



2014 Australasian Drafting Conference

*When too much law is barely enough: the role of
legislative drafters in an age of statutes*

by

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¹ I am indebted to Dr Jeannine Purdy for her invaluable contribution to this paper. However, responsibility for the views expressed, and any errors, is mine.

Introduction

I am greatly honoured to have been invited to address the Australasian Drafting Conference 2014. Might I take this opportunity to welcome all delegates to this conference, particularly those from other jurisdictions. I know that you have all travelled a long way to get here, but I would particularly like to welcome our colleagues from the other countries represented here today, New Zealand, Singapore and Hong Kong. While I do not have any relevant expertise on the role of legislative drafters in Singapore and Hong Kong, I do hope participants from those jurisdictions find the address of interest given our shared legal and parliamentary heritage.

Traditional Owners

Before going any further I would like to acknowledge the traditional owners of the lands on which we meet, the *Whadjuk* people, who form part of the great Noongar clan of south-western Australia, and pay my respects to their Elders past and present. Visitors to Perth may not be aware that we meet on a place of particular significance to the *Whadjuk*, as we meet on land reclaimed from the bed of the river which we know as the Swan River, but which is known to the *Whadjuk* as *Derbarl Yerrigan*. According to *Whadjuk* lore, this river and various other sources of fresh water situated on the coastal plain between the scarp and the sea were carved out by the *Waugal*, which is a serpentine creature of great significance to the culture and traditions of the *Whadjuk* people.²

² Information from Christopher Pease, available at Kaartdijin Noongar - Noongar Knowledge website, www.noongarculture.org.au/spirituality (accessed 11 July 2014).

The prominent hill overlooking this Convention Centre has a more recent cultural significance, and includes the Kokoda Track Memorial Walk, a tribute to the bravery of Australian troops, including Indigenous Australians, who fought in the Papua New Guinea campaign of July 1942 - January 1943. It also offers panoramic views of the city and environs and I would strongly recommend it to those who have not been there before. The hill is now known as Mt Eliza, named after the wife of Governor Darling, and forms part of a large area of natural bush known as King's Park. The hill is known to the *Whadjuk* as *Ga-ra-katta*, and is a place of great cultural significance. A natural spring at its base, on the banks of the *Derbarl Yerrigan*, was a significant meeting place for the indigenous inhabitants of this land, and so there is a certain appropriateness in us meeting nearby.

Disclaimer

I accepted the invitation to address this conference with some trepidation, as I know little of the process of legislative drafting. Perhaps the most I can claim is that I have been a 'client' of legislative drafters when I represented the Supreme Court, instructing on amendments to the Rules of Court. (I will return later to the somewhat vexed question of who is the 'client' of a legislative drafter.) During my time as a lawyer and more recently as a judge I have also gained a consumer's perspective of the product of your labours. However, neither that experience nor my limited experience as a 'client' qualifies me to express any views on the process in which you are all engaged.

Nevertheless, like most lawyers, I have never let a lack of knowledge stand in the way of expressing an opinion, or more accurately, from recycling opinions expressed by others.

When Too Much Law is Barely Enough

There cannot be many fields of endeavour in which skilled professionals are vigorously criticised because they have increased the volume of their production or outputs. Yet that is what has occurred in the field of legislative drafting over the last 50 years or so. The exponential increase in the volume of laws passed by legislatures in most western democracies has attracted criticism from many quarters, often expressed in colourful language and metaphor. In conformity with that trend, I have shamelessly plagiarised Rampaging Roy Slaven and HG Nelson's catch cry in the title of this address,³ describing the product of your labours as 'When too much law is barely enough'. It might be of some comfort, however, to note that their catch cry was recently described as a 'double-edged motto'; simultaneously a critique and a celebration.⁴

The statutory tide submerges the common law

Almost 50 years ago Professor Grant Gilmore described the fecundity of American legislatures over the preceding decades as an 'orgy of statute making'.⁵ When Guido Calabresi, now a United States Circuit judge, wrote *A Common Law for the Age of Statutes* in 1982, he complained that we were 'choking on statutes'. He observed that over the past 50 to 80 years there had been a 'fundamental change' in American law. It had gone from a system dominated by the common

³ The catch cry, 'When too much sport is barely enough' is from ABC radio's 'This sporting life'. Samples from the series, which spanned 1986 to 2008, are available from the National Film and Sound Archive at: <http://nfsa.gov.au/collection/sound/sounds-australia/2013-registry/#royhg> (accessed 21 July 2014).

⁴ Professor David Rowe, 'Too much sport is barely enough: what makes Roy and HG funny?' *The Conversation* (19 February 2014).

⁵ Grant Gilmore, *The Ages of American Law* (1977) 'The Age of Anxiety' p 95.

law to one in which 'statutes, enacted by legislatures, have become the primary source of law'.⁶

Similar observations have been made in most western democracies over the last 40 years or so. In Australia, Chief Justice French observed:

The evolution of our legal universe has been dominated by the runaway expansion of statutes, delegated legislation and legislative instruments enacted by Commonwealth, State and Territory governments and their legislative delegates. The common law is today so entangled with statutes that it is difficult to find any legal problem which is able to be defined and resolved solely by resort to the common law.⁷

One of the last bastions of the common law, the law of tort, has now been significantly affected by statute law on both sides of the Tasman. Another pediment of the common law, the law of contract, has, in Australia at least, been significantly influenced by statute law such as the statutory provisions relating to unconscionable contracts, and has been significantly eroded by statutes providing civil remedies for misleading and deceptive conduct; I note that these are described as 'consumer laws' - misleadingly (and indeed somewhat ironically) given the statutory remedies provided are not limited to consumers.⁸ Statutes defining the duties of company directors, almost certainly the most populous class of fiduciaries in contemporary commercial life, have significantly affected a central pillar of the law of equity, the concept of fiduciary obligation.

⁶ Guido Calabresi, *A Common Law for the Age of Statutes* (1982) 'Choking on Statutes' p 1.

⁷ Chief Justice Robert French AC, 'Litigating in a Statutory Universe' (Victorian Bar Association 2nd Annual CPD Conference - the New Litigation Landscape - Challenges and Opportunities, Melbourne, 18 February 2012) p 2.

⁸ For example, the general protections in Chapter 2 of the Australian Consumer Law (*Competition and Consumer Act 2010* (Cth) Schedule 2) extend beyond consumers, as that term is defined in the legislation.

More metaphors

Chief Justice French has also referred to our time as 'an age of statutes',⁹ to 'a statutory universe'¹⁰ and to 'the empire of statutes'.¹¹ At other times he has engaged other metaphors to describe your labours, including 'a mountain range of statutory words'. That expression should be placed in its context:

In the 110 years that have passed since the Federation came into existence, there has been a steady and latterly, it seems, exponential growth in the number of statutes and regulations, rules, by-laws and other forms of instrument made under statutes. Moreover, statutes have become longer and more complex despite laudable attempts to use plain English drafting. In Australia today we go about our lives under a mountain range of statutory words which impose obligations and restrictions, create rights and liabilities, and confer powers on a large and varied array of regulatory bodies, public authorities and officials.¹²

In support of this proposition Chief Justice French cited the two largest and most complex Commonwealth statutes - the *Income Tax Assessment Acts 1936 and 1997* (Cth), and the *Social Security Act 1991* (Cth). To those examples I would add, not so much because of its size but more because of its impenetrably dense language, the *Native Title Act 1993* (Cth).

