

“Reflections on a Career in Legislative Drafting”

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June 20, 2009

New Orleans, Louisiana

First, I am going to talk about how I first became involved in legislative drafting and, contrary to my expectation, came to find satisfaction and enjoyment in that field.

Then I would like to share with you a few personal reflections concerning law drafting. I will talk about things that seem important to me.

I was admitted as a barrister and solicitor of the Supreme Court of New Zealand at the beginning of 1954, 55 years ago, so it will be apparent to you that I fall into that age group when people are likely to be categorized as either a “wise old head” or less charitable as a “silly old fool”. I hope I may be classified somewhat in between those extremes.

Since professional qualification long ago, I have been privileged to work in a number of countries and to enjoy living amongst different cultures. Obviously, during that lengthy time there have been many changes – political, social and technological. In the drafting field the most significant developments have probably been the growing demand in many countries that legislation be made easier to understand and secondly the impact of the growing use of computers.

My professional life began in Wellington, New Zealand where I worked in private practice. I should have been content to continue to practice there but NZ is a small country at the foot of the world and I was looking for something more from life – even if I didn’t really know what! A legal appointment in what was then known as the British Colonial Service offered me that opportunity. In early 1958 I took up an appointment as a Crown Counsel in Tanganyika (which as you will know is now the mainland part of the United Republic of Tanzania). It was there that I began to take my first hesitant steps as a drafter of legislation.

As a Crown Counsel I was part of a small legal team in a large country. The duties of a Crown Counsel were varied – prosecuting and advising the Police, advising the various arms of Government on civil and administrative matters, and drafting in elementary fashion various subordinate instruments. The drafting of bills for submission to the Legislative Council was handled by more senior people. Inevitably in view of our small numbers, we Crown Counsel were obliged to accept plenty of responsibility. For example I prosecuted my first murder trial after I had been in the country less than a

couple of months. The breadth of the legal experience I gained was fortuitous but in fact proved to be valuable in the extreme when I came to learn the art of drafting.

My elementary efforts at drafting must have shown some promise (or perhaps no one else was available) because when a vacancy arose in one of the 2 senior law drafting posts I was assigned to fill in until a substantive appointment could be made. I still remember vividly the first bill I drafted. It concerned fertilizers and animal foodstuffs. I worked at it with enthusiasm, revised it and revised it and eventually, full of the confidence of youth, submitted it to the dour Scot who was the Solicitor General at the time. I awaited the approval and compliments I confidently expected. I received neither approval nor compliments, just the return of my draft heavily scored with a series of red lines and pertinent but non-flattering criticisms in the margins. An early and useful lesson in humility learned the hard way.

My second tour of duty in Tanganyika began with some months up country in Mwanza on the shores of Lake Victoria. There I was the sole Crown Counsel – the work was restricted to advising the Police and prosecuting before the Courts. My personal empire consisted of one clerk and his bicycle. In mid 1961 I had the good fortune to be promoted to the legal staff of the East Africa High Commission (soon to be renamed the East African Common Services Organization) based in Nairobi. This body provided common services such as Railways and Harbours, Post and Telegraphs, Customs and Income Tax, and Civil Aviation throughout East Africa. There was an East African legislature with members from each of the three countries. I was required to make further efforts to learn the art of legislative drafting while at the same time extending my experience in other directions. It was a great opportunity. For example, I not only drafted income tax law but appeared as counsel in tax cases right up to Privy Council level.

A few years later, at the invitation of the Tanzania Government, I returned to Dar es Salaam to become Chief Parliamentary Draftsman and Counsel to the Speaker. I was happy to go back and spent the next two years in that post. They were 2 busy and satisfying years. There were just 2 of us drafting with lots to do and some daunting challenges. The greatest challenge arose from President Nyerere's rather startling announcement that became known as the Arusha Declaration. He announced that the government proposed to take over and nationalize the Tanzanian branches of the major banks, such as Barclays, and also other major commercial companies owned by overseas companies. No existing law provided for this. Parliament was summoned for a week later and I had somehow to produce a draft in that time achieving the takeover and at the same time establishing a Tanzanian Bank to take over their assets and business. I am sure that my grey hairs began that week.

In the 1960s Tanzania was typical of many recently independent countries – very short of experienced professional staff. This was particularly so with respect to legislative drafting. It was not a sought after field. There was (and is) no glamour in drafting legislation – only hard work away from the public eye with little if any recognition. Experienced drafters, where they existed, were far too busy to spend much time assisting learners and there was no practical manual available which might have been of assistance. The only book I came across at that time was Sir Alison Russell's "Legislative Drafting and Forms" the second edition of which had been published as far back as 1922. It was outdated, poorly constructed and after 40 years or so, not much use.

This problem really bothered me. I could see that the shortage of drafters and the inadequacy of teaching facilities was a widespread problem. I wondered if, despite my comparative inexperience, I could do something useful about it. I decided to have a shot at writing something that was intended to be practical and easy to understand. And so I began to work at a manual of practice in my spare time. The first edition was published by Butterworths in London in 1970 by which time I had returned to work in Hong Kong.

