WELLINGTON DISTRICT LAW SOCIETY SEMINAR
PARLIAMENT BUILDINGS, WELLINGTON, 3 APRIL 2006

———

LEGISLATION ADVISORY COMMITTEE

———

DRAFTING THE LAW—A BORING JOB?
THE ROLE OF THE PARLIAMENTARY COUNSEL OFFICE

George Tanner QC[1]

Introduction

1 The notice about this seminar that appeared in the March edition of *Council Brief* contained the following statement:

> A seminar will be presented by members of the Legislation Advisory Committee including **Sir Geoffrey Palmer**, Chairperson and President of the Law Commission, and **Professor John Burrows**, Chief Parliamentary Counsel, on the use of the Legislation Advisory Committee guidelines and the legislative process.

I sent an email to Professor Burrows informing him that he would, in his new role, be speaking on these topics and that I had been let off the hook. He replied saying he was pleased to have a new job, but surprised no one had told him about it.

2 Woodrow Wilson compared the legislative process with an elaborate dance: "[o]nce begin the dance of legislation, and you must struggle through its mazes as best you

[1] Chief Parliamentary Counsel, Parliamentary Counsel Office, Wellington.

can to its breathless end, — if end there be"[2]. Writing in 1987, Sir Geoffrey Palmer elaborated on that. He has said, "Each Bill is a different dance and each dance has many different steps. The dance requires perseverance, stamina and a large degree of esoteric knowledge" [3]. One might go further still and say it requires a sense of humour and a thick skin. Sir Geoffrey also observed that law-making may be simpler in New Zealand with its unicameral legislature than in some countries, but it nevertheless consists of a complex interaction of each stage between a variety of institutions and personalities. Sir Geoffrey wrote about the legislative environment before MMP. It is a different scene today.

3 What can be said is that while perseverance and stamina cannot be taught, the esoteric knowledge so essential to effective participation has to a large extent been captured in the *Legislation Advisory Committee Guidelines* and other publications. Those other publications include the *Cabinet Manual* and the *Cabinet Step by Step Guide*, the recently revised *Guide to Working with the Parliamentary Counsel Office*, the long awaited and comprehensive revision of David McGee QC's authoritative text on parliamentary procedure, Parliament's standing orders, and various publications of the Office of the Clerk. Anyone who is intent on engaging in some part of the legislative process should become familiar with these publications.

Role of the Parliamentary Counsel Office

4 The PCO is only one institution involved in the legislative process. The PCO is described in its establishing statute as an office of Parliament. The Hansard debate on the introduction of the Bill that became the Statutes Drafting and Compilation Act 1920 shows that Sir Francis Bell intended that it should be independent from the public service. It is not part of the public service under the State Sector Act 1988, but is subject to that Act for certain purposes, including the provisions relating to minimum standards of integrity and conduct.[4] It is under the control of the Attorney-

---

[2]W Wilson, *Congressional Government: A Study in American Politics* (1885), 15th ed, Houghton Mifflin C, Boston 297.

[3]Sir Geoffrey Palmer, *'The New Zealand Legislative Machine'*, *Victoria University of Wellington Law Review* (1987), Vol 17, p 285.

[4]Sections 57 to 57C.

General who is its vote Minister for the purposes of the Public Finance Act 1989. It missed out on being classified in the Crown Entities Act 2004. One can only speculate how that happened. In reality it is more the creature of the executive, but it is intimately connected with parliamentary processes. It occupies a somewhat ambiguous position. It is both at the heart of government but is also engaged in parliamentary law-making. This is no different, however, from other jurisdictions, notably Australia and the United Kingdom, and it works.

5 The PCO drafts all government Bills and statutory regulations published in the SR series. It can expect to draft between 100—150 Acts a year and between 400—500 regulations. It also drafts certain other kinds of legislative instrument, for example, orders appointing Commissions of Inquiry under the Commissions of Inquiry Act 1908, Royal Commissions, and references under section 406 Crimes Act 1961. It also advises the promoters of and drafts local Bills and private Bills and, if directed to do so by the Attorney-General, drafts members Bills. The Attorney-General will usually give a direction to draft a member's Bill if it appears that there will be sufficient support for the measure for it to pass, for example, the Prostitution Reform Act 2003. Private Bills deal with a wide range of matters including the merger of banks, educational institutions, church affairs, and private trusts. Local Bills and private Bills bring the PCO and legal practitioners into contact with each other.

6 The PCO has a total staff of 80, which includes 28 full-time equivalent lawyers engaged in legislative drafting who work in 3 teams each of which is responsible for drafting the legislation administered by a particular group of departments or agencies. The PCO also has the statutory function under the Acts and Regulations Publication Act 1989 of publishing legislation, and publishes Bills, Acts, regulations, reprints of Acts and regulations (principal Acts and regulations with their amendments incorporated), the annual volumes of statutes and regulations (13 for 2004 / 9 for 2005), and makes up-to-date legislation available free via the Internet through a commercial arrangement with a legal publisher. The PCO is one of the largest paper-based publishers in the country.

7 A drafter is really counsel to the Government and Parliament in their legislative capacities. Drafting legislation is a specialist kind of legal work. To many it is

perceived as purely mechanical and technical. My job was recently described by a firm of management consultants engaged to undertake an evaluation of it as "mechanical process management". Some years ago I heard a conversation between our daughter and the daughter of a former President of the Wellington District Law Society and Queen's Counsel. They were discussing their fathers' jobs in our kitchen. The friend described to our daughter how her father appeared in important court cases that involved lots of money and in things called arbitrations. She said her mum and dad were in London because her dad had a case there. She said to Helen, "you're father's a lawyer too isn't he? What sort of a lawyer is he?" The reply was "he's a boring lawyer". At a recent function, a Judge said to me "I don't know how anyone could do your job, it must be so boring". There are times when one wishes it were.

