"THE GENESIS OF LAWS"

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Introduction

1 This paper deals with the sources of legislative change, the processes of drafting legislation, and the preparation of explanatory memoranda and second reading speeches. It then discusses the extent to which judicial approaches to construction are taken into account in the drafting process.

2 My comments relate to practices in the Commonwealth. Some elements of the process are similar in the States and Territories but I suspect that some are rather different.

3 The paper is almost entirely practical rather than theoretical. It makes only passing reference to academic or other theoretical comments on the processes, and focuses on what actually happens from day to day.

4 One of the interesting things I found in trying to set out a practical description of what really happens is that it is very difficult to generalise. There are certain points in the process (mainly immediately before legislation is introduced in the Parliament) at which rules or practices circumscribe the possible actions. These occur, however, surprisingly rarely, and in general the processes of legislation are open to quite a lot of variation.

5 While it is true that most Bills go through basically similar processes before introduction, it is also fair to say that each Bill goes through a unique process from conception to introduction. As well, hardly any of the rules and practices that do exist are immutable. Most of them can be changed or overridden quite easily if the right people want to change or override them.

Sources of legislative change

Technical sources of legislative change

6 Technically, the common source of all new Government legislation is a Minister of the Government.

7 A Government Bill will not be introduced into the Parliament unless the policy has been approved by:

- the Cabinet; or
- the Prime Minister; or
- the Minister administering the legislation in question[1].

Therefore, the Minister must take a submission to the Cabinet (for major policy changes) or write to the Prime Minister seeking policy approval (for minor policy changes) or give his or her own approval (for technical drafting changes). The Minister's responsibility is of minor

[1] Department of the Prime Minister and Cabinet, Legislation Handbook, July 1988 (AGPS), Paragraph 3.4 (this Handbook is out-of-date as to many matters of detail, but is still relevant as to broader matters of principle).

significance if one is asking the question "who thought of it?". It becomes far more significant if the question is "whose fault is it?".

Substantive sources of legislative change

8 More can be said about the substantive sources of legislative policy. These are many and varied, and are all but impossible to categorise except in the most superficial way. Here are some examples:

- Party platforms. These tend to be particularly significant at the beginning of the term of a "new" government (that is, a government of a different political persuasion from the immediately preceding government). In general, the party platform becomes less significant as a source of legislative proposals in situations like the current one, where a particular party has been in office for a number of years. As well, of course, a policy does not get implemented simply because it is enshrined in a party platform. Unless the policy is on the personal "to do" list of an influential member of parliament (generally a Minister) or very senior party official, it is unlikely to progress far.

- A Minister may have a personal commitment to achieve a particular result in an area that has been of interest to him or her before becoming a Minister or before becoming a member of Parliament. In my experience, Attorneys-General have a particular tendency to this kind of commitment, perhaps because they are much more likely than other Ministers to have worked in the relevant area (ie law) before acquiring ministerial responsibility for it.

- A member of a Minister's staff may have a personal commitment to changing the law - this may even be what inspired him or her to join the Minister's staff.

- A public servant may have a personal commitment to changing the law.

- A Minister may respond, either personally or at the instigation of staff or public servants, to a perceived problem or need by establishing a body, or referring the matter to an existing body, to investigate the issues and make recommendations, which often include recommendations about legislating. These bodies may be composed entirely of public servants, or they may draw on expertise outside the public service by including consultants or by being headed by respected non-public-servants such as academics, judges or practitioners in relevant fields.

- A body whose function it is to inquire into referred matters and make reports on those matters (eg a law reform body or a parliamentary committee) may actively pursue references relating to particular matters. Having obtained a reference from the Minister concerned and reported on the need for legislative change, the body may then put pressure on the Government to implement its report.

- Public servants or others who are responsible for administering legislation may perceive administrative difficulties, public dissatisfaction or unintended losses to the revenue arising from the form or content of the legislation, and

may make proposals to the Minister for legislative change. Judicial decisions are a common source of such perceptions.