Over the years I worked on three further editions of my book, and I have no doubt that as my own skills and knowledge developed the 4th and final edition published in 1996 was a great improvement on the earlier editions.

Subsequently I have had continuing involvement in legislative drafting in Hong Kong, Australia and New Zealand and you will be relieved to learn that I don't intend to go into any detail about my work and experiences in those jurisdictions. It all adds up to a lot of years and a lot of drafting. Have I learned anything useful to pass on to you? Well, for what they are worth, here are a few of my reflections:

Reflection1 *Law drafting offers an extraordinarily satisfying career to those lawyers who are suited to it.*

Competent law drafters tend to stick with it as a career. Some might think this surprising because generally speaking it is work that generates no fame, no public profile or acclaim, no wealth, and on occasion unfair criticism. To those who take to it however, the work is interesting, challenging and satisfying. It is also creative and positive. Part of the interest lies in the breadth of the areas both of law and policy which a drafter becomes acquainted with in the course of his or her work. By way of example of how people remain in the drafting field, I left employment by the Western Australian Government in 1989. Not long ago I enjoyed a holiday in Western Australia and paid a visit in Perth on my former colleagues. I found nearly all of them were still there nearly 20 years after I had left. My successor in charge of the office was just about to retire

after 19 years in the job and his successor has been drafting in that office for well over 30 years.

Reflection 2 This is the corollary to Reflection 1.

A person who, after a reasonable trial period, does not find drafting to be interesting, challenging and satisfying should give it up and move to some other branch of the law.

Over the years I have been responsible for recruiting and training lots of drafters and am in no doubt that the work just does not suit many otherwise competent and accomplished lawyers. This implies no criticism of such persons. We all have different talents and have to learn to make use of our strengths rather than our weaknesses. You may ask who is suited to be a law drafter? Quite a question and dangerous one to answer dogmatically. I will just offer a couple of pointers

1 – *a drafter needs a particular sort of mind – perceptive, orderly, and positive.*

2 – *a drafter is likely to have a love of language and to take pleasure in using words and combining them into structures.*

There is a great deal of pleasure to be found in the literature about language and language use. Let me refer to just two examples. First, what a wonderful book is “The Language of the Law” by David Mellinkoff first printed in 1963 and continually reprinted. And what an influence it has had. And then, on a more practical level, what an admirably succinct and perceptive book is “Plain English for Lawyers” by Dick Wydick who has played such an important role in this institute for many years. And there are many more wonderful books likely to be savoured by those with an aptitude for drafting.

Of course you also need to have a respect for language. Its use demands a lot of care. We all have a tendency to hear or read what we expect to hear or read. In Hong Kong there was a tailor who came around the offices of the Legal Department looking for business. His habit was to produce a reference which a very senior officer had given him. He really should have read it more carefully as I’m sure it did not gain him any business. It read “I confirm that Mr. X made me a suit to his entire satisfaction.”

Reflection 3 *A warm collegial relationship among the drafters and support staff in a law drafting office is enormously valuable.*

A spirit of friendly good fellowship and cooperation within an office is a pearl beyond price. There are obviously different ways of achieving that comfortable and warm feeling. In part it is a matter of leadership. In the law drafting office in Western Australia where I worked for 10 years, we met once a week mid-morning and shared a cup of tea and some talk for a half an hour or so. Some of the talk was work-related but some was not. The idle chat was not a waste of time in my opinion.

1. Although drafting is inevitably a solitary occupation in many respects, it should not be wholly so.
2. Informal consultation and cooperation are likely to flow readily where a warm, friendly relationship exists.

I believe that every completed legislative draft requires and deserves consideration by a second drafter. Not many offices have the resources to work in pairs but there are obvious advantages. I have never enjoyed that luxury but I have instituted and found beneficial a practice of nominating for each project a second drafter as “reader” with the responsibility of reading carefully and critically a completed draft and commenting on it to the drafter. Such a “reader” need not be a more senior or experienced person – merely a second pair of watchful eyes.

Reflection 4 *The wider the breadth of legal experience that a drafter possesses, the better.*

I do not go so far as to say a person coming to drafting directly after attaining a legal qualification cannot succeed, but the ideal, in my opinion, is that drafter should first have other practical experience of the law. The advantage is that a breadth of experience tends to extend the focus of the drafter beyond the terms of the law in question to the law as a whole and to the practical operation of the particular law as part of that whole. Just to give one example, a common drafting task is to provide for offences liable to prosecution in the courts in the event of breach. A person who has prosecuted before the courts is at a considerable advantage in this task because he or she will have in mind the practicalities – the necessity for the law to establish clearly what are the essential elements of the proposed offense and the necessity also to be satisfied that those elements would be readily capable of proof.

