





Victorian  
Law Reform  
Commission

# Plain English and the Law

**THE 1987 REPORT REPUBLISHED**

With a new preface by the Chair of the Victorian Law Reform Commission





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The Hon. Mr Justice James Gobbo  
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Mr Tony Smith  
Ms Jude Wallace

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Mr Philip Cummins QC  
Mr Mark Dreyfus, then Ministerial Adviser to the Attorney-General  
Mr John Ewens CMG CBE QC, former First Parliamentary Counsel of the Commonwealth  
Professor Harold Ford, Chairman, Companies & Securities Law Review Committee  
Ms Eve Grimm, the Law Institute  
Mr Peter Ickeringill, Mallesons Stephen Jaques  
Mr Campbell Johnston, Blake & Riggall  
Dr Greg Lyons, Chief Electoral Officer  
Mr Peter Marks, McIntosh Hamson Hoare Govett Ltd  
Mr Robert Miller, Director, Regulation Review Unit  
Mr Eamonn Moran, Assistant Chief Parliamentary Counsel  
Mr Ian Renard, Arthur Robinson and Hedderwicks  
Dr Robert Smith, Member, Public Service Board  
The Hon. Haddon Storey MLC  
Ms Kathy Walter, Clayton Utz

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# Preface

In his novel *The Trial*, the great Czech writer Franz Kafka wrote of a man who is prevented from gaining admission to the Law by a gate-keeper. The man waits his entire life for admission, believing the law should be accessible to everyone, but he is never allowed in. There are still various 'gate-keepers' preventing people from gaining access to the law, one of which is obstructive language.

*Plain English and the Law* was first published in 1987 by the Law Reform Commission of Victoria, the predecessor organisation of today's Victorian Law Reform Commission. The plain English inquiry was initiated by the then Attorney-General, Jim Kennan, who gave the Commission the task of recommending how plain English could be adopted into drafting legislation, legal agreements and government forms. Chaired by Professor David St L Kelly, with Professor Robert Eagleson (on secondment from the University of Sydney) as Commissioner-in-charge, the Commission published this report.

Thirty years later, the report and its associated publications are recognised as an important achievement in the plain English movement. According to Clarity, an international association promoting plain legal language, "The Commission's work caused general acceptance of plain language principles throughout governments, the courts and business."<sup>1</sup>

Of course, over-complex legal language, and concern about it, had existed long before the 1980s. In 16th century England, as this report notes, an unfortunate plaintiff whose documents were too lengthy was paraded around the courts with his head stuck through a hole in the middle of the papers. However, history does not record whether he or his lawyer received any practical advice on how to do better.

The Commission's aim in 1987—as it remains today—was not simply to reiterate an age-old problem, but to present solutions. Alongside its report, the Commission published a practical manual for legislative drafters together with examples of plain English. A further publication, *Access to the Law: the Structure and Format of Legislation*, followed in 1990. The aim was to assist legal writers to achieve "accuracy of content combined with plainness of expression."<sup>2</sup>

Over the last 30 years, due to the concerted efforts of many people and organisations, plain English has moved from the margins to the centre, and the plain language movement is active worldwide. Victoria led the way in stipulating that legislation should be drafted in plain English, and other Australian states followed. Since then, legislation has demonstrated the effectiveness of plain English. Some techniques have become standard practice for all legal writers, such as writing short-to-medium length sentences, preferring the active to the passive voice, and dispensing with unnecessary words. Most writers today understand the importance of beginning with a summary of the whole and using layout to assist with communication. In Victoria, organisations such as the Victoria Law Foundation have played a major role in promoting plain English, as has the international body Clarity, and the Commission commends their work.

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1 Clarity No 43 May 1999  
2 *Plain English and the Law, Drafting Manual*, 1.

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It is a matter of social justice that the legal profession communicates effectively with the community, as it is fundamentally important that everyone affected by the law should be able to understand it. Unintelligible language not only confuses and alienates people, it causes them to become cynical about institutions.

It is pleasing to have a continuing connection with plain English and the law. I played a small part as a consultant to the 1987 report, and was President of the Victoria Law Foundation years later, which successfully developed plain English under the hand of its Executive Director, Joh Kirby, who was also President of Clarity.

The Victorian Law Reform Commission is republishing this seminal 1987 report, and the accompanying manual, in order to make them more readily available to a new generation of readers, particularly online. The world has moved on to digital technology, but the principles and practices outlined in this report remain as valuable today as when they were first published. I commend this report to you and hope it once again finds a wide audience.



**The Hon. P. D. Cummins AM**

Chair

Victorian Law Reform Commission

October 2017

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## Terms of reference

[Referred to the Law Reform Commission of Victoria by Attorney-General, the Hon. J H Kennan MLC, on 10 September 1985.]

To inquire into and review current techniques, principles and practices of drafting legislation, legal agreements and those Government forms which affect legal rights and obligations, in order to recommend what steps should be taken to adopt a plain English drafting style.

The Commission is to have regard to overseas experience in plain English drafting and plain English legislation. It is required to make particular reference to:

- a) the elements of a plain English drafting style
- b) current drafting techniques, principles and practices which are inconsistent with plain English drafting and which impede comprehension
- c) whether any changes to common law and statutory maxims, principles or rules of interpretation would be needed to complement the adoption of a plain English drafting style
- d) how computer technology can be applied to assist in introducing plain English into legislation and Government documents
- e) the identification of a strategy for the implementation of plain English in legislation and Government documents
- f) whether legislation should be introduced requiring certain categories of agreements and documents to be written in plain English, and if so, the desirable content of these laws
- g) whether plain English drafting should be incorporated into law courses, and if so, the desirable content.

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# Summary

## General conclusions

- 1 The Commission's examination and analysis of recent legislation and of other legal documents has revealed that they suffer from a number of linguistic defects. They also suffer from excessive sentence length, the creation and use of unnecessary concepts, poor organisation of material and unattractive layout.
- 2 These defects are not required by policy or by existing law. They are solely matters of drafting. They make many legal documents much less intelligible to their audiences than they should be. Even judges and experienced lawyers have difficulty with them. They are regularly unintelligible to non-lawyers, even when they are experts in the relevant fields.
- 3 The clarity of legal documents would be considerably improved if drafters got rid of these defects and adopted a plain English style in place of the present one. Plain English is not a special language. It is ordinary English, expressed directly and clearly to convey a message simply and effectively. It does not require the abandonment of technical terms or strict legal concepts.
- 4 It is not possible to draft laws and other legal documents on technical and complex matters in a way to make them intelligible to the average citizen. The average citizen lacks the necessary knowledge of the subject matter, but it is possible to draft them in a way to make them intelligible to a much wider audience.
- 5 Redrafts of the *Companies (Acquisition of Shares) (Victoria) Code* and of other legal documents form appendixes to the Report. They demonstrate that legal documents, even those dealing with a complex subject, can be written in plain English without loss of precision or accuracy.
- 6 Legislative requirements for a purposive approach to be adopted in interpreting legislation are important to the success of a plain English style. Lawyers will have to develop a less technical approach to language.

## Why is plain English important?

- 7 Plain English in legislation is important because it helps members of the public to comply with their legal obligations and to obtain benefits to which they are entitled. Laws and documents should not be drafted on the assumption that a trained lawyer will be available to interpret them.
- 8 Plain English in legislation is also important because it saves money. Poorly drafted laws impose costs on those who administer them and on those whose conduct they are intended to control. Time is wasted in trying to understand them. Lawyers have to be employed to interpret them.
- 9 Poorly drafted private documents impose similar costs on the persons affected by them. Poorly drafted government forms also waste money. They produce inaccurate and incomplete responses. Substantial administrative costs have to be incurred in correcting the information.

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# Recommendations

## A. Training of drafters

### Drafting manual

The Commission has prepared a drafting manual, dealing with linguistic matters, to assist legislative drafters to write plainly and to avoid the defects which have been identified in present legal drafting.

**The drafting manual should be formally adopted by the Government as its official guide to Departments and Agencies in relation to the drafting of Acts, regulations and related forms and explanatory documents. The drafting manual should be supplemented by material prepared by Chief Parliamentary Counsel dealing with the technical aspects of legislative drafting.**

### Legal Drafting Institute

Training drafters by the apprenticeship method is inadequate. It perpetuates poor drafting practices. At the Commission's suggestion, Monash University is arranging for a feasibility study to be conducted by the Public Service Board into the establishment of a Legal Drafting Institute as a joint project between the University and the Government. The feasibility study is to be funded by the Law Foundation.

**The Government should support the establishment of a Legal Drafting Institute at Monash University as a joint project between the University and the Government. When the Institute is established, qualifications obtained from it should become, except at base grade and in the absence of exceptional circumstances, a mandatory requirement for appointment to, or promotion within, the Office of Chief Parliamentary Counsel.**

### Broadening experience

Experience in private practice would help drafters to appreciate the needs and abilities of those who are affected by legal documents. Experience in policy units in departments and agencies would help drafters to appreciate the difficulties faced in policy development. Each would contribute to clear and intelligible drafting. Many recruits to the Office of Chief Parliamentary Counsel have very little experience in private practice. They also have little experience in policy development.

**The Secretary to the Attorney-General's Department should investigate ways of diversifying the experience of Parliamentary Counsel. The options which should be investigated include exchange schemes with, and secondments to, private solicitors' offices and policy Units in Departments and Agencies.**

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## Use of electronic aids

Word processors and computers can provide valuable assistance in the drafting of clear documents. Software programs with capacity for textual criticism are already commercially available. Substantial improvements are likely to be made in the near future.

**Chief Parliamentary Counsel should investigate existing software programs and closely monitor developments to ensure that appropriate use is made of electronic aids to drafting. A software program should be developed in cooperation with Chief Parliamentary Counsel elsewhere in Australia to facilitate clear and consistent drafting.**

## Relationship between parliamentary counsel and instructing officers

The traditional view of the relationship between parliamentary counsel and instructing officers is that instructing officers should formulate all the details of a legislative scheme before presenting it to parliamentary counsel for drafting. Parliamentary counsel can play a valuable role in assisting in policy development, particularly through advice on general legal principles and on the legal options available for achieving specific goals. Early involvement of parliamentary counsel in major policy development would contribute to the consistency and clarity of draft legislation.

**Appropriate amendments should be made to the Cabinet Handbook to give positive encouragement to instructing officers and parliamentary counsel to consult with one another during the development of detailed policy proposals in respect of major new legislation and major rewriting of existing legislation. These consultations should not be restricted to the period immediately before the making of the Cabinet submission for a Bill in Principle. A Cabinet submission should not go forward for consideration by the normal procedures unless parliamentary counsel have indicated that the drafting instructions are appropriate and adequate. Where consideration of the Bill in Principle cannot await the production of revised instructions, the defects noted by parliamentary counsel should be attached to the Cabinet submission when it goes forward for consideration.**

## Duties of instructing officers

A lack of clarity concerning the duties of policy officers with respect to the preparation of instructions for Parliamentary Counsel contributes to inadequacy in drafting instructions. Steps should be taken to clarify the role of policy officers and to assist them in performing their tasks.

**Chief Parliamentary Counsel should take urgent steps to develop guidelines and sets of questions to assist instructing officers in drawing up drafting instructions, and to arrange periodical seminars involving parliamentary counsel and instructing officers to increase understanding on all relevant matters.**

## Improving regulations

Legislation is made up of Acts and regulations made under them. Acts are drafted by the Office of Chief Parliamentary Counsel. Regulations are usually drafted by subordinate legislation officers in the Departments and Agencies which administer the Acts. This arrangement is an unusual one. It makes quality control extremely difficult. The drafting of regulations is normally centralised in most other Australian jurisdictions. Chief Parliamentary Counsel should be responsible for maintaining drafting standards in relation to all legislation.

**Urgent consideration should be given to the possibility of transferring to Chief Parliamentary Counsel responsibility for the drafting of all regulations. The necessary reorganisation should take account of the need not to interfere with the obligation of Departments and Agencies, under section 5 of the Subordinate Legislation (Review and Revocation) Act 1984 (Vic), to update and re-enact 1962-1972 regulations by 30 June 1988. If it is decided not to transfer drafting responsibility to Chief Parliamentary Counsel, consideration should be given to**

other organisational options to ensure proper training of subordinate legislation officers and the system-wide monitoring of standards by Chief Parliamentary Counsel.

### Use of private practitioners

All Acts are drafted in the Office of Chief Parliamentary Counsel. In some cases, valuable assistance could be obtained by engaging expert members of the private profession.

In appropriate cases, members of the private profession should be retained to assist the Office in drafting legislation. Chief Parliamentary Counsel should retain ultimate authority and responsibility for the legislation. Members of the private profession should be retained only with the knowledge and approval of the Minister responsible for the legislation in question. The risk of the subsequent use of 'inside' information should be dealt with by contractual arrangements between the Office of Parliamentary Counsel and the private practitioner.

### Private legal documents

Implementation of the Government's plain English policy in the private Paras 146-150 sector should be achieved in cooperation with the Law Institute and business houses. Both lawyers and businessmen are already moving towards greater clarity in their documents. There is no need for legislation in this area.

The Secretary to the Attorney-General's Department should consult with the Law Institute of Victoria and the Victoria Law Foundation with a view to setting up a program to implement the Government's plain English policy in the private sector. That program should concentrate initially on the standard forms which have been prepared with the authority of the Law Institute of Victoria. It should then be extended to forms used by business houses, including banks, real estate agents and insurers. The steering committee for the program should include representatives of the Law Reform Commission of Victoria and of the proposed Legal Drafting Institute at Monash University.

## B. Structure and design of Acts and Regulations

There are no clear criteria for determining what material should be included in the body of an Act and what should be left to Schedules. A considerable amount of the detail which is included in the body of Acts could be transferred to Schedules. This would enable principles to be clearly stated in Acts and would contribute to clarity in drafting.

Chief Parliamentary Counsel should ensure that the body of an Act commences with a clear statement of the relevant principles and that, as far as practicable, the details and qualifications which have to be included in the Act are relegated to Schedules.

There are also no clear criteria for determining what material should be included in Acts and what should be left to regulations. The development of clear criteria would contribute to better organisation of material and improved clarity.

In consultation with the Cabinet Office, the Regulation Review Unit and other interested bodies, Chief Parliamentary Counsel should develop guidelines to assist Ministers, Departments and parliamentary counsel in the allocation of legislative material between an Act and the regulations made under it. In developing the guidelines, Chief Parliamentary Counsel should take account of the practical and constitutional concerns referred to in this report. The guidelines should be presented for consideration by Government.

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Improvements could be made in the design of Acts and regulations. A modern format should be adopted.

In consultation with the Cabinet Office, the Regulation Review Unit, the Victorian Government Printer and other interested bodies, Chief Parliamentary Counsel should develop a new design for Acts and regulations. The new design should incorporate improved cross-referencing systems and indexes for all major legislation. It should be presented for consideration by Government.

### **C. Rewriting existing legislation and Government forms**

The earlier recommendations should result in substantial improvements in the drafting of original legislation. But they would leave untouched existing legislation. It would not be cost-effective to rewrite all existing legislation. A more selective approach should be adopted.

A legislation rewriting program should be established. It should be aimed at a limited number of important Acts (say, 50) and regulations made under them.

Considerable savings could be made if Government forms were to be redesigned and rewritten in plain English. Departments and agencies would benefit from expert assistance in conducting rewriting programs.

A small Plain English Unit should be established to assist in the implementation of the Government's plain English program in relation to existing forms and documents. The unit should provide consultancy services to departments and agencies and should monitor implementation of the plain English policy. It should be dissolved within three years.





# Introduction

- 2** Reference
- 2** Work on the reference
- 3** Other developments

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# 1. Introduction

## Reference

1 On 10 September 1985, the Attorney-General, the Hon J H Kennan MLC, gave the Commission a reference dealing with the language used in legislation, legal documents and government forms. The reference followed a Ministerial Statement by the Attorney-General, *Plain English Legislation*, on 7 May 1985.<sup>1</sup> In that statement, the Attorney-General referred to a number of developments concerning plain English. These included the publication in 1978 by the then Government of *Plain English*, a short guide aimed at improving expression in government documents. The Attorney-General then announced a number of changes to the format of Acts of Parliament. These included:

- abandonment of long titles
- insertion of a statement of purposes or objects
- simplification of the formal enacting words
- removal of archaisms, including reference to regnal years
- abandonment of unnecessary qualifications, such as 'In this Act'; 'notwithstanding anything in this Act'; and 'subject to this Act'.

The Attorney-General continued:

What needs to happen now is to have a process whereby Parliamentary Counsel draft Bills and legislation officers draft subordinate legislation from the outset in plain English. This requires a radical departure from tradition and a break with the thinking of the past. It requires imagination, a spirit of adventure and a boldness not normally associated with the practice of law or with the drafting of legislation or subordinate legislation.<sup>2</sup>

## Work on the reference

### Secondment of Professor Eagleson

2 The Commission's work on the reference was facilitated by the secondment of Professor Robert Eagleson from the Department of English at the University of Sydney to the Attorney-General's Department and by his appointment as a part-time member of the Commission for a year from 1 January 1986. The Chairperson appointed Professor Eagleson as Commissioner in charge of the reference. In that capacity, Professor Eagleson assisted the Attorney-General's Department and the Historic Buildings Council to redraft important documents. Professor Eagleson assisted a number of other bodies with advice on plain English. He collaborated with the Office of Chief Parliamentary Counsel in the drafting of several Bills and gave a number of seminars to members of that Office on

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1 *Hansard*, Legislative Council, 1985, 432.  
2 *Hansard*, 437.

plain English drafting. He also assisted the Department of Planning and Environment in redrafting its Planning Scheme Ordinance under the Melbourne and Metropolitan Planning Scheme.

## Discussion paper

- 3 On 3 September 1986, the Commission published a discussion paper dealing with most aspects of the reference. Copies were sent to all members of parliament, all judges, all heads of government departments and all parliamentary counsel in Australia. They were also sent to all magistrates, all members of the Law Institute and all barristers in Victoria. The discussion paper identified a series of problems with present drafting styles and made a number of proposals for implementing a plain English policy in the Office of Chief Parliamentary Counsel and in the public service. Seminars were held in October 1986 with members of the Law Institute and with members of the Bar Council to discuss the Commission's findings and proposals. The document was also discussed at meetings of chief administrators, subordinate legislation officers, instructing officers, and officers of Chief Parliamentary Counsel's Office. Apart from these seminars and meetings, written submissions were received from numerous individuals and bodies, including ministers, judges, lawyers and public servants. Special mention should be made of the valuable submissions received from the First Parliamentary Counsel of the Commonwealth and from chief parliamentary counsel in Victoria, New South Wales, South Australia and Queensland. The Commission expresses its gratitude to all those, including its consultants, who made submissions or contributed to discussions.

## Other developments

### Commonwealth initiatives

- 4 Moves towards the adoption of plain English by government are not restricted to Victoria. The Commonwealth Government took important steps in 1983 and 1984. A number of tax and social security forms have been rewritten as have documents produced by the Electoral Commission, the Human Rights Commission and the Department of Health. Documents used in internal government communications have also been rewritten. Plain English has been adopted by the Opposition and its *Policies on Business*<sup>3</sup> acknowledges the value of plain English in the context of an overall policy of business deregulation. It commits the Opposition to plain English in both legislation and legal documents.

