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THE LOOPHOLE



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Submissions should be no more than 8,000 words (including footnotes) and be accompanied by an abstract of no more than 200 words. They should be formatted in MSWord or similar compatible word processing software.

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Contents

Editor's Notes	1
Legislative needs of an activist Parliament	
Charmaine van der Merwe.....	2
Managing non-legislative documents incorporated by reference into legislation: a practical perspective	
Rod Alsop	25
Common Law Rights, Human Rights and Delegated Legislation	
Ben Fraser	43
Penalties – Knowing what they mean and drafting for judicial scrutiny	
Alison Ryan	82
Brexit: A Catalyst for Change in Legislative Drafting	
Ingrid Morgan and Richard Spitz	93

Editor's Notes

This issue of the *Loophole* should give readers a sense of the breadth of the 2019 CALC Conference in Zambia under the theme of *Change and Continuity in Legislative Drafting*. Legislative counsel have always wrestled with the tension between these two ideas. Change is implicit in drafting legislation, which by definition creates new law. But it operates within a legal system oriented around the rule of law and democracy. The five articles in this issue address the tension between change and continuity from a variety of perspectives.

Charmaine van der Merwe leads off with her account of the changes in South Africa as it transitions to “[a]n activist and responsive people’s Parliament that improves the quality of life of South Africans and ensures enduring equality in our society”. She describes how she and the members of her drafting office have risen to the challenge of meeting the substantially increased demands of its members for drafting services.

The next two articles address delegated legislation, a significant and often somewhat neglected subject. **Rod Alsop** looks at how non-legislative documents are incorporated by reference in subordinate (or delegated) legislation, often with a view to keeping it up to date with developments in the areas it regulates. But this need for harmony comes with a price in terms of democratic accountability for, and accessibility to, law. Rod’s article focuses on how Queensland and its legislative counsel office have been striving to manage this challenge.

Ben Fraser also considers delegated legislation, but from the standpoint of its harmony with human rights in terms of both the common law as well as statutory and constitutional rights. His is a comprehensive and detailed analysis of this subject looking mainly at legislation and case law in Australia, New Zealand and the UK. He particularly focuses on the role of legislative counsel in drafting provisions that might infringe these rights.

The next article also takes a close look at drafting practice: that relating to penal provisions that pervade legislation. **Alison Ryan** examines how the courts of Queensland have interpreted and applied (or not) various types of provisions and provides helpful guidance on “thinking beyond the page” when drafting them.

This issue concludes with a subject that have captured attention the world-over: Brexit.

Ingrid Morgan and **Richard Spitz** take us inside the drafting rooms of Westminster for a look at how legislative counsel in the UK have been dealing with the unprecedented challenges of taking their country out of the European Union in a political climate that continues to change with incredible volatility. Change and continuity meet head on in their world as they describe how their office has been managing what is unquestionably the most cataclysmic drafting challenge the Commonwealth has ever seen.

John Mark Keyes
Ottawa, October, 2019

Legislative needs of an activist Parliament

Charmaine van der Merwe¹



Abstract

In keeping with the theme of the 2019 CALC Conference, this article aims to show that not only can the role of a legislative counsel be subject to change, but the environment in which a legislative counsel is placed may even result in an immediate transformation. The Fourth Parliament of the Republic of South Africa identified a need for dedicated legislative drafting capacity within the legislature. It required its legislative counsel to be independent from the Executive arm of government. The experience of the Legislative Drafting Unit within the Fourth and Fifth Parliaments showed that the role of a legislative counsel within a legislature is quite different from that of a legislative counsel placed within the Executive or within a centralised office. However, the challenges faced by these parliamentary legislative counsel may spill over to legislative counsel within the Executive or in a centralised office, which could result in an evolution of the role of legislative counsel in South Africa as a whole.

Table of Contents

An activist Parliament	3
A constitutional mandate to legislate	4
The need for legislative capacity	5

¹ Parliamentary Senior Legal Adviser, Parliament of South Africa. I wish to thank the members of my legislative drafting team for sharing their experiences with me in an open and honest manner. I also want to thank them for considering this article and holding me accountable for every word written down. I could not have completed this article without their support.

Capacity to be created within Parliament.....	10
Legislative Drafting Unit.....	11
Statistics on Bills	14
Interviews with parliamentary legislative counsel	15
The role of legislative counsel: immutable or evolving?	21
Conclusion	23
Sources.....	24

An activist Parliament

The work of the First Democratic Parliament of the Republic of South Africa (1994 – 1999) and the Second (1999 – 2004) focused on the repeal of legislation that formed the foundation for the implementation of apartheid, and on introducing laws that would bring about democratic transformation. This was necessary in order to establish a foundation that would result in the entrenchment of democracy and to achieve the hopes of reconciliation, unity and equality. The Parliaments specifically focused on opening up their parliamentary business to the people, thus ensuring transparency.

The focus of the Third Democratic Parliament (2004 – 2009) was on strengthening the oversight and accountability role of Parliament. To empower Members in their oversight activities, Parliament strengthened its internal research and content capacity.

The Fourth Democratic Parliament (2009 – 2014) adopted an activist approach in the achievement of its strategic objectives. The term “Activist Parliament” was however only defined and formalised in the Fifth Democratic Parliament (2014 – 2019) in its Strategic Plan dated 27 February 2015. The Plan describes the vision of the Fifth Parliament as “[a]n activist and responsive people’s Parliament that improves the quality of life of South Africans and ensures enduring equality in our society.”² The inclusion of the word “activist” is explained as follows:

The vision incorporates the additional element of an activist Parliament to broaden the intended impact on society so that equality can be achieved. This will reflect the evolving nature of Parliament and the need to enhance societal outcomes.³

² Parliament of the Republic of South Africa, *Strategic Plan for the 5th Democratic Parliament 2014-2019*, 27 February 2015 at 8.

³ *Ibid.* at 8.

The mission stated in the Plan includes the following elements that speak directly to this activist element:

Parliament aims to provide a service to the people of South Africa by providing the following:

- a vibrant people's assembly that intervenes and transforms society and addresses the development challenges of our people; ... and
- an innovative, transformative, effective and efficient parliamentary service and administration that enables Members of Parliament to fulfil their constitutional responsibilities.⁴

By way of its activist approach, the Fourth Democratic Parliament spearheaded the adoption of a Public Participation Framework in the legislative sector of South Africa, which framework demands greater participatory democracy, building on the work of the First and Second Parliaments. It further established a Parliamentary Budget Office to provide Parliament with professional analysis and advice on matters related to the budget, appropriation of funds and taxes, building on the oversight and accountability focused work of the Third Parliament.⁵ The Fourth Parliament also identified the need to improve legislative scrutiny and accordingly created dedicated legislative drafting capacity within the institution supporting Parliament. The Fifth Democratic Parliament acknowledged the emphasis that the Fourth Parliament placed on the constitutional mandate of Parliament related to legislation and identified as one of its strategic priorities, the need to strengthen legislative capacity.⁶

A constitutional mandate to legislate

Parliament is identified in section 43(a) of the *Constitution of the Republic of South Africa, 1996* ("the Constitution") as the primary authority in respect of legislation in the national sphere.⁷ Each of the First to Third Parliaments (and initially the Fourth Parliament) approached the constitutional mandate related to their legislative functions conservatively, by choosing to react to legislation introduced by the Executive. In doing so, these Parliaments accepted that expressing the national strategy lies in the purview of the Executive and that the Executive will determine its implementation by directing the "legislative policy and the initial preparation of Bills, [while] Parliament scrutinizes the Bills, amends or rewrites them and enacts them".⁸ While it is acknowledged that the scrutiny of legislation and the power to amend or rewrite such legislation constitutes a significant

⁴ *Ibid.* at 9.

⁵ *Ibid.* at 12-13.

⁶ *Ibid.* at 12-13.

⁷ Section 43(a): "In the Republic, the legislative authority ... of the national sphere of government is vested in Parliament, as set out in section 44;"

⁸ S. Gutto S et al, *A Study on Enhancing the Status Role, Image and Positioning of the Parliament of the Republic of South Africa* Research Paper Commissioned by Parliament (2007) at 10.

role, Parliament is constitutionally empowered, and in fact mandated, to proactively enact legislation to achieve its strategic objectives. The activist character of the Fourth Parliament (and its formalisation in the Fifth Parliament) is fully aligned with this constitutional mandate.

The Constitution provides a mandate for the Executive, as well as for committees and members of the two Houses of Parliament, to initiate legislation.⁹ Parliament, as the people's representative, thus has the constitutional power to actively identify legislative *gaps*, duplications or conflicts and initiate legislation to resolve these. As such, Parliament has the constitutional power to address any 'democratic deficit' that may occur when the Executive acts outside the ambit of its mandate and functions.¹⁰ This does not imply that the Executive enacts laws or that Parliament is not functioning properly. Rather, it implies that Parliament has the power to react more strongly than it currently is doing when its constitutional powers are undermined, or when it is required to ensure the proper exercise of a constitutional mandate, whether its own or the Executive's.

The constitutional mandate of Parliament to be proactive is further endorsed by the fact that it is tasked¹¹ to annually review the Constitution, in light of the 'living' character of the Constitution, to amend it where necessary to give expression to the public will.¹² Policy is furthermore no longer seen as the exclusive concern of the Executive: "In its legislative and oversight roles Parliament also contributes to policy evolution which is considered to be the domain of the Executive".¹³

The need for legislative capacity

Independent Panel Assessment

The Fourth Democratic Parliament appointed an Independent Panel to assess the extent to which Parliament meets the expectations outlined in the Constitution. The Panel completed its work in 2009 and issued an assessment report in which it expressed the following view:

In the view of the Panel, the power of the National Assembly to initiate legislation is a powerful tool through which Parliament may address policy issues and assert its independence vis-à-vis the Executive. In some cases, issues may be initiated through Parliamentary debates, but it is then left to the Executive to develop draft legislation, which may not have the same priorities as Parliament in terms of the development of

⁹ See section 73 of the Constitution. The only constitutional limitation placed on Parliament's power to initiate bills is found subsection (2), which dictates that only the Cabinet member responsible for national financial matters may introduce a Bill in the Assembly that amounts to a money Bill, or a Bill that provides for legislation envisaged in section 214 (that in turn deals with equitable shares and allocation of revenue).

¹⁰ See Gutto, above n. 8.

¹¹ Section 45(1)(c) of the Constitution.

¹² This function Parliament performs through its Joint Constitutional Review Committee.

¹³ Gutto, above n. 8 at 6.

legislation. The Panel observed that part of the reason for Parliament not initiating legislation lies in the relatively weak capacity of Parliament's legal services...The Panel recommends that Parliament should explore the reasons behind its poor record in initiating legislation and address capacity gaps that may contribute to it.¹⁴

Oriani-Ambrosini, MP v Sisulu, MP Speaker of the National Assembly

Urgency was added to the recommendation of the assessment report by the decision of the Constitutional Court ("Court") in the 2012 matter of *Oriani-Ambrosini, MP v Sisulu, MP Speaker of the National Assembly* ("Ambrosini").¹⁵ The Court had to consider whether the National Assembly ("Assembly") may regulate its business in a manner that may deny its members the opportunity of introducing a Bill in the Assembly – a right which the applicant argued was afforded all members of the Assembly by section 73(2) of the Constitution.¹⁶ This challenge to the Rules of the Assembly ("Rules"), was brought by Mr. Oriani-Ambrosini, a member of the Inkatha Freedom Party and of the Assembly.

The Rules challenged provided that a member of the Assembly may introduce a Bill in the Assembly, in accordance with section 73(2) of the Constitution, only if the Assembly has given *permission* to initiate legislation.¹⁷ For the purposes of obtaining that permission, the member must submit a memorandum to the Speaker setting out the particulars of the proposed legislation explaining its objects and stating whether it will have financial implications for the State. The Speaker would then refer the memorandum to the Committee on Private Members' Legislative Proposals and Special Petitions ("Committee"), which in turn would consult a Portfolio Committee that deals with the subject matter of the proposal.

After considering the memorandum, the Committee would then recommend to the Assembly that permission to proceed with the legislation either be granted or refused. A positive recommendation could be accompanied by an indication of the proposal's desirability, a recommendation that the proposal be approved by the Assembly in principle, or that permission be given subject to certain conditions. Mr. Oriani-Ambrosini argued that the required permission undermined the values of democracy, transparency, accountability

¹⁴ Report of the Independent Panel Assessment of Parliament, 13 January 2009 at 31.

¹⁵ (CCT 16/12) [2012] ZACC 27.

¹⁶ Section 73:

(1) Any Bill may be introduced in the National Assembly.

(2) Only a Cabinet member or a Deputy Minister, or a member or committee of the National Assembly, may introduce a Bill in the Assembly, but only the Cabinet member responsible for national financial matters may introduce the following Bills in the Assembly:

(a) a money Bill; or

(b) a Bill which provides for legislation envisaged in section 214.

¹⁷ Rule 230 of the Rules (8th edition and earlier editions). This rule is not included in the current 9th edition of the Rules.

and openness, as well as the importance of protecting individual members of minority parties in the Assembly.

The Court in the *Ambrosini* case found that the constitutional democracy of South Africa is designed to ensure that the voiceless are heard, and that even those who would, given a choice, have preferred not to entertain the views of the marginalised or the powerless minorities, listen.¹⁸ It was further observed by the Court that one must have regard to the broader scheme of the Constitution, Chapter 4 of the Constitution, and the purpose of section 55(1)(b) itself to appreciate whether a Member of the Assembly has the power to initiate or prepare legislation. Chapter 4 deals with Parliament, its composition, powers and how it ought to function. It also affords an individual member of the Assembly the possibility to introduce a Bill in the Assembly. This power, the Court concluded, extends to all and must not, therefore, inadvertently or deliberately, be rendered hollow and inconsequential for those individual Members of the Assembly who may wish to exercise it.¹⁹

The Court commented that a construction that also recognises an individual's competence to initiate or prepare legislation not only accords with the textual meaning of the section but also with the principles of multi-party democracy, representative and participatory democracy, responsiveness, accountability and openness. It also said that the very nature and composition of the Assembly renders it pre-eminently suited to fulfil the role of a national forum at which even individual Members may initiate, prepare and present legislative proposals to be considered publicly by all the representatives of the people present in the Assembly.²⁰

According to the Court, the "rights of all to be heard and have their views considered", within the context of the legislative process, dictates that individual Members ought to have the power to initiate or prepare legislation. In this way, the Court said, an opportunity would be availed to them to promote their legislative proposals so that they could be considered properly. The Court went on to say that it is a collective responsibility of both the majority and minority parties and their individual Members to deliberate critically and seriously on legislative proposals and other matters of national importance and that this should also apply to legislative proposals initiated or prepared by individual Members. This approach, it went on, would give meaning to and enrich the representative and participatory democracy, and probably yield results that are in the best interests of all the people.²¹

The Court interpreted section 55(1)(b) of the Constitution as empowering an individual member, even from a minority party, to sponsor or pilot a legislative proposal as his or her own and further that it is always open to the member, though, to seek the Assembly's

¹⁸ *Ambrosini* above n. 15, para 43.

¹⁹ *Ibid.* para 44.

²⁰ *Ibid.*, para 46.

²¹ *Ibid.*, para 48.

adoption of those initiatives as its own. This meaning of section 55(1)(b), it said, finds support in its textual and purposive interpretation, the nature of the power conferred by section 55(1)(b), and the manner in which the National Assembly operates.²²

The Court further held that the power of the Assembly to make Rules, which is derived from section 57 of the Constitution, must be exercised with due regard to representative and participatory democracy, accountability, transparency and public involvement. According to the Court, the Constitution does not entitle the Assembly to impose substantive or content-based limitations on the exercise of the constitutional powers of its Members, but rather contemplates rules that are procedural in nature.²³ The Court held that any Rule that empowers the Assembly to impose the permission requirement, or reinforces this requirement, would fly in the face of the meaning and purpose of section 57, read with sections 55(1)(b) and 73(2). It would therefore be constitutionally invalid, to the extent of that inconsistency.²⁴

Members' belief in their ability to influence policy

The Rules have since been reviewed and Bills introduced by Members of the Assembly ("private members' Bills) follow the same Parliamentary process as Bills introduced by the Executive, except that the Rules of both Houses require the Secretary to Parliament²⁵ to reimburse a member who has incurred costs in the process.²⁶ In practice, Parliament publishes any Bill that a member wishes to introduce (and pays for that publication) and also foots the bill for the printing of copies when the Bill is introduced. The Legislative Drafting Unit of Parliament was created to, among other things, assist members with the development of these Bills.

This almost unlimited power to introduce Bills poses a significant capacity and financial risk to Parliament as the only limit on the number of Bills that a member may introduce in any calendar year is found in Rule 332:

332. Same Bill may not be introduced more than once

When a Bill has been passed or has been rejected during a session in any year, no Bill of the same substance may be introduced in the Assembly in that year except by leave of the Assembly or where otherwise provided in these rules.

This has resulted in parliamentary legislative counsel often having more than 10 Bills on their desks, all in various stages of development and often on diverse topics. Some Bills may even be before Committees, adding to the capacity challenge as a day spent in a Committee

²² *Ibid.*, para 51.

²³ *Ibid.*, para 65.

²⁴ *Ibid.*, para 68.

²⁵ The Secretary to Parliament is the Accounting Officer of Parliament and thus financial accountability rests with the Secretary.

²⁶ Above n. 2 at 15.

inevitably results in more instructions on that Bill, on top of the day being a loss in respect of doing any other legislative drafting.

The following examples illustrate the financial risk:

- The Executive introduced a Bill dealing with the protection of indigenous knowledge. The Executive proposed that the existing principles contained in the South African law of intellectual property could be adjusted to apply to the protection of indigenous knowledge. A general laws amendment Bill (Intellectual Property Laws Amendment Bill, B8-2010) was accordingly introduced to amend various existing intellectual property Acts. Some opposition parties proposed that the matter should be dealt with through a “stand-alone Bill” that would operate separately from the existing intellectual property Acts. B8-2010 was passed by the Assembly as a general laws amendment Bill and referred to the National Council of Provinces (the second House). While B8-2010 was before the Select Committee in the second House, a Member developed a Bill with the same content as the Executive Bill, but fashioned it as a principal Act (i.e. “stand-alone”). The Protection of Traditional Knowledge Bill was published, introduced as PMB3-2013 and considered by the relevant Committee in the Assembly – the same Committee which considered and rejected the arguments for a stand-alone Bill when B8-2010 was considered. The Committee, and subsequently the Assembly, rejected the motion of desirability on the basis that a Bill with the same content was currently serving before Parliament.
- The Standing Committee on Finance passed a Committee Bill that dealt with the exact same matter as a Bill introduced by a Member – The Public Investment Corporation Bill, B1-2018, was introduced by a Member on 16 January 2018. The Standing Committee on Finance indicated that it was already busy considering the same matter for a Committee Bill. The Committee thus decided to proceed with a Committee Bill alongside the private member’s Bill B1-2018.²⁷ At one stage both Bills were word for word the same. Both Bills were also advertised for comment, thus duplicating the costs.

Certification of Bills

The Rules further require that, as is the case with Executive Bills, a Bill introduced by a committee or a member “must be certified by the Chief Parliamentary Legal Adviser or a

²⁷ Report of the Standing Committee on Finance on the Public Investment Corporation Amendment Bill (Committee Bill), 12 February 2019:

Following the Committee resolution of 18 October 2017 to effect amendments to the PIC Act, Mr David Maynier of the Democratic Alliance introduced a Private Members Bill in the National Assembly on 17 January 2018, covering many of the issues in the 18 October 2017 Committee resolution... There were discussions with Mr Maynier to merge his Bill with the Committee Bill but there was no agreement on this, and the Committee decided to process both Mr Maynier’s and the Committee’s Bill simultaneously.

parliamentary legal adviser designated by him or her as being consistent with the Constitution and existing legislation and properly drafted in the form and style which conforms to legislative drafting practice.” If the Bill cannot be so certified the relevant legal adviser must provide a report or legal opinion on why the Bill cannot be so certified.²⁸

Considering the report of the Independent Panel, the *Ambrosini* case, members’ belief in their ability to influence policy and the requirement of certification for private members’ Bills and committee Bills, it is clear that a need exists within Parliament for legislative drafting capacity.

Capacity to be created within Parliament

The Independent Panel expressed a concern about whether Parliament can be independent if it has to rely on the assistance of the Office of the Chief State Law Adviser (“OCSLA”):

As most Bills originate in the Executive, state law advisors are generally responsible for drafting Bills. In many cases these state law advisors will brief parliamentary Committees when the legislation is under consideration, outlining the intention of the Bill and answering questions posed by Committee members. In many instances parliamentary Committees will also rely on the state law advisors to draft amendments to the Bill when such amendments are agreed to by a Committee. This close relationship between Parliament and state law advisors who are situated in the Department of Justice has led to concerns that the independence of the Legislature vis-à-vis the Executive may be threatened. This was brought to the fore recently when it was claimed that state law advisors drafted amendments to legislation which exceeded the amendments agreed to by the Committee. In the view of the Panel adequate legal drafting capacity is essential in ensuring the independence of Parliament, and therefore proposes that the expansion of the Legal Services Office be pursued as a priority.²⁹

The OCSLA operates separately and distinctly from the Constitutional and Legal Services Office (“CLSO”) that is situated in Parliament. The difference lies in the customer base of each office. The OCSLA provides legal advice to the Executive, the national and provincial departments, as well as the municipalities. The OCSLA also provides legal support to parliamentary committees in relation to draft legislation that the Executive introduced in Parliament. The support includes:

- the drafting of Committee amendments;

²⁸ Rule 279(2) and (3) requires the Office of the Chief State Law Adviser (the drafting office situated in the Executive arm of government) to certify that the draft legislation developed by the Executive is constitutional and meets all the internationally accepted drafting standards and principles. Rule 279(4) and (5) requires the same in respect of committee and private members’ Bills. This task is however performed by the Constitutional and Legal Services Office of Parliament.

²⁹ Report of the Independent Panel Assessment of Parliament, 13 January 2009 at 72 to 73.

- the preparation of Bills which captures the Committee's amendments referred to as A-lists, B-Bills, C-lists or D- Bills (depending on the actual times a Bill has been changed by the Committee); and
- the provision of legal or constitutional advice on any legal issue that arises before the Committee whilst the Bill is being processed.

The Committees of Parliament require legal advice right to the point where the Bill is assented to by the President. The Independent Panel correctly expressed the concern that Parliamentary Committees cannot be expected to solely rely on the provision of legal or constitutional advice from officials who have, up to the stage of introduction of the Bill, been assisting the Executive. The Executive furthermore remains the main client of OCSLA during the processing of the Bill in Parliament. During parliamentary Committee deliberations on a Bill, it is possible that conflicting legal opinions may arise. Furthermore, the OCSLA often faces a conflict between instructions from its clients, the Executive, and Parliament as the Legislator. In these instances, it is important that Parliament is advised by an independent legal office.

The capacity created in Parliament does not replace the functions of OCSLA in Parliament. Rather, the intention is to enhance the services offered to Committees in respect of legal advice, as well as to offer a service to Parliament in respect of legislation originating within Parliament similar to that offered by OCSLA to the Executive.

Legislative Drafting Unit

The unit was created in October 2012 with 7 posts in phase 1 and 10 in phase 2. The unit currently consists of 5 parliamentary legislative counsel.

Because of the positioning of the unit within Parliament, the role of the parliamentary legislative counsel was already envisaged as being broader than that of a "normal" legislative drafting team. It was envisaged that the parliamentary legislative counsel must be able to assist members and committees of Parliament in the following:

- developing policy for the creation of legislation;
- identifying and rectifying *gaps* in National Legislation, as well as in the Constitution on an ongoing basis;
- drafting legislation;
- advising members and committees to enable effective participation in the legislative process from drafting, consultation and public participation to introduction and adoption in Parliament;
- advising Members and Committees on legislative proposals and processes; and

- advising Committees on legislation administered by the Executive in so far as said legislation relates to the oversight duties of Committees.³⁰

Drafting legislation includes:

- drafting new Bills (to become principal Acts) for members and committees of the Assembly, as well as for members and committees of the National Council of Provinces;
- drafting Amendment Bills (amending principal Acts) for members and committees of the National Assembly, as well as for members and committees of the National Council of Provinces;
- drafting new Bills or Amendment Bills on instruction of the Speaker and Chairperson of Parliament, or the Speakers' Forum, in respect of Bills applicable to the legislative sector;³¹
- drafting of amendments agreed to by a Committee in either House to Bills introduced by the Executive; and
- redrafting Bills introduced by the Executive on instructions of a Committee of either House.

The identification of *gaps* was envisaged as a powerful medium to empower Parliamentary Committees that wished to develop a Committee Bill. Court cases, academic papers and newspaper articles were all considered as possible sources.

This was, however, a very ambitious undertaking. The unit faced numerous challenges that made it difficult to tackle all of these tasks.

It was, and still is, difficult to recruit legislative counsel. As the unit was expected to start drafting from day one, there was very little scope for recruiting “persons with potential”. The focus had to be on persons who had drafting training or experience. At the time, Parliament only offered employment on a five-year fixed term basis, which was not attractive to more senior legislative counsel who were approaching retirement. Young professionals were hesitant to relocate their whole families to Cape Town for a post that may only last five years. Legislative counsel working in teams in the private sector would earn the annual salary of a parliamentary legislative counsel on one project. The team has never had more than five legislative counsel and during 2017 and during 2018 it only had four. This lack of capacity has affected all the envisaged functions of the team.

The Fourth Parliament experienced a large influx of Executive Bills in the last two years of its lifespan. In the Fifth Parliament, the CLSO lost a number of employees in other units due to resignations. Both of these factors required the parliamentary legislative counsel to focus

³⁰ Concept paper: “Constitutional and Legal Services Office: A need for internal legislative drafting capacity”, 16 March 2012 at 22.

³¹ The Speakers' Forum consists of the Speaker of the National Assembly, the Chairperson of the National Council of Provinces and the various Speakers of the provincial legislatures.

only on core functions (developing legislation and assisting parliamentary Committees in the processing of those Bills) and to lend assistance to the other teams in the office in respect of drafting opinions and advising parliamentary committees on Executive Bills.

This decision mostly affected the pro-active identification of *gaps* and assisting Committees on the drafting of amendments (or redrafts) of Executive Bills. Unless a parliamentary legislative counsel was by chance advising a Committee on an Executive Bill that required to be amended or redrafted, that task was left to the Executive and the State Law Adviser.

The development of policy was always a risky inclusion to the more traditional tasks of a legislative counsel. However, policy informs legislation and committees and members very seldom have such policy ready to inform legislation. There would have been a gap in the proposal if no provision was made for the development of policy. The parliamentary drafting team has however been very careful in this regard. The parliamentary drafting team attempts to limit policy development to the asking of questions that would direct the member or committee to any gaps or implementation issues that the policy might present.

When acknowledging an instruction, the parliamentary drafting team clearly states that a legislative counsel will not comment on policy. The only comment offered would relate to whether the policy proposed is in conflict with the Constitution, with other laws, or poses implementation challenges. This is to ensure objectivity especially in respect of a Bill drafted for a member of the opposition, as the parliamentary legislative counsel will also assist the committee that processes the Bill. However, as will be seen from the interviews below – policy development (and sometimes even proposing the solution to address the mischief that required the policy development in the first place) has been required from all parliamentary legislative counsel at one stage or another.

The rules require a committee in the development of a committee Bill and in the consideration of a private member's Bill to consider inputs from the relevant Department, as well as the public. When advertising the intention to introduce a Bill, a member may also call for comments. These consultative processes also assist the member or committee in the development of policy.

The main challenge in this regard is that any policy development that occurs in Parliament, whether by a member, a committee or at the direction of the parliamentary legislative counsel, cannot be tested. There is no requirement for an impact assessment – not regulatory, not social, and not economic. A member or a committee can be persuaded to do such an impact assessment independently, but that is costly and time-consuming. Parties and committees have a limited budget and most committee and private members' Bills are drafted under "urgent" circumstances, leaving very little time for impact assessments.³²

³² An example of "urgency" would be "The matter is pertinent in politics now. The Minister will make a statement on this matter tomorrow!".

Statistics on Bills

Since its inception in 2013, the unit has produced various private members' Bills and committee Bills. The CLSO has compiled the following statistics on these Bills:

4th Parliament						
Members' Bills						
<i>Instructions received (No. of Bills)</i>	<i>Drafts delivered</i>	<i>Files closed³³</i>	<i>Bills Introduced</i>	<i>Bills Lapsed</i>	<i>MOD rejected</i>	<i>Passed</i>
- 15 instr. to draft - 4 instr. to assist Committees	14	2	12	7 (2 were revived in the 5 th Parliament)	7	0
Committee Bills						
<i>Instructions received (No. of Bills)</i>	<i>Drafts delivered</i>	<i>Files closed</i>	<i>Bills Introduced</i>	<i>Bills Lapsed</i>	<i>Passed</i>	
- 5 instr. to draft - 7 where the unit was not involved	6	4	8	0	8	
5 th Parliament						
Members' Bills						
<i>Instructions received (No. of Bills)</i>	<i>Drafts delivered³⁴</i>	<i>Files closed</i>	<i>Bills Introduced</i>	<i>Bills still before Committees</i>	<i>MOD rejected</i>	<i>Passed</i>
49	83 5 Bills are still ongoing	- 6 with no drafts - 17 after a draft was delivered	20	8	11	1
Committee Bills						
<i>Instructions received (No. of Bills)</i>	<i>Drafts delivered</i>	<i>Files closed</i>	<i>Bills Introduced</i>	<i>Bills still being developed (pre introduction)</i>	<i>Bills before the Second House</i>	<i>Passed</i>

³³ "Files closed" indicate either a lack of further instructions or an impossibility – for example the Member lacks constitutional competency to introduce a Bill because it is a money Bill and only the Minister of Finance may introduce a money Bill.

