

Legislative Drafting

Edited by
Aldo Zammit Borda



Legislative Drafting

Legislative drafting is an extremely onerous, exacting and highly-skilled task. What is clearly conceived in the mind may not be easily expressed with clarity and precision in words. It is a highly technical discipline, and one of the most vigorous forms of writing. Few lawyers have the special combination of skills, aptitudes and temperament necessary for a competent draftsman.

This book provides, for the first time, detailed commentary on legislative drafting with a specific focus on the Commonwealth, covering: the ethics of legislative drafting, teaching, training and retention of drafters, the role of legislative drafting in good governance, keeping the statute book up-to-date, drafting by more than words: the use of graphics, labels and formulae in legislation; and the particular challenges of drafting for small states. It constitutes a key reference for legislative drafters, parliamentary counsel and professionals involved in this field in the Commonwealth and beyond.

This book was based on a special issue of *Commonwealth Law Bulletin*.

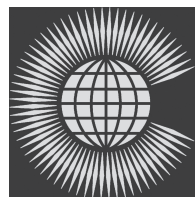
Aldo Zammit Borda is Legal Editor at the Legal and Constitutional Affairs Division, Commonwealth Secretariat.

This page intentionally left blank

Legislative Drafting

Edited by
Aldo Zammit Borda

 **Routledge**
Taylor & Francis Group
LONDON AND NEW YORK



First published 2011
by Routledge
2 Park Square, Milton Park, Abingdon, Oxon, OX14 4RN

Simultaneously published in the USA and Canada
by Routledge
270 Madison Avenue, New York, NY 10016

Routledge is an imprint of the Taylor & Francis Group, an informa business

© 2011 Commonwealth Secretariat

This book is a reproduction of *Commonwealth Law Bulletin*, vol. 36, issue 1. The Publisher requests to those authors who may be citing this book to state, also, the bibliographical details of the special issue on which the book was based.

Typeset in Times by Taylor & Francis Books

All rights reserved. No part of this book may be reprinted or reproduced or utilised in any form or by any electronic, mechanical, or other means, now known or hereafter invented, including photocopying and recording, or in any information storage or retrieval system, without permission in writing from the publishers.

British Library Cataloguing in Publication Data

A catalogue record for this book is available from the British Library

ISBN13: 978-0-415-59781-4

Disclaimer

The publisher would like to make readers aware that the chapters in this book are referred to as articles as they had been in the special issue. The publisher accepts responsibility for any inconsistencies that may have arisen in the course of preparing this volume for print.

Contents

<i>Notes on Contributors</i>	vii
<i>Foreword</i>	x
<i>Preface</i>	xvi

Articles

1. The ethics of legislative drafting <i>VCRAC Crabbe</i>	1
2. Training of Legislative Counsel: learning to draft without Nellie <i>Sandra C. Markman</i>	15
3. Teaching legislative drafting: reflections on the Commonwealth Secretariat Short Course <i>Robin Webster</i>	31
4. The role of Parliamentary Counsel in legislative drafting <i>N.K. Nampoothiry</i>	47
5. Prioritising legislative proposals in the legislative process <i>Richard C. Nzerem</i>	57
6. Keeping the statute book up to date: a personal view <i>Duncan Berry</i>	69
7. Drafting by more than words: the use of graphics, labels and formulae in legislation <i>St John Bates</i>	97

CONTENTS

vi

8. The challenges of legislative drafting in small Commonwealth jurisdictions	
<i>Ranjit Hewagama</i>	107
Fact sheet	
9. Building a commons for the common law: the Commonwealth Legal Information Institute (CommonLII) four years on	
<i>Graham Greenleaf, Andrew Mowbray and Philip Chung</i>	117
<i>Index</i>	125

Notes on Contributors

St John Bates is the Director of the St John Bates Consultancy (a subsidiary of Bates Enterprises Ltd) which offers legislative drafting services internationally (www.stjohnbatesconsultancy.com), a Visiting Professor at the University of Strathclyde Law School in Scotland and an Associate Senior Research Fellow, Institute of Advanced Legal Studies, University of London.

Duncan Berry is a consultant Parliamentary Counsel at the Irish Office of the Parliamentary Counsel to the Government. He holds an LLM, MPP, GDSM, and SJD. He is also the Secretary of the Commonwealth Association of Legislative Counsel and the editor of the Association's Journal 'TheLoophole'.

