered into. In my view statutory interpretation of commercial law legislation must have regard to the way businessmen conduct their affairs and should, in general, be consistent with established commercial practice. As Lord Denning M.R. observed in **United Dominions Trust v. Kirkwood [1966] 2 Q.B. 431** at page 455 —

> "... when merchants have established a course of business which is running smoothly and well with no inconvenience or injustice, it is not for the judges to put a spoke in the wheel and bring it to a halt. Even if someone is able to point to a flaw, the courts should not seize on it so as to invalidate past transactions or produce confusion."

In the field of industrial law, and especially in regard to legislation dealing with industrial safety and similar matters, the judges have traditionally tended towards placing a beneficial construction on industrial law statutes. In **J.F. Stone Lighting and Radio Ltd. v. Hayworth [1968] A.C. 157** Lord Upjohn stated at page 186 —

> ".... the Factory Acts are Acts passed for the benefit of the workers and ought to be broadly construed."

But recent events in certain Commonwealth countries demonstrate that where there is no consensus and where strong objection is taken to parliamentary interference in industrial relations, bitter controversy and public defiance of the law itself will supervene. In such a situation the judge cannot abdicate his function of interpreting the legislation, although he might do well to heed Lord Devlin's advice about being "very cautious about any extension of the written word."

The Commonwealth is singular in the variety of forms of government and social structures which it embraces. But our legal systems derive, for the most part, from a common heritage which underlines the need for judicial independence, impartiality and objectivity. Nowhere could these qualities be more important than in the area of statutory interpretation, the topic of this afternoon's proceedings.

PAPER FOR THE MORNING CALC SESSION by D.J.S. Duncan, Parliamentary Draftsman & Senior Assistant Legal Secretary, Lord Advocate's Department, UK

The main purpose of my speaking here today is to make contact with people in other countries who are involved in the application of legal informatics to statute law; to let them know that in the UK we do have an electronic system for the preparation of legislation, albeit at a relatively early stage of development, and to say that we would very much value the exchange of information with others interested.

STATLAW is an information technology system for the preparation of legislation. It was developed in the United Kingdom by draftsmen in the Lord Advocate's Department (the Scottish Parliamentary Draftsmen to whose number I belong), and the Parliamentary Counsel's Office. It is in use in these offices and the other offices which are involved in the drafting of primary legislation, the English and Scottish Law Commissions.

The essence of the system is our analysis of the text used in UK statutes into a regularly occurring syntax, which we call "Bill syntax". Bill syntax is a tree-like structure, going from Bill down to Part, to clause, to subsection, to paragraph etc.. More than 90 per cent of the text of Bills can be identified with these elements. The elements in the tree are, on a printed page, or on a Word Processor screen, blocks of text, separated by "white space" -- carriage returns and other formatting elements. When a Bill or an Act is prepared for printing by a photoypesetter, these blocks of text are separated by printer's command codes. For data processing and database purposes, these discrete blocks of text are useful as basic units of information.

Because of the tree structure, and the syntactic nature of the blocks of text, this view of statutes is particularly suitable for data-processing, and for word-processing, and for the use of generic coding which is becoming greatly in demand, particularly in the publishing environment. So what STATLAW is is the analysis of the text of Bills and Acts into blocks of text which have a legal syntactic meaning -- professional significance to the draftsmen -- these blocks being identified, controlled and separated by generic codes. The set of generic codes is an agreed standard between the drafting offices and the printers and publishers.

That is the physical description, as it were, of the system. The main feature of STATLAW in our estimation is that it has been designed by legislative draftsmen for legislative draftsmen.

When the first version of STATLAW was produced in LAD by Donald Macrae and myself, we had considered that there were two possible approaches to the application of technology to drafting. The more orthodox at this time, because of the domination of the new technology over older disciplines, would be to employ a "computer expert" and to invite him to acquire sufficient expertise in the "domain" of legislative drafting to design systems for us. The path which seemed to us more in keeping with the traditions of draftsmen, and the one which we have followed, was for some draftsmen to acquire sufficient familiarity with the technology to design systems which would correspond more

closely to the established methods of working of the draftsmen. Our experience since has led us to the firmer conclusion that legislative drafting includes a sophisticated type of data processing. It is not a matter of draftsmen learning a new and alien skill.

Of course, our concern was to match the intellectual methods of the draftsmen with the tools which can make those processes more effective, not to perpetuate the mechanical systems surrounding preparation of legislation, such as the dependence on printing works for hard copy, the use of humans for proof-reading, checking cross-references, etc.. What I might call the obvious uses of computers -- basic word-processing, programs to check spelling, programs to check internal references etc. would all, we were sure, find their place in the developed system. But it was important that these mechanics should not be the starting point, or the system would tend to develop in what was for our purposes a trivial way. We were seeking powerful tools for the draftsmen, to give draftsmen the most complete freedom to develop the best and clearest text, and saving time is only one aspect of achieving that.

We therefore set ourselves, quite deliberately, the constraint that no draftsman should be required to alter his method of work. At the same time, we do everything to offer incentives to draftsmen to devise **new** working practices for the **new** environment themselves, and a number of draftsmen have shown an interest in doing so, and feel that they have profited greatly as a result. Of course there is a limit to this freedom, and after three years we in LAD have reached it, in the sense that because we are now making keyboards directly available to draftsmen on a distributed system, there has to be a degree of organisation. However, I would not say that that imposition is nearly as heavy as the constraints traditionally imposed in practice by the working timescales of the printers, for example. Nor does it cut across the general principle that STATLAW is not a system imposed on draftsmen, but a set of facilities capable of wide and long-term expansion, development and flexibility. We provide a distributed system, but we do not **require** draftsmen to use it, or instruct in the degree of use. It is a matter for judgement on each occasion whether a draftsman keys in a text himself, edits a text keyed by a secretary, or has everything done for him. Those who are working the system themselves at any given time leave more secretarial capacity, to a limited degree, to others. It is a very efficient resource-sharing environment.

Initially, the benefits of STATLAW have largely been mechanical, but on a bigger scale than would be obtained by taking off-the-shelf Word Processing systems, etc.. To a considerable degree, we have been able to free ourselves from the constraints imposed by printing, particularly the "turn-around" which could lead to one waiting for several days for a fresh text of a Bill; and what I used to think of as the "PRINTING TONIGHT" syndrome, where everything was overwhelmed by the dedicated rush to prepare a text for 7 o' clock or some other magic hour, for the printer. It is possible to draft a Bill now more or less on a loose-leaf system, printing out good copy of new clauses as they are drafted. Everyone involved in the preparation of the Bill has more time for the intellectual problems of the text, when they do not have to spend days, or sometimes weeks in proof-reading. Similar remarks apply as time goes on to checking internal cross-references, the detection of rogue words (spelling-checkers as such are not of much use to draftsmen), the production of Tables of Derivations & Destinations for consolidations, and an open-ended list of data-processing features which may be developed in future.

In a sense the greatest benefit is in control of the text. The very fact of being able to handle the text within his own office throughout a large part of the drafting process gives the draftsman much more scope to get to grips with the Bill and stay in charge of it.

It seems a reasonable proposition to us that methods of handling statute law which satisfy the exacting standards of the draftsmen are likely to be satisfactory for many other purposes. In particular we think that there is a considerable potential in the developing of searching systems which reflect the way draftsmen look at statute law, as opposed to the keyword systems which now dominate legal databases. In a sense we are making draftsmen's skill of more general use, which is the basic rationale of legislative drafting offices.

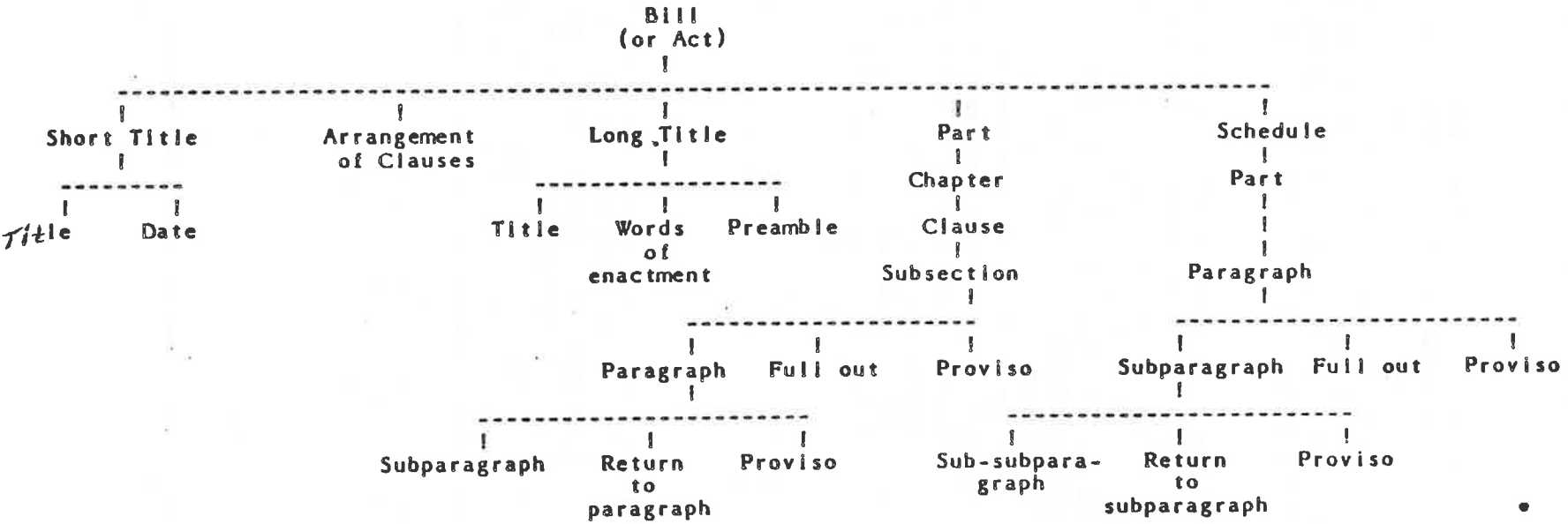
The early versions of STATLAW have been exported to the Government printers, and to the Public Bill Office in one House of Parliament, and there is discussion at present about use of the system in the Statutory Publications Office, which is responsible for preparing editions of statutes for publication. We hope that we are moving towards a system which is circular, in the sense that text which originates in the drafting office will move in electronic form first into Parliament to go through its amendable stages, then for publication as an Act and as part of publications like Statutes in Force, and finally to become available as part of a database on which the draftsman can draw, not only for enquiry, but also for text for consolidation, codification and textual amendment. The mere achievement of accuracy throughout so many stages of text is an advance. Draftsmen can put up with nothing less than complete accuracy, and machine-readable text to that standard is of general utility. However, there will also arise as the system develops the way in which draftsmen look at the statute book, the way they search it and the way they manipulate text becoming more implicit in the data, so that in the end of the day statute law becomes more regularly read in the context in which it was written.

Two features of STATLAW facilitate these developments particularly. The generic coding to which I referred is capable of being replaced by any set of codes required for a particular purpose. Her Majesty's Stationery Office are particularly interested in promoting the adoption of the SGML system of coding as an international standard. This makes the text of UK statutes potentially portable to any foreseeable environment. The basic STATLAW format makes the application of SGML very easy. Secondly, although the early versions of STATLAW were specific to a particular machine, the system is now being developed to a software standard, using C language for programs and STATUS searching software to give the maximum portability to the system. STATUS, for those who are familiar with it, also allows the creation of specialised searching systems -- based on the methods which are developed by the draftsmen -- and these also are in principle portable. This portability we see as an essential feature. The smallest office in the UK which carries out Government drafting has 3 draftsmen. The largest organisation which may have access to STATLAW may be Parliament, with many hundreds of people concerned, or eventually it may even be the general public. No hardware-based system would allow the flexibility to provide data and programs for whatever size or configuration of organisation might be involved.

STATLAW

BILL SYNTAX

General identification of the elements in Bills and Bill text
(other than Tables)



THE LEGISLATIVE PROCESS TODAY

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It is, I think, a sign of the times that the programme for this year's Commonwealth Law Conference includes two whole sessions devoted to the hitherto somewhat neglected topic of legislation — a topic which at the 1983 Conference was conspicuously absent not only from the programme, but also from Lord Hailsham's inaugural address, in which it was not even mentioned. There is, indeed, a general tendency for common lawyers to over-value judge-made law — a tendency which is reinforced by the emphasis which contemporary legal education still places on the study of case-law. Yet, in the telling words of the preface to Miers and Page on **Legislation** (1982) —

> "Legislation constitutes the single most important source of law in our society. Most central government activity is carried on within a statutory framework. The affairs of local authorities, nationalised industries, public corporations and private commerce are defined and directed by legislation. There is hardly any aspect of the education, welfare, health, employment, housing, income and public conduct of the citizen that is not regulated by statute. The preparation, enactment, interpretation and implementation of legislation are therefore matters of the first importance; not just for those whose behaviour is affected by the law, but also for those who are professionally involved in those matters. For governments, the preparation and enactment each year of a legislative programme implementing their manifesto promises and responding to the more routine requests of departments constitute vital features of their terms of office."