An example of exponential growth

It would be wrong to suggest that this phenomenon is limited to the Commonwealth of Australia. To take an example from my own jurisdiction, the *Legal Practitioners Act 1893* (WA), which regulated the legal profession of this State for 110 years prior to its repeal in

⁹ Chief Justice Robert French AC, 'The Judicial Function in an Age of Statutes' (2011 Goldring Memorial Lecture, Wollongong, 18 November 2011).

¹⁰ Note 7, p 1.

¹¹ Chief Justice Robert French AC, 'What were they thinking? Statutory Interpretation and Parliamentary Intention' (Sir Frank Kitto Lecture, Armidale, 23 September 2011) p 9.

¹² Note 11.

2003, contained 53 sections when enacted and effectively 143 sections at the time of its repeal. It was replaced by the *Legal Practice Act 2003* (WA), which contained 253 sections.¹³ The increase in the size of the statute did not enhance its durability. It was repealed five years later, by the *Legal Profession Act 2008* (WA), which contains no less than 637 sections.¹⁴ I am unaware of any changes within the structure or nature of the legal profession between 2003, when it was governed by an Act containing 143 sections, and 2008, which would have necessitated another 494 sections of legislation in order to properly regulate the profession.¹⁵

Judicial hypocrisy

There is a real risk of hypocrisy when observations of this kind are made by judges like me. Any comparison of the likely slender volume of law reports published in any Australian jurisdiction in 1893 with the equivalent volumes published in 2008 will reveal not only a predictable increase in the number of cases reported, but also an exponential increase in the length and complexity of the judgment in each case. While it is tempting, for a judge at least, to blame this on the exponential increase in the volume of legislation over the same period, I doubt that the proposition would survive any serious scrutiny.

Amend or perish

Of course volume is not the only measure of your labours. As the example I have just used shows, there seems to also be much contemporary enthusiasm for amending or replacing legislation. To

¹³ As originally passed.

¹⁴ Excluding those sections relating to consequential amendments (Part 20).

¹⁵ Admittedly the 1983 Act did also include a 20 clause schedule.

take an example from an area of particular interest to me, using the periodic compilation of 'law and order' legislation undertaken by the NSW Parliamentary Library Research Service, according to my count, researchers identified over 700 changes to law and order legislation in Australian States and Territories between 1995 and 2006.¹⁶

The importance of statutory interpretation

The many observations about the volume and impact of legislation underscore the vital importance of statutory interpretation in the contemporary administration of the rule of law. Statutory interpretation has become the core business of the courts in most jurisdictions. While judges at first instance have the important responsibility of finding the facts which provide the context for the process of interpretation, by the time cases get to the appellate courts, very often the issues turn upon the interpretation of statutory provisions.

While I can't comment on behalf of the courts of New Zealand and elsewhere, over recent years, many judges in Australia have expressed concern about the legal profession's capacity to grapple with issues of statutory interpretation and advance considered and well-structured arguments in relation to them.¹⁷ I share those concerns. Those concerns have prompted a dialogue between the judiciary and academy in Australia on teaching statutory interpretation in law schools. Most schools have been reluctant to offer statutory interpretation as a distinct field of study in an already crowded

¹⁶ NSW Parliamentary Library Research Service, *Law and Order Legislation in the Australian States and Territories - Briefing Papers* Nos 7/99, 6/03, 12/06 [176 major changes during 1995-8; 324 major changes during 1999-2000; over 230 major changes during 2001-2006].

¹⁷ See, for example, the opening address at the Australasian Drafting Conference in 2011 given by the Hon John Doyle AC, Chief Justice of South Australia (Adelaide, 3-5 August 2011).

curriculum, and instead assert that the teaching of the principles of statutory interpretation is infused through the other various subjects offered. Differing views might reasonably be held about the adequacy of this response, although there can be no doubt that all law students should achieve a proper understanding of the principles of statutory interpretation during the course of their studies.

The Importance of Legislative Drafting

Another proposition flows from the many observations on the volume and impact of statute law. That is the vital importance of maintaining appropriate standards of legislative drafting for the contemporary administration of the rule of law.

Judicial criticisms

It must be conceded that there are occasions when judges are critical of the clarity of particular statutory provisions. I suspect these criticisms are inevitable. As I am sure you are only too well aware, it is extremely difficult, if not impossible, for any statutory text to anticipate each and every possible permutation of fact and circumstance which may arise in the future and to define the legal consequences of each such permutation with absolute clarity and certainty. So, when, inevitably, occasions arise which were not foreseen by either the drafter or those instructing him or her, the judge confronted with that situation and aided by the benefit of 20/20 hindsight may tend to blame the drafter.

A contextual view of drafting

Before being tempted to make such criticisms, judges might instead take full account of the context in which legislative drafting is often undertaken. A useful example of that context was provided by Justice Nye Perram, of the Federal Court of Australia, when he recounted an anecdote of Hilary Penfold QC¹⁸ who served as the Commonwealth's First Parliamentary Counsel. According to Perram J:

The point that Hilary Penfold made during her speech was to underscore the sometimes extreme circumstances in which those who draft legislation work. The example she gave, and I may have got the detail wrong because it was seven years ago, but it concerned the circumstances in which the migration zone was altered during the *Tampa* crisis. She related a story that she was at her desk at lunchtime eating a bowl of noodles when she was summoned to the Prime Minister's office to draft a Bill, and told to bring a laptop. She arrived with noodles and laptop, and she was told that what they were going to do was excise part of Australia from the migration zone and she should start drafting, which she did.

Apparently they had the screens up where you could see what was going on in the House, and as she was tapping away on her laptop she saw the Prime Minister rise and announce the introduction of the Bill that she was still typing out on her laptop.¹⁹

Elsewhere, Hilary Penfold QC has observed that 'Bills are always drafted too quickly'.²⁰ This is not a recent phenomenon, as it was back in 1994 that Ms Penfold QC observed that legislative drafting was:

almost always carried out in too much of a hurry. This is partly because of the workloads of individual drafters, and partly because of the political demands to produce legislation quickly after the initial policy decisions have been made.

Last financial year, for instance, 10 drafting teams in my Office produced nearly 230 Bills totalling over 5,000 pages — an average of 23 Bills and 500 pages of drafting per team. The Employment Services Bill 1994, nearly 80 pages of legislation to give effect to some major policy decisions

¹⁸ Now Justice Penfold of the Supreme Court of the Australian Capital Territory.

¹⁹ Nye Perram, 'Comment on Paper by Peter Quiggin' in Neil Williams SC (ed), *Key Issues in Judicial Review* (2014) p 95.

²⁰ Hilary Penfold, 'The Genesis of Laws' ('Courts in a Representative Democracy', National Conference presented by the AIJA, the LCA and the CCF, Canberra, November 1994) p 8.

included in the Government's White Paper on unemployment, was drafted in 3 weeks — because that was the time available between the time when the policy Departments first thought they knew what they wanted and 30 June, when the Parliament rose for winter.

It could be suggested that the number of pages is evidence of failure rather than achievement, and this may be true to some extent. However, even if the drafters had time to write shorter Bills (to paraphrase the old story), they would still have to produce that average of 23 Bills per team, or about one Bill a fortnight.²¹

In this context I note that a number of sessions at previous iterations of this conference and elsewhere have concerned legislative drafters' management of stress, time management, and the maintenance of work life balance.²²

Legal complexity

Of course, this audience would already be well aware that the volume of work and the limited time within which to get it done are not the only challenges you face. It is difficult to overstate the complexity and sophistication of the tasks which you routinely address. The Hon Michael Kirby AC CMG put this well when he described legislative drafting as a 'never-ending challenge', more particularly described in these terms:

Drafting public laws is a special vocation within the profession of the law. It requires particular mental capacities. They include viewing the subject matter of the proposed legislation as a conceptual whole; expressing the proposed rules conformably with the constitution and the instructions of the government or other proponent; grafting the intended new law onto an already large and complex body of statute law; attending to inconsistent statutory provisions needing to be repealed or modified; and doing all this

²¹ Note 20.