VCRAC Crabbe is an expert in the field of legislative drafting and has held a number of high-profile positions, including: Commissioner (Statute Law Revision of Ghana); Professor of Legislative Drafting (University of the West Indies, Cave Hill Campus, Barbados); Director, Commonwealth Secretariat Scheme for Legislative Draftsmen (for the West Africa, East Africa, Southern and Central Africa Regions and the Caribbean Region); First Parliamentary Counsel and Constitutional Adviser (to the Ugandan Government); Chairman (Constituent Assembly for the drafting of the 1979 Constitution for Ghana); Judge (Supreme Court of Ghana) and Senior Instructor (International Law Development Centre, Rome, Italy).

Graham Greenleaf is Professor of Law at the University of New South Wales (UNSW); Andrew Mowbray is Professor of Law at the University of Technology, Sydney (UTS); and Philip Chung is Executive Director of AustLII and Lecturer in Law at the University of Technology, Sydney.

Ranjit Hewagama CBE is a legislative drafting consultant and a consultant with Omar Associates Attorneys-at-Law, Colombo, Sri Lanka. He holds an LLB from the University of Ceylon and has extensive experience in the area of legislative drafting having, amongst others, held the following positions: Assistant Legal Draftsman, Sri Lanka, 1972–1975; Assistant

Parliamentary Counsel, Jamaica, 1975–1978; Parliamentary Counsel, Jamaica, 1978–1985; Legal Draftsman, the Solomon Islands, 1985–2007 (1998–2001 Legal Draftsman/Solicitor General); Chairman, Law Revision Commission, the Solomon Islands; and Member of the Judicial and Legal Services Commission, the Solomon Islands.

Sandra C. Markman is consultant legislative drafter and trainer. For the past year, she has been in Dublin, Ireland, where she is a Consultant Parliamentary Counsel in the Attorney General's Office, drafting legislative instruments as well as developing and delivering training to drafters. A native of Montreal, Ms Markman was called to the Bar there in 1980 and then entered private practice. In 1984, she moved to Ottawa to obtain a Diploma of Legislative Drafting from the University of Ottawa. After her graduation in 1985, she joined the Department of Justice Canada, where she spent 22 years as a legislative drafter and manager. Since 2007, Ms Markman has worked as a consultant in the Caribbean and Europe. For some years, Ms Markman served as an adjunct (part-time) professor in the Faculty of Common Law at the University of Ottawa, teaching legislative drafting and related subjects to undergraduate and graduate law students. In the 1999–2000 academic year she taught full-time as part of an exchange between the University and the Department of Justice. In 2008, she was an Instructor in the course for Parliamentary Counsel offered by the Commonwealth Secretariat in Georgetown, Guyana for Parliamentary Counsel from the Caribbean region. Ms Markman has made presentations on drafting and legislative process issues to officials from Sweden, South Africa, Vietnam, Pakistan, Bangladesh and China. She has also served as an expert for the ILO in Geneva on the preparation of its drafting manual for international instruments.

N.K. Nampoothiry is Joint Secretary and Legislative Counsel at the Ministry of Law and Justice, Government of India, New Delhi and formerly Legal Expert and Advanced Legislative draftsman, Attorney General's Chambers, Ministry of Legal Affairs, Government of the Co-operative Republic of Guyana, Georgetown.

Richard C. Nzerem is the Hon. Director of the Sir William Dale Centre for Legislative Studies, Institute of Advanced Legal Studies of the University of London. He is also a legal consultant and former Director of the Legal and Constitutional Affairs Division, Commonwealth Secretariat. He holds an LLM (Lond).

Justice Robin Webster MBE has been drafting legislation since the late 1970s, when he joined the Office of the Solicitor to the Secretary of State for Scotland in Edinburgh. Secondments then followed as the Legal Draftsman to the Seychelles Government; Assistant Parliamentary Draftsman in the Lord Advocate's Department in London; Senior Parliamentary Counsel to the Kenya Government; and Attorney-General of the tiny Pacific

island state of Tuvalu. He became a Judge of the Supreme Court of Tonga in 1988, being awarded the MBE for services to the judiciary in Tonga. In 1991 he returned home to Scotland and was an Employment Tribunal Chairman for several years. In 2004 he was asked to return to Tonga as Chief Justice, a post he held until 2006. Since then he has been Course Director of the Commonwealth Secretariat Caribbean Short Course in Legislative Drafting in 2007 and 2008.