- Judicial decisions may require a legislative response by interpreting a law so as to leave an unacceptable regulatory vacuum, or they may inspire a legislative response by departing from an assumed interpretation of a law or from an apparently settled legal position, causing either a perceived threat to government policies or potentially damaging uncertainty within the community.

- Ministers, their staff or public servants may be lobbied by special interest groups for changes in the law to address particular concerns of the interest groups. In my experience, this is particularly common in areas such as primary industries, where much of the relevant legislation regulates particular industries largely at the instigation of powerful groups within the industry.

- A proposal put to the Cabinet by a Minister may cause disagreements or concerns in the Cabinet, which may be dealt with by the Cabinet as a whole by requesting the Minister, or another Minister, to investigate another aspect of the matter, or another possible solution to a relevant problem, and to produce a further submission for Cabinet consideration.

9 Some legislation develops through a combination of several sources. For instance:

- A member of a Minister's staff may have a personal interest in seeing the law changed in a particular way. He or she may influence the Minister to refer the matter to a law reform body, or may influence staff of the Minister's department to produce a policy proposals for the Minister.

- A Minister may conceive a general policy direction which is developed by his or her Department. The Minister may then move on, to another portfolio or out of the Parliament. The Department, having developed detailed policy in the area, may then seek to convince the new Minister of the virtues of the approach. This may be done for good reasons (ie the Department has itself become convinced of the virtue of the approach) or for less good reasons (inertia, or an understandable reluctance to let work go to waste).

10 There is little to be gained from trying to analyse or categorise these sources of change further. There are, however, 2 common threads that can be identified.

- In all cases, the proposed legislative change will not proceed unless it can capture the Minister's attention in some way, however fleeting that attention and however unwillingly it is directed towards the particular proposal.

- In all cases, it is possible to identify some perceived need or problem that is being responded to by means of a legislative proposal. This does not mean that the perceived need or problem is real. It does not mean that the proposal will necessarily meet the need or solve the problem. It is also important to remember that the perceived need may not relate to the substance of the issue so much as the need to be seen to be doing something.

The programming of legislation

11 In the Commonwealth, neither parliamentary time, nor drafting resources, are freely available to any Minister who wishes to legislate.

12 Before each Parliamentary Sittings, Ministers bid for the inclusion of proposed legislation on the program for that Sittings. The bids are collated and considered as a whole by the Parliamentary Business Committee of the Cabinet, which assigns each Bill to one of four priority categories (it is rare that a proposed Bill is completely excluded from the program, but assignment of the Bill to the lowest priority category may have the same effect).

13 Thereafter, the allocation of drafting resources and parliamentary time is governed by the priorities decided by the Parliamentary Business Committee. This process, like the requirement for policy approval to be obtained from either the Cabinet or the Prime Minister, imposes some discipline (although arguably not enough) on the legislation process.

The instructing process and the drafting process

14 The instructing and drafting processes are far more arcane than the sources of legislation and, indeed, are sometimes not understood by some of the participants.

15 A common view of drafting instructions is that they are more or less complete instructions (whether written or oral) to the drafter about what is required in the legislation. This view tends to be accompanied by a belief that drafters are mere scribes, and not particularly good ones at that.

16 On this assumption, a description of the process by which drafting instructions get to Parliamentary Counsel would require information about practical matters such as the levels of Departmental officers who have authority to issue instructions, and whether the instructions are posted, faxed or courier-delivered to us.

17 In reality, the instructing process and the drafting process are far more complex. They are also substantially interrelated, and cannot usefully be discussed separately.

First steps

18 The drafting process usually starts with the conveying of "instructions" to Parliamentary Counsel by the Department or Agency with policy responsibility for the proposal. How these instructions are conveyed, and the form they take, varies considerably from Bill to Bill.

- At one end of the spectrum, the process may start with a telephone conversation raising the need for a Bill, followed by the giving of oral "instructions" in conference, and the draft Bill may be the only piece of paper ever produced (some of our files would be an historian's nightmare).

- More commonly, the first batch of instructions are in writing, and attempt to set out the details of what the proposed Bill should achieve. Ideally, this is done by explaining the policy intentions in appropriate detail, and leaving it to the drafters to work out the legislative approach.

