Legislative Drafting in Australia, New Zealand and Ontario: Notes on an Informal Survey

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Where do I come from?

I would like to use the occasion of this conference to do two things: to give a very rough snapshot of Australasian drafting, and to draw together some of the strands of my experience in Toronto in the Ontario Office of Legislative Counsel with those from my work back in Australia.

My home office, the Parliamentary Counsel's Office of the Australian Capital Territory (ACT) drafts legislation for the small self-governing territory in which Canberra, Australia's capital city, is situated (not to be confused with Ms. Penfold's federal drafting office on the other side of the lake). Because of the somewhat weird arrangements under which the ACT is governed, our Parliamentary Counsel's Office has a rather bigger job than you might expect, however. The ACT Legislative Assembly of 17 members (representing about 310,000 people) is responsible not only for all traditional State matters (including criminal law) but all municipal governance as well—the City/State in action. As a result we have a dozen or so drafters, not among the larger Australian offices, but not the smallest either (see the *Survey*, item 3.1, page 8).

What do we do there?

Before coming over to Canada, I conducted a little survey of 9 Australian drafting offices, the New Zealand Office of Parliamentary Counsel and the Ontario Office of Legislative Counsel, covering their institutional roles, management structures, arrangements for legislative

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publishing and drafting styles. One of my reasons for going to Toronto was to get a broader sense of the role of the drafter and the functions of drafting offices, and I wanted to give myself a baseline from which to make comparisons. Probably the most profitable thing I can do here is to give you an overview of the results of that survey.

The general conclusion I would draw from the survey is that within Australia, and between Australia, New Zealand and Ontario, there is a broadly comparable set of institutional, management and publication arrangements, and professional standards and practices, for the drafting and publication of legislation. It is a conclusion that is strongly corroborated by my experience as an Australian drafter working in Ontario. There are many stylistic and environmental differences—citation of the law, clausing/paragraphing, amending language, format, use of subsection headings, office and government organisation. The drafting process, and to some extent drafting practice, is significantly influenced by the requirement for legislation to be translated into French. And I have not yet even mentioned the obvious substantial differences in the law, with a different version of the common law, a variant federal/provincial distribution of powers, and a *Charter of Rights and Freedoms* incorporated in the Canadian constitution.

But I felt from my first lawyers' meeting in Ontario that despite such differences, I was on the same wavelength as my colleagues. I understood the issues discussed and was able to play a part in the sometimes vigorous debates that ensued, even if my starting point in terms of drafting practice on particular issues might be somewhat different. The ACT experience with providing free internet access to official versions of the law was very similar to the history and prospects of the Ontario e-laws project. And as the year has progressed, it has become still clearer that my experience and skills as a drafter trained and working in Australia—such as they are—are sufficient for me to make a contribution to the bread and butter drafting work of this office, half way across the world.

I don't suppose I needed to conduct a survey to discover this, and to find out that most offices in Australia and New Zealand also shared similar basic functions, operations and drafting practices. But what the survey usefully indicates, I think, is the spectrum of difference—the possible alternatives—within which the same functions are carried out, and the current range of opinions and practice on various aspects of drafting style. I would like now to turn to the survey and draw your attention to some of the more instructive results.

Commentary on the drafting survey

Section 1: Vertical relationships

1.3[1] Parliamentary scrutiny. In the Australasian drafting environment, a constant backdrop against which subordinate legislation is drafted is the requirement that after making, subordinate laws must be laid before parliament and be subject to scrutiny by a standing committee whose remit is to examine them, not for policy, but for issues relating to validity (in terms of the head of power under which subordinate legislation is made), undue trespass on individual rights and freedoms (e.g. by retroactive effect), improper conferral of power to make administrative decisions, and whether the subject matter is proper for subordinate rather than primary law. All Australasian parliaments have the power to disallow subordinate legislation within a certain period after making, a power generally exercised (and it *is* exercised, albeit sparingly, in most jurisdictions, apparently with the exception of Tasmania) on the recommendation of the relevant standing committee.

In addition, a number of jurisdictions (I'm not sure how many) subject primary legislation to similar non-partisan scrutiny, for example, the Australian Senate Standing Committee on the Scrutiny of Bills reports on such matters, and the ACT Standing Committee on Legal Affairs.