8 At the start of each year the government determines a legislation programme for the year. This involves seeking bids from Ministers and assigning priorities to them. The work of the PCO and that of departments is determined by what is on that programme. One hears complaints about the volume of legislation enacted in New Zealand year in and year out. I blame Hon Jim McClay for this. He was an astute and able lawyer. He was an effective Minister of Justice and Attorney-General. He chaired the Cabinet Legislation Committee. He took 2 days over determining the legislation programme. His practice was to require Ministers, and that included the Prime Minister, and their departmental advisers to appear before his committee and explain what they wanted and why. He always asked a simple question: "what serious consequences would there be if this Bill did not pass?" The question seldom got an answer. Jim McClay's failure lay in the fact that he didn't tell his successor in those offices, Rt Hon Sir Geoffrey Palmer, to ask the same question. The result was an explosion of legislation (State-owned Enterprises Act, Resource Management Act, State Sector Act, Companies Act, Commerce Act, Children, Young Persons, and their Families Act, and many others) and that avalanche has continued ever since. Because Sir Geoffrey didn't know to ask the question, he didn't think to tell his eminent successors in office either.

9 Legislation programmes are dynamic. Bills are frequently added in response to domestic and international circumstances. The process for determining the programme is itself contestable and the programme reflects a mix of legal, fiscal, and political considerations. Some Bills are required to implement significant political

policies (employment relations, accident compensation, property relationships, recognition of civil unions, health sector and local government reform) while others are what is sometimes termed "departmental legislation".

10 Departmental policy and legal advisers have the responsibility for providing instructions for the drafting of legislation to the PCO. If you are involved in this I recommend that you read the publication *Guide to Working with the Parliamentary Counsel Office*. It sets out succinctly what it is the PCO expects of departments and what departments can expect of the PCO. A good piece of legislation involves a close working together between instructor and drafter where each understands and respects the other's role.

11 The role of the instructor is to—

- take responsibility for policy matters
- act as the primary point of contact for the drafter
- answer the drafter's questions
- critically analyse and provide comprehensive and timely feedback on drafts
- take a leading role in advising select committees
- be a project manager.

12 The role of the drafter is to—

- produce a draft of a Bill or regulation that gives legal effect to the Government's policy
- ensure the draft is consistent with legal principle, the New Zealand Bill of Rights Act 1990 and other key statutes, international law, the Treaty of Waitangi, and the *Legislation Advisory Committee Guidelines*
- ensure the draft is properly structured and expressed as clearly and simply as possible
- ensure the legislation is consistent with the rest of the statute book and applicable common law
- identify and help solve problems with implementing the policy
- advise on legal issues associated with implementing the policy
- advise on procedural issues both before introduction and during the passage of a Bill through Parliament

- take final responsibility for the way in which the legislation is expressed.

13 All this requires legislative drafters to consider a range of issues. Examples include—

- the relationship between primary and delegated legislation, that is, what to put in the Act and what to put in regulations, notices, orders, and other instruments— often a most difficult issue
- enforcement regimes and supporting powers, including powers of entry, search, and seizure
- constituting bodies and defining their functions and powers
- mechanisms for appeal and review of administrative decision making
- transitional and savings arrangements.

14 Legislation covers a broad canvas of subjects. Bills can be large and complex sweeping reforms, for example, individual and corporate insolvency, occupational regulation (Lawyers and Conveyancers Act 2006/health sector/veterinarians), state sector, penal institutions, criminal procedure, evidence, local government). Bills can also be small and technical.

15 The PCO estimates that about 60% of its time is spent in drafting Bills and about 40% in drafting regulations. Regulations also cover a broad range of topics from prescribing forms and fees to complex prescriptive rules about financial advertising and tobacco advertising, and notices under the Securities and Takeovers Acts that impact on commercial transactions. The drafter must ensure that the instrument he or she drafts—

- is authorised by the empowering statute
- satisfies any statutory pre-conditions for making it
- is Bill of Rights compatible in line with the principles in *Drew v Attorney-General*[5]

[5][2002] 1 NZLR 58. In *Drew* the Court of Appeal declared invalid a regulation denying legal representation to an inmate charged with a disciplinary offence on the grounds that the regulation-making power in the Penal Institutions Act 1954 did not authorise the making of a regulation that was inconsistent with the Bill of Rights. The decision rests on the vires of the regulation, rather than direct incompatibility of the regulation with the Bill of Rights.

- is not likely to be subject to complaint to the Regulations Review Committee under the Standing Orders or subject to disallowance under the Regulations (Disallowance) Act 1989.

16 No government welcomes a decision of a court that a particular regulation or instrument is ultra vires. Nor does it welcome having to appear before the Regulations Review Committee to defend regulations against a charge of not complying with the Standing Orders. Parliamentary Counsel give a written certification for each regulation that it is in order to be made. Drafters exercise the same degree of skill and care in drafting subordinate legislation as they do in drafting Acts of Parliament. There can be significant legal, fiscal, and practical risks associated with an invalid legislative instrument.

17 I have referred to the fact that the drafting of legislation is undertaken in 3 teams. This reflects that fact that, like other lawyers, drafters specialise. It is difficult and possibly dangerous to draft legislation in the transport sector without a good grasp of the statutes affecting land transport, civil aviation, and maritime transport and something of the dynamics operating in those sectors. A good knowledge of company, securities, insolvency, insurance, and takeover law is required by a counsel who drafts legislation in any of those areas. It is said by some that legislative drafting is a skill that can be applied to the drafting of legislation on any subject, and there is a parallel debate among judges. I don't agree. On the other hand, a drafter cannot be too much of a specialist. A broad knowledge of other areas is essential. Securities and commerce legislation relies on criminal and civil sanctions for enforcement, so the drafter has to be familiar with relevant criminal law principles, civil liability, as well as criminal and civil procedure.

18 Legislation is not drafted and enacted in a vacuum. Drafters have to know how legislation is interpreted and how the courts at any particular time approach the interpretative task. Justice Michael Kirby recently described a shift in approach by the High Court of Australia in the following terms:

> [62] ... the criticism [by other members of the High Court of the New South Wales Court of Appeal] represents an attempt to return this area of legal discourse to the sophistry that suggested that contested questions of causation (including in cases such as the present) can be resolved by the

> application of a legal formula or by an appeal to a "legal principle". In Australian law, we have progressed beyond such a masquerade to a more candid acknowledgement that some questions, presented for judicial decision, are not susceptible to such verbal formulae. ... It seems that unrealistic presumptions, fictitious postulates and argument-closing "legal principles" may now be retuning to vogue in Australia whereas, elsewhere in the common law, realism, a functional analysis and greater transparency in judicial reasoning represent the modern norms. If this is what is meant by a return to "strict legalism", I respectfully decline to embrace it: *Travel Compensation Fund v Tambree* [6].