³⁴ When comparing the number of instructions received, files closed and drafts delivered, one can see that parliamentary legislative counsel did not receive clear policy instructions with draft 1 and had to flesh out the policy direction by asking question in each draft, which then led to the next draft.

22	77	4	10	- 8 are before Committees - 4 have been approved by the Speakers Forum and must be referred to Committees	2	8
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Interviews with parliamentary legislative counsel

To explain just how different the role of a legislative counsel in Parliament is, I asked everyone on my team to answer a few questions for this article. I do not provide a consolidated reflection of their answers, but rather chose to give each of them, including myself, a voice in this record of their answers:

Ms Daksha Kassan

Previous experience as a parliamentary legislative counsel: What was expected of you?

I worked for provincial government as a legislative counsel. I would receive a brief that contained a policy document and would be requested to translate that policy intent into a draft Bill. Sometimes I would only be required to vet a draft Bill and consider whether that draft Bill was legally and constitutionally sound. In doing this, I was able to consult with our clients, who were officials from the various provincial departments, to clarify their policy intent. These officials were policy experts and would have their own teams in each provincial department to assist them. I was also tasked with certifying a Bill as constitutional prior to its introduction. After a Bill was introduced, I would accompany departmental officials to the relevant Standing Committee tasked to consider the Bill. The departmental officials would field all policy and implementation questions that the Committee might have. My responsibility was only to advice on any legal issues that might crop up.

How different are the expectations that Members and Committees have from you as a legislative counsel different in Parliament from your previous experience?

In Parliament, both Members and Committees often expect me to assist in the development of the policy, despite the fact that I might not be a subject matter expert, nor am I trained in the development of policy. In addition, I then need to develop a Bill in a very short period of time and sometimes have to effect amendments to the Bill in between weekly meetings, or even overnight where the meeting is continuing the next day. Committee members also put questions that are policy related or implementation issues to legal advisers and even when the legal adviser passes the question on to the relevant department (who normally is in attendance), the Committee members only seem to be comfortable with an answer once confirmed by the legal adviser. It is thus very difficult to restrain ourselves to the legal issues.

What is the biggest challenge for you working as a legislative counsel in Parliament?

I find the lack of clear instructions from Members and Committees to be a big stumbling block. This is especially the case as we are given very limited time in which to develop a Bill. When you ask further questions to clarify the drafting instructions, it often becomes clear that there is no clear and final policy intent. I am not trained as a policy developer but find myself having to enter this terrain due to incomplete instructions or the Member or Committee not being clear about their policy intent. The unit is supposed to have research assistance from the Research Unit in Parliament as well as from subject matter experts allocated to most Committees, especially on Committee Bills, but in practice every Unit claims to be over-loaded with work and requests for research or subject matter information is often either not delivered, or delivered after the fact. This lack of support adds to the time needed to properly research the issue at hand in order to draft a legally sound piece of legislation.

Ms Noluthando Mpikasho

Previous experience as a legislative counsel: What was expected of you?

When I was working for a non-governmental organisation, we only scrutinized Bills to comment on policy. Here I learned to consider policy and identify the gaps or challenges that a policy may pose. I started my legislative drafting experience with the Office of the Chief State Law Adviser (OCSLA). I found it difficult to warm up to legislation and initially I preferred to do opinions only. However, when I did work on legislation, it was mostly to consider a draft Bill and vet the same for constitutionality and drafting style. On occasion it was necessary to redraft the draft Bill and I gained significant experience in legislative drafting at OCSLA. I did not really receive a policy concept document from the Executive – mostly I had to base my work on the draft Bill only. I once had an opportunity to assist a parliamentary Committee on the drafting of a Committee Bill. That was before the establishment of the parliamentary Legislative Drafting Unit. I found that you have to start from nothing – the Committee only knew that it wanted to expand the meaning of a definition in the Act to be amended. It was a one-line instruction. I found this very challenging.

How different are the expectations that members and Committees have from you as a legislative counsel different in Parliament from your previous experience?

I was surprised to see that my experience with the Committee Bill was the norm in Parliament. There would be no Bill or policy. You will receive a one-line instruction and questions or requests for further instructions are not really responded to timeously. I also found it strange that Bills emanating from the Executive were dealt with by legal advisers, rather than by legislative counsel. Because of a lack of capacity, the Parliamentary

Legislative Drafting Unit has had the opportunity to assist on Executive Bills in the Fifth Parliament, but the bulk of these Bills were dealt with by legal advisers who do not necessarily check the Bills for drafting errors as that is not their field of expertise. Initially I was also rather affected by the lack of progress made on private members Bills. It felt that work was done in vain. However, towards the end of the Fifth Parliament, I could see a shift in the attitude of members of the majority party and I suspect we may see more private members' Bills being approved in the Sixth Parliament, should the policy proposed in the Bill be acceptable to the majority.

What is the biggest challenge for you working as a legislative counsel in Parliament?

Policy. Policy. Policy. I can understand that Members and their support staff perhaps do not have the know-how to at least develop a proper policy or concept document, but when we were requested to develop regulations for Parliament, I was shocked at the lack of knowledge and failure to provide clear answers when we asked questions of Parliament's own support staff. I would expect that officials working in the finance section would be able to inform me what the best policy would be for banking, for dealing with cash etc. But we received one answer from person A and another from person B. In Committees, Members would look to the parliamentary legislative counsel for answers on why certain policy decisions are reflected in the Bill that you drafted. Because the meeting is in public, you can't be glib in your answer – you have to be diplomatic and try to steer the question away from you. Sometimes, however, Members would insist on us responding to questions of policy – or to answer questions about complex fields of law, when the Committee's own subject matter experts would be much better suited to answer.

Mr Michael Prince

Previous experience as a legislative counsel: What was expected of you?

I started drafting legislation at provincial government level. I gained about eight years of drafting experience there, before moving over to a national department where I headed up a legislative drafting and review unit for about two years. Thereafter I joined the Legislative Drafting Unit in Parliament. At provincial level I drafted legislation, but was also expected to comment on national and provincial legislation; and because of capacity constraints in the legal advice office, I also assisted in the national legislative process, especially in respect of preparing, for the provincial legislature, mandates on national legislation that affected provinces. In my personal view, I already found at provincial level that the policy that should inform legislation was often not fully developed. On amendment Bills this would not be crucial, but when drafting principal Acts, the drafting unit often had to take a stand against the Department and insist on further workshops to finalise the policy. In one instance I even saw the green and white papers on a policy being developed. The unit could do this as it was a more mature unit with a longer history of working with the Executive. At the national department, drafting was often outsourced to consultants and the legislative counsel

struggled to communicate concerns to the clients and thus tried to influence the legislative drafting as far as they could during workshops with the consultants. I ended up focusing more on a project that the department started, on the review of the statute book, focusing on pre-democracy legislation that still negatively affected human rights. This exercise was very different from the drafting of legislation and, as the department I worked for was mandated by the President to conduct this project across all departments, I hoped to gain a lot of experience. I however found it very frustrating as other departments did not view this review of legislation as a priority. Interestingly enough, this project was taken up by the Fifth Parliament and again the question is currently with the various departments to report back.

How different are the expectations that members and Committees have from you as a legislative counsel different in Parliament from your previous experience?

I find that Members and Committees place a lot of demand on parliamentary legislative counsel to assist them with the development of policy. Even if it is stated upfront that it is not an area where parliamentary legislative counsel should become involved in, in practice we consistently find ourselves as part of the group developing policy, or asking questions to fill obvious gaps in a policy that is only half-formed. In some instances, we end up having to identify the mischief, the solution and the impact of that solution ourselves. We can, and we do, recommend that the Member or the Committee seek the assistance of experts on the subject matter or to request the relevant department to do an impact assessment, but often the time limits that the Member or Committee has set itself for completing the Bill, prevents this from happening. This places the parliamentary legislative counsel in a very risky position. The political environment in which we work results in advice often being side-stepped, or regarded as incorrect, in favour of the political intent behind the Bill. The relationship between Parliament and the Executive is also very different from the experience in both provincial and national departments and their respective Executives. In the provincial department we could simply refer a recalcitrant official to the Director-General at that department. In Parliament, you need to work through political channels where the ranking of the Committee's Chairperson on the hierarchy of the political party can play a role in the outcome of any concern that is expressed or request that is made. Perhaps because the unit is very new and is still struggling to assert itself in a difficult environment, it is often frustrating not to have the support of the Legal Services Office when you need to take a stand on the development of policy or on the time that you are given in which to develop, often complex, legislation.

What is the biggest challenge for you working as a legislative counsel in Parliament?

When discussing working circumstances with colleagues in other countries, I find myself envious of the teams that work together on a project for months. Here, we are often one legislative counsel per Bill with four or five other Bills waiting on your desk – all with imminent deadlines - and, despite standard operating procedures that argue for a reasonable

amount of time per draft (between 4 and 12 weeks), we are given extremely short periods of time in which to develop a Bill.

Ms Telana Halley-Starkey

Previous experience as a legislative counsel: What was expected of you?

I do not have much experience in legislative drafting. I've drafted regulations, but mostly my experience with legislation stems from the side of interpretation. One thing that I have noticed is how different Acts have different styles of drafting and how this affects the interpretation of those Acts.

How different are the expectations that members and Committees have from you as a legislative counsel different in Parliament from your previous experience?

As stated above, I do not have experience as a legislative counsel to compare against, but I have noticed how parliamentary legislative counsel are relied upon in Committees for work other than legal advice or legislative drafting advice. Members, Committees and support staff of Committees all turn to the parliamentary legislative counsel when a question of parliament procedure comes up.

What is the biggest challenge for you working as a legislative counsel in Parliament?

It appears that there is an over-reliance on the legislative counsel in a Committee – you are expected to have skills and knowledge that far exceeds that of what is normally expected of legislative counsel.

Adv Charmaine van der Merwe

Previous experience as a legislative counsel: What was expected of you?

I learned to draft legislation while employed as a legal adviser with the national Department of Trade and Industry. As I was the most senior legal adviser in the relevant division at the time, I was identified as the legislative counsel responsible for legislation that was to be the outcome of a few policy development processes and I simply had to ensure that I got myself trained and experienced enough to do this. I attended a training course and fortune smiled on me as I took to it as a duck to water. It was logical and everything I was taught just fell into place. I was also fortunate to have been part of the policy development process from the start. This allowed me to ask questions where I saw gaps and to understand what the mischief is and how the proposed solution was envisaged to address that mischief. I also had access to a seasoned legislative counsel³⁵ who could answer questions the legislative

³⁵ Adv Strydom took me through the legislative process and taught me a lot in a few sessions. I had the good fortune to work with him after I joined Parliament and he currently refuses to call himself a legislative counsel. According to him everyone nowadays call themselves "legislative counsels" and he simply cannot be a part of that. I'm glad I could share in his wisdom as he had years of experience to share.

drafting course could not. Even so, once the drafting process officially started, I was the only legislative counsel in the team and on one of the Bills I found that, despite me being a part of the policy development process, many issues were still not adequately addressed. For instance, the Bill required intergovernmental co-operation to be implemented successfully. The Bill could be mostly completed, but consultations with other departments were required to ensure that the Bill sufficiently enabled that co-operation. While these matters were still being negotiated, I joined Parliament. At Parliament I asked to be assigned to advise on the Bill when it was at last introduced. To my dismay the intergovernmental co-operation issues were still not sorted out and the consultants who finalised the drafting of the Bill made some impractical changes to the governing bodies that the Bill established – clearly showing a lack of understanding on how government can and cannot operate. My one colleague, Mr. Prince, experienced a similar frustration to convey concerns to private consultants who drafted for departments.

How different are the expectations that members and Committees have from you as a legislative counsel different in Parliament from your previous experience?

At the national department I had a whole team who would be developing the policy. My role was to listen, make suggestions and ask questions. I was also able to develop the draft Bills while the policy was being developed, giving me years in which to draft (read: “learn to draft”). I could thus look, re-look, “phone a friend and redraft without any pressure being placed on me to complete a draft. I was also able to “suss out” (discern) any political agenda that informed a policy behind closed doors and could thus advise on any constitutionality concerns without the fear of my advice becoming public knowledge. At Parliament I am working alone on most Bills, with several other Bills on my desk awaiting my attention. I must admit that we do have a working relationship with a number of State Law Advisers (who assist the Executive with the development of Bills) and when I really get stuck on a Bill, I have turned to their more experienced legislative counsel who to date have always been willing to assist. But they are also busy and sometimes your client wants secrecy and you have to be cryptic when formulating a question. However, I do not have the support of a policy team that I can approach and debate gaps or implementation concerns with. The Member or Committee in Parliament would have their own political agenda and often suggestions for the Bill to include or exclude specific elements would be rejected in favour of the political will that is fuelling the Bill.³⁶ Once you are in a Committee meeting, anything you say becomes public knowledge and we often hear friends saying they saw us

³⁶ I once suggested to a Member that we should consult with a unit in a department who was working on a very similar concept to what the member was proposing. I have met with them and I knew that they were trying to convince their principals to concretise their project in legislation. If we followed my suggestion, the Member's Bill would however have been referred to a different department than the one the Member wanted to target, but I was 90% certain that the Executive would have supported the Bill. The Member refused as he wanted the Bill to be referred to the Committee of which he was a Member. That Committee found the subject matter of his Bill not desirable. Part of their reasoning was that the Bill should rather have been combined with this unit's project.

on television or we would read an article where our advice to a Committee is reported. This makes advising on the development of the Bill like walking a tightrope, especially where the policy intention is not clear or a proposal includes an unconstitutional element.

What is the biggest challenge for you working as a legislative counsel in Parliament?

When we, as a parliamentary drafting team considered how long it should take us to produce the first draft on a Bill (provided that you have a proper policy) we took into account the dynamic nature of Parliament. As such, we proposed between four weeks on an amendment Bill, where there is already some form of a draft developed and 12 weeks on a principal Bill, where there is no draft provided, for the first formal draft to be developed. This is already a very compressed timeline. In practice, however, this guide was often ignored and I found myself on one occasion having to both develop policy, which included conducting consultations and considering founding documents, and produce the first draft on a principal Bill for the whole legislative sector, in one month.³⁷ Often I would go home after a Committee meeting and draft proposed amendments for the next day. The chairpersons and Members are very understanding of the concern and caution that I may be expressing in respect of these timelines, as well as the risk of cross referencing and consequential amendments being overlooked, but that does not change their political targets and thus your tight deadlines remain.

The role of legislative counsel: immutable or evolving?

The Oxford dictionary (online), defines the two terms as follows:

‘immutable’ (adjective): Unchanging over time or unable to be changed;³⁸ and

‘evolve’ (verb): Develop gradually.³⁹

The legislative counsel is at the heart of the game that is politics. To ensure that a policy outlasts a political term, you need a law. It may be changed, but until then, the policy prevails. As such, legislative counsel are required to remain level headed in the face of political games and even, at times, political warfare. Even if a legislative drafting office has a strict standard of operations and the political weight to back those standards up, there is no doubt that the role of the legislative counsel must be pliable. This is even more so when the legislative counsel is used as a political tool in the public arena of the legislature.

³⁷ I came down with bronchitis immediately after submitting the first draft of the Bill. I believe this was because of the toll the pressure placed on my immune system. This Bill went through the consultations that I requested be done before the first draft is developed, after the fact. It still has many outstanding questions but at least it has reached the stage where it can now be referred to a Committee in Parliament to process as a Committee Bill. To my frustration, it is now three years later and still no Committee has been established to do so.

³⁸ <https://en.oxforddictionaries.com/definition/immutable> (last accessed 7 October 2019).

³⁹ <https://en.oxforddictionaries.com/definition/evolve> (last accessed 7 October 2019).

The parliamentary Legislative Drafting Unit has operating standards, but as we are operating within an environment consisting of political games,⁴⁰ it is very difficult to keep our role immutable. As stated above, our unit avoids advising on policy, but as the legislative counsel sees a bigger picture of a new law within a body of law, it is very difficult not to point out challenges, or to suggest small changes that might make the Bill more palatable to the ruling party. In committees, policy or procedural questions are simply steered our way and the Members would refuse to accept an answer from the Executive if not backed up the parliamentary legislative counsel. To enable things to move, because other Bills are screaming for attention on your desk, you sometimes have to simply speak up and suggest a policy solution.

The nature of a committee and a private member's Bill is quite different from that of a Bill developed by the Executive: Although it looks exactly like an Executive Bill and requires the same effort, it is developed over a much shorter period and ideally should only address practical challenges, rather than introducing a broader policy shift. The Bills are almost always urgent, forcing parliamentary legislative counsel to work under continuous pressure: As a rule Bills are completed in one to two months. Capacity constraints add to this, so that one parliamentary legislative counsel could be working on 10 or more Bills at once, often with subject matters that are not related at all. Because the parliamentary legislative counsel can be (publicly) placed under pressure to produce drafts at short notice, we are already seeing departments bringing their legislation for parliament to develop as it is faster and frees the departmental staff up to focus on other tasks.

The positioning of the client in the legislature also requires the parliamentary legislative counsel to venture into roles that border that of legislative drafting: Committees and members do not have the research, policy development or impact assessment resources that are readily available to the Executive. The research and subject matter experts allocated to committees are often already over-loaded with other business of the committee. Smaller parties have almost no access to these resources, and even where there are such resources within Parliament, access to these are limited. Members and committees often provide only a "wish" as an instruction, requiring the parliamentary legislative counsel to push and prod to move from a high-level policy direction to the actual preferred method to resolve the indicated mischief. As stated above, on a few occasions team members had to propose solutions to resolve the indicated mischief in order for a deadlock on discussions to be resolved. Some Members regard their concept as "top secret" and parliamentary legislative counsel are forbidden to consult with experts or the relevant department.

Subject matter research, policy development and impact assessment thus often fall squarely on the shoulders of the parliamentary legislative counsel, which in itself opens the

⁴⁰ On one occasion I was informed beforehand that I would be verbally attacked in a committee on a proposal I was to make. The proposal would be accepted, but politically it could not be accepted without a fight. This is quite daunting as you are alone against seven or more Members and you have to make the proposal in a public arena.

parliamentary legislative counsel up to a number of risks. The parliamentary legislative counsel thus is not only afforded a few days to become an economist or engineer or whatever else the topic of the Bill requires, but also has to be able to research developments in that field, have strategic vision, and an ability to assess the practicalities and impact of measures proposed in the Bill.

Because of the setting in which a committee Bill is developed (meetings are often broadcast nationally), parliamentary legislative counsel also need presentation skills, the patience of a saint and an exceptional skill in diplomacy. Being a competent fortune teller and having a magic wand at the ready are also required (we add this requirement in extremely small print at the bottom of adverts).

Conclusion

In conclusion, I am of the view that placing the legislative counsel in the openly political arena of Parliament has shown that the legislative counsel's role cannot be seen as immutable. The environment in which the legislative counsel is placed determines his or her role. That is also evident from the varied past experiences of the members of the parliamentary Legislative Drafting Unit. Although all of them drafted legislation, their roles were quite varied. However, considering the definition of "evolution", these parliamentary legislative counsel did not so much "evolve" as become "transformed" against their will into developers of policy, proposers of solutions and purveyors of possible impacts, in addition to the development of legislation at the speed of light.

The Legislative Drafting Unit will be doing a post mortem of our first full term of Parliament during April and May 2019 when South Africa is caught up in national and provincial elections. We hope that the adoption of a policy on the drafting of legislation in Parliament by the powers that be may give the unit more political weight. The policy will have to keep the political environment in mind, but it should at least include a diplomatically worded "right to refuse to draft" if there is no clear policy, and a strict requirement (again, worded in a diplomatic manner) regarding the need for sufficient time in which to draft, coupled with explicit, but tactful, communication of the risks should this not be allowed. We can only hope that such a policy would allow parliamentary legislative counsel the chance to evolve at a gradual pace, because there is a risk that we are the start of the evolution – the pioneers of what might be expected of the legislative counsel of the future. South Africa is definitely not alone in having a parliamentary Legislative Drafting Unit. We are aware of a few other Parliaments with legislative drafting units, and we invite them to share their experiences with us.⁴¹

⁴¹ Our delegate to the Washington Conference on Legislative Drafting in 2014 reported that Ms Dina Melhem presented on legislative drafting in the Middle East and North Africa. Ms Melhem mentioned in her presentation that some North African parliaments have established their own legal drafting offices to ensure specialised skills in legislative drafting are available to the parliaments of these young democracies. Delegates to the CALC Conference of 2015 reported back that they found a number of countries where

With the increased focus on a need for checks and balances in a government, the concept of separation of powers may become stronger and more clearly defined in many countries. If so, the establishment of legislative counsel in the legislatures might become more and more a familiar occurrence. If these parliamentary legislative counsel face the same pressures and challenges as we have in South Africa and perform despite such pressures and challenges, the Executive may soon turn to their own legislative counsel and ask: If the parliamentary legislative counsel can do it, why can't you? In case that happens in the future, we hope that we can stem the tide with our Sixth Parliament so that, if we are one of the pioneer teams, we create good roadmaps with clear guidance along broad tarred roads that can easily be followed by all.

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Members and Committees of Parliament were assisted with the development of Bills in one way or another: Australia's OPC seconds staff to their Parliament in order to train clerks to draft Bills for members; the Parliament of Israel has a set up very similar to that of South Africa, but astoundingly this unit dealt with 2000 Members Bills in their 2014/2015 Parliamentary session. Within days of an election, they could receive up to 900 requests. It was however pointed out that most of these requests were quick amendments. The Isle of Man's Parliamentary Counsel Office assists members on Bills as well. However, this office does not prioritise these Bills - only 30 minutes are set aside per month for Members' Bills.

Managing non-legislative documents incorporated by reference into legislation: a practical perspective

Rod Alsop¹



Abstract

This article discusses aspects of the practice of incorporating non-legislative documents by reference into legislation, focussing on documents managed by government entities that are incorporated by reference into subordinate legislation. The article considers, mainly by analysing legislative examples, some ways in which these non-legislative documents can be effectively managed and concludes with a discussion of some practical implications for legislative drafting offices.

Table of Contents

Introduction	26
Technical and regulatory categories of incorporated documents	27
Dealing with incorporation by reference of non-legislative documents in Queensland	29
Approaches to dealing with incorporation of non-legislative documents by reference	32
Conclusion	39

¹ Assistant Parliamentary Counsel, Office of the Queensland Parliamentary Counsel. The author acknowledges the dedicated staff of the Office of the Queensland Parliamentary Counsel, both past and present, who have contributed to developing information resources that have assisted in the preparation of this article.

Introduction

‘All you really need to know for the moment is that the universe is a lot more complicated than you might think, even if you start from a position of thinking it’s pretty damn complicated in the first place.’ — Douglas Adams

Like everything else, legislation is becoming more complex and aspects of detail are likely to be subject to change at increasing frequency. Traditionally this has been dealt with by delegating legislative power to be exercised under delegated or subordinate legislation.² Pearce and Argument cite the following situations in which subordinate legislation has (traditionally) been considered legitimate and desirable: to save pressure on parliamentary time; dealing with matters too technical or detailed to be suitable for parliamentary consideration; and dealing with rapidly changing or uncertain situations.³

It is also commonplace for legislation, particularly subordinate legislation, to incorporate by reference non-legislative documents prepared by experts outside government. Incorporation by reference of Australian and New Zealand Standards is the classic example.

There is a growing tendency for government entities to have their own non-legislative documents incorporated by reference into subordinate legislation. The reasons for such a trend include:

- the ability to amend such documents relatively quickly and easily in response to the pressures of increasing complexity and need for rapid change;
- the reality or the perception of the procedural difficulties and delays in amending subordinate legislation;
- the ability to retain control of such documents without being subjected to the requirements for drafting legislation as would be applied in a legislative drafting office;
- the ease with which such documents can be published on the internet.

An example of the circumstances in which a government entity may seek to incorporate its own non-legislative document by reference is the Queensland biosecurity manual,⁴ prepared by the Department of Agriculture and Fisheries for incorporation under the *Biosecurity Regulation 2016* (Qld).⁵ The department’s Explanatory notes indicated that most of the provisions in the regulation referencing the biosecurity manual related to restrictions on the

² This article uses the description ‘subordinate’ instead of ‘delegated’ legislation consistently with legislative practice in Queensland. See the *Statutory Instruments Act 1992* (Qld), sections 7 (Meaning of *statutory instrument*), 8 (Meaning of *statutory rule*) and 9 (Meaning of *subordinate legislation*).

³ Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia*, 5th ed. (Lexis Nexis Butterworths: Sydney, 2017) at 6.

⁴ Department of Agriculture and Fisheries (QLD), *Queensland biosecurity manual*, v. 11, 2019, available at https://www.daf.qld.gov.au/data/assets/pdf_file/0004/379138/qld-biosecurity-manual.pdf.

⁵ SL 2016 No. 75.

interstate and intrastate movement of fruit and vegetables and went on to justify the reference:

Given there is a significant number of combinations and permutations relating to the required treatment of produce entering the State, it is not considered practical to include all these details in the Regulation.

The relevant provisions in the Regulation are aimed at preventing the introduction or movement of serious pests and diseases which could devastate Queensland's horticultural industries. On occasion, these movement restrictions may change quickly because of the discovery of a new pest or the spread of a new or current pest in another State.

These changes can be expected to take place within 24 hours of notification and any corresponding movement restrictions need to be adjusted to ensure trade in fruit and vegetables and nursery products are [sic] maintained without significant disruption. This need for a rapid response and change to movement restrictions cannot be achieved in a timely way through changes to legislation. A delay of weeks or months could result in significant costs to industry and the economy.⁶

Technical and regulatory categories of incorporated documents

There is a spectrum across which a non-legislative document may be incorporated by reference in subordinate legislation. At one end of the spectrum are incorporated documents of what may be termed a 'technical' category. Typically, a document of this category is of a technical nature and prepared by an entity outside government. The document may define a thing or concept mentioned in the incorporating legislation, but the actions involving the thing or concept are generally contained in the legislation. Usually the document will be incorporated by reference primarily because of the creating entity's acknowledged expertise regarding the subject matter.

Most importantly, documents in the technical category are usually created, and operate, independently of the incorporating legislation. Australian Standards are a prime example. While they may be incorporated in legislation for regulatory purposes, they usually serve the more general purposes of disseminating technical information about a product or system and providing an assurance of quality or safety.⁷

At the other end of the spectrum are incorporated documents of what may be termed a 'regulatory' category. A document of this category may be prepared by a government entity and, while it may contain technical matter, it is equally likely to contain policy or

⁶ *Ibid.*, Explanatory notes at 4-5.

⁷ See "Calling up' of standards: are we creating a legislative labyrinth?" at 3-4', paper delivered by the Hon. Janine Freeman MLA, Committee Member Joint Standing Committee on Delegated Legislation Western Australia to the Australia-New Zealand Scrutiny of Legislation Conference 26-28 July 2011, available at parliament.qld.gov.au/work-of-committees/former-committee/SLC/inquiries/past-inquiries/SLC_Conference.

administrative matter. The document may not merely define or complement a thing or concept in the incorporating legislation, but may provide for actions involving the thing or concept. Often the document will be incorporated by reference primarily for administrative convenience. Critically, the document will usually be created for the express purpose of dealing with the subject matter as authorised or required by the incorporating legislation and so will not operate independently of the incorporating legislation. An example of a document in the regulatory category is the biosecurity manual mentioned earlier.

These categories are descriptive and are not mutually exclusive. There is no neat dividing line by which only legislation includes performance-based provisions and only Australian Standards include the technical ‘fine print’ supporting the performance-based provisions.⁸ That said, this article maintains that for practical legislative purposes incorporation by reference of ‘technical category’ documents into subordinate legislation is largely a settled and non-controversial practice.

As discussed further below, parliamentary committees in Queensland have raised concerns about delegation of legislative power to entities outside the framework of government. However, it might be argued, paradoxically, that the incorporation of technical category documents made by non-government entities should not present as much of a concern in this regard because the documents are created and operate independently of government generally, and the incorporating legislation in particular. Keyes notes that while incorporation by reference may give legal effect to the incorporated material, that material is usually treated as something distinct from the incorporating law for other purposes because (among other reasons):

..it generally has some independent existence and function quite apart from the incorporating legislation.....The legal effect arising from its incorporation by reference results from the exercise of authority by the person or body making the incorporating legislation and not from any action on the part of the person or body responsible for the incorporated material.⁹

In contrast to ‘technical category’ documents, arguably there can be no such independence if the incorporated document is made directly by a government entity (although that could potentially be influenced by such factors as the level of independence of the entity from the executive under its establishing Act). The absence of such independence would be more pronounced in cases where the incorporated document has been created expressly for the purposes of the incorporating legislation. In this context, given that subordinate legislation is the generally accepted vehicle through which the executive exercises delegated legislative power, there is an argument that the proposed incorporation by reference of non-legislative documents made by government entities ought to be considered exceptional or at least

⁸ *Ibid.* at 16-17 (citing the Productivity Commission of Australia, *Research Report, Standard Setting and Laboratory Accreditation*, 2 November 2006).

⁹ John Mark Keyes, *Executive Legislation*, (Lexis Nexis Canada: Markham, 2010) at 453-454.

require rigorous justification. For the foregoing reasons, the focus of concern for this article is managing the incorporation of regulatory category documents into subordinate legislation.

