

# The effect of poorly written legislation in a bilingual legal system

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Hong Kong is unique in having legislation that is written in both the English and Chinese languages. Until the late 1980s, it was the policy for Hong Kong legislation to be drafted and enacted only in the English language. It was only with the enactment of the *Official Languages (Amendment) Ordinance 1987* (No. 17 of 1987) (HK) and the *Interpretation and General Clauses (Amendment) Ordinance* (No. 18 of 1987) (HK) that this policy was changed.<sup>2</sup> Soon afterwards, the first Chinese language versions of Hong Kong legislation appeared and a program to produce Chinese language versions of existing Hong Kong legislation was established.

Under section 10B(1)<sup>3</sup> of the *Interpretation and General Clauses Ordinance* (Cap. 1) (HK), both the English and Chinese texts are equally authentic and both texts are regarded as having equal status.<sup>4</sup> The normal Hong Kong practice is for the English text to be drafted first and for that text to be basis for preparing the Chinese text. This may be contrasted with Canada where, at the federal level at least, separate English and French texts are drafted contemporaneously by Anglophone and Francophone legislative counsel.

During the period immediately after the introduction of the new policy, the Chinese language versions of legislation were basically translated texts. Legislative counsel concentrated on closely adhering to the style and format of the English texts and ensuring that legislative concepts in the English version were accurately replicated, even at the expense of readability and comprehensibility. In other words, in preparing the Chinese version of a legislative provision, readability and comprehensibility were sacrificed for accuracy if alternative (but more readable and comprehensible) Chinese versions would result in an interpretation different from the interpretation of the English version. One reason for this was that the drafters of the Chinese versions were then relatively inexperienced in original legislative drafting. Nevertheless, according to Yen,<sup>5</sup> a Chinese version of a legislative provision would not be adopted if it would depart so far from the grammatical norm in the Chinese language that it would fail to convey

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<sup>2</sup> The principal catalyst for the change in policy was the signing of the Sino-British Joint Declaration of 1984 on the restoration of Chinese sovereignty over Hong Kong.

<sup>3</sup> As inserted by section 4 of the *Interpretation and General Clauses (Amendment) Ordinance 1987* (No. 18 of 1987) (HK).

<sup>4</sup> Article 9 of Hong Kong's Basic Law does not say so explicitly. However, it does provide that English may be used as an official language.

<sup>5</sup> Tony Yen, Law Draftsman, Hong Kong Department of Justice.

accurately, or even adequately, its technical meaning (Yen, 1997: 4).

In recent years, Sinophone legislative counsel have gained more experience and confidence in the preparation of the Chinese versions of Hong Kong legislation and so those versions are no longer a word for word translation of the English text. Nevertheless, the meanings that Sinophone users elicit from the Chinese version of the legislation are still expected to be the same as those elicited by Anglophone users who read the English version.

Despite the improvements in the Chinese drafting style that have evolved during the past 3 or 4 years, I contend that the Chinese version of Hong Kong legislation will still be difficult to understand if the English text from which it is derived is itself not readily comprehensible. Because of the semantic, grammatical and syntactic differences between the English language and the Chinese language, achieving exactly the same legal effect of the English statutory provisions by Chinese translation is far from easy. The difficulty lies in the structural differences between the English and Chinese languages. This can result in legislative texts that differ in effect. If therefore the English text is obscure, production of the Chinese version becomes nightmarish. According to Fung and Watson-Brown (1994)—

Without clarity, the law becomes a trap. What relevance is that to translation? Before the translator can hope to being understood, he must understand. The translator should not be led into the trap of misunderstanding the law. In recognising the issues that blur communication, the translator is able to work his way through the complexity of the law.

It should therefore come as no surprise to learn that at least some Chinese versions of Hong Kong legislation have been described as being difficult to read and comprehend. However, some of the critics may be unaware of the constraints imposed on those responsible for producing the Chinese version of a legislative document. Others may not yet have become used to using Chinese as a “legal language”. The problem of ensuring that legislation is both readable and comprehensible is not unique to the Chinese texts. Users of the English versions of legislation make similar complaints.<sup>6</sup>

Many older Hong Kong statutes and regulations are modelled on old English Acts that are drafted in archaic English and in a convoluted, opaque style that is difficult to understand. According to Yen (1997: 4), it has been particularly difficult to create readable and comprehensible Chinese language versions of these statutes and regulations. Hong Kong Sinophone legislative counsel have on many occasions told me how much easier it is to create readable and comprehensible Chinese versions of legislation when the English texts from which they are derived are themselves drafted in clear, user-friendly English, with shorter and less complex sentences and more familiar words.