Foreword

I am delighted that the focus of this special issue of the *Commonwealth Law Bulletin* is on legislative drafting. This area of legal work generally does not get the attention it deserves having regard to the increasingly important role played by statutes in our legal systems.

The Hon Justice Michael Kirby AC CMG (as he then was) in an article published in the *Statute Law Review* in 2003 wrote:

The world of common law principle is in retreat. It now circles in the orbit of statute. Where statute speaks – and particularly a curious statute like a Constitution or a Human Rights Act – there is no escaping the duty to give meaning to its words. That is what I, and every other judge in the countries of the world that observe the rule of law, spend most of our time doing.¹

My own journey along the path of a career in statute law writing began in September 1974 when I joined the Office of the Legislative Draftsmen in Northern Ireland. While at university the previous year I had written a paper that required me to carry out some research into the background of a particular legislative item. Somehow, and I cannot now recall precisely how, I got the opportunity to discuss the matter with Mr William Leitch, a legendary Northern Irish draftsman. From that encounter there must have developed deep within my consciousness the idea that legislative drafting might provide an interesting career choice. By the time an advertisement was published the following year for a junior drafting position in the Belfast office I didn't hesitate to apply and was delighted to be offered the post. I have never regretted the choice I made.

Over the course of my career so much has changed. At its beginning, a draft was prepared in longhand and then typed up by a secretary using a manual typewriter. Changes had to be made either by typing up new slips and pasting them onto the page or by whitening out some text and typing new material in its place. When finalised, drafts were sent to the government printing office which, using hot metal typesetting, produced a printed version. That version, of course, had to be manually proofread against the typed copy. There were no electronic databases of legislation so appropriate precedents, and places where consequential amendments were needed, had to be found by manual searching or recalled from one's own memory bank. Very low down in the scale of things in the mind of the typical drafter, at least in mine, was any conscious advertence to the need for simplicity in writing style. The task was to produce a workable law within the given timeframe using the available resources.

¹'Towards a Grand Theory of Interpretation: The Case of Statutes and Contracts' (2003) 24(2) *Statute Law Review*, at 95, 97.

The working world today for the vast majority of legislative drafters is so different. All available relevant technologies are used in the production of texts. Individualised templates maintain consistency in layout. Macros ensure consistency with in-house rules. Computerised search facilities help ensure consistency in word usage. Most jurisdictions have up-to-date electronic versions of their written laws available to their drafters and indeed to everyone through the World Wide Web. Precedents from all over the world can be found in an instant. Revised drafts can be quickly produced and disseminated to clients. For many jurisdictions the final printing process does not involve any proofreading as the same set of data is used throughout. And, when introduced to the legislature, a Bill can be made available to the whole community instantly by uploading it to the internet. It is a very different working environment from that of 1974.

Apart from all the technological changes, legislative drafters have been impacted by changes in the approach to interpreting statutes and, of course, by the plain language movement.

In the course of my career the pendulum has very much swung from a literal to a purposive approach to statutory interpretation. In some jurisdictions this changed approach has been mandated by statute while in others it has been arrived at through judicial development. It has resulted in the situation that courts are prepared to do some work on the text (either by reading words in, omitting words or straining the meaning of words) to ensure that it delivers the meaning that it was apparently intended to bear having regard to the overall context. Way back in 1969 the Law Commissions in Great Britain had recommended a purposive approach² and had recognised that the ‘intelligibility of statutes from the point of view of ordinary citizens or their advisers cannot in fact be dissociated from the rules of interpretation followed by the courts, for the ability to understand a statute depends in the ultimate analysis on intelligent anticipation of the way in which it would be interpreted by the courts’.³ This changed approach has made drafters realise the importance of making the purpose underlying the text as clear as possible assisted by the knowledge, in some jurisdictions, that recourse might be had to extrinsic materials to help in that search. However, given the importance of the legislative text as the source of law, it remains the prime responsibility of the legislative drafter to make the purpose underlying it clear. To this end many drafters now make use of purpose clauses, explanatory notes, examples, overviews and other aids to assist the reader in understanding the context and aim of the legislation.