19 Drafters have to be up with developments in the common law generally. They have to read cases. As Lord Steyn observed in *Pierson v Secretary of State,*[7] ultimately the common law and statute coalesce into a single legal system. They should also read what judges say off the bench. Fashions in judicial approach to the interpretation of statutes change as they do in other spheres. For instance, the principle of legality,[8] the emergence of a concept of distinction between statutes of different types requiring different approaches to construction,[9] confining of the doctrine of implied repeal,[10] and the notion that in the interpretation of human rights legislation we should "go with the grain".[11] Those entrusted with the writing of statutes have to keep up with fashion. It is important too to keep up-to-date with public debate on wider issues surrounding the respective roles of legislature and judiciary.

Features of the New Zealand legislative environment

20 All Bills, apart from Appropriation and Imprest Supply Bills and Bills passed under urgency, go to select committees. There are 13 subject select committees of the House established at the commencement of each Parliament by Standing Orders.[12] There are

---

[6](2005) 222 ALR 263. See also *Dossett v TKJ Nominees Pty Ltd* [2003] HCA 69.

[7][1997] 3 All ER 577.

[8]*R v Secretary of State for the Home Department, ex parte Simms* [2000] AC 115.

[9]*Thorburn v Sunderland City Council* [2993] 1 QB 151 (Laws LJ): Lord Steyn, *Interpretation (Treaties, Constitutions, Statutes, and Contracts)*, Lecture delivered at Victoria University Faculty of Law, 9 September 2002.

[10]*R v Pora* [2001] 2 NZLR 37.

[11]*Ghaidan v Godin-Mendoza* [2004] AC 557 discussed by Professor J F Burrows in *Statutory interpretation new style, New Zealand Law Journal*, May 2005.

[12]Standing Orders 185(1)(a) and 189.

also other select committees including the Regulations Review Committee, Standing Orders Committee, and ad hoc committees established by the House which may also examine Bills.[13] Select committees call for and consider public submissions on Bills. Submissions may be given orally by witnesses who appear in person as individuals or on behalf of organisations and interest groups. Departmental advisers usually provide briefings to select committees and act as advisers throughout the process. They analyse submissions and recommend and advise on changes to the legislation. Parliamentary Counsel draft all the amendments to Bills in select committees.

21 New Zealand legislators are "hands on". The select committee process is like a de facto upper House; in many ways a more effective one. In jurisdictions where there are no select committees, but an upper House on which the government has a majority, there is little scope for careful consideration, and changes are unlikely to be made. In New Zealand, changes can be substantial. Bills can emerge radically different. Working at its best, the select committee process is highly effective as a means of improving the quality of legislation. That is generally still so under MMP where the Government does not have a majority of the members of most select committees and where the chair is not always a government member. However, the fact that the Government does not have a majority of members makes it harder to get its legislation through the process and increases the likelihood of amendments. Bills have sometimes been reported back to the House without amendment because a select committee could not agree on the changes. It happened last week with the Oaths Modernisation Bill. At least in that case the Bill was reported back with an accompanying report. It could have simply been discharged without the benefit of an accompanying report reporting on the select committee's consideration.

22 MMP has resulted in a marked decline in the number of Acts passed. The 17-year average for the period 1980—1996 was 153 Acts. The 7-year average for the period 1997—2003 is 112. The 9-year MMP average is 72% of the 17-year average under the first past the post electoral system.

[13] Standing Orders 185(1)(b) and (2).

23 The House does not sit under urgency as often as it did under the previous system. This limits the time available to deal with legislation. In 2004 the House sat under urgency on only 2 occasions. Whether the House sits under urgency depends on whether the Government can get support from other parties. They do not willingly give that support.

24 Reduced House time has increased the pressure to structure Bills in a way that minimises debate. Bills are debated Part by Part. Because of this, they are arranged in as few Parts as possible. This generalises the debate in the committee of the whole House stage. The same amount of time is spent debating each Part regardless of what is in it. The committee stage was designed to enable the House to scrutinise Bills to ensure they are technically sound and effective. The debate is now more like the debate on the Second Reading; general and political. Government members and Ministers have little incentive to participate. These are unfortunate developments. This is a parliamentary problem. One can hardly blame a government for resorting to these kinds of measures to get its legislation enacted.

25 Lack of House time has also meant that governments have tended to concentrate on legislation that implements policies that have a high political priority. The prospects of "big picture" measures getting enacted are, on the whole, better than the prospects for what is routine, technical, law reform, and politically uncontentious.

26 Error correction is more difficult. In this context, error correction encompasses both the correction of legislative error and the validation of unauthorised administrative action. Error correction is more difficult for 2 reasons. First, the necessary corrective legislation makes an unwelcome claim on precious House time. Second, there are more people to convince and the level of parliamentary scrutiny is likely to be more intense. The "quick fix" is no longer a straightforward option. There is also the nagging fear that the consequences of confession will inhibit disclosure of errors that require fixing. Legislating and the business of government are complex activities. Legislation can have unintended consequences. When they become apparent they should be addressed properly and expeditiously. There is a lot written about the error correction role of appellate courts. Parliament has a similar role. It ought to be able to exercise it more easily.

27 Difficulties in error correction inevitably increase the pressure on governments and their advisers and drafters to get legislation right in the first place. That is not a bad thing. It is a very good thing.

28 The executive no longer dominates the legislative process like it once did. Multi-party Parliaments have replaced Parliaments that for decades were dominated by 2 main parties. More consultation, negotiation, and compromise are required at all stages of the legislative process from design to enactment. Numbers have become all important. Ministers and members have to have new skills. The informal understandings and accommodations that could be quickly reached in a Parliament dominated by 2 parties are not now possible.

The language of legislation

29 Lord Oliver of Aylmerton, formerly a senior Law Lord, described badly drafted laws, however well intentioned, as a form of tyranny.[14] Badly drafted laws cause a range of problems. First, there is the cost of recourse to legal advice or to the courts. Second, the courts and not Parliament end up deciding what the legislation means. Parliament cannot complain about judicial legislating and activist judges if that is a necessary consequence of legislation that is unclear. Lack of clarity can take many forms. A provision may be ambiguous. Different provisions of the same Act may conflict with each other. Provisions in different Acts may also conflict with each other. Third, there may be unintended consequences. Badly drafted laws constitute a barrier to justice.