- In some cases, policy officers attempt to work out the details of the legislation by identifying, for instance, each provision of an existing Act that requires amendment, and the exact nature of the amendment required, or by providing an outline or table of provisions for the proposed Bill.

- On rare occasions, policy officers actually provide a draft Bill by way of instructions.

The drafting of the Bill

19 In a few cases, a written drafting instruction may be entirely adequate. In such a case, the drafter may prepare a draft and send it to the instructor with a request for comments. I should say, however, that while preparing this paper, I tried to find an example of such an instruction and couldn't.

20 More commonly, the drafter will first work through the written drafting instructions analysing them from various angles including the following:

- What are the instructors trying to achieve?

- Do they need legislation at all (as a matter of law — generally the drafter does not enter into arguments about whether, for instance, community attitudes are best changed by legislation or by education campaigns etc)?

- Is there constitutional power for the proposed legislation?

- What are the possible legislative options?

- Are there gaps in the policy as expressed (eg missing steps in a process, particular cases not dealt with)?

- Are there other matters that need to be considered (eg integration with other legislation, consultation with other parts of the Government)?

Obviously, not all of these issues are of equal importance in all cases.

21 Having identified a set of issues that need to be discussed, the drafter will then make contact with the instructors to arrange that discussion.

22 If the legislative proposal and the issues raised are fairly minor, the drafter may do this over the phone, or even by preparing a preliminary draft and noting the issues that need to be addressed either in a covering memorandum or within the draft itself. Preliminary drafts containing alternative versions of provisions, phrases in square brackets, italicised questions aimed at the instructor (and reminders for the drafter) are very common in the Commonwealth Office these days.

23 More often, the drafter's initial analysis of the instructions is followed by a conference involving the drafters and the policy officers. The issues identified by the drafter are thrashed out around the table. Sometimes they can be resolved there and then. Sometimes advice needs to be sought from other agencies (eg the Attorney-General's Department). Sometimes the instructing officers recognise that they need to engage in further policy development

(often to address fundamental issues raised by the drafters) or to seek further guidance from their Minister or elsewhere.

24 In certain cases (often but not only those involving urgent Bills) there may be no written instructions as such. In these cases, the process of giving instructions may take place in a series of conferences taking weeks or even months, depending on the magnitude of the matter to be dealt with.

25 The process of rewriting the Commonwealth sales tax legislation[2] (completed in 1992) began with a period of several months during which the drafter spent most days of every week asking the instructing officers questions. I believe that these officers initially found this very irritating, but eventually they came to realise that the effect of this approach was to require them to examine their policy intentions down to the most basic levels, and that the end result was a model of legislative clarity and simplicity.

26 This conference or series of conferences may be followed by the production of a preliminary draft Bill of the kind described above (ie containing alternatives, suggestions, questions and reminders).

27 Alternatively the conference process may be used by the drafter to develop a document called an outline. This document does not purport to be a draft, even a preliminary one. Rather it attempts to bring together all the relevant information that will be needed for the eventual drafting of the Bill, before any attempt is made to do any "drafting". The outline may, for instance:

- contain a list of key concepts, with explanations of the concepts and of their significance in the proposed legislative scheme.
- contain a table showing all the cases intended to be dealt with, and the ways in which these cases are to be handled (tables are an almost unbeatable tool for revealing the cases that have been overlooked in the usual process of policy development).
- identify the elements of a scheme to be set up by the Bill.
- list the offences to be created, and relate them to other aspects of the Bill.
- note matters that are <u>not</u> to be dealt with in the Bill, with reasons.

28 Whether the drafter works with annotated preliminary drafts or with outlines, the process is almost invariably an iterative one. The instructors consider the preliminary draft or the outline, identify areas where it doesn't meet their needs, make suggestions about forms of expression, point out inconsistencies with other legislation and, above all, change their minds. Sometimes this is sheer indecisiveness on the part of instructors, Ministers or ministerial

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[2] *Sales Tax Assessment Act 1992*
Sales Tax Imposition (Excise) Act 1992
Sales Tax Imposition (Customs) Act 1992
Sales Tax Imposition (General) Act 1992
Sales Tax (Exemptions and Classifications) Act 1992

staff, but more often it is simply the result of the work that the drafter has done in drawing out the details of the original policy, articulating the operation of that policy and identifying its implications.