²² See for example, Susan Larsen, 'Managing stress - The work/life balance' (Australasian Drafting Conference, 1 - 3 August 2001, Melbourne); Peter Quiggin PSM, 'Statutory Construction: How to Construct, and Construe, a Statute' in Neil Williams SC (ed), *Key Issues in Judicial Review* (2014) p 79; Rachel Spencer, 'Survival of the fit and not so fit - How to think, act and survive as a professional in the modern world' (Australasian Drafting Conference, Adelaide, 3-5 August 2011).

with clarity and brevity, and generally with great speed, essential to accommodate the urgencies of the parliamentary timetable...

It is a most demanding occupation, requiring a special talent, a particular way of thinking about the law, a broad knowledge of legal rules and a lifelong devotion to intricate legal details.²³

Not just a scribe

The literature on legislative drafting often addresses the vexed question of the extent to which the legislative drafter is a mere amanuensis or scribe. In that context, at this conference in 2011, Jeffery Barnes observed:

Far from being a 'mere scribe', the drafter is variously described as a 'problem solver', a 'craftsman in the use of language', a 'legal theoretician', 'an architect of social structures', and an 'ardent democrat ... fired by a sense of the public importance of his function'.²⁴

I will return to the precise role of the legislative drafter when addressing another difficult question - the extent to which a drafter should contribute to the formulation of public policy in the course of the drafting exercise. For present purposes, however, it is sufficient to note the legal complexity of the task of legislative drafting. That complexity has been underscored by Mr Peter Quiggin PSM, First Parliamentary Counsel of the Commonwealth, who recently drew attention to the comparison sometimes made between legislative drafters and computer programmers and pure mathematicians.²⁵ Mr Quiggin is well qualified to comment upon this comparison, as he holds a science degree with majors in both those fields of science.

²³ The Hon Michael Kirby AC CMG, 'The Never-Ending Challenge of Drafting and Interpreting Statutes - A Meditation on the Career of John Finemore QC' 36 *Melbourne University Law Review* (2012) 140, pp 142, 145.

²⁴ Jeffrey Barnes, 'The Drafter as Interpreter: Investigating how Interpretation interacts with Legislative Drafting' (Australasian Drafting Conference, Adelaide, 3-5 August 2011) p 1.

²⁵ Peter Quiggin PSM, 'Statutory Construction: How to Construct, and Construe, a Statute' in Neil Williams SC (ed), *Key Issues in Judicial Review* (2014) p 78.

The complexity of the drafter's task is reinforced by a guide published by the Commonwealth Office of Parliamentary Counsel (OPC) in 2000. Drawing upon that publication, Mr Quiggin described the drafter's responsibility as assisting his or her instructor to arrive at a satisfactory solution which:

- (a) addresses the broad thrust and detail of the instructor's intentions;
- (b) draws on necessary and sufficient powers and is consistent with constitutional and general law;
- (c) does not have undesired legal consequences;
- (d) is legally and practically effective;
- (e) does not conflict with broad government policy, is cognisant of political realities and reflects OPC's responsibility to government as a whole;
- (f) is internally coherent and comprehensive;
- (g) is readily understandable by potential audience(s) and those who administer the law;
- (h) conforms with parliamentary requirements and meets the instructor's and parliamentary time-frames.²⁶

The Ethical Obligations of Legislative Drafters

The preceding attempt to succinctly describe what you already know about the difficulty and importance of legislative drafting provides the context for the primary topic of my address. That is, to endeavour to identify at least some of the ethical obligations which might apply to legislative drafters, having regard to the special place you occupy within the legal profession as a whole. (The presumption inherent in that choice of topic will be evident from my earlier acknowledgement of my lack of experience in this field.)

²⁶ Note 25, p 81.

A dearth of literature

Given the accepted importance of statute law in the contemporary administration of justice, there is a surprisingly limited amount of literature dealing with the extent to which those who draft statutes are subject to ethical obligations in the performance of their important responsibilities. In 2009, Mr John Mark Keyes, Chief Legislative Counsel of the Canadian Department of Justice, observed:

Although there is a small body of writing on the professional responsibilities of legislative counsel, the topic is somewhat neglected, perhaps because it is too often taken for granted that legislative counsel know all there is to know about it and little remains to be said. I believe that nothing could be further from the truth.²⁷

Others in North America have proposed that there should be a specific formulation of the ethical obligations of 'the legislative attorneys'.²⁸ However, the relative scarcity of literature on this subject stands in stark contrast not only to the exponential growth of statute law, but also the literature commenting on that growth.

An exception: the paper by Hodge, Cowan and Hurford

One notable exception in Australia is the paper delivered to this conference in 2008 by legislative drafters Robyn Hodge, Mark Cowan and Richard Hurford.²⁹ They drew upon the working life of a drafter, which I have endeavoured to describe, in order to set the scene for

²⁷ John Mark Keyes, 'Professional Responsibilities of Legislative Counsel' (Conference of the Commonwealth Association of Legislative Counsel, Hong Kong, 1-3 April 2009) pp 2, 3.

²⁸ See for example, Robert J Marchant, 'Representing Representatives: Ethical Considerations for the Legislature's Attorneys' 6 *Legislation and Public Policy* (2003) 439; Deborah MacNair, 'Legislative Drafters: A Discussion of Ethical Standards from a Canadian Perspective' 24 *Statute Law Review* (2003) 125; Deborah MacNair, 'In the Service of the Crown: Are Ethical Obligations Different for Government Counsel?' 84 *La Revue du Barreau Canadien* (2005) 501.

²⁹ Robyn Hodge, Mark Cowan & Richard Hurford, 'Ethical issues for drafters' (Australasian Drafting Conference, 23-25 July 2008, Brisbane).

their consideration of the manner in which ethical issues are commonly addressed by drafters. They observed:

The working life of a drafter is a busy one, driven by the seasonal demands and rhythms of parliamentary sittings and Government priorities and bounded by the latest deadlines. The drafter's task lies at the very end of the law-making process and so is the part of the process least able to be extended and most likely to be affected by the ultimate deadline for the completion of a law-making project. Drafters are always time-poor, hard pressed and focussed on achieving the tasks at hand. They are not as a working group inclined to construct scaffolds (other than drafting ones) around what they do. There is little time for the contemplation of the broader ethical issues involved in working as a drafter. Yet most drafters consider and resolve innumerable ethical questions throughout their working lives, often consciously but mostly unconsciously, in carrying out their work.³⁰

The moral and ethical dimensions of legislative drafting have not escaped attention across the Tasman either. As long ago as 1976, NJ Jamieson, an academic who had previously served as Parliamentary Counsel in New Zealand, observed:

No one is more a law-maker today than the legislative draftsman [sic]. By the scope of his power and his failure to exercise it he is both the hero and the villain of our times. The 'morality that makes law possible' in our expanding universe of legislation is often that alone of the draftsman.³¹

There cannot be any doubt that legislative drafters are subject to ethical obligations. Most, if not all, drafters have been admitted to legal practice and perform a function which is an integral part of the legal profession. The more difficult question involves the identification of the precise content of the ethical obligations to which legislative drafters are subject, having regard to the unique characteristics of their functions and responsibilities, as compared to other legal professionals.

³⁰ Note 29, p 1.

