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Workshop
on
Different Approaches to Legislative Drafting in EU Member States

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Legislative Drafting in the United Kingdom and in Common Law countries

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1. What are the distinctive features of the legislative process?

1.1 *Introduction*

There are three major distinctive features generally found in the legislative process in common law jurisdictions which particularly impact on legislative drafting.

First, a distinction is drawn between the functions of formulating a policy and drafting primary legislation to implement the policy.

Secondly, there is a strong tradition of quite rigorous detailed parliamentary consideration of the legislative text during the enactment process.

Thirdly, there is an emphasis on not only legislation but also judicial decisions as important sources of law. Judicial decisions may be the basis of significant areas of law, either solely or in conjunction with subsequent legislation. Judicial decisions are also often an important, although not necessarily exclusive[1], legal

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[1] Common law jurisdictions often enact legislation which contains, amongst other matters, general rules for the interpretation of legislation: see, for instance, the (UK) Interpretation Act 1978; and other legislation may contain provisions on the construction and interpretation of its provisions.

basis for the general principles applied in the interpretation of legislation, and they determine the interpretation of specific legislative provisions.

1.2 *Formulating Policy and Drafting Legislation*

The formulation of policy in common law jurisdictions has much in common with that in civil law jurisdictions.

Government policy is normally formulated within the responsible ministry. The impetus for this may be research and analysis within the ministry, or commissioned by the ministry from outside public or private sector sources, or independent research and analysis which is brought to the attention of the ministry, or a combination of these.

A common feature of modern policy development is an impact assessment of the proposed policy and implementing legislation. Such assessment should embrace not only a cost/benefit analysis but also an evaluation of the regulatory impact of the policy and related legislation, and thus its indirect economic consequences. Impact assessment is both a continuous process to help the policy-maker fully evaluate and understand the consequences of possible and actual government intervention and a tool to enable the government to weigh and present the relevant evidence on the positive and negative effects of such intervention, which includes reviewing the impact of policies after they have been implemented. It may also be used of course to determine the impact of existing legislation preparatory to considering revising it. In that sense, it can be treated as a continuum within government[2].

[2] For an example of recommended procedures in conducting impact assessment, see the UK Government *Impact Assessment Guidance (*http://www.berr.gov.uk/files/file44544.pdf).

Example 1: Cost Benefit Analysis and Football Hooliganism

The Football (Offences and Disorder) Act 1999 was one of a series of statutes to control football hooliganism in England and Wales, and amongst supporters of English and Welsh teams playing abroad. The cost benefit analysis of the legislation suggested: (i) additional but marginal costs for the police in investigating new offences created by the legislation (but discounting marginal costs here and elsewhere is cumulatively an analytical weakness); (ii) additional but marginal costs for the prosecution service and the courts as a result of new offences created by the legislation (but failed to take account of defence costs which would mainly fall on the state); (iii) additional reporting requirements placed by the legislation on those previously convicted of similar offences would create additional manpower costs from an estimated required 5 new posts) on the agency regulating this reporting.

The importance of consultation, which may be seen as another aspect of impact assessment, is now also widely recognised. Consultation is commonly undertaken in accordance with a centrally standardised procedure which, for example, may set criteria for determining the scope of consultation, a recommended timetable for submissions, and consideration and response to the submissions[3]. Increasingly, at least the initial stages of such consultation are conducted electronically.

[3] See for example the revised UK Government *Code of Practice on Consultation* prepared by the Better Regulation Executive within the Department of Business, Enterprise and Regulatory Reform, and published in July 2008 (http://www.berr.gov.uk/files/file47158.pdf).

Example 2: UK legislation on human fertilisation and embryology

Following the birth of Louise Brown in England in 1978, the first baby to be conceived by in vitro fertilisation, the UK Government appointed a committee of enquiry to examine the social, legal and ethical implications of this and related procedures which reported in 1984. Its report (Cm. 9314) led to the enactment of the Human Fertilisation and Embryology Act 1990. In 2004, the UK Government announced a review of the 1990 Act in the light of further scientific developments. This review involved wide public consultation in 2005, and the publication of results of the review in 2006 (Cm. 6989) with the Government's policy proposals. This eventually resulted in the enactment of the Human Fertilisation and Embryology Act 2008.