29 The rare occasions when the process doesn't show signs of developing into an iterative process are for drafters the most terrifying. If an instructor tells you that the first draft is entirely satisfactory, that almost certainly means he or she hasn't read it. It can be very distressing to the drafter to know that there is no-one in the world who both knows what the Bill is really meant to achieve, and knows what is actually in the Bill.

30 The process of revising and improving the draft or outline continues until the draft or outline is completed to the satisfaction of both the drafters and the instructors. This may involve further conferences, telephone calls or exchanges of correspondence.

31 If this process has involved an outline, the drafter will then turn the outline into a draft. The drafter in my Office who did most of the original work on developing the outline technique into a drafting tool estimates that the process of actually writing the draft Bill takes around 30% of the total time spent on the Bill, the rest of the time being spent on the outlining process.

32 When the Bill is completed to the satisfaction of the instructors, it is submitted to the Department of the Prime Minister and Cabinet, which arranges approval of the Bill for introduction. Currently, this approval is given by the Special Minister of State. The Bill may also be considered by the Caucus or a Caucus Committee.

Bills are always drafted too quickly

33 The point must be made that the processes described above are almost always carried out in too much of a hurry. This is partly because of the workloads of individual drafters, and partly because of the political demands to produce legislation quickly after the initial policy decisions have been made.

34 Last financial year, for instance, 10 drafting teams in my Office produced nearly 230 Bills totalling over 5,000 pages — an average of 23 Bills and 500 pages of drafting per team. The Employment Services Bill 1994, nearly 80 pages of legislation to give effect to some major policy decisions included in the Government's White Paper on unemployment, was drafted in 3 weeks — because that was the time available between the time when the policy Departments first thought they knew what they wanted and 30 June, when the Parliament rose for winter.

35 It could be suggested that the number of pages is evidence of failure rather than achievement, and this may be true to some extent. However, even if the drafters had time to write shorter Bills (to paraphrase the old story), they would still have to produce that average of 23 Bills per team, or about one Bill a fortnight.

36 When you compare these statistics with those for "plain English rewrite" projects, it is apparent that we don't in fact have time to write shorter Bills. For instance, the sales tax legislation mentioned earlier, consisting of 184 pages of legislation (5 Acts including 90 pages of "exemptions and classifications"), took a drafting team 18 months to produce. The Corporations Task Force produced 70 pages of draft legislation in 6 months. The Tax Law Improvement Project produced 50 pages of draft legislation in 6 months.

37 If my drafters were permitted to draft all Bills at the pace (and with the kinds of assistance) allowed to these projects, either my Office would need to expand enormously or the Parliament could deal with its legislative workload in a few weeks each year.

Outside consultation on Bills

38 Bills are usually drafted with inadequate consultation with outside experts. Often, policy development is handled by a small group of public servants who, however skilled and theoretically expert they may be, cannot hope to understand everything about the likely operation and effect of the legislation they are proposing. Indeed, it is often the drafters who point out to policy-makers some of the practical flaws in their ideas. Where there is outside consultation, it tends to be limited, sometimes one-sided, and often too late in the drafting process. As well, drafters are rarely directly involved in consultations with people outside the public service, and receive the results of such consultations second or third-hand.

Preparation of explanatory memoranda and second reading speeches

39 In the Commonwealth, the drafters are rarely involved in the preparation of explanatory memoranda or second reading speeches.[3]

Explanatory memoranda

40 The explanatory memorandum is generally prepared by the policy officers who are also giving instructions on the Bill.

41 Ideally, the memorandum would be written after the Bill is finalised, but generally the memorandum is written in parallel with the drafting of the Bill. There is rarely any time available between the finalisation of the Bill and the time when the Bill and the explanatory materials must be lodged with the Department of Prime Minister and Cabinet preparatory to being cleared for introduction.