At the same time as this changed approach to interpretation was happening, the spotlight was shining very brightly on the issue of the intelligibility of legislation. A major event was the publication in 1975 in the United Kingdom of the Renton Committee report.⁴ While noting that they had discovered that even judges, never mind ordinary citizens, find it difficult to understand legislation,⁵ they highlighted some of the difficulties facing legislative drafters:

²The Interpretation of Statutes (Law Com No 21) (Scot Law Com No 11).

³At para 4.

⁴The Preparation of Legislation, May 1975.

⁵At para 7.6.

- the sheer mass of statute law enacted each year dealing with an ever-expanding range of complex situations;
- the impossibility of dealing in simple non-technical terms with technical and complex subjects while at the same time pursuing certainty of legal effect as a primary objective;
- the format of Bills being dictated by political or legislative process considerations;
- the shortage of time available for preparing Bills;
- the under-resourcing of drafting offices accentuated by the difficulties in attracting suitable people as legislative drafters.⁶

The solution that the Renton Committee opted for was to adopt, whenever feasible, a ‘general principle’ approach to drafting, that is, using statements of principle or broad general rules accompanied, if necessary, by detailed provisions.⁷ Lord Denning was an early supporter of this approach. He stated:

It comes to this, that language ought to be simple and clear. There ought to be not long but short sentences. There should be a few commas and semi-colons in sentences. There should be simple words. There should not be too much detail. One of the troubles is that with the best motives the draftsmen try to think of every contingency ... It is impossible to think of everything that will happen in the future. All this ought to be in simple language expressing principles. There is no need to go into all this detail. The courts should then be allowed to deal with it, as I am sure they have in the past.⁸

While a ‘general principle’ approach to drafting never really took off in common law jurisdictions because of concerns that it failed to deliver the desired degree of certainty and shifted too much responsibility to the courts to determine how legislation applied in particular circumstances, the emphasis on the need for simple language very much remained. In Australia it was given much impetus by the work of the Law Reform Commission of Victoria from 1985 to 1992.⁹

In an article published in 2001 in the *Statute Law Review*,¹⁰ Professor Ruth Sullivan emphasised that plain language drafting goes beyond issues relating to vocabulary and syntax to encompass internal organisation, document design and the use of appropriate reader aids. She observed that plain language drafters ‘pay as much attention to fonts and white space as they do to choice of words’.¹¹

As a result of all these developments, the scope of a legislative drafter’s task has considerably broadened. Yet the difficulties facing legislative drafters highlighted by the Renton Committee still remain. Indeed they have been added to.

⁶See Chapters VII and VIII.

⁷At para 10.13.

⁸United Kingdom, *Parliamentary Debates*, House of Lords, 15 December 1982, col 617.

⁹See its reports *Plain English and the Law* published in June 1987 and *Access to the Law: The Structure and Format of Legislation* published in 1990.

¹⁰Some Implications of Plain Language Drafting (2001) 22(3), 175.

¹¹At 175.

Considerations related to human rights and the rule of law have emphasised the need for law to be ‘accessible’. Thus in *Sunday Times v United Kingdom*¹² the European Court of Human Rights referred to the requirements that flowed from the expression ‘prescribed by law’ in Article 10 of the European Convention on Human Rights. It stated:

Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a ‘law’ unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.

Such considerations make the role played by the legislative drafter all the more critical. A failure to produce a readily comprehensible law may in particular circumstances lead to invalidity and not just uncertainty.

Clearly the job of a legislative drafter is an important one. What qualities do you need to be able to perform it competently? Apart from the obvious requirement of a good solid legal education I would suggest that you require a love of language, the capacity for clear thought, high-level problem-solving skills, the ability to see the big picture as well as to hone in on the finest detail and the possession of a thick skin. You will need the latter to be able to deal with all the criticism liable to be heaped on your work by judges, politicians, academics, other lawyers and indeed just about everyone else. An interest in politics (short of partisanship) and current affairs generally can also prove useful.