It is therefore fitting that at this year's Conference we should be devoting some time to the consideration of legislation and the legislative process.

2. All over the Commonwealth, and indeed throughout the world, legislation has since the end of the Second w orld War been a growth industry. In the United Kingdom, for example, the **average** number of pages of new statutes (excluding consolidation Acts) passed annually in the period 1946 to 1949 — the era of post-war reconstruction and social reform — was 1434. In the 1950s the annual average fell to 745 pages; but it rose again to 1204 pages in the 1960s, to 1466 pages in the 1970s, and for the period 1980 to 1984 was 1525 pages. Over the thirty years from the mid-1940s to the mid-1970s, the annual number of pages of delegated legislation made in the United Kingdom roughly trebled. In 1984, the number of pages of new statutes (excluding consolidation Acts) passed at Westminster was 1779. If one adds to this the 1082 pages of consolidating statutes passed in that year, one reaches for 1984 a grand total of 2861 pages of primary legislation, which by my reckoning is about half as much again as the entire Bible printed in roughly the same format. For the same year, 1984, the number of pages of delegated legislation made in the United Kingdom was 6060. Thus the United Kingdom's primary and delegated legislation for 1984 together occupies not far short of 9,000 pages. This is a formidable figure; and it would indeed be surprising if every one of those 9,000 or so pages was beautifully drafted.

3. There are many reasons why the preparation and passing of legislation has become such a feverish activity. In developing and developed countries alike, a steady stream of new legislation is needed to generate and maintain social and economic progress. In developed countries, society has become immensely complex, as have the worlds of business, industry and finance, all of them nowadays increasingly international. New problems are constantly generated by technological advances. The last forty years have seen the development of nuclear energy, television and information technology, as well as undreamed-of advances in medical science. Drug abuse, hijacking and terrorism have become world-wide problems. New social attitudes have emerged towards sex discrimination, race relations, the handicapped and the environment. In all these and many other fields, governments are under constant pressure to legislate; and it is not unusual in these days of conflicting political philosophies for a party in opposition to declare its intention to repeal a controversial piece of legislation before it has even reached the statute book.

4. Thus all over the world legislatures are having to turn out an ever-increasing quantity of legislation on a wide variety of topics, most of which are made more complex, and therefore more difficult to

understand, by each successive accretion of legislation. It is against this background that one must view complaints of insufficient public participation in the processes by which governments formulate their proposals for legislation; of the inadequacy of the scrutiny to which proposed legislation is subjected during its passage through the legislature; and of the complexity and unintelligibility of the legislation which results.

5. In the introduction to their Report, published in 1975, the Renton Committee on the Preparation of Legislation said —

> "We must add that little can be done to improve the quality of legislation unless those concerned in the process are willing to modify some of their most cherished habits. We have particularly in mind the tendency of all Governments to rush too much weighty legislation through Parliament in too short a time, with or without the connivance of Parliament, and the inclination of Members of Parliament to press for too much detail in Bills."

There has been little sign of willingness to modify either of these "cherished habits" in the intervening decade. Governments continue to overload the parliamentary machine as a result of committing themselves to unduly heavy legislative programmes; and this frequently has a knock-on effect from one Session to the next, since the task of servicing a heavy Session's Bills during their passage through Parliament tends to take up far too much of the time which government departments and legislative drafters ought to be devoting to the preparation of the following Session's Bills.

6. I hope to learn more today about the methods adopted in different Commonwealth countries to foster greater public participation in the legislative process and to improve parliamentary scrutiny of legislation. My impression is that governments are tending to make greater use of pre-legislative consultation, if only because to do so may enable them to reduce the extent to which their Bills are likely to meet with opposition on points of detail in Parliament, thus allowing more legislation to be put through in the time available. In the United Kingdom there has certainly been a salutary development, since the late 1960s, in the practice of pre-legislative consultation on policy by means of White and Green Papers; and more recently the Revenue departments have taken to publishing "exposure drafts" of proposed legislation in order to elicit constructive suggestions for improvements which, in this way, can be embodied in the text of the Bill as subsequently presented to Parliament.

8. As regards the parliamentary scrutiny of primary legislation, I do not have the impression that, generally speaking, there have been any very striking improvements in parliamentary practice and procedure to match the increased quality and complexity of legislative business. In the House of Commons, the Committee Stage of the annual Finance Bill, once a great occupier of time on the floor of the House (especially at night), is now always divided between a Standing Committee and Committee of the Whole House. Since 1965 it has been possible for the government, with the agreement of the Opposition, to arrange for the Second Readings of a number of non-controversial government Bills to be taken upstairs in a Second Reading Committee, thus saving some time in the House itself. And during the past six years there has been provision (now enshrined in Standing Orders) enabling a Bill to be committed to a Special Standing Committee empowered to hold up to four morning sittings of not more than three hours each before the normal standing committee consideration of the Bill begins — three of these sittings being devoted to the public hearing of oral evidence. So far, however, this procedure has been used for only five or six Bills in all.

9. One innovation is certainly proving valuable. For all but the simplest government Bills it is increasingly the practice at Westminster for the sponsoring department to make available to Members a set of "notes on clauses" giving a fairly detailed explanation of the provisions of the Bill. This is helpful to Members, and tends to reduce the amount of time spent in committee on amendments designed to elicit explanations from the Minister rather than to improve the Bill. Also, where a Bill makes complicated textual amendments in an existing enactment, Members are coming to expect that they will be provided with a copy of the text of that enactment as it will read if the amendments are made.

10. The growth in the appetite for legislation has inevitably resulted in a huge increase in the volume of delegated legislation; and this imposes heavy burdens on the members of parliamentary scrutinising committees and their official advisers. At Westminster, the parliamentary scrutiny of delegated legislation has since 1973 been undertaken by a Joint Committee of both Houses, which considers instruments laid before each House. The Committee may draw the special attention of Parliament to an instrument on any of a series of grounds specified in its terms of reference, or on any other ground not impinging on the merits of the instrument or on the policy behind it. The most important of the specified grounds are that the instrument —

(a) is made under an enactment excluding it from challenge in the courts; or

(b) purports to have retrospective effect where this is not expressly authorised by the parent statute; or
(c) gives rise to doubts whether it is intra vires, or
(d) appears to make some unusual or unexpected use of the powers conferred by the statute under which it is made; or
(e) for some special reason requires elucidation as to its form or purport; or
(f) appears to be defective in drafting.

In an average year the Committee meets about 40 times, and draws between 30 and 40 instruments to the attention of both Houses.

11. There is no special provision at Westminster for the scrutiny of provisions in Bills conferring powers of delegated legislation. But Parliament is, in general, rather suspicious of these powers, being reluctant to leave too much to the discretion of the executive. So the provisions in a bill which confer power to legislate by subordinate instrument are expected to give a reasonably clear indication of what the Minister can and cannot do by this means; and if an enabling provision allows intereference with the liberty of the subject or the amendment of primary legislation or is in any other way felt to be giving the executive too much power, it is unlikely to reach the statute book unless — either in the Bill as introduced, or as a result of subsequent amendment — provision is made requiring any instrument proposed to be made under the power to be approved by each House of Parliament before it can be made — the so-called affirmative resolution procedure. It is not all that uncommon for a proposed subordinate instrument that requires Parliamentary approval to be rejected by one House or the other.

12. On the question of detail in statutes, I wholeheartedly agree with Mr. Justice Nazareth's view that the rights and liabilities of citizens ought, as far as possible, to be ascertainable directly from legislation without intermediate interpretation by the courts or exposition by bureaucrats. It has always seemed to me that the rule of law requires not merely that governmental authorities and bodies should be subject to law, but also that the laws to which they are subject should be detailed enough to enable the citizen to know what his rights are. Those who advocate the drafting of legislation in terms of principle argue that detailed legislation may fail to fit the circumstances of a particular case, thus leaving the citizen and the courts in doubt as to what Parliament intended. But it needs to be remembered that detailed legislation has the enormous advantage of dealing clearly with the great majority of cases likely to arise, unlike general statements of principle whose precise application may be difficult to determine even in cases where they clearly apply.

13. This point is far from new. In his dialogue **The Statesman,** Plato recognised that —

> "The differences of men and actions, and the endless irregular movements of human beings, do not admit of any universal and simple rule. A prefectly simple principle can never be applied to a state of things which is the reverse of simple." (294 a. Jowett's translation).

And in his discussion of equity in the **Ethics,** Aristotle said:—

> "Every law is laid down in general terms; but there are matters about which it is impossible to speak correctly in general terms. Where, then, it is necessary to speak in general terms, but impossible to do so correctly, the legislator lays down that which holds good for the majority of cases, being quite aware that it does not hold good for all. The law, indeed, is none the less correctly laid down because of this defect; for the defect lies not in the law, nor in the lawgiver, but in the nature of the subject-matter, being necessarily involved in the very conditions of human activity." (V.10,4. Peters' translation).

Aristotle's solution was to allow judges "to do as the legislator would do if he were present, and as he would have provided in the law itself if the case had occurred to him.' The alternative solution, developed in England and other common-law countries, is to legislate in sufficient detail to cover all likely cases, thus reducting to a minimum the area of judicial or administrative discretion. Let me end by quoting a passage from the preface to Ruffhead's edition of the Statutes at Large, published in 1764 —

> "It is indeed to be lamented that our penal laws are so numerous; but perhaps this is an inconvenience unavoidably resulting from the wide and extensive concerns of a commercial kingdom. Though a state confined within a narrow sphere of action may be very vicious, yet the modes of vice will not there be greatly diversified: offences will multiply as the pursuits and occupations of mankind grow more various and diffusive: and in a kingdom so jealous of its liberty as to leave as little as possible to discretionary power, every offence must be precisely described; therefore it is well observed by Montesquieu that the multiplicity of our laws is a price we pay for our freedom."

STATUTES IN FORCE

The United Kingdom's official revised edition of the statutes

Between 1885 and 1950 three editions of the Public General Acts of the United Kingdom as amended were published under the title The Statutes Revised. These took the form of bound volumes, with the Acts arranged in chronological order. The Third Edition, published in 1950, consisted of 32 volumes, and was supplemented by an annual noter-up service which gave details of subsequent amendments and repeals. In order to keep the edition up to date, each volume had to be noted up by hand once a year. This process, which involved writing in, crossing out and sticking in printed slips, was extremely laborious, and the secretaries whose task it was quite often made mistakes. The service was called 'Annotations to Acts' and was published well after the end of the year to which it related, sometimes as long as 18 months after.

2. In 1968 work began on a new official revised edition of the statutes, constructed in an entirely different way. Called Statutes in Force it was designed as a self-renewing, self-expanding and thus permanent edition. It was decided to print each Act as a separate booklet, and to assemble them in loose-Act binders, thus making it possible to keep the new edition up to date without disfiguring the text. The first instalment of the new edition appeared in 1972; but it was not until 1983 - 11 years later - that it could be said to contain practically the whole of the unrepealed text of the statute book (representing some 3500 subsisting public general Acts). The complete edition fills 90 loose-Act binders and occupies about 23 feet of shelf space. As a "revised edition of the statutes published by authority" it enjoys the statutory recognition afforded by section 19(1) of the Interpretation Act 1978.

3. The main novelty of Statutes in Force, apart from its loose-Act structure, is the arrangement of Acts by subject matter. Acts are classified into groups and subgroups according to subjects, there being at present 125 groups, running in alphabetical order from Agency to Weights and Measures. Where necessary, a group is divided into subgroups. Thus group 43 (Employment) has 5 subgroups, namely (1) General, (2) Wages, (3) Health and Safety, (4) Children and Young Persons and (5) Trade Unions and Industrial Relations. Within groups and subgroups, Acts are arranged in chronological order. Some 60 or so Acts which deal with a number of distinct subjects have been split and their provisions allocated to the groups to which they respectively belong, together with all relevant interpretation provisions and other provisions of general application (which for split Acts are therefore to be found in each group containing a portion of the Act in question). Each group is preceded by a blue divider, and each subgroup by a yellow divider. Immediately after the blue divider there is filed a key item, namely the latest Filing Instructions and Contents List for the group, listing the Acts currently contained in the group (or in each subgroup).

4. To find a particular Act, it is necessary to know its group and, where applicable, its subgroup. This is readily discoverable from the Alphabetical List of Acts; but if one needs to look up a particular Act in a hurry - for example, in the course of a telephone conversation - the arrangement by groups and subgroups makes it difficult to know which binder contains it, even if one knows the year and chapter number of the Act. On the other hand, this arrangement gives the reader all the Acts on a given topic conveniently assembled in the compass of one or more adjacent binders. There is also a Chronological List of Acts which similarly identifies the group (and subgroup) of each Act.