In order to determine whether or not this view was valid, I identified what I considered to be fairly

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<sup>6</sup> For example, see Fung (1998: 28, 29). Other contributors to the *Hong Kong Lawyer* have voiced similar criticisms about the complexity of the Chinese texts of Hong Kong legislation.

difficult sections in the *Police Force Ordinance* (Cap. 232) and the *Fixed Penalty (Criminal Proceedings) Ordinance* (Cap. 240) and, as part of a legislative drafting training exercise, asked some of the legislative counsel<sup>7</sup> who were participating in the exercise to provide me with interpretations of the them. Each of the provisions was misinterpreted by at least one of the counsel. I subsequently redrafted the provisions with a view to making them more readable and more intelligible and asked one of the Sinophone legislative counsel in the Department to say whether those versions would enable a Sinophone version to be produced that would be easier for a Sinophone to read and understand than the original<sup>8</sup> Chinese versions. One of the sections that I redrafted for the purpose of this exercise was section 9A of the Fixed Penalty (Criminal Proceedings) Ordinance. The section reads as follows:

**9A. Additional penalty in proceedings on complaint**

Where a person, having notified the Commissioner of Police, in accordance with a notice under section 3(3), that he wished to dispute liability for a scheduled offence<sup>9</sup> or having been given leave under section 3B(1)(a) *and* having been served with a summons, does not appear before the court or, having appeared, offers no defence or a defence which is frivolous or vexatious, the magistrate shall, in addition to any other penalty and costs, impose an additional penalty equal to the amount of the fixed penalty for that offence.

In my view, the section is too long; it is too compressed; and it contains too many ideas for the reader to absorb on first reading. Furthermore, the section is ambiguous.<sup>10</sup>

My redraft of the section is as follows:

**9A. Additional penalty in proceedings on complaint**

- (1) A magistrate who hears the proceedings in respect of a scheduled offence<sup>11</sup> must impose on a person to whom this section applies an additional penalty in addition to any other penalty and costs if the person—
  - (a) does not appear before the magistrate; or
  - (b) having appeared, either offers no defence or offers a frivolous or vexatious defence.

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<sup>7</sup> All of the counsel involved in the training exercise were employed in the Legislative Drafting Division of the Hong Kong Department of Justice and were well-qualified lawyers who had been regularly exposed to Ordinances and subsidiary legislation for at least 2 years. Far from being a reflection on them, their inability to accurately interpret the sections concerned is a reflection on the readability and comprehensibility of those sections.

<sup>8</sup> I.e. the existing versions.

<sup>9</sup> “Scheduled offence” is a term defined in the interpretation (definitions) section of the Ordinance.

<sup>10</sup> It is not clear which of the preceding clauses the clause “*and* having been served with a summons” modifies.

<sup>11</sup> Ibid.

- (2) The additional penalty must be equal to the amount of the fixed penalty for the offence.
- (3) This section applies to a person who –
  - (a) has given a notice of an intention to dispute liability for a schedule offence to the Commissioner of Police under section 3(3); or
  - (b) has been given leave under section 3B(1)(a) and served with a summons.

Although the redraft contains more words than the original, it arguably expresses the ideas in a way that is more readable and comprehensible. The comments of the Sinophone legislative counsel<sup>12</sup> on the redrafted section are as follows:

“The tabulation of the English text of section 9A<sup>13</sup> improves its comprehensibility greatly and also helps to remove ambiguities contained in the original text. If correspondingly structured, the Chinese version will be much more focused with the legal subject (the magistrate) and the legal action (imposition of the additional penalty) stated upfront. Placing the circumstances and conditions under which the law operates in a tabulated subsection (3) can offload the original Chinese sentence, streamline its syntax and convey its meaning much more clearly.”

Along with others, I have proposed to the Hong Kong Department of Justice that the English versions of older Hong Kong statutes and regulations could be re-written in plain, modern language that would be much easier for Anglophone users to read, understand and use. If this suggestion were implemented, it would surely facilitate the creation of Chinese versions of those statutes and regulations that Sinophone users would find much easier to read, understand and use. Although the proposal has been favourably received by the Department, it remains to be seen whether there is sufficient political will to implement it in the foreseeable future.

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<sup>12</sup> I would normally provide an attribution here, but the Sinophone counsel concerned preferred to remain anonymous.

<sup>13</sup> [of the *Fixed Penalty (Criminal Proceedings) Ordinance*]

## **References**

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