The pattern in many common law jurisdictions is that once the policy has been determined within the ministry which requires implementing legislation, lawyers within the ministry prepare detailed instructions for the legislation to be drafted by lawyers who specialise in legislative drafting in an institutionally distinct part of government.

Ideally, the instructions from a ministry should contain a clear detailed account of the policy which is to be implemented by the legislation, existing legislation which relates to this and similarly any relevant judicial decisions. The quality of the instructions is an important consideration in drafting effective legislation. Consequently, it is not uncommon for the drafters to produce advice on what should be included in the instructions[4], and in some cases they provide short training courses on this for administrators and lawyers in the instructing ministries.

2. Who drafts the legislation?

2.1 In the UK, for much of the Government primary legislation[5] this is undertaken by the Office of Parliamentary Counsel (OPC), which is formally within the Cabinet Office. The OPC also drafts government amendments to the legislation which are introduced during the parliamentary process. In addition, when instructed to do so, it drafts some secondary legislation, and reviews secondary legislation which amends primary legislation to ensure the consistency of primary legislation. However, this division between the formulation of policy and the drafting of implementing legislation can be overemphasised, as once the

[4] See, for instance, the paper produced by the UK Office of Parliamentary Counsel, *Working with Parliamentary Counsel* (http://www.cabinetoffice.gov.uk/media/190079/working_with_pc_guide.pdf)

[5] As the UK is a quasi-federal state, there are similar units for drafting legislation to be introduced into the Scottish Parliament, the Welsh Assembly and the Northern Ireland Assembly within their respective devolved legislative competences; legislation which applies those parts of the United Kingdom on matters which remain within the legislative competence of the UK Parliament are drafted within the Office of Parliamentary Counsel.

instructions have been received there is, for obvious practical reasons, liaison between the instructing ministry and the lawyers in the OPC drafting the legislation, with the ministerial committee of the Cabinet that considers draft Government legislation and, after the draft legislation is introduced into Parliament, with officials of the Parliament on procedural matters.

2.2 There are seen to be advantages in Government primary legislation being exclusively[6] drafted within an office independent of the ministry instructing the legislation, in contrast to the usual institutional pattern in civil law jurisdictions where the legislation is drafted within the promoting ministry, with commonly one ministry (often the Ministry of Justice) having a supervisory role.

First, it allows for a fresh independent assessment of the proposed legislation by lawyers who have not been directly involved in the policy development process within the ministry. This may involve, as well as offering technical solutions offered for effective legislative implementation of policy, an independent assessment of the constitutional appropriateness of provisions within the proposed legislation[7]. In any event, this fresh independent assessment may reveal weaknesses in the proposed legislation, including whether new legislative powers are needed as they replicate existing powers, as well as in the practicalities of implementing and enforcing the legislation.

Example 3: OPC assessment identifying a technical weakness

A lawyer within the OPC recounted:

"In the 1990s I drafted the legislation establishing landfill tax. One problem was to define a disposal by way of landfill. I was asked to follow some regulations which defined waste disposal operations. When I looked at the items I saw that one of them was (in effect) "tipping (for example landfill)". I said that we could not use this as part of a *definition* of landfill, because it referred to the very thing we were trying to define."

Secondly, the size, manner of working and collegiality of the OPC, tends to facilitate a consistency of drafting style[8].

[6] In the UK there are some very limited exceptions to this exclusitivity. There was also a brief experiment in the 1990s of contracting out the drafting of elements of legislation to the private sector, which was widely regarded as unsuccessful as it resulted in errors and inconsistency: see Bates, "Contracting out drafting: a British experience" [1996] *Statute Law Review* 152.

[7] This is reinforced by the fact that the head of the OPC, the First Parliamentary Counsel, formally has, if it is necessary, a right of direct access to the Prime Minister to indicate any concerns over such an issue.

[8] There is, for example, a very English tradition in the OPC that, where pressure of work permits, the lawyers gather together for a cup of tea in the afternoon!

