LEGISLATING IN LANGUAGE – RECENT DEVELOPMENTS AND INTERPRETATIVE ISSUES ARISING FROM PARLIAMENTARY DEBATE AND LEGISLATION IN INDIGENOUS LANGUAGES

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We would like to start by thanking the Arrernte people for their thousands of years of ongoing care for the country on which we meet. We want to acknowledge their elders past, present and emerging.

There are signs that Australia is beginning a long-overdue process of incorporating Indigenous languages first, into its parliamentary debates and, ultimately, its legislation. This is a welcome development, but to date it has received insufficient scholarly and public attention. In order to further advance this project of legislating in language it is necessary to start thinking about some practical and theoretical issues that are raised by multi-lingual legislation and parliamentary debate. This paper will begin to unpack some of these issues. First, we will conduct a brief review of the past and present state of Indigenous languages in the Australian lawmaking process. Then, the paper will look abroad to how other countries – particularly Canada and South Africa – facilitate parliamentary debate and legislation in multiple languages. The experience of these countries will inform a discussion of two interpretative questions likely to arise when Australia commences legislating in Indigenous languages. Finally, the paper will propose means by which Australian parliamentary institutions might begin to more comprehensively incorporate Indigenous languages into their debates and legislation.

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[1] This is a lightly referenced version of the paper delivered at the third "Language and the Law III" conference held at the Alice Springs Supreme Court, Northern Territory, on 5, 6 and 7 April 2019. The authors are working on a longer version of this paper for future publication.

I. THE GREAT AUSTRALIAN SILENCE, AND ITS END

Pioneering anthropologist W. E. H. Stanner coined the term "great Australian silence" to describe Australia's collective quiet concerning its First Peoples. The same descriptor might well be applied to recognition of Indigenous languages in Australia's houses of parliament and its written laws. Since European arrival in Australia, the process and publication of the country's laws has been conducted in English only, despite the hundreds of other languages spoken within our borders. Thankfully, this great Australian silence appears to be coming to an end, as various Australian legal institutions are finally acceding to the demands of Indigenous (and non-Indigenous) people to speak and legislate in Australia's first languages.[2]

The first recorded usage of an Indigenous language in an Australian parliament was in the Northern Territory in 1981 when Neil Bell addressed the Legislative Assembly in Pitjantjatjara. Similarly, the first usage of an Indigenous language in the federal Senate was when Northern Territorian Senator Trish Crossin spoke in Gumatj in 1998. Malcolm Turnbull was the first Prime Minister to speak the Ngunnawal language during his Closing the Gap address in the House of Representatives on 10 February 2016. More recently, a number of federal, state and territory houses of parliament have had members and guests use Indigenous languages on as varied topics as environmental protection, treaty and land rights. In 2017, Victoria passed the first Australian statute incorporating Indigenous words in its title and preamble: *Yarra River*

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[2] Many of the examples in the following paragraph are drawn from Jacqueline Battin, "Indigenous Languages in Australian Parliaments" *AIATSIS* (21 May 2018, updated 4 July 2018) <https://aiatsis.gov.au/news-and-events/blog/indigenous-languages-australian-parliaments> (5 December 2018).

Protection (Wilip-gin Birrarung murron) Act 2017 (Vic). It seems fair to say that Indigenous languages are increasingly entering the lexicon of Australian public law. However, we still have a long way to go.

II. Looking Abroad

Many jurisdictions around the world legislate bilingually, or multi-lingually. These include Hong Kong, Ireland, New Zealand, Tanzania, Wales as well as the American states of New Mexico and Louisiana. In this paper, we consider how Canada and South Africa have interpreted and applied multi-lingual legislation. Canada has been chosen as a comparator because, while it does not legislate in Indigenous languages, its has perhaps the most mature literature on bilingual legislation. South Africa has been chosen because it provides a recent example of a country moving to legislate in Indigenous languages. Furthermore, both countries operate as Westminster democracies with common law legal systems and, as such, it is hoped that the lessons learned in these places might be readily applied in the Australian context.