42 This lack of time has more to do with human nature than with the legislative processes. Murphy's Law for legislative drafting says that a Bill is not finished (for the first time) until it is introduced. In other words, until the relevant deadlines arrive, instructors (and sometimes drafters) will keep having second and third and fourth thoughts about changes they could make to it and other provisions they could usefully add and provisions that might be unnecessary ... and so on. Since the deadlines are the same for the Bill and the explanatory materials, there is no time available after the Bill is "finished" in which to prepare the explanatory materials.

43 In these circumstances, it is understandable that Departments do not leave the writing of the explanatory memorandum and second reading speech until the Bill is finalised. On the other hand, having regard to the tendency mentioned above for Bills to change and develop in the course of the drafting process, it will be apparent that drafting the explanatory memorandum in parallel with the drafting of the Bill generally involves a considerable amount of wasted effort.

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[3] Legislation Handbook (see note 1), paragraph 7.3.

44 The contents of an explanatory memorandum may vary from unilluminating paraphrases of the provisions of the relevant Bill to thoughtful attempts to explain the background and purpose of those provisions.[4]

45 Since sections 15AA and 15AB of the *Acts Interpretation Act 1901* gave legislative respectability to certain long-standing approaches to statutory construction, and even more so since this Office first came under pressure to look for ways to simplify its legislation, there is somewhat more of a tendency for explanatory memoranda to try to explain how, and in what circumstances, provisions are intended to operate.

46 In the past, lengthy or complex provisions might have been included in a Bill to clarify the application of other provisions to particular, highly unlikely, cases, or to resolve a potential ambiguity in a provision, even if both the drafter and the instructors were confident that the problem was unlikely to arise, or that if it did, a reasonable court could not possibly adopt an interpretation other than the intended one.

47 These days, such a case might be handled by a paragraph in the explanatory memorandum. In general, this would seem to be a desirable result, because it leaves the legislation uncluttered by probably unnecessary provisions whose length and complexity often seem to bear an inverse relationship to the likelihood that they will ever become important.

48 On the other hand, it is hard to imagine a case in which the explanatory memorandum would be relied on to clarify the meaning of a central or significant legislative provision.

49 It is perhaps a measure of how rarely explanatory memoranda are actually intended to be used in the interpretation of the legislation concerned that drafters in my Office hardly ever see a draft explanatory memorandum. It is very rare for us to be consulted by instructing officers in relation to this material, which suggests to me that instructing officers do not often focus on any possible use of the material to interpret the legislation.

Second reading speeches

50 Second reading speeches are a further step removed from the work of the drafters. Preliminary drafts of such speeches are usually prepared by departmental officers but the drafts are often revised by members of the Minister's staff to inject appropriate political content.

51 Like explanatory memoranda, second reading speeches are of course available to be used in the interpretation of the Act in certain circumstances. My impression is that, like explanatory memoranda, the majority of second reading speeches are not taken particularly seriously by their authors as a vehicle for bolstering a particular interpretation of the legislation.[5]

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[4] Compare, for example, the Explanatory Memorandum for the Agricultural and Veterinary Chemicals Bill 1993, the Supplementary Explanatory Memorandum relating to parliamentary amendments of the Primary Industries and Energy Legislation Amendment Bill 1993 (copy at Attachment A) and the Explanatory Memorandum for the Education Services for Overseas Students (Registration of Providers and Financial Registration) Amendment Bill 1994.

[5] Last year I was involved in a dispute between the Government and certain Senators about whether a particular Bill "imposed" taxation within the meaning of section 55 of the Constitution. Before the Bill was drafted, legal advice had been obtained to the effect that the provisions in questions did not impose taxation. In spite of this, the second reading

Judicial approaches to construction

52 There are several contexts in which judicial approaches are taken into account in the drafting process, and several reasons why they are not taken into account more often.

Judicial interpretations of particular statutes

53 First, drafters are sometimes called on to deal with particular examples of judicial interpretation of statutes. If a court interprets legislation in a way which conflicts with the interpretation that has been placed on it by the administering Department, it is not uncommon for the Government to seek to amend the law with a view to reinstating the previously assumed operation of the law. Often this response is based on the belief that the law as interpreted by the Court will be far more costly to administer, or will threaten the revenue directly.