Dealing with incorporation by reference of non-legislative documents in Queensland

In Queensland, the *Statutory Instruments Act 1992* provides for the incorporation into subordinate legislation of non-legislative documents by fixed or ambulatory reference:¹⁰

23 Statutory Instrument may make provision by applying another document

- (1) If an Act or statutory instrument (the **authorising law**) authorises or requires the making of a statutory instrument with respect to a matter, a statutory instrument made under the authorising law may make provision for the matter by applying, adopting or incorporating (with or without modification) the provisions of—
 - (a) an Act, statutory instrument or other law; or
 - (b) another document (whether of the same or a different kind);as in force at a particular time or from time to time.
- (2) If a statutory instrument made after 1 January 1992 applies, adopts or incorporates the provisions of a document, the provisions applied, adopted or incorporated are the provisions as in force from time to time unless the statutory instrument expressly provides otherwise.
- (3) *****

Section 23(1)(b) applies to documents other than laws. While beyond the scope of this article, there is a question as to whether, or how far, incorporation by reference as originally contemplated under section 23 was ever intended to extend beyond the technical category of documents as described above.¹¹

At a practical level, parliamentary committees in Queensland have considered incorporation of documents by reference, at least when in ambulatory form, in the context of subdelegating legislative power. In considering the Marine Parks Bill 2004, the former Scrutiny of Legislation Committee stated:

The incorporation of external documents in ambulatory form (that is, in whatever form they may take from time to time) raises an additional issue for the committee, namely, that this practice has the tendency to undermine the institution of Parliament by effectively delegating the making of Queensland law to outside bodies.¹²

¹⁰ In other Australian jurisdictions the incorporation of non-legislative instruments on an ambulatory basis is restricted. See Pearce and Argument, above n. 3 at 411-412.

¹¹ Interestingly, the Explanatory Notes to the Acts Interpretation Amendment Bill 1991 explaining s. 28AA(1) of the *Acts Interpretation Act 1954* (the precursor of s. 23 of the *Statutory Instruments Act 1992*), state at 8: "A statutory rule.....may adopt the provisions of any other Act, statutory rule or other publication such as an Australian standard." (emphasis mine).

¹² Scrutiny of Legislation Committee, Alert Digest 2004, No. 5, para 8.

While there is a threshold argument about whether incorporation of documents by reference can properly be categorised as a subdelegation of the relevant legislative power,¹³ in view of the practice adopted in Queensland, I propose to consider the matter as such.

The basic concern arising out of subdelegating legislative power to persons administering rules incorporating non-legislative documents is that it potentially undermines the institution of Parliament. In Queensland, fundamental legislative principles (the principles relating to legislation that underlie a parliamentary democracy based on the rule of law)¹⁴ include requiring that legislation has sufficient regard to the institution of Parliament¹⁵ which depends on (among other things) allowing the delegation of legislative power only in appropriate cases and to appropriate persons.¹⁶ For subordinate legislation, it depends on (among other things) allowing the subdelegation of a delegated power only in appropriate cases and to appropriate persons.¹⁷

One of the functions of the Office of the Queensland Parliamentary Counsel is to advise on the application of fundamental legislative principles to proposed legislation.¹⁸ Explanatory notes for Bills and subordinate legislation are required to include a brief assessment of the consistency of the legislation with fundamental legislative principles and, if there is an inconsistency, the reasons for the inconsistency.¹⁹

The former Scrutiny of Legislation Committee's consideration of the Marine Parks Bill 2004 provides a useful exposition of the approach that has been taken by Queensland Parliamentary Committees.

- The Bill allowed management plans that were prepared by the Minister to apply, adopt or incorporate the provisions of a non-legislative document as in force from time to time.
- The committee considered the incorporation of non-legislative documents in a fixed form (under Bills and subordinate legislation) to be acceptable, provided the document concerned and, if relevant, amendments of the document, were readily accessible to the reader. As mentioned, the committee considered the incorporation of non-legislative documents in an ambulatory form amounted in effect to a subdelegation of the making of Queensland law to an external body.²⁰
- The committee preferred the incorporation of non-legislative documents be kept to the minimum reasonably achievable in the circumstances, particularly incorporation in an ambulatory form, but it recognised that there are many cases

¹³ See Pearce and Argument, above n. 3 at 413 and Keyes, above n. 9 at 453-454 and 476.

¹⁴ *Legislative Standards Act 1992* (Qld), section 4(1)).

¹⁵ *Ibid.*, section 4(2)(b).

¹⁶ *Ibid.*, section 4(4)(a).

¹⁷ *Ibid.*, section 4(5)(e)(i).

¹⁸ *Ibid.*, section 7(g) and (h).

¹⁹ *Ibid.*, sections 23(1)(f) and 24(1)(i).

²⁰ Scrutiny of Legislation Committee, *Alert Digest 2004*, No. 5, paras 7 & 8 and para 10.

(particularly in relation to subordinate legislation) where incorporation of documents by reference will be convenient for drafters of legislation.²¹

- In view of the concerns raised by the committee, it sought the following information from the Minister, which it is suggested may still serve as a useful starting point in considering these issues:
 - What type of documents are likely to be adopted or incorporated?
 - Will these documents be readily accessible to the public?
 - Will any future amendments to these documents be similarly accessible?
 - For what practical or other reasons is it considered appropriate to provide such a power of incorporation?²²

A related concern is that the exercise of a subdelegated power as reflected in a non-legislative document avoids parliamentary scrutiny to which the document would be subject if it were subordinate legislation. In Queensland, subordinate legislation is subject to parliamentary scrutiny in the following ways:

- it is required to be notified (principally) by publication on the Queensland legislation website;²³
- it is required to be tabled in the Legislative Assembly;²⁴
- it may be disallowed by resolution of the Legislative Assembly.²⁵

The repealed *Sustainable Planning Regulation 2009* (Qld)²⁶ incorporated by reference the (former) State Development Assessment Provisions ('SDAP') which provided for the matters to which the chief executive was to have regard when assessing particular development applications. The SDAP was defined by fixed reference to a non-legislative document of a stated date as published by the former Department of State Development, Infrastructure and Planning.

The department, in correspondence to the former State Development, Infrastructure and Industry Committee examining the amendment regulation, advised the document would be publicly disseminated and available on its website and that an amendment regulation (incorporating a new version of the SDAP) would be tabled in Parliament.²⁷ The committee noted the SDAP would not be tabled in Parliament and commented:

Despite the SDAP being publicly available on the department's website, when changes to the SDAP can be made without the exact content of those changes coming to the

²¹ *Ibid.*, para 9.

²² *Ibid.*, para 12.

²³ *Statutory Instruments Act 1992* (Qld), s. 47.

²⁴ *Ibid.*, s. 49.

²⁵ *Ibid.*, s. 50.

²⁶ *Sustainable Planning Regulation 2009* (Qld) (repealed), schedule 26.

²⁷ State Development, Infrastructure and Industry Committee, Subordinate legislation tabled between 5 June 2013 and 10 September 2013, Report No. 30, October 2013 State Development, Infrastructure and Industry Committee at 6.

attention of the House (in the form of tabling), it can be argued that the document (and the process by which it is incorporated into the legislative framework) has insufficient regard to the institution of Parliament.²⁸

The committee recommended that the SDAP and any future versions of the document be tabled in the Legislative Assembly.²⁹

Approaches to dealing with incorporation of non-legislative documents by reference

The following approaches are available for dealing with proposals to incorporate non-legislative documents by reference into legislation, although the extent to which they are in the control of legislative counsel will vary.

1. *Determining whether the incorporated document falls into the accepted category of technical documents incorporated for a limited purpose*

In many cases it may be necessary to go no further than considering the context in which the document is proposed to be incorporated and asking questions of the following nature:

- How is the incorporated document to be used in the legislative scheme? For example, is it only filling in a technical definition?
- Is the document likely to fall in the technical or regulatory category as mentioned above?
- Is the reference to be fixed or ambulatory? (if the reference is to be ambulatory, it may be appropriate to use the approach under item 2 below)

In the context, particularly if the document is of a technical category, any subdelegation of legislative power may be minimal and incorporation of the document by reference may be within accepted limits.

2. *Determining the justifications for incorporating the document and the viability of any alternatives*

In all but the most straightforward of cases mentioned in the approach under item 1 above, it will be useful, as a starting point, for legislative counsel to ask the instructor questions of the type asked by the former Scrutiny of Legislation Committee as previously mentioned.

The advantage of this approach (as with most drafting issues) is that a full understanding of the reasoning behind the proposed incorporation of the document is likely to help legislative counsel in advising the instructor about the availability of any alternative drafting solutions to resolve or mitigate the relevant issue.

²⁸ *Ibid.*

²⁹ *Ibid.*, at 7.

3. Incorporating the document by reference in the authorising Act (rather than in subordinate legislation) and imposing requirements, usually reserved for subordinate legislation, on the making and publication of the document

An obvious way in which issues associated with incorporating non-legislative documents into subordinate legislation may be avoided is if an Act directly incorporates the document by reference. An Act may also impose requirements usually associated with subordinate legislation (principally, tabling and disallowance) for dealing with the incorporated documents to ensure the documents are subject to Parliamentary scrutiny. This may be achieved directly, by an express provision,³⁰ or indirectly, by requiring the incorporated document to be approved by an instrument of subordinate legislation.

The latter approach is illustrated by considering the development assessment rules the relevant Minister is required to make under section 68 of the *Planning Act 2016* (Qld). The Act relevantly provides as follows:

- the development assessment rules may provide for a wide range of matters relating to the development assessment process, including giving public notification of particular development applications and approvals, considering whether applications are properly made, and the effect on applications of the expiry of a time limit under, or a contravention of, the rules;³¹
- the Minister is required to follow certain procedures if proposing to make the rules, including giving public notice and inviting submissions;³²
- importantly, the rules themselves are not subordinate legislation but do not have effect unless prescribed by regulation;³³
- the Minister may amend the rules, but the amendment does not have effect until the rules as amended are prescribed by regulation and the chief executive publishes the amendment and the rules as amended on the department's website;³⁴
- the chief executive is required to keep on the department's website the rules as in effect from time to time, endnotes detailing amendments of the rules and superseded versions of the rules.³⁵

The department justified the reference to the development assessment rules in the Explanatory Notes to the Bill, stating:

- the rules will be approved under the regulation so, like all subordinate legislation, will be subject to portfolio committee examination;

³⁰ See, for example, *Biodiscovery Act 2004* (Qld), s. 44.

³¹ *Planning Act 2016*, s. 68(1) and (2).

³² *Ibid.*, ss. 10 and 68(3).

³³ *Ibid.*, s. 68(4) and (5).

³⁴ *Ibid.*, s. 69.

³⁵ *Ibid.*, s. 70.

- any amendments of the Regulation will be subject to the normal requirements of the *Statutory Instruments Act 1992* for regulatory impact assessment, Parliamentary scrutiny and disallowance.³⁶

The former Infrastructure, Planning and Natural Resources Committee (the ‘Infrastructure Committee’), in considering the potential impact on fundamental legislative principles, questioned whether clause 68 did sufficiently subject the exercise of a delegated legislative power to Parliamentary scrutiny. The committee referred to previous consideration of the issue by the former Scrutiny of Legislation Committee, noting:

The SLC [sic] commented adversely on provisions allowing matters, which might reasonably be dealt with by regulation, to be processed through some alternative means that does not constitute subordinate legislation and therefore is not subject to parliamentary scrutiny. In considering the appropriateness of delegated matters being dealt with through an alternative process, the SLC considered:

- the importance of the subject dealt with;
- the practicality or otherwise of including those matters entirely in subordinate legislation;
- the commercial or technical nature of the subject matter;
- whether the provisions were mandatory rules or merely to be had regard to.³⁷

The Infrastructure Committee also noted the view adopted by the former Scrutiny of Legislation Committee that the concerns about fundamental legislative principles were reduced if, despite the incorporated document not being subordinate legislation, there was a provision requiring tabling and providing for disallowance of the document.³⁸

In considering clause 68, the Infrastructure Committee noted the development assessment rules would be applied by subordinate legislation, which is subject to parliamentary scrutiny and disallowance, and concluded that sufficient regard had been given to fundamental legislative principles with respect to the provision.³⁹

An Act, rather than subordinate legislation, incorporating a non-legislative document by reference as amended from time to time represents a delegation, rather than a subdelegation, of legislative power. As such, any uncertainty that could otherwise arise about Parliament’s intention about the status or use of the document should be reduced, if not eliminated.

However, a decision to incorporate a non-legislative document by Act rather than subordinate legislation, is likely to have been made by the instructing department before legislative counsel become involved in a project and certainly, before legislative counsel is

³⁶ Planning Bill 2015, Explanatory Notes at 10.

³⁷ Infrastructure, Planning and Natural Resources Committee, Planning Bill 2015 (*inter alia*), Report No. 23, 55th Parliament, April 2016 at 72-73.

³⁸ *Ibid.* at 73

³⁹ *Ibid.*

instructed. Therefore, in practical terms, this approach may not be available because it is not within the legislative counsel's direct control.

Provisions having the effect of directly or indirectly subjecting the non-legislative document to tabling or disallowance, as if the document were subordinate legislation, should largely resolve concerns about the document being subjected to adequate parliamentary scrutiny. However, from a practical perspective, these provisions place a burden on departments to coordinate the tabling and publication of the documents, which would otherwise be managed by the Office of the Queensland Parliamentary Counsel. A department may consider that the administrative inconvenience of managing these processes outweighs the benefit of being allowed to prepare the documents outside the legislative framework.

4. *Incorporating the document by reference in subordinate legislation and imposing requirements, usually reserved for subordinate legislation, on the making and publication of the document*

This is a variation on the approach described above. An alternative model is that the Act provides for the non-legislative document to be incorporated under subordinate legislation but imposes requirements for the tabling and publication of the document. The making of codes of practice under the *Biosecurity Act 2016* (Qld) provides an example. The Act authorises codes of practice about certain matters to be made under the regulation.⁴⁰ The regulation may adopt, apply or incorporate the whole or part of another document (as part of the code of practice) but if the incorporated document is not part of, or attached to, the regulation, the Minister is required to table the document (or part) in the Legislative Assembly.⁴¹ A similar tabling requirement applies if the incorporated document (or part) is amended.⁴² The chief executive must keep a copy of the incorporated document (or part) as in force from time to time, available for free public inspection.⁴³

Although the incorporated code of practice is provided for under the regulation, similarly to the approach described above, the necessary regulation-making powers must already be established under the Act and the instructing department will need to accept the administrative burdens of tabling and publishing the incorporated document.

5. *Controlling the operation of the incorporated document in the incorporating subordinate legislation*

Incorporation by reference of a non-legislative document in subordinate legislation may be justified in a given case but it may nevertheless be possible to reduce the scope of any subdelegation by including controls over the reference of the incorporated material in the

⁴⁰ *Biosecurity Act 2016*, s. 104.

⁴¹ *Ibid.*, s. 106(2).

⁴² *Ibid.*, s. 106(3).

⁴³ *Ibid.*, s. 106(4).

incorporating legislation. The incorporation by reference of the Department of Agriculture and Fisheries' biosecurity manual under the *Biosecurity Regulation 2016* (Qld), as mentioned earlier, serves as an example.

The *Biosecurity Act 2014* imposes a “general biosecurity obligation”⁴⁴ on a person dealing with biosecurity matter⁴⁵ or a carrier (vector)⁴⁶ [of biosecurity matter] or carrying out an activity, to take all reasonable and practical measures to prevent or minimise a biosecurity risk⁴⁷ posed, or likely to be posed, by the biosecurity matter, carrier or activity. Failure to discharge the general biosecurity obligation constitutes an offence (the “general biosecurity obligation offence provision”)⁴⁸ carrying a significant penalty including imprisonment.

Section 25 of the Act provides for how the regulation affects the discharge of the general biosecurity obligation:

25 Effect of regulation for discharge of general biosecurity obligation

- (1) This section applies if a provision of a regulation (**regulation provision**) is identified in the regulation as a provision that prescribes a way of discharging a person's general biosecurity obligation. (*emphasis mine*)
- (2) *****
- (3) However, for applying the general biosecurity obligation offence provision, the person fails to discharge the general biosecurity obligation if the person contravenes the regulation provision.

During the drafting of the regulation it was considered that subsection 25(1) in effect precluded the regulation from prescribing ways of discharging the general biosecurity obligation by the wholesale incorporation by reference of the biosecurity manual. In other words, the regulation could not provide that “a person may discharge general biosecurity obligation *x* by complying with provision *y* of the biosecurity manual”.⁴⁹ The department, however, for the reasons mentioned earlier, wished to use the biosecurity manual in administering the legislative scheme. This required the legislative scheme to be balanced so that the regulation would contain the substantive requirements for actions to discharge the general biosecurity obligation while allowing the things or concepts related to the actions to be relegated to the biosecurity manual.

Various provisions in the regulation are identified for subsection 25(1) of the Act, including chapter 5 which deals mainly with interstate and intrastate movement restrictions on

⁴⁴ *Ibid.*, s. 23.

⁴⁵ ‘Biosecurity matter’ is essentially a living thing, pathogen, disease or contaminant: see the *Biosecurity Act 2016*, s. 15.

⁴⁶ *Ibid.*, s. 17.

⁴⁷ *Ibid.*, s. 16.

⁴⁸ *Ibid.*, s. 24.

⁴⁹ To this extent, section 25(1) was considered to limit the general power for incorporating documents under section 23 of the *Statutory Instruments Act 1992* mentioned above. The application of that Act can be displaced wholly or partly by a contrary intention appearing in any instrument (s. 4).

carriers.⁵⁰ Several provisions in the chapter refer to the “risk minimisation requirements”⁵¹ which are defined as particular requirements stated in the biosecurity manual. Many provisions allow a person to move a carrier if (among other things):

- the person obtains a biosecurity certificate⁵² stating that the carrier meets the [biosecurity manual] risk minimisation requirements for the carrier; and
- the person ensures under section 46 of the regulation that the carrier is “dealt with”⁵³ in accordance with the [biosecurity manual] risk minimisation requirements.

The reference mentioned in the first dot point above is relatively limited. The reference mentioned in the second dot point, however, is potentially very broad. Therefore, in order to limit the breadth of that reference, section 46 of the regulation sets the parameters for a person ensuring that a carrier is (properly) dealt with under the [biosecurity manual] risk minimisation requirements:

46 Ensuring...a carrier is dealt with in accordance with risk minimisation requirement

- (1) A person...ensures... a carrier is dealt with in accordance with a [biosecurity manual] risk minimisation requirement for dealing with the ... carrier if—
- (a) for a requirement to treat the... carrier with a... chemical product [mentioned in the manual]—the person ensures the... carrier is treated with the chemical product; or
 - (b) for a requirement to treat the... carrier by changing its temperature—the person ensures the... carrier is heated or cooled to the... temperature [stated in the manual], for the... period [stated in the manual], and otherwise in the... way [stated in the manual]; or
 - (c) for movement of the... carrier from a place free of...biosecurity matter [mentioned in the manual]—the person ensures the surveillance procedures [defined] have been undertaken at the place in a ... way [stated in the manual]; or
 - (d) for a requirement to deal with the... carrier by complying with a... procedure [stated in the manual] or in another... way [stated in the manual]—the person ensures the procedure is complied with or the... carrier is dealt with in the...way [stated in the manual].
- (2) *****
- (3) *****

⁵⁰ *Biosecurity Regulation 2016*, ch. 5 (Prevention and control measures for biosecurity matter) and s. 47.

⁵¹ *Ibid.*, sch. 11, definition risk minimisation requirement.

⁵² *Ibid.*, ss. 412 and 413.

⁵³ “Deal with”, a carrier, is defined extensively and includes, for example, “keep, produce, use, import, transport and dispose of”: see *Biosecurity Act 2016*, sch. 4, definition “*deal with*”.

In the Explanatory notes to the regulation, the department acknowledged that allowing non-legislative documents not subject to Parliamentary scrutiny to stipulate the circumstances under which a person must carry out a “risk minimisation requirement” may be seen to breach the fundamental legislative principle requiring legislation to have sufficient regard to Parliament.⁵⁴ The Explanatory notes described the incorporation by reference of the risk minimisation requirements in the following terms:

The Regulation provides to the greatest extent possible the risk minimisation requirement a person must follow. The technical detail for achieving the risk minimisation requirement is contained in the Manual.⁵⁵

The department also advised that the biosecurity manual would be readily available on the department’s website and would only be amended or revised in consultation with “the relevant stakeholders”⁵⁶ and concluded:

It is considered that the structure of the provisions in the Regulation that reference the Manual coupled with the rigour surrounding the development of the Manual and proposed consultation on any changes to the Manual justifies the sub-delegation[sic] by referring to the Manual in the Regulation.⁵⁷

In considering the reference to the biosecurity manual under the regulation, the former Agriculture and Environment Committee noted the department’s justification, as mentioned earlier: that it was imperative to be able to act more quickly than the normal legislative cycle permitted to establish interstate and intrastate movement restrictions. The committee also noted the biosecurity manual would be available on the department’s website and the department’s intention that the manual would be amended in consultation with relevant stakeholders. The committee considered, on balance, the potential breach of fundamental legislative principle (requiring legislation to have sufficient regard to Parliament) was justified in the circumstances.⁵⁸

Using the incorporating subordinate legislation to control the operation of the incorporated document may provide a compromise in allowing for the flexibility sought by an instructing department to use the document for administering the legislative scheme while also limiting the extent of any subdelegation of the relevant power.

However, drafting provisions in the incorporating legislation to complement the incorporated document may be fraught. The document proposed to be incorporated may not

⁵⁴ *Biosecurity Regulation 2016*, Explanatory notes for SL 2016 No. 75 at 4.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*, at 5. The Explanatory notes did not expressly identify the stakeholders who would be consulted about amendments or revisions of the biosecurity manual but, at 5 details entities, including peak industry bodies, which had been consulted during the development of the regulation. It might be inferred these entities are the “relevant” stakeholders.

⁵⁷ *Ibid.*

⁵⁸ Agriculture and Environment Committee, Subordinate legislation tabled 16 August 2016, Report No. 26, 55th Parliament, October 2016 at 3.

even exist at the time of drafting, so legislative counsel must draft the relevant controlling provisions of the incorporating legislation allowing for a wide variety of contingencies while avoiding a level of generality that may give rise to a potential unauthorised subdelegation of legislative power.

The document may exist but the version of the document that is to be in force when the incorporating legislation takes effect may not have not been prepared at the time of drafting, if indeed it has been contemplated. In those cases, legislative counsel may not have access to a reliable version of the document against which to test the draft provisions of the incorporating legislation.

Even if legislative counsel has access to a reasonably reliable version of the document proposed to be incorporated, there is an inherent difficulty in trying to reconcile a document that may not have been prepared primarily as a legislative document with the standard requirements for preparing a legislative document that must be legally effective.

The difficulties in drafting provisions of the incorporating legislation to control the operation of the incorporated document as mentioned may contribute to drafted provisions that are complicated or unwieldy.

Conclusion

As a matter of practice, the incorporation of governmental non-legislative documents by reference is likely to be a continuing feature of Queensland legislation, and it may be conjectured, the legislation of other jurisdictions. In my own experience, once subordinate legislation allows for subject-matter to be administered by reference to a government entity's non-legislative documents, such as guidelines, government entities may seek to use the same device in comparable circumstances. In such an environment, there may be increasing pressure on a legislative drafting office to justify why it may not be appropriate for a government entity to incorporate its own non-legislative document by reference in a given case.

An increasing tendency for government entities to rely on incorporated non-legislative documents is not universally negative. Government entities are likely to make these documents publicly available on their websites if legally authorised and practically convenient to do so. It might be argued the advent of the internet and consequent enhancement of public access to electronic information has reduced the need for non-legislative documents to be reproduced in legislation. It might also be argued that increasing public availability of these documents on the internet merely reflects the increasing public availability of electronic information generally. To the extent a government entity assumes responsibility for publishing an incorporated document on its website, this might be considered to reduce the administrative burden on a legislative drafting office or other entity responsible for publication of the incorporating legislation. However, enhanced public access to non-legislative documents through the internet does not compensate for lack of

Parliamentary scrutiny of the documents. As the former State Development, Infrastructure and Industry Committee noted:

... here is a subtle but important distinction between a document being publicly available, and a document being tabled in the Legislative Assembly. Tabling in the Legislative Assembly brings the document to the attention of all members for consideration and also forms part of the Parliament's historic records.⁵⁹

The increasing reliance on incorporating by reference governmental non-legislative documents presents some practical challenges for legislative drafting offices.

Co-ordinated and timely preparation of non-legislative documents proposed to be incorporated

As touched on above, if a proposal relates to new legislation, it is likely that the instructing department has not developed the relevant non-legislative document to be incorporated and therefore may have little idea of the proposed content and how the document is to work with the authorising provisions of the incorporating legislation. This may lead to difficulties for legislative counsel, including disagreement with the department, in coordinating the incorporating legislation with the incorporated document.⁶⁰

In order to address the issue, if a department were to propose incorporating its own non-legislative document into subordinate legislation, the legislative drafting office and instructing department should liaise at the earliest opportunity before drafting of the legislation is started. The department should be encouraged to have a draft of the proposed document prepared to supplement the instructions and assist legislative counsel in drafting the provisions of the incorporating legislation on which the document is to rely. However, whatever level of coordination might be achieved, legislative counsel would need to stress to the instructor the strict hierarchy of the Act/Bill provisions (if relevant), subordinate legislation provisions and provisions of the incorporated document. Any coordination of the processes would need to ensure that preparation of the content of incorporating subordinate legislation was driving the preparation of the content of the incorporated document and not the reverse.

Role of legislative drafting offices in preparing non-legislative documents proposed to be incorporated

If non-legislative documents are to be increasingly incorporated into legislation they should be drafted in a style that is reasonably consistent with the incorporating legislation to allow

⁵⁹ State Development, Infrastructure and Industry Committee, Subordinate legislation tabled between 5 June 2013 and 10 September 2013, Report No. 30, October 2013 at 7.

⁶⁰ This is analogous to those instances in which a department gives instructions for drafting provisions for the original regulation under a new Act only to be advised it has misunderstood the scope of the relevant regulation-making powers under the Act.

for compatible use with the legislation. Some latitude should be allowed in the case of documents in the technical category because, as mentioned, they are usually prepared by experts outside government for purposes beyond complementing the incorporating legislation. However, such latitude is more difficult to justify when considering documents in the regulatory category prepared by government entities, particularly when prepared expressly to complement the relevant incorporating legislation. This raises a question as to whether legislative counsel might take a greater role in drafting or advising on the preparation of regulatory category documents to encourage a higher level of consistency with the procedural requirements and style of legislation.

Any proposal for legislative counsel to assume a role in drafting or monitoring non-legislative documents would be contentious. There may be a threshold issue in some jurisdictions as to whether legislative counsel would have lawful authority to draft non-legislative instruments. In Queensland, the functions of the Office of the Queensland Parliamentary Counsel (OQPC) are centred on drafting and advising in relation to Bills and subordinate legislation,⁶¹ so legislative change would be required to formally expand the office's statutory functions.

If a drafting office were to have any responsibility for drafting or influencing the quality of non-legislative documents, those documents would need to be expressly recognised within the relevant legislative drafting framework in some way. An analogy might be drawn with the treatment in Queensland of "exempt instruments", which include local government laws and statutory rules declared to be exempt subordinate legislation or not to be subordinate legislation.⁶² While OQPC is not authorised to draft exempt instruments,⁶³ the parliamentary counsel may issue guidelines for drafting practices to be observed by persons drafting them.⁶⁴ The guidelines may provide for the citation and numbering, use of gender-neutral language, application of fundamental legislative principles, and the drafting style to be used, for exempt instruments.⁶⁵

The main objection to having legislative counsel draft non-legislative documents would be a practical one: that the legislative drafting office would need to allocate additional resources that would be required for such work. This need not be an insurmountable problem. OQPC occasionally enters into arrangements with client departments whereby legislative counsel are exclusively designated to special legislative projects on a fee for service basis. It is also noted the Australian Office of Parliamentary Counsel drafts instruments under legislation

⁶¹ *Legislative Standards Act 1992* (Qld), s. 7.

⁶² *Ibid.*, schedule 1, definitions exempt instrument and exempt subordinate legislation.

⁶³ *Ibid.*, s. 7(e) and *Statutory Instruments Act 1992*, s. 9(2)(a).

⁶⁴ *Ibid.*, s. 9(1).

⁶⁵ *Ibid.*, s. 9(2) - OQPC has issued guidelines for drafting local laws available at https://www.legislation.qld.gov.au/file/Guidelines_Local_Laws.pdf.

(other than legislative and notifiable instruments) on a fee for service basis and provides support services for agencies drafting their own instruments.⁶⁶

While, in practical terms, it is unlikely that legislative counsel will be formally drafting non-legislative documents in the foreseeable future, there might be an argument for legislative counsel incorporating regulatory category non-legislative documents to undertake an advisory or consultative role to assist the relevant government entities in preparing those documents. However, there would need to be a demarcation of responsibilities between legislative counsel and the government entity for preparing the document. At the very least, administrative safeguards might be required to ensure that an advisory or consultative role does not become a *de facto* drafting role allowing legislative counsel to be burdened with the responsibility for preparing a document without having the legal and editorial control that would normally rest with the legislative drafting office.

⁶⁶ Australian Government, Office of Parliamentary Counsel, *Instruments Handbook*, reissued June 2018, p 11, available at <https://www.opc.gov.au/sites/g/files/net2056/f/m17jf142.v12.pdf>.

Common Law Rights, Human Rights and Delegated Legislation

Ben Fraser¹



Abstract

This article outlines the impact of common law rights and statutory human rights on delegated legislation. As Parliaments are increasingly empowering delegated legislation to cover more and more matters, the likelihood that delegated legislation will curtail common law rights or (where relevant) statutorily-enshrined human rights also increases. Parliament is generally required to consider and, if need be, authorise the abrogation or curtailment of rights. The clearest way is by authorising the infringement of the right in primary legislation expressly. Drafters of delegated legislation must confront the need to infringe rights directly and advise on whether the abrogation or curtailment is appropriate for delegated legislation. If it is appropriate, legislative counsel must ensure that the policy intent is clearly communicated to the Parliament and public so that any infringement of rights can be authorised and ultimately understood by the consumers of legislation. This article outlines a drafting approach to take when delegated legislation engages a common law or statutory human right that may need to be expressly abrogated or curtailed.