A. Canada

First, parliamentary debate. Parliamentary debate in many parts of Canada has, for centuries, been conducted bilingually, in French and English. When Canada first became a Confederation in 1867 it passed a constitutional clause explicitly allowing for parliamentary debate to be in both English and French.[3]

[3] *British North American Act 1867* (Canada), s 133.

Secondly, legislation. Canada legislates bilingually (in English and French) at a federal level, and also in a number of provinces.[4] How has such legislation been drafted? Historically, the approach in Canada was to first draft legislation in English and then translate it into French. This posed some problems. As we have learned over the course of this conference, interpretation (and translation) depends not just on an understanding of the text, but also of the context. Unfortunately, legislative translators in Canada appear to have had to operate for many years without sufficient contextual information about a particular draft bill, with the result that meaning was not always clearly conveyed in the translation.[5]

This *sequential* approach to drafting bilingual legislation was discarded in the late 20th century in favour of a *simultaneous* approach. The new approach is know as "co-drafting". During the co-drafting process, the English language drafter and the French language drafter will have access to all of the same information and will attend all of the same meetings during the development of the bill.[6] The result, it appears, is more consistent and faithful dual language statutes.

B. South Africa

There are 11 official languages in South Africa,[7] with 9 of them being Indigenous. Pursuant to the South African Constitution, national and provincial governments may use any official language for the purpose of government, taking into account, among

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[4] André Labelle, "What Ever Happened to Legislative Translation in Canada?" (2016) 37 *Statute Law Review* 133, 133.
[5] André Labelle, "What Ever Happened to Legislative Translation in Canada?" (2016) 37 *Statute Law Review* 133, 135.
[6] André Labelle, "What Ever Happened to Legislative Translation in Canada?" (2016) 37 *Statute Law Review* 133, 136.
[7] *Constitution of the Republic of South Africa*, s 6(1).

other things, the practicality of such and the balance of the needs and preferences of the relevant population. However, each government must use at least two official languages. All official languages must “enjoy parity of esteem and be treated equitably”.[8]

A Bill in the South African Parliament must be submitted in English and at least one other official language and all versions are considered by the Parliament, although the State Law Advisor need only certify the English version. It appears that a practice developed whereby Bills are published in English and an Indigenous African language rather than Afrikaans, even though more people speak Afrikaans than English as their first language in South Africa.[9] Legislative texts are signed in turn in the different languages in which they were adopted and different language versions may be used as an interpretative tool to clarify the meaning of the text. However, in the case of irreconcilable conflict, the first signed copy prevails.[10] This is distinct to the case of the Constitution itself, whereby the English language version prevails to the extent of any inconsistency.[11]

III. Interpretative Issues

The interpretation of bilingual legislation raises many novel questions. Here we discuss only two:

1. do we treat different language versions of a law as equally binding?; and

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[8] *Constitutional of the Republic of South Africa*, s 6(4).
[9] Max Loubser, “Linguistic Factors into the Mix: The South African Experience of Language and the Law” (2003) 78 *Tulane Law Review* 105, 126.
[10] Bernard Bekink and Christo Botha, “Aspects of Legislative Drafting: Some South African Realities (or Plain Language Is Not Always Plain Sailing)” (2007) 28 *Statute Law Review* 34, 55.
[11] *Constitution of the Republic of South Africa*, s 240.

2. what do we do when the different language versions of a law have inconsistent meanings?

The answers we propose to these questions are, respectively, the equal authenticity rule and the shared meaning rule.

A. Do we treat different language versions of a law as equally binding?

Generally speaking, there are three possible approaches to the authoritativeness of different language versions of legislation:

1. A rule of linguistic priority - requiring that where there is any inconsistency between two different language versions of a statute, one version will prevail.[12]
2. A rule of temporal priority – requiring that where there is any inconsistency between two different language versions of a statute, the first version signed into law will prevail.[13]
3. The equal authenticity rule – requiring that each different language version of a law have equal authority and be given equal weight.