³¹ NJ Jamieson, 'Towards a Systematic Statute Law' 3 *Otago Law Review* (1976) 543, p 547 quoted in Ann Willcox Seidman, Robert B Seidman & Nalin Abeysekere, *Legislative Drafting for Democratic Social Change: A Manual for Drafters* (2001) p 42.

The possible sources of ethical obligations for legislative drafters

An appropriate place to start is the identification of the possible sources of the ethical obligations to which legislative drafters are subject. The primary potential sources would appear to arise from:

- (a) membership of the public service;
- (b) membership of a professional association;
- (c) admission as a lawyer.

Membership of the public service

As Hodge et al observed, the majority of legislative drafters in Australia and New Zealand are public servants.³² As such, legislative drafters will be subject to any statutory ethical standards required of public servants and administrative codes of conduct. Parochially taking my own jurisdiction as an example, legislative drafters are subject to public sector standards, and the codes of ethics and of conduct promulgated in accordance with the *Public Sector Management Act 1994* (WA).

Hodge et al have pointed out that officers of the Parliamentary Counsel's Office of New South Wales are also bound by a code of conduct. They summarised that code in the following terms:

- (a) the duty to provide impartial, accurate and confidential advice and assistance to Government and other clients,
- (b) the duty to implement the policies of the Government of the day promptly, courteously, efficiently and effectively,
- (c) the duty to disclose, and avoid, conflicts between the proper exercise of duties and personal interests, associations and activities,
- (d) the duty to ensure that any private participation in political matters does not conflict with the duty as a public servant to serve the Government and other clients in a politically neutral way,
- (e) the duty not to accept or solicit gifts or benefits in relation to the carrying out of duties,
- (f) the duty to act honestly and with integrity at all times,

³² Note 29, p 3.

- (g) in the case of senior officers, the duty to demonstrate ethical leadership and lead by example,
- (h) the duty not to disclose official information without proper authority or unless required by law.³³

Detailed analysis of the relevant standards, codes of ethics and of conduct applicable to public servants in each of the jurisdictions represented at this conference is well beyond the scope of this paper. It is sufficient to observe that in most, if not all jurisdictions, standards of conduct deal with issues of relevance to all public servants including:

- (a) the maintenance of confidentiality;
- (b) the obligation of fidelity to the entity or organisation by which the public servant is engaged;
- (c) the avoidance of conflict of interest.

Similar issues are addressed through legal professional standards of conduct.³⁴ As Hodge et al have noted, however, these generally applicable public sector codes provide 'little actual guidance as to the ethical practice of law by a drafter, that is, the kinds of rules and obligations that are found in lawyers' professional rules'.³⁵ For present purposes at least, it is sufficient to address these standards in the context of legal practitioners' obligations and I turn to those next.

Membership of legal professional associations

Most, if not all, legal professional associations in Australia and New Zealand have codes of conduct or ethical standards which apply to their members. In many instances those codes or ethical standards

³³ Note 29, p 3. The Code of Conduct (April 2007) is available at: <http://www.pco.nsw.gov.au/corporate/codepco.pdf> (accessed 23 July 2014).

³⁴ See, for example, Susan Campbell & John Lynch, *Regulation of Government Lawyers: Report to the Attorney-General* (2009) pp 15, 16.

³⁵ Note 29, p 3.

enunciate specific standards which correspond generally to those required by the courts to which legal practitioners are admitted. Most have been fashioned by reference to the branches of the profession engaged in general legal practice as either a solicitor, barrister or both. Many of the specific rules and standards of behaviour which have been developed in that context however have no practical application to the work of the legislative drafter. Later in this paper I will endeavour to address those obligations which do apply.

In the result, although legislative drafters are generally part of the legal profession, professional codes do not have specific rules that apply to their conduct.³⁶ In any event drafters are often exempted from these codes.³⁷ This is because professional codes generally apply only to those holding a practising certificate, and in a number of jurisdictions, government lawyers, including legislative drafters, are not required to hold such certificates.³⁸

Admission as a lawyer

The obligation to abide by standards of conduct and behaviour is acquired with the status of an officer of the court upon admission, and the practitioner's subsequent conduct and behaviour is subject to supervision by the court. Movement towards a more unified regulatory structure for the legal profession in Australia will likely consolidate the applicable codes of conduct and ethical standards.

³⁶ The NSW Law Society's *A Guide to Ethical Issues for Government Lawyers* (2nd ed, 2010) goes some way to addressing the 'issues unique to government lawyers', but it also does not provide specific guidance for legislative drafters.

³⁷ Note 29, p 2.

³⁸ I note that in WA, the *Legal Profession Conduct Rules 2012* are issued by a statutory Legal Profession Board and the applicability of the Rules does not depend upon either membership of a legal professional association or holding a practising certificate.

Until that time is reached, detailed analysis of jurisdictional variations is beyond the scope of this paper.

Generally however, legal practitioners have common law obligations to their clients, the court, other practitioners and to the administration of justice more broadly.³⁹ I note that the obligations to clients include addressing the same kinds of issues relevant to public sector officers - of fidelity, confidentiality and the avoidance of conflict of interest referred to earlier - and an additional obligation of competence. I consider those duties which apply to legal practitioners generally next.

The Specific Application of the General Ethical Obligations of Legal Practitioners to Legislative Drafters

The preceding analysis leads to the conclusion that most, if not all, legislative drafters will be subject to ethical obligations arising from more than one source. As noted, however, while generally applicable public sector codes provide 'little actual guidance as to the ethical practice of law by a drafter', many of the specific rules of behaviour applicable to members of the legal profession will have no practical application to those engaged in legislative drafting. In the result few of the existing obligations are fashioned with respect to the particular tasks and responsibilities of a legislative drafter.

In the next section of my paper I will endeavour to address the extent to which those ethical obligations of lawyers, which are cast in more general terms, have practical application to legislative drafters. The ethical obligations which I will consider for that purpose are:

³⁹ Note 34, p 15.

- (a) the duty of fidelity;
- (b) the duty to avoid conflict of interest;
- (c) the duty of competence;
- (d) the duty to maintain confidentiality.

I note that these correspond to a number of the general duties owed by lawyers to their clients.⁴⁰

The duty of fidelity

Legal practitioners owe a general duty of fidelity to the person to whom, or the entity to which, they provide legal services. There is no reason to doubt that legislative drafters who are admitted to law are subject to this duty. What is more contentious, is identifying precisely to whom the duty of fidelity is owed by legislative drafters, or put in more conventional terms, identifying who is the legislative drafters' 'client'. There would seem to be at least three possibilities;

- (a) executive government (as the provider of instructions to the drafter);
- (b) the legislature (as the body to which the legislative draft is to be presented); or
- (c) the public (as the ultimate consumer of the product of the legislative drafter's work).

As will be seen, within each of these alternatives there is room for reasonable differences of opinion with respect to the precise identification of the 'client' to whom the duty is owed.

⁴⁰ See for example, the Hon Michael Kirby, 'Legal Professional Ethics in Times of Change' (1998) 72 *Australian Law Reform Commission Reform Journal* 5, p 5.

Executive Government

The answer most commonly given to the question 'who is the client?' in the limited literature to which I have referred is that the legislative drafter's primary obligation is to executive government, essentially because executive government is the usual source of instructions.⁴¹

The answer does not appear to be dependent upon the degree of structural autonomy of the relevant legislative drafter or drafting office, as to which there are variations within the jurisdictions represented at this conference. For example, since 1920 the Parliamentary Counsel Office of New Zealand has been an office of the Parliament, although it is specified to be under the control of the Attorney General.⁴² In Queensland, from 1992,⁴³ and at the Commonwealth level, from 1970,⁴⁴ parliamentary counsel have been statutory officers. In other jurisdictions, like Western Australia, although styled by reference to Parliament, structurally drafting officers form part of the executive government - often part of the Department of the Attorney General, but sometimes part of the Department of Premier and Cabinet.