Table of Contents

Introduction	44
Common law rights and the interpretative presumption	46
Statutory human rights	60
Interaction between common law rights and statutory and constitutional human rights	68

¹ Assistant Parliamentary Counsel, Parliamentary Counsel's Office, Western Australia. The views expressed in this paper are my own and do not necessarily reflect the views of the Parliamentary Counsel's Office. I would also like to thank Yen Mascarenhas for her assistance in preparing this article. Any mistakes are my own.

Role of legislative counsel when rights may impact on delegated legislation	70
Conclusion	80
Appendix - Process for considering common law rights	80A

Introduction

Delegated legislation is a necessary part of governance in the 21st century. The Australian Law Reform Commission said the delegation of legislative power to the executive is commonplace and is “essential for an efficient and effective government.”² Parliaments are increasingly delegating authority in Acts to make delegated legislation, including by enacting skeletal legislation or by providing a broad discretion to make delegated legislation. Parliaments also empower subsidiary legislative-making bodies (such as local governments) to make delegated legislation over a broad range of matters.

Delegated legislation³ owes its existence and authority to another piece of legislation.⁴ It can take many forms, including Orders in Council, regulations, by-laws, notices, orders and rules of court. Authority to make these forms of legislation is delegated by Parliament.⁵ Delegated legislation is usually made by a member of the executive or an entity that is responsible to the executive. Delegated legislation can be distinguished from administrative action of executive governments because delegated legislation generally prescribes rules of conduct while administrative action involves applying those general rules to particular cases.⁶ The distinction between delegated legislation and other administrative action is not always entirely clear and may be a fine distinction.⁷

There are limits to what can be achieved by delegated legislation. Delegated legislation is authorised by primary legislation and therefore is subject to being declared invalid for being beyond the power granted by the primary legislation or being read down so the delegated legislation is within power.

This article considers one aspect of how courts may declare invalid, or read down, delegated legislation for being beyond power. Delegated legislation may be beyond power if it:

1. abrogates rights regarded by the courts as fundamental rights or principles (which this article refers to as **common law rights**) because legislation that

² Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (Report No 129) at 447 [17.4]. Available at <https://www.alrc.gov.au/publications/freedoms-alrc129>.

³ Legislation made by the executive is known by a variety of names in CALC jurisdictions, including delegated legislation, executive legislation, secondary legislation, subordinate legislation, and subsidiary legislation. For ease of reference this article will refer to delegated legislation.

⁴ Daniel Greenberg, *Craies on Legislation*, 11th Ed, (Sweet and Maxwell: London, 2017) at 10.

⁵ Dan Meagher and Matthew Groves, “The Common Law Principle of Legality and Secondary Legislation” (2016), 39 *University of New South Wales Law Journal* 450 at 453.

⁶ Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia*, 5th ed, (LexisNexis Butterworths: Sydney, 2017) at 1.

⁷ *Ibid* at 2.

empowers the making of the delegated legislation is presumptively interpreted not to be inconsistent with a common law right (this article will refer to this interpretation principle as the **common law presumption**); and

2. infringes a human right that is statutorily enshrined by human rights legislation⁸ (which this article refers to collectively as **human rights Acts**) that requires courts to interpret legislation in accordance with the human rights enshrined in the statute (which this article refers to as **statutory human rights**); in jurisdictions that have enacted a human rights Act, delegated legislation may be beyond power if it infringes statutory human rights enshrined in the human rights Act and the delegated legislation is not authorised to infringe the right by the legislation that empowers it; and
3. infringes a constitutionally-enshrined right.⁹ Constitutionally-entrenched rights generally have the effect of invalidating all legislation inconsistent with those rights; as all types of legislation are invalidated by these rights, this article does not address the nature of constitutional rights and how they affect the validity or effect of delegated legislation.

Human rights Acts and the common law presumption apply to empowering provisions in primary legislation that affect the interpretation of those provisions so that they are read as not affecting the relevant right. This means that delegated legislation made under those empowering provisions may be:

1. read down so it is consistent with the common law or human right; or
2. invalid because the delegated legislation infringes the common law or human right and is therefore beyond the power conferred by the empowering provision; or
3. in the case of delegated legislation made in a jurisdiction in which it is possible for a court to declare legislation incompatible with statutory human rights, the subject of a declaration of incompatibility (which generally does not affect a statute's validity).

The article considers how the common law presumption and the requirement to interpret legislation in accordance with human rights enshrined in human rights Acts affect the validity of delegated legislation. This article examines how the courts may invalidate delegated legislation because it is inconsistent with common law rights or statutory human rights, and how legislative counsel should consider these issues when drafting Bills authorising delegated legislation.

The article covers the following matters:

1. what are common law rights and how courts use those rights to interpret legislation;

⁸ For example, the United Kingdom, New Zealand, the Australian Capital Territory and the Australian States of Victoria and Queensland.

⁹ For example, the *Canadian Charter of Rights and Freedoms* (Part I of Schedule B to the *Canada Act 1982* (UK), 1982, c 11).

2. what are statutory human rights and how courts use those rights to interpret legislation;
3. how those rights affect the way legislation is interpreted;
4. how those rights may apply to invalidate delegated legislation.

This article then sets out a suggested process for legislative counsel to consider when rights are infringed.

This article largely focuses on the cases and law of the United Kingdom and Australia. However, consideration of other jurisdictions' jurisprudence is discussed throughout to show the general application of the principles under discussion. As with all areas of law, jurisdictional variation is likely to mean that the principles discussed in this article may diverge in various jurisdictions, but the common law presumption appears to be a feature of many common law countries.

Common law rights and the interpretative presumption

Defining common law rights

The common law presumption protects common law rights, fundamental principles and systemic values.¹⁰ Unlike statutory human rights documents, which define rights either in relation to international documents or a list of human rights declared by statute, there is no established and accepted set of common law rights to which the common law presumption attaches.¹¹ The courts and lawyers use their knowledge to identify what those rights are.¹²

The below table lists examples of rights that have been found to engage the common law presumption.

Table 1: *examples of common law rights protected by the common law presumption*

<p><i>Court proceedings and access</i></p> <ul style="list-style-type: none"> • Access to courts¹³ • Access to legal representation¹⁴ 	<p><i>Criminal rights and principles</i></p> <ul style="list-style-type: none"> • Privilege against self-incrimination or exposure to civil penalty²¹
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¹⁰ *Lee v New South Wales Crime Commission* (2013), 251 CLR 217, 310 [323]; Dennis Pearce and Robert Geddes, *Statutory Interpretation in Australia*, 8th ed. (LexisNexis Australia: Sydney, 2014) at 212.

¹¹ Pearce and Geddes, *ibid.* at 250.

¹² Philip Sales, "The Principle of Legality and Section 3 of the Human Rights Act 1998" (2009), 125 *Law Quarterly Review* 598 at 598.

¹³ *R (Daly) v Home Secretary* [2001] 2 AC 532, 537 [5]; *Mohamed Ali Sheikh v Abdiwahab Sheikh* [2018] eKLR (Court of Appeal (Kenya), Election Petition Appeal (Application) 261 of 2018, 19 December 2018) [73]; *R v Secretary of State for the Home Department; ex parte Anderson* [1984] 1 QB 778, 792; *R v Lord Chancellor; Ex parte Witham* [1998] QB 575.

¹⁴ *R (Daly) v Home Secretary* [2001] 2 AC 532, 538 [5]; *Drew v Attorney-General (New Zealand)* [2002] 1 NZLR 58, 72 [66].

²¹ *Sorby v Commonwealth* (1983) 152 CLR 281 at 289; *Lee v New South Wales Crime Commission* (2013), 251 CLR 218 [30] and 249 [150]; *X7 v Australian Crime Commission* (2013) 248, CLR 92 a 117-

<ul style="list-style-type: none"> • Legal professional privilege¹⁵ • Confidential communication with lawyer¹⁶ • Preserving the court system and the system of accusatorial justice¹⁷ • Executive not to overrule judicial proceedings¹⁸ • Not ousting jurisdiction of the court¹⁹ • Procedural fairness/natural justice²⁰ 	<ul style="list-style-type: none"> • Prosecution has burden of proof²² and onus of proof²³ • Accused cannot be required to testify in trial of accused's offence²⁴ • Criminal offences are not created in the absence of clear words²⁵
<p><i>Economic rights and principles</i></p> <ul style="list-style-type: none"> • Contractual rights • Property rights, including: <ul style="list-style-type: none"> ○ Preventing interference with property,²⁶ including not authorising trespass²⁷ 	<p><i>Political and personal rights</i></p> <ul style="list-style-type: none"> • Free expression or speech³¹ • Free press³² • Free association³³ • Free movement³⁴

121 [37]-[48]; *Police Service Board v Morris* (1985), 156 CLR 396; *Nugent v Commissioner of Police (Queensland)* (2016) 261 A Crim R 381 at 393-4 [39].

¹⁵ *R (Daly) v Home Secretary* [2001] 2 AC 532, 538 [5]; *B v Auckland District Law Society* [2003] 2 AC 736; Pearce and Geddes, above n 10, 241; *R v Home Secretary, Ex parte Leech* [1994] QB 198, 211.

¹⁶ *R (Daly) v Home Secretary* [2001] 2 AC 532, 542 [16].

¹⁷ *X7 v Australian Crime Commission* (2013) 248 CLR 92, 132 and 153 [160]; *Lee v New South Wales Crime Commission* (2013) 251 CLR 217, 222 [37].

¹⁸ *R (on the application of Evans) v Attorney General* [2015] UKSC 21.

¹⁹ Sales, above n 12 at 603.

²⁰ *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 259 [14]-[15].

²² *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 153 [159].

²³ Pearce and Argument, above n 6 at 333.

²⁴ *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 153 [159]; *Lee v New South Wales Crime Commission* (2013) 251 CLR 217 at 307 [304].

²⁵ *Uganda v Abdala Nabil* [2016] UGHCCRD 69 (High Court of Uganda, Criminal Case No. 0004 of 2016, 31 August 2016); Sales, above n 12 at 603. This is generally described as the principle of legality in many jurisdictions: see n 58. However, Bell and Engle state that British courts generally apply a purposive approach to penal statutes: John Bell and George Engle, *Cross: Statutory Interpretation*, 3rd ed. (LexisNexis Butterworths: London, 1995) at 173-4. In Australia the approach is to ascertain the meaning of the penal provision, but if there are multiple meanings those meanings should be resolved in favour of the defendant: Pearce and Geddes, above n 10 at 367-8.

²⁶ *R & R Fazzolari Pty Ltd v Parramatta City Council* (2009) 237 CLR 603 at 618 [40] to 619 [43]; Sales, above n 12 at 603; Diggory Bailey and Luke Norbury, *Bennion on Statutory Interpretation*, 7th ed. (LexisNexis: London, 2017) at 726.

²⁷ *Coco v The Queen* (1994) 179 CLR 427 at 438.

³¹ *Attorney-General (SA) v Adelaide City Corporation* (2013) 249 CLR 1, 31 [41]; *R v Home Secretary, Ex parte Simms* [2000] 2 AC 115, 130; *Evans v New South Wales* (2008) 168 FCR 576 at 579 [7] and 596 [78]; Sales, above n 12 at 603.

³² *Evans v New South Wales* (2008) 168 FCR 576 at 595 [73].

³³ Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (Report No 129), (2016) [4.15] and [4.16].

³⁴ Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (Report No 129), (2016) at [5.14] and [5.15].

- Compulsory acquisition of property should only be done with compensation²⁸
- Privacy and personal security²⁹
- Not impeding the use of property³⁰

- Personal liberty³⁵
- Free use of roads³⁶ (although there are permissible regulations)³⁷

The list of common law rights protected by the common law presumption is not closed. Some rights may, by the effluxion of time and community attitudes, no longer attract the presumption.³⁸ Similarly, rights may be newly observed as attracting the common law presumption. However, some judgments have expressed concern about extending the application of the common law presumption to other rights not currently protected.³⁹ Sales considered that the fundamental right must be concrete, well-recognised and of sufficient weight so that Parliament could not be regarded as intending to abrogate the right unless it does so expressly or by necessary implication.⁴⁰ It is necessary for a right to be so fundamental so that it is taken that Parliament legislated with the right in mind.⁴¹

Courts draw a distinction between fundamental and ordinary rights that engage the presumption.⁴² For example, in some cases, personal liberty has been described as the most fundamental right⁴³ and freedom of speech has also been granted special recognition at common law.⁴⁴ When a fundamental right is engaged the legislation must be clearer to override it.⁴⁵ The courts have not attempted to identify non-fundamental rights that engage the presumption.⁴⁶

Community values may inform whether a fundamental principle is or remains fundamental.⁴⁷ If something was regarded as a fundamental right but is no longer so

²⁸ *CJ Burland Pty Ltd v Metropolitan Meat Industry Board* (1968) 120 CLR 400 at 406, 409-10 and 415; Sales, above n 12 at 603; Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (LexisNexis Canada: Markham, 208) at 476; Pearce and Argument, above n 6 at 335; Bailey and Norbury, above n 26 at 726.

²⁹ Sullivan, *ibid.* at 478.

³⁰ *Ibid.* at 481.

³⁵ *J v Welsh Ministering (Mind Intervening)* [2019] 2 WLR 82 at 92 [24]; Bailey and Norbury, above n 26 at 720.

³⁶ *Moule v Cambooya Shire Council* [2004] QSC 50 at para [16]; Pearce and Argument, above n 6 at 333.

³⁷ Pearce and Argument, above n 6 at 333.

³⁸ *Bropho v Western Australia* (1990) 171 CLR 1 at 18.

³⁹ *Australian Communications and Media Authority v Today FM* (2015) 255 CLR 352 at [67] (Gageler J); *Elliot v Minister Administering Fisheries Management Act 1994* [2018] NSWCA 123, [38].

⁴⁰ Sales, above n 12 at 604-5.

⁴¹ *Ibid.* at 606.

⁴² Pearce and Geddes, above n 10 at 217 and 250; Francis Cardell-Oliver, "Parliament, the Judiciary and Fundamental Rights: The Strength of the Principle of Legality" (2017), 41 *Melbourne University Law Review* 30 at 34 and 56.

⁴³ Cardell-Oliver, *ibid.* at 56.

⁴⁴ *Attorney-General (SA) v Adelaide City Corporation* (2013) 249 CLR 1, 31 [43] and 67 [151].

⁴⁵ Pearce and Geddes, above n 10 at 215.

⁴⁶ Cardell-Oliver, above n 42 at 57; Pearce and Geddes, above n 10 at 211 and 218.

⁴⁷ Pearce and Geddes, *ibid.* at 217.

regarded, it may be that the application of the presumption against interference with common law rights will be weakened in relation to the right.⁴⁸

How common law rights are used to interpret legislation and affect delegated legislation

The common law presumption is a rule of statutory construction that requires clear and unambiguous language to be used in a statute before Parliament will be regarded as intending to curtail or abrogate a fundamental common law principle or right.⁴⁹ The presumption has been described as being akin to a common law bill of rights.⁵⁰ Parliament is assumed not to intend to achieve the particular result unless it has made its intent unambiguously clear.⁵¹ The legislative intention to curtail or abrogate the right can be expressed by:

- express words that authorise the abrogation or curtailment of a common law right or principle by statute; or
- using unambiguous language that manifests or indicates a necessary intention to abrogate or curtail the right.⁵²

It has been argued that particular rights are so fundamental that they can only be abrogated by express statutory language and not by implication. In the United Kingdom, there was some support for this proposition⁵³ but courts have ruled rights can be abrogated without express statement.⁵⁴ In Canada however the Supreme Court has recently considered that express language was needed to abrogate legal professional privilege (although in Canada the privilege has taken on a constitutional dimension).⁵⁵ In Australia alterations to rights may still be abrogated by necessary intendment, even if the legislation would constitute a fundamental alteration to significant principle.⁵⁶ Thus, while the position is not uniform across the jurisdictions and in relation to every right, generally every right can be abrogated if there is a necessary intention. This operation of the presumption reflects that Parliament is sovereign and may (subject to relevant constitutional restraints) abrogate or curtail a right if it chooses to do so.

The presumption against statutory interference with common law rights has been described in a variety of ways in the common law jurisdictions. In many jurisdictions, the presumption is described as the presumption against interfering with common law rights; in Australia, New Zealand and the United Kingdom, the presumption is known as

⁴⁸ Ibid, citing *Bropho v Western Australia* (1990) 171 CLR 1 at 18 (albeit the comments made in *Bropho* concerned the presumption that Crown was not bound by statutes).

⁴⁹ *Coco v The Queen* (1994), 179 CLR 427 at 436-8; *Bropho v Western Australia* (1990) 171 CLR 1 at 17 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

⁵⁰ Pearce and Geddes, above n 10 at 211; Kent Roach, "Common Law Bills of Rights as Dialogue Between Courts and Legislatures" (2005) 55 *University of Toronto Law Journal* 733 at 738.

⁵¹ *Bropho v Western Australia* (1990) 171 CLR 1 at 18 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

⁵² *Coco v The Queen* (1994) 179 CLR 427 at 436-8.

⁵³ *R v Lord Chancellor; Ex parte Witham* [1998] 2 WLR 849, 858.

⁵⁴ Sales, above n 12, 606, citing *R v Secretary of State for the Home Department; Ex parte Pierson* [1998] AC 539.

⁵⁵ *Alberta (Information Privacy Commissioner) v University of Calgary* [2016] SCR 555 at 584 [52].

⁵⁶ See *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 142-143 [124]-[125].

the principle of legality. It has also been called the clear statement rule.⁵⁷ However, the principle of legality has different meanings in different jurisdictions. For example, in Zimbabwe the principle of legality is concerned with the publication of laws and acting in accordance with the law.⁵⁸ It seems likely that the principle of legality that relates only to the clear statement of criminal offences would also form part of the broader sense of the principle of legality that applies in New Zealand, Australia and the United Kingdom because of the requirement that legislation be published and be clear.

In Canada, the common law presumption is generally used to interpret legislation only after the Court considers there is sufficient ambiguity to authorise recourse to other principles.⁵⁹ Generally, a Court is required to consider the modern approach to statutory interpretation, which requires consideration of a statute's context to ascertain its meaning.⁶⁰ It appears in *Alberta (Information Privacy Commissioner) v University of Calgary* that the majority considered that legal professional privilege was a principle that formed part of the context of the legislation that could be used when interpreting the legislation.⁶¹ The dissenting judgment considered that there was no ambiguity so consideration of the other principles was prohibited by the modern approach to statutory interpretation.⁶² The majority judgment in *Alberta*, in which constitutional principle was considered as part of the context of a statute necessary to obtain the meaning of a statute, is consistent with the Australian approach where the common law presumption is a canon of construction used to ascertain parliamentary intent.⁶³

Courts have required legislation to clearly address the consequences of abrogating rights so Parliament is aware of the impact of legislation on rights. Courts assume that the tenets of the legal system will be followed by the legislature, which are said to reflect the views of the community, lawyers and legislators about fundamental rights.⁶⁴ Interpreting legislation in accordance with the presumption against interference with common law rights is an important application of the rule of law.⁶⁵ The presumption is not a strict rule, but amounts to an assumption about the interpretation of legislation that can be

⁵⁷ See, for example, *Elliot v Minister Administering Fisheries Management Act 1994* [2018] NSWCA 123 at para [35].

⁵⁸ In Zimbabwe the principle is concerned with requirements that legislation be sufficiently clear so that a person may be able to ascertain what the law is: *Chimakure v Attorney-General of Zimbabwe* (Unreported, Zimbabwe Supreme Court, 30 October 2013) 26. It also requires that an act of a public official must be in accordance with the law: *Mukoko v Attorney-General* (Unreported, Zimbabwe Supreme Court, 20 March 2012) at 18. It requires that administrative action that affects the rights or interest of an individual be in accordance with the law as it exists at the time, because administrative action that is not in accordance with the law will otherwise violate the rights of the individual concerned: *Mukoko v Attorney-General* (Unreported, Zimbabwe Supreme Court, 20 March 2012) at 18.

⁵⁹ John Mark Keyes & Carol Diamond, "Constitutional Inconsistency in Legislation — Interpretation and the Ambiguous Role of Ambiguity" (2017), 48 *Ottawa Law Review* 319 at 324 and 331.

⁶⁰ *Alberta (Information Privacy Commissioner) v University of Calgary* [2016] SCR 555 at 584 [52]; Keyes and Diamond, *ibid.* at 329 and 330.

⁶¹ *Alberta (Information Privacy Commissioner) v University of Calgary* [2016] SCR 555 at 574 [29], 586 [58] and 589 [64].

⁶² *Alberta (Information Privacy Commissioner) v University of Calgary* [2016] SCR 555 at 594 [78] and 595 [81].

⁶³ *Lacey v AG for State of Queensland* (2011) 242 CLR 571 at 592 [43] and [44].

⁶⁴ Pearce and Geddes, *above* n 10 at 211.

⁶⁵ *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 329 [21].

overcome by contrary intention, whether as express words or by implication.⁶⁶ The rule is a way to ascertain Parliament's true intent.⁶⁷ As Parliaments work within established common law systems, the rules of those systems form a part of the common law and statutes operate because of them.⁶⁸ Common law rights form a part of the system and the presumption against interference with those rights is a rule of that system. Parliament is assumed not to intend to abrogate rights until Parliament shows that was its intention. Therefore, it is reasonable to assume that common law rights recognised in the system would apply to statutes unless the statute excludes it. Isaacs J of the High Court of Australia considered Parliament would be expected *prima facie* to respect common law principles.⁶⁹ Requiring Parliament to make an express statement about the infringement of a right draws Parliamentary attention to the consequences of abrogating the right.⁷⁰ Lord Hoffman provided a classic statement of the common law presumption that has been applied in a number of jurisdictions in *R v Home Secretary, Ex parte Simms*:

Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights... The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.⁷¹

As Parliament is taken to be aware of the common law presumption, it is taken to know it could have excluded the right if it wanted to and chose not to do so.

A version of the common law presumption has been applied by courts in a number of countries. For example, the following jurisdictions have recognised the existence of common law rights that the common law presumption protects:

- Australia;⁷²
- Canada;⁷³
- Kenya;⁷⁴

⁶⁶ Pearce and Geddes, above n 10 at 211.

⁶⁷ Sales, above n 12 at 607.

⁶⁸ Bell and Engle, above n 25 at 165.

⁶⁹ *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 93.

⁷⁰ *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115 at 131; Pearce and Geddes, above n 10 at 211, citing *Coco v The Queen* (1994) 179 CLR 427 at 437-8.

⁷¹ [2000] 2 AC 115 at 131.

⁷² See, for example, *Coco v The Queen* (1994) 179 CLR 427.

⁷³ The Honourable Thomas A Cromwell, Siena Anstis and Thomas Touchie, "Revisiting the Role Of Presumptions of Legislative Intent in Statutory Interpretation" (2017), 95 *Canadian Bar Review* 297 at 302-303, citing *Re Estabrooks Pontiac Buick Ltd* (1982) 144 DLR (3d) 21; Sullivan, above n 28 at 476; Ruth Sullivan, "Statutory Interpretation in a New Nutshell" (2003), 82 *Canadian Bar Review* 51 at 63.

⁷⁴ *Mohamed Ali Sheikh v Abdiwahab Sheikh* [2018] eKLR (Court of Appeal (Kenya), Election Petition Appeal (Application) 261 of 2018, 19 December 2018) [73]; *Law Society of Kenya v Kenya Revenue Authority* [2017] eKLR (High Court of Kenya, Petition 39 of 2017, 14 March 2017).

- Namibia;⁷⁵
- New Zealand;⁷⁶
- Uganda;⁷⁷
- The United Kingdom.⁷⁸

While the common law presumption affects the interpretation of, but cannot invalidate, primary legislation, the common law presumption may invalidate delegated legislation where the provision empowering the making of the delegated legislation does not authorise the infringement of the common law right.⁷⁹ The common law presumption applies to invalidate delegated legislation, or read down its meaning, because the provision that empowers delegated legislation is interpreted on the basis that the empowering provision could not confer power to curtail or abrogate a common law right in a statute. The common law presumption operates to assume that it is not the intent of a statute to interfere with common law rights; that includes a presumption against construing a statute to authorise delegated legislation to infringe a common law right.⁸⁰ The application of the principle to delegated legislation has been explained in a number of cases in the following ways:

In *R v Lord Chancellor; ex parte Witham*, Laws J said:

the right in question cannot be abrogated by the state save by specific provision by an Act of Parliament, or by regulations whose vires in main legislation specifically confers the power to abrogate. General words will not suffice.⁸¹

Also, in *R v Home Secretary, ex parte Leech*, Steyn LJ said:

It will be a rare case in which it could be held that such a fundamental right was by necessary implication abolished or limited by statute. It will, we suggest, be an even rarer case in which it could be held that a statute authorised by necessary implication the abolition of limitation of so fundamental a right⁸² by subordinate legislation.⁸³

In *R v Secretary of State for the Home Department; Ex parte Pierson*, Lord Browne-Wilkinson said:

A power conferred by Parliament in general terms is not to be taken to authorise the doing of acts by the donee of the power which adversely affect ... the basic

⁷⁵ See *Municipality of Windhoek v Van Wyk* (LCA 6.98) [1999] NAHC 12.

⁷⁶ See, for example, *B v Auckland District Law Society* [2003] 2 AC 736.

⁷⁷ See, for example, *Uganda v Abdala Nabil* [2016] UGHCCRD 69 (High Court of Uganda, Criminal Case No. 0004 OF 2016, 31 August 2016).

⁷⁸ See, for example, *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115; *AXA General Insurance Limited v The Lord Advocate (Scotland)* [2011] UKSC 46; *R v Lord Chancellor; Ex parte Witham* [1998] 2 WLR 849; *R v Secretary of State for Social Security; Ex parte Joint Council for the Welfare of Immigrants* [1997] 1 WLR 275.

⁷⁹ *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115, 132; *CJ Burland Pty Ltd v Metropolitan Meat Industry Board* (1968) 120 CLR 400, 406, 409-10 and 415; Dan Meagher and Matthew Groves, "The Common Law Principle of Legality and Secondary Legislation" (2016) 39 *University of New South Wales Law Journal* 450 at 451.

⁸⁰ *R v Home Secretary, Ex parte Leech* [1994] QB 198 at 209.

⁸¹ [1998] 2 WLR 849 at 854.

⁸² In the case the right at issue was legal professional privilege.

⁸³ [1994] QB 198 at 212.

principles on which the law of the United Kingdom is based unless the statute conferring the power makes it clear that such was the intention of Parliament.⁸⁴

Similarly, in *AXA General Insurance Ltd v HM Advocate*, Lord Reed said:

The [common law presumption] means not only that Parliament cannot itself override fundamental rights or the rule of law by general or ambiguous words, but also that it cannot confer on another body, by general or ambiguous words, the power to do so.⁸⁵

The courts have assessed whether delegated legislation is invalid for infringing a common law right by taking the following approach:

1. Is the right one that is recognised by the common law?
2. Is the right infringed by the delegated legislation?
3. Is the infringement authorised by the Act?⁸⁶

The first question may be answered by consideration of the rights protected, which is discussed above under the heading Defining common law rights.

The second question requires a consideration of the terms of the delegated legislation to evaluate how it might affect the identified right. In many cases this will be clear on the face of the delegated legislation. For example, in *R (Daly) v Home Secretary*, a policy authorising the examining of legal correspondence when the prisoner was not present engaged the right to legal professional privilege.⁸⁷ Similarly, in *Evans v New South Wales*,⁸⁸ regulations that purported to prevent conduct that caused annoyance to participants at a World Youth Day Event would curtail rights of freedom of speech given their clear application to protests.⁸⁹ In other cases, it may not be immediately clear how the legislation will affect the rights of those to whom the legislation applies. For example, in *R v Lord Chancellor, Ex parte Witham* an Order that significantly increased court fees and removed the capacity to waive fees for financial hardship was held invalid because the Order was an absolute bar on many people from seeking justice from the courts.⁹⁰

The third question requires an exercise in statutory interpretation of the empowering provision. The provision of the Act conferring the power to make delegated legislation must be construed in accordance with the Act's scope and objects and then decide whether the impugned delegated legislation falls within that power.⁹¹ If there are

⁸⁴ [1998] AC 539 at 575.

⁸⁵ [2012] 1 AC 868 at 946 [152].

⁸⁶ See, for example, *R (Daly) v Home Secretary* [2001] 2 AC 532 at 542 [15].

⁸⁷ *R (Daly) v Home Secretary* [2001] 2 AC 532 at 542 [16].

⁸⁸ (2008) 168 FCR 576.

⁸⁹ *Evans v New South Wales* (2008) 168 FCR 576 at 597 [83].

⁹⁰ *R v Lord Chancellor, Ex parte Witham* [1998] 2 WLR 849 at 857. See also **Error! Bookmark not defined.**, above n. 55 at 99.

⁹¹ *Evans v New South Wales* (2008) 168 FCR 576 at 591 [60].

constructional choices open on the face of the legislation, the legislation should be construed so as not to infringe common law rights.⁹²

The greater the deprivation of the right the higher the scrutiny that will be required to interpret the legislation as abrogating the right.⁹³ The same principle applies to the validity of delegated legislation. Courts will be more reluctant to construe a rule-making power to permit delegated legislation to significantly deprive a person of a right.⁹⁴

Expressly infringing a common law right

Using a clear statement is the “most satisfactory way” to make Parliament’s intention unambiguously clear.⁹⁵ For example, the *Criminal Assets Recovery Act 1990* (NSW) section 13(1) abrogates legal professional privilege:

13 Privilege

- (1) A person being examined under section 12 is not excused from answering any question, or from producing any document or other thing, on the ground that:

...

- (c) the answer or production would disclose information that is the subject of legal professional privilege.