We prefer the last of these rules, if for no more than the symbolic significance that this rule has had in Canada. As Donald Revell explains of the Canadian experience:

> "It would be possible to make one version prevail over the other. However, this would be unacceptable to the cultural group whose language was given inferior status. It would also not be true bilingualism as the version in the

[12] See, e.g., *An Act Respecting the Interpretation of the Laws of the Province, Statutes of Quebec,* 1937, ch. 13. (repealed 1938).

[13] Bernard Bekink and Christo Botha, "Aspects of Legislative Drafting: Some South African Realities (or Plain Language Is Not Always Plain Sailing)" (2007) 28 *Statute Law Review* 34, 55.

> second language would exist only as a reference document rather than an official one."[14]

However, notwithstanding widespread theoretical support for the equal authenticity rule in Canada, prominent commentators have suggested that the rule is largely ignored in practice.[15] In reality, it seems, people interpreting bilingual laws (including law professors, students, judges, lawyers and citizens) simply refer to the law in the language in which they are most comfortable. One reason this occurs is that where much of the contextual information about a particular law is in one language, lawyers and judges will tend to prefer the version of the law drafted in that language. Pierre André Côté explains:

> "Even when both versions have been drafted as originals, the simple fact that the ministerial instructions preceding the drafting process result from discussions that have taken place in one language only and are themselves drafted in that language will be detectable by interpreters, who will accordingly tend to attach more weight in their approach … to the version drafted in the language of the ministerial instructions."[16]

B. The shared meaning rule

The shared meaning rule requires that any ambiguity in meaning in bilingual legislation be resolved, where possible, by settling on the meaning that is shared by both versions

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[14] Donald L. Revell, "Bilingual Legislation: The Ontario Experience" (1998) 19 *Statute Law Review* 32, 40.

[15] Pierre André Côté, "Bilingual Interpretation of Enactments in Canada" (2004) 29 *Brooklyn Journal of International Law* 1067, 1079.

[16] Pierre André Côté, "Bilingual Interpretation of Enactments in Canada" (2004) 29 *Brooklyn Journal of International Law* 1067, 1079-1080.

of the statute. There are two common situations in which the shared meaning rule is engaged. First, the shared meaning rule is often applied where one version of a statute conveys a broad meaning and the other version of the statute conveys a narrower meaning that is a subset of the former. In such a case, the narrower (subset) will be preferred. Secondly, the shared meaning rule is applied where one version of a statute is so ambiguous as to leave open multiple possible meanings and the other version clearly supports only one such meaning. In those circumstances, the single clear meaning will be attributed to both versions.

Detractors commonly raise three challenges to the value of the shared meaning rule. First, the shared meaning rule is not capable of resolving all inconsistencies between different language versions, because on some occasions there may be *no* shared meaning (i.e. where two versions of a statute suggest *mutually exclusive* meanings). In such instances, courts will rely on generally applicable principles of statutory interpretation, most prominently the rule suggesting that ambiguities in legislation should be resolved so as to give effect to its purpose.

This leads to the second criticism of the shared meaning rule, which is that it prioritises superficial linguistic equality to the detriment of legislative intent. Critics in this camp argue that the shared meaning rule should be abandoned, or at least deprioritised, in favour of an interpretative approach employing all of the normal principles relating to statutory interpretation.

Finally, the shared meaning rule is said to be unrealistic, because even where it is established in law it is ignored in practice. Canadian scholars have explained “When a shared meaning can be found, it constitutes merely a supplemental factor in the search

for the best meaning of the provision. It will, however, be ignored if it is felt that it does not correctly reflect the intention of Parliament."[17]

IV. PROPOSALS

In light of the above discussion it is clear that there are a number of complex practical and theoretical issues raised by bilingual parliamentary debate and legislation. In this section of the paper we make a number of proposals as to how Indigenous languages might be more fully incorporated into Australian lawmaking processes. Before proceeding we want to make clear that these proposals are not prescriptive. The particular approach to be adopted in each Australian jurisdiction should be guided by local communities, particularly Indigenous communities. Accordingly, what follows are merely suggestions that might provide helpful starting points for further discussion between lawmakers, Indigenous communities and the general public.