However, as a number of commentators have pointed out, a conclusion that a legislative drafter's duty of fidelity is owed to executive government often begs other questions arising from the nature of contemporary executive government, which can be compared to the multi-headed Hydra of Greek mythology.⁴⁵ As those

⁴¹ See for example, Notes 27, 29.

⁴² *Statutes Drafting and Compilation Act 1920* (NZ) s 2(2); the equivalent provision now reads 'The Parliamentary Counsel Office continues as an instrument of the Crown and a separate statutory office under the Attorney-General's control' (*Legislation Act 2012* (NZ), s 58).

⁴³ *Legislative Standards Act 1992* (Qld), s 5.

⁴⁴ *Parliamentary Counsel Act 1970* (Cth), s 2.

⁴⁵ Notes 27, 29.

commentators have pointed out, not uncommonly, different organs of executive government will wish to have input into the process of legislative drafting. Often primary responsibility for the provision of instructions will be conferred upon a team headed by an officer within a central department or other agency of government. However, because it is the minister who will carry the responsibility of introducing the legislation into the Parliament, very often the minister's office will also wish to be engaged, at least to some extent, in the drafting process. What is the obligation of the drafter if different instructions are provided by differing organs of executive government? To me the obvious answer to this question appears to be to point out the differences to the relevant organs of executive government and require them to sort it out amongst themselves. However, what if they will not or cannot do so? I suspect everybody in the audience is better qualified than I to proffer an answer to that interesting question.

Hodge et al point to another complication arising from the primacy of Cabinet in most structures of executive government.⁴⁶ In most jurisdictions, authority to draft an act of Parliament has to come from a decision of the Cabinet. To that extent, the source of the legislative drafter's instructions is the decision of Cabinet, rather than the officers to whom responsibility for implementing that decision is delegated by the relevant minister. According to this analysis, the drafter has an obligation to stay within the confines of the instructions provided by the relevant Cabinet decision unless and until that authority is extended by a subsequent Cabinet decision. But if the legislative drafter's primary responsibility is to Cabinet, there is great potential

⁴⁶ Note 29, pp 6-8.

for tension between the drafter and the officers providing drafting instructions. This will particularly be the case if and when the drafter forms the view that those instructions go beyond the scope of the relevant Cabinet decision. Hodge et al describe the role of the legislative drafter in such a scenario as a kind of gate-keeper.⁴⁷ I would also be interested in the views of the audience as to how issues of this kind are usually resolved.

The Legislature

It is difficult, if not impossible, to assimilate the relationship between a legislative drafter and the legislature with the relationship between client and lawyer for a number of reasons. Not least is the fact that the legislature, as an entity, speaks with one voice only through its resolutions, most commonly a resolution to pass proposed legislation. It is therefore difficult to see how the legislature as an entity could be conceived as providing instructions to the legislative drafter. Rather, those instructions are provided by the member or members responsible for the introduction of the legislation into the legislature. In some cases those members could readily be construed as the client of the legislative drafter - being the responsible minister, in the case of government legislation, or a particular member, in the case of a private member's bill prepared with the assistance of parliamentary counsel.

However, the inability to classify the legislature as a 'client' does not necessarily mean that no obligations are owed to the legislature by parliamentary counsel. Professor Roger Purdy has suggested that

⁴⁷ Note 29, pp 7, 8.

legislative drafters owe a general obligation of fidelity to the legislature to whom their work is to be presented.⁴⁸

Later in this paper I consider whether specific ethical obligations arise from the particular characteristics which attend legislative drafting; possible obligations such as to ensure that draft legislation is within the legislature's power, is drawn in such a way as to not erode fundamental principles of law, or so that its legal effect is not obscured. In my view, if such obligations exist, it is appropriate to conclude that these are owed to the legislature as a whole, and arise from the general relationship between the function of a legislative drafter, and the function of the legislature.

The Public

Again, although it is difficult to see any meaningful way in which the public could be considered to be the 'client' of a legislative drafter, a legislative drafter might still owe obligations to the public, or at least to some section of the public. A broader view of that obligation could derive from the nature of democratic government 'of the people, by the people, for the people'. On this view, executive government, and the legislature, are each a means to an end, the end being a system of responsible government.⁴⁹ On this broader view, the various government organs and officials, including the legislative drafter who produces legislation for the legislature's consideration, all work towards the ultimate purpose of serving, and as a result owe obligations to, the community which is to be subject to that legislation.

⁴⁸ Roger Purdy, 'Professional Responsibility for Legislative Drafters: Suggested Guidelines and Discussion of Ethics and Role Problems' 11 (1987) *Seton Hall Legislative Journal* 67.

⁴⁹ In this context 'responsible' is used in the democratic sense - that is, government which is responsible to the people governed.

A narrower view which sits more comfortably with conventional analysis is also open. As Professor Purdy points out, it is quite common for legislative drafters to provide an analysis of legislation,⁵⁰ perhaps in the form of what we would refer to as an explanatory memorandum, or through reviewing and settling a Second Reading speech describing the effect of the legislation. It can be reasonably expected that these materials will be relied upon by members of the public and others, especially given their admissibility as an extrinsic aid to the interpretation of the legislation pursuant to provisions such as s 15AB of the *Acts Interpretation Act 1901* (Cth). In these circumstances it is consistent with general principle to conclude that the legislative drafter might owe an obligation, at least ethical and perhaps even legal, to any member of the public who might reasonably rely upon the accuracy of representations made in those documents with respect to the effect of the legislation. Although probably not enforceable in the same way, this obligation would be similar to the obligations owed by publishers of a prospectus to members of the public who might rely on upon statements made in the prospectus when deciding to acquire shares.

This analysis suggests that in the case of legislative drafters, the identification of the person or entity to whom ethical obligations of 'fidelity' might be owed is significantly more complex than is the case with other branches of the legal profession, where the identification of the 'client' and, where relevant, the court, to which the obligations are owed, is usually straightforward. It seems to me that this is a topic which merits further detailed consideration and analysis.

⁵⁰ Note 48, p 81.

The duty to avoid conflict of interest

Legal professionals engaged in the provision of legal services to private clients owe a duty to avoid a circumstance of conflict of interest. Those circumstances are often characterised as falling within one of three categories:

- (a) a conflict arising from a duty owed by the practitioner to another client;
- (b) a conflict arising from a duty (such as the duty of confidence) owed by the practitioner to a former client;
- (c) a conflict arising from the practitioner's personal interests.

There is no reason to suppose that legislative drafters would not be subject to the same ethical obligation, although in practice it is difficult to see how conflicts of interest arising from duties to other clients would often, if ever, arise.⁵¹ However, there is a real prospect that occasions may arise in which a legislative drafter has personal interests that are in conflict, or at least in potential conflict, with the obligation to produce a draft which will give effect to the instructions given.

In this area it is necessary to separate out those interests which legislative drafters have in common with all members of the community, or perhaps with large sectors of the community, such as the sector of the community which pays income tax. Of course, it could not seriously be suggested that a drafter engaged in the preparation of amendments to the *Income Tax Assessment Act* has a

⁵¹ Except perhaps in a circumstance in which there have been confidential dealings with members of the previous government, or different entities within the current government.

conflict of interest because the effect of those amendments will be to increase or reduce his or her liability to pay income tax.