30 There is an assumption that the statute ought to be perfect. Legislation cannot be 80% right. It is not enough that most of it is right or that the important parts are right. There is no scope for compromise. Every piece has to be right from the central components right through to the smallest detail. A small error in the detail can have catastrophic consequences. A tiny error in a schedule of consequential amendments to a United Kingdom Act resulted in litigation that finished up in the House of Lords, but happily resulted in some valuable jurisprudence from another senior Law Lord about the circumstances in which the courts may correct manifest error in statutes.[15]

---

[14] Rt Hon Lord Oliver of Aylmerton, 'A Judicial View of Modern Legislation', (1993), 10, Stat LR 2.

[15] *Inco Europe Ltd v First Choice Distribution* [2000] 2 All ER 109.

31 In speaking of error, I am not confining my comments to the words themselves. Drafting error is often synonymous with flawed policy and practical deficiencies. It is common to hear politicians and others say "this Act is badly drafted" when what they really mean is that they don't like the policy. A drafter is not responsible for policy embodied in legislation, but he or she must draw attention to any deficiencies in that policy and to practical problems that may arise with its implementation. If the design of a legislative scheme is seriously flawed, a drafter should say so.

32 Completely accessible legislation will often be illusory. A reader cannot necessarily go to a statute and expect to find all the law on the subject with which the statute deals. The meaning of legislation is affected by interpretation legislation and common law principles. Context is important. Other legislation that deals with related aspects of the subject matter may be relevant. A legislative regime may consist of a mix of statute, regulations, and other forms of delegated legislation, such as codes of practice, rules, guidelines, standards, even frameworks. Legislative history may be relevant to meaning. Mark Gobbi has identified out of 700 public Acts 92 Acts that implement treaties or conventions. In the 1920's and 1930's no statutes implemented treaties or conventions.[16] International law has become increasingly relevant in interpreting modern statutes.

33 Many statutes deal with complex policies and concepts. Examples include taxation, companies, securities, financial reporting, takeovers, personal property securities, telecommunications, commerce, admiralty. Different Acts have different readership. The principle of one-size-fits-all does not apply to the design and drafting of the law.

34 It might be claimed that it doesn't really matter how a statute is drafted. As long as judges and lawyers can understand it, does it matter whether anyone else can? Why make it widely accessible if that means "dumbing it down". There are powerful answers to these questions. First, ascertaining the meaning of a legislative text is not inherently an easy thing to do for anyone. A statute is not a rivetting read. The easier it is to understand the better, whether that means for judges and lawyers or other

[16]Mark Gobbi 'Drafting Techniques for Treaties in New Zealand', *Statute Law Review* (2003),Vol 21, No 2, pp 71—103 (2003).

readers. We no longer live in an age where learning is a privilege enjoyed by a handful of citizens like judges and lawyers. In the view of an Australian writer, lawyers are no longer seen as the learned custodians of unknowable secrets.[17]

35 Second, the implicit assumption that ordinary people do not read legislation is simply wrong. It is plain from looking at the list of best sellers that lawyers law statutes do not dominate. The number of visits to the New Zealand website of legislation shows that the public reads legislation. The monthly average is around 30,000 and is regarded as high for a government website of legislation. Third, the public want to understand legislation in the form of Bills so that they can influence their final content. That is an important element in a free, open, and democratic society. Fourth, clearly drafted legislation exposes bad policy especially in the development stage. Fifth, if an unpleasant message has to be communicated, and not all legislative messages are pleasant ones, the message ought not to be hidden in a mass of words.

36 Much has been accomplished in different parts of the world to improve the way in which legislation is drafted. Progress in this regard owes much to the plain language movement in the United States and the United Kingdom, to the work of law reform agencies, and to an appreciation on the part of legislative counsel that making legislation as understandable as possible really does matter.

37 The New Zealand Law Commission was the catalyst for change in this country through the publication in the 1990's of 3 reports *A New Interpretation Act to avoid Prolixity and Tautology*,[18] *The Format of Legislation,*[19] and *Legislation Manual Structure and Style.*[20] These reports represented an integrated approach to reform of the language and design of New Zealand legislation. The Commission's recommendations reflected world-wide pressure for change.

---

[17]Michèle Asprey, *Plain Language for Lawyers* (2003), 3rd ed, The Federation Press, Australia, p 3.

[18](1990) NZLC R 17.

[19](1993) NZLC R 27.

[20](1996) NZLC R35.

38 With effect from 1 January 1997, the New Zealand Parliamentary Counsel Office made a number of modest changes to the style and expression of legislation. These included:

- avoiding archaic language ("hereby", "notwithstanding", "hereunto")
- expressing dates in simpler form ("1 January 1997", rather than "the 1st day of January 1997")
- omitting unnecessary referential words ("of this Act", "of this section", "of this subsection") when it is clear which part of the Act is being referred to
- using arabic in place of roman numerals ("Part 21", instead of "Part XXI")
- using "must" rather than "shall" ("notice must be given", not "notice shall be given")
- using the active voice ("The Minister may appoint up to 9 members" instead of "Up to 9 members may be appointed by the Minister")
- omitting qualifying words ("subject to", "except as provided in")
- using simpler expressions of age ("a person who is 18 years old" instead of "a person who has attained the age of 18").

The changes were debated in Parliament and welcomed.[21] Otherwise, they went unnoticed.

39 The PCO then incorporated into its drafting manual much of the material in the Law Commission's report *Legislation Manual: Structure and Style*. Chapter 5 stresses the importance of drafting in plain language and the structure and organisation of material. The guidelines endorse some basic principles which can too easily become lost sight of in the challenges law drafters face to integrate complex policies and massive amounts of material into an understandable, coherent, and effective statute. They include, for example,—

- using the simplest word that best conveys the intended meaning
- using short sentences
- using the active voice
- constructing short sections

[21](1997) 559 NZPD 869—879.

- using common speech equivalents for traditional forms of expression ("without notice" instead of "*ex parte*", "under" instead of "pursuant to").

40 The importance of structure is also stressed. This means—

- substantive material should precede procedural material
- the general should precede the particular
- provisions of general application should precede those of limited application
- the fundamental and important should precede matters of lesser significance.