In Ontario, while there is a standing committee of the Legislative Assembly that reports on such matters relating to the making of regulations, there is no mechanism for parliamentary disallowance. There is also no parallel standing committee that reviews Bills. My impression is that as a result of the lack of disallowance arrangements, the Assembly standing committee reports carry less weight, though drafters are certainly aware of the committee criteria, and will bring them to the attention of instructors when appropriate. In addition, there is a procedure for the Legislative Counsel's Office to alert Cabinet to questions concerning the validity of regulations.[2]

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[1] The numbering is keyed to that used in the survey. I do not comment in this paper on every section of the survey, so these numbers are discontinuous.

[2] One historical reason for the failure to provide for a disallowance procedure is the findings of the 1968 McRuer Royal Commission which recommended the establishment of the current standing

Section 2: Horizontal relationships

Most relationships with instructors are broadly similar. In all cases legislation is drafted on instruction from other areas of government, sometimes from legal advisers, sometimes from policy officers. There is little evidence of significant or routine involvement by the private sector, though this happens from time to time.

Section 3: Drafting management

3.1 Drafting strength. Office drafting strength ranges between 6 (Tasmania, the State with the lowest population) and 28 (Commonwealth OPC). There is no simple correlation between drafters and the population of the jurisdictions drafted for; in Ontario's case, for example, there are just 14 drafters for a population of 11 million or so (only the Commonwealth of Australia has a higher population among the jurisdictions surveyed). However, all Ontario drafters are senior lawyers who work unsupervised, many with long years of experience within OLC and other areas of Ontario Government. Perhaps the municipal layer of government has more to do in Ontario than is common in Australia, as well.

3.2 Specialisation. Also of interest in this section is the tendency of drafters NOT to specialise. The nearest to specialisation is in the Cwlth OPC's special outposting arrangements for the Corporations and Tax law rewrites, and in Ontario's and NZ's allocation of drafters to work from a portfolio of Ministries—though the allocations are not set in stone, either.

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committee arrangements, but against disallowance. (See *Royal Commission Inquiry into Civil Rights*, Report No. 1, Volume 1. Queen's Printer: Ontario, 1968. Pages 366-68. For a brief discussion of the proposal for the disallowance of subordinate legislation, see also Revell, Donald L. "Rule-making in Ontario." *Gazette* [of the Law Society of Upper Canada] XVI, 1982: 350-74, at 367.). The procedure referred to is one whereby draft regulations are impressed with a brass seal in the Legislative Counsel's Office before submission to Cabinet, to indicate that the drafter considers the exercise of the regulation-making power to be valid (if not, the seal is withheld, and a memorandum explaining why submitted to Cabinet over the signature of the Attorney-General).

3.3 & 3.4 Recruitment and training. Recruitment to senior levels tends to be internal, except in the smaller offices, reflecting the specialised nature of the craft. Training tends to be on a master/apprentice basis, but there are different ways this works in practice. It is interesting that in 7 out of 11 offices drafts are routinely read by another drafter (either a senior or a peer). This works not only as a training device, but has a quality control function; or at least the practice provides a mechanism for increased standardisation.

Section 4: Publications

4.4 Electronic access to law. All jurisdictions surveyed except NZ now have up-to-date consolidations available to the public free on the internet. NZ will catch up shortly. Access to source law is patchier, though in most jurisdictions this is available as well, sometimes through parliamentary websites which post final-reading versions of Bills (eg Ontario). The Austlii website given is a secondary source (they post law available from other sites), but useful of course for cross-jurisdiction searches.

4.5 Official status of electronic law. The ACT is the only jurisdiction to have given official status to the electronic form of the law, as published on an internet register (though Qld has done so *de facto* in the Evidence Act amendment noted). Ontario and NZ may not be far behind.

Section 5: Drafting style

5.2 House style. The responses line up on either side of a dividing line: "modern/traditional" versus "plain language". But they are nuanced to some extent. Having regard to some of the explicit comments of the respondents and my general impression from discussion with Australian, NZ and Ontario drafters, it is tempting to make the assertion that Australasian and Ontario drafting is (a) better than UK drafting; (b) better than the normal run of US drafting; and (c) light years ahead of drafting in private legal professional practice. But I must add the caveat that this is a highly subjective, partial assessment, reflecting a certain level of professional hubris all round.

It can be seen from section 5.6 that almost all jurisdictions (NT and WA are the standouts) claim to have adopted either an express "plain language" (or "plain English") policy, or a substantive policy that drafting should be "clear, accessible and understandable".