### Statements in state parliaments

#### South Australia

- 5 On 21 August 1986, Mr D Ferguson, the Member for Henley Beach in the South Australian House of Assembly, moved:
- that this House supports the encouragement of the use of plain language in legislation, legal documents and Government forms.<sup>4</sup>

Mr Ferguson referred to developments in Victoria and emphasised the benefits to the community and to government which would flow from the adoption of a plain English policy. He noted that the Commissioner for Consumer Affairs had criticised official documents in his last two annual reports. He also noted that the Motor Registration Division had redesigned a number of its forms with the assistance of members of the English Department of Flinders University.<sup>5</sup>

3 Adelaide, September 1986.

4 *Hansard*, House of Assembly, 1986, 532.

5 *Hansard*, House of Assembly, 28 August 1986, 756.

## Tasmania

6 On 16 September 1986, Mr M Weldon, the member for Braddon in the Tasmanian House of Assembly, drew attention to the Commission's discussion paper in expressing the hope that the Government would give consideration to requiring a simpler drafting form:

Parliamentary draftspeople are operating in a system they believe they are familiar with and have been for some time. I am suggesting that the time has come when the parliamentary draftspeople, legislators and the public generally should be able to read and understand legislation in plain English. I recommend to the Government that it give due consideration to this [discussion paper] from the Law Reform Commission of Victoria and that it also take up some of the other drafting technique references which exist.<sup>6</sup>

## Recent endorsements

### Federal Government

7 Two other recent endorsements of plain English drafting should be noted. First, on 9 January 1987, the Minister for Industry, Technology and Commerce (Senator Button) issued a news release announcing the Commonwealth Government's strengthened commitment to the review of business regulation. In the course of his statement, the Minister announced that:

The Government has also committed itself to a policy of, as far as possible, expressing laws and regulations in simple English. That is in ways that can readily be understood by those affected. This requires that—

- definitions will be set out at the front of the legislation
- sections will be expressed in short sentences
- jargon and legalese will be avoided wherever possible.

### New South Wales

8 Secondly, in January 1987, the Select Committee of the Legislative Assembly of the New South Wales Parliament on Small Business delivered its report *Business Regulation and Licensing*. That report referred to and quoted from the Commission's discussion paper.<sup>7</sup> It referred to the Commission's view that plain English need not lead to a lack of accuracy and precision in legislation.<sup>8</sup> It concluded that a plain English style should be adopted in relation to all legislation regulating business:

In drafting regulations, the Parliamentary Counsel's Office should, as far as possible, simplify the wording of regulations by using 'plain English' to facilitate the understanding of regulatory requirements by those organisations which are required to comply with them. The plain English policy must be implemented in an appropriate manner to ensure that legal clarity is not jeopardised, and legal loopholes are not created.

6 *Hansard*, House of Assembly, 1986, 2508.

7 Paragraph 4.4.10.

8 Paragraph 4.5.8.

## Structure of report

- 9 The report is divided into 8 chapters. Chapter 2 deals with existing legal language. It notes the criticisms which have been made of that language and analyses the reasons why legal drafting is so obscure. Chapter 3 contains the results of the Commission's survey of recent legislation. It comments on the language and organisational defects found in that legislation. Chapter 4 examines the nature of plain English and the objections made to its use in the law. Chapter 5 discusses the benefits which would flow from using plain English in Government legal documents, in particular. Chapters 6, 7 and 8 discuss implementation of the Government's plain English policy: chapter 6 examines ways of improving legal drafting; chapter 7 proposes changes to the form of Acts and regulations; chapter 8 deals with the rewriting of existing legislation and Government forms.

## Appendices to report

### Manual and Takeovers Code

- 10 Attached to this report\* are 5 appendices of particular significance. The first is a Drafting Manual prepared by Professor Eagleson with the assistance of officers of the Commission. The Manual is not concerned with technical matters peculiar to legislative drafting. Instead, it concentrates on issues of language and communication. It provides detailed guidance on how to avoid obscurity and unnecessary obstacles to comprehension. It is designed for use by those who draft legislation and related forms and documents. The second appendix is a plain English version of the *Companies (Acquisition of Shares) (Victoria) Code (the Takeovers Code)*. This document demonstrates that legislation can be written in plain English, even when it deals with a difficult and complex subject. Initial drafts of the plain English version were prepared by the Commission and refined and improved with the critical advice and assistance of a number of people.<sup>9</sup> The final version was prepared after wider consultation at meetings of lawyers and regulators in Melbourne and Sydney.

## Legal documents

- 11 The third, fourth and fifth appendices contain examples of government documents and private legal documents redrafted in plain English. The government documents are the Summons and Information used for both summary and indictable offences and the Covenant and Agreement under sections 41 and 47 of the *Historic Buildings Act 1981* (Vic). The private document is the Law Institute's form for a mortgage over business. The plain English summons form was developed by Professor Eagleson with assistance from a number of officers of the Attorney-General's Department and the Ministry of Police and Emergency Services.<sup>10</sup> The summons will come into use on 1 January 1988. The plain English form combining the original covenant and agreement under the *Historic Buildings Act 1981* was prepared by the Commission with the assistance of a number of officers from the Ministry of Planning and Environment, the Attorney General's Department and the Department of Property and Services.<sup>11</sup> It is already in use. The Law Institute's mortgage over business document was redrafted at the request of the Law Institute and

\* The appendices were printed separately and are not included in this edition.

9 These included Mr Bruce Cameron of Gledhill Burrridge & Cathro; Ms Marina Darling of Corrs Pavey Whiting & Byrne; Mr Mark Dickens, then General Counsel to the National Companies & Securities Commission; Mr Mark Dreyfus, then Ministerial Adviser to the Attorney-General; Mr John Ewens, CMG, CBE, QC, former First Parliamentary Counsel of the Commonwealth; Professor Harold Ford, Chairman, Companies & Securities Law Review Committee; Ms Eve Grimm of the Law Institute; Mr Peter Ickeringill of Mallesons Stephen Jaques; Mr Ian Jamieson, Corporate Affairs Commission; Mr Peter Marks of McIntosh Hamson Hoare Govett Ltd; Mr Leigh Masel, a part time member of the Commission, and former first Chairman of the National Companies & Securities Commission; and Mr Ian Renard of Arthur Robinson & Hedderwicks. Mr Renard was briefed to assist in settling the final draft.

10 These included Mr D Hourigan, Deputy Secretary, Courts Management Division, Attorney General's Department; Ms M Ardlie, Mr G Brooks, Mr R de Saram, Mr J Ferguson, Mr SMackie and Mr T Wilson of the Attorney-General's Department; and Inspector P. McDonald of the Ministry of Police and Emergency Services.

11 These included Mr J Delves, Deputy Registrar of Titles; Mr T Falkiner, then from the Department of Planning and Environment; Mr David Gray, Ministerial Adviser to the Minister for Planning and Environment; Mr Ray Harman from the Crown Solicitor's Office; and Mr Boyce Pizzey and Mr David Syme from the Historic Buildings Council.

with considerable assistance from its members.<sup>12</sup> It has been submitted to the Institute for its consideration.

## Context of criticisms

- 12 Drafting legislation and other documents is no simple task. The drafting of legislation, in particular, requires knowledge of the law, facility with language and a good understanding of policy making and parliamentary processes. Above all, it requires intellectual rigour. The work done by parliamentary counsel is of critical importance to the Government and the legal profession. The traditional drafting style detracts from its value by placing unnecessary obstacles in the way of the various audiences of legislation. Parliamentary counsel themselves recognise that the present drafting style could be improved. As Chief Parliamentary Counsel for Western Australia has said:

Statute books contain at the present time much that is unsatisfactory and much that is difficult to understand. The need to communicate appears not infrequently to have been overlooked: ... [I]t is very clear that drafting techniques have a long way to go before they satisfy all those who have a right to be satisfied with the state of written laws. There is, I think, an acknowledged obligation to take stock of contemporary drafting practices and to improve legislative drafting where this is seen to be possible.<sup>13</sup>

- 13 Since the Attorney-General's Ministerial Statement, the Office of Chief Parliamentary Counsel has been developing a simpler drafting style. Notable achievements include the *Supreme Court Act 1986* and the *Planning and Environment Act 1987* (Vic). In the course of this report, the Commission concentrates not upon those achievements but on defects in the traditional style. It does so in order to analyse the source of the difficulties and to demonstrate how those difficulties could be resolved. The criticisms which it makes are intended to be constructive. They are not aimed at disparaging those who drafted the documents or at calling in question their undoubted professionalism. Indeed, it would be quite wrong to assume that the defects in drafting are the sole responsibility of the drafters. There are many factors, historical and other, which have contributed to the present drafting style. In relation to legislative drafting, several submissions pointed to the fact that instructing officers themselves are often wedded to a drafting style. In some cases, they strongly resist a simpler method of exposition, particularly if it involves a reduction in detail and a greater emphasis on statements of principle. The Commission's criticisms are directed at the style of legislation and of other legal documents, not at those who have been trained to use it. They are aimed at assisting drafters to recognise the defects and to assist in making the law and legal documents more readily comprehensible and intelligible to a much wider audience.

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12 Among those who assisted were Mr David BurrIDGE of Gledhill BurrIDGE & Cathro; Mr Campbell Johnston of Blake & Riggall; and Ms Kathy Walter of Clayton Utz.  
13 G C Thornton, *Legislative Drafting*, 3rd ed, Butterworths, London, 1987, vii.

# Legal language

**8** Criticisms of legal language

**9** Nature of the problem

**11** Causes of the problem



## 2. Legal language

### Criticisms of legal language

#### General

14 The language of the law has long been a source of concern to the community. It has been the subject of continuous literary criticism and satire.<sup>1</sup> Critics have highlighted its technical terms, its convolutions and its prolixity. These faults have been noted by judges and by practising and academic lawyers as well.<sup>2</sup> Calls have regularly been made for the use of a more simple and straightforward style. Some improvements have been made in response to those calls. But legal language remains largely unintelligible to most members of the community. It even causes problems for members of the legal profession. In some cases, the obscurity may arise from the complexity of the law and of its subject matter. In other cases, however, it is due to the complexity of the language in which the law is expressed. Some lawyers do not take sufficient care to communicate clearly with their audience. Letters, private legal documents and legislation itself are still drafted in a style which poses unnecessary barriers to understanding.

#### Legislation

15 Legislation is a particular source of concern. It is the most important form of legal drafting, since it creates rights and duties. Moreover, the style in which it is written affects other legal writing in a variety of ways, both direct and indirect. Criticism of the style of legislation has intensified in recent years. One example is the comment by Mr Warren Pengilly, a Sydney solicitor, on the draft Franchise Agreements Bill 1986:

While one must give credit to the government for coming up with a policy which seems conceptually correct, one must marvel at the prolixity with which the Parliamentary Draftsperson attempts to achieve his objective ... Are we inevitably locked into this tortuous language? Should we not just once consider drafting a simply worded statute with a clearly stated purpose and see if our judiciary, perhaps against all punting odds, cannot come up with a reasonable commercial interpretation of what is said?<sup>3</sup>

1 For example, Jonathan Swift, *Gulliver's Travels*, New York Modern Library, 1958, 104; Charles Dickens, *Bleak House*, Chapman & Hall, London, 1893, 8; James Joyce, *Ulysses*, Penguin, London, 1977, 321; Groucho Marx, *Animal Crackers*, 1928, quoted by R Goldfarb, and J Raymond, *Clear Understandings: a Guide to Legal Writing*, Random House, New York, 1982, 133. For other recent examples, see R Benson, 'The End of Legalese: The Game is Over', (1985) 13 *Review of Law and Social Change* 519 at 527–528.

2 For example, J Bentham, 'Rationale of Judicial Evidence', John Bowring (ed), *Works of Jeremy Bentham* Vol 11, William Tait, Edinburgh, 1838, 281; Renton Committee, *The Preparation of Legislation*, Sweet & Maxwell, London, 1975, Cmnd 6053, 6-7; Current Topics, 'Unintelligible Acts', (1930) 4 *Australian Law Journal* 105 at 106; *Bismag Ltd. v Amblins (Chemists) Ltd* (1940) 1 Ch 667, 687 (Mackinnon LJ); *Davy v Leeds Corporation* (1964) 3 AllER 390, 394 (Harman LJ); *City of Marion v Becker* (1973) 6 SASR 13, 29 (Bray CJ); *BT Australia Ltd v The Bell Bros Ltd* (1981) 6 Aust Company Law Reports 138, 149 (Wells J).

3 In a paper entitled: *State and Territory Credit Legislation—How Intelligible? How Effective? How Necessary?*, 11 April 1986, 11–12. See also Current Topics, 'The problem of drafting styles', (1986) 60 *Australian Law Journal* 369; Current Topics, 'Legalese and Courtspeak', (1985) 59 *Australian Law Journal* 189; *Sydney Morning Herald*, 1 January 1985, 8; Lord Campbell, 'Law in Plain Language', 80 *The Law Society Gazette*, 9 March 1983, 621.

Another example is the condemnation of the *Social Security Act 1947* (Cth) by the Chairperson of the Victorian Division Social Security Appeals Tribunal, Mr Chris Loorham:

Other Parliaments in Australia seem to be able to pass or amend legislation in a manner that is at least intelligible to well educated persons. It is unfortunate that the Parliament of the Commonwealth of Australia allows legislation such as the Social Security Act 1947 to remain on the statute books which is almost totally unintelligible to anyone. The fact that this Act directly touches the lives of every person belonging to this country gives the Tribunal even greater cause for concern. The current state of this most important Act can only be described as a national disgrace.<sup>4</sup>

### Private legal documents

- 16 The problem is not restricted to legislation; it exists in private legal documents as well. These are addressed to a much more restricted audience than legislation. But their defects are occasionally noted in the course of litigation. In *Guardian Assurance Co v Underwood Constructions*,<sup>5</sup> for example, Mr Justice Mason of the High Court (now the Chief Justice) referred to an insurance policy as being ‘made up of a jumble of ill assorted documents expressed in that distinctive style which insurance companies have made their own’. And Mr Justice Powell of the Supreme Court of New South Wales recently said of a partnership agreement that it:

can hardly be described as a shining example of the draftsman’s art—indeed, it is not going too far to describe it as exuding the glutinous aroma of paste pot and scissors.<sup>6</sup>

## Nature of the problem

### A separate language

- 17 These criticisms indicate the nature of the problems which exist in relation to legal language.<sup>7</sup> Many legal documents are unnecessarily lengthy, overwritten, self-conscious and repetitious. They consist of lengthy sentences and involved sentence construction. They are poorly structured and poorly designed. They suffer from elaborate and often unnecessary cross-referencing. They use confusing tautologies such as ‘ordered, adjudged and decided’ and ‘let, allow and permit’. They retain archaic phrases such as ‘know all men by these presents’ and ‘this indenture witnesseth’. They use supposedly technical terms and foreign words and phrases, such as *inter alia* and *res ipsa loquitur*, even when English equivalents are readily available. They are unintelligible to the ordinary reader, and barely intelligible to many lawyers. Language which suffers from some or all of these defects is called ‘legalese’.<sup>8</sup> Linguists regard it as an identifiably different dialect or class of language.

### A legislative example

- 18 A legislative example of this ‘different dialect’ is subsection 11 (3) of the *Foreign Proceedings (Excess of Jurisdiction) Act 1984* (Cth). One of the aims of that Act is to protect an Australian defendant against the consequences of being sued in foreign antitrust proceedings. Section 11 is designed to enable a defendant to recover reasonable costs and expenses (‘recoverable costs and expenses’) incurred in the foreign proceedings. Subsection (3) states:

4 Margaret McGregor, Social Security Appeals Tribunal hearing, 19 November 1986; see also criticism of Commonwealth tax legislation by Mark Liebler, a Melbourne solicitor, *Australian Financial Review*, 28 April 1987, 5.

5 (1974) 48 ALJR 307, 308. See also *National Bank of Australasia v Mason* (1975) 133 CLR 191, 203 (Stephen J).

6 *Vander Waal v Goodenough* [1983] NSW Conv R 55–115 at 56, 850.

7 For detailed analysis, see F Rodell, *Woe unto You, Lawyers!*, Pageant-Poseidon, New York, 1939; D Mellinkoff, *The Language of the Law*, Little Brown & Co, Boston, 1963.

8 For further analysis of the characteristics of legalese, D Crystal & D Davy, *Investigating English Style*, Longman Harlow, 1969, at 193–217; V Charrow & R Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions* (1979) 79 *Columbia Law Review*, 1306; E Finegan, R DiPietro (eds) *Form and Function in Testamentary Language in Linguistics and the Professions*, 1982, 113; D Mellinkoff, *Legal Writing: Sense and Nonsense*, West Publishing, St Paul, Minn, 1982.

Proceedings in respect of a cause of action arising under this section (in this sub-section referred to as 'cost proceedings') in relation to proceedings instituted in or before a foreign court (in this sub-section referred to as the 'foreign proceedings') may be instituted, notwithstanding that the foreign proceedings are still pending, in respect of recoverable costs and expenses that have been incurred by a defendant in the foreign proceedings at any time before he institutes the cost proceedings (other than recoverable costs and expenses in respect of which cost proceedings have previously been instituted as provided by this sub-section), and the institution of cost proceedings under this section in relation to foreign proceedings that are still pending does not prevent the defendant from instituting cost proceedings, after judgment has been given in the foreign proceedings or the foreign proceedings have been discontinued or otherwise terminated, in respect of recoverable costs and expenses (other than recoverable costs and expenses in respect of which cost proceedings have previously been instituted as provided by this sub-section).

When unravelled, this provision of approximately 175 words has only this to say:

Proceedings may be commenced at any time for recoverable costs and expenses incurred in the foreign proceedings and at later times for recoverable costs and expenses subsequently incurred.

### A non-legislative example

19 A somewhat similar style of drafting is evident in the following introduction to a guarantee agreement:

NOW THIS AGREEMENT WITNESSES that in consideration of the Lessor at the request of the Guarantors (which request is evidenced by their execution of this Agreement) continuing at its discretion and during its pleasure the provision of a forbearing to sue for the repayment of leasing accommodation already granted to the Debtor or presently or at any time or from time to time hereafter at its discretion and during its pleasure granting further leasing accommodation advances a financial accommodation to the Debtor the Guarantors jointly and severally HEREBY GUARANTEE to the Lessor the due and punctual payment to the Lessor of all moneys now or hereafter to become owing or payable to the Lessor by the Debtor (including but not limited to interest or any sum or sums so owing and payable calculated at any specified increased rate due to the default of the Debtor) either alone or jointly with any other person on any account whatsoever including all moneys which the Lessor pays or becomes actually or contingently liable to pay to for or on behalf of or for the accommodation of the Debtor either alone or jointly with any other person whether or not such payment is made or liability arises by way of loans, advances or other accommodation of whatever nature by reason of the Lessor having already or hereafter become a party to any negotiable or other instrument or entered into any bond, indemnity or guarantee or, without restriction, under or by reason of any transaction or event whatsoever whereby the Lessor is or becomes or may become a creditor of the Debtor (all of which moneys and liabilities as aforesaid are intended to be secured by this Guarantee and are hereinafter referred to as 'the Moneys Hereby Secured').

This extract is a single sentence of approximately 180 words. Its main effect is that:

- the guarantor guarantees the performance by a lessee of his or her obligations to pay money under a lease;

and on that basis:

- the lessor promises not to sue the lessee for repayment of money which is already owing or which becomes owing by the lessee.