- The Government has made several legislative attempts to reverse the effect of the High Court's interpretation of the *Veterans' Entitlements Act 1986* in *Bushell*[6], which it is believed exposes the Commonwealth to a potentially huge liability to pay disability pensions to ex-servicemen and women.

- Many of the multitudinous amendments to the Income Tax Assessment Act made in the last 20 or 30 years have been a direct response to judicial pronouncements on provisions of that Act.

54 Drafters are often asked to make pre-emptive amendments where administrators are not confident that their preferred interpretation of the law will survive judicial scrutiny. This tendency to legislate further instead of testing the original legislation in a court has caused serious problems for the form and content of our statutes, but it is likely to survive as long as pre-emptive legislating is quicker, cheaper and safer than going to court.

Judicial pronouncements on constitutional matters

55 Secondly, drafters in the Commonwealth Office must pay attention to the High Court's views on constitutional issues. For instance, the *Air Caledonie*[7] method of testing the validity of certain legislation that purports to impose tax is something that would not otherwise have occurred to any of us, but it must now be borne in mind by all drafters. The Court's willingness to recognise certain limited political freedoms[8] is a matter we would bring to our clients' attention where appropriate. The Court's apparent unwillingness to dismantle a

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speech prepared by the sponsoring agency and members of the Minister's office referred to the relevant provisions as "imposing" taxation. Those of us involved in defending the form of the Bill before a Senate Committee were not particularly impressed with the speechwriter's choice of words.

[6] *Bushell v Repatriation Commission*, (1992) 175 CLR 408.

[7] (1988) 165 CLR 462.

[8] *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106.

long-accepted taxing structure for different levels of government[9] may also be relevant at some stage.

56 However, rarely would a drafter confidently assert, based on the Court's previous decisions, that a particular provision would be upheld by the High Court. At best, a drafter might advise that a particular legislative approach, or a particular formulation of a proposition, might be safer than another approach or formulation.

57 Of course, drafters sometimes advise that a particular approach or formulation is likely to fall foul of the High Court, and this advice is ignored. In the end, if the instructors say, in effect, "your views are noted but we want to proceed", then the drafter must draft the legislation as the instructors request.[10]

Rules of statutory interpretation

58 Thirdly, of course, drafters try to pay appropriate regard to judicially developed general rules of statutory interpretation. It has been suggested that these rules (or approaches and presumptions, as some commentators prefer to call them[11]) constitute a "code of communication" between the legislative drafter (charged with conveying what Parliament meant to say) and the courts (charged with construing what Parliament did say).[12]

59 Unfortunately, this is a somewhat idealistic view of the matter, at least from the perspective of the legislative drafter. For various reasons which I shall mention later, many of the general rules of interpretation are of little value to the drafter as he or she works. At best, they may serve to get the drafter out of a hole that is only recognised long after his or her dealings with a Bill have finished.

60 However, it is worth mentioning at this point one element of statutory interpretation which is used (rather than relied on) by drafters quite frequently these days. The notion of purposive interpretation, which was made respectable by the enactment of section 15AA of the *Acts Interpretation Act 1901*, has influenced our drafting in recent years. This is shown in the significant increase over the last 15 years in the use of purpose clauses of various kinds in Commonwealth legislation. However, in general we regard purpose clauses as an extra chance to direct users of legislation towards the "intended" construction of the legislation, rather than as a technique which will compensate for other failings, or deliberate simplifications, of the substantive provisions.[13]

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[9] *Capital Duplicators Pty Ltd v Australian Capital Territory* [No. 2] (1993) 178 CLR 561.

[10] In such a case, we would of course make sure that our views are recorded, but the private satisfactions, such as they are, of saying "I told you so" to instructors don't generally compensate for the public shame of being a party to failed legislation.

[11] Pearce and Geddes, "*Statutory Interpretation in Australia*", 3rd edition (1988), at 3.

[12] See for instance Roberts, "*Mr Justice John Bryson on Statutory Interpretation: A Comment*", (1992) 13 Statute Law Review, 209 at 211.