A. Parliamentary debate

All Australian houses of parliament ought to have procedures in place to allow for the use of Indigenous languages during debate. The easiest way in which this might be facilitated is by having an interpreter present to simultaneously or sequentially translate the Indigenous language content into English. By way of example, Yingiya Mark

[17] Pierre André Côté, "Bilingual Interpretation of Enactments in Canada" (2004) 29 *Brooklyn Journal of International Law* 1067, 1071.

Guyula proposed the following amendment to the Standing Orders of the Northern Territory Legislative Assembly:

> "A member may be assisted on the floor of the Assembly by an interpreter to provide interpretation from … the first language of the member into English. The interpreter will only be present for the purposes of interpreting and not for any other purposes … and must vacate the floor when not undertaking those duties."[18]

As at the time of writing, it is understood that the Standing Orders are in fact in the process of being amended to read something like Guyula's proposal.

B. Legislation

It would be ideal for all Australian laws to be interpreted into local Indigenous language or languages. With further developments in digital linguistics and translation software, this may one day be possible. At present, resource constraints are such that it is unlikely that every single statute in Australia will be interpreted into Indigenous language or languages. Nevertheless, particular statutes or provisions should be interpreted into, and promulgated in, Indigenous languages where:

a. the content of the statute makes that appropriate; or
b. local Indigenous people have expressed a desire for this to occur.

The concept of large-scale legislative translation is no doubt daunting to many Australian lawmakers and legislative drafters; it need not be. Experience abroad shows that it is not only possible, but also productive. Canada has been doing it for centuries.

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[18] Quoted in Ben Grimes, "The English-only NT parliament is undermining healthy democracy by excluding Aboriginal languages" *The Conversation* (online) (23 October 2018).

Even in Australia, we are already translating many government documents and quasi-legal texts into Indigenous languages. A drive west of Alice Springs reveals many street signs in the local Indigenous language, Arrernte.

As Australia begins to embrace multilingual legislation it must grapple with the most appropriate method for drafting such legislation. While a number of places in Canada still practice *sequential* drafting, observers largely agree that the preferable approach is *co-drafting*. However, co-drafting is also the most time and resource-intensive approach. Further, it requires fundamental changes to current Australian legislative drafting processes. For these reasons, and notwithstanding the acknowledged superiority of co-drafting, it is may be most realistic to begin Australia's process of multi-lingual legislation by the path of least resistance – translation.

C. Interpretation

Perhaps the most complex aspect of bilingual lawmaking is the process of interpretation. The approach that Australia ultimately takes to interpreting bilingual laws will take years to evolve as courts get used to the idea of interpreting texts in multiple languages. We will not attempt here to pre-empt that process, except to say two things.

First, whatever approach we take to interpreting bilingual laws, it must be remembered that the process is not a *problem* it is an *opportunity.* Having multiple versions of legislation will *improve* legislative clarity; because many ambiguities in one version will be able to be clarified by reference to the other version.

Secondly, there are strong arguments to support Australia adopting the equal authenticity rule and the shared meaning rule in its interpretation of multi-lingual

statutes. Experience in Canada has shown that these rules are not immutable, and rarely will they lead to absurd results. Rather, both rules are designed to assist the courts in discerning the meaning of the law which best accords with legislative intent and underlying community values.

V. Conclusion

In conclusion, Australia can be seen to have recently commenced the important project of incorporating Indigenous languages into our laws and our lawmaking processes. It is very early days yet, but there are positive indications that politicians and the community are finally giving this issue the attention that it deserves. In other countries, laws have been debated and passed in multiple languages for centuries. As we embark on our own multi-lingual legislation journey we can learn a lot from these countries. Ultimately, however, the approach that we take to legislating in language will be guided by the leadership of Indigenous politicians and local Indigenous language speakers.