## Causes of the problem

- 20 Numerous factors have led to the development and retention of such drafting styles. They include the:
- early use of Latin and French in legal documents
  - supremacy of Parliament in law-making
  - calculation of legal fees according to the length of a document
  - common law tradition of determining what the law is by reference to judgments in earlier cases
  - development of standard pleadings
  - professional pressure to conform with the practices of other lawyers.

## A mixture of languages

- 21 Latin was the language of learning in Europe for many centuries. English, like other vernacular languages, was thought not fit for scholarship. In England, Latin was the principal written language for important documents and books.<sup>9</sup> It was the language used in statutes until the fourteenth century, and in writs and court records until its use was forbidden by statute in 1731. However, Latin was not the sole legal language used after the Norman Conquest. In the fourteenth and fifteenth centuries, a form of Anglo-French came to be widely used, particularly as the language spoken in the courts. The use of 'Law-French', as the lawyers' mixed version of French and English came to be known, was also forbidden by statute in 1731. But, by then, both Latin and French terms were an integral part of the language of the law.<sup>10</sup>
- 22 Until English became the dominant legal language, there was neither need nor opportunity for it to develop a full range of technical terms and phrases. As it gradually became the official language, it borrowed terms and phrases from French, in particular, to cover deficiencies in its own word stock. As a result, English law could not be expressed in pure English. Pollock and Maitland summarised the position in the following way:
- One indelible mark [the Norman Conquest] has stamped for ever on the whole body of our law. It would be hardly too much to say that at the present day almost all our words that have a definite legal import are in a certain sense French words. The German jurist is able to expound the doctrines of Roman law in genuinely German words. On many a theme an English man of letters may, by way of exploit, write a paragraph or a page and use no word that is not in every sense a genuinely English word; but an English or American lawyer who attempted this puritanical feat would find himself doomed to silence.<sup>11</sup>
- 23 Many of the terms borrowed from French have now been absorbed into the English language. Words such as 'contract', 'agreement', 'crime', 'damage', 'robbery', 'judge', 'court', 'juror', 'infant', 'action', 'conviction' and 'pardon' offer no present impediment to understanding the law and legal documents. There are other foreign terms with technical meanings which do cause difficulty, but which may have to be retained. These include *habeas corpus*, *mandamus*, *certiorari* and *chose in action*. But not all the borrowings were, or remain, necessary. There are a number of Latin and French terms and phrases which occur in legal documents and for whose retention there is no overriding need. These include *ab initio*, *corpus delicti*, *in re*, *ex contractu*, *in custodia legis*, 'demise' and 'hereditament'. These might readily be replaced with more common words and phrases.

9 For example, Glanvil's *De Legibus* (c. 1187) and Bracton's *De Legibus et Consuetudinibus Angliae* (c. 1256).

10 See E Campbell, *Legal Research: Materials and Methods*, Law Book Company, Sydney, 1979, 174–175; C Weeramantry, *The Law in Crisis*, Capemoss, Lodon, 1975, 141–3.

11 F Pollock & F W Maitland, *The History of English Law Before the Time of Edward I*, The University Press, Cambridge [Eng] 1923, I, 80.

Latin and French are no longer widely taught in Australia. Latin is no longer a prerequisite for admission to faculties of law. More and more lawyers are unfamiliar with Latin and French terms and phrases. Certainly, their use is a hindrance to communicating with the public.

24 The mixed linguistic history of legal language also lies behind another characteristic of legalese—the doubling and even trebling of synonyms, as in:

- acknowledge and confess
- give, devise and bequeath
- act and deed
- null and void
- goods and chattels
- cease and desist
- fit and proper
- rest, residue and remainder
- keep and maintain.

Originally there may have been good reasons for the practice. As lawyers translated documents into English, they may have felt the need to preserve some of the technical French or Latin terms. To assist comprehension, they added an English word to the foreign one. Consequently the English word ‘acknowledge’ was added to the French ‘confess’ and the English ‘goods’ was added to the French ‘chattels’. Unfortunately the practice of adding such extra words persisted even when the borrowed terms became known and no longer needed explanation. The result is that legal texts are cluttered with tautologies. This confuses many readers. They strain to find a difference in the meaning of the terms assuming that two or three words would not have been used if one would have sufficed. Lawyers themselves are sometimes misled. They are afraid to omit one of a set of synonyms for fear of an unintended gap.<sup>12</sup>

## The supremacy of Parliament in law-making

25 The constitutional changes which took place in the seventeenth century and which established the supremacy of Parliament were also of great significance in the development of legal language, particularly in its legislative form. Before Parliament became the supreme law-maker, the judges themselves commonly drafted statutes. They wrote them in terms of general principle. ‘No great precision of language prevailed and the words were very loose and general’.<sup>13</sup> The judges interpreted the statutes liberally and without excessive regard to fine points.<sup>14</sup> This ‘equitable’ construction of legislation lost popularity as the judges’ role in drafting legislation diminished. Its death-knell was sounded by the constitutional settlement at the end of the seventeenth century. The significance of that settlement for legislative drafting was, indeed, profound:

The constitutional theory after 1688 bore upon interpretation of statutes in several ways. It affected the form of legislation by tending to make its provisions particular rather than general, an enumeration of instances rather than a broad statement of principle. Prior to the revolution, the details of administration had been largely settled by the executive under the prerogative. With prerogative cut to the bone, and the command of the king no longer a justification for governmental action, anything of moment that was done in the name of government had to be authorized by a statute passed by Parliament. However, to have given an authority in general terms would have created a statutory prerogative.

12 In some cases, the emphasis created by the tautology may have led to a particular interpretation by the courts of the composite phrase which would not be given to its constituents. In such a case, it may be necessary to retain the tautology.

13 *Wilson v Knubly* (1806) 7 East 128, 136 (Ellenborough C.J.).

14 *Eyston v Studd* 2 Plowd 467; E Driedger, *A Manual of Instructions for Legislative and Legal Writing*, Vol 6, Department of Justice, Canada, 1982, 541; D St. L Kelly, ‘The Osmond Case: Common Law & Statute Law’, (1986) 60 *Australian Law Journal*, 513.

Hence the tendency to specify in detail the exact powers given. This spread to all branches of legislation and was accelerated by the judicial policy of strict construction. When the judges cut down the operation of general expression, Parliament had to attempt to achieve its object by specific enumeration of all that the general expression was meant to include. A vicious circle was established, and prolixity became a pronounced vice of eighteenth century statutes.<sup>15</sup>

- 26 Today's statutes are not as defective in this regard as their eighteenth century counterparts. The relationship between the legislative and executive branches of Government has changed in a number of ways since then. Remarkable legislative powers are delegated to ministers. In some cases, they include even the power to extend or restrict the class of persons or circumstances to which the Act itself applies.<sup>16</sup> But the legacy of the constitutional changes in the seventeenth century remains. As recently as 1985, Lord Hailsham said in an address to the Statute Law Society in England that 'the victory of the literalists [strict constructionists] has led to increased pressure for detail on the part of Departments'.<sup>17</sup> In several Australian jurisdictions, legislation requires the adoption of a purposive approach to interpretation.<sup>18</sup> Even so, some parliamentary counsel still fear that a judge may be only too willing to read down the clear language of an Act.<sup>19</sup> Consequently, nothing must be left to chance. The striving of parliamentary counsel to prevent judges from interpreting legislation restrictively leads to repetition, to a maze of cross-references and to the inclusion of too much detail.

### Calculation of fees

- 27 For a long time, legal fees were calculated on the number of sheets or folios which the lawyers or court clerks produced. Malpractices, such as the leaving of wide margins and the inclusion of blank spaces, soon developed. Recitals and preambles were used by unscrupulous lawyers because these preliminary sections gave scope for repeating material contained in the body of the text. Efforts were made to curb these malpractices by specifying the number of words each folio was to contain. These efforts backfired badly. The supposed remedy did nothing but encourage prolixity. So outrageous did the problem become that judges were moved to act.
- 28 In 1556, one of the plaintiff's pleadings had been stretched from 16 to 120 pages. The Chancellor punished not the drafter, but his client. A fine of 10 pounds and imprisonment was not enough:

It is therefore ordered that the Warden of the Fleet shall take the said Richard Mylward ... into his custody, and shall bring him unto Westminster Hall on Saturday next ... and there and then shall cut a hole in the myddest of the same engrossed replication ... and put the said Richard's head through the same hole, and so let the same replication hang about his shoulders with the written side outward; and then, the same so hanging, shall lead the same Richard, bare headed and bare faced, round about Westminster Hall, whilst the courts are sitting, and shall shew him at the bar of every of the three courts within the Hall.<sup>20</sup>

15 E Driedger, *Manual of Instructions for Legislative Legal Writing*, Vol 6, Department of Justice, Canada, 1982, 544, quoting Corry ('The Interpretation of Statutes', Appendix 1 to Cons. St).

16 See, for example, *Credit Act 1984* (Vic), s19.

17 'Addressing the Statute Law', [1985], *Statute Law Review* 4, 5.

18 *Acts Interpretation Act 1901* (Cth), s15AA (inserted in 1981); *Interpretation of Legislation Act 1984* (Vic), s35. In the case of the Uniform Companies and Securities legislation, a similar provision applies in all states; see, for example, *Companies and Securities (Interpretation and Miscellaneous Provisions) (Victoria) Code* s5A corresponds with s15AA of the *Acts Interpretation Act 1901* (Cth).

19 The hypothetical perverse judge was named 'Judge Fiendish' by Rudolf Fleisch: *How to Write Plain English*, Harper & Row, New York, 1979, 36. Fleisch's reaction was: 'Let's forget about Judge Fiendish. Let's write so that no reasonable man will misinterpret what we're trying to say.'

20 *Mylward v Welden* (1565) Toth 101; 21 ER 136; cited in W Holdsworth, *A History of English Law*, Vol 5, 1924, 233.



The blame was more properly allocated when Chief Justice Hale later wrote:

There are certain unreasonable impertinences used ... which doth not only exceedingly prejudice the people, but ... serves for no other use but to swell the attorney's bill, and at present helps fill their prothonotaries' pocket, and to reimburse with advantage the purchase of his place.<sup>21</sup>

The system of payment by the page has now all but disappeared.<sup>22</sup> But its legacy of repetition and of the use of lengthy recitals and preambles has yet to be finally discarded.

## The common law

29 The common law tradition of determining the law by reference to judgments in earlier cases has also contributed to the development of legalese, especially in relation to documents other than legislation. The fact that earlier decisions, even ones that are hundreds of years old, may be relevant in determining what the common law is, requires lawyers to become familiar with writing styles which have long since passed from common use. Not only do they adopt a similar form of expression by a type of literary osmosis, they also use standard documents, especially pleadings, which had proved successful in earlier cases. In the past, these pleadings were collected and followed, however poorly they were drafted and however obscure the language in which they were written.<sup>23</sup> Books of forms and precedents were published. Some are still in use. Long after the importance of pleadings has diminished and the law has become more concerned with substance than form, lawyers continue to collect and follow tried and proven precedents, often without scrutiny or independent assessment. This approach has been extended to other legal documents, including wills, deeds and contracts. Writing in 1973, a leading commentator observed that:

Documents can only be judged by reference to the needs of the clients in their desire to regulate transactions against a background of conditions. The needs of clients differ; so do the conditions. Nevertheless the majority of members of the branches of the profession are addicted to the use of precedent books, office forms, and printed forms. The thinking seems to be that the needs of a client must be satisfied by some cure prescribed years ago. The pipe dream that the precedent books would always be legally viable was rudely shattered in *Dunn v Blackdown Properties Ltd.*, and the foundations of the castle were further undermined in *Tophams Ltd. v Sefton* where the House of Lords had the effrontery to hold that a clause taken out of an office file of a lease (effective in the lease) was valueless in a conveyance ... That is not to say that precedents in general do not have their uses. They serve a purpose even if it is only to sow ideas in the minds of the draftsman. But he must sift those ideas and select those that individually or together give effect to what the parties need. He must judge each clause by reference not only to the facts but also to the law. If it does not fit exactly then he must alter it.<sup>24</sup>

30 Despite this advice, precedent books are often used unwisely. Individual clauses are sometimes put together from different sources. As another commentator observed recently:

One very expensive piece of litigation in equity, *In Re Gulbenkian's Settlements* [1968] 3 WLR 1127, [1968] 3 All ER 785, went to the House of Lords because the draftsman had carelessly telescoped two separate clauses, resulting in uncertainty. Lord Reid commented that he 'was surprised to learn that this botched clause has somehow found its way into a standard book of precedents'.<sup>25</sup>

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21 M Hale, 'Considerations Touching the Amendment or Alteration of Lawes', in I Hargrave (ed), *A Collection of Tracts* (1787), 287.  
22 S Robinson, *Drafting*, Butterworths, Sydney, 1973, 13.  
23 D Mellinkoff, *The Language of the Law*, Little Brown & Co, Boston, 1963, 139f.  
24 S Robinson, 'Drafting—Its Substance and Teaching', (1973) 25 *Journal of Legal Education* 514, 515.  
25 (1987) *Legal Service Bulletin* 73.

It is hardly surprising that different writing styles, all of them difficult, sometimes appear in a single document. The development of word processing, with its facility for producing standard documents with required variations, has further institutionalised the problems.<sup>26</sup>

### Professional pressures

- 31 Another factor which has been important in maintaining a peculiarly legal language is the pressure on lawyers to conform with the conventions of other lawyers. A person who wishes to become part of a group, particularly a respected member of that group, is under considerable pressure to conform with the language conventions of that group. Experimental evidence has confirmed this in the case of scientists.<sup>27</sup> A project was based on a report of a medical experiment which was written in the style generally followed by scientists. The report was rewritten in plainer language and both versions were shown to a panel of scientists. The only difference between the two versions was linguistic. The scientists were asked to respond to a number of questions. Their answers indicated that the scientists found the plain English version easier to read, more dynamic, more indicative of a competent scientist and more stimulating. But they still preferred to write in the style of the original version. They apparently believed that the more difficult style was expected of them. That style has no particular merit as communication. It is a matter of appearances. It has nothing to do with professional ability.

<sup>26</sup> Some documents are so far removed from plain language and so difficult to disentangle that grammatical and syntactic blunders due to printing or proofreading errors are sometimes overlooked even by the lawyers who use them. Below, Appendix 5.

<sup>27</sup> E Bardell, 'Does Style Influence Credibility and Esteem?' (1978) 35 *Communicator of Scientific and Technical Information* 4–7; C R Turk, 'Do you Write Impressively?' (1978), 9 *Bulletin of the British Ecological Society*, 5–10. The study was later duplicated in the United States with similar results: see Wales, L H, *Technical Writing Style: Attitudes Towards Societies and their Writing* (University of Vermont Agricultural Experiment Station) 1979.





# Survey of legislation

18 Language problems

26 Organisation problems

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## 3. Survey of legislation

- 32 Isolated complaints about legal language do not establish the existence of a general problem. To assess how widespread the problem is, the Commission made a special study of Acts passed by the Victorian Parliament during 1985 and 1986. It also made a study of some recent Commonwealth legislation. This examination confirmed that the defects alleged to exist in legal language appear frequently in legislation. There are two main types: defects in language and defects in organisation. The problems are described in the following paragraphs. Examples are given from the relevant statutes. In some cases, additional examples are given from other Victorian or Commonwealth legislation.

### Language problems

- 33 Many of the problems for comprehension posed by legislation arise from a failure to observe a number of basic rules about language and communication. These rules are well known and not difficult to observe. Many of them were referred to in the discussion paper. They are set out in greater detail in the *Drafting Manual* in Appendix 1.\* The following paragraphs deal only with three recurring problems which give rise to grave difficulty for readers—sentence length, the creation of unnecessary concepts, and a failure to state underlying principles.

### Length of sentences

#### Example 1

- 34 It has long been recognised that long sentences present a considerable obstacle to understanding a document.<sup>1</sup> Long sentences abound in legislation. The following example is from section 128 (1) of the *Accident Compensation Act 1985* (Vic):

Where in respect of any claim the Tribunal determines that compensation is or may be payable under this Act, but is unable presently to ascertain the total amount of the compensation, the Tribunal may make an interim award for payment of the whole or any part of the compensation and the making of any such interim payments shall not preclude the Tribunal from making in respect of the same claim a further interim decision or determination or a final decision or determination or prejudice the rights of either of the parties in respect of any such further or final decision or determination.

In this extract, the conjunction 'and' (in 'and the making ...') is simply a substitute for a full stop. The readability of the section would have been improved substantially if it had simply been split in two.

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\* The appendices to this book were published separately.

1 E Gowers, *The Complete Plain Words*, HMSO, 3rd ed, London, 1986, 13. Renton Committee, *The Preparation of Legislation*, Sweet & Maxwell, London, 1975, Cmnd 6053, paragraphs 11.9 to 11.11 G.C. Thornton, *Legislative Drafting*, 3rd ed, Butterworths, London, 1987, 61.

## Example 2

35 The clearer the structure of a long sentence, the less the difficulty it creates for understanding. But the longer a sentence runs, the greater the probability that it will become structurally complex. It is this complexity rather than the mere length of a long sentence which leads to incomprehensibility. For example, subsection 27 (2) of the *Companies (Acquisition of Shares) (Victoria) Code* states:

Where an offeree who has accepted a take-over offer that is subject to a prescribed condition receives a copy of a notice under sub-section (1) in relation to a variation of offers under the relevant take-over scheme, being a variation the effect of which is to postpone for a period exceeding one month the time when the offeror's obligations under the take-over scheme are to be satisfied, the offeree may, by notice in writing given to the offeror within one month after receipt of the first mentioned notice and accompanied by any consideration that has been received by the offeree (together with any necessary documents of transfer), withdraw his acceptance of the offer and, where such a notice is given by the offeree to the offeror and is accompanied by any such consideration and any necessary documents of transfer, the offeror shall return to the offeree, within 14 days after receipt of the notice, any documents that were sent by the offeree to the offeror with the acceptance of the offer.

This sentence runs to 174 words. But it is not just its length that creates the difficulty. It is, rather, the mass of information which it contains and its intertwining of ideas that create the problem. The information could have been presented much more clearly if the requirements relating to the form and timing of the relevant notice had been set out separately.

## Example 3

36 Another example is subsection 25 (3) of the *Credit Act 1984* (Vic):

Where, by reason of sub-section (1), a tied loan contract is discharged when a contract of sale is rescinded or discharged—

- (a) the credit provider is liable to the buyer for the amount (if any) paid by the buyer to the credit provider under the tied loan contract to the extent that it is discharged;
  - (b) the supplier is liable to the credit provider for—
    - (i) the amount (if any) paid under the tied loan contract, to the extent that it is discharged, by the credit provider to the supplier;
    - (ii) the amount paid under the tied loan contract, to the extent that it is discharged, by the credit provider to the buyer and paid by the buyer to the supplier; and
    - (iii) the amount of the loss (if any) suffered by the credit provider by reason of the discharge of the tied loan contract, being an amount not exceeding the amount of the accrued credit charge under the tied loan contract; and
  - (c) the buyer is liable to the credit provider for the amount (if any) paid under the tied loan contract, to the extent that it is discharged, to the buyer by the credit provider, other than amounts paid to the buyer and paid by him to the supplier—
- and, where the contract of sale is a contract of sale of goods or services—
- (d) if the goods are in the possession of the buyer—
    - (i) where, before the rescission or discharge of the contract of sale, there was a mortgage relating to the tied loan contract to the extent that it is discharged, the buyer shall deliver the goods to the credit provider; and
    - (ii) where before the rescission or discharge of the contract of sale, there was a mortgage relating to the tied loan contract to the extent that it is discharged, the buyer shall deliver the goods to the credit provider; and

- (e) if the goods are in the possession of the credit provider and no amounts are owed to the credit provider under paragraph (b), the credit provider shall deliver the goods to the supplier.