[13] See Barnes, "*Statutory Interpretation, Law Reform and Sampford's Theory of the Disorder of Law — Part One*" (1994) 22 FLR 116, for a discussion which suggests that purposive interpretation is no more reliable, at least from the drafter's point of view, than any other approach to statutory interpretation.

61 Some "rules" of interpretation are expressly aimed at cases in which the court finds an ambiguity or uncertainty in the language of the Act (the golden rule, the mischief rule). Obviously, the drafter is trying to ensure that there are no ambiguities or uncertainties in the language he or she chooses. If the drafter recognises a potential problem in the Bill, he or she will try to solve the problem before the Bill is finalised rather than relying on the Courts to solve it by applying a rule of interpretation.

62 Some other rules do not require the same kind of ambiguity before they become applicable (for instance, syntactical presumptions such as the *ejusdem generis* rule). In these cases, the drafter may consider whether the words of the Bill could be misinterpreted by a court applying the relevant rule, and may take steps to prevent this. The drafter would, however, be highly unlikely to rely on such a rule to ensure that a court reached the intended interpretation of his or her words. This is largely because, as the cases demonstrate, the courts cannot be relied on to apply any particular rule of interpretation in a particular way or at all[14].

63 Accordingly, drafters are more inclined to assume that the best that can be hoped for from the courts is that they will heed Sir Harry Gibbs' exhortation to "begin with the assumption that words mean what they say"[15].

64 Unfortunately, however, this exhortation is of limited value. It may be useful as a reminder that judges should look to the "obvious" meaning of the words of the provision before venturing into the relative dangers of the various rules or presumptions of statutory interpretation. As a suggestion that the words have some sort of absolute meaning, it is at best misleading. Mr Justice Bryson of the NSW Supreme Court has pointed out one of the problems with Sir Harry's comment:

> Gibbs CJ's observation that it is not unduly pedantic to begin with the assumption that words mean what they say will guide us to the solution of most problems, but could tend to obscure the besetting difficulty that each of us is very tempted to see his own first interpretation as much more strongly and clearly what the words say than any other view.[16]

65 Perhaps more significant are the warnings of the linguists and communications experts who are increasingly turning their attention to legislation. For instance, Dr Robyn Penman of the Communication Research Institute of Australia makes the point:

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[14] See Pearce and Geddes, op.cit. At page 93, the authors state:

> Whether the court will have regard to punctuation [in the interpretation of a legislative provision] seems to depend very much upon whether it suits the judge to refer to it as aiding the interpretation that he or she wishes to adopt or whether it interferes with that interpretation.

The discussion of a wide range of approaches to the construction of legislation in Chapters 2, 3 and 4 of this work suggests that an equivalent statement could fairly be made about most if not all specific approaches to the construction of legislation.

[15] Referred to in Bryson, "*Statutory Interpretation: An Australian Judicial Perspective*", (1992) 13 Statute Law Review, 187 at 188.

[16] Bryson, op.cit. at 194-5.

> When we are dealing with language and communication we must recognise the fundamentally slippery nature of words and meanings. The very open ended, symbolic features of language makes meanings fundamentally and unavoidably uncertain. Despite all, and often desperate, attempts of legal writers to ensure certainty, this is fundamentally impossible. Regardless of whether clarity or tortuous legalese is chosen as the approach to legal documents, neither will ever guarantee certainty of meaning.[17]

Unhelpful judicial pronouncements

66 Finally, it must be said that, from a drafter's point of view at least, judicial approaches to the construction of legislation are sometimes unhelpful.

67 Some of them are no better than veiled personal abuse. A current member of the High Court was recently reported as saying that a statutory provision "looked as though it had been drafted by a social worker rather than a lawyer".

68 Some of them are entirely unconstructive. Some years ago a member of the High Court referred to the numbering system used in Commonwealth legislation as "barbaric". Not surprisingly, we weren't able to find any guidance in this comment, and our numbering system remains the same.

69 More usually, however, judicial comments are unhelpful either because of the way the judiciary operates or because of inherent difficulties in the drafting of legislation.