5. The crucial feature of Statutes in Force is the system for keeping it up to date. This involves -

(1) the addition of new Acts;
(2) the removal of repealed Acts;
(3) the replacement of extensively amended Acts; and
(4) the provision of Cumulative Supplements (giving particulars of amendments and partial repeals pending their eventual incorporation in replacement issues of the Acts affected).

6. About 60 newly enacted Acts are added to the edition each year. These are generally issued within about two months of Royal Assent. Most Acts are framed so as to allow a delay of two months between Royal Assent and coming into force; so in most cases a new Act becomes available in Statutes in Force at about the same time as, or shortly before, it comes into force, though somewhat later than it takes for loose copies of the Act to be on sale in the Stationery Office. About the same number of Acts are repealed in an ordinary year, and subscribers to the edition normally receive notice to remove a repealed Act within a month or so of the date on which the repeal takes effect. There is room for improvement in both these respects.

7. The real problem of updating, however, is occasioned by the yearly quantity of amendments. In a typical year, their number is likely to be well over 5000. A small proportion of these will be incorporated immediately into replacement issues of the amended Acts. (In 1983 only 16 replacement Acts were issued, amounting in all to about 1500 pages; in 1984, 24 such Acts, amounting to about 1600 pages; and in 1985, 38 such Acts, amounting to about 800 pages.) But the bulk of each year's amendments have to wait their turn to be published in Cumulative Supplements. These Supplements are issued in succession for affected groups, according to practicability and priority, at intervals of between one and four years. Some Supplements - those most recently published - are therefore very up to date; some are moderately so; and a few are anything up to four years in arrears. The number of unincorporated amendments for the time being awaiting publication in supplements or replacement Acts has been slightly reduced over the past few years; and to make it at least possible for users of Statutes in Force to discover the latest amendments without delay, newly enacted Acts are now issued in full. This is better than having to wait for the issue of a new Supplement (though amendments to Acts made by subordinate legislation must still await publication in a Supplement); but a person who consults the latest issue of an Act in Statutes in Force, together with the latest Supplement for the group to which it belongs, still finds no mention of subsequent amendments, even if he has received the full text of the Act or Acts containing them. This is a serious defect from the user's point of view.

8. Plans are now on foot to speed the editorial process by the introduction of word processors. It is hoped by this means to be able to issue a new Supplement every year for each affected group of Acts. This would mean that no Supplement would in future be more than twelve months out of date - a considerable improvement, but still less than the serious user needs. There is talk of enabling users to have access, via VDUs, to updated texts of amended Acts in advance of their re-issue or the issue of Supplements for them. But this still lies in the future. Meanwhile, for an Act that forms part of the law of England and Wales, the surest way to ascertain the text as currently in force is to call it up on Lexis.

9. It will be interesting to hear how the problem of constantly updating the printed texts of Acts is being tackled in other jurisdictions. One major constraint is, of course, the formidable cost of constantly re-issuing whole Acts each time they are amended. Another is the cost of employing enough editorial staff to prepare Supplements for publication with the minimum of delay. Statutes in Force has improved considerably in the first 14 years of existence; but it still has its problems.

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May 1986

82

A CASE FOR GREATER PUBLIC PARTICIPATION IN THE LEGISLATIVE PROCESS[1]

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At a recent regional seminar[2] attended by some fifty judges, lawyers, law teachers and legal activists, the participants adopted a memorandum on legal education for alternative development in Asia.[3]. The memorandum consists of a critique and recommendations. In its critique of the law making process, the memorandum had this to say:—

"1. **The Law Making Process**

"The passing of written laws by our respective law "making bodies, particularly the promulgation of "martial law decrees, are essentially non-participa- "tory. A small group of law makers, to which the "majority of the population have little or no access, "determines the laws to be administered."

While in a representative form of government it cannot be said that the population does not in theory have access to the law makers, the fact of this access does not necessarily mean any great degree of public participation in the process. On the one hand, one tends to assume that under a representative form of government the broad mass of the population participates in the legislative process while the contrary is true of non-representative forms of government. This is, of course, not necessarily so. The title for discussion, therefore, correctly assumes that there is a case for greater participation in the process regardless of whether it is representative or not. The experience of the writer is almost exclusively of the law making process in a representative form of government in a developing country.

The popular view of the law making process is that it is totally incomprehensible to the ordinary man. The majority of people, regardless of the system of government and, therefore, the law making process, tend to be intimidated by the same. Even lawyers consider those of their profession closest to the law making process, the legal draughtsmen, as rather odd persons who indulge in some sort of obscure, at best, esoteric, craft. There is a certain mystique about the legislative process and those involved in it at a technical level.

This mystique does not escape the very law-maker or legislator. Very often the elected representative sitting in the Parliament is no better off than the ordinary man in the street. Several reasons or excuses are advanced for this. At base, however, it would seem to be for reasons no different from those of the public. The reasons for this appear to be some of the following:

1. Most people are only concerned with the end product of the legislative process i.e. the laws and regulations, when they or their interests are directly affected. This interest will therefore arise either before the measure is passed or when the particular individual runs foul or has to take into account the provisions of the law in whatever transaction or set of circumstances.
2. The language and style of drafting is such as to make most laws difficult for the uninitiated to comprehend.
3. In the majority of cases, little effort is taken to explain to the population, particularly in developing countries, either the legislative process or the proposals/measures to be passed into laws.
4. The state of the law on the interpretation and construction of statutes is quite unsettled. There is an on-going battle between the "ordinary grammatical school" and the contextual approach — often with no logical or settled basis for the choice of one or the other.
5. Those parts of statutes which might be most helpful for a popular understanding of the measure (explanatory notes, marginal notes) are not considered in most countries as being of any use whatsoever in interpreting the law.
6. Legislation has become increasingly complex to respond to specialised and technical advance. Often a specialist knowledge of technical matters is necessary for any participation in the process. This most people do not have.

Ideally in a participatory system a Bill for a law should represent the end product of the political debate on any particular matter. It should mean that broadly speaking the particular topic to be legislated has been debated or campaigned at a popular level; that as a result of this campaign the successful candiate or party is elected into office for the purpose of enacting into law the particular proposal. In this way it may be

said that there has been some popular mandate for the particular measure. This, in turn, should at least pre-suppose some understanding and participation of the public in the measure. Experience has, however, shown that only a small percentage of laws are ever presented to the population in this way. Increasingly one is aware of the tendency to advise the aspirant to the Parliament (law making body) "not to make any promises if you can get away with it". The representative form of government in no way ensures, as it should, that a mandate exists for the enactment of laws in a representative Parliament.

In the light of the above, the problem would appear to be of a three-fold nature:

1. Ensuring the existence of a sufficiently large number of persons within the population who, if stimulated, could appreciate and be involved in the law making process.
2. Devising mechanisms and structures to ensure as far as possible that those who wish to participate in the process may do so.
3. A simplification of the approach to the interpretation and construction of laws once they have been enacted.

The problem of ensuring that there is a sufficiently large cadre of persons in any population capable of understanding and participating in the law making process is really not the task of the lawyer. This belongs to the area of the educator. One of the problems is that the communication skills of the ordinary man are at a different plane from that required for a proper understanding of the law making process and its end result, the law. However, the system of legal training to a large extent fosters and furthers this dichotomy. Candidates for legal training are, quite rightly, required to have certain minimum qualifications in communication skills. The difficulty is that the training widens the gap between the professional and the non-professional rather than seeking to narrow it. Little thought is given to the overall responsibility which the profession has to increase social awareness and an understanding by the population of the law. The orientation is towards training persons to provide a service to rather than with the population. At the top of the scale, the goals of the profession are highly materialistic, not being concerned with any broader didactic function. The lawyer's success is measured largely by his ability to know more than the other person and his skills in persuasive communication. There should, therefore, be increased activity in the area of popular legal education generally. The distinction is made here between the social purpose of the lawyer and legal extension services as they now exist. Admittedly, legal aid services and advisory clinics are extremely useful things. Their existence is, however, quite rightly premised on the assumption that there are people who have a legal problem with which they cannot cope on their own. While these services assist persons who are already in trouble, they really do not attack the root problem of diminishing the number of persons who may require that sort of service. There is nothing within the range of legal extension services comparable to preventative medical programmes. There is, therefore, a need, particularly in the developing world, for considerable work in the area of information as to the rights and obligations of the ordinary citizen within the legal framework in order to raise the level of public awareness and comprehension. This would conduce to eliminating a lot of the mystique and intimidation surrounding the actual law making process.

The problem has been identified above of measures being brought to Parliament without their having been debated or canvassed at the level of the hustings. Classically we are told that in the law making process the draughtsman receives his brief from the Government or a particular Ministry. The drafting is then done by a small number of technicians who are supposed to liase with those giving the policy directions. These policy positions are all too infrequently the subject of White Papers. Often, however, the law maker himself sees the proposals for legislation for the first time when a Bill for it is laid in the Parliament. Often the representative himself is ill-equipped to translate the Bill into language for communication at a popular level. Obviously, one should not attempt to put unnecessary fetters on the ability of any Government to take legislative action in cases of emergency. But a lot can be done to ensure that the total legislative process is more open and that structures are put in place to permit popular participation. Some measures may be the following:

1. Some mechanism should be found to impose some discipline on those who seek election to representative bodies requiring them to state the broad outlines of their legislative programmes. One is speaking here at the more technical rather than political level. It should not be asking too much to require proposals for legislation to be filed in the office of the Speaker of a Parliament or some other appropriate office. In this way, Standing Orders may be introduced requiring that a specified period of time elapse between the filing of the measure in the appropriate office and the laying of the Bill in the Parliament or law making body for first reading. Rules may be introduced to ensure the publication and dissemination of the proposals when they are first filed. The information should be circulated

in a form so that the implications of the proposed measure may be easily understood.

2. In a representative body, the law making process may be cynically viewed as an exercise in the dictatorship of the majority in the law making body. This is so except where constitutions require more than a simple majority for the passage of any measure[4]. But, as stated above, the control of the law making body does not necessarily mean that the measures passed by it have been debated with the population and therefore have a popular mandate in that sense. The policy directions to the draughtsman should themselves be published. (One suspects that very often the draughtsman is required to draft on the scantest of instructions, piecing out the imperfections of his instructions with his own thoughts). Hopefully, publication of these instructions would impose a discipline on the policy maker and give a further opportunity for public awareness about the particular proposal.

3. The mechanism of the referendum, so successfully used in certain countries (Switzerland is an example of this), may be employed more frequently in Commonwealth countries[5]. There are certain proposals which lend themselves to referenda. Coming immediately to mind are issues on which the members of the legislative body may be permitted "conscience" votes. The abolition, retention, reintroduction or extension of capital punishment is a case in point. It would be difficult to make a comprehensive shopping list of measures which should be subjected to a referendum but, here again, a simple mechanism can be evolved for deciding when a referendum should be called. It may, for instance, be a resolution by a simple majority with a limitation on the number of referenda which may be called within a specified period.

4. A lot has been written on the opening up of the committee stage of proceedings in the law making process. There is no reason why, as a rule, proceedings at the committee stage should not be made fully public. There have always been, over the years, a number of proposals for participation by members of the public at the committee stage[6]. In some sense, this is an admission of the criticism that measures are brought to the law making bodies without or before the views of the public have been canvassed. This latter proposal, however, will not achieve any marked success unless the steps stated above to sensitize the population to the process are instituted. Care should, however, be taken to avoid a situation, not unknown in the Caribbean, where certain sections of the population deliberately refrain from participating in the political process while still insisting on their right to shape and determine the content of laws.

Nothing inhibits public participation in the law making process more than the difficulty experienced by most people in understanding the textual content of laws. Quite apart from the overuse of archaic and convoluted language, laws often do not mean what they appear to be saying to the ordinary man, and even the lawyer. One, of course, knows the arguments and the reasons for this. But, "the common law of statutory interpretation has reached such a stage of confusion that no theory of construction can be said to have been definitely ruled out". Decisions on interpretation often depend on the state of curial (judicial) digestion or fancy. In interpreting a statute, one can give cogent and logical argument for completely different interpretations. There is urgent need to settle this area of the law. For a start, there is absolutely no reason why preambles, headings and marginal notes should not always be considered as aids to the construction of statutes. These are the parts of statutes more readily understood by the ordinary man — now, unfortunately, at his peril. Why should it not be permissible to use the speeches made in Parliament (and some good speeches have been made in that place) as aids to construction?

There is need to explore the feasibility of wider application of the new canons of construction employed in the interpretation of the new Commonwealth independence constitutions. It has been said[7] that these are documents which have been drafted "in broad terms and in language more familiar to politics than to legal draughtsmanship"[8]. This new canon of interpretation is justified on the basis that these constitutions were the end result of a political bargaining process and so they called for "a generous interpretation avoiding what has been called 'the austerity of tabulated legalism' suitable to give individuals the full measure of the fundamental rights and freedoms referred to"[9].

One can think of several laws which may not be interpreted by the courts with that "width of generosity". But all laws are, or should be, the result of some political bargaining process and there is little valid reason why they should not be all so interpreted. Legislative intervention (of the sort which the layman can understand) is needed to standardise and therefore make more predictable the interpretation of statutes. The above is intended to be provocative and is the basis for discussion.