This subsection is made up of a single sentence of 345 words. The division into paragraphs and subparagraphs certainly helps the reader. But the structure is too complex for clear communication. Take subparagraph (d) (i). There is a subordinate clause, 'Where, before the rescission ...' which is embedded in another subordinate clause, 'if the goods are in the possession ...'. This, in turn, is embedded in yet another subordinate clause, 'where the contract of sale ...' which is coordinated with another subordinate clause introduced some 200 words earlier at the beginning of the subsection, 'Where, by reason of ...'. It is also related to an item within a subordinate temporal clause, 'when a contract of sale ...'.

## Unnecessary concepts

### Example 1

37 Another practice which causes difficulty is the creation of special concepts in order to deal with complex subject matter. This practice is followed in a number of sections of the *Companies (Acquisition of Shares) (Victoria) Code*. Section 39 of the Code is an example. It imposes obligations on persons to report to securities exchanges if they acquire or dispose of voting shares at certain times. It commences with 26 lines which create the concepts 'relevant period' and 'prescribed person':

39. (1) For the purposes of the application of this section in relation to a listed public company—

(a) each of the following periods is a relevant period:

(i) if a Part A statement is served on the company—

(A) the period commencing when the statement is served and ending at the expiration of 28 days after the day on which the statement is served or, if take-over offers are dispatched pursuant to the statement within those 28 days, at the expiration of the period during which the take-over offers remain open; and

(B) if take-over offers are dispatched; in accordance with an order under section 46; pursuant to the statement—the period during which the take-over offers remain open; and

(ii) if a take-over announcement is made in relation to shares in the company—the period commencing when the announcement is made and ending at the expiration of the period during which offers constituted by that announcement remain open; and

(b) a person is, at a relevant time, a prescribed person in relation to a period that is, by reason of the service of a Part A statement or the making of a take-over announcement, a relevant period in relation to the company if—

(i) he is the person who is, or one of the persons who constitute, the offeror under the take-over scheme to which the Part A statement relates or is the person or one of the persons who caused the take-over announcement to be made; or

(ii) he is, at that time, entitled to more than the prescribed percentage of the voting shares in the company and he is not, and is not associated with, a person referred to in sub-paragraph (i).

38 The remaining subsections specify the persons who are to report, the circumstances in which they are to report and the particulars to be covered in a report. Subsection (2) imposes obligations on:

[a] person who, at the commencement of a period that is a relevant period in relation to a listed company, is a prescribed person in relation to that period by reason of subparagraph (1) (b) (i) ...

Similarly, subsection (3) imposes obligations on:

[a] person who, during the period that is a relevant period in relation to a listed company, becomes a prescribed person in relation to that period by reason of subparagraph (1) (b) (ii) ...

It would have been far better to dispense with these artificial constructs and to build into each subsection the precise description of the relevant person and period. This would have resulted in a much simpler statement of the law.<sup>2</sup>

## Example 2

39 Another example of the creation of unnecessary concepts comes from section 150 of the *Futures Industry Act 1986* (Cth). The purpose of this section is to ensure that a continuing failure to comply with the Act's requirements continues to be an offence even if the time for complying has passed and even if the offender has already been convicted of the relevant offence. In subsection 150 (6), a number of concepts are established:

(6) In this section—

...

“primary derivative offence”, in relation to failure to do an act, means an offence (other than an offence of which a person is guilty by virtue of this section) of which a person is guilty by virtue of being an officer of a body corporate who is in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the commission by the body corporate of a primary substantive offence in relation to failure to do the act;

“primary substantive offence”, in relation to failure to do an act, means an offence (other than an offence of which a person is guilty by virtue of this section) constituted by failure to do the act, or by failure to do the act within a particular period or before a particular time;

...

“relevant day”, in relation to an offence of which a person is guilty by virtue of this section, means—

(a) in a case where the information relating to the offence specifies a day in relation to the offence for the purposes of this section, being a day not later than the day on which the information is laid—the day the information so specifies; or

(b) in any other case—the day on which the information relating to the offence is laid;

...

“secondary derivative offence”, in relation to failure to do an act, means an offence or further offence of which a 2. See the plain English version of s37 in Appendix 2. 25 person is, in relation to failure to do the act, guilty by virtue of paragraph (4) (c) or (d);

“substantive offence”, in relation to failure to do an act, means—

(a) a primary substantive offence in relation to failure to do the act; or

(b) a further offence of which a person is, in relation to failure to do the act, guilty by virtue of sub-section (3).

- 40 The remaining subsections make use of these concepts. Subsection (4) is the main provision:
- (4) Where—
    - (a) a body corporate is guilty of a primary substantive offence in relation to failure to do the act; and
    - (b) throughout a particular period (in this sub-section referred to as the “relevant period”)—
      - (i) the failure to do the act continues;
      - (ii) a person (in this sub-section referred to as the “derivative offender”) is in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the failure to do the act; and
      - (iii) the derivative offender is an officer of the body corporate, then—
    - (c) in a case where either or both of the following events occurs or occur:
      - (i) the body corporate is convicted, before or during the relevant period, of the primary substantive offence;
      - (ii) the derivative offender is convicted, before or during the relevant period, of a primary derivative offence in relation to failure to do the act, the derivative offender is, in relation to failure to do the act, guilty of an offence (in this paragraph referred to as the “relevant offence”) in respect of so much (if any) of the relevant period as elapses—
      - (iii) after the conviction referred to in sub-paragraph (i) or (ii), or after the earlier of the convictions referred to in sub-paragraphs (i) and (ii), as the case may be; and
      - (iv) before the relevant day in relation to the relevant offence; and
    - (d) in a case where, at a particular time during the relevant period, the derivative offender is first convicted of a secondary derivative offence, or is convicted of a second or subsequent secondary derivative offence, in relation to failure to do the act—the derivative offender is, in relation to failure to do the act, guilty of a further offence in respect of so much of the relevant period as elapses after that time and before the relevant day in relation to the further offence.
- 41 The constant cross-referencing required by this method of drafting is exhausting. The message could have been conveyed without creating special concepts. The following plain English version of the whole of section 150 dispenses with the artificial constructs in subsection (6). It reduces the total length of the section from 960 words to 208:
- 1) Even if the period specified for an act has ended—
    - a) a person is guilty of an offence if he or she continues to fail to do an act after being convicted of an offence in relation to failure to do the act; and
    - b) an officer of a body corporate is guilty of an offence if he or she is knowingly concerned in a continuing failure by the body corporate to do an act if either the body corporate has been convicted of an offence, or the officer has been convicted of an offence under section 151, in relation to failure to do the act.
  - 2) A person may be guilty of successive offences in relation to a continuing failure to do an act.

- 3) The penalty for a further offence is \$50 multiplied by the number of days in the period during which the further offence continued between
  - a) the person's or officer's most recent conviction for failure to do the act or, in the case of an officer's first offence in relation to a continuing failure to do an act, an earlier first conviction of the body corporate for failure to do the act; and
  - b) the earlier of
    - i) the laying of the information;
    - ii) the day specified in the information.

## Absence of underlying principle

### Example 1

42 The third practice which creates difficulty for readers is common in complex legislation, in particular. It is the tendency to deal at length and in separate subsections with a series of variations instead of integrating the relevant statements in a single provision which states the underlying principle. Again the *Companies (Acquisition of Shares) (Victoria) Code* contains numerous examples. The Act provides two main methods for a takeover. A person who wishes to take over a target company may proceed by way of takeover offers made directly to shareholders or by means of a takeover announcement through the stock exchange. Part V of the Code contains provisions which are applicable to both types of procedure. In some sections, however, takeover offers and takeover announcements are dealt with separately in different subsections. Section 40 is an example:

(1) Subject to sub-section (3), during the period commencing when a Part A statement is served on a target company and ending at the expiration of 28 days after the day on which the statement is served or, if take-over offers are dispatched pursuant to the statement within those 28 days, at the expiration of the period during which the take-over offers remain open the offeror, or a person associated with the offeror, shall not give, offer to give or agree to give to a person whose shares may be acquired under the relevant take-over scheme, or to a person associated with such a person, any benefit (whether by payment of cash or otherwise) not provided for under the take-over offers or, if the take-over offers are varied in accordance with section 27<sup>3</sup>, under the take-over offers as so varied.

(2) Subject to sub-section (3), during the period commencing when a take-over announcement is made in relation to shares in a company and ending at the expiration of the period during which offers constituted by that announcement remain open the on-market offeror, or a person associated with the on-market offeror, shall not give, offer to give or agree to give to a person whose shares may be acquired pursuant to the take-over announcement, or to a person associated with such a person, any benefit (whether by payment of cash or otherwise) not provided for under the terms of the take-over announcement or, if those terms have been varied under section 17, under the terms as so varied.

(3) ...



- 43 There is simply no need for all this separate treatment. It is true that the period during which the obligation continues varies from one type of offer to another, but that variation can be captured in a single provision covering both direct offers and offers made by an announcement at the stock exchange. This not only reduces the length of the provision, it also reveals the essential similarity of treatment of the two types of procedure:
- 1) An offeror or an associate must not give, or offer or agree to give, to an offeree or an associate of an offeree a benefit not provided for under the offers
    - a) within 28 days after the Part A statement is served;
    - or
    - b) if offers are made within that time—within the offer period; or
    - c) after the takeover announcement is made until the end of the offer period.

### Example 2

- 44 A similar example of a failure to state the underlying principle is provided by section 35 of the Code. This imposes a restriction on the disposal of shares by the offeror during particular periods. Direct offers are again treated separately from offers made by way of an announcement:
- (1) During—
    - (a) the period commencing when a Part A statement is served on the target company and ending at the expiration of 28 days after the day on which the statement is served or, if take-over offers are dispatched pursuant to the statement within those 28 days, at the expiration of the period during which the take-over offers remain open; and
    - (b) if take-over offers are dispatched, in accordance with an order under section 46, pursuant to the statement—the period during which the take-over offers remain open, the offeror shall not dispose of any shares in the target company included in the same class of shares to which the Part A statement relates unless another person (not being a person associated with the offeror) has, after the Part A statement is served and before the disposal takes place, made a take-over offer or caused a take-over announcement to be made in respect of shares in the target company included in that class of shares.
  - (2) After the making of a take-over announcement in relation to shares in a company and before the end of the period in which offers constituted by the take-over announcement remain open, the on-market offeror shall not dispose of any shares in the target company included in the same class of shares as the first-mentioned shares unless another person (not being a person associated with the on-market offeror) has, after the making of the announcement and before the disposal takes place, made a take-over offer or caused a take-over announcement to be made in respect of shares in the target company included in that class of shares.
- 45 The variation in the period during which the restriction applies does not require separate treatment in separate subsections. The variation can be captured in a single, integrated provision:
- An offeror must not dispose of shares in the class covered by a takeover scheme or a takeover announcement
- a) within 28 days after the Part A statement is served; or
  - b) if offers are made within that time or are sent in accordance with an order under section 64—during the offer period; or
  - c) from the making of the announcement until the end of the offer period.
- unless, after the Part A statement was served or the announcement was made, a person who is not an associate of the offeror has made offers under a takeover scheme or by an announcement for shares of the same class.

### Example 3

46 *The Fair Trading Act 1985 (Vic)*<sup>4</sup> provides another example of a failure to state the underlying principle. Section 35 enables a court to make certain orders in respect of a contravention of another provision in Part II of the Act. The orders are of two types: an order to disclose information and an order to publish certain advertisements. Subsections (2), (3) and (4) set limits on those orders by reference to the amount that a person would have to expend in order to comply with them:

(2) Where, on an application made under sub-section (1), the Court is satisfied that a contravention of a provision of Part II. has been committed, the Court shall not, in respect of that contravention, make an order or orders under subsection (1) that the Court considers would, or would be likely to, require the expenditure by the person or persons to whom the order or orders is or are directed of an amount that exceeds, or of amounts that, in the aggregate, exceed, \$50,000.

(3) Where, on an application made under sub-section (1), the Court is satisfied that a person has committed, or been involved in, two or more contraventions of the same provision of Part II, being contraventions that appear to the Court to have been of the same nature or a substantially similar nature and to have occurred at or about the same time (whether or not the person has also committed, or been involved in, another contravention or other contraventions of that provision that was or were of a different nature or occurred at a different time), the Court shall not, in respect of the first-mentioned contraventions, make an order or orders under sub-section (1) that the Court considers would, or would be likely to, require the expenditure by the person or persons to whom the order or orders is or are directed of an amount that exceeds, or of amounts that, in the aggregate, exceed, \$50,000.

(4) Where—

- (a) on an application made under sub-section (1), the Court is satisfied that a person has committed, or been involved in, a contravention or contraventions of a provision of Part II; and
- (b) an order has, or orders have, previously been made under sub-section (1) against the person who committed, or against a person who was involved in, that contravention or those contraventions in respect of another contravention or other contraventions of the same provision, being a contravention which, or contraventions each of which, appears to the Court to have been of the same nature as, or of a substantially similar nature to, and to have occurred at or about the same time as, the first-mentioned contravention or contraventions (whether or not an order has, or orders have, also previously been made under subsection (1) against any of those persons in respect of another contravention or other contraventions of that provision that was or were of a different nature or occurred at a different time)—

the Court shall not, in respect of the contravention or contraventions mentioned in paragraph (a), make an order or orders under sub-section (1) that the Court considers would be likely to require the expenditure by the person or persons to whom the order or orders is or are directed of an amount that exceeds, or of amounts that, in the aggregate, exceed, the amount (if any) by which \$50,000 is greater than the amount, or the sum of the amounts that has or have been or that the Court considers would be or be likely to be, expended in accordance with the previous order or previous orders first mentioned in paragraph (b).

Three separate, but closely analogous, situations are dealt with in three separate subsections. The fact that each is to be treated in much the same way is lost in the maze of words. Subsections (2), (3) and (4) could have been readily integrated in the following provision:

A Court may not make an order under subsection (1) if, either alone or together with any other orders in respect of contraventions which

- a) are of the same provision of Part II; and
- b) are of the same or a substantially similar nature; and
- c) occurred at or about the same time,

it would be likely in the Court's opinion to require the person or persons to whom it is directed to spend more than \$50,000.

## Organisation problems

- 47 The second main type of defect in legislation is poor organisation of material. The importance of organisation in the drafting of legislation was well explained in a Study Paper published by the Canadian Law Reform Commission in 1981:

the order in which the ideas in a discourse appear has more than a merely aesthetic importance, for it also carries a functional significance that is relevant, on the one hand, for an understanding of the discourse, and on the other hand, for retrieving the various elements. Indeed, a disorganized discourse, in which the writer presents his ideas without following a logical sequence, has less of a chance of being understood than a discourse in which the reader can follow a certain chain of reasoning.<sup>5</sup>

Despite this fact, many Acts suffer from defects in organisation which add to the difficulties already posed by the language in which they are expressed. Indeed, there are occasions when the organisation of material is so poor that it displaces language problems as the main cause of the obscurity and incomprehensibility of legislation.

### Within a single section

#### Example 1

- 48 In some cases, the problem arises within a single section. Take the following example from the *Life Insurance Act 1945* (Cth):

16 (1) A person or company shall not be deemed to carry on any class of life insurance business by reason only-

- (a) of collecting renewal premiums under a policy in respect of that class of business issued outside Australia to a person resident outside Australia at the date of issue of the policy; or
- (b) of making payments due under any such policy.

(2) Subject to the last preceding sub-section, a person or company receiving premiums or proposals in respect of life insurance business shall be deemed to be carrying on the class of life insurance business to which the premiums or proposals relate.

A person first reading subsection (1) would be mystified, because neither the collection of the relevant premiums nor the making of the relevant payments could possibly have the relevant, or indeed any, deeming effect. The deeming provision itself has been missed out. It is found in subsection (2). Subsection (1) makes no sense without it. The drafter has dealt with an exception to a principle without first stating the principle.

## Example 2

49 Another example of poor organisation within a single section is to be found in the *Mental Health Act 1986* (Vic). Section 112 is headed 'Powers of inspection'. Subsection (1) entitles a 'community visitor' -a person appointed to make certain inquiries in relation to the provision of mental health services-to inspect premises, see patients and make other inquiries. Subsections (2) and (3) read:

(2) Where a community visitor wishes to perform or exercise or is performing or exercising any power, duty or function under this Act, the person in charge and every member of the staff or management of the mental health service must provide the community visitor with such reasonable assistance as the community visitor requires to perform or exercise that power, duty or function effectively.

(3) Any person in charge or member of the staff or management of a mental health service who—

- (a) unreasonably refuses or neglects to, render assistance when required to do so under sub-section (2); or
- (b) does not give full and true answers to the best of that person's knowledge to any questions asked by a community visitor in the performance or exercise of any power, duty or function under this Act; or
- (c) assaults, obstructs, hinders, threatens, intimidates or attempts to obstruct or intimidate a community visitor visiting a mental health service—

is guilty of an offence against this Act and liable to a penalty of not more than 25 penalty units.

The location of these subsections is misleading. They are not limited, as their location suggests, to requiring cooperation with a community visitor in relation to the exercise of powers conferred by subsection (1). They require cooperation with a community visitor in the performance or exercise of any duty, function or power conferred under the Act. The general functions of community visitors are set out in section 109. They are considerably wider than those set out in section 112. Subsections 112 (2) and (3) should have been drafted as a separate section, with a different heading, in order to avoid the risk of the mistaken inference that they are only relevant to the exercise of the powers conferred by subsection 112 (1).

## Example 3

50 Perhaps the clearest example of the problems caused by poor organisation of material within a single section is section 44 of the *Companies (Acquisition of Shares) (Victoria) Code*. That section prohibits the making of false or misleading statements in a wide variety of documents produced by parties in an attempted takeover. Because of the different types of documents and the different people who in each case are responsible for them, it was necessary to create a number of separate offences in respect of each type of document. Each had to specify the people covered by it and the defences available to them.