41 The next step in the reform process was the passage of the Interpretation Act 1999 to replace the Acts Interpretation Act 1924, which as the Law Commission recognised was itself little different from the even earlier Interpretation Act 1888. The reasons given by the Law Commission for reform included changes in the perception of the role of the State, changes in the approach of the courts to interpretation, the role and potential of new technology, the enactment of new interpretation statutes in Australia, Canada, and the United Kingdom, and developments in the drafting and presentation of legislation in other jurisdictions.

42 There are a number of differences between the Bill recommended by the Law Commission and the Act. For example, the Act did not, as the Law Commission had recommended, reverse the statutory presumption that the Crown is not bound by Acts of Parliament. The Act is longer and more detailed than the proposed Bill. The new Act has removed anomalies and inconsistencies in the earlier statute and, in restating many of the provisions in that statute in simpler and plainer language, it was designed to lead the way. Interpretation legislation is sometimes perceived as merely technical. It is, however, important constitutional law because it is the legislature's directive to readers of legislation and to the courts as to how legislation is to be interpreted. For this reason, it ought to be the most accessible of all the statutes. The 1924 Act committed one of the cardinal sins of legislative drafting: obscuring important provisions in long sections dealing with multiple topics.

43 In its report *The Format of Legislation*, the Law Commission recommended a fundamental redesign of the New Zealand statute book. As the Commission observed in its report:

> Good, functional typography and design are invisible. Good design allows readers to concentrate their energy on substance rather than be distracted by format. Good design can also facilitate the very drafting of legislation because it can make the task more logical. The nature of the message will of course influence the appearance of the text: the design must be appropriate to the substance, and to the reader. But bad design remains bad design, even though it may be redeemed to some extent by familiarity.[22]

44 A number of factors were identified as influencing the need for change. They included the increasing complexity and volume of legislation, the need for legislators to spend more time dealing with legislative policy and not trying to ascertain meaning, the need for administrators to understand the law they administer, the need for lawyers to ascertain the law more easily, economic savings, and the need for the public to understand the laws that govern their personal business affairs. They are, coincidentally, the same sorts of considerations that underlie the importance of drafting legislation in plain language.

45 The new format, including a new typeface, was introduced on 1 January 2000 for Bills, Acts, and statutory regulations. Parliament resolved that Bills before Parliament on that date were to be converted into the new format. The more significant changes included:

- a new and larger typeface (Times New Roman 12pt in place of Baskerville)
- section headings appear above the text, where they are more distinct
- a running head at the top of each page contains the number of the Part and the number of either the first or the last section appearing on the page
- defined terms in bold rather than within double quotes
- simplified punctuation
- simplified layout of provisions with different levels indented progressively
- consequential amendments to other statutes are listed alphabetically, not chronologically, and the layout of the amendments is simplified
- the Long Title and Short Title are replaced with a single Title and, quite often, a purpose provision
- a legislative history appears at the end of every Act
- more white space on the page.

---

[22] *Ibid*, p 1.

46 The Acts and Regulations Publication Act 1989 was amended so that the format and design changes could be incorporated into reprints of Acts and statutory regulations enacted or made before the changes took effect. The Bill to amend the Act was described by a member of Parliament in the debate on the Bill, in what might be described as a cheap shot, as "one of the most underwhelming Bills ever to come before the House". The Act was also amended to enable reprints to be produced so as to be consistent with current legislative drafting practice. The need for these changes is obvious. A statute reprinted in the pre-2000 format and reflecting earlier drafting practices with post-2000 amendments in the current format and reflecting current drafting practices would be a strange beast. The enlarged reprint powers are subject to the overriding qualification that no change may be made that, if enacted, would change the effect of the legislation.[23]

47 Numerous other changes have been made to the expression of New Zealand legislation over recent years. They include—

- the use of outline sections or Parts that provide an overview of what a particular Act is about[24]
- extensive use of purpose, objects, and principles provisions[25]
- the use of examples both in the text of the legislation and in separate "example boxes" following the provisions to which they relate[26]

[23]Section 17C(2) of the Acts and Regulations Publication Act 1989.

[24]See, for example, the Property (Relationships) Act 1976, Personal Property Securities Act 1999, Animal Products Act 1999, New Zealand Public Health and Disability Act 2000, and Health Practitioners Competence Assurance Act 2003.

[25]See for example, the Property (Relationships) Act 1976, the Employment Relations Act 2000, the New Zealand Public Health and Disability Act 2000, and the Animal Welfare Act 1999.

[26]See, for example, the numerous examples in the Personal Property Securities Act 1999, Property (Relationships) Act 1976, and Overseas Investment Exemption Notice 2001 (SR 2001/410).

- flow-charts[27]
- tables.[28]

48 Examples are a useful method of supplementing a particular legislative rule with an explanation of how the rule will apply in a particular situation. They are not new. They were used in the Consumer Credit Act 1974 (UK), the Occupiers Liability Act 1957 (UK), the Indian Evidence Act 1972, and the Indian Penal Code. Examples now feature extensively in Australian Commonwealth legislation and in the legislation of Victoria, Queensland, and the Australian Capital Territory. In an interesting study of the role of examples in legislation, an Australian academic lawyer, Jeffrey Barnes, says this:

> Examples have altered the language and structure of statutes in significant ways. Their separate location after the relevant provision has allowed a variety of means of expression, including most radically, the narrative form. It has also allowed the example to rival the rule for legal or practical effect.[29]

49 Many of the features outlined above appear in the legislation of other jurisdictions. They are part of an international trend to make legislation more accessible to both the ordinary and the expert reader. Legislation is used every day in a vast array of different environments. Administrators apply it, lawyers structure transactions around it and advise on it, judicial officers in the courts and tribunals apply it, exercise discretions under it, and interpret it, individuals and corporations use it, whether as manufacturers, sellers, or employers, and ordinary citizens use it to ascertain their rights and obligations. Interpretation of legislation is now widely regarded as the most

---

[27] See the flow chart in Part 3 of the Trade Marks Act 2002 outlining the process for obtaining registration of a trade mark. See also the diagrammatic overview of the clean slate scheme in section 3(3) of the Criminal Records (Clean Slate) Act 2004. See also the diagrammatic overview of the process established by the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004 set out in Schedule 1 of the Act.