70 The difficulties of extracting clear reasons for a decision from several separate judgments, written in several different styles by judges whose positions as members of the majority or the minority might shift in the course of a single judgement from issue to issue (and who often don't even address the same issues in the same order or even under the same names) affect most lawyers, not only legislative drafters.

71 On a personal level, drafters may find these difficulties more frustrating than other lawyers do. Now that it is generally accepted that judges make law, questions about the form in which judges make law cannot be ignored. Presumably it would not be acceptable for drafting offices to produce 2 or 3 or even 7 different versions of each Bill, drafted by different drafters, which could all be enacted by the Parliament and which, taken together, would form the law on the particular subject. Should it remain acceptable for judges to make law in this fashion?.

72 Leaving that issue aside, it is still arguable that the problems with using case law are magnified as far as the drafter is concerned. If we as drafters are to make any constructive use of judicial comments (rather than treating them only as marking the boundaries beyond which we cannot safely proceed), we need to be able to use whatever general principles can be extracted as a basis for deciding the exact words to be used in legislation.

73 We do not have the judicial luxury of giving reasons or of being able to set out at length all the matters we considered in reaching a particular form for a legislative statement.

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[17] Penman, "*Legislation, Language and Writing for Action*", Collected Papers, Parliamentary Counsel's Committee Conference on Legislative Drafting, Canberra, July 1992, 33 at 40.

We do not have scope for explaining and qualifying our legislative statements at length. We don't even have the privilege of being able to set out the background to our laws.[18]

74 Bearing in mind the point made earlier about the time usually available for drafting legislation, and the material quoted earlier about the inherent difficulties in using language to communicate, it will be apparent that the drafter faces a difficult task in choosing words and legislative structures with which to attempt to convey the intentions of the sponsors of legislation. Those intentions need to be conveyed to a variety of different audiences, each individual member of which brings to the process of interpretation a unique set of pre-conceptions, life experiences and understanding of language. Without the opportunity to sit down individually with each reader and explain the legislation personally, the drafter is bound to fail in the task of conveying the same message to all his or her readers. At best, the drafter can hope to convey a message which is similar enough (for practical purposes) to enough of the readers (ideally including any judges called on to interpret the legislation). Unfortunately, these difficulties often appear to be overlooked by judicial interpreters of legislation.

75 Even when judges take the major step of recognising the conflicting aims inherent in the writing of legislation, they don't seem to be any more successful than the rest of us in resolving that conflict. In *Blunn v Cleaver*, the Federal Court made some perceptive observations about the difficulties of attempting to improve the accessibility of legislation, but finished by throwing up its collective hands:

> It is difficult to know what can be done about [the problem of the complexity of legislation]. As the [Senate Standing Committee on Legal and Constitutional Affairs] remarked, the increasingly complex society in which we all live very often demands that legislation be expressed in a complex form. That is the factor which will so often operate to prevent simplicity in legislative drafting.[19]

Conclusions

76 In this paper I have tried to give some insights into the processes by which legislation comes into being. It will be apparent that the processes are far from ideal, and that in many ways they are not particularly well adapted to the difficult task of using an infinitely flexible but correspondingly imprecise language to communicate complex concepts to a wide range of different audiences.

77 I have little hope for significant improvement in the political aspects of the process. Nor am I suggesting that judges should be more sympathetic to the drafter's problems in their interpretation of legislation. However, I would like to think that some judges might take account of the difficulties I have outlined and, without in any way compromising their independence, seek to be more constructive in their comments on legislation.

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[18] It is interesting to note that recent Commonwealth attempts to add various forms of explanatory material to our Bills (reader's guides, examples, provisions setting out the matters covered by a particular part of the Bill) have generally received a cool response from judges, who have been known to suggest that statutes should simply state the law.

[19] (1993) 119 ALR 65 at 83.

78 While drafters and judges could never be seen to be on the same side in relation to the interpretation of legislation, I would hope that drafters and judges could agree on the desirability of improving our legislation in the interests of all users. Judges, who are some of our most experienced and perceptive users of legislation, could give extremely useful advice to drafters if they chose to do so. I would like to think that more of them will choose to do so in the future.