85

1. Presented by Karl T. Hudson-Phillips of the Trinidad and Tobago Bar.
2. Seminar on "Innovation on Legal Education for Alternative Education" Penang February 1985.
3. See International Foundation for Development Alternatives (IFDA) Dossier No. 51 January/ February 1986.
4. Several of the new Commonwealth constitutions require special majorities for amendments to the constitution or the abrogation of fundamental rights provisions. These special provisions are only effective where the numerical strengths of the opposing sides in the Parliament are well balanced. This then requires some across-the-board consensus or political horse-trading if the measure is to be passed with the two-thirds, three-fifths or three-fourths majority, whichever. In recent history in the Caribbean, cases have been known of the majority party holding more than the number of seats and therefore votes required to pass measures to amend their constitutions or affect fundamental rights provisions. Cases in point are Trinidad 1971-1976; Jamaica 1983 —; Grenada 1984 —; Barbados 1986 —.
5. Referenda provisions exist in the constitutions of former Associated States in the Eastern Caribbean. See sec.39(5) of the Grenada Constitution (Grenada Constitution Order No. 1973 S.I.1973/No.2155). These referenda provisions however only apply for the alteration of the constitutions and certain other laws.
6. It is understood that in Jamaica the present Parliament permits a certain measure of this given the absence of any Parliamentary opposition. In Trinidad in the 1971-1976 Parliament, when a similar situation obtained, important measures were first published for public comment and then introduced in the Upper (Senate) House before being sent to the Elected House.
7. Maharaj v A-G of Trinidad and Tobago (No.2) [1979] AC 385; Clarke v Karika [1985] LRC (Const.) 732,; Thornhill v A-G of Trinidad and Tobago [1981] AC 61.
8. Maharaj v A-G of Trinidad and Tobago (No. 2) ibid.
9. Fisher v Minister of Home Affairs of Bermuda [1979] 3 AER 21 at 25h per Wilberforce L.J.

PUBLICATION, CONSOLIDATION AND REVISION

THE HONG KONG EXPERIENCE: NEW BOOKS FOR OLD

A paper prepared by E.H. MARTIN & A.B.S. PIERCE for the second meeting of the Commonwealth Association of Legislative Counsel held at the Eighth Commonwealth Law Conference, Jamaica, 10 September 1986.

1. Introduction

Those of you who read your CALC Newsletters will be aware that Hong Kong has been examining the possibility of moving from a loose booklet system to a loose leaf system for the publication of its statutes. You may therefore be surprised to find that in this paper we shall be supporting the use of the loose booklet system of publication, consolidation[1] and revision[2]. The reason is quite simple; we believe that the system, which we have been using since 1965, is the best if certain circumstances exist. We would urge those thinking of a loose leaf system to consider the loose booklet system. The choice is not simply between a basic system of annual volumes with periodic consolidations/revisions and a full scale loose leaf system. There is a third alternative.

Hong Kong does not claim that its system is original. A similar system has been operating for years in Kenya and one or two other jurisdictions in Africa, and is, of course, the basis of the U.K. "Statutes in Force". It is a system which has received considerable praise; indeed Professor G.W. Bartholomew of the University of Singapore, writing in the Hong Kong Law Journal, said,

> "It would be invidious to attempt any detailed comparisons here between the various revised editions of laws which have appeared over the last few years. It must suffice to say that the revision undertaken in Hong Kong is incomparably the best which has appeared to date. It satisfies to the fullest extent possible the criteria of completeness, conciseness and up-to-dateness and will surely remain a model to which all other revisions will aspire.".[3]

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(1) "Consolidation" means the process by which effect is given to one piece of legislation which amends or affects another producing a single composite piece of legislation correctly representing the intention and language of Parliament.

(2) "Revision" means the process by which the language of Parliament is altered to remove grammatical and other minor errors, rearrange provisions, correct cross references and other similar matters, while preserving the intention of Parliament.

(3) (1971) 1 HKLJ 274

2. Publication of statutes in Hong Kong

In our view any system adopted for the publication and revision of statutes should satisfy the following basic criteria -

(1) all statutory law must be easily available in a readily accessible form;

(2) it must be capable of easily facilitating historical research;

(3) there must be a system of consolidation not only in the conceptual approach to amendment but also in the practical approach to the text;

(4) there must be a system of revision, by which we mean not only consolidation but the preparation of a text by a person authorized to make minor changes to it which, when published, will be treated as the authoritative text.

All legislation in Hong Kong, whether primary or subsidiary, is published in the Government Gazette. At the end of each calendar year 3 bound volumes are prepared; one each for all bills, ordinances and subsidiary legislation printed in the Gazette for that year. A calendar year is chosen despite the fact that the legislative year or session is from October to August.

Prior to 1964 Hong Kong produced 6 revised and bound editions of the Laws of Hong Kong in the years 1887, 1901, 1912, 1923, 1931 and 1950. These editions contain the primary and subsidiary legislation to those dates revised under powers set out in legislation applying to each exercise.

In 1962 it was proposed that instead of a bound edition being prepared periodically, a permanent edition of the Laws of Hong Kong would be prepared with the intention that thereafter it be revised annually. After much research and argument on the form the publication should take it was decided that loose booklets would be used rather than loose leaf sheets. Consequently in 1965 Hong Kong enacted the Revised Edition of the Laws Ordinance 1965. The long title reads "To make provision for the preparation, publication and periodical revision of a revised edition of the laws of the Colony", and the Ordinance provides for a permanent edition of the Laws of Hong Kong in loose booklet form with annual revisions. Section 11 provides that such a revision will, upon being approved by the Governor -

> "be deemed to be and shall be without any question whatsoever in all courts of justice and for all purposes whatsoever the sole and only proper laws of the Colony in respect of all Ordinances contained therein.".

Under the Ordinance wide powers of revision were given to the Commissioner appointed by the Governor to prepare the first revised edition. These powers, which are set out in sections 4 and 5, are now exercised by the Attorney General.

3. The loose booklet system

The purpose of the loose booklet system is to provide a permanent and authoritative set of the Laws of Hong Kong (both primary and secondary legislation) in a form which will facilitate frequent consolidation and annual revision. Each ordinance and each piece of subsidiary legislation that should form a part of the permanent collection of the Laws of Hong Kong is printed in a separately produced booklet contained in one or more signatures.(4)

The basis of each booklet is the legislation as it was printed in the Gazette. Apart from new legislation and changes that may be necessary to existing legislation for the purposes of revision, a number of items of information are added. These include -

(a) the year of the edition, which will tell the user the last occasion on which the measure was revised;

(b) the date of commencement;

(c) the legislative history of the measure, i.e. the annual number of the original and of measures making subsequent amendments to it;

(d) the legislative history of each section;

(e) information notes, showing, for example, that a section has been repealed, drawing attention to transitional provisions affecting a section.

The system so far described does not differ from many periodic revisions in other jurisdictions nor from any of the earlier revisions in Hong Kong. The defect of such revisions is that they are usually neither regular nor frequent enough for the users, and so a method needed to be devised that would enable this basic system to be kept up to date.

It was decided to approach the problems of consolidation and revision separately. A decision was made that the volumes would be revised annually and 1 January was

(4) In the printing trade books are made up of a number of folded pages called "signatures". A signature consists of a double sized piece of paper which, when folded, makes 4 pages. The basic unit used by our printer is 4 such sheets or 16 pages.

chosen as the date, again not coinciding with our legislative year. More frequent consolidations were clearly also required. It was recognized from the beginning that some subscribers may only be interested in having their sets brought up-to-date as part of a revision exercise, but that there would be others who would need or wish to have their sets updated as soon as possible. The system was therefore sold with 2 subscriber programmes; the former can subscribe to a cheaper service which provides annual revisions, and the latter to a much more expensive service which includes the "noter-up" service.

4. Consolidation: the "noter-up" service

A consolidation service, known as a noter-up service, consisting of the texts of amending legislation printed on only one side of the paper, is distributed to subscribers approximately every 6 weeks. The subscribers then themselves cut and paste the noter-up into their volume of the laws. Minor amendments are written in by hand following instructions issued with the noter-up service.

5. Revision

The aim of each annual revision is twofold -

(a) to consolidate new legislation enacted in the period 1 January to 31 December in any one year into the existing volumes of legislation;

(b) to pick up any necessary minor changes, for example printing errors or incorrect cross-references both to legislation that has been amended and to other legislation.

Where it is considered that a particular booklet has been sufficiently altered by the revision to justify the reprinting of a new booklet, such a booklet is issued, usually in the middle of the next year, and bears the new edition date. The revision of the remaining booklets is covered by the issue of, concurrently with the issue of new booklets, a cumulative volume of minor amendments. As and when a booklet the amendments to which had previously been included in the minor amendments is reissued the amendments relating to it are removed from the volume of minor amendments.

Concurrent with the issue of the new booklets and new volume of minor amendments the Governor gives notice under section 15(4) of the Revised Edition of the Laws Ordinance to make the revision authoritative. The subscribers then remove the old booklets and substitute the new. In our

chambers we retain 3 sets of the old booklets which are bound together in annual volumes called "Extracts".(5)

6. Setting up the system

Two matters essential to the setting up of a loose booklet system were the choice of suitable binders and the involvement of appropriate staff.

In choosing binders we simply looked at the various examples on our library shelves and chose the best. We were looking for binders that were light yet sturdy, held material securely, yet easily enabled material to be inserted or removed, and which would be reasonably flat when opened. Today considerably more choice is available; modern binders are lighter and stronger. Some are, in our view, too thin and hence too weak. We particularly like the binders currently being used by Trinidad and Tobago.

From the beginning of the scheme Hong Kong has been fortunate in having the services of a retired counsel to supervise each revision. Preparation of the annual revision is a full time job for him and an assisting clerk and temporary help is obtained from other clerical staff in the drafting division when proofreading is required. Although the availability of a retired counsel who is prepared to undertake this task is extremely useful, it is not essential so long as the final responsibility is taken by counsel and there is a consistency of approach.

A close liaison with the Government Printer is necessary to any system of publication. Hong Kong's printing services have lagged behind those of other countries, and we are only beginning to make use of modern printing technology. Recent revisions have been aided by the extensive use of computer type-setting equipment enabling the printer to retain on computer tape the text of each measure printed in the Gazette. The printer can thus build up a data base of material, which can be edited and updated as and when necessary and used to prepare the revised booklets.

In our research in USA and Canada we saw many more sophisticated printing and revision systems. The "state of the art" was, we thought, in Minnesota, where the marriage of new text and old is done automatically by computer. The existence of this equipment, although time and labour saving, is not, in our view, essential, provided there is close co-operation with a printer who is sympathetic to the needs and deadlines of the drafting office.

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(5) This system is intended to facilitate historical research although, in our experience, only draftsmen use it. Other researchers resort to the annual volumes, using as a guide the legislative history information at the end of a particular section.

Initially we made an effort to place booklets covering similar areas in the one volume. We have found this impossible to maintain except to the extent that we do ensure that all subsidiary legislation is placed immediately after its primary legislation.

7. Advantages of a loose booklet system

While the system has many of the advantages of a loose leaf system, it also has advantages over a loose leaf system. Booklets can be removed easily as a whole for use in court and will remain secure. With booklets there are not the difficult current-page indexing, pagination and layout problems that exist with a loose leaf system. Historical research is possible through the system of extracted booklets. Although, in theory, a system of extracts could operate under a loose leaf system we have not seen a successful such system.

The principal advantage of a loose booklet system over a loose leaf system is, however, that with the former there is no conceptual difficulty in accepting a bound booklet as an authoritative version of a law. It is difficult to accept a collection of loose leaves as authoritative.

8. Disadvantages of a loose booklet system

In this paper we have concentrated on two aspects of Hong Kong's loose booklet system: revision and consolidation. Each of these aspects has, as well as having the advantages discussed above, one major disadvantage. In the case of a revision without a consolidation there is a considerable delay between the enactment and the issue of the revised booklet. The disadvantage in the case of the consolidation is the clerical cost of updating the volumes.

Unless a subscriber takes the noter-up service, that is, if only the annual revision is subscribed for, the edition may be as much as 18 months out of date (between, say, January 1985 and June 1986). If there is no reprint and if any minor amendments are not cut and pasted in the current edition of an ordinance, the ordinance may become years out of date. If, however, the noter-up service is taken and used efficiently and regularly the volumes of legislation will be, at worst, 2 months behind.

We have found that the clerical cost of manually updating by cut and paste in the noter-up is high. The work is tedious but requires some skill. A set of the Laws of Hong Kong consists of 25 volumes containing some 20,000 pages. We have calculated that, assuming one clerk works full time at updating, he is able to continually service just over 8 sets. In Hong Kong in the Attorney General's Chambers the problem is compounded by having one complete set for each professional officer, making some 240 sets.