[28] See section 77 of the Administration Act 1969, which sets out in tabular form how property is to be distributed on an intestacy. See also the table of categories of Crown entities set out in section 7 of the Crown Entities Act 2004 and the table (which uses ticks) in Schedule 4 (substituted by the Public Finance Amendment Act 2004 itself formerly part of the Public Finance (State Sector Management) Bill 2003) of the Public Finance Act 1989.

[29] Jeffrey Barnes, *Shining Examples*, a paper presented at the Conference of the Commonwealth Association of Legislative Counsel (in association with the 13th Commonwealth Law Conference), Melbourne, Australia, 17 April 2003.

important aspect of judicial work.[30] There is a great challenge on law reformers to continue to make legislation ever more accessible. This is in part the result of governments making legislation available free on the Internet. Particularly if one is a lawyer, a change in mindset is required along with a recognition that legislation has a far wider audience today than it ever did. It requires a degree of experimentation to find out what works best. It also calls for balanced judgment and an element of courage. Not everyone thinks the use of plain language in a legislative context is a good thing, and there are well-positioned individuals ready with disparaging criticism of one's efforts.

50 Examples of the concerns expressed are:

- outline Parts, overviews, flow-charts, diagrams, and examples are unnecessary if the statute is clearly drafted: "if you were doing your job properly, you wouldn't need all this"
- material additional to the text only clutters the legislation and makes understanding more, rather than less, difficult
- users get a false understanding: "they think they know more than they do"
- legislation is really only intended for lawyers and judges. People will need legal advice anyway and, as long as the lawyers understand the legislation, it doesn't matter whether the public does or not
- established provisions and "sacred phrases" have well-established meanings and should not be restated in modern language if there is a risk that they will be interpreted as meaning something different[31]
- rewriting legislation merely to improve readability risks opening up political debate, particularly if the topic is controversial
- plain language rewriting will inevitably make the legislation longer, there will be more Parts and provisions and scarce parliamentary time will be taken up.

---

[30] Johan Steyn, *'Pepper v Hart:* A Re-examination', *Oxford Journal of Legal Studies (2001)*, Vol 21, No, p 59. Hon Justice Kirby, "Towards a Grand Theory of Interpretation: The Case of Statutes and Contracts" (2002) 48 *Clarity* 3. J J Spigelman AC "*The Poet's Rich Resource: Issues in Statutory Interpretation*" *Australian Bar Review* (2002), 21, 224. Lord Steyn *Interpretation (Treaties, Constitutions, Statutes, and Contracts)*, an address delivered at Victoria University of Wellington, September 2002.

[31] See Edward Nugee QC, *Legislation From the User's Perspective*, Clarity/Statute Law Society Conference Peterhouse College, Cambridge, July 2002.

51 Two Australian Judges provide an interesting contrast in perspective. In a decision given in 2000 in the Queensland Supreme Court in *FAI Insurance Co Ltd v Spannagle*, Justice Chesterman said:

> The Act and the regulations are in the modern style. No attempt has been made to articulate with any precision what the legislation intends. Different words are used to give expression to the one concept and any continuity of terminology is avoided as is any consistency in the treatment of the concept. Instead, one finds disjointed platitudes set forth with almost banal generality. In this wilderness of words two factors appear to indicate that it is within the power of the Transport Administration to renew registration retrospectively after the effluxion of a period of registration.
> ...
> It would have been relatively straight forward to express the notion simply and clearly but any requirement of intellectual discipline is avoided by the modern parliamentary draftsman for whom freedom of expression is to be prized above comprehension.[32]

52 More recently and sympathetically, Justice Dyson Heydon, a Judge of the High Court of Australia, has written:

> Parliament, when it changes the law, is usually capable of doing so with a degree of clarity because legislation is drafted by persons with considerable training, experience and skill in drafting. They are capable of achieving a much greater degree of precision than a group of judges can, particularly a group of judges speaking in separate judgments.[33]

As you might expect, Parliamentary Counsel would side with Justice Heydon.

53 The process of trying to simplify and improve readability is a continuing one. Over the past 2 weeks the Parliamentary Counsel Office has made 2 further minor changes to the terminology used in amending statutes. The first of these is that an amending provision will no longer begin by referring to the principal Act being amended. This means, that the amending provision will no longer state—

> Section 5(1) of the principal Act is amended by ...

---

[32] [2000] QSC 002, paras 21 and 22.

[33] Hon Justice Dyson Heydon, 'Judicial Activism and the Death of the Rule of Law', *Otago Law Review* (2004), Vol 10, No 4, 493, 509.

Instead, it will state—

"Section 5(1) is amended by ...

There will be a new section 3 at the beginning of the amending Act that states which Act is being amended.

54 The second change relates to not using descriptive language in amending provisions that omit words, expressions, numbers, dates, or items from other provisions or omit them and substitute new ones. The amending provision will no longer state —

Section 5(1) of the principal Act is amended by omitting the words "cats and dogs", and substituting the words "rats and mice".

Instead, it will state—

Section 5(1) is amended by omitting "cats and dogs" and substituting "rats and mice".

55 It might justifiably be thought these changes fall into the rats and mice category. They will shorten legislation and hopefully make it more readable. In a large amending Act, they will reduce the word count significantly. The changes were adopted by Parliament by a sessional order on 15 March 2006 which authorised the Clerk of the House, in consultation with the Chief Parliamentary Counsel, to apply them to Bills currently before Parliament. This means that there will be no inconsistency in drafting technique across the statute book for 2006 and subsequent years.

56 Improving readability of legislation is an ongoing process and progress is incremental. In 2004, the PCO asked Michèle Asprey, an Australian lawyer and expert in the use of plain language in legal documents to carry out an evaluation of New Zealand legislation and its drafting from a plain language perspective. Ms Asprey conducted a wide ranging review of New Zealand legislation drafted both before the format changes in 2000 and subsequently. Her main recommendations were—

- make further changes in the format and design of Acts and regulations and engage information design professionals to assist in this
- test existing and new features through document testing programmes and find

out what readers of legislation actually think about them

- engage information designers to help with visual aids
- there is little overarching empirical evidence to prove that plain language techniques and visual aids in particular aid readability in general (and even less in the legislative context), but plenty of evidence that they do in individual cases
- experiment through trial and error.