At the other end of the spectrum, however, there will be cases in which the legislative instrument to be prepared has an impact upon a legislative drafter's financial interests in a manner which is specific to that person. An example would be if instructions are for an amendment to a town planning scheme to rezone land owned by the legislative drafter from rural to urban use. In that circumstance, it would seem to me to be clear that the drafter's personal interest in the subject matter of the legislation would preclude his or her participation in the drafting exercise.

It is the circumstances which lie in between these two extremes which are likely to give rise to the greatest difficulty. So, if the proposed legislation would have an impact upon a relatively small group, of which the drafter was a member, nice questions might arise as to whether there is an actual or apparent conflict between the drafter's personal interests and the obligation to faithfully prepare legislation in accordance with instructions. This is an area in which questions of fact and degree will often be significant. It is also a topic upon which I would be interested in the views of conference participants.

There will also no doubt be occasions when legislative drafters are instructed to prepare legislation with which they disagree. If that disagreement is manifest from the drafter's participation in a particular group or organisation opposed to the policy reflected in the proposed legislation, there would be a conflict of interest such that it would be unwise for the drafter to act. I expect most prudent legislative drafters

would avoid engagement with such groups or organisations for this reason.

But in the absence of any outward manifestation of a personal view, personal opposition to the policy underpinning the legislation should not, in the ordinary course, prevent the drafter from acting any more than opposition to murder prevents legal practitioners from representing those who have confessed their guilt to that crime. However, different considerations might apply if the drafter formed the view that his or her antagonism towards the legislative policy might interfere with their capacity to faithfully implement the instructions to the best of their ability. If that point was reached, it would seem preferable for the drafter to decline to act.

The duty of competence

All legal practitioners are under a duty to provide legal services with an appropriate standard of competence and diligence. There is no reason to suppose that legislative drafters are not subject to a similar obligation. Of course this does not mean that a drafter has to be an expert in the area of law to which the legislation relates. What it does require, however, is that the drafter acquire sufficient knowledge of that area of law to competently and diligently implement the instructions given. No doubt a standard part of drafting practice is acquiring knowledge of the legal context in which the proposed legislation is to operate.

The duty to maintain confidentiality

Legal practitioners are under a general duty to maintain confidentiality with respect to information provided to them in the performance of

their obligations. Again, there is no reason to suppose that legislative drafters are not subject to a similar obligation. However, in the case of legislative drafters this obligation may have some nuances.

The first possible area of nuance relates to the question of privilege. In the case of legislative drafters, two potential sources of privilege may arise - legal professional privilege and public interest immunity privilege. It seems likely that both privileges would often apply to communications undertaken in the course of the drafting process. Legal professional privilege applies to communications undertaken for the dominant purpose of obtaining or providing legal advice. The preparation of documents which are the product of legal training and expertise constitute the provision of advice for this purpose.⁵² Similarly, it is well established that public interest immunity privilege will generally apply to information relating to the workings of cabinet and, arguably by extension, to communications which are the consequence of cabinet decisions, or reflect their terms, such as those providing instructions with respect to draft legislation. However as Hodge et al identified, maintaining confidentiality in the context of 'the drafter's many-headed Government client' is not straightforward.⁵³

Another potential area of nuance in relation to the duty of confidentiality owed by a legislative drafter arises from the Freedom of Information (FOI) legislation which is to be found in all jurisdictions. However, although I have not undertaken a detailed analysis of the relevant legislation in all jurisdictions participating in this conference, it seems highly likely that in each jurisdiction there would be categories of exemption from the operation of the FOI

⁵² *Dalleagles Pty Ltd v The Australian Securities Commission* (1991) 4 WAR 325.

⁵³ Note 29, pp 4, 5.

legislation which would exempt documents produced in the course of preparing draft legislation from the right of access created by the legislation.

Ethical Issues Specifically Applicable to Legislative Drafters

Up to this point I have been endeavouring to identify the ethical obligations which might apply to legislative drafters by examining general obligations applicable to all legal practitioners. I now turn to the obverse side of that coin and endeavour to assess particular ethical obligations which might arise from the peculiar characteristics of the roles and responsibilities of legislative drafters.

Possible obligations with respect to policy

As noted, a question commonly addressed in the limited literature in this area concerns the extent to which legislative drafters can be considered to be mere scribes, responsible only for the conversion of policy dictated by others into legislative form, entirely lacking any responsibility to advise or comment upon that policy or its implementation. The narrow or amanuensis view of the role of the legislative drafter was neatly exemplified when Mr David Noble, Chief Parliamentary Counsel of New Zealand, during the 2011 conference, referred to a parallel drawn between the work of a legislative drafter and the life and work of the introverted, eccentric and obscure mid-nineteenth century American poet, Emily Dickinson, who worked largely in splendid isolation and whose contribution remained unrecognised until after her death.⁵⁴ Ms Dickinson was

⁵⁴ David Noble, 'Drafting in the 21st Century - How the Role has Developed and Where it is Now' (Australasian Drafting Conference, Adelaide, 3-5 August 2011) p 1.

noted for her reluctance to greet guests or, later in life, to even leave her room, and most of her communication with the outside world was undertaken in the form of correspondence.

I expect many of you will also be familiar with the suggestion that the legislative drafter should have the qualities of both an 'intellectual eunuch' and an 'emotional oyster', neither of which appear to me to be particularly attractive metaphors. They are each to be found in the writings of Reed Dickerson, who came to be known as the 'dean of American legislative drafting'.⁵⁵ In 1955 he wrote:

Although the draftsman [sic] is not himself a policy maker, he can help educate the client so that the client can make informed decisions. In doing this the draftsman must avoid two extremes. On the one hand, he must avoid being a mere legal stenographer or short order cook. On the other, he must not be an officious meddler in policy. Mr Beaman, [Legislative Counsel of the US House of Representatives], once remarked that the legislative draftsman must be an 'intellectual eunuch'. I would like to add that he must also be an emotional oyster. However deeply he may feel about the wisdom of the policy he is called on to express, he must submerge his own feelings and act with scrupulous objectivity. He will do his utmost to carry out his client's purpose even when he strongly disagrees with it.⁵⁶

So, where is the balance to be struck between legal stenographer or short order cook at one end of the spectrum, and officious meddler in policy at the other end? The enunciation of the appropriate balance between these two extremes is difficult. However, it has been very neatly put by Hodge et al in their 2008 paper and it would be presumptuous of me to attempt to improve upon their description of the way in which this balance is often struck in practice:

A drafter is not an 'intellectual eunuch' or an 'emotional oyster' as some commentators have suggested. He or she brings to the drafting process life

⁵⁵ Gary D Spivey, 'F Reed Dickerson: The Persistent Crusader' 6 *Scribes Journal of Legal Writing* (1996-7)149, p 149.