9. The present position in Hong Kong

Before drawing conclusions it may be of assistance to outline the reasons why Hong Kong is reconsidering the use of the loose booklet system.

A decision has now been made that the Laws of Hong Kong will be drafted bilingually in English and Chinese. This coupled with the need by 1997 to patriate a number of English laws applying to Hong Kong will result in the volumes of the laws increasing to 60 volumes. The clerical cost of operating a noter-up system will be, in our view, prohibitive. It is therefore apparent that the noter-up system of consolidation can no longer continue.

Having regard to the advantages relating to the revision system we are reluctant to abandon loose booklets altogether. We are therefore currently investigating the alternative of abandoning the noter-up service, and considering a number of options in relation to revision to replace it. These options include moving the revision date to August, revising more frequently, revising monthly, revising continuously (that is, booklet by booklet), issuing supplements, or a combination of these.

10. The ideal environment for a loose booklet system

In the opening paragraph we suggested that the loose booklet system was the best if certain circumstances exist. In our view the circumstances in which the loose booklet system may be the best choice are -

(1) Where there are distinct legislative peaks.

In Hong Kong the flow of legislation is relatively even. Many, if not most, jurisdictions have very definite legislative peaks. In some most bills are enacted in the last few days of each session and are in force shortly thereafter. Where such conditions exist we question the efficiency of having a loose leaf system. There seems little point in each month issuing a few loose leaf replacement pages and then to swamp subscribers with one or 2 very large issues. Is it not preferrable to simply reissue the amended legislation, after consolidation or revision, in the form of a booklet?

(2) Where there is a commitment to textual amendments.

The loose booklet system must be seen as a living and complete statement of the statutory law. Unless textual amendments are used the task of consolidation is too difficult to enable frequent revision to occur and makes an effective noter-up service impossible.

(3) Where there is a commitment to frequently revise rather than merely consolidate.

As a revision results in a change in the law, albiet minor, either the revised version must be re-enacted by Parliament, or Parliament must provide that the revised version is to be authoritative and thus to replace the authoritative text passed and assented to. The best way to present this authoritative revised version is obviously in bound volumes. There can be no doubt then about the content of that version. The loose booklet form provides an alternative and only marginally less perfect way of achieving this. Such a system is after all just a greater number of volumes.

By publication of lists of pages to be regarded as authoritative it is possible to operate a revision in loose leaf form. However, as on each occasion a loose leaf replacement page is issued this list must be brought up to date, it can be seen that if there is a large volume of legislation and of replacement pages the task of keeping control becomes difficult.

In practice therefore we see a loose leaf system being an option only where there is to be consolidation rather than revision.

(4) Where there is a small volume of legislation.

It follows from our view that the present system operated in Hong Kong cannot cope with an increase in the number of volumes, that one of the most important factors to be considered in choosing the loose booklet system is volume. Not only the size of the present legislation must be taken into account but also the flow of new legislation.

The frequency of revision, whether it is sessional, annual, or continuous, will partly depend upon the volume of materials. The total number of enactments to be included and the volume of new legislation will be relevant not only to the issue of mode of publication but also to the question whether a noter-up consolidation service is appropriate.

(5) Where there is a sufficient degree of control over the legislation.

In Hong Kong all legislation, primary and subsidiary, is drafted by our Law Drafting Division. We can therefore control ordinances and subsidiary legislation and can, thus, operate the

loose booklet system for both. If subsidiary legislation is drafted by others it may not be possible to include it in a loose booklet system, although this is not fatal to the introduction of such a system.

11. Conclusion

Our conclusion is quite simple and, hopefully, obvious. The loose booklet system offers a viable alternative to a loose leaf system and must be preferable to a system of annual volumes with periodic revisions. The loose booklet system offers a sufficient degree of flexibility to be capable of being tailored to the individual needs of a particular jurisdiction, and can be operated without sophisticated and expensive equipment.

There are, as we have explained, factors peculiar to the Hong Kong experience which have reduced the effectiveness of the system, and for this reason we have been investigating the loose leaf alternative. But all things considered, we have found the advantages of the loose booklet system to outweigh its disadvantages, and our inclination now is not to abandon what appears to be the most efficient and effective method of publication of legislation but rather to adapt and adjust the loose booklet system to our particular needs.

LEGISLATIVE DRAFTING:

COULD OUR STATUTES BE SIMPLER?

The Hon. Mr. Justice Nazareth, C.B.E.
Judge of The High Court, Hong Kong

That our statutes are not simple is, I hope, not in question. What is in question is whether they can be made simpler. Of course the nature of the complaint has to be looked at and the causes, all of which has been done before. But I think it is also necessary now to see if calls for reform have been made in the right direction. That is, to those who are in a position to remedy matters. Barking up the wrong tree is not going to provide any remedy.

It was an implication of the terms of reference of the Renton Committee appointed in 1973, that there was widespread concern that much of United Kingdom statute law lacked simplicity and clarity. The Report of that Committee broadly grouped the complaints it heard under four heads. That was in 1975. To day, for the purposes of this paper the complaints can be narrowed down to obscurity said too often to degenerate into unintelligibility, and to be the result of the tendency to provide for every foreseeable contingency in detail.

As to what should be done to mitigate if not to remedy that, suggestions have not been lacking. The Renton Report itself makes upwards of a score. The most drastic suggestion (actually, not made in that Report) is that we should adopt the civil law or continental system of legislative drafting practised in Europe. That system, incidentally, is said to dispense altogether with professional draftsmen, though I do not suggest that that is its drastic aspect. Since it highlights many of the common features of the remedial measures that can be taken, it would not be inappropriate to begin with that suggestion. There are in fact several continental systems, but notwithstanding some differences between them, they are now commonly referred to as the civil law system, as distinct from the common law system. While far from being the first to commend the former, the chief present-day protagonist must be regarded as Sir William Dale. In a study commissioned by the then Commonwealth Secretary General and published in 1977 under the title "Legislative Drafting: A New Approach" he attempted by comparison to demonstrate the relative simplicity and superiority of the continental or civil law system. Professor Clarence Smith has also argued powerfully in support.

The roots, development and ethos of that system are very different to ours. It derives not so much from the decision of judges as from the monumental codification by Justinian, which inspired the great codifications in Europe, particularly in France. Far from being undermined or restricted by the courts, the codes are promoted and complemented by a judicial approach to interpretation very different to that of the common law system in England. The codes and ancillary legislation are accepted as the principal source of law. They are given a very liberal interpretation. Great importance is attached to preparatory work and parliamentary discussion and debate. There is no doctrine of stare decisis except to a very limited extent where there is an unbroken line of established precedent (jurisprudence constante). Even in totally new kinds of cases, civil law courts generally look for a legislative text and its underlying principles which they can use one way or another as a basis for their new decisions. Each new decision must be grounded on the authority of the legislative text which provides the basis of continuity and stability. Each case must be decided on the primary authority of the legislation. A court may not render a judgment in the nature of a general rule.

Other incidents of the civil law system that may be mentioned are the extent to which delegated legislative power is in general relied upon notwithstanding relatively minor parliamentary control and scrutiny; legal education centered upon legislation, codification and doctrine on a very high level of abstraction; the special training of judges who go directly from law school to judicial apprenticeship and then into a career judiciary; the Conseil d'Etat and travaux preparatoires.

The foregoing is only a thumb-nail sketch. But it should sufficiently indicate that like its common law counterpart, civil law legislation drafted in its own style is but one part of a complex whole. Yet no serious attempt has been made by its advocates to demonstrate that such a style could be imported without the supporting mechanism of its own system, in particular the liberal judicial interpretation that sustains it. And curiously in acclaiming that style virtually no account was taken by Dale of the extraneous demands upon common law drafters for detail, certainty of legal effect, brevity and speed, all of which are acknowledged in the Renton Report.

What then is the nature of civil law drafting that common law drafters are recommended to adopt? Dale says first that "The continental lawmakers, influenced by their heritage of codes, think out their laws in terms of principle, or at least of broad intention and express the principle or intention in the legislation". He adds that "codification, willy nilly, involves — nay, is — the continental style". He

concludes under the heading "THE REMEDIES" with the following passage:

> "English statutes originated, and continue to exist, within the matrix of the common law. Although they have grown to an immense size, they are not free of mother's apron strings. Independence will follow codification. But we cannot wait for codification to bring a change in our drafting methods. We need at least to reduce the verbal impedimenta; to be less fussy over detail, to be more general and concise; and to situate each rule where it belongs, in an orderly and logical development. On this level, the question is largely a matter of style and arrangement. A more profound change is also desirable: a determination to seek the principle, to express it, and to follow up with such detail, illuminating and not obscuring the principle, as the circumstances require."

So the ultimate object is to be codification (which we have been told is itself the continental style). Pending attainment of that, the immediate strategy is to be removal of verbal impedimenta. And the intermediate step is to draft in terms of principle. That does not indicate very clearly what is being recommended. But then it is fair to say that styles of writing and drafting are neither tangible nor easy to describe.

Professor Clarence Smith probes the difference between civil and common law drafting in some depth. He notes first that between the generality of the former and the particularity of the latter there is in practice a difference only of degree. The common lawyer, anxious not to be misunderstood nor to allow any escape, seeks to list all possible particulars. Inevitably he misses some. The civilian with his specially developed intellect penetrates the underlying essentials and formulates his provisions in terms of principle, thereby, catching even the unforeseen particular. The civilian's ideal is that his master's meaning shall be not only understood but easily understood. Bureaucratic concern with detail is not permitted to frustrate that ideal but is dealt with by breaking down any mass of detail into grammatically self-contained sentences, even eliminating sub-clauses, so far as possible. If there are qualifications, the general rule is first stated, then the qualifications each separately (in contrast to the common lawyer's composite grammatical sentence broken down into indented paragraphs, sub-paragraphs and sub-subparagraphs, without full stops). The common lawyer to some extent lightens his long sentences by separately defining his key words. But his prized definition section amazes the civilian to whose style (if pure) definitions are mostly unnecessary. It is against the civilian's principles to use any word in a specialised sense. Above all Clarence Smith sees the characteristics of civil law drafting as clarity, simplicity and orderliness. While wholly convinced of the superiority of civil law drafting, he somewhat curiously concludes that "the choice is perhaps finely balanced as between the two styles viewed ideally", though pointing out that the failure to live up to the ideals under the common law system has the far more serious tendency of rendering the legislation unintelligible.

To compound the difficulty of discerning precisely what civil law drafting consists of or requires, there is the admission by those who should know, that neither style excludes the other and that there are British statutes drafted in terms of principle and generality, and equally continental statutes, particularly German, that are every bit as detailed as common law statutes. Dale himself says that "the common idea that continental legislation is drafted only in terms of principle is demonstrably mistaken".

Professor Kahn-Freund told the Renton Committee that:

> "You find in the continental countries the type of detailed minute legislation, not terribly different from what you find in this country. If you take France and if you take what the French call public law, which means administrative law, you will not find the general principles in the statutes — you will find them in the case law of the Conseil d' Etat and the statutes are a chaotic mass of detail not all that different from what we have here. The same could be said of Germany".

The Renton Report quotes the following passage from a Foreign and Commonwealth Office memorandum on European secondary legislation:

> "Community Regulations often contain matters normally found in both primary and secondary legislation, with the result that in addition to the very general provisions already referred to there will frequently be minutely detailed provisions, sometimes of a purely administrative character, in the same instrument".

Dreidger examined the question of drafting in "principle" in some detail. He observed that "writing principles so as to cover what is wanted and what is not wanted is not easy", that some details cannot be brought into any general principle, and indeed that detail cannot be avoided. As the doyen of legislative drafters in the jurisdiction that has had the most experience of the interaction and competing claims of civil and common law drafting, Dreidger's conclusion is of particular significance. He said this:

> "The evidence I have seen persuades me that if a comparison were made between many civil law statutes with their subsidiary laws, and Canadian common law statutes plus their subsidiary laws, there would be found as much detail in the civil law as in the common law and as much principle in the common law as in the civil law. I do not believe it can be said that one is superior or inferior to the other. I have commendations and criticisms for both, and I believe that both can be improved and that each can profit from the other".

Clearly there are major difficulties in the adoption

of civil law drafting, quite apart from its style. The principle of judicial precedent, which is at the very heart of our common law system would in all probability have to be abandoned. It is difficult to see how statutes drafted in the civil law fashion could otherwise work. Case law would again assume its present importance with a corresponding diminuition of the authority of the looser text of statutes; and it is likely to prove far more prolix, unclear and generally frustrating. It will also be far less accessible to the layman.

In addition new rules of interpretation would be required. Although overlooked by his supporters, this was recognised by Dale who said that "any change in the style of statutory drafting is likely to require an overhaul of accepted rules of interpretation". Dreidger puts it more plainly in saying:

> "I have often heard it suggested that statutes in the common law jurisdictions should be written in continental civil law style. That won't work here. The Supreme Court of Canada interprets legislation by common law methods, and statutes must therefore be written to fit those methods. In any case, I doubt that Canadians generally would want to see the transfer of legislative power to the judiciary that would be required if the continental methods of interpretation were adopted".