Particular challenges

57 For political and other reasons, some Bills have to be drafted and enacted quickly. Modern governments are impatient for legislative change necessary to implement key policies to occur quickly. This places pressure on those responsible for providing drafting instructions and on the Parliamentary Counsel who have to do the drafting. The time required to draft legislation is often underestimated. Time gets taken up in deciding matters of policy and in consulting within and outside government. The result is that the time for drafting gets compressed. One of the drafter's chief enemies is lack of time. Drafters come up against impossible deadlines. If a Bill is produced miraculously, an expectation is created that it can be done again and again. The need for extensive amendments to a Bill is probably a good indication that the Bill was produced too quickly to get the policy and the drafting right. In common with lawyers in private practice, legislative drafters are no strangers to clients who demand the impossible.

58 Continuous redesign is another problem. As I have suggested in the comments about the select committee process in the New Zealand Parliament, New Zealand legislators have considerable impact over the final product. Extensive changes made to Bills during the select committee and at the committee of the whole House stages do not always fit well with the Bill's original structure. Amendments to existing legislation raise the same issues. It can be difficult to decide whether the better course is to rewrite the Bill, Act, or regulations. That, in turn, can create problems for a government that may not wish to open up politically controversial issues to renewed debate. There are many statutes that would benefit from being rewritten and reorganised.

59 A related matter concerns continual amendment. This can also affect the accessibility of legislation. A statute may begin life with a sensible and coherent structure but, after frequent amendments, end up, to use the description of a senior Queen's Counsel in describing a large and important piece of legislation, looking like "the back of the family station wagon setting off on summer holiday: mother, father, 3 children, camping gear, barbecue, surfboard, and the dog". The Judicature Act 1908, enacted as part of the 1908 consolidation, has been amended 37 times by way of direct amendment and times too numerous to count by way of consequential amendment. The principal amendments relate to—

- jurisdiction in relation to the liquidation of bodies other than companies
- establishment of the commercial list
- establishment of the judicial office of Associate Justice (formerly Master) of the High Court
- reconstitution of the Rules Committee so as to include rule-making for the District Courts
- power to detain and sentence for contempt
- power for the High Court to sit in Australia in proceedings under the Commerce Act 1986 and for the Federal Court of Australia to sit in New Zealand in comparable proceedings under the Trade Practices Act 1974
- creation of the Civil and Criminal Appeals Divisions of the Court of Appeal
- restrictions on vexatious litigants
- recovery of money paid under mistake of law or fact
- power for the Court of Appeal to appoint technical advisers
- application for review (by the stand-alone Judicature Amendment Act 1972).

60 The more an Act is amended, the more it loses its coherence. While frequent amendment can be a sign that there was insufficient time to develop the policy for, and then draft and enact, the statute, it may also be the result of legitimate changes in the policy area with which the statute deals. Incorporating new provisions into a statute that has been carefully structured can destroy the statute's original coherence. Reprinting alleviates to some extent the problems of accessibility in cases such as these, but a heavily amended statute remains a heavily amended statute. If anything, a reprint can make the incoherence more obvious.

The importance of good quality legislation

61 Good quality legislation—

- endures
- does not need frequent amending
- gives effect to the Government's policies
- reduces fiscal risks to the Government
- avoids the courts deciding what it means
- reduces compliance costs
- limits scope for avoidance.

62 Translating policy into legislation is a complex process. In giving effect to government policies it reflects political decision making. It relies on the processes of consultation and may reflect to varying degrees the views and interests of organisations and individuals whether as concerned citizens or as lobbyists. It is the result of the work of Ministers, Cabinet committees, Cabinet, policy advisers, lawyers, Parliamentary Counsel, select committees, members of Parliament. It requires the expertise of the Clerk of the House and his staff in parliamentary law and procedure. It requires an efficient and competent printer. New Zealand's laws ought to rank at least as favourably as the laws of other comparable developed nations. There are immense challenges facing those who participate in the legislative process. The needs of modern societies are complex and expanding. To the extent they require legislative responses, it is imperative that our legislation is always of the highest quality, principled, effective, and accessible.

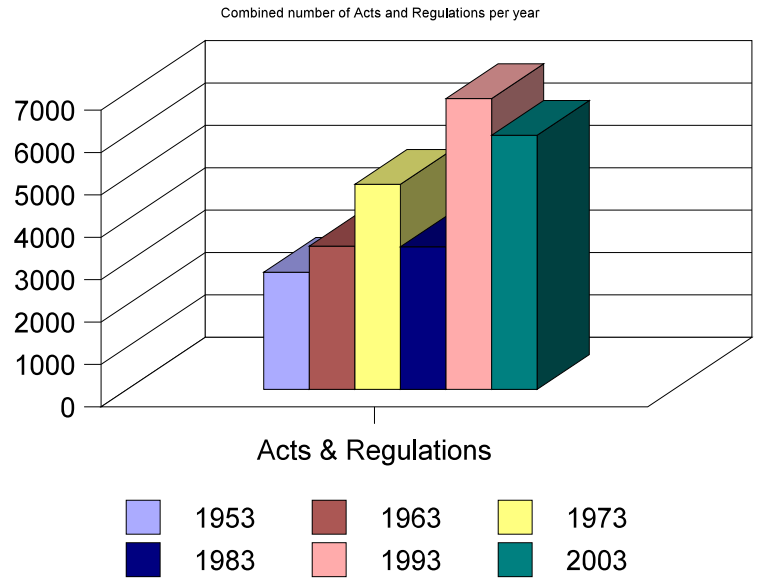
Improving public access to legislation

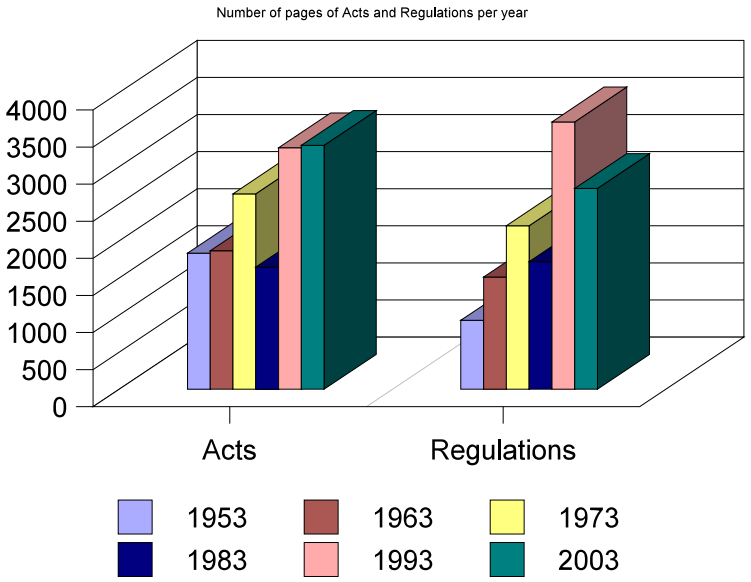
63 I have mentioned the phenomenal increase in the volume of legislation emanating from the legislature and from the executive. A former Chancellor of the Exchequer, and for a time one of the United Kingdom Government's business managers, Lord Howe QC, described it as legislative lust.[34] The Roman historian Tacitus also complained about it. Writing almost 2000 years ago, he said—