The OPC has currently 55 drafters, although only about 85% of them are engaged in drafting legislation for the Government's immediate legislative programme[9]. The drafters are traditionally recruited after some years in private practice. There is no formal induction course for new recruits[10] and the drafters acquire their knowledge on an "apprenticeship" system. Drafting is most commonly undertaken in teams of two drafters, with a junior drafter and a more senior experienced drafter; and drafters do not specialise in substantive areas of law but are allocated instructions as they are received. Somewhat unusually the OPC does not have a comprehensive style book, although it does have a Drafting Techniques Group which produces a variety of recommendations and papers on various drafting issues from time to time[11].
However, some see difficulties and possible disadvantages in the system. First, drafters within the OPC have to be careful to distinguish between offering alternative technical solutions to the legislative implementation of the policy and proposing changes in the policy, and this distinction is not always easy to apply in practice. Secondly, the drafters in the OPC do not specialise in specific substantive areas of law, but rather provide expertise in drafting. Of course, in drafting legislation they have to analyse fully the law relating to the legislation they are drafting, but nevertheless not being specialists in the particular area of substantive law they are perhaps that more dependent on the quality of the instructions that they receive.

It must also be emphasised that the OPC drafting function is limited in the main to Government primary legislation of general application.
It does not draft primary legislation promoted by individual parliamentarians (although it may be instructed to assist in drafting such legislation which the Government adopts politically, and some such legislation is anyway Government legislation which the Government has not been able to find space for in its own parliamentary legislative programme and is passed to individual parliamentarians to promote). In the UK Parliament, individual parliamentarians promoting legislation, or amendments to Government legislation have access to very little professional drafting assistance within the institutions of the state[12].

[9] So, at present 2 are seconded to the law reform body for England and Wales (the Law Commission), 6 are seconded to the Tax Law Rewrite Project and a further drafter is seconded part-time to work for Welsh Assembly.
[10] Although this is not necessarily the case in other common law jurisdictions; so, for instance, there is an induction course for Government drafters in Ireland.
[11] These recommendations and papers are available on the OPC website (http://www.cabinetoffice.gov.uk/parliamentarycounsel/drafting_techniques.aspx); however, as the drafting of secondary legislation is largely decentralised in the UK, there is a general guide to its drafting, *Statutory Instrument Practice*, although this largely addresses technical rather than stylistic issues.
[12] This is not always the case in other predominantly common law jurisdictions; for instance, the Scottish Parliament has a unit to provide such drafting assistance and in Canada, specialist drafters are directly employed by the Parliament.

Neither does the OPC draft primary legislation which has specific rather than more general application (“private bills”); this is undertaken by specialist lawyers in private practice.
And perhaps of particular significance, other than the exceptions already indicated, the OPC does not draft Government secondary legislation. This, rather following the manner of civil law jurisdictions, is done by lawyers within the promoting Ministry. These lawyers are not specialist drafters in the sense that they normally will only draft secondary legislation for a period of their careers.

3. How is the quality of legislation ensured?

3.1 *Introduction*

For historical and constitutional reasons, the tendency in many common law jurisdictions is to draft primary legislation in a more detailed style than would be common in civil law jurisdictions. This contrast in drafting style is perhaps not as pronounced as it once was, but it has been explained by a number of factors. One is the parliamentary tradition of close textual scrutiny of draft primary legislation, and also of secondary legislation which often has to be presented for parliamentary consideration. Another is the traditional emphasis of common law judges on textual interpretation of legislation rather than interpretation on the basis of the principle and purpose of the provision; this is not as pronounced today as it once was, but it still tends to be an underlying judicial approach to legislative interpretation.
One consequence of this context is that both parliaments and the courts are seen as providing general institutional checks on the quality of legislation. Also, the practice primary legislation being drafted by units of independent specialist drafters has tended to make these units very conscious of the need for self-regulation in matters of the quality and style of legislation. In addition, although not in the UK, many common law jurisdictions have institutional arrangements to review the quality of legislation from the perspective of such matters as the use of clear and contemporary language.
However, in the final analysis, both common law and civil law jurisdictions recognise that good legislative drafting identifies the legal objectives and meets them fully by expressing the necessary legal rights and obligations in an accurate clear manner, while also ensuring that the draft complies with superior norms, and that it effectively and consistently relates to existing legal norms.