Reflection 5 *A drafter needs oral communication skills as well as the ability to write well.*

I do not mean to suggest that a drafter needs to be an extrovert public speaker. The need for oral communication skills is less obvious than the need for a drafter to be an accomplished writer. It is important though because ordinarily a drafter will have numerous discussions with those instructing him or her as the process of drafting continues. In the first place drafting instructions are very often incomplete and unclear and the drafter has to tease out the information and policy decisions needed. Secondly, very often the drafter has to relate the drafting instructions to the wider law which may be not well known to the instructor. On occasion the drafter finds him or herself instructing the instructor. Thirdly, once it exists the draft needs to be discussed, revised, and tested. A good working relationship with the instructor is clearly productive and the drafter needs to be able to express himself or herself clearly to develop the

relationship to the advantage of the draft. There may be a need to explain and perhaps justify the draft.

Reflection 6 *There is a continuing tension between precision and simplicity. The accomplished drafter strives for a balance.*

There have been instances when the pursuit of precision has led to total unintelligibility in cases where a basic proposition is subjected to lengthy and multiple qualifications, exceptions and provisos. In famous dicta in an old English case (*In re Castioni* [1891] Q.B. 167), Stephen J said “it is not enough to attain a degree of precision which a person reading in good faith can understand; but it is necessary to attain if possible to a degree of precision which a person reading in bad faith cannot misunderstand.” I think that approach has caused a lot of difficulties. The search for precision can obscure and overpower the vital principle that law must be communicated as well as determined. A desire to cover every possible contingency and plug every remotely possible loophole is very likely to lead to complexity beyond what is acceptable. A drafter should never lose sight of the need to communicate and the plainer his or her language is, the more likely that communication will succeed.

Successful communication is assisted if a consistency of style is achieved in a jurisdiction. Computers can help to see that similar provisions are presented consistently in the same fashion. Of course, they are great research and storage tools also.

Reflection 7 *Time spent on creating a clear and logical structure of a bill is time well spent.*

That reflection may appear rather obvious, but it is worth remembering that a practical and, if appropriate, chronological structure can contribute enormously to intelligibility and ease of administration and use.

Reflection 8 (Will they ever end? Yes, just two more to go.) *Punctuation is important. It can contribute mightily to clarity.*

I have known drafters who had almost a contempt for punctuation and virtually ignored it. On the other hand, I have also known drafters who were obsessed with punctuation. It has been described well as “a courtesy to help readers” but a host of examples tell us that it is more than that. It can totally alter meaning. Lynne Truss in her amusing and instructive book “Eats, shoots and leaves” gives this example:

Dear Jack,

I want a man who knows what love is all about. You are generous, kind, thoughtful. People who are not

like you admit to being useless and inferior. You have ruined me for other men. I yearn for you. I have no feelings whatsoever when we're apart. I can be forever happy – will you let me be yours?

Jill

The same words but punctuated differently yield the following version:

Dear Jack,

I want a man who knows what love is. All about you are generous, kind, thoughtful people, who are not like you. Admit to being useless and inferior. You have ruined me. For other men I yearn! For you, I have no feelings whatsoever. When we're apart I can be forever happy. Will you let me be?

Yours,

Jill

There are some classic texts on punctuation which are readable and helpful. I think they are worthy of study.

Reflection 9 *Drafts need to be tested with great care for practicality as well as intelligibility.*

Thomas Jefferson once wrote “The execution of the laws is more important than the making of them.” Well, I don't want to debate that but at the end of the day it is beyond argument that a law that is not capable of being administered in a practical and efficient manner is a bad law. Testing by drafters and administrators at the draft stage is an absolute must. A bill may be drafted in plain and elegant language but if it does not work and does not achieve the purpose of the policy behind it, all the plain language in the world will not resuscitate it. A sentence can be as plain as plain can be but still rubbish. Plain language is not always the same thing as sensible content. Consider an old chestnut said to originate in Kansas:

“When two trains approach each other at a crossing, they shall both stop and neither shall start up until the other has gone”.

Finally, I found on the internet an example that is not particularly plain or elegant and certainly failed the test of practicality. It purports to be an amendment to a psychologist regulatory bill proposed in 1995 in the New Mexico legislature.

“When a psychologist or psychiatrist testifies during a defendant’s competency hearing, the psychologist or psychiatrist shall wear a cone-shaped hat that is not less than two feet tall.

The surface of the hat shall be imprinted with stars and lightning bolts. Additionally, a psychologist or psychiatrist shall be required to don a white beard that is not less than 18 inches in length, and shall punctuate crucial elements of his testimony by stabbing the air with a wand. Whenever a psychologist or psychiatrist provides expert testimony regarding a defendant’s competency, the bailiff shall contemporaneously dim the courtroom lights and administer two strikes to a Chinese gong.”

Apparently, the amendment was passed but the Governor vetoed it.

I hope that you may find pleasure, satisfaction and occasionally some humour in your own drafting careers.