Commonwealth governments and legislatures are accustomed and expect to see statutes with detail. They seek to lay down precisely what is permissible and what is not. It surely cannot be assumed that that will all change if only drafters would stop being unreasonable and draft in terms of principle and without detail. Nor can it be assumed that legislators would be prepared to abandon any legislative scope to the courts, particularly as they would have to do so without the sort of controls they exercise over delegated legislation.

Under the common law system, judges are concerned with justiciable issues. It is not part of their function to make law and a majority, it is said, would not want it otherwise. Under the civil law system that function is an inherent part of their role. The Swiss Civil Code, for instance, provides that in the absence of statutory provision or customary law, the judge should decide "in accordance with the rule he would establish as legislator". A warning of the grave implications of such a function, which are blithely disregarded by the proponents of civil law drafting, was given by Lord Hailsham L.C. in his address to the Statute Law Society in 1984:

> "If the subject matter of the statute is so lacking in clear legal propositions, that the burden of ascertaining the meaning of the legislature is thrown completely on to the judges, this can only bring the judges and hence the law into the field of political controversy with consequent grave implications for the law itself and for the Constitution. "

Stripped of their detail, statutes will obviously be easier to read, both for the lawyer and the layman. But they will also be found less helpful in supplying specific answers. The detail will have to be found somewhere. Sweeping it all into schedules and subordinate legislation is obviously not the answer. And if omitted altogether it will simply find its way into case law, which is virtually inaccessible to the layman and presents even the lawyer with problems. The courts themselves are not without their limitations in filling gaps and building up rules [14]. Nor has consideration been given to the capacity of the courts to cope with the potentially huge increase in the number of rulings they would have to give, and without which the legal profession would not be able to advise with confidence. It has been assumed that the profession will go along with any proposal for simplicity; but if the implications of civil law drafting are appreciated, it is on the contrary quite likely to be opposed.

Besides is the citizen not entitled to be able to ascertain his rights and liabilities directly from legislation without intermediate interpretation by the courts (or exposition by the bureaucrats, which is also a feature of the civil law system)? And should he be exposed to protracted and expensive litigation in doing so?

Common law drafting, obscure though it is claimed to be, does provide the answers. Even Dale says that "once one understands a United Kingdom Act, one can usually ascertain the answer to one's question". He adds:

> "But what time, toil and trouble may be needed to get to the bottom of the Act! The continental legislation, on the other hand — the copyright legislation at least — is easy to read; and so far as a foreign lawyer can judge, the answers to one's questions seem to be readily forthcoming."

Note that Dale is not prepared to say that the answers are forthcoming in civil law drafting. Is not the trouble a necessary price? And is it really that high when the matter and its not immediately apparent implications are considered? Those are the questions we should be asking.

As to the style itself of civil law drafting, common law drafters remain unimpressed. Its looseness was illustrated by the defects in a proposed European Commission directive on the law relating to commercial agents listed (by no means exhaustively) by the English Law Commission. The Law Commission concluded that the text was badly drafted, unclear, ambiguous and internally inconsistent.[15] Even that champion of simplicity of language and of judges being entrusted with power to supplement legislation, Lord Denning, had this to say of the European Convention for the Protection of Human Rights and Freedoms (which is drafted in the civil law style):

"The convention is drafted in a style very different from the way we are used to in legislation. It contains wide general statements of principle. They are apt to lead to much difficulty in application; because they give rise to much uncertainty. They are not the sort of thing we can easily digest".[16]

I will leave the last word to Lord Cross. In reviewing Bennion's Statute Law, specifically that part concerned with the merits and defects of civil law drafting, this is what he had to say:

"The idea of laws being couched in language intelligible to the ordinary man is undoubtedly attractive and 'civil law drafting' has distinguished advocates such as Sir William Dale and Professor Clarence Smith. The objection to it is, of course, that it leaves so much to the discretion of individual judges. Some English judges, notably Lord Denning, might welcome this, but others(I suspect the majority) would, whether from humility or timidity or a mixture of both, shrink from the burden. Further, and more importantly, I doubt very much whether the average Englishman for whose benefit the laws are intended would approve of such wide powers of interpretation being given to judges, let alone to administrators. I think that Sir Courtenay Ilbert was probably right when he said in 1901 'Englishmen prefer to be governed (if they must be governed) by fixed rules rather than by official discretion'. Mr. Bennion prefers common law to civil law drafting because of its 'much greater degree of certainty and democratic control'. For myself, I will only say that I doubt whether in a modern developed community the ideal of civil law drafting is really attainable. Certainly such draft directives and regulations of the Community as I have had to consider as a member of the Law Sub-committee of the House of Lords Select Committee on the European Communities fall short — sometimes very far short — of what I take to be the civil law ideal. They tend to be at once both detailed and imprecise".[17]

But what of the developing countries? Let it not be forgotten that Dale's study was commissioned by the Commonwealth Secretary General

"to examine means of improving and simplifying legislative drafting techniques, and methods of training draftsmen, and for that purpose to make a comparative study of the different legislative systems, particularly those followed in continental countries. The study had its origin in the evident need of developing countries for help in the task of drafting laws".[18]

There may be more scope for adaptation of the common law system to receive civil law drafting in developing countries, and in at least one, that is being explored and attempted[19]. Dale himself suggests that where the first need may be for a simple and direct legislative style, the Swedish model may prove especially attractive.[20] But further study is required and in any case the matter is beyond the scope of this paper. I would merely reiterate that drafting in terms of principle is not necessarily simpler than common law drafting. Erosion of the existing common law infrastructure is unlikely to be compensated by the dream, by no means confined to developing countries, of legislation so simple that it can be readily understood by all. However, since the content of legislation in those countries tends to be less complicated, there is obviously some greater scope for simplification.

Reverting to Dale's book, it had been assumed, and I think not without reason, that it advocated civil law drafting as the answer. But in "reviewing the reviewers"[21] of his book, Dale clarified his message. It is not that we should adopt the continental style of drafting, but that we should learn from it. And indeed in that great system with its variations, there must be some lessons for us. While they should not be lost, the attendant difficulties have also to be kept in mind. Adoption of civil law drafting in an attenuated form would not necessarily overcome them.

It should not be thought that drafting in terms of principle is something to which common law drafters have rooted or doctrinaire objections. On the contrary it is something that common law drafters have tried to do, subject to the overriding requirement of certainty of legal effect. It is one of the obvious ways of keeping drafts short, for which there is much pressure upon drafters. But as explained, the scope under existing circumstances is limited. Moreover, contrary to what is said to be the continental practice, drafting instructions in common law countries are not formulated in terms of principle, which can be difficult and time-consuming to discover and distill. Left in broad terms, principles have to be hedged with qualifications and exceptions. Narrowed down, they do not achieve simplicity. Nonetheless there is probably more scope for drafting in principle and in broader terms — scope that could be considerably enlarged if purposive interpretation by the courts were assured and governmental and parliamentary priorities on simplicity, detail and certainty of legal effect were re-ordered.

A major cause of the obscurity complained of, and which may not have received sufficient attention, is the high degree of compression achieved by drafters in some jurisdictions. In terms of craftsmanship and ingenuity, it is deserving of the highest praise. But sadly it is only other drafters who can really appreciate the heights attained. For others, the process of unravelling the tightly knotted threads produces only the frustration that accounts for much of the criticism mis-directed at drafters. Mis-directed because few drafters are spared the pressure for brevity and at the same time for detail. As Bennion explains —

"Where both brevity and detail are demanded the only course available to the draftsman is compression of language. If we add the parameters of certainty and legal effectiveness we tighten the screw further. As the Renton Committee remarked, 'a primary objective is certainty of legal effect, and the United Kingdom legislature tends to prize this objective exceptionally highly'. They added:

> 'For these reasons statutory phrases often irritate or baffle the reader, either because they state the obvious or because the 'punch-line' is delivered with such economy that it is intelligible only to those who have the time and inclination to inform themselves of the whole context on which it operates' ".

There are obvious steps that can be taken to remedy the matter. For a start governmental and parliamentary pressure (exacerbated by existing rules of interpretation) could be eased. Positive action by government is required, a matter to which I shall return. Then there is action that drafters themselves could take. Bennion proposes spatial breaking-up into grammatical clauses which he calls comminution. As an analytic technique applied to obscure and complex passages, it is not new, but, as Bennion himself points out, there are practical difficulties in adopting it in statutes . More to the point it is drafters who compress and it is they who can decompress. Some degree of repetition and of increased length might not be unacceptable to their political masters particularly if compensated by increased intelligibility.

I was encouraged recently by a distinguished first parliamentary counsel remarking that if maximum certainty rendered a provision nigh unintelligible he would be disposed to forego some degree of certainty in favour of intelligibility. Not that long ago this would have been heresy. The orthodox view as expressed by another parliamentary counsel has always been that:

> "The object is to secure that in the ultimate resort, the judge is driven to adopt the meaning which the draftsman wants him to adopt. If in so doing he can use plain language, so much the better. But this is easier said than done".

It is often observed that legislation should be readily intelligible not only to the lawyer, but also the layman. That may be the ideal. Regrettably it is also a pipe dream for all but the most simple of matters. Complicated matters are neither easily understood nor explained. And it is not only experts that have to deal with complicated matters. Average householders and housewives are confronted with but cannot be expected to master the intricacies of the law governing their tenancies any more than the workings of their television sets. The sooner such fanciful notions are abandoned the quicker we should be able to get on with the business of achieving such a measure of simplicity and intelligibility as is attainable.

In this context the Renton Committee mentions language as one of the complaints. Lord Denning told the Committee that the first principle should be simpler language and shorter sentences. Statutes enacted over the last century demonstrate the considerable progress that has been made in that direction. There are of course limitations. As the Renton Report says:

> "If any room is left for argument as to the meaning of an enactment which affects the liberty, the purse, or the comfort of individuals, that argument will be pursued by all available means. In this situation, Parliament seeks to leave as little as possible to inference, and to use words which are capable of one meaning only".

Moreover the language of the law in the view of not a few should have dignity and not be expressed in colloquial terms. The House of Commons, for instance, did not take kindly to the expression "the owner has tried his best to let the building" preferring the more orotund "used his best endeavours".

Shorter sentences too, present their own difficulties, as Sir John Fiennes, a former First Parliamentary Counsel, explained to the Renton Committee:

> "Shorter sentences are easier in themselves and it would probably help overall to have them shorter, but of course you are then faced with having to find the relationship between that sentence and another sentence two sentences away, which, if you have it all in one sentence, is really done for you by the draftsman".

In the event that Committee concluded that "there should be no general rule about drafting in short sentences...". Nonetheless given more time and a clear message from the legislators that that is what they want, drafters should be able to find some additional scope for simpler language and shorter sentences. Of interest in this regard is the announcement last year that the Law Reform Commission of the Australian State of Victoria would enquire into practices and procedures of Parliament, Government Departments and the Chief Parliamentary Counsel's Office which impede the adoption of plain English. It would also examine whether any changes to common law and statutory maxims, principles or rules of interpretation are needed to complement the adoption of a plain English drafting style . That a government has actually taken that sort of initiative is perhaps the most encouraging feature of the proposal. Of course the results remain to be seen.

Another development to be welcomed is examples of how it is suggested, simpler drafting could be achieved. The Statute Law Society held a drafting competition and published the result last year .

Critics of the existing style should be encouraged to follow suit. That should make them more aware of the difficulties. It should also, I hope, demonstrate to drafters and their political and civil service masters, that something can be done to achieve simplicity. Criticism in general terms and in terms of principle tends to be ineffective.

I have made repeated reference to the pressure of time. It is not generally appreciated how severe this can be. My experience has been that additional time coupled, if possible, with an opportunity for a fresh look at a draft after even a short period away from it, invariably enables a drafter to produce a better product. Better usually in achieving the current objective of legal certainty. But if simplicity is also made an objective there is no reason to believe that it, too, could not be better achieved.

What then are the conclusions to be drawn? Neither legislative drafting nor relevant circumstances are the same throughout the Commonwealth, and some generalisation and perhaps oversimplification is unavoidable. But I would suggest there are refinements within the existing common law style that do tend to simplify statutes and make them "user-friendly". Drafters can and in varying degrees do effect these. Some of the Renton recommendations fall within this category. Without modification of parliamentary requirements, rules of interpretation or matters of principle, simply by administrative action, governments are in a position to expand the process by providing drafters with the necessary remit and time.

On the other hand, it is likely to prove impossible to achieve simplification of a more fundamental sort involving drafting in principle and the omission of detail, without some modification of the requirements of governments and legislatures and the rules of interpretation. Moreover there are fundamental and far reaching considerations and implications involved. These are matters that have to be resolved by ministers and legislators, and not drafters. It is not without significance that the Renton Committee examined and noted the difference between the two systems. But although it could under its terms of reference have done so, it carefully refrained from recommending the adoption of civil law drafting. In all the circumstances the suggestion that drafters should on their own initiative introduce that style is little short of absurd. Those who are nonetheless of that view, should instead of berating drafters address their representations to their governments and legislatures; and they should bear in mind that a convincing case has yet to be made out.