This provision is a clearly expressed abrogation of legal professional privilege and the Australian High Court found this was an effective provision to abrogate the privilege.⁹⁶

Infringing a common law right by necessary implication

In the absence of an express abrogation or curtailment of a common law right, it will be necessary to decide whether it is Parliament’s clear intention to override or abrogate the right.⁹⁷ The courts have formulated the test as necessary to evince a necessary implication to curtail a right as asking whether the statute is unambiguous, unmistakable, clear or necessarily implies or intends to evince a necessary implication to curtail or abrogate a right.⁹⁸

A statutory provision may be ambiguous unless the provision has specifically contemplated and dealt with the common law right to be abrogated or curtailed.⁹⁹ However, in other cases courts have not required unmistakable or unambiguous language. It may be sufficient if the provision is general enough to mean that the common law right is abrogated or curtailed.¹⁰⁰ The Australian High Court acknowledged

⁹² *Ibid.*, at 593 [68].

⁹³ *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115 at 130.

⁹⁴ *R v Secretary of State for the Home Department; Ex parte Anderson* [1984] 1 QB 778 at 791; *R (Daly) v Home Secretary* [2001] 2 AC 532 at 541.

⁹⁵ *Coco v The Queen* (1994) 179 CLR 427 at 446.

⁹⁶ *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 at 208 [13].

⁹⁷ Pearce and Geddes, above n 10 at 214.

⁹⁸ Different formulations have been expressed with variations on these words. See the list stated in Pearce and Geddes, above n 10 at 239.

⁹⁹ Cardell-Oliver, above n 42 at 49.

¹⁰⁰ *Ibid.*

that it would be possible to abrogate a common law right by implication, but only if it were necessary to ensure the legislation did not become meaningless.¹⁰¹

There is unlikely to be a clear answer on whether a piece of legislation requires that a common law right be curtailed or abrogated. In many cases courts have divided almost evenly on the question of whether it is necessarily implied that common law rights have been abrogated.

In the United Kingdom the test for whether a common law right is abrogated by necessary implication is a strict one. A common law right would be infringed by necessary implication if it is clear that Parliament would have included language abrogating rights if Parliament had thought about it, or the abrogation is clear from the express language of the statute.¹⁰² If legislation includes contrary provisions prohibiting the exercise of a statutory power contrary to a right, that is an indication that Parliament did not intend to abrogate the right.¹⁰³ Whether abrogation of a right is necessary could be decided by working out whether the provision could be interpreted without abrogating it. If a provision can be interpreted without abrogating a common law right, the provision should be interpreted that way.¹⁰⁴ Equally, the provision could be tested to see if a common law right was abrogated by including words protecting the right in the provision to see if the words produced an inconsistency or stultified the purpose of the provision.¹⁰⁵

Australia does not share the United Kingdom's clear and robust approach to cases involving necessary implication. There are a number of conflicting cases from the High Court of Australia on when laws will infringe rights by necessary implication. In *Coco v The Queen*, one of the leading Australian cases on the principle of legality, the High Court considered that it would be rare that general words would be enough to curtail or abrogate the right and specificity would be required.¹⁰⁶ However, in *Al-Kateb v Godwin*, a slim majority of the Court found that the general words in a provision requiring that a person be detained in immigration detention until they left Australia would be sufficient to mean that a person would be detained indefinitely if the person could not be removed from Australia. The majority decided the provision was unambiguous.¹⁰⁷ Conversely, the minority considered that the provision did not specifically address a person who could not be removed from Australia and to another country so the detention could not fulfil its purpose. The minority considered the common law presumption required that the person not be detained indefinitely.¹⁰⁸

¹⁰¹ Pearce and Geddes, above n 10 at 214.

¹⁰² *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563, [45]; *J v Welsh Ministering (Mind Intervening)* [2019] 2 WLR 82 at 93 [25]-[26]; *Sorby v Commonwealth* (1983) 152 CLR 281 at 300 and 310.

¹⁰³ *J v Welsh Ministering (Mind Intervening)* [2019] 2 WLR 82 at 94 [27].

¹⁰⁴ *B v Auckland District Law Society* [2003] 2 AC 736 at 759 [59], citing *Commission of Inland Revenue v West-Walker* [1954] NZLR 191 at 213.

¹⁰⁵ *B v Auckland District Law Society* [2003] 2 AC 736 at 759-60 [59].

¹⁰⁶ *Coco v The Queen* (1994) 179 CLR 427 at 437.

¹⁰⁷ *Al-Kateb v Godwin* (2004) 219 CLR 562 at 581 [33] and [35], 643 [241], 661 [298]; 662-3 [303].

¹⁰⁸ *Ibid.* at 577 [21] (Gleeson CJ).

A starker divergence in views on the principle can be seen in *X7 v Australian Crime Commission*¹⁰⁹ and *Lee v New South Wales Crime Commission*,¹¹⁰ which were decided by the same court in the same year with different outcomes on whether a person could be compelled to answer questions in relation to crimes for which they had been charged. In *X7*, the *Australian Crime Commission 2002* (Cth) authorised examination by an examiner in the Commission; in *Lee*, the *Criminal Assets Recovery Act 1990* (NSW) authorised examination by the Supreme Court. Both Acts abrogated the privilege against self-incrimination and included a direct-use immunity. In *X7* the High Court sitting with 5 justices held (3 judges to 2) that a law would not permit the questioning of a person who had been charged with an offence because of its impacts on the accusatorial system of criminal justice, while a differently constituted bench in *Lee* decided by majority in the same year (4 judges to 3) that similar legislation would have that effect. The majority in *X7* became the minority in *Lee*.

Justices Hayne and Bell (with whom Kiefel J agreed) held in *X7* that the legislature would need to alter the operation of the accusatorial system of justice by allowing a contempt of court with express words or necessary intendment¹¹¹ (over and above the abrogation of self-incrimination). Hayne J in *Lee* considered the arguments advanced in *Lee* were addressed in *X7*.¹¹² Kiefel J in *Lee* (with whom Bell J agreed) considered that while the privilege against self-incrimination was clearly abrogated, there was nothing that suggested the Act authorised a contempt of court.¹¹³ Justice Hayne (who was in the majority in *X7* and minority in *Lee*) criticised the different result arising from a change in the bench.¹¹⁴

Chief Justice French and Justice Crennan formed the minority in *X7* and part of the majority in *Lee*. Chief Justice French and Justice Crennan's joint judgment in *X7* considered the policy of the legislation was to allow investigation of crimes which overrode and abrogated the privilege against self-incrimination.¹¹⁵ Their Honours considered that a trial judge can protect against an abuse of process.¹¹⁶ The Chief Justice in *Lee* considered that the risk of a contempt of court arising from questioning of an accused could be managed by the judiciary because the judiciary was required to act judicially and had a direct role in that questioning.¹¹⁷ His Honour considered that the role that the court played in questioning the persons in *Lee* was a significant difference that distinguished it from *X7*,¹¹⁸ although his Honour considered in both cases that risks to the system of the accusatorial system of justice could be managed by a court conducting the criminal trial. In *Lee* Crennan J agreed with the judgment of Gageler and Keane JJ.¹¹⁹

¹⁰⁹ (2013) 248 CLR 92.

¹¹⁰ (2013) 251 CLR 196.

¹¹¹ *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 143 [125].

¹¹² *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 at 233 [70].

¹¹³ *Ibid.* at 281-2 [225]-[226].

¹¹⁴ *Ibid.* at 233 [71]. See also Cardell-Oliver, above n 42 at 11.

¹¹⁵ *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 112 [29].

¹¹⁶ *Ibid.* at 124 [59].

¹¹⁷ *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 at 223-4 [40]-[41].

¹¹⁸ *Ibid.* at 221-2 [36]-[38].

¹¹⁹ *Ibid.* at 249-50 [126].

Justices Gageler and Keane did not constitute part of the bench in *X7* and were the deciding votes in *Lee*. Their Honours considered that the statute specifically was directed at curtailing the fundamental right at issue to allow for examination of persons and made no distinction about whether the person was charged or not.¹²⁰ The common law presumption could therefore not be used to interpret legislation to prevent the outcome the legislation sought to achieve.¹²¹ Their Honours considered, similarly to French CJ and Crennan J in *X7*, that the potential contempt of court could be addressed by a court controlling its procedures.¹²²

A similar example arose in 2015 from the United Kingdom Supreme Court in *R (on the application of Evans) v Attorney General*, in which 3 of the 7 judges considered that the common law presumption meant that a conclusive statement that information was not to be released could not be used to overrule the decision of a court of record, while the other 4 judges of the Court considered that the statute did authorise the overturning of the court of record's decision by the executive.¹²³ The outcome turned on the decision of 2 of the 4 judges who considered that while there could be executive override, the override had to directly respond to the decision made by the court.¹²⁴

There are a number of matters relevant to decide whether or not a necessary implication to abrogate or curtail fundamental common law rights can be established from legislation:

- The significance of the incursion into the right may be a factor to decide whether Parliament intended to abrogate it.¹²⁵
- The specificity of legislation is relevant to imputing an implication that the legislation is intended to abrogate rights and freedoms.¹²⁶ However in some cases the test has differed markedly within the same jurisdictions. Different majorities of Australian High Court justices have required that there be a high level of specificity before the common law right will be abrogated; others only required unqualified or plain language to override the right without requiring specificity.¹²⁷ Cardell-Oliver has expressed the view that there does not appear to be justification or explanation for the differences in approach.¹²⁸
- The continued history of abrogating rights, or not granting them in the first place, in particular contexts may be sufficient to provide that the protection is abrogated (even when there is no indication that the right is to be abrogated).¹²⁹

¹²⁰ *Ibid.* at 318 [331] and 319 [333].

¹²¹ *Ibid.* at 311 [314].

¹²² *Ibid.* at 321 [340].

¹²³ *R (on the application of Evans) v Attorney General* [2015] UKSC 21 at [90].

¹²⁴ *Ibid.* at [129].

¹²⁵ *R (Daly) v Home Secretary* [2001] 2 AC 532 at 541; Sales, above n 12 at 607.

¹²⁶ *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 at 218 citing *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319 at 332-33 and *Mortimer v Brown* (1970) 122 CLR 493 at 499.

¹²⁷ Cardell-Oliver, above n 42 at 54.

¹²⁸ *Ibid.* at 55.

¹²⁹ *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 at 218 [38]; Cardell-Oliver, above n 42 at 60-61.

- The overall purpose of the legislation may be a sufficient indication of legislative intent to abrogate common law rights.¹³⁰ The purpose of the legislation can be ascertained from express statutory statement, from the inference from the statute and from appropriate use of extrinsic materials.¹³¹ On occasions the Australian High Court has favoured a test that focused on furthering or not frustrating the purpose of a statute. In *Lee*, which was handed down shortly after *X7*, a majority of the High Court used a test which only required that the statutory purpose would be frustrated if the legislation did not curtail the right or, putting it another way, the right could be infringed because infringing the right furthered the statutory purpose.¹³² Previously, the High Court held that a right would be curtailed because the purpose of the legislation would be hampered or seriously impeded if the right was not curtailed,¹³³ which was a higher standard than simply requiring furthering the purpose. It was not relevant that the provision could work without the right being curtailed.
- The legislation would be inoperative, meaningless or unworkable without abrogating the right.¹³⁴ The Australian High Court has generally, but not always, required that the fundamental right will not be curtailed unless the statutory provision is rendered inoperative or meaningless.¹³⁵ Generally, a fundamental right would not be curtailed only because adherence or observance of the fundamental right would make it more difficult, but not impossible, to achieve the statutory purpose.¹³⁶ The abrogation must be necessary; abrogation will not occur merely because it is desirable.¹³⁷ If a provision has other work to do without curtailing the right, the provision would not curtail the right.¹³⁸ Under this test, it would be rare for a provision expressed generally to be rendered inoperative because a fundamental right was curtailed or abrogated.¹³⁹
- There may be particular situations where the courts accept that the right should be abrogated. Regulations that abrogate rights may be within power if they serve the purpose of the Act and therefore be within power when abrogating rights. For example, some courts have accepted that within the context of police disciplinary proceedings provided by the regulations, the abrogation to the right to silence was necessary to maintain discipline in the force and the

¹³⁰ *Ibid.* at 218 [38], 222 [38], 230 [55], 249 [126] and 310 [314].

¹³¹ *Ibid.* at 226 [45].

¹³² This approach was adopted in *Lee v New South Wales Crime Commission*, *Ibid.* at 218 [30] and 230 [56]; 251 [131]; Gageler and Keane JJ refer to purpose at 310-311 [314].

¹³³ Cardell-Oliver, above n 42 at 44.

¹³⁴ Pearce and Geddes, above n 10 at 239. The effect of the abrogation of the privilege against self-incrimination was summarised by Allsop J in *Griffin v Pantzer* (2004) 137 FCR 209 at paras [37]-[56].

¹³⁵ *Coco v The Queen* (1994) 179 CLR 427 at 436, 438 and 446, cited in Cardell-Oliver, above n 42 at 36.

¹³⁶ Cardell-Oliver, above n 42 at 37.

¹³⁷ *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 149 [142].

¹³⁸ Cardell-Oliver, above n 42 at 39. See for example *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 150 [147].

¹³⁹ *Coco v The Queen* (1994) 179 CLR 427 at 438.

duty owed to the community by the police officers.¹⁴⁰ In *Police Service Board v Morris*, the Australian High Court considered whether regulations could compel a police officer to follow an order to answer questions in a disciplinary proceeding if those answers could render the police officer liable for prosecution for a criminal offence.¹⁴¹ The Court found that the regulations excluded the privilege against self-incrimination because the Act provided for regulations that dealt with the regulation and discipline of the police force, which is necessary for the proper functioning of society.¹⁴² The application of the privilege would be inappropriate to the regulation under which the order to answer questions was given because the regulation required obedience to orders.¹⁴³ Similar approaches have been taken in relation to general words found to have abrogated the privilege against self-incrimination in relation to bankruptcy or liquidation of companies.¹⁴⁴

- The amount of legislation regulating an area may be a factor in deciding whether the presumption against interference with common law rights is justified. Further statutory regulation over a matter once regulated by common law may evince a legislative intention that aspects of the pre-existing law on a subject matter do not apply.¹⁴⁵

The following cases show how the common law presumption has been applied when interpreting legislation:

- Legislation that provided that a person may use a listening device would not be sufficient to provide that a person may commit a trespass to implant that device.¹⁴⁶ That intention would have been manifest by implication if there was a statement providing that the device could be placed on private premises without the occupier's knowledge or consent.¹⁴⁷
- Legislation providing for the implementation of UN Security Council resolutions could not by very general words authorise the freezing of people's assets without due process of law.¹⁴⁸
- Regulations that purported to prevent conduct that caused annoyance to participants at a World Youth Day Event were held to be beyond power because they curtailed the rights to speech and expression that did not disrupt

¹⁴⁰ *Police Service Board v Morris* (1985) 156 CLR 396 at 404, 410 and 412; *Nugent v Commissioner of Police Queensland* (2016) 261 A Crim R 383 at 391 [20], 399 [64], 403 [75] and [78], 404 [79]-[80] and 415 [133]-[134]. However, this approach has not been universally applied: see *Baff v Commissioner of Police (New South Wales)* (2013) 234 A Crim R 346 at 367-8 (in particular 368 [112]).

¹⁴¹ (1985) 156 CLR 396.

¹⁴² *Police Service Board v Morris* (1985) 156 CLR 396 at 404, 410 and 412.

¹⁴³ *Ibid.* at 404, 410 and 412.

¹⁴⁴ See *Griffin v Pantzer* (2004) 137 FCR 209 at 254 [174]-[175] cited in *Baff v Commissioner of Police (New South Wales)* (2013) 234 A Crim R 346 at 368 [113].

¹⁴⁵ Pearce and Geddes, above n 10 at 244, citing *Daly v Thiering* [2013] HCA 45, paras [32]-[33].

¹⁴⁶ *Coco v The Queen* (1994) 179 CLR 427 at 439.

¹⁴⁷ *Ibid.* at 446.

¹⁴⁸ *A v HM Treasury* [2010] 2 AC 534.

nor cause interference with the freedom of others and could not be supported by a head of power that regulated the conduct of the public.¹⁴⁹

Purposive delegated legislative powers are subject to a proportionality analysis.¹⁵⁰ In cases involving a purposive power to make delegated legislation, courts have engaged in proportionality analysis to decide whether the purpose to be achieved by the delegated legislation is proportionate to the infringement of the common law right. In *R (Daly) v Home Secretary*, the Court considered whether a power to create prison rules would authorise the abrogation of legal professional privilege so that a prisoner's legal correspondence could be examined during a search of the prisoner's cell without the prisoner being present.¹⁵¹ The Court found that the policy that authorised the making of prison rules, which was to carry out the search in the absence of the prisoner so they did not learn about the prison's searching techniques, did not authorise reading legal correspondence without the prisoner being present because the infringement of prisoners' rights is greater than that which is necessary to serve the legitimate policy.¹⁵² Lord Cooke of Thorndon considered that rights are abrogated "only then to the extent reasonably necessary to meet the ends which justify the curtailment".¹⁵³

It is also possible to read down delegated legislation so that it does not infringe a right.¹⁵⁴ In *Raymond v Honey*,¹⁵⁵ the House of Lords read down rules made under the *Prison Act 1952* so that the regulations would not operate to interfere with a prisoner's uninterrupted access to a court because the empowering provision in the Act did not indicate that it conferred power to make regulations that authorised interference with or deny the uninterrupted access to a court. If the regulations were not read down, they would have been beyond power.¹⁵⁶ The Court appeared to take this approach because of the general words that were included in the delegated legislation.

Statutory human rights

Human rights are protected by statutes in many different ways. Statutes may prevent discrimination on the basis of defined characteristics¹⁵⁷ which may provide a basis for suing to enforce a right. Statutes may declare particular rights as human rights which can invalidate inferior legislation for inconsistency with that right.¹⁵⁸ Statutes may also protect human rights by requiring that legislation be interpreted consistently with those rights, which affects the meaning of the provisions without authorising a court to

¹⁴⁹ *Evans v New South Wales* (2008) 168 FCR 576 at 597 [83].

¹⁵⁰ *Attorney-General (SA) v Adelaide City Corporation* (2013) 249 CLR 1 at 32 [44].

¹⁵¹ *R (Daly) v Home Secretary* [2001] 2 AC 532 at 545 [21].

¹⁵² *Ibid.* at 543 [19] and 545 [21].

¹⁵³ *Ibid.* at 548 [31].

¹⁵⁴ *Attorney-General (SA) v Adelaide City Corporation* (2013) 249 CLR 1, 33 [46]; Cardell-Oliver, above n 42 at 59.

¹⁵⁵ [1983] AC 1 at 12-13.

¹⁵⁶ *Raymond v Honey* [1983] AC 1 at 13.

¹⁵⁷ See, for example, the *Racial Discrimination Act 1975* (Cth) and the *Sex Discrimination Act 1984* (Cth).

¹⁵⁸ See, for example, the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and *The Saskatchewan Human Rights Code*, 2018.

invalidate the legislation for inconsistency with the right.¹⁵⁹ This article is concerned with the protection of human rights in legislation that affects the way statutes are interpreted.

Defining statutory human rights

Human rights Acts enshrine some human rights into legislation and provide that other legislation must generally be interpreted in accordance with the enshrined rights. The rights protected by the human rights Acts are commonly either set out in the legislation or are said to be stated in another instrument. Examples of these Acts are:

- The Victorian *Charter of Human Rights and Responsibilities Act 2006* (**Victorian Charter**);
- Australian Capital Territory's (ACT) *Human Rights Act 2004* (**ACTHRA**);
- Queensland's *Human Rights Act 2019* (**QHRA**)¹⁶⁰
- *New Zealand Bill of Rights Act 1990* (**NZBOR**)

Those rights generally reflect international human rights from the International Covenant on Civil and Political Rights¹⁶¹ and the International Covenant on Economic, Cultural and Social Rights.¹⁶²

The *Human Rights Act 1998* (UK) (**UKHRA**) enshrines rights that are set out in the *Convention for the Protection of Human Rights and Fundamental Freedoms*.¹⁶³ It requires legislation to be read and given effect to in a way compatible with Convention rights.¹⁶⁴ The rights can be found in Schedule 1 of the UKHRA.¹⁶⁵

The rights enshrined by human rights Acts are generally expressed. Their exact content requires jurisprudence to decide how the generally-expressed rights might apply to particular situations in their context.¹⁶⁶ Human rights Acts generally allow for recourse to international human rights documents and foreign and international jurisprudence to

¹⁵⁹ See, for example, the *Canadian Human Rights Act*, *The Human Rights Code* (Manitoba), the *Racial Discrimination Act 1975* (Cth) and the *Sex Discrimination Act 1984* (Cth).

¹⁶⁰ The Act is due to commence by proclamation, and partially commenced on 1 July 2019: see s 2 of the Act and *Proclamation No. 1—Human Rights Act 2019*. The legislation will commence automatically in a year after the Act receives Royal Assent, unless its commencement is delayed by a further year: *Acts Interpretation Act 1954* (Qld) s 15DA.

¹⁶¹ *International Covenant on Civil and Political Rights*, opened for signature 19 December 1996, 999 UNTS 171 (entered into force 23 March 1976).

¹⁶² *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976). See *Human Rights Act 2004* (ACT) s 7, Parts 3 and 3A; *Human Rights Bill 2018* (Qld) Explanatory Notes p 3 to 5; *Charter of Human Rights and Responsibilities Bill 2006* (Vic) Explanatory Memorandum p 7.

¹⁶³ *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

¹⁶⁴ *Human Rights Act 1998* (UK) s 3(1). Convention rights are rights set out in the *Convention for the Protection of Human Rights and Fundamental Freedoms* and in the First and Thirteenth Protocol to the Convention: *Human Rights Act 1998* (UK) s 1(1).

¹⁶⁵ The provision sets out articles 2 to 12 and 14 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, articles 1 to 3 of the First protocol to the Convention agreed at Paris on 20 March 1952 and article 1 of the Thirteenth Protocol to the Convention agreed at Vilnius on 3rd May 2002.

¹⁶⁶ Sales, above n 12 at 599.

assist in interpreting the rights. This is the case in the Australian human rights Acts.¹⁶⁷ The UKHRA provides for recourse to decisions of the European Court of Human Rights and particular decisions of the European Commission of Human Rights and Committee of Ministers under the *Convention for the Protection of Human Rights and Fundamental Freedoms*.¹⁶⁸ However, the NZBOR does not have an express provision allowing the use of international jurisprudence in interpreting the rights.

How statutory human rights are used to interpret legislation

Human rights Acts do not invalidate primary legislation. They primarily operate by affecting the interpretation of legislation by requiring that statutes be interpreted in accordance with the rights they protect. Unlike the common law presumption, the statutory human rights regimes are not always concerned with ascertaining Parliament's intention. The human rights Acts can be usefully divided into 2 categories:

1. Human rights Acts that require the courts to interpret legislation in accordance with rights and without specified reference to legislative purpose. The NZBOR and UKHRA fall into this category.
2. Human rights Acts that require an interpretation in accordance with a right as long as that interpretation is consistent with the Act's purpose. The Australian human rights Acts fall into this category.

Each category is considered below.

Legislation and delegated legislation interpreted in accordance with statutory human rights without reference to purpose: New Zealand and United Kingdom

The NZBOR and UKHRA require courts to interpret legislation in a way that is most consistent with the rights protected by those Acts.

The UKHRA provides that, so far as it is possible to do so, legislation must be read and given effect in a way compatible with Convention rights.¹⁶⁹ Courts must give a statute a meaning that is the most consistent with the Convention over Parliament's intention.¹⁷⁰

The UKHRA interpretative approach requires consideration first of the ordinary meaning of the statute to decide whether that ordinary interpretation is consistent with the rights stated in the Act. If that interpretation is not consistent with those rights, section 3 of the UKHRA applies and the court attempts to modify the meaning so it is consistent with the right.¹⁷¹ It is not necessary to have regard to Convention rights if the ordinary interpretation is consistent with the right (including through the application of the common law presumption).

¹⁶⁷ *Human Rights Act 2004* (ACT) s 31; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32(2); *Human Rights Act 2019* (Qld) s 48(3).

¹⁶⁸ *Human Rights Act 1998* (UK) s 2(1).

¹⁶⁹ *Human Rights Act 1998* (UK) s 3(1).

¹⁷⁰ Sales, above n 12 at 607-8.

¹⁷¹ *Ibid*, 608.

The interpretative approach taken in the UKHRA also allows for the reading in of words to create an interpretation that is consistent with a Convention right in issue.¹⁷²

Parliamentary sovereignty is retained because Parliament is able to legislate inconsistently with a Convention right and a court cannot declare primary legislation invalid for inconsistency with a Convention right.¹⁷³

The NZBOR also requires that an enactment be given a meaning consistent with the rights and freedoms contained in the Act. The rights-consistent meaning must be preferred over any other meaning.¹⁷⁴

In the United Kingdom, the courts may also declare legislation incompatible with a right. If the primary legislation prevents removal of the incompatibility with a human right and a court considers subordinate legislation is incompatible, the court may make a declaration of incompatibility.¹⁷⁵ The declaration does not affect the validity of the legislation.¹⁷⁶ Further, if a declaration of incompatibility has been made, a Minister of the Crown¹⁷⁷ may amend primary or subordinate legislation by order to remove the incompatibility if there are compelling reasons to do so.¹⁷⁸ The Supreme Court of New Zealand decided by majority that superior courts can declare legislation to be inconsistent with the NZBORA.¹⁷⁹

In the NZBORA the rights enshrined in the Act may only be subjected to the reasonable limits prescribed by law that can be justified in a free and democratic society.¹⁸⁰ This forms part of the interpretative approach when applying the NZBOR to other statutes.¹⁸¹ No similar provision is included in the UKHRA, although this element forms part of the proportionality analysis carried on by the courts.¹⁸²

The UKHRA and NZBOR treat delegated legislation differently on their terms, but both provide for courts to declare delegated legislation invalid for being inconsistent with a rights-protecting interpretation of an empowering provision.

The NZBOR treats delegated legislation the same way as it treats primary legislation. The interpretative requirement in the NZBOR applies to delegated legislation in the same way as it applies to Acts because the NZBOR applies to “enactments”.¹⁸³ Thus, an interpretation of regulations that is consistent with a right in the Act must be preferred over any other meaning. Regulations under the Act include matters such as by-laws,

¹⁷² Sales, above n 12 at 608.

¹⁷³ *Human Rights Act 1998* (UK) s 3(2)(b).

¹⁷⁴ *New Zealand Bill of Rights Act 1990* s 6.

¹⁷⁵ *Human Rights Act 1998* (UK) s 4(3) and (4).

¹⁷⁶ *Ibid.* s 4(6).

¹⁷⁷ “Minister of the Crown” means a Minister of the Crown under the *Ministers of the Crown Act 1975* (UK): see *Human Rights Act 1998* (UK) s 21.

¹⁷⁸ *Human Rights Act 1998* (UK) s 10(3) and Schedule 2 paragraph 1(1)(a) and (2).

¹⁷⁹ *Attorney-General v Taylor* [2018] NZSC 104.

¹⁸⁰ *New Zealand Bill of Rights Act 1990* s 5.

¹⁸¹ See *R v Hansen* [2007] 3 NZLR 1.

¹⁸² See the text accompanying footnote 195 on page 64.

¹⁸³ *New Zealand Bill of Rights Act 1990* s 6. Enactment is defined to mean a whole or part of an Act or regulations: *Interpretation Act 1999* (NZ) s 29, definition *enactment*.

rules and Orders in Council.¹⁸⁴ Thus, a court cannot affect the validity of regulations or refuse to apply regulations only because it is inconsistent with a right mentioned in the NZBOR.¹⁸⁵ However, if an empowering provision contained in the Act authorising delegated legislation to be made is interpreted in accordance with the NZBOR, the delegated legislation could still be invalid for being inconsistent with that empowering provision.¹⁸⁶

In the United Kingdom, the UKHRA applies to both primary and subordinate legislation wherever enacted.¹⁸⁷ Subordinate legislation includes rules, regulations, orders or other instruments made under primary legislation, Acts of the Scottish or Northern Ireland Parliament or the Welsh or Northern Ireland National Assembly.¹⁸⁸ Primary legislation in the United Kingdom may provide that subordinate legislation may be inconsistent with a Convention right. Subordinate legislation may be quashed or declared invalid because it is incompatible with a Convention right¹⁸⁹ unless the primary legislation “prevents removal of the incompatibility”.¹⁹⁰

A public authority is also prevented from acting in a way incompatible with a Convention right, unless the public authority was authorised to act inconsistently with the right.¹⁹¹ This extends to the making of subordinate legislation.¹⁹²

The United Kingdom courts apply proportionality analysis when deciding whether a Convention right has been infringed.¹⁹³ The proportionality analysis goes beyond what is traditional judicial review, but does not devolve into merits review.¹⁹⁴ When considering whether a human right has been infringed the courts consider:

- the limitations on the right that are necessary in a democratic society; and
- whether the interference is proportionate to the legitimate aim being pursued.¹⁹⁵

Legislation and delegated legislation interpreted in accordance with statutory human rights and purpose: ACT, Victoria and Queensland

The Australian human rights Acts differ from the UKHRA and NZBOR because they require consideration of the purpose of the legislation being interpreted. The Australian human rights Acts state that legislation must be interpreted in a way compatible with human rights to the extent possible that is consistent with the purpose of the legislation

¹⁸⁴ *Interpretation Act 1999* (NZ) s 29, definition *regulations*.

¹⁸⁵ *New Zealand Bill of Rights Act 1990* s 4.

¹⁸⁶ *Drew v Attorney-General* [2002] 1 NZLR 58 at 73 [68].

¹⁸⁷ *Human Rights Act 1998* (UK) s 3(1).

¹⁸⁸ *Ibid.* s 21 definition *subordinate legislation*.

¹⁸⁹ *Ibid.* s 10(4).