[34]Rt Hon Lord Howe of Aberavon QC, *'Managing the Statute Book', Statute Law Review* (1992),Vol 13, No 3, pp 165—178.

... and where the country once suffered from its vices, it was now in peril from its laws. This circumstance suggests that I should discuss more deeply the origin of legislation and the processes which have resulted in the countless and complex statutes of today.[35]

64 The following table gives some idea of the extent of the increase.





[35]Tacitus, *The Annals, Book III, XXV* (1951), William Heinemann, London: Harvard University Press Massachusetts.

65 The increase is the result of many factors, including the expansion of the role of the State, advances in science and technology, threats to the environment and national borders, the influence of international law, and public demand for responses to social and economic issues. One suspects the trend in judicial law-making is similar. The caseload of the Court of Appeal went from 78 decisions in 1960 to 458 in 2000, an increase of 500%.[36]

66 Increases in the amount of law generated by the legislative and judicial branches of government must affect its accessibility. What has to be done to ensure that it is accessible? Throughout its short history, New Zealand statutes have been both consolidated and reprinted. The last consolidation was in 1908 when the number of public Acts was reduced from 806 to 208. Professor J F Burrows aptly describes it in the following terms, "[t]he 1908 consolidation was an impressive achievement. It effectively wiped the slate clean; New Zealand's statute law may be said to have started afresh in 1908".[37] The 1908 consolidation was followed by a period during which individual Acts were consolidated. This included the consolidation of some major statutes (Land, Rating, Chattels Transfer, Mining, Coal Mines, Industrial Conciliation and Arbitration, Electoral, and Magistrates Courts Acts).

67 The Statutes Drafting and Compilation Act 1920, which established the Law Drafting Office (now the Parliamentary Counsel Office) as an office of Parliament, was primarily designed to ensure that the statute book was kept up to date by a separate division within that office dedicated solely to compilation. From 1920 to 1932, 70 Acts were consolidated. In 1931 a reprint of New Zealand statutes was published and a further reprint was published in 1957. After 1957 individual statutes and a few regulations were reprinted, but not in any systematic way. From 1979, individual reprints were published as part of the Reprinted Statutes of New Zealand series (the brown volumes). The aim was to reprint every public Act every 10 years, with Acts

[36] Sir Ivor Richardson, *Trends in Judgment Writing in the Court of Appeal*, Legal Research Foundation Seminar, Auckland, 2 March 2001.

[37] J F Burrows, *Statute Law in New Zealand* (2003), 3rd ed, Butterworths Wellington, p93.

that had been heavily amended being reprinted more frequently. That objective was not achieved and the interval between reprints of Acts, many of which were both important and the subject of extensive amendment, extended beyond 10 years.

68 That system has now ceased. There is a reprinting policy that aims to reprint Acts and regulations according to a defined set of criteria on the basis of an annual reprints programme established following consultation with users. In contrast to a single volume (800—900 pages), or at most 2 volumes, of reprints published annually, the volume of reprints has increased to the point where about 10,000 pages are published annually; a level still behind some Australian jurisdictions.

69 Combined with this, the PCO now makes up- to-date legislation available free via the Internet under an arrangement with the legal publisher, Brookers. The PCO is also engaged in a project (Public Access to Legislation (PAL) Project) to integrate the drafting and publishing of legislation so that Acts and regulations, both as enacted and made and with their amendments incorporated, can be published in hard copy and electronic form from a database owned and maintained by the Crown. The intention is that the database will have official status so that electronic versions will be as authoritative as those in hard copy. One of the objectives of the project is to make available, in selected cases, copies of Acts with proposed amendments shown (prospective reprints) during the passage of Bills through the House. It will thus be possible for members of Parliament, in particular, to see more easily what the effect of proposed amendments to an Act will be.

70 International trends in legislative publishing indicate a decline in demand for printed copies. In the Canadian province of New Brunswick, only 1 set of statutes and regulations is published each year and that is done simply as a matter of historical record. Legislation in that province is available only in electronic form. I am not suggesting that such a situation should be the objective for New Zealand. The point I wish to make is that we need to think differently about how best to make our laws available and make the best use of modern technology to do so.

71 Sir Geoffrey Palmer has some interesting and, for New Zealand, radical ideas in this area that were the subject of his address as President of the Law Commission to the New Zealand Centre for Public Law at Victoria University of Wellington last Thursday.[38] It would be good if there is time today for him to outline what they are.

New Zealand Law Society's contribution to the legislative process

72 The Legislation Committee of the New Zealand Law Society makes submissions on Bills before select committees. It relies on members of the committee and on practitioners with expertise in the particular areas covered by Bills to prepare, and sometimes appear before the committees to speak to, these submissions. The submissions are valuable for 2 reasons. First, they address a wide range of issues including the relationship between a Bill and the existing law, practical implementation matters, and minor technical and drafting difficulties. Second, they are made by an organisation that is not interested in the same way as organisations directly affected by the Bill might be. The society is a neutral commentator. Its submissions are invariably helpful. It performs a valuable public service. There are only 2 agencies that do this: the society and the Legislation Advisory Committee.

A boring job?

73 The job of the Parliamentary Counsel may be challenging, demanding, exhausting, frustrating, humiliating, the cause of anxiety and despair, and for whom golf is a game other people play: but boring it most certainly is not.

[38] Rt Hon Sir Geoffrey Palmer: *Law Reform and the Law Commission in New Zealand after 20 Years—We Need to Try a Little Harder,* March 2006.