Whatever the outcome I think the idea of a committee or authority to encourage simplicity in drafting, on a loose analogy with the Conseil d'Etat, has much to commend it. But I do not think it could have the coercive role sought by some of the critics of common law drafters. That role would necessitate powers and procedures that could delay and weaken legislation which no government would readily accept. On the other hand a consultative and advisory role should provide an emphasis upon and an opportunity of achieving a greater degree of simplicity. That should be a sufficient start. But I must confess i am not optimistic about the prospects.

Too much should not be expected in the way of simplification. Many of the improvements mentioned have long been effected in some jurisdictions. They have neither stilled the complaints nor simplified the statute book significantly. Legislation by its very nature and because of the demands it has to meet, does not lend itself to simplicity. But that is not to say it cannot be made simpler in some degree or that we should not try.

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ELECTRONIC AIDS IN LEGISLATIVE DRAFTING

Creation of Data Bases and other Publications

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INTRODUCTION

My portion of this presentation is to deal with the creation of data bases and how these data bases can assist in preparing legislation.

DATA BASES

The computer's biggest benefit is being able to create a data base of legislative materials for the purpose of accessing information from that data base. In Alberta we currently have all of our public statutes on a data base and we are in the process of completing a consolidation of our regulations which will then be set up as a separate data base.

Creating the data base

Creating the data base can be most time consuming if the information to be included in the data base is not already in "machine readable form". If it is not in machine readable form the data base can be created in a number of ways. For example, with respect to statutes, the statutes would have to be typed onto a word processing system. The ideal time to do this would be during a general "consolidation" or "revision".

Another way of creating a data base would be to use an "optical character reader" (OCR). OCRs can read printed material and transform the material into machine readable form. There is an error rate in this method that varies with the quality of the printed material, so the product must be proofread. However, it must be remembered that even if the information were to be typed, it too would have to be proofread.

If you had a printed consolidation of the statutes you could create your data base completely with an OCR.

If a printed consolidation has not yet been prepared then the latest consolidations could be put on the system by using the OCR and the subsequent amendments could be inserted by typing.

Searchable data bases

Once a data base is created it can be searched through the use of a special computer program. It must be noted that a very powerful computer is required in order to operate such a program and the cost of storing that information can be expensive. In Alberta our searchable data base is on a government computer system which can be accessed through our word processing terminals. In addition, there are national data base services that can provide access to searchable data bases.

In Alberta, we provide a copy of our data base, as created by our word processing system, to one of these national data base services (Q.L. Systems Ltd.) They take our information and convert it to information that can be understood by their computer. In Canada many of the jurisdictions have their data bases stored with Q. L. With the statutes on Q. L. not only is there the advantage of being able to search our own data base but we can search the data bases of other jurisdictions.

As mentioned above the costs of storing this information can be costly, however, the technology is changing very rapidly. In fact, compact discs, which is the new technology in playing musical recordings are being used to store immense amounts of information at very inexpensive prices.

With a searchable data base the benefits of computerization become even more apparent. The whole of your legislative material is at your finger tips. The searchable data base can help you

a) search for precedents

b) check for cross references

c) search for related subject matter

d) do legal research.

When we amend a provision that replaces another, we, as a matter of course during the drafting process, do a search of the data base to locate any references to the provision that is to be replaced. We can then make the appropriate consequential amendments. This capability is absolutely necessary in a looseleaf or other continuing consolidation service.

Recently while preparing amendments relating to the Canadian Charter of Rights and Freedoms we used the computer to identify certain key words that would help us to determine if our legislation conflicted with the Charter. For example, with respect to sex discrimination we searched terms like, "mother", "father", "wife", "husband", "male", "female", "man", "woman", etc. We then reviewed each word in its context to determine if there was a conflict. The searches can be viewed on the screen or can be printed either

(a) in full text with the searched words underlined, or

(b) containing only the appropriate citation.

Of course one must realize that the computer cannot identify concepts or subject matter. It can only identify individual words. For example, when trying to find information on "confidentiality", searching the word "confidential" is not sufficient. You may also have to search words like "disclose" and "disclosure".

CREATION OF OTHER PUBLICATIONS

The data base of legislative materials also assists us in the production of certain publications. Once a draft has been finalized, much of the same information can be used for different purposes without having to retype all the information. In most cases it is just a matter of changes in format. The text of a finalized draft can be used to produce the printed Bill, the individual chapter after enactment of the Bill, updating the data base, creating updates for the looseleaf system, office consolidations and the annual volume.

Following is a brief review of the publications prepared by our Office showing how "electronics" assist in preparing them:

BILLS

The first draft of a Bill is entered from the draftsman's handwritten draft and proofread. For subsequent drafts, only changes need to be keyed and proofread.

Bills are transmitted by communications line to the typesetter. Page proofs are read orally against the draftsman's final working draft. Corrections marked on the page proofs are kept on the Bill file for entering on the system prior to the transmission of the Chapter for typesetting.

CHAPTERS

Bills that receive Royal Assent are published as individual pamphlet Acts called "Chapters".

Official copies of the Bills assented to are photocopied in Legislative Counsel Office and returned immediately to the Parliamentary Counsel. The photocopies are used as authority documents for the Chapters.

Bills on the system are converted to Chapters by word-processing operators, who make minor formatting changes, insert the chapter number and, if required, additional marginal notes, and enter all changes marked on the official copy: assent date, house amendments and renumbering of provisions and internal cross-references. Explanatory notes are deleted from amendment Acts.

The Chapters are transmitted to the typesetter by communications line. Page proofs are read against the photocopies of the official copies. All corrections marked on the page proofs are passed on to a word-processing operator for entry on the system.

The publishing of Chapters is completed within 3 weeks of the end of the sitting. It is essential that Chapters be made available as soon as possible, as many of the Acts are in force from the beginning of the day on which they receive Royal Assent. This is particularly important in the case of Bills to which house amendments have been made, since the law as passed is not available in any other published form. (Some jurisdictions re-publish Bills at the 3rd Reading stage).

The artwork generated by the typesetter for individual Chapters is stored by the printer and is used in the printing of the annual statute volume.

STATUTE DATA BASE

The statute data base contains public Acts, as amended from time to time, that are currently in force. It plays a central role in the production of draft documents, publications and search data bases, as the Acts stored in it can be printed in-house on a laser printer, transmitted by communications line for typesetting and to create an in-house search data base, and sent on magnetic tape to a commercial supplier of search data bases.

New Acts that are in force are moved into the statute data base after all corrections made on the Chapter page proofs have been entered

on the system. The updating of the statute data base to incorporate amendment Acts is effected in the course of producing printed updating releases for the looseleaf Statutes of Alberta.

Acts that are subject to proclamation or that commence on a specified future date are stored on the system but are not moved into the statute data base until they come into force.

LOOSELEAF STATUTES

The looseleaf Statutes of Alberta is a consolidation of the public Acts in force as of the publication cut-off date of the most recent updating release. This date appears on the title page of each binder for the user's reference. The original looseleaf set was published at the same time as the Revised Statutes of Alberta 1980, and contained all the revised Acts except those awaiting proclamation as of December 31, 1980. Looseleaf subscribers receive updating releases at least twice a year.

The production of looseleaf updating releases is intertwined with the maintenance of the statute data base. Cut and pasted consolidations of amended Acts serve as the authority documents for entering amendments and citations into the data base. The text of the looseleaf release is then duplicated from the data base and transmitted by communications line for typesetting. Page proofs from the typesetter are proofread against the cut and pasted consolidations, and in this way the proofreaders can check the accuracy of the data base and of the typeset document at the same time. All corrections marked on the page proofs are also entered into the data base.

A looseleaf release usually contains many pages that have not changed but are included either because changes have been made to the pages on their reverse sides, or in order to simplify filing of the release. If amendments are scattered throughout an Act, it is often simplest to reissue the entire Act. It is not necessary to retypeset every page. Pages that have not changed can be reprinted from artwork produced for previous releases or for the 1980 Revision. The

printer maintains files of artwork for all the Acts and, following a "dummy" of photocopied pages and proofs, prints from a combination of old and new artwork. After each release is printed, the artwork for that release must be incorporated into the files.

New Acts being added to the looseleaf set can be reprinted from artwork used in the production of Chapters or annual volumes. Only the pages that contain consequential amendments require pasting up, typesetting and proofreading; the amending sections are replaced by a note to the effect that the consequential amendments have been incorporated in the Acts that they amend.

When producing updating pages to be interfiled with the existing pages of a looseleaf system it is essential to ensure that the new pages begin and end at exactly the right place, so that the continuity of the Act is maintained.

OFFICE CONSOLIDATIONS

Individual Acts into which all effective amendments have been incorporated are published in pamphlet form as "office consolidations".

Acts can be transmitted for typesetting as office consolidations once the proofreading of the latest looseleaf updating release is finished and any corrections have been entered into the data base. The office consolidations are scanned to ensure that the cover, preliminary material, marginal notes, running heads and text format are all right, but proofreading is not required.

In the case of Acts to which extensive amendments have been made, it is convenient to retypeset the entire Act for the looseleaf release, and have the typesetter produce artwork for the printing of the office consolidation at the same time.

SEARCH DATA BASES

Once the statute data base is up to date, it is transmitted by communications line to create an in-house search data base. It is also provided, by means of magnetic tape, to Q.L. Systems Limited, a commercial supplier of data bases that provides search services to subscribers.

ANNUAL VOLUMES

All the public and private Acts enacted in a year are included in an annual statute volume, which is published after the final sitting in that year. The annual volume also contains cumulative tables of public and private Acts and a table relating to proclamations of Acts.

The artwork for individual Chapters is used for the printing of the annual volume; only the preliminary material and the tables require typesetting and proofreading.

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COMMONWEALTH LAW CONFERENCE - JAMAICA

SEPTEMBER 1986

COMMONWEALTH ASSOCIATION OF LEGISLATIVE COUNSEL

Consolidation of Statutes in Small Commonwealth States

by

Professor Keith Patchett

The Commonwealth embraces a wide variety of states - from those which are large, economically advanced and comparatively wealthy with sophisticated legal systems, to the very small, less developed countries with minuscule resources and little skilled manpower, legal or otherwise. All have found it necessary to make increasing use of written law to regulate their increasingly complex affairs. Almost everywhere one finds similar expectations about the growing body of statute law, which derive, in part I would suggest, from shared values which we encapsulate as the Rule of Law. In consequence, the state is looked to to ensure that there exists a collation of the written law in force which is -

(a) comprehensive and authoritative;

(b) accurate;

(c) as nearly up-to-date as possible;

(d) readily available and accessible;

(e) in a readable format and logically ordered;

(f) adequately indexed;

(g) in the official languages of the legal system.

Fulfilment of these objectives, as we know, presents major technical problems even for the advanced legal systems. What I would like to do in this session is to consider for a few minutes the circumstances of the small states in the Commonwealth - into which category we can also add the still numerous dependencies of certain Commonwealth members. Small states now constitute a significant part of the Commonwealth membership. As is the case for any autonomous legal system, they, though small, still require a body of written law that is concerned with the whole gamut of human activities.

Let me illustrate my account by making reference to a particular example of a micro-legal system. Imagine, if you will, in an economic sea zone of 800,000 square kilometres, an independent country of 9,000 persons, living in 9 island atolls, together totalling less than 25 square kilometres of land, linked by one inter-island ship. Its GNP is around US$6m, made up, in the main, from grants-in-aid, remittances from abroad and sales of postage stamps. There is no local newspaper or television. Imagine its legal system - with one expatriate Judge, who visits twice a year; an expatriate Senior Magistrate who is resident in another country, four hours flying time away by a three-times-a-week air service; one full-time but unqualified magistrate in the main atoll and lay magistrates in the island courts. There is but one government legal officer, the Attorney-General, and a People's Lawyer, both expatriates on two-and-a-half year technical assistance contracts. There are, as yet, no lawyers in the private sector. Parliament, with 12 members, is able to meet in sessions

of some 3 weeks, perhaps three times a year. The statute book comprises just over 100 statutes: the delegated legislation is proportionally no more substantial - but in the Government headquarters there *is* a new word-processor!

You may be inclined to dismiss this as a rather impoverished island paradise. I would suggest, however, that the problems facing this country in relation to the publication of its laws are but acute examples of those commonly found in almost all small jurisdictions. Those of us who work in developed countries may, by considering these, recognise how much we take for granted in this matter.