51 Instead of exhaustively dealing with all aspects of each offence in turn, the drafter first set out each of the offences in subsections (1) to (7). In the case of the offences set out in subsections (4) to (6), the people who may be guilty of those offences are identified in each case. Not so, however, with the offences set out in subsections (1)–(3) and (7). In each case, the person who may be guilty of an offence is identified only by the phrase 'a person to whom this sub-section applies'. There is not even a cross-reference to the provisions which give this phrase substance. These appear as subsections (11) to (14) of section 44, some two or three pages after the subsections to which they refer. The defences available to the relevant people covered by subsections (1) to (7) are, in each case, entirely separate from the provisions which they qualify. Instead, they appear as

subsections (16) and (17) of section 44. The consequence of this organisation is that section 44 is little better than a jigsaw puzzle. The provisions would be more easily understood if they were set out in tabular form, with the circumstances of each offence in one column and the relevant persons and defences side by side in other columns. The reader could then identify all the relevant information at once. This format has been adopted in the plain English version of section 44 in Appendix 2.<sup>6</sup>

## Within an Act as a whole

### Failure to highlight central message

- 52 If legislation is to be readily intelligible, its central message should be introduced early in the document. That is not generally done at present. A substantial amount of technical material is included at the beginning of Acts. They commence with a number of 'preliminary' sections. For example, the preliminary sections of the *Dangerous Goods Act 1985* (Vic) cover commencement of the Act, definitions, the question whether the Crown is bound by the Act, commencement of repeals and amendments noted in the Schedule. The sections also include the continuation of existing regulations and those repealed by the Act, the continuation of existing legislation, the matters to which the Act applies and the adoption by regulation of provisions of the *Transport Code*. Much, if not all, of this material would be better placed elsewhere. The commencement provision should be located at the back of the Act, as is already done in several Canadian jurisdictions. The remainder of the preliminary sections could also be relocated easily. That would enable a swifter introduction to the central provisions of the legislation, with considerable improvement in communication.
- 53 Even after dealing with 'preliminary matters', legislation often goes to peripheral or less important issues before dealing with the central provisions. Again, the *Dangerous Goods Act 1985* provides an example. Part II, consisting of 10 sections, deals with the appointment and powers of inspectors. The central requirements of the Act—those dealing with licensing of people and with the requirements imposed on licensees and other people to provide information to the Government and to take care with respect to dangerous goods—follow in Parts III, IV and V, respectively. These should appear before Part II. The appointment of inspectors and the provision of information to the Government are not ends in themselves. They simply facilitate enforcement of the Act's main provisions.
- 54 But the Act's principal defect is its failure to state anywhere in Part III the people who are required to obtain a licence. Section 21 simply indicates that a person is required to obtain a licence if the regulations say so. One must then turn to section 52 in Part VII, which deals with the power to make regulations. This refers to Schedule 2 of the Act. Clause 27 of the Schedules ('Subject matter for Regulations') covers:
- Requiring licences to be obtained by persons in relation to—
- (a) the manufacture, storage, sale, use, handling or transfer of dangerous goods (other than in relation to the storage, use, handling or transfer of dangerous goods by a primary producer being dangerous goods which are used or intended to be used in connexion with the business of the primary producer and are not held by the primary producer for the purpose of resale);
  - (b) the transport of dangerous goods;
  - (c) the carrying out of work in respect of the installation, alteration, repair, maintenance or testing of equipment, piping, fittings or appliances which is or are used or intended to be used for or in connexion with dangerous goods;
  - (d) the import of explosives into Victoria;

- (e) the sale of explosives; or
  - (f) the assembling and blending of the inexplusive component parts of any prescribed explosive mixture—
- and prescribing the conditions to be complied with before licences can be issued.

### Separation of related material

- 55 Another organisational problem within an Act as a whole is the separation of closely related provisions. A relatively straightforward example of unexpected separation of related matters is found in the *Companies (Acquisition of Shares) (Victoria) Code*. Company takeovers are conducted by two main methods: direct offers to the shareholders; and indirect offers through a takeover announcement to the stock exchange. Some provisions of the Code deal with takeover offers; others with takeover announcements; still others with both. The relevant provisions are set out in Parts III, IV and V of the Code, respectively. But the central provisions which define the procedure to be followed in respect of takeover offers and takeover announcements are located not where they might be expected to be found, at the beginning of Parts III and IV, but in Part II, which defines the circumstances in which shares may be acquired. One result is that the central provision dealing with takeover announcements is physically placed some 14 sections before those which, in conceptual order, immediately follow it.
- 56 Another example is contained in the 'Uniform' *Credit Act 1984*. In a commentary on the New South Wales version of the Act, Mr Warren Pengilley, a Sydney solicitor, criticised the Act's organisation of the material in the following terms:

The Act believes in 'the treasure trove' principle of statutory interpretation. By this method, the draftsman drops clues in certain sections of the Act which enable the astute seeker of truth to see the possibility of the relevance of other sections, and thus by shuttling back and forth, hopefully to arrive at the correct conclusion.<sup>7</sup>

He illustrated the difficulties by attempting to answer the 'not unreasonable question' whether a mortgage of goods is regulated under the Act and, if so, what steps a mortgagee has to take to exercise the power of sale:

... the following sections need to be studied before such questions can be answered:

1. Is the mortgagee a credit provider?—s 5 (1) (a), (b), (c).
2. Is the credit for any transaction prescribed by the Act or regulations as not being within the above?—see government gazettes.
3. Is there a credit sale contract?—ss 5 (1), 13, 14, 16 and various subsections of each, plus government gazettes for classes of credit sale contract within the statutory definition but prescribed as outside it.
4. If there is a credit sale contract, is it a regulated credit sale contract?—ss 5 (1), 18, 30 (1) (b),(c). S.
5. Is there a loan contract?—ss 5 (1), 15, 16 and government gazettes for classes of loan contracts within the statutory definition but prescribed as outside it.
6. If there is a loan contract, is there a regulation loan contract?—ss 18 (1), (2), 30 (2).
7. Is there a continuing credit contract?—ss 5 (1), 16, 48 and various subsections, plus government gazettes for classes of continuing credit contracts within the statutory definition but prescribed as outside it.
8. If there is a continuing credit contract, is there a regulated continuing credit contract?—ss 5 (1), 18 (1), 49 and various subsections.
9. Are there any orders under s 19 exempting various persons or classes of conduct?—see government gazettes.

At this stage, one may pause and state that if question 4, 6 or 8 is answered positively and question 9 is inapplicable, then the basic transaction is a regulated one. The next question for the mortgagee is whether the mortgage is regulated—something he can find out from an evaluation of ss 5 (1), 18 (1), (2) and 89. An assessment then is required as to whether the mortgage has invalidity aspects, which requires searching at least through ss 98, 99, 100, 119 and 120. Our mortgagee can then find out from ss 106 (six alternative possibilities), 107 (which may involve up to 29 alternative considerations), 110 (three alternatives), 115 (nine alternatives) and 116 (12 matters for evaluation), how he exercises his rights and what factors affect his decision.<sup>8</sup>

Having written out a summary of the Act, Mr Pengilley still found it to be incomprehensible:

Only when [I] put it on to a series of 'Computer Analysis Flow Charts' did the legislation make any sense. This analysis, however, took a period of many weeks. The cost to the nation of lawyers, business persons and consumer advisers going through this process must be astronomical.<sup>9</sup>

# Plain English and objections to it in the law

**32** Nature of plain English

**32** Objections to plain English in legal drafting



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## 4. Plain English and objections to it in the law

### Nature of plain English

57 The drafting defects catalogued in the preceding chapter are not unique to legislation. Other legal documents examined by the Commission contain equivalent or analogous defects.<sup>1</sup> These defects can only be eradicated by the adoption of a plain English approach to communication. 'Plain English' involves the use of plain, straightforward language which avoids these defects and conveys its meaning as clearly and simply as possible, without unnecessary pretension or embellishment. It is to be contrasted with convoluted, repetitive and prolix language. The adoption of a plain English style demands simply that a document be written in a style which readily conveys its message to its audience. However, plain English is not concerned simply with the forms of language. Because its theme is communication, it calls for improvements in the organisation of the material and the method by which it is presented. It requires that material is presented in a sequence which the audience would expect and which helps the audience absorb the information. It also requires that a document's design be as attractive as possible in order to assist readers to find their way through it.

### Objections to plain English in legal drafting

58 During the course of its work on the reference, the Commission was confronted with a number of specific objections to the adoption of a plain English policy in relation to legislation and other legal documents. The rest of this chapter examines each of these objections. The conclusion reached is that they are based on misunderstandings concerning the nature of plain English and the objectives of those who advocate it.

#### a. 'Plain English involves a debasement of the language'

59 It would certainly be a debasement of language if Shakespeare's:

I'll call thee Hamlet,  
King, father, royal Dane: Oh answer me,  
Let me not burst in ignorance; but tell  
Why thy canoniz'd bones hearsed in death,  
Have burst their cerements, why the sepulchre  
Wherein we saw thee quietly inurn'd  
hath op'd his ponderous and marble jaws,  
To cast thee up again?<sup>2</sup>

were to be translated as:

What are you doing out of your coffin, Dad?

We buried you the other day and you're supposed to be dead,

Don't keep me waiting! I'm bursting to know.<sup>3</sup>

The message conveyed by the translation is a poor shadow of the original. It has lost its sense of the awful solemnity of Hamlet's meeting with his dead father. It has none of the elegance of the original and generates no aesthetic pleasure.

- 60 But legal documents are functional documents, not literary ones. Their aim is to establish, and to communicate information about, rights, duties, benefits and burdens. They are not intended to be works of art, to convey atmosphere or to generate aesthetic pleasure. That is not to say that they may be written clumsily or inelegantly. Like convolution and prolixity, clumsiness and inelegance detract from the efficiency with which a document communicates its message. Like convolution and prolixity, they are inconsistent with plain English. Writing legal documents in plain English requires direct and clear expression. It does not involve any debasement of the language.

### b. 'Plain English is incompatible with precision'

- 61 For lawyers, accuracy and precision are fundamental. Adoption of a plain English policy in relation to legal drafting would be unacceptable if it involved a change in the intended allocation of rights and duties or if it made a clear document ambiguous. Some responses to the discussion paper pointed out that statements in plain language can lead to uncertainty because of their lack of precise meaning. Section 92 of the Commonwealth Constitution was given as an example:<sup>4</sup>

Trade commerce and intercourse between the States shall be absolutely free.

Section 92 has given rise to a large amount of litigation aimed at determining how it applies in particular situations. But it is quite wrong to blame the simplicity of its language. The fault (if it be a fault) lies with the lack of precision of the Founding Fathers in developing the policy which lay behind section 92. If the policy had been more detailed, the section would certainly have been longer. Much of the litigation which has followed would have been avoided. But the detailed policy could still have been expressed in simple language. The fact that statements in plain language can lead to uncertainty when they express an imprecise policy is irrelevant to the question of the utility of a plain English approach to legal writing in general.

- 62 Other critics of the plain English movement have strenuously maintained that clarity and precision are inconsistent goals. The 1984–85 Annual Report of the Commonwealth Office of the Parliamentary Counsel states that:

Critics of legislative drafting fail to appreciate that the reason that even a well-drafted law may be difficult to understand (even to an expert on the subject matter of the law) is that the law has to be unambiguous. This contrasts with literary English where the main object of the writing is to convey an idea readily to the reader and it does not matter that it may not be conveyed precisely. The drafter of legislation is not likely to receive any thanks from the Government for drafting a law that is easily comprehensible but is imprecise. As Sir Ernest Gowers pointed out in *The Complete Plain Words*, ... [I]ack of ambiguity does not go hand in hand with intelligibility, and the nearer you get to the one, the further you are likely to get from the other.<sup>5</sup>

3 G A Hackett-Jones, Submission, 3 December, 1986.

4 The examples given by I.M Turnbull ('Problems of Legislative Drafting', [1986] *Statute Law Review* 67 at 69) are in much the same category. In each case, the criticism is of a failure to express a developed policy. Mr Turnbull does not use them to cast doubt on plain English, but on the abbreviated form of Continental drafting.

5 At 250. Similarly, Sir John Rowlatt's aphorism 'the intelligibility of a Bill is in inverse proportion to its chance of being right'. See Sir Harold Kent, *In on the Act*, McMillan, London, 1979, 97. Whether precision and a lack of ambiguity are in fact achieved by the present style is questionable. Compare D Mellinkoff, *The Language of the Law*, Little Brown & Co, Boston, 1963, 293f.

- 63 This statement, like other similar ones, begs the question whether accuracy and intelligibility really are inconsistent goals. The authority relied upon is certainly an impressive one. Sir Ernest Gowers has been described by Professor Robert Benson, an advocate of plain English, as ‘the patron saint of sensible writing’.<sup>6</sup> Yet, in a chapter entitled ‘A Digression on Legal English’, Gowers argued that the reason for the peculiarities of legal English lay in the necessity not to be unambiguous:

That is by no means the same as being readily intelligible; on the contrary, the nearer you get to the one, the further you are likely to get from the other ... It is accordingly the duty of a draftsman of these authoritative texts to try to imagine every possible combination of circumstances to which his words might apply and every conceivable misinterpretation that might be put on them, and to take precautions accordingly. He must avoid all graces, not be afraid of repetitions, or even of identifying them by aforesaid; he must limit by definition words with a penumbra dangerously large, and amplify with a string of near synonyms words with a penumbra dangerously small; he must eschew all pronouns when their antecedents might possibly be open to dispute and generally avoid every potential grammatical ambiguity.<sup>7</sup>

- 64 Commenting on this passage, Benson stated that it was ‘as if the Sunday preacher has unveiled himself as Judas Iscariot’.<sup>8</sup> Gowers was, of course, a lawyer and a civil servant. Like many lawyers, he appears to have been seduced by the claim of parliamentary counsel that clarity must be sacrificed to precision. Benson rightly compares Gowers’ defence of this claim with the response made by the Swiss clockmaker to the mayor’s criticism of a clock of great precision which had been installed in the tower on the main square:

‘But Johann,’ complained the mayor, ‘the clock has no hands or numbers and the citizens cannot tell the time.’ ‘I give you the finest precision-instrument in Europe,’ grumbled Johann, ‘and you are ungrateful. Besides, if the citizens want to know the time, they can pay me to climb the tower, inspect the workings, and announce it.’

As Benson points out, Gowers was guilty of sleight of hand in altering the concept of precision by removing from it the requirement of communicability. It is hardly surprising to find that Gower’s ‘Digression’ was removed by a subsequent editor<sup>9</sup> and that the treatment of legal English as a separate dialect has been all but abandoned in the most recent edition.<sup>10</sup>

- 65 In fact, precision and clarity are not competing goals. Precision is desirable in order to minimise the risk of uncertainty and of consequent disputes. But a document which is precise without being clear is as dangerous in that respect as one which is clear without being precise. In its true sense, precision is incompatible with a *lack* of clarity. As Thornton says:

The purposes of legislation are most likely to be achieved by the draftsman who is ardently concerned to be intelligible. The obligation to be intelligible, to convey the intended meaning so that it is comprehensible and easily understood by the affected parties, is best satisfied by writing with simplicity and precision ... A law which is drafted in precise but not simple terms may, on account of its incomprehensibility, ... fail to achieve the result intended. The blind pursuit of precision will inevitably lead to complexity; and the complexity is a definite step along the way to obscurity.<sup>11</sup>

In summary, neither precision nor simplicity should be sacrificed at the altar of the other.<sup>12</sup>

6 R Benson, ‘The End of Legalese: The Game is Over’, (1985) 13 *Review of Law & Social Change*, 519, 559.

7 *The Complete Plain Words*, 1st ed, Pelican, London, 1954, 18–20.

8 R Benson, ‘The End of Legalese: The Game is Over’, (1985) 13 *Review of Law & Social Change*, 519, 560.

9 Fraser, 2nd ed, 1972.

10 Greenbaum & Whitcut, 3rd ed, 1986.

11 G C Thornton, *Legislative Drafting*, 3rd ed, Butterworths, London, 1987, 49.

12 At 48.

66 Despite all this, the view that the adoption of plain English is inconsistent with achieving the required degree of legislative precision is a persistent one. A number of submissions<sup>13</sup> pointed to the fact that the Commission's earlier attempts to redraft particular legislative provisions in plain English had in several cases failed to reproduce the detail contained in the originals. Some submissions attributed this to the tension between precision and clarity. In the Commission's view, that is not correct. The errors found in the earlier drafts resulted from difficulties in establishing the exact meaning of the original. Once that was done, the errors were readily corrected without departure from a plain English style.<sup>14</sup> The same is true of the plain English version of the *Companies Acquisition of Shares (Victoria) Code* in Appendix 2. Considerable effort has gone into reproducing the detail of the original. If some detail has been missed, it could readily be included without affecting the style of the plain English version. It would not be necessary to resort to the convoluted and repetitious style of the original, nor to introduce the unnecessary concepts which it contains. Any errors in the plain English version are the result of difficulties of translation, particularly difficulties in understanding the original version. They are not inherent in plain English itself. Ideally, of course, plain English should not involve a translation. It should be written from the beginning. In that event, all necessary detail would be included automatically in the draft Bill. There would be no question of a failure to reproduce the precise amount of detail required.

### c. 'It is impossible to draft complex laws which are intelligible to the average citizen'

67 Underlying this objection is a misconception concerning the audience of legislation. The view of many drafters is that they should draft with prime concern for lawyers and judges.<sup>15</sup> Clearly lawyers must have access to an intelligible text in order to advise their clients. Similarly, judges must be able to understand legislation in order to construe and apply it. But that does not mean that a law is satisfactory if it is intelligible to lawyers and judges. Lawyers and judges are an important audience, but they are a secondary one.

68 The primary audience of draft legislation is Parliament.<sup>16</sup> Parliament bears the ultimate responsibility for the language used in an Act. An Act contains only what Parliament has approved. But members of parliament must themselves read Bills if they are to vote on them. If they are not readily comprehensible, parliamentary time may be wasted and the Government's legislative program interfered with. Worse still, laws may be enacted without members fully understanding and appreciating their significance. Parliament regularly has to grapple with complex content. It should not also have to struggle with obscure language.

69 Once a Bill has been passed, the primary audience is the group of people who are affected by it and the officials who must administer it. A clear statement of the law is necessary if citizens are to be aware of their rights and obligations. It is also necessary if the officials who administer the law are to do so properly. When Parliament passes a law applying to citizens or to a selected group of citizens, its prime concern is not with the reaction of judges or lawyers or even administrators. Its prime concern is with the conduct of the citizens whom it regulates or on whom it imposes burdens or confers benefits. That is not to say that drafters should not be concerned with accuracy and precision. They certainly should. But the prime aim should be to ensure that those to whom the law is addressed act in accordance with it. The law should be drafted in such a way as to be intelligible, above all, to those directly affected by it. If it is intelligible to them, lawyers and judges should have no difficulty in understanding it and applying it.

13 For example, P Balmford, submission, 7 November, 1986; G K Kolts, submission, 19 December 1986; I M Turnbull, submission, 18 March 1987.

14 See, for example D St L Kelly, 'Legislative Drafting and Plain English', (1987) 10 *Adelaide Law Review*, 409, 415, 418.

15 For example, E Driedger, 'Legislative Drafting', (1949) 27 *Canadian Bar Review*, 296.

16 Parliament is not the only audience, however. The community is also interested in proposed legislation.

70 The correct relationship between drafter and audience has been admirably described by Thornton. He distinguishes between three groups to whom the communication of a law is relevant: (1) the members of the law-making authority, (2) the members of society who are concerned with or affected by the law, and (3) the members of the judiciary. He continues:

It is unrealistic to believe that laws should be drafted in language and in a style which is familiar and instantly intelligible to the man in the street. Nevertheless the draftsman must in each case endeavour to draft in such a way that the law is successfully communicated to the persons who make up the three groups. Legislation having a high technical content may not be fully understood by groups 1 and 3, at least without comprehensive technical explanation. This is inevitable. A law to regulate radio communication may justifiably contain phrases such as 'intermediate frequency gain' and 'sinusoidal tones' and other phrases equally meaningless to most people. What is vital is that the words be chosen and a style adopted which those whose interests are affected (i.e. group 2) should be able to comprehend without unnecessary difficulty. Technical purposes are likely to require technical words and technical law may still be good law, even if unintelligible to most people, so long as it achieves ready communication with those who matter so far as that law is concerned. On the other hand, because in its application to some specialist areas legislation must be virtually unintelligible to most people, that does not provide the slightest justification for widespread unintelligibility. The style of legislation should deviate from common language only when a specialist topic requires. Even in such cases, the style should deviate from common language no more than is made necessary by the technical content. This principle cannot be emphasised too strongly.<sup>17</sup>

71 The plain English movement does not require that laws always be drafted in such a way as to make them intelligible to the average citizen. However, it does require that every effort be made to make them intelligible to the widest possible audience. There is no justification for the defects in language and structure which were noted in Chapter 2 and which sharply reduce the range of people who are capable of comprehending a document. Many legal documents are written in such a way that not only the people to whom they are directed but also judges and skilled lawyers have extreme difficulty in comprehending them. In such a case, it is not unfamiliarity with the subject matter or a lack of technical knowledge which causes the problem; it is the language and structure of the document itself. These should be improved, not in the hope of making the document intelligible to the average citizen, but in order to make it intelligible—and immediately intelligible—to as many of those as possible who are concerned with the relevant activities.