⁵⁶ Reed Dickerson, 'How to Write a Law' 31 *Notre Dame Law Review* (1955) 14, p 16.

experience, opinions and values that shape his or her approach to particular issues and that influence the questions asked by the drafter about particular matters. As Daniel Marcello says 'drafting decisions are often influenced consciously or subconsciously by the advocacy agenda of the individual drafter'. Drafters should be aware of this when making decisions about the policy or intent of proposed legislation.⁵⁷

David A Marcello, referred to by Hodge et al, is one of the Northern American commentators who have referred to the ethical dimension of the legislative drafter's role in implementing public policy. Marcello has also observed:

the relationship between drafter and text [is] the furthest thing from a technical, value-neutral enterprise. [My] thesis is that legislative drafting is inherently political, that it inescapably demands policy choices by drafters, and that no legislative drafter can fully escape the ethical and political implications of the task.⁵⁸

Marcello expressed concern that failing to appreciate that legislative drafters exercise personal judgment in the performance of their duties rendered the process vulnerable to influence from a source which was not appreciated or recognised. In his view, the legislative drafter was far from being 'the stereotypical scribe' and there were many points at which the legislative drafter's personal and political views might influence the drafting process.⁵⁹

In his analysis of the competing views relating to the involvement of legislative drafters in the formulation of public policy, Professor Purdy has also drawn attention to the ethical dimensions of this issue. He observed:

Denying involvement in, or responsibility for, the laws drafted serves to make the drafter's job easier, and perhaps more secure. A drafter who avoids involvement in decisions on the merits, or who avoids judgment on bills he or she is requested to draft may avoid potentially awkward conflicts with legislators, and may avoid difficult decisions regarding the

⁵⁷ Note 29, p 6.

⁵⁸ David A Marcello, 'The Ethics and Politics of Legislative Drafting' 70 *Tulane Law Review* (1996) 2437, p 2439.

⁵⁹ Note 58, pp 2463, 2464.

substantive or ethical merits of bills presented. As with lawyers, for whom the role of 'technician' divorced from the merits of their client's claims provides 'an expedient escape from contexts of ethical complexity', so too, do many drafters desire to shun responsibility and difficult decision-making.⁶⁰

The so-called 'Nuremberg defence' to the effect that 'I was only following orders' did not work for those tried at Nuremberg, nor has it worked to exonerate lawyers caught in the spotlight of recent controversy, at least in the public realm. Lawyers have been robustly criticised for their role in the removal of assets from James Hardie which might have been available to satisfy claims from persons suffering from asbestos-induced disease, the defence of claims brought against big tobacco companies, and in aggressively representing institutions in which alleged sexual abuse of children took place. The interesting question which is raised by the criticisms is whether there is a point at which the lawyers should have refused to accept those instructions on the basis of a broader ethical and moral obligation to serve the public interest? And if there is such a point (which I think is not yet clear), would there, by analogy, be a point at which legislative drafters would be justified in refusing to act upon instructions on the basis of a similar broad ethical and moral obligation?

It is tempting to conclude that there is no point at which a legislative drafter would be justified in refusing to act on such a basis because ultimate responsibility for the legislation rests with other organs of government who can be assumed to represent the will of the people. However, the German judges who subordinated their responsibilities to the will of the government during the Nazi era justified their

⁶⁰ Note 48, p 96.

conduct on the basis that the government represented the will of the people at a time of national crisis. Leaving to one side for the moment constitutional issues arising from the *Racial Discrimination Act 1975* of the Commonwealth, what would be the appropriate response of the legislative drafter to a proposal to re-enact legislation along the lines of the infamous *Aborigines Act 1905* (WA) which created a form of apartheid in Western Australia and which made a State official the legal guardian of 'every Aboriginal and half-caste child' under the age of 16 years? What would be the appropriate response of a drafter asked to implement a government proposal to reintroduce the death penalty, and apply it to the wide range of offences to which the death penalty applied in the 18th and 19th centuries?

Perhaps the answer is not so easy after all - perhaps there is a point at which the drafter should refuse to act on the basis of a broader ethical and moral obligation to serve the public interest. But if so, how do we identify when that point has been reached? Or is the question best approached from the perspective of conflict of interest - such that a drafter is justified in declining instructions on the basis that their personal opposition to the proposed legislation is so strong that he or she cannot be confident of faithfully fulfilling the instructions given?

I now turn to some less fraught scenarios, before addressing the perplexing issue of whether legislative drafters have a broader ethical and moral obligation to serve the public interest that overrides their instructions.

A possible duty to ensure draft legislation is within power

In Australia, the legislative powers of the State and Commonwealth legislatures are each constrained by the constitution of the Commonwealth and the relevant State constitution. The legislative powers of the Territory parliaments are constrained by the legislation creating them. In such a context, there seems to me to be a cogent argument that legislative drafters are obliged to draft legislation such that it falls within the legislative competence of the relevant legislature. In the absence of such a duty, legislative drafters could be said to be complicit in the usurpation of powers which lie with another polity within the federation.

Commonly, however, the precise extent of the legislature's power to enact the draft legislation will be uncertain. In such a circumstance, it seems to me that, provided the legislative drafter clearly and unequivocally advises that there is a doubt as to the constitutional competence of the legislation, there is no ethical impediment to the drafting of the legislation. Were it otherwise, legislative drafters would be expected to usurp the role of the courts in determining the precise boundaries of the legislative powers conferred upon the various polities which together comprise the federation.⁶¹

Similar considerations arise with respect to drafting delegated legislation. If the proposed legislation would plainly be beyond the scope of the power delegated, it seems to me to be relatively clear that the legislative drafter would be obliged to decline instructions to prepare the legislative instrument, lest he or she be seen as complicit in an unlawful act. On the other hand, if there is genuine doubt or

⁶¹ Note 48, p 103.

uncertainty about whether or not the instrument falls within the power delegated, provided the legislative drafter draws the doubt or uncertainty to the attention of those providing instructions, there does not appear to me to be any ethical impediment to acting upon those instructions. The ultimate responsibility for deciding whether or not delegated legislation is beyond the power delegated rests with the courts.

A possible obligation to ensure that the legislation is within the authority provided

I have referred above to the role which Hodge et al describe as the 'gate-keeper role', of ensuring that any legislation drafted is within the scope of the authority provided by the relevant Cabinet decision or decisions. There seems to me much to be said for the recognition of this obligation. As with the possible obligations considered immediately above, in a case in which it is clear that those providing instructions are exceeding the authority given by Cabinet, it seems to me that the appropriate response would be to either refuse to act upon the instructions until the authority of Cabinet was obtained, or to only act upon the instructions on the express condition that Cabinet authority is subsequently obtained. However, I suspect that more often the precise extent of the authority conferred by a Cabinet decision will be unclear, in which case it seems to me that the drafter's responsibility is adequately discharged by drawing the attention of those who provide instructions to the issue.

Obligations in jurisdictions with legislative requirements as to human rights and other related principles

Some of the jurisdictions represented at this conference have charters of human rights, which identify specific human rights which are said to guide (but not limit) future legislative action. In Victoria, legislative drafters check all draft legislation for possible incompatibility with charter rights under the *Charter of Human Rights and Responsibilities Act 2006* (Vic).⁶² This appears to be undertaken to assist those introducing bills or subordinate legislation into Parliament to fulfil their legislative obligation to table a statement identifying the extent of the bill's compatibility with human rights.⁶³ In any event, it would seem to me to be clearly incumbent upon legislative drafters to provide advice with respect to possible incompatibility if and when it arises in those jurisdictions with such charters.

As Hodge et al also point out,⁶⁴ in Queensland the *Legislative Standards Act 1992* sets out 'fundamental legislative principles' which are defined as 'the principles relating to legislation that underlie a parliamentary democracy based on the rule of law'.⁶⁵ That legislation would appear to impose obligations analogous to the charters of human rights upon the legislative drafters of Queensland,⁶⁶ and raises the broader issue of possible obligations with respect to fundamental principles of law, which I address next.

⁶² Note 29, p 2.

⁶³ *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 28; *Subordinate Legislation Act 1994* (Vic), s 12A.

⁶⁴ Note 29, pp 1, 2.

⁶⁵ *Legislative Standards Act 1992* (Qld), s 4(1).

⁶⁶ *Legislative Standards Act 1992* (Qld), ss 7(g)(ii), 7(h)(ii).