¹⁹⁰ *Ibid.* s 3(2)(c).

¹⁹¹ *Ibid.* s 6(1) and (2).

¹⁹² Diggory Bailey and Luke Norbury, *Bennion on Statutory Interpretation* (6th ed, 2013, LexisNexis) at 770; Greenberg, above n 4 at 555.

¹⁹³ *R (Daly) v Home Secretary* [2001] 2 AC 532 (HL) at 547-548.

¹⁹⁴ *Ibid.* at 547-548.

¹⁹⁵ *Ibid.* at 548 [27].

being interpreted.¹⁹⁶ This means that the Australian human rights Acts are much closer to the interpretative approach undertaken by the common law presumption than to the rights-preferred approach taken by New Zealand and the United Kingdom.

Similar to the NZBOR¹⁹⁷ and the UKHRA,¹⁹⁸ human rights enshrined in the Australian human rights Acts may be limited to the extent that can be justified in a free and democratic society.¹⁹⁹ The factors that may be considered include the nature of the human right, the nature of the limitation, whether there is a less restrictive right and reasonably available way to achieve the purpose, the importance of the legislation and the importance of preserving the human right.²⁰⁰

The Australian High Court took divergent approaches when considering how legislation should be interpreted under the Victorian Charter in *Momcilovic v The Queen*.²⁰¹ The Court split in the following way:

- Chief Justice French and Kiefel and Crennan JJ considered that the interpretation requirement that legislation be interpreted in accordance with human rights where consistent with the purpose stood separate from the provision that provided that human rights could be limited.²⁰² The limitation provision could only be employed when a statutory provision purported to limit a right.²⁰³ French CJ held that statutes had to be interpreted with human rights as a feature of the canons of statutory construction in the same way that the common law presumption operates.²⁰⁴ Further, French CJ considered that the interpretation obligation in the Charter worked in the same way as the common law presumption but had a wider application given the nature of the rights enshrined in the Charter.²⁰⁵
- Justices Gummow (with whom Hayne J agreed),²⁰⁶ Heydon and Bell considered that the provision allowing for justified limits on rights (when that provision was engaged) was a part of the interpretation process required by the Charter.²⁰⁷

However, as Heydon J was in dissent as to the outcome, there is no ratio in the case to support the view that the limitation provision conditioned the interpretation requirement of the Charter.²⁰⁸ Subsequent Victorian decisions have taken the approach that the

¹⁹⁶ *Human Rights Act 2004* (ACT) s 30; *Human Rights Act 2019* (Qld) s 48(1) and (2); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32(1).

¹⁹⁷ See the text accompanying footnote 181 on page 63.

¹⁹⁸ See the text accompanying footnote 195 on page 64.

¹⁹⁹ *Human Rights Act 2019* (Qld) s 13(1); *Human Rights Act 2004* (ACT) s 28(1); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2).

²⁰⁰ *Human Rights Act 2019* (Qld) s 13(2); *Human Rights Act 2004* (ACT) s 28(1); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2).

²⁰¹ (2001) 245 CLR 1.

²⁰² *Momcilovic v The Queen* (2001) 245 CLR 1 at 44 [35], 53 [59], 219 [572]-[574] and 220 [576].

²⁰³ *Ibid.* at [35] and 219 [573].

²⁰⁴ *Ibid.* at, 52 [51].

²⁰⁵ *Ibid.*

²⁰⁶ *Ibid.* at, 123 [280], 164 [409], 167 [420].

²⁰⁷ *Ibid.* at 92 [168] and 249-250 [683]-[684].

²⁰⁸ *Kerrison v Melbourne City Council* (2014) 228 FCR 87 at 124 [151].

statutory obligation to interpret legislation in accordance with human rights consistently with their purpose means that legislation is interpreted the same way all legislation is interpreted.²⁰⁹ Thus, courts examine the purpose of legislation taking the interpretation provision in the Charter into account in the same way Australian courts take other canons of construction (like the common law presumption) into account. Pearce and Geddes consider that, while there is some inconsistency in the reasoning in *Momcilovic*, the best approach is to interpret the legislation in light of the ordinary canons of construction (including the common law presumption) and then considering whether a statutorily-enshrined human right is affected by the legislation so that the interpretation requirement is engaged.²¹⁰ This is similar in part to the approach taken in the United Kingdom.²¹¹

The Queensland²¹² and Victorian²¹³ Parliaments may also declare an Act or a provision of an Act to be incompatible with a human right. The declaration extends to delegated legislation made under or for the purpose of the Act or provision.²¹⁴ It is an open question how the common law presumption would apply to delegated legislation the subject of a Parliamentary inconsistency declaration. While it is not clear, the inconsistency declaration could reflect an indication that Parliament intended delegated legislation to be able to infringe common law rights as well as the statutory human rights.

The ACTHRA,²¹⁵ the Victorian Charter²¹⁶ and QHRA²¹⁷ provide that Courts in those jurisdictions may make a declaration of incompatibility, but that declaration does not affect the validity, operation or enforcement of the law.

The QHRA and the Victorian Charter require that Acts and delegated legislation must be interpreted in a way that is compatible with human rights, so far as it is possible to do so consistently with their purpose.²¹⁸ However, the interpretation requirement does not affect the validity of a subordinate instrument or a provision of the instrument incompatible with a human right that is empowered to be incompatible by the Act under which it is made.²¹⁹ If an Act were declared to be incompatible with a human right by Parliament as discussed above, it appears that delegated legislation could deal inconsistently with a human right.

²⁰⁹ *PBU & NJE v Mental Health Tribunal* [2018] VSC 564 at [130]; *Nigro v Secretary to the Department of Justice* (2013) 41 VR 395 at 382-383 [82]-[85]; *Slaveski v Smith* (2012) 34 VR 206 at 215 [24].

²¹⁰ Pearce and Geddes, above n 10 at 254-5.

²¹¹ See the text accompanying footnote 171 on page 62.

²¹² *Human Rights Act 2019* (Qld) s 43(1).

²¹³ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 31(1).

²¹⁴ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 31(2); *Human Rights Act 2019* (Qld) s 43(3).

²¹⁵ *Human Rights Act 2004* (ACT) s 32(2) and (3).

²¹⁶ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 36.

²¹⁷ *Human Rights Act 2019* (Qld) s 53.

²¹⁸ *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 3, definition *statutory provision* and 32(1); *Human Rights Act 2019* (Qld) s 48(1).

²¹⁹ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 31(3)(b); *Human Rights Act 2019* (Qld) s 48(4)(b).

Like the NZBOR the ACTHRA generally treats Acts and statutory instruments the same. Statutory instruments are required to be interpreted in a way compatible with human rights, so far as it is possible to do so consistently with their purpose.²²⁰

There is no specific provision that deals with the validity of statutory instruments that are inconsistent with a human right.

Even so, an abrogation or curtailment of a right protected in the Act could provide a basis for invalidating the delegated legislation.²²¹ Delegated legislation that is inconsistent with a statutory human right enshrined in an Australian human rights Act is unlikely to be invalid for direct inconsistency with a human right stated in the human rights Act; rather, the question will be whether the inconsistency is authorised by the Act that empowers the making of the delegated legislation. Delegated legislation could, therefore, in the proper context, be declared to be beyond the power of an empowering provision that is interpreted in accordance with a human right enshrined in the Australian human rights Acts. Once the interpretative obligation is applied to a provision empowering the making of delegated legislation, it may be that the delegated legislation is to be read down to be consistent with the statutory human right or declared invalid because of the inconsistency with the right.

This was the approach taken by the ACT Supreme Court in *SI bnhf v KS bhnf IS*,²²² where a head of power to make orders under the *Domestic Violence and Protection Orders Act 2001* (ACT) was construed to authorise the making of orders compliant with the ACTHRA. However, the position is not entirely clear. The Full Federal Court in *Kerrison v Melbourne City Council*²²³ held that the interpretative provisions of the Victorian Charter preserved the ability for legislative counsel of both primary and delegated legislation to draft provisions that were inconsistent with the statutorily-enshrined rights. This is true to the extent that the Charter does not allow primary legislation to be invalidated for inconsistency with human rights and does not, by itself, invalidate delegated legislation that is inconsistent with human rights.

It is also possible that courts could make a declaration of incompatibility with a human right. However, delegated legislation that abrogates or curtails statutorily-enshrined human rights must be authorised by a head of power. The Charter's requirement that empowering provisions be interpreted consistently with human rights (so far as that is consistent with the purpose of the Act) suggests that it could be possible to invalidate delegated legislation abrogating a human right if a rights-consistent interpretation of the empowering provision made the delegated legislation beyond power. The Court's judgment in *Kerrison* does not specifically address that possibility. Therefore, it appears correct to say that delegated legislation infringing a statutory human right could be invalidated in a jurisdiction with a human rights Act unless the delegated legislation is

²²⁰ *Human Rights Act 2004* (ACT) s 30.

²²¹ Pearce and Argument, above n 23 at 161.

²²² (2005) 195 FLR 151 at 169 [110] and [113].

²²³ (2014) 228 FCR 87 at 132-3.

authorised by the empowering provision to infringe the human right. That appears consistent with the way human rights Acts operate in other jurisdictions.

Interaction between common law rights and statutory and constitutional human rights

Although the common law presumption and the human rights Acts protect rights in a similar way, the common law presumption and statutory human rights largely operate differently and have a different underlying rationale.²²⁴ The common law presumption is designed to ascertain Parliament's true intent, while the UKHRA and NZBOR are not as concerned with interpreting legislation consistently with the statute's purpose or Parliamentary intention; they are concerned with providing an interpretation of legislation that is as consistent with human rights as possible. The common law presumption assumes Parliament's will is to legislate consistently with the common law rights it protects; the United Kingdom and New Zealand statutory rights are less concerned with intention and may work in spite of it. The Australian human rights Acts however, in contrast to the United Kingdom and New Zealand, consider legislative intention as a significant factor under the interpretative obligation in those Acts. Parliament's intention as interpreted through the principle of legality is therefore directly engaged by the Australian human rights Acts.

It may be argued that the common law presumption is less important in light of the increased protection of human rights - whether those rights are constitutionally entrenched or contained in statutory rights documents. However, there are reasons that the common law presumption, and the rights that it protects, will have ongoing utility even if those same rights are also protected by the constitution or legislation.

First, while there is some overlap between common law rights and statutory human rights and constitutional human rights,²²⁵ the overlap is not complete. Rights such as free speech, access to lawyers and the inviolability of correspondence between solicitor and client are rights protected both by the common law presumption and human rights Acts respectively. However, protection of business rights and property rights are examples of common law rights that are not ordinarily protected by human rights Acts.²²⁶ Thus it is better to think of statutory human rights and common law rights as complementary.²²⁷ The NZBOR²²⁸ and the Australian human rights Acts contain provisions supporting the continuing existence of common law rights.²²⁹

Further, it is possible that there will be more convergence between statutory human rights and common law rights.²³⁰ There is a suggestion that the existence of rights in

²²⁴ Sales, above n 12 at 615.

²²⁵ For example, property rights are not generally protected in the Canadian Charter: Roach, above n 50 at 747-748. See also *R v Lord Chancellor; Ex parte Witham* [1998] 2 WLR 849 at 857.

²²⁶ Pearce and Geddes, above n 10 at 252.

²²⁷ *Ibid.*

²²⁸ *New Zealand Bill of Rights Act 1990* s 28.

²²⁹ *Human Rights Act 2004 (ACT)* s 7; *Charter of Human Rights and Responsibilities Act 2006 (Vic)* s 5 and *Human Rights Act 2019 (Qld)* s 12.

²³⁰ Pearce and Geddes, above n 10 at 250.

human rights documents may found a basis for recognition of those rights in common law jurisprudence.²³¹

Second, even where there is overlap and the same right is protected by the common law and human rights Acts, the rights can sit contemporaneously. The British courts have often identified that the outcome when applying the common law presumption is the same as that which would have been reached by applying the UKHRA to a statutory human right (while also acknowledging that may not always be the case).²³² To the extent that a common law right is not incorporated into a constitution or into human rights legislation, that right should continue to operate. The common law rights may also have a different focus than a statutory human right or a constitutional right so the common law right could still operate in the areas where the constitutional right does not apply. For example, in *City of Adelaide*, while the majority of judges primarily considered an implied freedom of political communication arising from the Australian Constitution,²³³ Heydon J considered the common law right of free speech extended beyond the implied freedom of political communication, because the common law right was not limited to political speech.²³⁴

Third, the common law presumption is still engaged when considering the applicability of statutory human rights. In many jurisdictions it is necessary first to consider the legislative intent to decide whether the intent is consistent with a human right before the interpretation requirements in the statutory human rights are engaged. When courts in Australia,²³⁵ New Zealand²³⁶ and the United Kingdom²³⁷ are confronted with an allegation that a law is inconsistent with a right enshrined in human rights Acts, they have interpreted the provision in light of common law and statutory interpretation principles before applying the interpretative provisions in the relevant human rights Acts. The common law principles include the common law presumption so once that presumption has been applied there may not be a need to apply the statutory human rights requirement at all.²³⁸ Thus even where rights are protected under human rights statutes the common law presumption applies to obviate the need for the human rights legislation to be engaged.

Despite the continued existence of common law rights in jurisdictions that have adopted human rights Acts, the emphasis on rights over purpose in many human rights Acts suggests that litigants may prefer to attack the validity of delegated legislation under a human rights Act than the common law presumption. This is particularly true where the human rights Acts authorise reading in words into a provision (as well as reading provisions down) to arrive at a more rights-consistent interpretation.²³⁹ The common law

²³¹ See, for example, *Evans v New South Wales* (2008) 168 FCR 576 at 595 [75].

²³² See, for example, *R (Daly) v Home Secretary* [2001] 2 AC 532 at 545 [23] and 548 [30].

²³³ *Attorney-General (SA) v Adelaide City Corporation* (2013) 249 CLR 1 at 68 [152].

²³⁴ *Ibid.*

²³⁵ Pearce and Geddes, above n 10 at 253.

²³⁶ *Drew v Attorney-General (New Zealand)* [2002] 1 NZLR 58 at 72 [66].

²³⁷ See, for example, *J v Welsh Ministering (Mind Intervening)* [2019] 2 WLR 82 at 94 [29] and *R v Lord Chancellor; Ex parte Witham* [1998] 2 WLR 849 at 857.

²³⁸ Pearce and Geddes, above n 10 at 254.

²³⁹ Sales, above n 12 at 610.

presumption does not allow for the same judicial creativity in interpreting legislation in relation to common law rights. Rather, legislation may only be read in order to not abrogate or curtail a common law right.²⁴⁰ Reading in additional words to make the law consistent with rights goes beyond finding the purpose and therefore would not be consistent with the common law presumption's rationale to find Parliamentary intent.²⁴¹ However, there appears to be a continuing role for the common law presumption even in jurisdictions that do not have statutory (or constitutionally-enshrined) rights protection.

Role of legislative counsel when rights may impact on delegated legislation

This part of the article considers how legislative counsel can address the interaction between rights and delegated legislation that arise in the drafting of, or providing for, delegated legislation.

When drafting delegated legislation, it is necessary to consider the legal environment that affects the way the delegated legislation will operate.²⁴² As noted above, the common law presumption is a part of the general law that affects the way legislation will be interpreted. Human rights Acts also form part of the legal framework in which statutes are interpreted.

As the common law presumption and human rights Acts (where applicable) are part of the legal framework, regard should be given to its operation when formulating legislation. It is assumed that Parliament and the executive have the common law presumption in mind.²⁴³ The Full Federal Court of Australia in *Evans v New South Wales* assumed that legislative counsel are aware of the common law presumption:

we observe that the legislature, through the expert parliamentary counsel who prepare draft legislation, may be taken to be aware of the [common law presumption] and the need for clear words to be used before long established (if not “fundamental”) rights and freedoms are taken away.²⁴⁴

The joint judgment of French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ in the Australian High Court in *Lacey v Attorney-General (Queensland)* also assumed legislative counsel are aware of the presumption.²⁴⁵ The same knowledge must also be imputed to legislative counsel in relation to human rights Acts.

This article suggests that, when considering whether the common law presumption is engaged in a drafting project involving the use of delegated legislation (although many of these questions may also be useful to consider in relation to drafting principal legislation), it is useful to consider the following:

²⁴⁰ *Ibid.* at 611.

²⁴¹ *Ibid.*

²⁴² Helen Xanthaki, *Thornton's Legislative Drafting*, 5th ed, (Bloomsbury: West Sussex, 2012) at 404-405.

²⁴³ Sales, above n 12 at 62.

²⁴⁴ (2008) 168 FCR 576 at 593 [70].

²⁴⁵ (2011) 242 CLR 573 at 592 [43].

1. Is the legislation being drafted likely to infringe a common law or statutory human right?
2. If the legislation will infringe a right, is it a matter appropriate for delegated legislation?
3. If the matter is appropriate for delegated legislation and the legislation being drafted is:
 - a. delegated legislation, is there an express head of power that authorises infringing the common law right or does the Act authorise the infringement by necessary implication?
 - b. principal legislation, is there already an express power empowering the delegated legislation to infringe the right? If not, one should be drafted.
4. Are there statutory protections that are appropriate or that limit the interference with the right?
5. Is the meaning confirmed in the extrinsic materials?

Detailed discussion of each of these questions follows below. A flow chart that summarises this suggested approach is included as an Appendix to this article.

1. *Is subsidiary legislation likely to attempt to infringe rights?*

The start of the analysis is working out what is the right in question and how the proposed legislation is likely to affect that right. This is the same approach taken by courts in analysing the impact of drafted legislation on rights.²⁴⁶ This question requires consideration of the rights recognised by the common law and those statutorily-enshrined human rights. If you are concerned that a right might be infringed by policy, it may be worthwhile considering whether the delegated legislation will involve any of the following:

- *Routine or mechanical matters.* It is less likely that a right is being abrogated or curtailed.
- *Schemes or other complex provisions.* It may be difficult to predict how delegated legislation is to operate if the delegated legislation will prescribe a scheme of some description. It may be appropriate before the Bill is introduced to ask the instructor about what matters are likely to be included in the delegated legislation so that the appropriate empowering provision authorising the abrogation can be drafted.
- *Actions constituting trespass or other torts.* Generally speaking, the executive is not empowered to act to affect the rights of others without legal authority.²⁴⁷ Therefore, it may be useful in deciding whether a common law right is engaged to ask whether the action would constitute a trespass or other tort.

²⁴⁶ See, for example, *Nugent v Commissioner of Police (Queensland)* (2016) 261 A Crim R 381 at 393-394 [38].

²⁴⁷ Peter Hogg, *Constitutional Law of Canada* (Carswell Thomson: Toronto, 1997) at 776.

- *A power to ask questions or require information.* This may involve infringing legal professional privilege or the privilege against self-incrimination.
- *A regime where a person is likely to exercise inspector's powers.* This may involve powers of entry which may constitute a trespass or a requirement to give documents that may engage legal professional privilege or the privilege against self-incrimination.
- *Rules affecting police officers or army personnel.* Where disciplinary proceedings require an officer to provide evidence in relation to a matter, the privilege against self-incrimination may be authorised by the disciplinary nature of the regulations (although this may be an accepted abrogation for historical reasons).
- *Planning regimes.* This may involve interfering with property rights.
- *Rules affecting prisoners.* These may seek to regulate:
 - access to lawyers and the courts; or
 - monitoring correspondence or communication with lawyers; or
 - allowing access to journalists.
- *Regulating access to court.* This may have the effect of limiting the access to courts and could be triggered by something as simple as setting fees.

Given the multitude of rights that are involved, it is difficult to easily identify when a right might be engaged by a particular proposed piece of delegated legislation. The above list is a guide based in part on past judicial consideration and rights discussed above.

If it is decided, after considering those matters, that it is not intended to include a provision that abrogates rights, a statement to that effect could be included in the legislation. That would provide clear guidance to users of the legislation that Parliament's intention was not to abrogate the right.

2. Is infringing the right appropriate for delegated legislation?

This question requires consideration of whether, in the ordinary course of drafting legislation, it is appropriate for laws made by the executive to abrogate or curtail fundamental freedoms.

The legislative counsel's role involves considering the appropriateness of matter for delegated legislation as part of the more general role of being responsible for the statute book.²⁴⁸ What can be included in delegated legislation is likely to be impacted by jurisdictional practice and Parliamentary consideration about what is appropriate for delegated legislation.

Delegated legislation is ordinarily concerned with subsidiary matters and is therefore not commonly the place where rights would be expected to be abrogated. There is often a question about what should be included in delegated legislation and what should be included in the principal legislation. Xanthaki drew the line between "principle and

²⁴⁸ See, for example, the *Legislative Standards Act 1992* (Qld) ss 4(5)(c) and 7(g) and (h).

detail, between policy and the details or technicalities of its implementation”.²⁴⁹ The distinction is drawn between matters appropriate for primary and delegated legislation because there are matters that should be decided by persons who have direct responsibility to the electorate.²⁵⁰

Legislative counsel also routinely explore the intended effects of policy proposals to consider how the proposals are to operate in practice. In assessing the contours of how a policy will operate, legislative counsel should also consider whether it is necessary to abrogate or curtail common law or statutory human rights, or whether the proposal can be achieved in another way. Parliaments are also often charged with assessing whether legislative proposals contain matter that is suitable or appropriate for delegated legislation.²⁵¹

Professor Xanthaki has noted that it may be appropriate to consider the following when deciding what is suitable for delegated legislation:

- whether the scheme proposed requires flexibility - there may be a need to modify the scheme for local conditions or exceptional circumstances;²⁵²
- whether there is a high degree of technical material that must be included in the delegated legislation;²⁵³
- whether there are several tiers of legislative instruments - this is common in areas such as town planning;²⁵⁴
- whether there is a need to deal with emergencies.²⁵⁵

Meagher and Groves consider that delegated legislation is less likely to be accepted as being a useful place for technical or administrative detail when it infringes common law rights.²⁵⁶

A number of commentators suggest that delegated legislation should not generally abrogate or curtail common law rights (and the same could be said for statutory human rights). The Australian Department of Prime Minister and Cabinet’s Legislation Handbook states that rules that have a significant impact on human rights and personal liberties should ordinarily be implemented in primary legislation²⁵⁷ while also acknowledging that there may be circumstances in which matters could be included in

²⁴⁹ Xanthaki, above n 243 at 403.

²⁵⁰ *Ibid.*

²⁵¹ See, for example, the *Parliament of Queensland Act 2001* (Qld) s 93(1)(b), which requires the consideration of fundamental legislative principles, including whether the legislative matter is appropriate for subordinate legislation under the *Legislative Standards Act 1992* (Qld) s 4(5)(c); and the fundamental legislative principles considered by the Western Australian Legislation Committee of the Western Australian Legislative Council: see Legislation Committee’s Report No. 39 of 2019 on the Residential Parks (Long-stay Tenants) Amendment Bill 2018, [2.2] and Appendix 2. See also generally Pearce and Argument, above n 6 at 127-138.

²⁵² Xanthaki, above n 243 at 403.

²⁵³ *Ibid.* at 404.

²⁵⁴ *Ibid.*

²⁵⁵ *Ibid.*

²⁵⁶ Meagher and Groves, above n 79 at 455.

²⁵⁷ Department of Premier and Cabinet, *Legislation Handbook* (2007) at 2 [1.10]. Available at <https://www.pmc.gov.au/sites/default/files/publications/legislation-handbook-2017.pdf>.

delegated legislation.²⁵⁸ Meagher and Groves also consider that delegated legislation should only abrogate common law principles in exceptional circumstances.²⁵⁹ Professor Xanthaki's comments about matter that is appropriate for delegated legislation also suggest that abrogating common law rights and statutory human rights is a matter best left for primary legislation.

Parliament may also provide guidance on what it considers appropriate. Parliamentary committees scrutinise delegated legislation in relation to identified scrutiny principles, including the impact delegated legislation has on the rights and liberties of individuals and whether delegated legislation includes matter that is not appropriate for delegated legislation.²⁶⁰ In jurisdictions with human rights legislation, Parliament may also specifically review delegated legislation for consistency with human rights.²⁶¹ In the ACT, Parliament examines Bills in relation to human rights issues.²⁶² However, no mention is made of statutory instruments that will be made under the Bill. The ACT's Human Rights Commission has the role of reviewing the effect of Territory laws on human rights.²⁶³

A review of the literature suggests therefore that, in general, it is not appropriate for delegated legislation to abrogate rights. It is difficult to contemplate particular examples where it might be appropriate to abrogate rights directly by delegated legislation rather than in principal legislation. A clear example is legislative responses to emergencies. On such occasions, and depending on Parliamentary practice, it may be appropriate to provide for abrogation or curtailment of rights by delegated legislation. Equally, the legislative counsel may be instructed that, despite questions about the appropriateness of infringing rights in delegated legislation, the client still wants to be able to do so.

Of course, it is ultimately for Parliament to decide whether delegated legislation should be able to abrogate or curtail common law rights or statutory human rights. Therefore, if it is intended to abrogate or curtail rights it may be appropriate to provide for Parliamentary scrutiny for the instrument (particularly if it is an instrument that is not ordinarily subject to such scrutiny) or provide that delegated legislation does not come into operation until a time has passed in which Parliament could disallow it. This will not insulate the delegated legislation from judicial review for being beyond power, but does better reflect the need for Parliament to squarely confront the abrogation or curtailment of rights. This is recognised in the principle that the human rights legislation and the common law rights can be overridden by Parliamentary decision. As long as that intention is clear on the face of the legislation, it will be effective and Parliament will be

²⁵⁸ *Ibid.* at 3 [1.11]. The report was quoted in Australian Law Reform Commission, above n 2 at 8 [17.49].

²⁵⁹ Meagher and Groves, above n 79 at 454.

²⁶⁰ For example, the Joint Standing Committee on Delegated Legislation in the Western Australian Parliament is required to consider whether delegated legislation has no unintended effect on any person's existing rights or interests: see Legislative Council's Standing Orders, Schedule 1, clause 10.6(b).

²⁶¹ See, for example, the *Subordinate Legislation Act 1994* (Vic) s 21(1)(ha).

²⁶² *Human Rights Act 2004* (ACT) s 38.

²⁶³ *Ibid.* s 41(1)(a).

given the opportunity to decide whether it is appropriate for delegated legislation to abrogate the right.

3. *If the policy is to abrogate rights, what steps can be taken to ensure that the intention is achieved?*

Whether or not it is appropriate to abrogate rights, once the decision has been made to abrogate or curtail those rights it is possible for delegated legislation to abrogate them so long as there is sufficient legal authorisation to do so (assuming there is no constitutional impediment to abrogate rights). That authorisation would normally be found in the provision empowering the specific making of the delegated legislation. Consideration will therefore need to be given to empowering the delegated legislation to abrogate rights expressly when the primary legislation is drafted.

What can be done in the legislation is dependent largely on the type of legislation being drafted. Ideally the question of whether delegated legislation is authorised to abrogate or curtail common law or statutory human rights should be expressly resolved in the empowering primary legislation.

Once the delegated legislation is being drafted, it may be too late. In the absence of express authorisation to abrogate rights in the primary legislation, it is necessary to consider whether a law authorises the abrogation of rights in delegated legislation by necessary implication. As noted above, once the primary legislation is drafted that is not an easy question to answer.

It is important therefore to keep in mind, when the primary legislation is drafted, whether the delegated legislation to be made is likely to infringe common law or human rights.

Drafting primary legislation

If it is intended to allow delegated legislation to abrogate or curtail a common law right or statutory human right, the primary legislation can expressly empower delegated legislation to abrogate the right. The abrogation should be done as clearly as possible to make the source of authority for the abrogation clear and to allow Parliament to clearly confront the abrogation. In the absence of an express statement, it will be necessary to consider the intention of the legislature. As is shown above, the question of whether legislation has done enough to create the necessary implication to abrogate the right is often a fraught one.

It is likely to be enough in the ordinary case to identify the particular right that otherwise applies and make it clear that the right does not apply, or may be abrogated or curtailed by the delegated legislation. In primary legislation that can be done simply.

While it is possible to rely on abrogating or curtailing a right by necessary implication, there are risks that the provision may not be interpreted in accordance with the policy intent. As noted above, there are a number of cases when the court has divided almost evenly on the question of whether a right is curtailed or abrogated.

There is a risk that the necessary implication would not be made out in cases where there are contrary intentions on the face of the legislation that point against abrogating the

right. In *Sorby v Commonwealth*, the Australian High Court considered whether the *Royal Commissions Act 1903* (Cth) and the *Commissions of Inquiry Act 1950* (Qld) provided for the abrogation of the privilege against self-incrimination in relation to questions asked by a Royal Commission established under both of those Acts. The *Royal Commissions Act 1903* (Cth) section 6A(2) (as it then was) contained a clear abrogation of the privilege against self-incrimination in the following form:

- (2) A person is not entitled to refuse or fail to answer a question that he is required to answer by a member of a Commission on the ground that the answer to the question might tend to incriminate him.

The Australian High Court held that the provision effectively abrogated the privilege against self-incrimination.²⁶⁴

By contrast, the High Court in the same case considered there was no abrogation in the Queensland *Commissions of Inquiry Act 1950*. That Act did not contain a specific abrogation of the privilege against self-incrimination but it did include a direct-use immunity²⁶⁵ and an offence for failing to answer questions. The Court rejected an argument that a direct-use immunity and a contempt offence would be sufficient to evince the necessary intention that the privilege was to be abrogated.²⁶⁶ The Court held the Act showed a contrary intention by providing a reasonable excuse defence for refusing to answer a question.²⁶⁷ In the absence of the reasonable excuse defence, Mason, Wilson and Dawson JJ considered there may be substance in considering there was an abrogation of the privilege, but with the additional provisions the intention to abrogate the privilege could not be found in the statute.²⁶⁸

How then can a legislative counsel empower delegated legislation to abrogate a common law right? Section 47ZX(b) and (c) of the *Waste Avoidance and Resource Recovery Act 2007* (WA)²⁶⁹ provides an example of a statutory abrogation of common law contractual rights in delegated legislation. The provision expressly provides for the novation, modification, assignment or termination of agreements entered into by a Coordinator under the Act. The provision provides:

47ZX. Transitional arrangements between Coordinators

Regulations may deal with any matter in relation to the transition from a person who is, or has been, the Coordinator or an Interim Coordinator (the *previous Coordinator*) to a person who subsequently is to, or has, become the Coordinator or an Interim Coordinator (the *subsequent Coordinator*)

²⁶⁴ *Sorby v Commonwealth* (1983) 152 CLR 281 at 296, 305 and 323.