72 This point has not always been fully appreciated. In its 1984–85 Annual Report, the Commonwealth Office of Parliamentary Counsel stated that plain English criticisms of legislative drafting styles appeared to be based on the mistaken belief that all statutes should be able to be expressed in simple language capable of being understood by the average citizen. Professor Robert Eagleson was cited as one person who holds such a view. In fact, he does not. Writing of the effect which the adoption of a plain English policy would have, Professor Eagleson said that:

An advanced text on cancer or a law about the ownership of shares ... will remain complex. But the complexity will reside solely in the subject matter, and not be compounded by difficulty in language. For it is an error to assume ... that difficulty in context must be matched by difficulty in language ... complexity in subject matter does not call for complicated, convoluted language.<sup>18</sup>

A similar point was made in the discussion paper.<sup>19</sup> It is re-emphasised here. The Commission's criticisms of the traditional drafting style are not based on the view that all statutes can be expressed in simple language capable of being understood by ordinary citizens. They are based on the view that style decreases the number of persons who can understand statutes by imposing unnecessary barriers in the way of comprehension.

#### d. 'There often isn't sufficient time to draft in plain English'

73 The proposition that it takes more time to write clearly than to write obscurely is neatly put in the remark made by the famous seventeenth century mathematician and philosopher, Blaise Pascal: 'I am sorry that this letter is unusually long. I did not have enough time to write a shorter one.'<sup>20</sup> Much the same view was adopted by the Commonwealth Attorney-General's Department in response to criticisms made by members of the Commission in relation to the drafting of certain provisions in the *Takeovers Code and Futures Industry Act 1986*:

No doubt, given opportunity or time, there would be scope for simplification ... [While] the [plain English] provisions are more readable ... they have the advantage and result from the editing of a completed text. This is a far less arduous task than that confronting the original draftsman who had to formulate the total text under considerable time pressures.<sup>21</sup>

74 Legislative drafting is certainly subject to time constraints. The time given to prepare drafts is often inadequate. Ministers and instructing officers sometimes make radical changes to the policy which has been incorporated in earlier drafts. Amendments are sometimes passed in Parliament at short notice. As Sir George Engle, former First Parliamentary Counsel in the United Kingdom, has said:

for too many Bills, the time left for serious work on their preparation is less, and for large and difficult Bills often far less, than the minimum time needed to do the job satisfactorily. Instructions may have to be sent before the policy is finally settled. Drafting too often has to begin on the basis of partial or incomplete instructions. And if the requirements of the Parliamentary timetable make it necessary for a particular Bill to be introduced at the earliest practicable moment in the session, the draftsman may find himself hard put to it to produce a Bill at all in the time, and is most unlikely to be allowed the luxury of a period of calm in which to consider how the drafting could be improved. Given time, the draftsman of a Bill can nearly always perceive ways in which its structure and wording could be bettered; but this is not something that can be done in a rush.<sup>22</sup>

The very process by which drafts develop is such as to make continuous redesign of a Bill impracticable:

In the early stages it may be comparatively easy to redesign each successive draft to fit the latest version of what is wanted; but as each successive draft embodies a larger proportion of material that has been seen and commented on by the various departments interested in the Bill, it becomes more and more difficult, in the time available before introduction, to make radical changes in the way the Bill is drafted, since to do so would mean taking to pieces many provisions which have been generally agreed.

Once the Bill has been introduced, there is little enthusiasm for redesign for redesign's sake. Yet, in the case of nearly all complex or controversial Bills, the process of amendment goes relentlessly on; and though the draftsman can sometimes achieve a measure of redesign in the course of preparing government amendments to the Bill,

19 Paragraph 25.

20 *Lettres Provinciales* (1657), xvi; cited by I.M Turnbull, *Legislative Drafting—Use of Plain English*, 1986, 5.

21 *Drafting Styles, Policy Formulation and the Role of the Courts with Reference to the Takeovers Code*, 12 September 1986, 18.

22 G Engle, 'Bills are Made to Pass as Razors are Made to Sell: Practical Constraints in the Preparation of Legislation', [1983] *Statute Law Review* 7,14.



his ability to do anything radical in this line is limited by the fact that it is usually not until the Bill is nearing the end of its course that its ultimate content becomes settled in substance—and by then Ministers are not only reluctant to disturb provisions which have emerged from earlier stages of the Bill, but are also ... unwilling to devote valuable time on the floor of the House to amendments which are not strictly necessary.<sup>23</sup>

- 75 There can be little doubt that pressures of time and the process involved in refining draft legislation militate against coherence of structure and form. But not all legislation is subject to such pressures. As Benson says:

even statutes ... are initially conceived in silent minds and quiet rooms and have a gestation period of many months. It is only the moment of birth of these documents that tends to be quick and violent. If the prose is clear and simple from conception through gestation, chances are that a good deal of clarity and simplicity will survive the birth.<sup>24</sup>

Moreover, it is by no means clear that the reason for legislative obscurity lies in a lack of time for a final edit of the material. In the Commission's view, the reason is more deep-seated than that. Some drafters fail to recognise the needs of the various audiences to whom the legislation is directed. They follow established styles and drafting conventions which legitimise excessive caution, repetition and convolution. They see no need for the type of editing which is necessary to remove or minimise obscurity. They lack a forum for reassessing long-held assumptions about legislative drafting.

- 76 If these factors were considered during the early drafting stage of a new Bill or an amendment to an existing one, there would be little need for a final edit of legislation to produce a clear version. Indeed, there would be considerable savings in time and substantial opportunities for increased productivity. The amount of writing required by the present style is typically more than twice that required by a plain English style. The writing time saved should more than compensate for any additional time which might be required to write more directly and concisely.

- 77 In any event, the assertion that it takes longer to write in plain English is a doubtful one. It seems to assume that legislation has to be written in traditional legal language and then 'translated' into plain English. That is wrong. Legislation can, and should, be written in plain English from the start. In fact, traditional legal writing is, in some cases at least, a clumsy collation and translation of plainer originals. Much legislation is long-winded. Sentences run on, sometimes for hundreds of words. They consist of numerous clauses entwined in and entangled with other clauses. No one could possibly produce such sentences in an initial draft. They must have started as a series of short sentences which were gradually merged; or even as one simple sentence to which qualification upon qualification was added.

- 78 Writers often begin plainly but then work through a series of revisions to produce an inflated version. Take the development of a section in a report of a Commonwealth authority dealing with housing loans. In an early draft, it stated:

The Commission gives equal consideration to joint applicants where the partner is non-Aboriginal.

It was then expanded into:

Consistent with the provisions of the Act, the Commission gives equal consideration to joint applicants where the partner is non-Aboriginal.

It finally ended up as:

Consistent with the provisions of the Act, the Commission gives equal consideration to joint applicants where one partner is non-Aboriginal. The children of mixed marriages are regarded as Aboriginal and benefit from the provisions of a stable environment.<sup>25</sup>

- 79 Similar revision of a simple statement must have led to the following description by a government accounts officer of the procedures for a publications division of a Commonwealth Government Department:

It should be borne in mind that the annual publishing program consists of not only those publications scheduled for printing during 1984–85 but also those publications which will be paid for during 1984–85, i.e. publications which are not expected to be delivered to the AGPS until May or June of this year should be included in your 1984–85 program. Notwithstanding this, those publications which you expect to deliver to the AGPS during May and June of 1985 should be included in the 1984–5 program.

Thankfully, the writer explained what was meant in a postscript.

P.S Above is very long-winded. Maybe we could just say that the service covers May 1984 to June 1985 when material is delivered to the AGPS.

If a plain English policy were adopted in relation to legal writing, the long-windedness created by revision of simple statements could be avoided. Less time, not more, would be required for drafting a document. There would be substantial savings for the whole community.

### **e. 'Plain English would lead to uncertainty through the loss of words and phrases whose meanings have been settled by judicial interpretation'**

- 80 The concern over the loss of established and precise meanings for many legal words and phrases is understandable. As Prather said:

Legal language gradually has become precise and relatively certain; when a word, term or phrase is used in a contract, and that contract has been the subject of judicial interpretation, the precise meaning of the words therein has become more certain or determinable. Thus, one can depend upon what the particular words mean (or certainly what they do not mean) because a court has ruled, and probably would rule in the future, that they mean just that.<sup>26</sup>

In fact, however, there are relatively few words and phrases which have been subject to the type of detailed interpretation which this argument assumes. Professor Mellinkoff examined at length the question whether the vocabulary of the law is precise. His conclusion was that only a tiny part of the language of the law was technical and precise:

The defect in the dogma of precision is that it claims too much. Law language is but rarely precise. In a few particulars, 'Yes'; as a whole pattern of communication, 'No'. And it is as important to the lawyer to make himself aware that his language is not generally precise as it is for him to know the precision that is there.

If the language of the law is stripped first of its overwhelming mass of ordinary English ... and next of the repeated words and phrasings of tradition ... precedent, and requirement which are occasionally precise but only by coincidence, there still remains a distinctive nubbin of precision. It is achieved by the discriminating use of terms of art and some of the law's argot and by a striving for precision—for limitation of meaning, a striving that can be detected in the works of draftsmen of every degree of competency.

25 Australian Aboriginal Development Commission, *Annual Report*, 1981–82, AGPS, Canberra, 23.

26 W Prather, 'In Defence of the People's Use of Three Syllable Words', (1978) 39 *Alabama Lawyer*, 394, 395; cited in R Benson, 'The End of Legalese: The Game is Over', (1985) 13 *Review of Law & Social Change*, 519, 561.



This small part—this precise part—of the language of the law is almost lost in any given square foot of law language. Put to better use, with some of the dross skimmed off, the precise part could make a better showing. As it is, the sprinkling of precision is no more representative of the whole than the nuggets in a slated gold field.<sup>27</sup>

Plain English does not require that this ‘small part’, this ‘precise part’ of legal vocabulary be abandoned. It recognises that a technical vocabulary has developed and that it could not be eradicated without a loss of meaning. But that does not justify the retention of the convolution, repetition and overwriting which now characterise legal writing. They could be removed without any loss at all to precise expression.

#### **f. ‘Plain English has only a limited role in relation to documents establishing rights and duties’**

81 Several submissions suggested that the discussion paper indicated that the Commission had not adequately appreciated the differences between different types of legal writing.<sup>28</sup> Legislation and private legal documents create rights and duties. Other writings do not. They are simply explanatory in nature. Some of the submissions accepted that plain English is important in relation to explanatory texts. But they went on to argue that it has only a limited role in relation to documents creating rights and obligations, the precise statement of which might be prejudiced by plain English.

82 This objection is based on a misunderstanding of the aims of the plain English movement. It assumes that plain English involves a loss of precision, partly, no doubt, through the loss of a peculiarly legal terminology. The falsity of that assumption has already been demonstrated.<sup>29</sup> Plain English does not involve a loss of precision. Nor does it require rejection of legal terminology. It demands simple straightforward statements, the avoidance of repetition and an economical use of words. None of that is incompatible with the retention of precision and of technical legal words which lack a substitute in everyday language. Although statutes and private legal documents which create rights and obligations are subject to certain technical rules, they are subject to the same rules of grammar and structure as other legal documents.

83 That is not to say, however, that explanatory texts should not be used. There may well be value in using them in relation to complex legislation in particular. There is, of course, a risk that simplified explanatory texts may not accurately reflect the originals and may, to that extent, mislead their audience. Nonetheless, they are likely to reach a wider audience than the originals, and to be more widely used than other means of informing the public. As one submission put it:

the eradication of the structural and linguistic vices that disfigure and obscure so much statute law would make it intelligible to a wider audience. But even so, there would be a substantial section of the public to which the law would remain incomprehensible in statutory form. The people who comprise this group have difficulty in coping with the degree of abstraction that is necessarily involved in the statement of legal principles. If we want them to understand the significance of a law, we need to link the legal principles embodied in the law to situations in real life with which they can identify; we need to show them how the principle operates in those situations. For this purpose, radio and television are much more effective mediums of communication than the written word.<sup>30</sup>

The Commission agrees that more could be done to inform the public of the content of legislation, either by explanatory text or by the use of radio and television. But that is not a matter for report by the Commission. The primary task is to improve the quality of

27 D Mellinkoff, *The Language of the Law*, Little Brown & Co, Boston, 1963, 388. 28.

28 For example, Francis Bennion (the renowned English critic of legislative drafting), submission, 8 October 1986; R M Armstrong (Chief Parliamentary Counsel for Victoria), submission, 22 December 1986.

29 Paragraph 80.

30 G A Hackett-Jones, submission, 3 December 1986.

legislation. Only then will it be possible to identify what more needs to be done in relation to explanatory texts and other forms of publicity.

### **g. 'Plain English cannot succeed without a new approach to statutory interpretation'**

- 84 This objection is based on a fear that judges, in particular, will fail to appreciate the significance of a change to plain English drafting. They will continue to interpret legislation and other legal documents on the basis that they have been drafted to cover the finest of detail; if gaps appear to have been left, they must have been intended. One answer to this objection is that many, if not most, of the changes produced by adopting a plain English style could not give rise to the risk on which the objection is based. The shortening of sentences, the removal of repetition and circumlocution, and improvements in the structure and layout of legislation involve no loss of detail and create no gaps. The only change which may create a risk of misunderstanding by judges is the abandonment of attempts to spell out each particular case covered by the legislation and the adoption, instead, of words of more general coverage.
- 85 In many cases, that approach is no more likely to give rise to misunderstandings than the one it is intended to replace. A prohibition against 'assaulting, obstructing, hindering, threatening or intimidating' another person raises doubt about whether 'impeding' or 'delaying' that person is also covered. Lawyers and judges may feel obliged to determine the precise coverage of each of the terms used and gaps may result which bear little relationship to the policy which the words are intended to implement. That risk would be avoided if a more general phrase, such as 'interfering with' were used instead.
- 86 However, the use of general expressions in place of the listing of particulars may give rise to difficulty in some cases. Lawyers have a tendency to restrict the coverage of general expression. The term 'power', for example, undoubtedly covers a power which is given expressly but may not cover one given by implication. It obviously covers lawful power, but may not cover a power whose exercise involves a breach of the law. This tendency to read down the ambit of general expressions is detrimental to clarity. Drafters are sometimes led to pile qualification upon qualification to counteract it. Take section 9 of the *Companies (Acquisition of Shares) (Victoria) Code*. That section deals with relevant interests in shares. Subsection (1) states that a person has a relevant interest in a share if that person has power to control its disposal or to control the exercise of the right to vote attached to it. Subsections (2) and (3) continue:
- (2) It is immaterial for the purposes of this section whether the power of a person—
    - (a) to exercise, or to control the exercise of, the right to vote attached to a voting share; or
    - (b) to dispose of, or to exercise control over the disposal of, a share,
 

is express or implied or formal or informal, is exercisable alone or jointly with another person or other persons, cannot be related to a particular share, or is, or is capable of being made, subject to restraint or restriction, and any such power exercisable by a person jointly with another person or other persons shall, for those purposes, be deemed to be exercisable by either or any of those persons.
  - (3) A reference in this section to power or control includes a reference to power or control that is direct or indirect or is, or is capable of being, exercised as a result of, or by means of, or in breach of, or by revocation of, trusts, agreements, arrangements, understandings and practices, or any of them, whether or not they are enforceable, and a reference in this section to a controlling interest includes a reference to such an interest as gives control.

87 The extent to which all these points would be covered by a general expression is a matter for judgment. ‘Any kind of power whatever’ might appear to cover all of them. Nonetheless, there is a danger that some powers would escape the net. In its rewrite of the *Companies (Acquisition of Shares) (Victoria) Code*, the Commission recognised this point. It qualified the word ‘power’ in the definition of ‘relevant interest’ in clause 3 of Schedule 2, adding:

of any kind (however it arises and whether it may be exercised alone or jointly, including a power that is subject to restraint or restriction or whose exercise involves a breach or revocation of a trust, understanding or practice) ...

The Commission’s recognition of the risks associated with the use of general expressions did not require a retreat to the exhaustive listing method used in the original. Moreover, section 9 is an extreme example of the difficulty. In many cases, the risk of lawyers and judges reading down a general expression is much less than it would have been in relation to the word ‘power’ in section 9. In those cases, the requirement that courts adopt a purposive approach to interpretation<sup>31</sup> should ensure that plain English has no adverse effect on the intended coverage of the relevant provision.

88 The example in the preceding paragraph indicates how the objection being considered should be met. Those who wish to substitute clear statements of principle for a list of particulars must be careful to ensure that the statement of principle clearly covers each of the particular cases that it is intended to cover. They must also ensure that the statement of principle does not cover particular cases which it is not intended to cover. Errors are possible. But they are also possible in the method which relies on particulars rather than principle.

89 Whether there is a need to modify particular rules of interpretation is more difficult to assess. It is important to recognise, however, that many of the so-called ‘rules’ of interpretation are really only maxims. They suggest possibilities; they do not require results. The possibilities which they suggest are dictated by common sense. Take the *ejusdem generis* maxim as an example. This states that a general phrase following a list of particulars may be limited to particulars ‘of the same class’ as the ones listed. Consequently ‘or any other bird’ after ‘sparrow, starling, blackbird’ may be limited to introduced birds. This possibility is apparent enough. It is suggested by the particulars themselves. The maxim would be unaffected by a plain English approach to drafting. So, too, would other maxims, including *noscitur a sociis* (it is known by its associates), *expressio unius est exclusio alterius* (express mention of one thing implies the exclusion of another) and *generalia specialibus non derogant* (general provisions do not detract from particular ones). Their only magic is in the language of their labels.

90 There are, however, other rules of interpretation which might possibly impede total acceptance of a plain English drafting style. The Commission has in mind those ‘rules’ of interpretation which call for a narrow construction of certain types of legislation. They include the ‘rule’ that penal provisions should be construed narrowly and the presumption that legislation is not intended to derogate from fundamental principles of the common law and is not intended to take away common law rights. On bases such as these, courts have sometimes read legislation so narrowly that its purpose has been defeated. One example is *Great Fingall Consolidated Ltd v Sheehan*.<sup>32</sup> That case concerned the question whether an employee could ‘compromise’ his rights to compensation under the Act by accepting that an amount paid to him was in full settlement of his claim. Both Griffith CJ and O’Connor J referred to the common law presumption against interference with common law rights. Griffith CJ could see no reason why the Workers Compensation Act should be taken to deprive a worker of his entitlement to release or compromise claims against his employer—despite the fact that the aim of the Act was to ensure the payment of adequate compensation, and to prohibit contracting out of its provisions.

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s 35 *Interpretation of Legislation Act 1984* (Vic); s15AA *Acts Interpretation Act 1901* (Cth).  
(1906) 3 CLR 176.33.