Possible obligations with respect to fundamental principles of law or public policy

I have already touched upon the vexed question of whether there is a point at which a legislative drafter is justified in refusing to act because he or she considers that the proposed legislation would contravene basic or fundamental principles of morality. The answer to extreme cases, such as those which arose during the Nazi era, appear easier than the more likely contemporary instances in which a drafter might consider that the instructions provided are immoral. Professor Purdy has proposed that in such circumstances, the legislative drafter is subject to an ethical obligation which would arguably put the drafter in the category of the 'officious meddler in policy' to which Dickerson referred. Purdy suggested:

The drafter faces a more difficult situation where he or she concludes that that a requested bill would be immoral, irresponsible, or extremely undesirable for some other reason. For example, the legislator could suggest a bill that might very well withstand a constitutional challenge, but would still encourage obnoxious racial or gender discrimination, working an unequal hardship on some unprotected group, detract from the integrity of the legal system, conflict with the drafter's personal ethics, or transgress some more widely held sociable mores. In such a case, the drafter may have some affirmative duty to seek a change in the bill. If that fails, the drafter may take further action to help prevent passage of the law. ... it may be appropriate, if negotiation fails, for the drafter to take stronger measures. While the drafter should not simply substitute his or her judgment for that of the legislator, greater duties as a drafter, or even as a citizen, legitimise some steps which may be taken to avoid bad law. One possibility may be to make public statements which disclose the drafter's disagreement, or the drafter may simply expose the problems in a more neutral way.⁶⁷

With respect, this seems to me to go rather too far. While I would be very interested in the views of conference participants on this subject, it seems to me that action of the kind proposed by Purdy would only be justified on moral grounds in the most extreme circumstances.

⁶⁷ Note 48, pp 101, 102.

However, I think it is strongly arguable that different considerations apply if the effect of the legislation would be to either exclude or diminish fundamental principles recognised at common law, as compared to legislation which is 'immoral, irresponsible or extremely undesirable'. That is because of the well accepted principle of statutory construction to the effect that legislation will be construed so as to conform to fundamental principles of common law in the absence of clear and unequivocal language to contrary effect. Accordingly, where legislation would depart from fundamental principles of common law, it seems to me to be incumbent upon the legislative drafter to draw attention to this aspect of the legislation, and to this principle of construction, not only in his or her dealings with those instructing him or her but also, in any extrinsic materials provided to the legislature relating to the legislation. The latter obligation conforms to the admissibility of those materials as an aid to the interpretation of the legislation and would enable the court to conclude that the legislature's attention was specifically drawn to the effect which the legislation would have upon fundamental common law principles. This would enhance the prospect of the court adopting the construction intended by the legislature. Whether one looks upon this as an ethical obligation arising from the fundamental principles of the common law, or as a professional obligation arising from the need to ensure that the legislation has the intended effect, does not appear to me to matter much.

A possible obligation to 'truth in drafting'

There are techniques which can be used to obscure the legal effect of words used. The development of special legal meanings which are

applied to particular words and phrases by trade custom and usage is a technique well known in the area of mercantile insurance contracts, and there are other ways in which the legal consequences of particular terminology can be obscured. Sometimes this effect can be achieved without being intended - perhaps through the use of overly complex terminology.

It seems to me to be cogently arguable that legislative drafters have an obligation to prepare legislation in such a way that its legal effects and consequences are clear and apparent. Arguably that obligation has two sources. First, draft legislation is prepared for the purpose of consideration by the legislature. Implicit in that purpose is the requirement that the effect of the legislation be apparent to the legislature at the time of its consideration. The second source of the obligation arises from the fact that the legislation, if enacted, creates legally enforceable rights and obligations. That consequence carries with it the implicit requirement that the effect of the legislation be apparent to those whose rights and obligations are affected by it.

On occasion the complexity of the legal task involved necessitates the use of complex language. If there is an appreciable risk that the effect of the legislative provision may be obscured by the language used, a corollary of the arguable obligation to which I have referred would require the drafter to ensure that the extrinsic materials accompanying the legislation explain its effect in clear and comprehensible terms.

Another corollary is that it would plainly be improper for a drafter to accept instructions to deliberately obscure the legal effect of the proposed legislation - but hopefully that goes without saying.

Going further?

Some commentators would go further. Professor Paul Delnoy, of Belgium, contends that statute law must guarantee what he describes as 'legal security' for citizens, and that one of the tasks imposed upon the legislative drafter might be to inform the legislature with respect to the extent to which proposed legislation conforms to what he terms 'legal security', namely, that:

- (a) the precise temporal applicability of the laws be known (that is, the laws have no retro-active norms);
- (b) there be no loss of legitimate expectations for citizens;
- (c) legislative processes are timely, enabling citizens time to adjust to reforms and without unduly frequent amendments; and
- (d) legislation is effected so as not to undermine the confidence of the citizens in the law, and is not based on what he terms 'legislative inflation', or over-regulation.⁶⁸

With respect, it seems to me that imposing an obligation upon the legislative drafter to produce an evaluative 'score card' of this kind with respect to the legislation drafted goes too far (at least in the absence of legislative requirements to do so). I have already suggested that it is at least arguable that drafters have an obligation to draw attention to:

- any doubts with respect to constitutional or legislative power;
- any possible incompatibility with human rights or fundamental legislative principles specified in those jurisdictions which have such legislation;

⁶⁸ 'The Role of Legislative Drafters in Determining the Content of Norms', available at: Department of Justice Canada website, www.justice.gc.ca/eng/abt-apd/icg-gci/norm/norm.pdf (accessed 7 July 2014). Originally published as Paul Delnoy 'The role of legisitics and legists in the determination of the norm content' in Ulrich Karpen & Paul Delnoy (eds), *Contributions to the methodology of the creation of written law: proceedings of the first Congress of the EAL in Liège (Belgium), September 9-11, 1993* (1996).

- any inconsistency with fundamental principles of the common law; and
- any legal effect or consequence which might not be apparent on the face of the legislation.

This appears to me to go far enough, and perhaps, some would argue, too far.

Summary and Conclusion

Contemporary acknowledgement of the importance and impact of statute law attests to the importance and impact of the work of legislative drafters. In that context it is perhaps a little surprising that greater attention has not been given to the precise ambit of the ethical obligations to which drafters are subject. In this paper I have endeavoured to address that important issue from two perspectives - the first being the practical application to drafters of general ethical obligations applicable to all legal practitioners, and the second being the obligations which arguably arise from the particular characteristics of the work undertaken by legislative drafters.

Having commenced with a disclaimer, it is necessary for me to conclude with two caveats. First, given my acknowledged lack of experience in this field, I have not attempted in this paper to suggest or prescribe an exhaustive code of ethical standards and obligations applicable to legislative drafters. My purpose has been much less ambitious - being simply to stimulate thought and debate in what appears to me to be an important area. I have no doubt that conference participants can readily identify important ethical issues pertinent to their work which I have not addressed.

The second caveat is that this paper should not be taken to suggest that there is any want of ethical standards amongst the legislative drafters of Australia, New Zealand, Singapore and Hong Kong. To the contrary, I am firmly of the view that our countries have been very well served by professional drafters of undoubted integrity and exceptional legal capacity over many years. But one of the vital distinctions between a profession and other forms of endeavour is the common bond of ethical obligation shared by members of a profession. That notion only has utility or meaning if the members of the profession know what their shared ethical obligations are. For that reason, discussion amongst legislative drafters aimed at identifying the content of the particular ethical and professional obligations to which they are subject must have a virtue of its own. I hope this paper has the effect of stimulating such a discussion.