²⁶⁵ A direct-use immunity prevents evidence obtained from abrogating the privilege against self-incrimination from being used in a criminal proceeding or a proceeding in which a person would be liable to penalty. Usually however evidence can be used in a proceeding for providing false information. Direct-use immunities are a more limited immunity than a derivative use immunity, which prevents the use of evidence found because of the person was required to divulge incriminating evidence. For an example of a direct-use immunity see the *Health Services Act 2016* (WA) s 178(2).

²⁶⁶ *Sorby v Commonwealth* (1983) 152 CLR 281 at 300, 310-1, 313 and 324.

²⁶⁷ *Ibid.* at 300 and 310.

²⁶⁸ *Ibid.* at 300 and 311.

and may (without limitation), deal with, or with any matter in relation to the following —

...

- (b) the novation, from the previous Coordinator to the subsequent Coordinator, of any agreement or class of agreements the previous Coordinator has entered into in relation to the scheme (despite anything in the agreements to the contrary);
- (c) the amendment, modification, assignment or termination of any agreement or class of agreements the previous Coordinator has entered into in relation to the scheme (despite anything in the agreements to the contrary); ...

The provision contemplates the modification of contractual rights without the consent of the parties, including by authorising the novation of a contract.

Meagher and Groves suggest the following would be sufficient to provide a power to abrogate or curtail common law rights in the context of a plenary grant of power to a local council to make by-laws:²⁷⁰

2. Where it is reasonable and appropriate, the power under (1) may be exercised by Council to make by-laws which remove or restrict any or all common law rights or freedoms, including any or all rights or freedoms recognised as fundamental at common law.

The above suggested provision purports to confer power on councils to abrogate or curtail rights where the council considered it is necessary. A provision of this type is broad and purports to cover all of the common law rights and freedoms. Such an approach may be so broad as to be ineffective because it purports to apply to all common law freedoms. It is unlikely that an attempt by parliament to disapply all common law rights would be as successful. Given the difficulty of showing delegated legislation is authorised to infringe common law rights by necessary implication, legislative counsel should use the direct approach in empowering delegated legislation to infringe rights wherever possible. Identifying the right with particularity and directly would assist in ensuring the intention is achieved because Parliament clearly turned its mind to the particular right and identified that right should be abrogated. To avoid unintended consequences, it appears beneficial to identify the rights that must be infringed to achieve the policy intent.

Provisions that expressly provide for the abrogation of a right in the above way are also likely to be sufficient to abrogate rights protected under human rights legislation. It appears appropriate to also seek a Parliamentary declaration of inconsistency to make it clear that the right is abrogated. In jurisdictions that have a human rights Act, it is more important to show an express infringement of a human right because courts may favour a rights-consistent interpretation that denies the existence of infringement by necessary implication. This is in fact the case under human rights legislation in the United Kingdom and New Zealand, which have a positive emphasis favouring an interpretation

²⁷⁰ Meagher and Groves, above n 79 at 485.

that is consistent with rights. However, as discussed above, the Australian human rights Acts require the rights-based interpretation to be consistent with the legislative policy, meaning that the Australian human rights Acts operate more closely to the common law presumption.

It may also be possible to allow for an Act to authorise the abrogation of common law rights based on matters that are contained in the regulations. For example, it could be possible to compel a person to answer a question that incriminates them in an Act in relation to a request set out in the regulations. For example, section 47(1) of the *Electricity Industry Act 2010* (NZ) provides that a warrant may be issued in relation to a breach of regulations:

- (1) The Authority may, for a purpose specified in section 45(b), authorise an employee of the Authority (an authorised person) to search, under a warrant issued under subsection (2), any place named in the warrant for the purpose of ascertaining whether an industry participant has breached, or may breach, this Part, Part 4, the regulations, or the Code.

...

Section 17 of the *Petroleum Demand Restraint Act 1981* (NZ) is another example. It confers powers of entry on a person authorised in writing by the Minister to, among other things, secure compliance with regulations, make inquiries and inspections under the regulations and check and verify information required for the purposes of the regulations.

Drafting delegated legislation

If you are drafting delegated legislation, a head of power will need to be found under the primary law to authorise the abrogation of a common law right or else the delegated legislation will be beyond power. If there is no express power to abrogate a right, it will be necessary to decide, as a matter of statutory interpretation, whether the statute authorises the abrogation or curtailment by necessary implication.

If there is a concern about power, a provision may be inserted to clarify that it is not intended to abrogate the right. For example, regulation 5(2) of the *Foot-and-Mouth Disease (Control of Vaccination) (Scotland) Regulations 2001* (UK) clearly preserves the right against self-incrimination by providing:

- (2) Nothing in paragraph (1)(b) shall be construed as requiring any person to answer any question or give any information if to do so might incriminate that person.

4. Are there protections or other provisions appropriate or necessary arising because of the abrogation of common law rights?

It will further clarify the abrogation of the right to provide associated protections, for example, a direct-use or derivative-use²⁷¹ immunity in relation to information acquired as

²⁷¹ For information on the difference between a direct and derivative use immunity see above n. 265 on page 76.

a result of abrogating the privilege against self-incrimination. A direct-use immunity provides an equivalent protection for a person so that the person is not convicted out of their own testimony, which goes some way to balance the public interest in receiving the information, against the private person's interest in not revealing that information.²⁷² See, for example, section 71 of the *Transport Infrastructure (Public Marine Facilities) Regulation 2011* (Qld):

71 Evidential immunity for individuals complying with particular requirements

- (1) Subsection (2) applies if an individual gives or produces information or a document to an authorised officer for a public marine facility under section 62.
- (2) Evidence of the information or document, and other evidence directly or indirectly derived from the information or document, is not admissible against the individual in any proceeding to the extent it tends to incriminate the individual, or expose the individual to a penalty, in the proceeding.
- (3) Subsection (2) does not apply to a proceeding about the false or misleading nature of the information or anything in the document or in which the false or misleading nature of the information or document is relevant evidence.

Limiting the impact or the extent of the abrogation expressly on the face of the statute makes the statute's intended operation clearer. However, as noted above, the absence of an express abrogation makes it less likely that the rights would be held to be abrogated even where there are protections put in place as a result of the abrogation of a right.²⁷³

5. Do the Extrinsic materials reflect the intention?

It may also be appropriate to seek the inclusion of a statement in relevant extrinsic materials to aid in the interpretation of the legislation. The explanatory material could indicate that the Parliament's intention is to abrogate a common law or statutory right and confirm the clear meaning of the provision is to abrogate the rights. Conversely, the explanatory material could clarify that it is not Parliament's intention to affect the rights.

Courts have used statements in extrinsic materials supporting the view that a provision abrogates the privilege against self-incrimination, along with consideration of the long history of abrogating the privilege in the context of interrogations of bankrupts, to uphold an interpretation that general words have abrogated the privilege against self-incrimination.²⁷⁴ Similarly, a failure to include a statement in an Explanatory Note in relation to section 138 of the *Domestic and Family Violence Protection Act 2012* (Qld) that the criminal prohibition on double punishment was to be abrogated confirmed a Magistrate's opinion that the provision was not intended to abrogate the prohibition.²⁷⁵

²⁷² *Hamilton v Oades* (1989) 166 CLR 486 at 496.

²⁷³ See above the discussion of *Sorby v Commonwealth* in the text accompanying footnotes 264 to 268.

²⁷⁴ *Griffin v Pantzer* (2004) 137 FCR 209 at 252 [163]-253 [166].

²⁷⁵ *Queensland Police Service v DLA* [2015] QMC 6 at [10]-[17] and [41].

However, courts are reluctant to use extrinsic materials as a statement of Parliament's intention in the absence of textual support in the provision.²⁷⁶ The courts will regard this as an aid to interpretation and, while it deserves serious consideration, cannot be determinative or be a substitute for the words of the statute.²⁷⁷ The extrinsic materials can only clarify or confirm the meaning of the legislation.

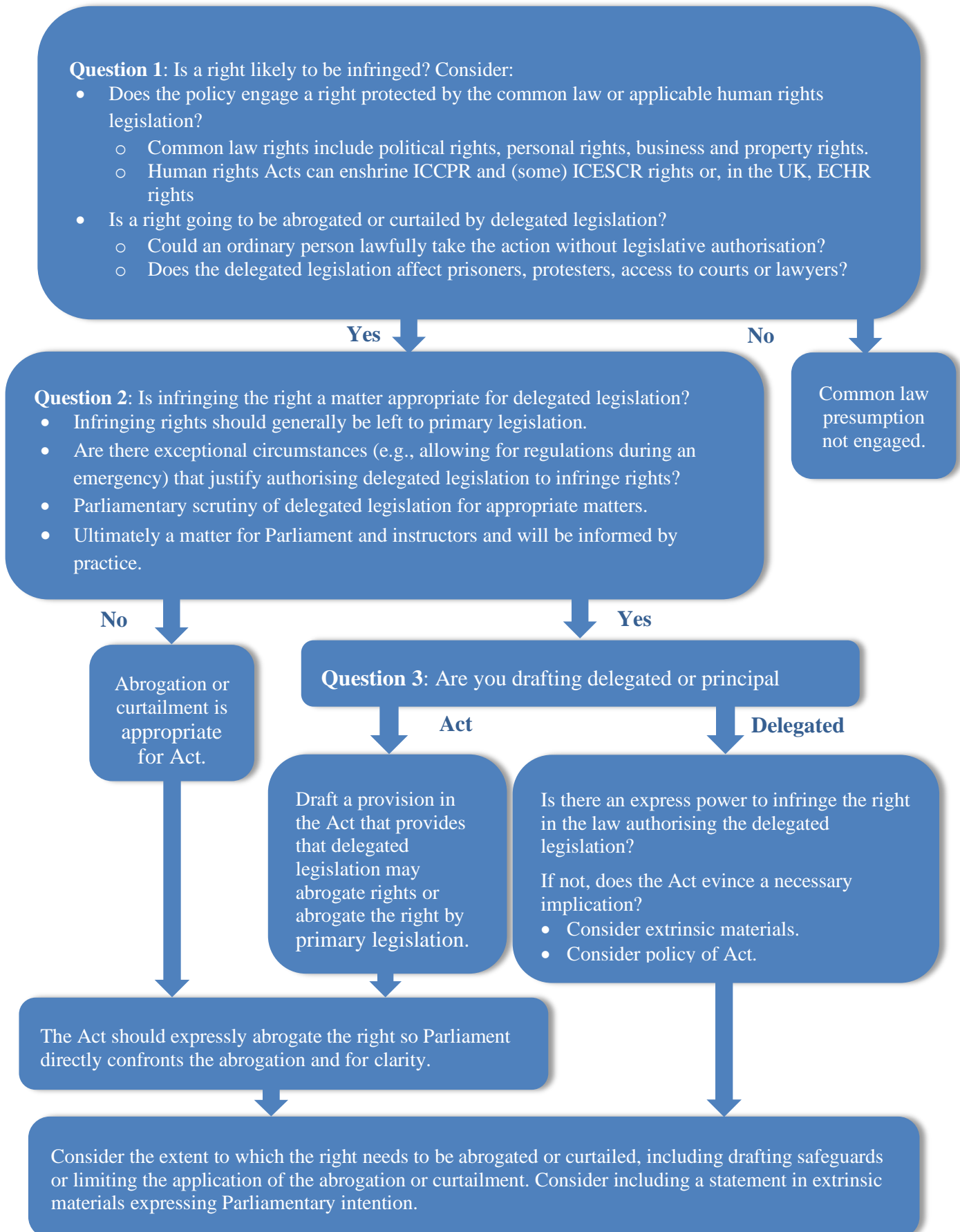
Conclusion

This article has outlined the impact of common law rights and statutory human rights on delegated legislation. As Parliaments are increasingly empowering delegated legislation to cover more and more matters, the likelihood that delegated legislation will purport to curtail common law rights or (where relevant) statutorily-enshrined human rights also increases. Generally however it is Parliament that is required to directly confront and authorise the abrogation or curtailment of rights. The courts are unlikely to change their view that Parliament must authorise the abrogation or curtailment of rights. The authorities show the clearest way this can be done is by authorising the infringement of the right in primary legislation expressly. As legislative counsel, it is necessary to confront the need to infringe rights directly and to advise on whether the abrogation or curtailment is appropriate for delegated legislation. If it is appropriate, legislative counsel must ensure that the policy intent is clearly communicated to the Parliament and public so that any infringement of rights can be authorised and ultimately understood by the consumers of legislation. This article has outlined an approach for legislative counsel to take when they are concerned that delegated legislation engages a common law or statutory human right that may need to be expressly abrogated or curtailed.

²⁷⁶ Pearce and Geddes, above n 10 at 215.

²⁷⁷ Pearce and Geddes, *ibid.* at 216, citing *R v Bolton*; *Ex parte Beane* (1987) 162 CLR 514 at 518.

Appendix - Process for considering common law rights



Penalties – Knowing what they mean and drafting for judicial scrutiny

Alison Ryan¹



Abstract

This article considers penalties, a common feature of legislation, from the perspective of legislative counsel. Given the ubiquity of penalties, and their popularity with governments in addressing problems, it pays for legislative counsel to be informed about them, in particular: the statutory and common law framework within which they sit; the drafting difficulties that can arise when new types of penalties are called for; and the need for care and attention to each word used. This article examines those points, utilising recent Queensland judgments in which the wording of penalties was challenged, and distils lessons for legislative counsel from the judgments.

Table of Contents

Introduction	83
Court Challenges to Criminal Laws – Case Studies	85
The rise and rise of secondary legislation	100

¹ Assistant Parliamentary Counsel, Office of the Queensland Parliamentary Counsel (Australia).

Introduction

My article is about penalties in legislation and is in two parts. The first part is about why it is important that drafters understand the penalties they attach to offences they draft. The second part looks at some cases where a penalty has not gone to plan in the courts and what drafters can learn from that. By penalties, I mean the punishment meted out by a criminal court after conviction for an offence.

I have been drafting for four years. Before becoming a drafter, I worked as a criminal defence lawyer and as a criminal law policy officer. The intersection of drafting and criminal law is interesting.

In drafting, the focus is often on the offence itself – is there a mental element, what are the physical elements, is there to be an exception? The sanction is then inserted, the penalty point having been determined by policy officers. However, there is a lot of law packed into that sanction.

It is important for a drafter to have a good knowledge of offences and their penalties. Five reasons come to mind, in no particular order.

In most Commonwealth countries, judges interpret penalties and establish sentencing principles, like totality and proportionality. There is a large body of sentencing law that is all judge-made, which is unsurprising given the largely unfettered power judges have in sentencing. A lot of judicial colouring-in is done within the broad boundaries set by legislation. But the creation of new offences and the setting of penalties is a power that lies only with Parliament, so the privilege and burden of crafting offences falls uniquely to the drafter.

The second reason is fairness to the community. A principle of the rule of law is that a person knows what they should do, or should not do, under the law. On a more practical level, what is the point of using law to control behaviour if the target subjects don't comprehend the law?

Clarity achieves both fairness and effectiveness. In Queensland penalties are drafted very clearly in large part because they are reduced to the essentials. A member of the community, a criminal lawyer or a court can see in a flash what the consequences are for disobedience and get a measure of the seriousness of the offence.

In Queensland we are lucky because we have the Griffith *Criminal Code* named for the Queensland Premier and Attorney-General who codified the criminal law. This means defences and excuses are already provided for, so we don't have to legislate them, which makes offences even cleaner in appearance.

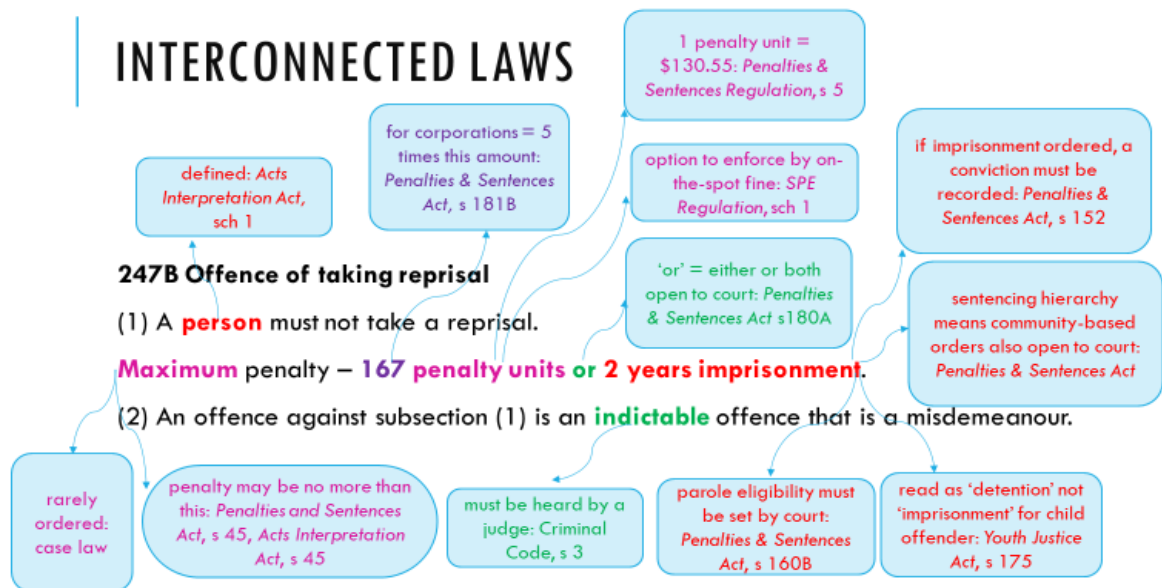
Thirdly, criminal law is significant in drafting because it is a go-to for governments. When a government identifies a problem, often the first response is to create a penal law. Organised crime, food handling hygiene, environmental protection, animal cruelty...you name it, there

is a long list of issues for which governments use penal laws to control behaviours. Indeed, almost every piece of legislation contains at least one offence. A change of government often brings a wave of criminal law reform. So, we are constantly exposed to instructions in this area. Drafting an offence isn't something that happens occasionally.

Fourthly, criminal laws are high use laws. Every day those provisions are enforced by police and other officers and are used by the courts. In terms of numbers of cases heard, the criminal jurisdiction of the courts is huge. In the vast majority of cases defendants plead guilty and if they instead go to trial, around half are found guilty. Sentencing is big business and the penalties we draft are constantly in play.

Criminal lawyers will challenge laws. Their clients have literally nothing to lose. Although judges are not today automatically reading down criminal laws, where there is ambiguity the case will tend to go the defendant's way. These laws are subject to a lot of scrutiny.

And lastly, and I think most importantly in a practical sense for a drafter, is the interconnectedness of penalties with other laws. The plain English and reductive, clear appearance of penalties in Queensland is only possible because it relies heavily on other statutes to do some heavy lifting. When a drafter creates an offence, that provision enters into a dialogue with a big body of statute law and case law. Judges know this and assume Parliament is operating on that basis also. It falls to us and our policy officer clients to understand this dialogue.



This diagram shows different provisions talking to each other in relation to the offence just shown. The offence and penalty are supported by, or call up, the *Acts Interpretation Act*

1954, the *Penalties and Sentences Act 1992*, the *State Penalties Enforcement Regulation 2014*, the *Criminal Code*, the *Youth Justice Act 1992* and others.

Although two maximum penalties are listed here, this only has the effect of limiting those types of penalties. Still open by way of punishment is:

- conviction without punishment,
- a good behaviour bond,
- probation,
- community service,
- restitution,
- compensation,
- property forfeiture,
- damage clean-up orders,
- orders banning persons from places,
- licence cancellation,
- suspended imprisonment, and
- indefinite detention.

Understanding that a straightforward offence calls up all those other provisions across the statute book means you can draft with confidence.

I have been involved in or taken a keen interest in criminal laws that have been challenged in recent years in Queensland. An analysis of laws that did not reach their full legal effect as intended by the government provides lessons for drafters.

Court Challenges to Criminal Laws – Case Studies

Case Study 1

- *Commissioner of Police Service v Magistrate Spencer and Ors* [2013] QSC 202
- *Police v Stewart* [2014] QMC 018
- *Forbes v Jingle* [2014] QMC 204

In this case study, the Supreme Court,² the District Court³ and the Magistrates Court⁴ of Queensland – so all three levels of courts in Queensland – considered the offence of evading police. This offence is found in section 754 of our *Police Powers and Responsibilities Act 2000*. This is an extract of the offence as it originally was:

Evade Police Offence

754 Offence for driver of motor vehicle to fail to stop motor vehicle

² *Commissioner of Police Service v Magistrate Spencer and Ors* [2013] QSC 202.

³ *Police v Stewart* [2014] QMC 018.

⁴ *Forbes v Jingle* [2014] QDC 204.

- (1) This section applies if, in the exercise of a power under an Act, a police officer using a police service motor vehicle gives a driver of another motor vehicle a direction to stop the motor vehicle the driver is driving.
- (2) The driver of the motor vehicle must stop the motor vehicle as soon as reasonably practicable if a reasonable person would stop the motor vehicle in the circumstances.

Maximum penalty – 200 penalty units or 3 years imprisonment.

In 2011 a government report revealed the most common fine for the evade police offence was \$300. This amount was considered by government not to be commensurate with the risk posed by police evaders.

In 2012 the government amended the penalty to introduce a minimum penalty of 50 penalty units, which at the time translated into a \$5,000 fine.⁵

Minimum penalty – 50 penalty units.

Maximum penalty – 200 penalty units or 3 years imprisonment.

It was clear from the explanatory notes and Hansard that the government's aim was to impose a large fine penalty that was mandatory and to the exclusion of any other penalty, such that every offender would come away from court with a fine of \$5,000, at a minimum. However, the Supreme Court found otherwise when a case came before it on judicial review. In the case, Mr Nicolaou drove a vehicle without number plates, failed to stop his vehicle when police used their lights and siren, and then subsequently crashed into a wall. The first magistrate who heard his case imposed the minimum fine of 50 penalty units. However, the case was re-opened and a different magistrate substituted an order of probation.

The Supreme Court upheld this. The reason was that the minimum 50 penalty unit fine was operating against the backdrop of other general laws. The first was section 180A of the *Penalties and Sentences Act 1992*, which says that in this case either a fine or imprisonment or both could be ordered. Because imprisonment was open, that meant under section 91 of the *Penalties and Sentences Act 1992*, so was probation.

But what of the minimum fine requirement? The judge found that the penalty imposed needed to be not less than the specified minimum, however, there was nothing in law stating that probation was a lesser penalty than a fine. For a wealthy person a fine would be preferable to a community-based order, for another it would be unaffordable.

The story would end there, except for the fact that the penalty provision was amended again in response to this case. In 2013 the government introduced an alternative minimum penalty of 50 days imprisonment.

⁵ *Criminal Law Amendment Act 2012*, s 21.

Minimum penalty – 50 penalty units or 50 days imprisonment served wholly in a corrective services unit.

Maximum penalty – 200 penalty units or 3 years imprisonment

The reference to “served wholly in a corrective services facility” is necessary language in drafting in Queensland if the policy is that imprisonment must be served in total in a prison, as opposed to being suspended for a period. The amendment was brought forward in two Bills for reasons that are not relevant.

The first Bill’s explanatory notes said the “amendment specifically excludes the imposition of alternative penalties or sentencing options such as probation or a suspended sentence in lieu of the minimum penalty.”⁶

The second Bill’s⁷ explanatory notes said the “clause requires the minimum imposition of either the minimum fine or minimum sentence of imprisonment and excludes other sentencing options, for example a good behaviour order, probation or a suspended sentence.”

However, the Magistrates Court and the District Court found when subsequently considering the amendment, that the position simply had not changed. The courts were of the view that it was still open to order imprisonment and it was therefore still open to order probation. Further, it remained open to order something other than a fine, such as community service or probation, because nowhere does the law say that a fine is something greater than a community-based order. Parliament had not specifically excluded probation or community service so both remained penalty options open to the court.

Case Study 2

- *R v S; R v L* [2015] QCh 3

In my second case study, the Childrens Court of Queensland considered a new offence of breach of bail by a child.⁸

59A Finding of guilt while on bail

(1) This section applies to a child if –

- (a) the child is granted bail after being charged with an original offence; and
- (b) a finding of guilt is later made against the child for a subsequent offence committed while on bail for the original offence.

(2) The finding of guilt made against the child for the subsequent offence is taken to be an offence against this Act.

⁶ Police Powers and Responsibilities and Other Legislation Amendment Bill 2013, cl 39.

⁷ Criminal Law (Criminal Organisations Disruption) Amendment Bill 2013, cl 64.

⁸ *R v S; R v L* [2015] QCh 3.

Maximum penalty (subject to part 7) – 20 penalty units or 1 year’s imprisonment.

This offence was contained in section 59A of our *Youth Justice Act 1992*, which was inserted in 2014. The breach occurs where a second offence is committed while a person is on bail for a first offence. So, there is the original offence that gives rise to a bail undertaking, then there is a second offence committed whilst on bail. The government was also penalising children a third time for breaching bail.

This case concerned two children, S and L, who were convicted of offences committed whilst on bail for earlier offences. Defence counsel challenged the provision and the court was amenable to striking it down.

The main problem concerned double punishment, which comes up from time to time where a person is charged with two offences based on the same set of facts. The judge found that punishing a child for the second offence and then punishing the child for breach of bail because of that offence was double punishment. Therefore, the children could be convicted, but not punished for the breach of bail. The principle of double jeopardy, which in Queensland is enshrined in legislation, had not been overcome.

Case Study 3

- *Callanan v Attendee Z* [2013] QSC 342

In case study 3, the Supreme Court of Queensland considered section 199 of the *Crime and Corruption Act 2001*, which concerns punishment of contempt.⁹

The Crime and Corruption Commission is a Queensland statutory body set up to investigate organised and serious crime, and corruption in the public service. It has the power to conduct hearings as part of its intelligence gathering operations.

In 2013 the government introduced extensive criminal law reforms targeting organised crime by motor cycle gangs.¹⁰ They were commonly referred to as the “bikie” laws.

Crime and Corruption Act 2001

199 Punishment of contempt

(8A) ... the court must punish the person in contempt by imprisonment to be served wholly in a corrective services facility.

(8B) The minimum punishment the court must impose is—

- (a) for the first contempt—imprisonment for the term decided by the court; or

⁹ *Callanan v Attendee Z* [2013] QSC 342.

¹⁰ *Vicious Lawless Association Disestablishment Act 2013; Criminal Law (Criminal Organisations Disruption) Amendment Act 2013; Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Act 2013; Tattoo Parlours Act 2013.*

(b) for a second contempt relating to a hearing dealing with the same subject matter as that dealt with in a hearing in which the person's contempt was first certified—2 years and 6 months imprisonment; or

(c) for a third or subsequent contempt ...

These reforms included amendment to section 199 of the *Crime and Corruption Act 2001* to set out penalties for persons who were in contempt of an officer of the Commission conducting a hearing. In this case, Attendee Z refused to take the oath, which amounted to contempt. The contempt case was heard by a Supreme Court judge.

The new penalty required imprisonment to be ordered and for the imprisonment to be wholly served in a corrective services facility. The judge considered six months imprisonment was appropriate for the seriousness of the contempt and considering the person's criminal history.

However, operating in the background to this penalty was an announced government policy that all bikie offenders would be subject to a special prison regime with 18 restrictions. The most severe of these was that the prisoner would receive a total of two daylight hours a day, with the remainder of the time, 22 hours a day, spent in solitary confinement. Also, no TVs in cells and no access to the gym or the oval (sports field). A further condition, which received considerable media attention, was that these prisoners would wear bright pink jumpsuits.

The Supreme Court judge took the solitary confinement policy very seriously and commented on the adverse health effects of solitary confinement as being well-established, particularly the long-term psychological damage. The judge reduced six months to 28 days expressly and solely based on the government policy.

The government was concerned about the outcome of the case and stated an intention to make amendments. Perhaps that would have been to expressly remove solitary confinement from the sentencing judge's considerations. However, ultimately no amendments were made.

Case Study 4

In the next two case studies I was involved as an instructing policy officer. One of the key Acts in the bikie law reforms was the *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013*.

Under sections 45 and 46 of the Act, a circumstance of aggravation was added to the offences of serious assault and grievous bodily harm in the *Criminal Code*, to increase the maximum penalty where the offender was a participant in a criminal organisation.

The amendment stated the offender must be imprisoned for one year:

(2) if the offender is a participant in a criminal organisation and unlawfully does grievous bodily harm to a police officer while acting in the execution of the officer's duty, the offender must be imprisoned for 1 year with the imprisonment served wholly in a corrective services facility.

After the amendment passed, we experienced a frisson of anxiety that the court would interpret the penalty to mean that 1 year was the *only* sentence that could be ordered. The government was trying to achieve the opposite of course, namely that 1 year was the starting point and a sentence could go up to the overall maximum of 14 years imprisonment. So, during debate of a later Bill, a further amendment was made to clarify that 'be imprisoned for 1 year' meant 'be imprisoned for a *minimum* of 1 year'.