On commencing a career in legislative drafting you have a lot of new things to learn. You need to develop a deep familiarity with the terms of the local Interpretation legislation. This is a statute that you may never have heard of as you moved through law school. Yet legislative drafters assume knowledge of it in their readers. Thus a term that is defined there (for example, document) will not be defined in any other legislation that uses the term. Readers are expected to be aware of the definition. There are also interesting rules to be found in Interpretation legislation about the exercise of powers, the calculation of time, the effect of repeals and a raft of other matters.

You need to become familiar with the rules of parliamentary procedure and how they impact on the presentation of Bills and their capacity to be amended. You need to develop an overall good knowledge of the local statute-book as any new law must be woven within it as seamlessly as possible. To write criminal laws you need to be familiar with criminal procedure and with the sentencing structure of courts. There are other areas, for example, general government financial legislation, of which you need to develop some knowledge. Through gaining this specialised knowledge you become an expert in the development of legislative schemes and can counsel and advise the proponents of new schemes. A fully-fledged legislative drafter is not merely someone who puts words on a page but a person capable of performing an important advisory role. Not infrequently, for the policy colleagues on a drafting project it is their first legislative experience, and

¹²(1979–80) 2 EHRR 245.

they are very much in need of guidance and assistance from an experienced hand at such projects.

Clearly there is a real need for those setting out on a drafting career to be adequately trained. Traditionally the emphasis has been on in-house, on-the-job training. While some external courses are available,¹³ a lack of resources can prevent them being accessible to drafters in under-resourced jurisdictions. Unfortunately there tends to be a great disparity in the resources available to legislative drafters across jurisdictions and yet the essential task to be performed remains the same.

Attendance at international drafting conferences is a valuable source of learning about particular aspects of legislative drafting. Such conferences are organised by the Commonwealth Association of Legislative Counsel (CALC) in conjunction with each Commonwealth Law Conference. The most recent one was held in Hong Kong, China in April 2009. The formal conference programme usually extends over 2½ days and allows detailed discussion on a range of drafting-related topics. The next CALC conference will be held in India, in 2011. Regional drafting conferences are also regularly organised by the Canadian Institute for the Administration of Justice (CIAJ) and by the Australasian Parliamentary Counsel's Committee. In April 2010, CALC is holding an Africa Region Conference in Abuja, Nigeria.

The objects of CALC include the promotion of co-operation on matters of common interest among Commonwealth drafters and the dissemination of information about legislative drafting, and the role of those who engage in it. CALC provides a valuable networking forum for legislative drafters. From its formation in 1983, CALC has grown to an organisation with around 1000 members drawn from some 100 jurisdictions. It publishes a flagship journal, *The Loophole*, as well as regular Newsletters. Its website at <http://www.opc.gov.au/calc/index.htm> is an excellent resource for information about, and articles related to, legislative drafting. CALC has recently joined forces with CIAJ to provide an online forum facility for CALC members to discuss matters of mutual interest.

As highlighted in this Foreword, the changes over the course of my 35 year drafting career have been immense. They have involved not only changes to the tools available to do the work, but also changes in the techniques used in doing it. What changes lie ahead in the course of the next 35 years? It really is impossible to predict this with any real hope of accuracy. The move from seeing legislation as a paper product to seeing it as an on-line product is likely to continue and gain pace. This may well impact on the writing and presentation style used. The on-line product also opens up opportunities for hypertext links to cross-referenced texts enabling the presentation of a more comprehensive package. Some governments may also seek community involvement in drafting projects through the use of a wiki. This has been trialled in New Zealand on police legislation and the Australian Government in 2009 expressed some interest in it. While such exercises do generate community involvement in what should be covered by legislation, they fail (at least superficially) to recognise that legislative drafting is a skilled art and that not every member of the community can practise it.

¹³Details about available courses can be found on the website of the Commonwealth Association of Legislative Counsel at <http://www.opc.gov.au/calc/training.htm>.

However in my view, despite the heavy demands placed on legislative drafters, the intrinsic difficulty of their task, the all-too-frequent criticism directed at their product and the limited resources with which many have to carry out their work, legislative drafting is still the best legal job going. I hope that, after having read the articles contained in this Special Issue, you will gain some insight into the world of the legislative drafter and what makes drafting such an attractive career choice.

Eamonn Moran, PSM QC JP

*President, Commonwealth Association of Legislative Counsel
Law Draftsman, Hong Kong Special Administrative Region, China
Hong Kong, 1 November 2009*