The questions in this section were framed to test the adoption of what has become, to my mind, a particular "plain language" *style* in Australia, marked by the indicators surveyed in s. 5.7 (though as you can see from some of the responses, e.g. from Vic., not all of these are accepted as being genuinely in the spirit of "plain language"). Drafters in the jurisdictions surveyed have in the last 15 to 20 years (I make this judgment based on general impressions only, reinforced by the survey responses) a good track record on avoiding overly complex legalistic drafting and developing clear legislative structures. The "traditional" modern approach, as advocated by Thornton and Driedger, for example, emphasises consistency and economy.[3] Plain language style is aimed at making positive changes to reform legislative language to communicate the law to a broader public than before. The emphasis is not so much on a logically structured and efficiently stated text than on a text of the law that effectively conveys its contents to the reader.[4] This may result in a sacrifice of economy and is sometimes accused of resulting in inconsistencies of language.[5]

Most traditional: NT, SA, Tas, WA, [Ont.—see below]. The WA respondent makes the most articulate case for resistance to "plain language" style as practised in Australia—a sharp line is drawn between what is sufficient to *prescribe* the law and what are felt to be extraneous devices for *explaining* the law. The NT respondent goes further, being sceptical about whether "plain English" has really achieved any progress in making the law more comprehensible. Perhaps the "traditional" school

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[3] Driedger, Elmer A. *The Composition of Legislation.* 2nd ed. Ottawa: Dept. of Justice, 1976. Thornton, G.C. *Legislative Drafting*. 3rd ed. London: Butterworths, 1987.

[4] The point of departure for plain language reform of legislative drafting in Australia was a Victorian law reform commission report in the 1980s (Law Reform Commission of Victoria (1987) *Plain English and the Law*, Victorian Government Printer).

[5] For a philosophical and theological reflection on "plain language style" see my article "Black Letters: Plain English and Epistolary Rhetoric." 9 *Griffith Law Review* (2000): 7-24. I will also be giving a paper along similar lines at the PLAIN conference in Toronto at the end of September 2002.

of drafting is best characterised as plain language without the quotation marks.

Evolution: NZ is moving cautiously on similar changes to those implemented in Australian jurisdictions with "plain language" policies. NSW appears to be backing off from plain language reforms a little, after initially being towards the forefront of experimentation. Vic., where plain language was mandated in the 1980s (in implementation of the law reform commission report I mentioned earlier), is perhaps less enthusiastic than NSW or the current proponents of plain language reform.

Reformers: ACT, Cwlth OPC (& OLD, though less so recently), Qld. All are, or have recently, adopted or at least experimented with the reforms objected to by the WA and NT respondents. Of course, it is an oversimplification to say that a single "plain language" style has been adopted everywhere (though QLD, Cwlth OLD and the ACT have adopted a very similar approach due to the leadership of the same head of office at different times, John Leahy). And elements of it are pervasive in Australasia: for example, "must" is used almost everywhere instead of "shall" to express legal obligation, on however questionable a basis.

Ontario: Here there is a certain difference due to historical and legal context. The reference to the influence of the "civil law tradition" of drafting indicates a level of comfort with general statements that are not circumscribed by the prevarications of the English common law school of drafting. Practically, it underlies a tendency to draft without undue recourse to definitions and cross-references, using words of ordinary meaning (as the Ontario respondent notes elsewhere, no law Latin, no law French etc.). However, this is well within the spectrum of drafting styles in evidence in Australasia; more on what I call the "traditional" end of the spectrum, perhaps, but only due to a lack of experimentation with the devices mentioned in the survey.

Section 5.7 Markers of plain language. Drafting in most jurisdictions except the "traditional" jurisdictions sanctions the use of many of these devices (examples, readers' guides etc., explanatory notes, in-text definitions,[6] highlighting of defined terms, general preference for

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[6] The point about in-text definitions could have been better explained. I intended to refer to new styles of definition which embed the definition into the provision in which it is first used, intended to avoid having the reader go back and forwards too much to the list of definitions for

rewriting (in Ontario an additional reason for doing this is for ease of translation), short provisions and short sentences. But clearly in some jurisdictions use of the more extroverted of these devices (readers' guides, examples) is encouraged more than in others.

Perhaps more to the point, the survey indicates that most jurisdictions will at least contemplate the introduction of such drafting methods if particular drafters wish to employ them, or if they become broadly enough accepted. My personal feeling is that we are still not yet over the age of experimentation, although it has slowed in some places (e.g. NSW); but eventually some experiments will fall by the wayside while there will be a convergence towards others as they are tested and found to be useful. If "plain language" style is to improve legislative drafting, drafters and, more particularly, drafting offices, have always to keep under review the issue of whether drafting practices invoking that style live up to its name, and assist in the comprehension of the law while at the same time stating the law with sufficient certainty.

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the whole Act (though there may well be a cross-reference there as well). I did not intend to refer simply to localized definitions as such.