- 91 The rule that penal provisions should be construed narrowly, like the presumptions against derogation from fundamental principles of the common law and against the taking away of common law rights, developed during the period when statutes were regarded as an unusual method of lawmaking and an unwelcome intrusion on the common law. While those days have now passed, neither the 'rule' nor the presumptions need to be discarded. Like maxims, they do not require particular results. They simply serve as a warning that certain values are deeply imbedded in the law and that it would be surprising if Parliament were to reject those values without saying so in quite clear terms.<sup>33</sup> On this basis, they pose no particular problem for plain English drafting. They simply call for clear expression when it is intended to impose criminal liability on a person or to depart from previously recognised principles. The risk that they will be used to frustrate the legislative intention has all but disappeared with the passage of section 15AA of the *Acts Interpretation Act 1901* (Cth) and section 35 of the *Interpretation of Legislation Act 1984* (Vic).<sup>34</sup>
- 92 The interpretation of private legal documents is subject to many of the rules and maxims that apply to the interpretation of legislation. However, there are significant differences. One arises from the fact that recent Commonwealth and Victorian legislation requiring a purposive approach to interpretation and allowing for use to be made of extrinsic material applies exclusively to legislation. Even so, the interpretation of private legal documents now generally proceeds on a purposive basis. Moreover, the original rule prohibiting reference to facts and circumstances outside the document being interpreted has been largely consumed by exceptions.<sup>35</sup> It would be possible to supplement these developments by legislation, but there is no obvious need to do so. The Commission is not aware of any recent evidence that the courts lack the required degree of flexibility in their approach to the interpretation of private legal documents.<sup>36</sup>

33 R v Bolton; *Ex parte Beane* (1987) 70 ALR 225.

34 These sections do not, however, require that an interpretation be accepted merely because it is suggested by the extraneous material. See R v Bolton; *Ex parte Beane* (1987) 70 ALR 225, 227–229 (Mason CJ, Wilson and Dawson JJ); 238 (Deane J).

35 See, for example, *Antaios Compania Naviera SA v Salen Rederierna AB* (1985] AC 191, 200, 201.

36 K Lindgren, J Carter & D Harland, *Contract Law in Australia*, Butterworths, Sydney, 1986, paragraph 723.



# The importance of plain English

46 The rule of law

49 Cost savings

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## 5. The importance of plain English

- 93 Plain English is important because it improves communication. Improved communication increases information and decreases the need for interpreters. In the legal system, adoption of a plain English approach would have two main benefits. First, it would contribute to the rule of law by decreasing the risk of unintentional breaches of the law, and of legal obligations, resulting from ignorance or misunderstanding. Secondly, it would decrease the costs associated with the administration and application of legislation and other legal documents.

### The rule of law

#### Problems created by poor drafting

- 94 Laws confer benefits and impose obligations on people. If laws are not written in clear and easily comprehensible language, those who are affected by them may be deprived of those benefits or fail to discharge their obligations. But laws are rarely written as plainly as they might be. In 1950, Lord Radcliffe commented on legal language by saying that:

a sort of hieratic language has developed by which the priests incant the commandments. I seem to see the ordinary citizen today standing before the law like the laity in a medieval church: at the far end the lights glow, the priestly figures move to and fro, but it is in an unknown tongue that the great mysteries of right and wrong are proclaimed.<sup>1</sup>

He concluded by posing the question:

what willing allegiance can a man owe to a canon of obligation which is not even conceived in such a form as to be understood?

#### Recent concern

- 95 Little has changed since Lord Radcliffe expressed his concerns. Sir John Donaldson MR referred to precisely the same question in a case in 1983. *Merkur Island Shipping Corp v Laughton*<sup>2</sup> concerned the question whether the International Transport Workers Federation (ITF) had committed the tort of inducement to commit a breach of contract. The answer depended on the effect of three interrelated Acts of Parliament, none of them expressed in clear language and the most recent of them adopting definitions which distorted their natural meanings. Sir John Donaldson MR observed that:

The efficacy and maintenance of the rule of law, which is the foundation of any parliamentary democracy, has at least two prerequisites. First people must understand that it is in their interests, as well as in that of the community as a whole, that they should live their lives in accordance with the rules and all the rules. Second they must know what those rules are. Both are equally important, and it is the second aspect of the rule of law which has caused me concern in the present case, the ITF having disavowed any intention to break the law.

In industrial relations, it is of vital importance that the worker on the shop floor, the shop steward, the local union official, the district officer and the equivalent levels in management should know what is and what is not 'offside'. And they must be able to find this out for themselves by reading plain and simple words of guidance. The judges of this court are skilled lawyers of very considerable experience, yet it has taken us hours to ascertain what is and what is not offside, even with the assistance of highly experienced counsel. This cannot be right.<sup>3</sup>

### Relationship to Government policy

- 96 There is a growing awareness of the importance of proper communication in relation to the rights and obligations of citizens. A failure by the Parliament or the Government to communicate its message as clearly as possible to its audience puts at particular risk those who are not well educated, who have had relatively little experience, or who are not fluent in the English language. Many of the Government's major client groups, including those in receipt of social welfare payments are within one or other of these categories. There is a special danger that they will break the relevant rules, fall foul of the relevant procedures, and be deprived of entitlements and opportunities if Government bodies communicate with them in inappropriate ways. The objectives of the Government's Social Justice Strategy include the extension of the effective exercise of legal rights. That objective is put at risk by laws and forms which are needlessly complex and pay little or no attention to the principles of plain English. People must know their rights and be aware of relevant opportunities if they are to exercise and make use of them. Government initiatives to further the objectives of its Social Justice Strategy will be less effective if resources have to be wasted on unnecessary administrative tasks.

### Response of legal system

#### United States

- 97 In the United States, the courts themselves are responding to the problem in innovative ways. Perhaps the most important decision is *David v Heckle*.<sup>4</sup> This involved a class action on behalf of hundreds of thousands of elderly people in New York whose Medicare claims had been reduced by the Department of Health and Human Services and the insurance carrier administering the relevant part of the Medicare program. Under the program, reduction of such a claim was permitted if the particular treatment was not necessary, or was not covered by the program, or if the doctor's charge was not reasonable. A beneficiary was entitled to seek a review of a reduction of a claim. After review, the insurance carrier was required to send a notice notifying the beneficiary of the basis of the decision on review. Where the amount involved was more than \$100, there was an opportunity for a hearing. The plaintiffs claimed that the review notices they received were in violation of the due process clause of the United States Constitution.
- 98 Chief Judge Weinstein of the United States District Court for New York upheld their claim. The particular review letter received by Joseph David was long and confusing. The explanation for the refusal of additional payment was:

3 At 351.  
4 591 F Supp 1033 (1984).



The Medicare Department has reviewed these claims and have determined that no additional allowances are warranted. They were paid correctly to the doctors' new and old profiles.

There was no indication of what the doctors' reasonable charge allowance was. The phrase 'doctors new and old profiles' was not defined. Expert evidence was given to the effect that the letter was understandable only by someone with the reading ability of a college senior. While other review letters were not as complex, the reading level required for them was still above that of most of the relevant elderly population:

The review letters defy understanding by the general populace. They are filled with confusing cross-references to 'control numbers' and are composed of paragraphs that seem strung together randomly. Explanations are couched in technical jargon. The words and phrases 'approved charges', 'customary charges', 'prevailing charges', 'locality', 'economic index', and 'physicians' old and new profile', which are the substance of the letter, are specialized Medicare vocabulary. To a layman unfamiliar with Medicare regulations, this language has no real meaning.

Review letters are not only incomprehensible, but the information they do contain is insufficient and misleading. They set forth the figure which the carrier says is controlling without making any pretense of showing how the carrier arrived at the figure. The notices explain the computation of the carrier's payment to the beneficiary only in generalized terms, assuming the correctness of the reasonable charge. This despite the fact that the key ingredients in the total computation are the reasonable charge figure and the method by which it is determined.

Chief Judge Weinstein summed up the letter in the following way:

The language used is bureaucratic gobbledegook, jargon, double talk, a form of officialese, federalese and insurancese, and doublespeak. It does not qualify as English.<sup>5</sup>

## Australia

99 The doctrine of due process is available in the United States as a catalyst for change in legal language. It has no counterpart in Australia. Many American jurisdictions have gone further and enacted specific and general laws prescribing levels of intelligibility in certain documents. In Australia, however, legislative recognition of the importance of proper communication of citizens' rights has been halting and piecemeal. Specific information requirements are contained in a small number of Acts. One example is the *Insurance Contracts Act 1984* (Cth). This requires that the insured be 'clearly informed' of his duty of disclosure and of a variety of terms in a proposed contract of insurance.<sup>6</sup> Another example is the *Credit Act 1984* (Vic). This also requires that certain information be provided to consumers, partly on prescribed forms which have been said to be a model of clarity.<sup>7</sup> But many other areas of the law remain unaffected. The doctrine of unconscionability might provide an answer in extreme cases. This doctrine enables agreements which are fundamentally unfair to be set aside in certain circumstances. Incomprehensibility of a contractual clause is regarded as capable of giving rise to unconscionability under the Uniform Commercial Code in the United States.<sup>8</sup> However, Australian courts have not yet said anything on the matter, either under the general law or under the *Unfair Contracts Act 1980* (NSW). This might not matter so much if laws and other legal documents were written clearly. But as earlier chapters of this report demonstrate, that is not always the case.

5 At 1037.

6 ss 22, 35, 37, 44.

7 W Pengilly, submission, 29 December 1986.

8 See *Wille v Southwestern Bell Telephone Co*, 219 Kan 755, 549 P 2d 903 (1976); J Fort, 'Understanding Unconscionability: Defining the Principle', (1978) 9 *Loyola University Law Journal* 765.

## Cost savings

### Costs of poor drafting

- 100 Laws which are not written in plain English impose unnecessary costs on Government and on the community at large. A document that is not readily comprehensible takes longer to understand, is more likely to need a 'translator' and is more likely to be misunderstood. Poorly drafted Bills consume the time of Members of Parliament who must understand and debate them. They impede the conduct of business in Parliament and interfere with the Government's legislative program. Poorly drafted Acts and regulations consume the time of those who must administer or comply with them. They reduce the efficiency of administration and of business activity contrary to the Government's policies on public service efficiency and business deregulation. They waste the time of lawyers and judges. The costs imposed by poorly drafted laws and related documents could be much reduced if they were written in plain English. The government would save administrative costs. The community would benefit from a reduction in the costs of complying with the law.

### Savings on plain English forms

#### United Kingdom

- 101 Recent experience in the United Kingdom indicates the potential savings which could result from adoption of a plain English policy in relation to government forms. Since February 1982, there has been a concentrated effort by Government departments in the United Kingdom to reduce the number of forms used and to improve the design of those that are essential. The Management and Personnel Office of the Cabinet Office is responsible for the program. It reports directly to the Prime Minister. By July 1985, 15,700 forms had been eliminated and 21,300 had been significantly improved. Savings to Departments by the redesign of forms amounted to millions of pounds a year, of which 4 million pounds a year was identified in 1984–85 alone. The 1984–85 cost of work on forms was only 2 million pounds. This included the cost of purchase of equipment.
- 102 One of the major factors in the savings has been the simplification of language and layout to minimise errors in completing government forms. A report made by Coopers & Lybrand Associates on the effectiveness of forms used by the United Kingdom Department of Health and Social Security<sup>9</sup> identified the types of costs involved in the action necessary to correct errors on forms. These were of three main types:
- *Costs to the Department.* These included staff time for interviews, telephone calls and visits; postage, telephone and stationery; travel and subsistence.
  - *Costs to respondents.* These included the additional time spent on interviews, telephone calls and visits; completing additional forms; postage; and delay in receipt of benefits.
  - *Costs to employers of respondents.* These were constituted by the time taken by staff in locating respondents to answer queries and the time taken off work by respondents themselves.
- 103 The error rates on the forms were high and the costs enormous:
- The DHSS currently uses some 12,000 different forms, roughly half of which are issued to the public in numbers varying from 10,000 to 30 million per year. Forms are used for assessing entitlement to benefits, collecting information and providing information to the public. Forms which are badly designed generate misunderstanding and errors; incorrect information may be given, questions may not be answered or, in some cases, the entire form may be left blank. In addition to the delay and frustration caused for members of the public, employers and the DHSS, such errors give rise to very significant cost. Estimates made during the course of this assignment suggest that if the forms we

examined are typical then the costs of errors to the DHSS in additional processing costs alone, average some 113,000 pounds per form per annum. Thus, for the 6,000 forms issued to the public, the total annual cost to the DHSS of errors could be of the order of 675 million pounds, with costs and disbenefits of similar magnitude being incurred by employers and members of the public.<sup>10</sup>

- 104 A particular study was made of the costs resulting from errors in completing 14 separate forms. One form alone, with an estimated annual use in excess of 4 million copies, accounted for errors costing more than 1 million pounds to remedy. The cost of the remedial action for errors in all 14 forms was almost 11 million pounds. The estimate of the cost imposed on respondents by the errors on those forms was almost 2 million pounds. Further costs imposed on respondents' employers were more than 500,000 pounds.

## Victoria

- 105 No equivalent studies have been made in Australia. However, substantial savings have already been achieved in projects undertaken during the Commission's work on the plain English reference. A project on rewriting the traditional Summons and Information form will eliminate both wasteful paperwork and unnecessary procedures. As a result, 26 staff positions, including 15 in the police force, will be available for redeployment to more useful areas. In a project on court forms in connection with road traffic offences, two forms have been eliminated and the redesign of the third will reduce paperwork and save another four staff positions. The combined savings are estimated to be worth between \$400,000 and \$600,000 a year.

## Savings on plain English legislation

- 106 It is much more difficult to assess the likely savings to Government and the community of the implementation of a plain English policy in relation to legislation. There is no experience to rely on. There would clearly be savings in administrative time and costs, particularly legal costs, to the community. The level of these savings would depend on a variety of factors. It is evident, however, that the savings in relation to the time taken to comprehend legislation would be substantial. To investigate the improvement in the time taken to comprehend legislation and the level of comprehensibility, the Commission engaged Dr Virginia Holmes, Reader in Psychology at the University of Melbourne, to conduct a study. The broad aim of the study was to determine whether legislation drafted in the traditional manner is more difficult to understand than legislation drafted in plain English. The study was based on a comparison between traditional and plain English versions of sections from the *Companies (Acquisition of Shares) Act 1980* (Cth) and the *Futures Industry Act 1986* (Cth). Passages of original legislation and plain English versions<sup>11</sup> were given to separate groups of lawyers and law students. They were asked to apply the legislation to a number of hypothetical cases. The time taken to complete the task was recorded and the answers were assessed. The results are set out in Table 1.

TABLE 1

Mean time to read test passage		
	Plain English version	Original version
<b>Students</b>		
Futures	2m 18s	8m 17s
Companies	5m 11s	10m 10s
Mean	3m 5s	9m 13s
<b>Lawyers</b>		
Futures	2m 19s	5m 29s
Companies	3m 45s	11m 6s
Mean	3m 45s	8m 17s

There was no significant difference in the level of accuracy of the answers given by participants.<sup>12</sup> However, there was a significant improvement in the time taken to reach that level. The mean time for comprehending the plain English versions of the test passages was between one half and one third of the mean time for comprehending the traditional versions. These findings strongly suggest that considerable savings could be made for lawyers and the community if legislation were drafted in plain English. A much more sophisticated study would be necessary to establish the extent of those and other savings, including savings resulting from a decreased need to seek lawyers' advice.

### Other benefits

- 107 The Government would benefit from a plain English policy not only by the obvious reduction of its costs in dealing with the public but also through the increased understanding its officers would have of corporate goals. Mr Brian Palfrey, a training and development consultant whose work with various government departments and agencies has been concerned with effective communication, said in his submission dated 23 February 1987:

In evaluating some of these programmes and from my reading of the experiences of organisations that have adopted (or imposed) a [plain English] house-style, I am impressed by the results. One particularly interesting feature is that, once the house-style is simplified, not only can the clients understand, but the staff within the organisation suddenly become more aware and productive. Plain English removes the mystery and inaccessibility of documents not only for the reader: the writer gets relief too, once the skills and confidence begin to take root. One significant consequence of this in some organisations has been that more staff become capable of writing effectively and independently. This is healthy. It makes more productive use of more people's time; it raises self-esteem and enriches jobs; and, remarkably, it allows staff to understand sometimes for the first time exactly what the section or department does, and how it does it.

More effective communication is therefore not just a benefit in external relations. It assists an organisation in increasing its own efficiency in a variety of ways. It leads to greater understanding of corporate goals, greater job satisfaction and greater efficiency.

12

The passages chosen dealt with complex concepts. Even the plain English versions were difficult. The rate of comprehension (words per minute) was slightly lower in the case of the plain English versions than in the case of the traditional versions. This is probably attributable to the absence from the plain English versions of the repetitions in the original. These are familiar to lawyers and law students.



# Improving the clarity of drafting: recommendations

- 54 Training of drafters
- 63 Duties of instructing officers
- 64 Improving regulations
- 66 Drafting assistance from private practitioners
- 68 Private legal documents

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## 6. Improving the clarity of drafting: recommendations

108 In the preceding chapters, the Commission identified a number of defects in the language and the organisation of legislative material. It suggested that these defects might be cured by the adoption of a plain English policy. It examined a number of common objections to plain English and concluded that they are based on misunderstandings about the nature of plain English. It identified the benefits which would flow from the adoption of a plain English policy. This chapter is concerned with improving the clarity of drafting in legal documents, particularly legislation. It suggests ways in which the existing defects might be removed. It deals with the training of drafters, the organisation of Government drafting services, the engagement in appropriate cases of expert outside assistance, and the use of word processors and computers in the drafting process.

### Training of drafters

#### A drafting manual

109 The implementation of the Government's plain English policy in relation to legislation is already under way in the Office of Chief Parliamentary Counsel. To assist in the process, a drafting manual concentrating on language problems and aimed at assisting drafters to improve their drafting style and to avoid the defects noted in Chapter 2 of this Report has been prepared by the Commission. It forms Appendix 1 to this Report.\* Much of its content is equally applicable to other forms of legal drafting.

### Recommendation

The drafting manual should be formally adopted by the Government as its official guide to Departments and Agencies in relation to the drafting of Acts, regulations and related forms and explanatory documents. The drafting manual should be supplemented by material prepared by Chief Parliamentary Counsel dealing with the technical aspects of legislative drafting.

#### Formal training courses

110 Parliamentary counsel are recruited from the ranks of lawyers, usually at a relatively early age.<sup>1</sup> Lawyers themselves are not generally trained drafters. Although valuable drafting courses are available at both Melbourne and Monash Law Schools these are optional and only a small percentage of students enrol for them. There is no postgraduate course in drafting, either for practising lawyers or for staff of the Office of Chief Parliamentary Counsel.