This jurisdiction, as so many others which were United Kingdom dependencies, has become accustomed to the practice of publishing a revised collation of laws at intervals of some ten years or so. The most recent full revision, for the laws to 1978, was in the commonly used format of a loose-leaf collection of the locally enacted statutes and subordinate legislation in accordance with the standards prescribed by a Law Revision statute. This authorises the future issue of additional pages comprising the similarly revised contents of subsequent legislation for insertion at the appropriate places in the three volumes of the *Laws*. One such updating, to 1982, has taken place. There has been no printing and binding of the annual volumes of legislation essential to provide the historical record. More seriously, there has in recent years been no systematic printing of the individual statutes enacted by Parliament nor of delegated legislation. These can only be found, in a number of cases, in a mimeographed form which carries the handwritten assent and authentications. When I asked for a set, photocopies of these originals had to be made. It seemed probable that many to whom such legislation applied would be unaware of the legislation, quite apart from having no access to its text.

For the first time, an index of the titles of legislation currently in force has this year been produced - one of the first applications of the new word-processor. A lesson learned is that the longer the interval since the last revision of the laws the more important is the availability of an up-to-date index. Those who have had opportunity to use the indices prepared by Sir Clifford Hammett, under the West Indian Legislation Indexing Project of the University of the West Indies, will pay testimony to the contribution that these have made in the small states of this Region.

There are, of course, no alternative sources of written laws to these. There is no newspaper and publication of the *Official Gazette* is handicapped by the absence of a Government Printery. There are no private sector entrepreneurs publishing their own sets of annotated statutes; there are no secondary sources in the form of practitioners' works or text books to draw attention to the existence of legislation. One can also say that there is very little by way even of a public memory of legal matter, since there are no legal practitioners and the principal legal offic-

ials and several senior civil servants, holding their offices under shortish contracts supported by technical assistance programmes, change frequently. In these circumstances the statute book itself has to be the major provider of continuity to which each new incumbent expects to be able to turn to determine the extent of the legal powers and the legal constraints applicable to his activities. Its shortcomings are quickly reflected in the work of those whose responsibilities call for implementation of, or compliance with, the current law.

A case can be made, I would suggest, for treating *Revised Laws* as having a higher priority to the smooth running of the legal system of a very small jurisdiction than would be the case in a larger, more developed, state. Deficiencies in the production of *Revised Laws* are, therefore, potentially more damaging. Unhappily, there are numerous impediments in small states to the preparation of an adequate set of laws, even where there is no great body of locally made legislation.

Thus, for example, these collections are never comprehensive. Although locally made law may be fully covered, there appears to be no case in which the body of inherited imperial legislation has been adequately incorporated in the *Revised Edition*. Some jurisdictions have endeavoured to identify relevant United Kingdom statutes, but such lists are usually not authoritative. Some such legislation has been reprinted where it appears to have pressing application. As yet, no state (large or small) in the Commonwealth has fully patriated the imperial statutes that became part of its law prior to independence - by patriation I mean enable itself to publish such statutes with a content and in a format which is consistent with the locally enacted legislation. New Zealand and some Australian States (with respect to laws within their jurisdiction) are, however, well advanced with this kind of exercise.

For some small states, this is no trivial issue. In my exemplar state, the received law includes not only legislation of the United Kingdom of paramount force which has been extended by the United Kingdom up to 1978 but also all "Acts of general application" in force in England on 1 January 1961 so far as local circumstances permit, but subject to contrary local enactment. Many of the locally made statutes are concerned with indigenous institutions and special local conditions and do not deal with many aspects of basic law. That law is governed, to some undefined extent, by inherited law. The revised *Laws* give little guidance: there are no reported decisions of the local courts on the reception of imperial law, particularly since independence. One cannot ascertain, from the printed laws for example, whether a company can be incorporated under inherited Companies Acts, there being no local legislation; whether in a largely subsistence economy, bankruptcy legislation has any place; to what extent the Sale of Goods Act 1893 or the Bills of Exchange Act 1882 suit local circumstances; which of the Merchant Shipping Acts apply and whether they constitute a workable system of shipping regulation. Will some civil servant be penalised under

the Official Secrets Acts for divulging confidential information in a society so small and so close that there can be few secrets?

I should perhaps note here that my current assignment with the Government of Tuvalu is to help bring an end to their dependence upon received imperial legislation and to prepare the way for all those statutes which it is appropriate to continue to be published as Tuvalu legislation and for the rest of the received statutes to be finally repealed. This task is made no easier by the intractability of many United Kingdom Acts, the past English practice of non-textual amendments and the failure at times of Parliament and the draftsman to take proper account of the imperial dimension even when the statute in question was intended to extend to dependencies.

Unhappily the results of this kind of exercise can have only limited application to other jurisdictions where different reception and independence dates apply, different local circumstances obtain and different local statutes are in force. (See "Patriation of Inherited Imperial Law" in *1986 Meeting of Commonwealth Law Ministers: Memoranda* CLMM(86)20). I can, however, commend to other Governments the determination of the Government of Tuvalu to make the statute book entirely their own.

What is clear is that patriation will give rise to a very substantial number of additional statutes. This will have serious repercussions. There is little doubt that a new Revision will be needed to incorporate these statutes with the existing local legislation. The original ordering, for example, could not accommodate them.

Here must lie one's major concern. For the costs of the traditional law revision process have come to be formidable. The editorial, compositing and publishing costs may not be so different from those for a much larger and less economically constrained jurisdiction. But a small state can expect to recoup very little of the cost by sales. How can a country with a GNP of US$6m contemplate funding from its own resources an undertaking which may cost US$400,000 ? But which aid agency will support a project of this order, especially if they foresee the need for a similar project some ten years hence and expenditure on regular updating in the interim ?

What is equally clear is that preparation and publication will invariably be beyond local technical resources. It will be exceptional if there is locally available the professional manpower with the skills and experience necessary. Few jurisdictions will be able to provide the calibre of required support staff, which is always in short supply. The local Government Printer is unlikely to be able to undertake the volume of printing to the standard required. In many instances, this will be as true for the periodic updates as for the Revision itself.

What is to be done ? I can see no immediate way in which at least the next round of law revision can be undertaken in most small states except with technical assistance and financial aid. In that context the vital importance of the availability of a comprehensive statement of the written law for the stability and well-being of these states and for their development needs constant emphasis. Aid-funding for these infrastructural requirements, because they appear to involve recurring commitments, is often by-passed in favour of assistance for less important schemes largely, it seems, because the latter can be presented as one-off projects. Whilst lawyers, particularly those in the public sector, may be well aware of the crucial role of a complete and up-to-date statute book, Governments may not share that view to the extent that it will influence their aid priorities. There is no doubt more that can be done to encourage a recognition of this matter as having high priority.

I have suggested elsewhere ("Assistance to small states to meet their legal needs" in *1983 Meeting of Commonwealth Law Ministers: Memoranda* LMM(83)9) the potential of Regional Legal Units for assisting small states in carrying out legal tasks which are beyond their individual manpower resources. Could not such a service be utilised in this matter ? May not economies be made and the duplication of effort be reduced by such a concentration of resources and by adopting a common revision system using appropriate technology ? If not feasible with respect to a full Revision, might not this approach be possible for the regular updating of the statute books of several states ?

A final thought - is this not a proper area for harnessing appropriate electronic technology, especially if a system could be developed to meet the needs of several jurisdictions centralised upon a regional resource unit ? I do not wish to cover ground examined in our earlier session (see also *Report of Meeting of Law Officers of Small Commonwealth Jurisdictions*, Vanuatu, 1985, p.83). Let me be content with one or two points.

There is, in my view, a strong case for mounting a pilot law revision project, a prime purpose of which would be to determine the most appropriate technology. It has been suggested that very substantial savings can be made in the compositing and printing of legislation under new systems. It would be immensely valuable to determine:

(a) the compatibility of equipment to be used at different stages and in different jurisdictions served by a regional unit;

(b) the possibilities of interfacing with appropriate word-processing equipment to be used in the drafting services;

(c) suitability of systems for use in small, particularly tropical, states;

(d) the best software to ensure a common format in the final product;

(e) the level of skills required in the various processes;

(f) the feasiblity of preparing and maintaining a data base comprising the *Revised Laws* and subsequent legislation and of data search and retrieval systems that would be most suited for the day-to-day work of the public legal sector in a small state;

(g) accurate costings.

I believe that recent technological innovations could lead to a possible solution to some of the law revision problems of small states by greatly reducing the need for full revisions and by bringing them within more acceptable financial limits. I am concerned, however, that states might seek to expend valuable resources and aid assistance in pursuing different and separate routes, some to find themselves handicapped for many years by a less than satisfactory choice of systems. It would be disastrous if a small state were committed to a process that in use proved to be inadequate or unsuited to its needs. One thing we do know about very small states - there is almost no margin for error.

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Electronic Aids in Legislative Drafting and Publication

Electronic Typing and Typesetting

To introduce this topic - Electronic Aids in Legislative Drafting - it will be useful to summarize what the drafting process is without electronic aids.

All laws begin as ideas which are expressed in words and put down on paper. The ideas and words are revised and settled and multiple copies of the paper are made for the enacting body. After enactment many more copies are made for the public.

Without electronic aids, the common method of "processing words" is to use typewriters to put the words on paper and, for extensive editing, to retype or use scissors and tape to prepare final drafts. Multiple copies of these final drafts are prepared using a mimeograph, photocopier or offset press.

In many jurisdictions, a computer connected to a keyboard, video display screen and an automatic printer are now used instead of a typewriter.

Following is a list of some of the most dramatic ways in which the use of these electronic aids, commonly called "word processors", affects the drafting and publication process.

- Changes are made easily, from minor typographical corrections to major re-arrangement of provisions.
- More drafts can be prepared with fewer typists.
- This facility to make changes removes the reluctance to make desirable alterations, thus improving the clarity of the final draft. A tenfold increase in the number of drafts is not uncommon.

- Drafts are prepared more quickly. It is practicable to have new drafts prepared throughout the course of a drafting meeting, enabling thoughts to be tested and settled while still fresh in everyone's minds.

- Because text is retained in the computer memory or stored on magnetic disks or tape, publication of Acts in a variety of forms is facilitated. *Bills*, individual *Acts*, the bound Acts of a *Session*, the looseleaf *consolidation* of Acts and even a searchable *database* of Acts can all be prepared directly from the computer memory without any need to retype or typeset the words.

- The equipment can also result in similar advantages in the preparation of office correspondence, reports and management information such as file records and index updating.

- The most versatile electronic aids, through the use of laser printers, can print original forms, letterhead, orders in council, etc. completed and ready for use, mailing or enactment, plus as many high quality duplicate originals as are desired, in only seconds.

Desktop Publishing

So far, all I have said applies to the magnetic capture and reuse of typed characters - "word processing". Special mention of "typeset" characters is appropriate. Typewriters, and many computer driven printers, print only one size and style of print, or *font*, at a time. The latest generation of electronic laser printers allow for the use of many fonts, sizes and even graphic illustrations on the same document. The industry calls this "desktop publishing". Some people would view this capability as an expensive frill.

However, the essential purpose of a document is to communicate information. Typesetting a document is not done merely for aesthetic purposes, although the prominence of Acts of the Legislature as public declarations of government policy does justify considerable attention being paid to the appearance of the document. The practical purpose of typesetting statutory documents is to enhance its readability and clarity, to facilitate concentration on important text, to assist the reader to scan the document to find material of relevance to him, and thereby to reduce the time needed to grasp essential information without error. In a few moments I will show you contrasting examples of "typed" and "typeset" text.

The Future - nearer than you think!

- So far, what I have been describing assumes that you have been submitting your drafts in handwritten or dictated form to your secretary for typing on the keyboard. The following features assume that you are using the computer yourself.

- Within the coming year, practical and economical systems will enable the draftsman to speak into a microphone and have his words typed on screen automatically. The ability to see a draft and revise it as quickly as you think and speak will result in a major productivity gain for legislative counsel. Incidentally, once you are operating your own device, you have the opportunity to exchange messages, "mail", electronically without bothering your secretary and incurring time delays.

Typing aids - "writing" aids

Most technological improvements until very recently have been in the "keystroke capture" or typing enhancement area. With more powerful and economical computers, sophisticated programs are becoming available that focus on "writing enhancement". These programs assist in the creative thinking process.

- *Outline creator or idea processor* - helps you create an outline in point form with major and minor levels, along with bits of text. For an oral argument or speech, the outline may be sufficient on its own, or it could be used as a starting point for a major document. The major advantage of this program over the usual pen and paper method is that it is always displayed in its most recently modified format. Paper outlines soon get cluttered with strikeovers, renumbering, arrows - the usual editing scrawls.

- *Computer Thesaurus* - this program offers, on screen, an immediate choice of alternative words.

- *Writing style analyser* - this clever program scans a document and gives you advice on how to improve it. It finds dozens of types of errors: grammatical, punctuation, jargon, ambiguous or overused terms, weak forms, passive verbs, long sentences and many others.

Warning note

One side effect of these modern aids to drafting is that your words appear in print far faster than before. The temptation is great to share the draft with your client before adequate reflection. Client speed expectations rise even faster than the technological speed gains. Legislative counsel should guard against being rushed ahead on a project that deserves more consideration before being finalized.

Finally, let me show you just a few examples of some of the things that can be achieved on modern equipment with a laser printer.

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