104 Amendment of s 320 (Grievous bodily harm)

Section 320(2), after 'be imprisoned for'—

insert—

a minimum of

Case Study 5

The last case study also concerns an amendment made as part of the bikie laws concerning bail applications by persons alleged to be participants in a criminal organisation. For these types of defendants, section 16 of the *Bail Act 1980* was amended to reverse the presumption that otherwise exists in favour of bail being granted.¹¹

as originally enacted

(3A) If the defendant is a participant in a criminal organization, the court or police officer must-

(a) refuse to grant bail unless the defendant shows cause...

as amended

7 Amendment of s 16 (Refusal of bail)

(1) Section 16(3A), 'If the defendant is a'—

Omit, insert—

If the defendant is charged with an offence and it is alleged the defendant is, or has at any time been, a

This is not strictly about penalties, but it is in the criminal law sphere.

¹¹ By the *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013*, s 4.

The Supreme Court found that the reference to “the defendant is a participant in a criminal organisation” meant, only, “is currently”, that is, at the time of the bail application.¹²

In the case before the Supreme Court, the defendants Nuno and Bruno Da Silva had resigned from the Hells Angels motorcycle club prior to the bail hearing. The court found the presumption in favour of bail was not reversed. In this instance, the government did not let that interpretation sit, and amendments followed swiftly to clarify that the legislation meant “is, or *has at any time been*,” such a person.

**42 Transitional provision for Criminal Law
(Criminal Organisations Disruption) and Other
Legislation Amendment Act 2013**

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| <p>(1) Sections 6 and 15A as amended or inserted by the amending Act apply to a bail proceeding heard on or after the commencement.</p> <p>(2) Section 16(3A) as in force on 17 October 2013 applies and is taken to have always applied to a bail application hearing on or after that date but before the commencement.</p> <p>(3) Section 16(3A) as in force on the commencement applies to a bail application hearing on or after the commencement.</p> | <p>(4) For subsections (1) to (3), it is irrelevant whether the act or omission constituting the offence the subject of the proceeding happened before or after—</p> <p style="padding-left: 20px;">(a) for subsections (1) and (3)—the commencement; or</p> <p style="padding-left: 20px;">(b) for subsection (2)—17 October 2013.</p> |
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This also meant a transitional provision was needed, which I have included in the slides for those of you who take pleasure in transitional provisions. The bikie laws, by the way, were in the media every day, so each amendment made was publicly scrutinised.

Lessons from the Case Studies

The final point is what can be distilled from those cases that is helpful to drafters. I see three lessons.

The first is about text. In relation to text, the last two cases studies and the breach of bail case study demonstrate how just one word can make a difference. To me, this arises, as it did in those case studies, where the instruction is to create new types of rules and sanctions. You cannot follow an established, tested precedent. The more novel a penalty provision, the more likely it will be challenged by defendants and scrutinised by courts. When the instruction is to get creative, provisions need to be watertight.

¹² *Da Silva v Director of Public Prosecutions; Da Silva v Director of Public Prosecutions; Spence v Director of Public Prosecutions* [2013] QSC 316.

We need to re-consider each word carefully and decide how many interpretations a court could come to. Is there more than one? And are any of them going to result in the policy not being realised?

Last year I used the lesson I had learnt from the bail case where the court had focused on the present tense of the word 'is' a participant in a criminal organisation. A different Bill I was involved in referred to involvement by a defendant in a particular activity. I suggested the policy would be best achieved if we included the past as well as present tense to avoid that same adverse interpretation scenario.

The second lesson is about context. With penalties, we do not draft in a vacuum, we draft with a whole body of law around us. Be aware of what your words can trigger or how they may be made less effective by existing laws in other statutes, as with the evade police case.

And consider what aspects of the common law you are trying to overcome. If the policy is to override the common law in a particular way, then do so expressly. Do not leave room for doubt, as there was in the breach of bail by child case with double punishment.

To assist drafters to safely draft in context, it helps to find out who in the drafting office understands an area best and exploit their expertise through precedents, explanatory documents and talks for other drafters.

It also means keeping up to date with case law that may affect how it all works. Recently in Queensland we have had three decisions in our highest state courts turning on its head the rule about what happens when an offence is repealed. In response the office has developed an explanatory text on the cases, and what it means for drafters when they are instructed to repeal an offence. We also offer external training to instructing officers and this year have built in a slot for criminal law policy officers from our justice department to attend and present on the basics of creating offences and the importance of consulting with them as early as possible as specialists on the topic.

Thirdly, it pays to be more than just a drafter and to think beyond the page. What happened in the Attendee Z case about contempt of court would have been very hard to foresee. The government would have expected the judge to follow precedent and sentence consistently for similar contempt. The judge instead drastically reduced the sentence based on a government policy. This was a relevant factor, brought into being by the government, being utilised by a court to reduce a sentence in cases where this was not what the government intended.

In criminal law, the trigger for thinking beyond the page is often where governments try to reduce judicial discretion in sentencing. Judges will still endeavour to interpret the statute in a way that delivers a just sentence. Issues of this nature are ultimately ones for policymakers to ponder, but an awareness of them and engagement with them by drafters is always going to help our clients.

Brexit: A Catalyst for Change in Legislative Drafting

Ingrid Morgan and Richard Spitz¹



Abstract

This article seeks to give a flavour of the unprecedented drafting challenge that the UK has been facing in terms of the legislative dislocation caused by Brexit, the quantity of new legislation it has required, the nature of the EU legislation that legislative counsel are having to get to grips with and amend, and the uncertainty of the target they are aiming at..

Table of Contents

Introduction	94
Disruptive effect on the statute book.....	95
Accessibility of the law.....	98
The rise and rise of secondary legislation	100
Conclusion	103

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Introduction

The European Union is an economic and political partnership – a club, as it were - between 28 countries. Its original goal was to promote economic cooperation between member states. But it has evolved into an organisation spanning a diverse range of policy areas, and member states have in effect delegated to the EU institutions decision-making powers in relation to specific matters within those areas. Within the EU there is a single market which allows goods, capital, services and people to move freely across the national borders of EU member states.

The United Kingdom joined what was then the European Economic Community in 1973. The UK's relationship with the EU has always been somewhat ambivalent and there have long been strong currents of anti-EU opinion - "Euroscepticism" - in UK politics. On 23 June 2016, a referendum was held in the UK on the question whether the UK should remain a member of the EU or leave the EU. The referendum was intended to settle the question of the UK's relationship with the EU once and for all. Of those who voted in the referendum, 52% voted to leave, 48% to remain.

Referendums are a rare beast in UK politics, although there have been two others this decade (on Scottish independence, most significantly, and on the voting system for parliamentary elections). The government legislated for the EU referendum² but it did not provide in the legislation for the consequences of the outcome and nor did it require a threshold in favour of a particular option. The fact that the consequences of a leave vote were not spelled out has meant that the meaning of the "leave" outcome has been open to interpretation. "Brexit means Brexit", as Theresa May has said³ – but precisely what that means has been a matter of intense debate.

On 29 March 2017, the UK government invoked Article 50 of the Treaty on European Union. In doing so it gave notice of the UK's intention to withdraw from the EU and related structures. Article 50 itself provides for a 2-year process for withdrawal negotiations between the EU and the departing member state, after which the EU treaties cease to apply to the departing state. That 2-year process was due to end on 29 March, though the process was extended and is now due to end on 31 October, at which point the UK will cease to be part of the EU.

On "exit day" – now enshrined in UK law by the *European Union (Withdrawal) Act 2018* (the "Withdrawal Act") as 11pm on 31 October⁴ (subject to any further extension of the date) –

² See the *European Union Referendum Act 2015*.

³ Theresa May first used the phrase in a speech on 11 July 2016, when campaigning to become the new leader of the Conservative Party (and Prime Minister).

⁴ See section 20(1) of the *European Union (Withdrawal) Act 2018*, as amended by regulations under section 20(4) of that Act.

- the *European Communities Act 1972* (the “ECA 1972”) will be repealed. The ECA 1972 established the legal relationship between the UK and the EU, and provides the “conduit pipe” by which EU law applies in the UK;
- EU law, as it had effect in UK law immediately before exit day, will be cut and pasted or “retained” in UK law – thereby creating an entirely new body of law – “retained EU law” - in the UK legal space;⁵
- around 550 statutory instruments (UK secondary legislation) made under powers conferred by section 8(1) of the Withdrawal Act and commonly referred to as “Exit SIs”- will come into force in order to “fix” aspects of the cut and pasted retained EU law that would otherwise no longer work as a result of the UK’s ceasing to be an EU member state.

The purpose of this article is to examine some of the ways in which Brexit has brought about change in relation to legislative drafting at Westminster – through its effect on the statute book and on how the Office of Parliamentary Counsel and government legal department draft – and its impact in relation to the balance between primary and secondary legislation. It also touches on how Brexit has affected Parliament itself – an effect that has been accentuated by the UK government’s lack of an overall majority in the House of Commons since the June 2017 general election.

It should be stated at the outset that this article does no more than scratch the surface when it comes to the effect of Brexit. In particular, it does not seek to deal with the special implications of Brexit for Scotland, Wales and Northern Ireland, in terms of the powers of their legislatures and more generally for relations between the UK Government and the devolved governments.

Disruptive effect on the statute book

The effect of Brexit on the UK statute book cannot be overstated. As a member state, the UK is bound by EU law.

Whole swathes of UK law – in areas as diverse as financial services, data protection, immigration, agriculture, product safety and workers’ rights – emanate from the EU. So, when the UK voted leave, it was unthinkable that it could extricate itself by just walking away from that EU law framework on exit day. To do so would have left enormous holes in the legislative fabric of the UK and it would have been impossible in the time available to stitch them up.

The solution, provided in the Withdrawal Act, is that a snapshot of EU law – as it has effect in the UK immediately before exit day – will be taken and, as it were, cut and pasted into UK law in order to provide legal continuity and certainty. After exit, that body of law, referred to as retained EU law,⁶ may be amended or repealed by domestic legislation in the

⁵ See, in particular, sections 2 to 4 of the Withdrawal Act.

⁶ See the definition in section 6(7) of the Withdrawal Act.

usual way. So, in terms of legislation, a simplified picture of the UK statute book currently has a mixture of Acts of Parliament and secondary legislation. After exit day, a huge volume of EU legislation will become part of the UK statute book. Dealing with that EU legislation is where the new challenge for legislative counsel lies.

All of the EU legislation that is being incorporated into the UK statute book is part of “retained EU law”.

- Some retained EU law is *domestic* legislation. This legislation is home-grown and has been enacted in the UK in order to implement its EU obligations. Some of it is primary legislation, but mostly it is secondary legislation made under the delegated powers in section 2(2) of the ECA 1972.
- Then there are the instruments drafted and made in the EU (broadly, EU Regulations, EU tertiary legislation and decisions). These are the instruments which are directly applicable in the UK as a member state. When the UK leaves the EU, domesticated versions of these EU instruments will, overnight, become part of the statute book and are referred to in the Withdrawal Act as “retained direct EU legislation”. The plan, in theory, is that these instruments will “wither on the vine” - they will be replaced by domestic legislation over time. But there are thousands and thousands of them – an estimated 12,000 EU Regulations alone – so it will be a long time before they are gone. To be clear, this isn’t new law - it must be operative in the UK immediately before exit day in order to be incorporated in the first place. But it *is* new domestic legislation over which Parliament (and the government) will have control, and in relation to which legislative counsel in the UK will hold the pen.

There have already been a significant number of amendments made to retained direct EU legislation. The Withdrawal Act recognised that a simple cut and paste on its own would not be enough to ensure that retained EU law operates effectively after exit. So it conferred powers to make secondary legislation – the so-called “Exit SIs” – to fix deficiencies in retained EU law. Around 550 of these Exit SIs have been made and are waiting to come into force on exit day. They vary from regulations making a single amendment, to the 617-page *Product Safety and Metrology etc. (Amendment etc.) (EU Exit) Regulations 2019*,⁷ and between them they make in the region of 100,000 amendments to both the home-grown retained EU law and the domesticated EU instruments.

A drafting project of that scale is challenging. But it has been dealing with the new domesticated legislation that has been particularly difficult. It looks and feels very different to UK domestic legislation.

- It has a very different style in that it is much more formal.

⁷ http://www.legislation.gov.uk/uksi/2019/696/pdfs/ukxi_20190696_en.pdf.

- It tends to use what UK legislative counsel would consider to be antiquated language.
- It is structured differently. In the UK, legislative counsel rarely put more than one sentence in a numbered provision, the thinking being that it is clearer for the reader if distinct propositions are in separate provisions. But it is common in EU legislation for several propositions to appear in a dense paragraph of text, sometimes with the main one buried in the middle.
- It is subject to different rules of interpretation. For example, in EU law cross-references to other provisions and instruments are “dynamic”: they update automatically to reflect future amendments to the thing referred to. That is not the case in UK legislation, where the question of whether or not a cross-reference is ambulatory is one of statutory construction.

Because of these differences all sorts of issues have arisen in relation to what sort of approach to take when amending retained EU law. Here are some of the questions legislative counsel have needed to think about, ranging from the sublime to the ridiculous:

- *Tear it up and start again?* When amending a particular EU regulation would it be preferable to revoke and replace it instead, drafting in normal UK style? This largely has not been done in Exit SIs, for two reasons. First, the whole point of the exercise was to ensure continuity and certainty in the law and there is always a risk, when re-writing, of inadvertently changing the meaning of the provision, or at least of users of the legislation inferring some change. Secondly, the extra resources and time required for that sort of exercise simply haven’t been available. Legislative counsel have been aiming for a functioning statute book, not a perfect one.
- *What to do with recitals?* Recitals are the often lengthy provisions at the start of an EU instrument which set out the reasons for making it. The decision was made not to amend them, as they are not operative. But it was also decided not to omit them because in EU law recitals are an aid to interpretation of the instrument as enacted and the intention was not to imply that the provisions should be read differently after exit.
- *What to do about structure?* Should the legislative counsel follow what is there, even if it means adopting a structure that would never be used in domestic legislation, indeed couldn’t be used because it was not permitted by the drafting software?
- *Follow the language style and grammar?* For example, EU instruments regularly use phrases such as “without prejudice”, “Subject to this Chapter” and “shall”, which are discouraged at Westminster. EU instruments use colons where UK legislation would use an em-dash and a single quotation mark instead of a double. There is a constant tension between trying to fit in with the “EU style” of the

legislation being amended and a temptation to draft in normal UK style because what is being amended is now domestic law.

In many cases there is no right answer. But legislative counsel have been doing something that UK legislative counsel have never had to do before, on a very significant scale, with lots of different people using the same powers at the same time. It was decided at an early stage that consistency of approach would go a significant way to helping improve the end product. And on a practical level there was a desire to avoid those with heavy drafting loads re-inventing the wheel and agonising over the same questions.

As a result, lots of central guidance on drafting Exit SIs has been prepared by the Statutory Instruments Hub – a central unit in the UK government legal department that specialises in drafting secondary legislation. The guidance has covered all manner of points on how to approach amending retained direct EU legislation and other aspects of making Exit SIs. Some of the guidance has had to confront very tricky questions – perhaps most notably how to deal with cross-references to EU instruments, whether in UK or retained EU legislation. The guidance, which has been updated regularly as more and more issues have been unearthed, has played a significant role in ensuring a level of consistency and coherence in the approach taken to amending retained EU law.

Accessibility of the law

Brexit also has more general implications for the UK statute book, including accessibility of the law after exit day.

While UK legislation is available online through a number of providers, the only non-commercial publisher of UK legislation is The National Archives (“TNA”), which publishes UK legislation on the [legislation.gov.uk website](https://www.legislation.gov.uk).

The website is a great, free resource. Until recently, a downside of the website has been that amendments to Acts have taken a long time to be reflected. That situation has improved dramatically, and so far as primary legislation is concerned legislation.gov.uk is now 99% up-to-date – with plans for secondary legislation also to be brought up-to-date, albeit on a slower track.

But just as the updating of primary legislation on legislation.gov.uk is virtually complete, along comes retained EU law. And there’s a huge amount of it. The most important area of retained EU law for these purposes is “retained direct EU legislation” (i.e. those EU instruments the text of which is being incorporated into UK law). In the interests of legal certainty and transparency it is imperative that this new body of domestic legislation is accessible from exit day. And it needs to be accessible *in the form in which it has effect in UK law* (which is likely, in time, to diverge more and more from the form in which it has effect in EU law).

Hence the publication duty imposed by the Withdrawal Act on TNA. That duty requires TNA to make arrangements for the publication of – broadly speaking – retained direct EU legislation as well as the main EU treaties.

The duty is coupled with a power for TNA to make arrangements to publish any other EU documents that they consider may be helpful to the user.

Getting retained direct EU legislation on to legislation.gov.uk has been a massive exercise. Apart from the sheer volume of it, there is the difficulty that EU Regulations are structured and drafted very differently from UK primary and secondary legislation. TNA has done an amazing job in getting all the material on to the website in time. And it has gone well beyond what its publication duty requires, as it has used its publication power to ensure that Directives and other EU instruments (many of which will continue to be relevant to UK law) are also available on the website. In total, 160,000 EU documents have been uploaded to the website.

Configuring the website to accommodate EU legislation has been no easy task. And in a parallel exercise, retained direct EU legislation and other forms of UK legislation have had to be updated to reflect amendments made by all the Exit SIs made under the Withdrawal Act as part of getting the statute book ready for exit day.

Getting the legislation on to the website, however, only gets one so far when it comes to accessibility. Already, significant areas of domestic law are spread across three different sources: primary, secondary and EU. Even if those different sources dovetail as they should, that is an awkward state of affairs for someone trying to get to grips with a given area of law. And in some respects it is about to get more difficult because quite a lot of UK legislation that implements EU Directives does so by cross-reference to those Directives. That is just about tolerable while EU Directives remain a source of UK law. After exit, though, Directives will not be part of UK law as they are not part of retained EU law.

By way of illustration, take a piece of UK legislation that requires a UK regulator to “ensure compliance” with an EU Directive. That is not ideal at the moment, because the regulator’s compliance duty can only be deciphered by reference to an EU Directive. But after Brexit, the position is likely to be worse, at least for a time: that is because the Directive is likely to be subject to non-textual modifications set out in an Exit SI, aimed at ensuring that the Directive continues to work, in relation to the compliance duty, despite the fact that the UK will no longer be an EU member state to which the Directive applies.

As a result, a person needing to work out what the regulator’s duties are will have to have at least the following pieces of legislation on the table—

- the domestic legislation that imposes the requirement to ensure compliance with the Directive;
- the Directive (which no longer forms part of UK law);

- the Exit SI containing non-textual modifications to the Directive, aimed at ensuring that the Directive will work in the post-exit world.

And it may not end there. In some cases there may be several levels of cross-reference to EU instruments, with each instrument needing to be read with non-textual modifications set out in one or more Exit SIs.

All of that could make for a statute book that's very difficult for users to navigate. In the short to medium term that is one of the prices to pay for ensuring continuity of the law after Brexit. But in future there are things that legislative counsel can do that might improve this state of affairs—

- a. *consolidation*: opportunities might be found to consolidate areas of law, so that as far as possible it is in one place (rather than spread across multiple documents, each of which needs to be read for the user to be confident about knowing what the law is);
- b. *substitution*: instead of amending provisions, legislative counsel might take the bolder approach of replacing and rewriting them in the interests of leaving behind a clearer area of legislation that minimises or avoids cross-reference to non-domestic sources of law;
- c. *signposting*: a bit of a half-way house, perhaps, but for example where UK legislation needs to cross-refer to an EU Directive, more use could be made of signposting to give a sense of the substance of the cross-reference;
- d. *explanatory material*: as with signposting, while it is not ideal to rely on explanatory material, legislative counsel can seek to make it as helpful as possible so that the user is capable of deriving genuine assistance from it.

Consolidation and substitution are among the things that could have been done in Exit SIs had there been more time and resources. But going forward there may be more opportunities for a bolder, more creative approach and it's possible that legislative counsel might find other innovative ways to improve the situation.

The rise and rise of secondary legislation

Leaving the EU has involved the UK legislating, a lot. The 550 or so Exit SIs that have been made to “fix” the statute book once the UK ceases to be a member state have already been mentioned, but they are just one species of Brexit-related secondary legislation. They will be followed by many more SIs to be made under powers that are being taken to replace legislation in areas currently governed by EU law.

The difficulty is that it hasn't been known:

- when the UK will leave the EU,
- whether it will leave with or without a deal, and,
- if there is a deal, what that deal will say.

And this has meant that many of the so called “Brexit Bills” – dealing with the future of Agriculture, Financial Services, Fisheries, Road Haulage and Nuclear Safeguards to name a few – have included powers to make secondary legislation which are wide enough to deal with all eventualities. This has proved very controversial.

Even before Brexit, there had been growing concern in Parliament and in academic circles about the number and breadth of delegated powers being granted in Westminster. Brexit has shone a bright light on the issue, culminating in a report by the House of Lords Select Committee on the Constitution in November 2018.⁸ That report made the following points:

- while delegating power to make provision for minor and technical matters is a necessary part of the legislative process, there has been an “upward trend” in seeking delegated powers which should cease;
- seeking a delegated power “simply because” substantive policy decisions had yet to be taken is “constitutionally objectionable”;
- broad and vague powers to provide the government with flexibility are inappropriate – there must be a “compelling justification” for each power taken;
- Henry VIII powers – those which enable secondary legislation to amend primary legislation – are a “departure from constitutional principle”, they require particularly robust justification, and they must be narrowly drawn; and
- the constitutional restraint shown by the Lords in not voting down secondary legislation is under threat as a result of these trends.

Set against that backdrop it is worth taking a brief look at an example of a Brexit Bill where the issues with delegated powers were raised. The Healthcare (International Arrangements) Bill was introduced in October 2018 and received Royal Assent five months later, as the *Healthcare (European Economic Area and Switzerland Arrangements) Act 2019*. The background to the Bill was that EU Member States enjoy reciprocal healthcare arrangements. A UK citizen can access healthcare in France, and vice versa; and, if the UK left on the basis of the deal agreed by Theresa May’s government, that arrangement would continue for a transitional period of 2 years. But, because the basis on which the UK will leave was (and remains) uncertain, the government wanted to be able to put legislation in place to deal with any number of scenarios: the deal, no deal, healthcare deals being concluded with individual EU countries, and healthcare deals with individual countries outside Europe. This entailed the legislative counsel crafting a very wide power to try to cover off everything that might need to be done in any scenario.

The Bill as introduced had two key clauses: clause 1 empowered the Secretary of State to “make payments, and arrange for payments to be made, in respect of the cost of healthcare provided outside the United Kingdom”. And clause 2 gave the Secretary of State power to make regulations in relation to the exercise of the power conferred by clause 1, for and in

⁸ 16th Report of Session 2017-19 - published 20 November 2018 - HL Paper 225. Available at <https://publications.parliament.uk/pa/ld201719/ldselect/ldconst/225/22502.htm>.

connection with the provision of healthcare outside the United Kingdom, and for the purpose of giving effect to “healthcare agreements”.

The Delegated Powers and Regulatory Reform Committee (DPRRC) – the Committee in the House of Lords which scrutinises the appropriateness of delegated powers in Bills – was not impressed. It reported twice on the Bill and here are some of the things it had to say:

“...the Brexit process has given rise to a series of Bills...containing unprecedented powers for Ministers to make law by statutory instrument.”

“Clause 2 has a breath-taking scope. Indeed, the scope of the regulations could hardly be wider.”

“Under the powers in...the Bill, the Secretary of State could fund the entire cost of mental health provision in, say, the state of Arizona as well as the cost of all hip replacements in, say, Australia.”⁹

This is, of course, an unsatisfactory way to legislate. But it does unfortunately reflect the political reality of the Brexit process, which from a legislative counsel’s perspective is back to front: the statute book needs to be ready in the event that a deal is agreed, but how can it be made ready without knowledge of *what* deal is going to be agreed?

Parliament does recognise the extraordinary nature of the circumstances of Brexit and the need for the government to take powers to make secondary legislation to deal with that. But at the same time it is nervous of powers like those in the Healthcare Bill being seen as some sort of precedent for what is acceptable outside of the unique Brexit context. The Healthcare Bill was amended in a number of significant ways in the House of Lords, and the government accepted those amendments. As a result, when enacted as the *Healthcare (European Economic Area and Switzerland Arrangements) Act 2019*:

- the Bill’s scope was limited to healthcare provided in EU member states, other EEA States and Switzerland;
- what was a list of examples of things that could be done in the regulations under clause 2 became an exhaustive list;
- the Henry VIII power conferred by the Bill was removed; and
- there is now a 5-year limit on exercising the regulation-power in section 2 of the Act.

Those amendments to that Bill are by no means the only example of Parliament flexing its muscles while recognising that the extraordinary times of Brexit necessitate extraordinary delegated powers. The government has had to make a wide variety of concessions to get some of these powers on to the statute book:

⁹ Delegated Powers and Regulatory Reform Committee: 39th and 47th Reports of Session 2017–19.

- Many of these powers are subject to sunset provisions like the one in the Healthcare Bill. The power in the Withdrawal Act to make fixing regulations, for example, is subject to a 2-year limit.
- In that Act the government also agreed to provide a significant amount of extra explanatory material when making Exit SIs, in the form of statements by the Minister covering matters such as the appropriateness of the SI and confirming that there are good reasons for making it.
- In addition, the government accepted an additional form of scrutiny procedure to which Exit SIs are subject. Originally the Withdrawal Bill set out certain circumstances in which regulations had to be subject to the more stringent level of Parliamentary scrutiny – the affirmative procedure. These included, for example, regulations which themselves conferred power to legislate or created serious criminal offences or related to fees. But in most cases the Minister making the regulations was to be able to decide whether the affirmative procedure or the negative procedure – a lower level of scrutiny – should apply instead. Parliament was not persuaded by that and the compromise was a new mechanism by which a Minister cannot make regulations subject to the negative procedure unless “sifting” committees in each House of Parliament have had the opportunity to consider draft regulations and, if they see fit, to make a recommendation that the affirmative procedure should be used instead. While the committees can only recommend, not enforce, an upgrading of the procedure, the government to date has followed their recommendations.
- Finally, in the Financial Services (Implementation of Legislation) Bill, the Government accepted a requirement to publish proposed regulations in draft a month before the formal process of making them starts, together with an explanatory report. In practice, that will allow Parliament some opportunity to shape the substance of the regulations in question before they are formally laid, after which Parliament can only approve or reject them.

While Brexit was long heralded as a return to Parliamentary sovereignty from control in Brussels, making Brexit happen has inevitably involved Parliament conferring significant delegated powers on the executive. It remains to be seen how the balance of power between the two will play out in the future “post-Exit” world.

Conclusion

This article has sought to give a flavour of the unprecedented drafting challenge that the UK has been facing in terms of the legislative dislocation caused by Brexit, the quantity of new legislation it has required, the nature of the EU legislation that legislative counsel are having to get to grips with and amend, and the uncertainty of the target they are aiming at.

Beyond the technical implications of drafting in a Brexit world, Brexit has focused attention on Parliament in an unprecedented way. The fact that the government has been without a

majority in the House of Commons since June 2017 has created a perfect storm, which has allowed Brexit to test the limits of Parliamentary procedure and the legislative process as rarely before.

“Parliamentary activism” has manifested itself in several ways. Parliamentarians have pushed the rules relating to the scope of bills by tabling amendments to government Bills that would ordinarily be thought to go well beyond the Bill’s subject-matter. Amendments designed to tie the government’s hands by requiring Brexit to take a particular form have been tabled and (in some cases) agreed to. One recent example is an amendment to the Trade Bill, which requires the UK to continue to participate in a customs union with the EU.

MPs have also used non-legislative devices – Commons motions and addresses - to force the government into doing things that, by convention, it does not do (such as publishing the Attorney General’s legal advice relating to the government’s draft deal for withdrawal from the EU). And MPs have voted to remove the government’s control over the timetabling of business in the House of Commons on a particular day, so that the House would be given the opportunity on that day to vote on different options for delivering (or possibly not delivering) Brexit.

Then there’s the fact that events at Westminster have been conducted, since the referendum, under an intense media and academic spotlight, with the Speaker of the House of Commons often at the heart of the action. The recent focus on usually obscure areas of law and Parliamentary procedure has been remarkable: *Erskine May* (the parliamentary rulebook) has trended on Twitter and been referenced in headline news in a surprising indication that Parliamentary procedure has gone mainstream. And there’s been lively discussion of, for example:

- whether the PM could give the Article 50 notice of the UK’s intention to leave the EU without first being authorised to do so by means of an Act of Parliament (the UK Supreme Court decided in the *Miller* case that an Act was required);
- whether, in light of the decision in *Miller*, a request to postpone or cancel Brexit would also require the cover of an Act of Parliament;
- whether Ministers could advise the Queen not to give Royal Assent to a backbench bill designed to postpone or cancel Brexit (and, if Ministers did advise the Queen to withhold Royal Assent, whether she would be bound to follow that advice);
- whether a backbench bill designed to postpone or cancel Brexit could be blocked by the government refusing to give it the financial authorisation the bill would need;
- the Speaker’s role in determining whether Parliamentary rules allow the Government, having twice been defeated on motions for approval of its withdrawal agreement from the EU, to bring back a motion in the same terms.

The fact that these matters of Parliamentary procedure, which would usually be considered niche even in legal circles, have attracted such widespread attention is a symptom of the febrile times in which the UK has for 3 years been living. As one academic said in a blogpost in January on the UK Constitutional Law Association blog: “Truly, Brexit is the constitutional gift that keeps on giving.”¹⁰

In summary, Brexit has dominated the working lives of UK legislative counsel since the referendum, and has created unprecedented drafting challenges. But it has been a uniquely fascinating time.

¹⁰ Robert Craig, “Could the Government Advise the Queen to Refuse Royal Assent to a Backbench Bill?”, UK Constitutional Law Association, January 22, 2019. Available at <https://ukconstitutionallaw.org/2019/01/22/robert-craig-could-the-government-advise-the-queen-to-refuse-royal-assent-to-a-backbench-bill/>.