111 The training of parliamentary counsel has traditionally been carried out by the apprenticeship method, under which:

the newcomer works with and alongside a more experienced officer and learns from him by watching the way he goes about his work.<sup>2</sup>

Some people maintain that on-the-job training is the only way to learn the art. This is reminiscent of the views held by some members of the legal profession at the time of the establishment of legal practice courses<sup>3</sup> as an alternative to articles of clerkship. One reason for the establishment of those courses lay in the recognition of the inadequacies of the articulated clerk system to provide broad-based practical training at a uniform standard for all students. It is now recognised that formal courses can achieve a great deal in a relatively short time, even if on-the-job training is also needed for the development of a fully-rounded lawyer. So it is with the training of legislative drafters. In their case, too, on-the-job training has not been entirely satisfactory. As a leading writer on drafting observed some time ago:

The idiosyncrasies of masters were passed on to pupils. For too long, the experience of the teacher has been the sole criterion of what is correct. The tyro is bewildered by a mass of formless constructions and the abuse of tautologies potentially diverse. This is a sorry state of affairs, particularly as analysis or disciplined compliance with the principles underlying the drafting of legal documents can bring about not only consistency but also an overall improvement in the form of documents.<sup>4</sup>

112 Particularly during parliamentary sessions, a competent drafter is likely to be under considerable pressure to meet drafting deadlines. Meeting those deadlines must take precedence over other tasks, including the training of apprentices. A formal course of training would not only be a valuable contribution to improving the technical skills of parliamentary counsel. It would also contribute to the clarity and intelligibility of legislation. But a formal course should not entirely replace on-the-job training. As a former First Parliamentary Counsel recently pointed out, no amount of formal training can teach drafters such matters as ‘how to cope with the idiosyncrasies of their clients, of members of the legislature or of Ministers.’<sup>5</sup>

### An earlier experiment

113 Formal courses of instruction for legislative drafting were run between 1975 and 1981 by the Commonwealth’s Legislative Drafting Institute, headed by the late Mr Noel Sexton. The Institute was established in 1974.<sup>6</sup> Its functions were:

- To conduct courses of training and instruction in legislative drafting.
- To assist other countries (especially developing countries) in the training of legislative drafters.
- To undertake research into methods and techniques of legislative drafting with a view to the simplification of laws and procedures and the reduction of costs.
- To foster interest in, and encourage suitably qualified persons to enter, the profession of legislative drafting.

It was hoped that the Institute would provide training for people wishing to become legislative drafters in Australia. The first course in 1975 was limited to people nominated by the Commonwealth, the States and Papua New Guinea. Only the Commonwealth, New South Wales, Tasmania and Papua New Guinea nominated participants. In 1976, invitations were sent to the Commonwealth, the States, Papua New Guinea and other

2 J Q Ewens, ‘Legislative Draftsmen: Their Recruitment and Training’, (1983) 57 *Australian Law Journal*, 567.  
 3 In Victoria, at the Leo Cussen Institute.  
 4 S Robinson, ‘Drafting—Its Substance & Teaching’, (1973) 25 *Journal of Legal Education* 514, 515.  
 5 J Q Ewens, ‘Legislative Draftsmen: Their Recruitment and Training’, (1983) 57 *Australian Law Journal*, 569.  
 6 *Legislative Drafting Institute Act 1974* (Cth).



British Commonwealth countries in the South Pacific area. Because only two nominations were received, the Institute's program was suspended until the following year. In 1977, it became clear that no nominations would be received from the Commonwealth or the states. The course was eventually given to participants from a number of developing countries. In subsequent years, invitations appear to have been extended only to developing countries. The Institute was abolished on 11 November 1981 as a result of recommendations made by a Ministerial Committee to review Commonwealth functions (the Razor Gang). The training of legislative drafters from developing countries was to be left to on-the-job training in Canberra.<sup>7</sup>

## Other models

- 114 A more ambitious and ultimately more successful training program was established in Canada in 1970. Unlike the Australian Institute, it is attached to a University. The Legislation Training Programme is sponsored jointly by the University of Ottawa and the Federal Department of Justice. The course was the brain-child of Professor Elmer Driedger QC, former First Parliamentary Counsel for Canada and the author of leading works on legislative drafting.<sup>8</sup> Originally a post-graduate certificate program, it is now also a Master's program leading to an LLM degree. The course lasts for 30 weeks and consists of lectures, seminars and assignments. The assignments involve redrafting of existing provisions and drafting original legislative provisions. The redrafting assignments concentrate on improving comprehensibility and removing obscurity.<sup>9</sup>
- 115 Legislative drafting is also the subject of formal instruction in other countries. In the United States, special mention should be made of the course run at Indiana University by Professor Reed Dickerson, author of a pioneering collection of materials on legal drafting in the American Casebook Series.<sup>10</sup> In the United Kingdom, Edinburgh University has established an honours course on the subject of legislative drafting.<sup>11</sup> Formal training of legislative drafters to assist developing countries of the Commonwealth is well under way. Initiatives in this direction were taken by the Commonwealth Law Ministers at their meeting in London in 1973. As a consequence, six-month courses have been regularly run by the Commonwealth Secretariat in a number of countries. They have been attended by more than 300 participants nominated by their respective Governments. Drafting courses associated with universities have now been established in the West Indies<sup>12</sup> and Africa<sup>13</sup>. In each case, the degree of LLM is now available.<sup>14</sup>

## A Legal Drafting Institute

- 116 The lack of a formal training course for parliamentary counsel and for legal drafters in general seriously affects their capacity to write plainly. They rely too much on poorly expressed precedents and outmoded drafting conventions. After discussions with the Attorney-General and with the Director-General of the Department of Management and Budget, the Commission approached the Dean of Monash Law School, Professor R. Baxt, to investigate the possibility of establishing a Legal Drafting Institute at Monash University to be jointly funded by the University and the Government. An application for funding of a feasibility study has been made to the Victoria Law Foundation. It is expected that the study will be conducted by the Public Service Board. The study will include:
- Assessing the degree of interest and support for such an Institute from government, commercial and professional bodies both within Australia and more generally in South East Asia and the South Pacific region.

7 Legislative Drafting Institute, *Annual Reports, 1975-1981*, AGPS, Canberra.

8 *Composition of Legislation*, 2nd ed, Department of Justice, Canada, 1976; *A Manual of Instructions for Legislative Writing*, Department of Justice, Canada, 1982.

9 E Driedger, 'The Legislative Training Programme in Ottawa', (1973) 54 *The Parliamentarian* 228.

10 *Materials on Legal Drafting*, Wests Publishing Co, 1981.

11 H Henderson and T Bates, 'Teaching Legislation in Edinburgh: An Outline', [1980] *Statute Law Review*, 151.

12 Barbados, 1979.

13 Zimbabwe, 1985.

14 K Makumure, 'The Diploma in Legislative Drafting at the University of Zimbabwe: An Experience from the New Commonwealth', [1985] *Statute Law Review* 21.

- Investigating the possible product range of such an Institute in legislative and non-legislative drafting, for example, commercial and public documents.
- Assessing the likely on-going demand for the services of such an Institute from government, commercial and professional bodies within Australia, in South East Asia and in the South Pacific region. This will include an assessment of the likely competition from other similar institutes and training programs and the appropriate role of a new Institute in the future delivery of such services.
- Estimating the likely establishment and annual operating costs of the Institute and assessing its financial viability given the likely market demands for its services.
- Estimating the level at which private and State and Commonwealth Government funding could be warranted.
- Researching the secondary effects of improved drafting in both legislative and non-legislative areas and investigating methods for assessing their financial implications.

117 Unlike its Canadian model, the Institute would cover not only legislative drafting, but also other forms of legal drafting. It would have both teaching and research functions. The projected teaching functions of the Institute include those at the postgraduate level. The possibility of certificate and diploma courses, as well as degree courses, is to be investigated. The projected research functions of the Institute include:

- a) the principles and techniques of drafting;
- b) techniques of evaluation of the standard of drafting; and
- c) the administration and delivery of drafting services, the organisation of drafting units and the qualifications and training of personnel.

Its management structure and the precise basis of its on-going funding are matters for discussion after successful completion of the feasibility study.

## Recommendation

The Government should support the establishment of a Legal Drafting Institute at Monash University as a joint project between the University and the Government. When the Institute is established, qualifications obtained from it should become, except at base grade and in the absence of exceptional circumstances, a mandatory requirement for appointment to, or promotion within, the Office of Chief Parliamentary Counsel.

### Broadening the experience of parliamentary counsel

118 The development of skills in relation to clear communication requires more than a manual or a formal course, important though these are. It also requires a keen appreciation of the needs and abilities of the audience of relevant documents. Lawyers in private practice deal regularly with the business community and the general public. They are more likely than parliamentary counsel to understand the needs and abilities of the business community and the general public in relation to legislation. Policy officers in departments and agencies also have regular contact with client groups, as well as with senior administrators and politicians. They are more likely than parliamentary counsel to appreciate the particular administrative and social goals which specific proposals are intended to serve. Few recruits to the Office of Chief Parliamentary Counsel come from within the public service. Many of them enter the Office shortly after completion of their degrees or after only a very brief period in private practice. Chart 1 indicates the extent of experience in

private practice of recruits to the Office in the past five years. Of 27 recruits, nine had no private professional experience at all. Seven others had less than one year's experience. Only four of the 27 had had more than five years in private practice.

- 119 On entry to the Office, recruits have as their clients only ministers and government Departments. They deal with instructing officers who are either government lawyers specialising in policy development or career bureaucrats. They have little if any professional contact with ordinary citizens or interest groups or lawyers in the private profession. As an English commentator has said: 'At present, the Parliamentary draftsman gets further and further removed from the day to day application and use of statutes in legal practice.'<sup>15</sup> There is a grave danger of organisational isolation. There is a clear need to bring legislative drafters into closer contact with their audiences.

## Recommendation

The Secretary to the Attorney-General's Department should investigate ways of diversifying the experience of parliamentary counsel. The options which should be investigated include exchange schemes with, and secondments to, private solicitors' offices and policy Units in Government Departments and Agencies.

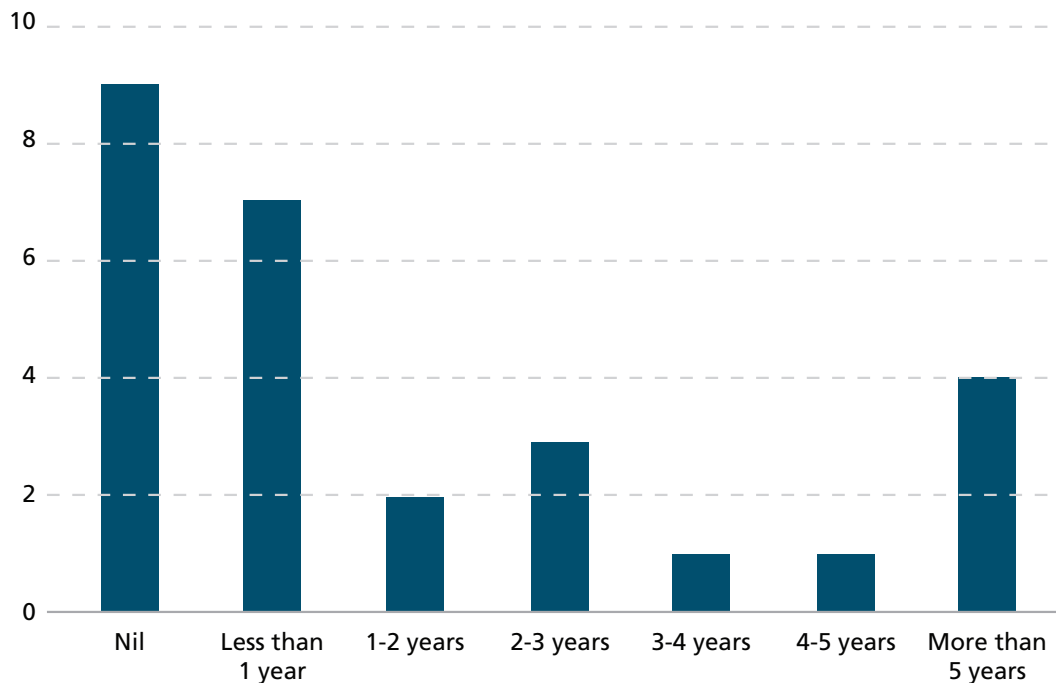


Figure 1: Parliamentary counsel recruits: experience in private practice (in years)

## Electronic aids to drafting

- 120 Better training and greater experience should lead to increased clarity in legislative drafting. But these are not the only ways in which drafting might be improved. Word processors and computers have already transformed the process of technical writing through their remarkable capacity for editing and revising documents. Drafters can identify all uses of a word to help them check consistency in usage. Some systems can also generate a list of all words used in a document in order to assist in the preparation of indexes. They could also be used to assist in generating and retaining standard forms and variations on standard forms to assist in achieving consistency across the statute book.
- 121 Other relevant capacities of word processors and computers are less well known. A recent review<sup>16</sup> discussed software systems which can check and even correct spelling, abbreviations and common capitalisations. They can also note excessive sentence length, the relative frequency of word use and the 'tonal' features of a passage (for example, the extent to which formal language is used, and the use of hackneyed words and phrases). More sophisticated aids to drafters are being developed. It is hoped to produce programs which identify common misuses of particular words (for example 'infer' in place of 'imply') and the use of particular words in different senses in the same context. Plans are being drawn up to write programs to identify ungrammatical sentences, particularly those involving failure of agreement in number, person, gender and case.
- 122 Systems which provide some of these functions are already commercially available. Major developmental work is taking place in a number of quarters, notably in IBM's 'Epistle Project' at the Yorktown IBM Watson Research Center. Means of assisting drafters of legal documents has been the subject of a special study.<sup>17</sup> These developments are of profound significance for future legal drafting.

## Recommendation

Chief Parliamentary Counsel should investigate existing software programs and closely monitor developments to ensure that appropriate use is made of electronic aids to drafting. A software program should be developed in cooperation with other Chief Parliamentary Counsel elsewhere in Australia to facilitate clear and consistent drafting.

## Organisation of drafting services

- 123 The recommendations in the preceding section of this chapter should go a considerable way towards implementing the government's plain English policy, particularly in relation to legislation. However, the Commission's examination of the way in which legislation is drafted has led it to the conclusion that implementation of that policy would be enhanced if a number of other steps were to be taken. These include clarification of the role of legislative drafters, clarification of the duties of instructing officers, re-organisation of responsibility for subordinate legislation, and the use of expert private professional services to draft legislation in appropriate cases.

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17

L Miller, 'Computers for Composition: A Stage Model Approach to Helping', (1986) 20 *Visible Language* 188.  
D Halpern and L Miller, *Automated Legal Writing*, 1984.

## Clarification of the role of legislative drafters

124 Clear drafting can only proceed on the basis of clear instructions about the policy to be implemented. Not all drafting instructions are as clear and well thought out as they might be. That is sometimes the fault of instructing officers but it may also be attributable to a lack of a clear definition of the respective roles of parliamentary counsel and instructing officers. The traditional view of the division of functions between parliamentary counsel and Departmental instructing officers is clearly expressed in the following statement:

The Office of Parliamentary Counsel is not really geared to provide this kind of assistance; nor indeed is any similar drafting office. The traditional role of Parliamentary Counsel, and indeed the only role for which they are trained, is to incorporate formulated proposals into a legislative framework. It is not, and has never been, their role to render substantial assistance in the construction of a viable policy scheme. The Parliamentary Counsel are supposed to be experts in drafting, not experts in the formulation of policy proposals. When they are called upon to draft a Government Bill, the policy and scheme to which legislative form is to be given have been worked out in considerable detail by persons in the instructing Department who have the necessary expertise in the relevant area. If Parliamentary Counsel are to perform for a private member the role for which they are trained, namely, the incorporation into a legislative framework of a scheme that has been worked out, it will be necessary for the member to have a fully-developed scheme in readiness ...<sup>18</sup>

## Commonwealth

125 The Commonwealth's *Legislation Handbook*<sup>19</sup> reflects a similar approach. It provides for the preparation of drafting instructions in two stages. Preliminary instructions are prepared for attachment to the Cabinet submission. These are normally circulated beforehand to other Departments for any comment which may need to be included in the submission. Final instructions are prepared after Cabinet has approved the submission in whole or in part. They are lodged with the Office of Parliamentary Counsel within five days after the instructing Department has been notified of the Cabinet decision. Parliamentary counsel themselves appear to play little role in the development of the instructions. The *Legislation Handbook* specifically states that 'Preliminary drafting instructions need not normally be sent to the Office of Parliamentary Counsel'.<sup>20</sup>

126 The *Legislation Handbook* deals in some detail with the respective functions of parliamentary counsel and of instructing officers. Instructing officers are required to provide instructions covering:

- a) the objectives of the proposed legislation and, in detail, the means (the administrative structure) by which it is suggested they be achieved;
- b) difficulties of a legal, administrative or other nature that appear to be involved;
- c) reference to other similar existing legislation which may be affected or require modification; and
- d) any other details necessary for the preparation of a draft bill by Counsel.<sup>21</sup>

The extent of the detail required in instructions can be gauged by referring to the section of the *Legislation Handbook* which deals with specific matters which may need consideration. It contains almost seven pages dealing with the specific matters which may need consideration by instructing officers. These include a number of matters on which expert legal knowledge is essential. In several cases, such as the effect of the proposed legislation on State legislation, instructing officers are advised to seek guidance from

18 G.K Kolts, (then First Parliamentary Counsel of the Commonwealth), 'The Provision of Drafting Services for Private Members of the Federal Parliament' in K Turner (ed), *The Information Sources of Parliament*, 97–8.

19 *Legislation Handbook*, AGPS, Canberra, 1983.

20 At paragraph 4.6.

21 At paragraph 4.17.

the Attorney-General's Department. But the instructions which officers are required to present must incorporate both the main principles of the legislative scheme and all relevant matters of detail.<sup>22</sup>

- 127 The role of the Office of Parliamentary Counsel is to draft legislation on the basis of the instructions it receives. However, the Handbook recognises that:

the dividing line between policy and drafting ... is not always clear and Counsel may often be involved in the resolution of policy issues. Counsel considers how a proposed policy may best be implemented and is often required to round out the policy and fill in the details.<sup>23</sup>

Moreover, the legislative plan:

may be in a different form from that envisaged in the proposal approved by Cabinet or set out in the drafting instructions. The legislative plan is usually discussed with officers of the instructing department and modified until agreement is reached.<sup>24</sup>

Even so, the distinction between the roles of instructing officers and parliamentary counsel is generally clear. Instructing officers must formulate instructions in considerable detail, generally without assistance from the Office of Parliamentary Counsel.<sup>25</sup> The Attorney-General's Department fills the void when expert assistance on legal policy is required by the instructing officers.

## Victoria

- 128 The Commonwealth approach has been adopted in slightly modified form in Victoria. Drafting is only to commence when a Cabinet submission for a Bill in Principle has been approved by Cabinet. Drafting instructions must be attached to the Cabinet submission. These are to be prepared by instructing officers rather than parliamentary counsel. They must set out in detail the proposed legislative scheme. Early editions of the *Legislation Handbook* appeared to assume that parliamentary counsel would only become aware of the instructions after they had been approved by Cabinet along with the Bill in Principle. However, a change in emphasis was made in the 1985 *Cabinet Handbook*:

An instructor should usually have discussions with Parliamentary Counsel prior to completing the drafting instructions. Parliamentary Counsel should also consider drafting instructions on complex legislative proposals. However, time spent by Parliamentary Counsel on such discussions should not be excessive. Also officers should not use Parliamentary Counsel to avoid their responsibility in presenting a coherent, adequate and comprehensive drafting proposal.<sup>26</sup>

Parliamentary counsel have in fact collaborated at an early stage with policy officers in relation to a number of recent sensitive and major projects, including those dealing with accident compensation and transport accidents.

## A more radical approach

- 129 A much more active role for parliamentary counsel in relation to policy was put to the Commission by the Chief Parliamentary Counsel for South Australia, Mr G. Hackett-Jones QC:

the important point is not that it is untrue but that it really oughtn't to be true. After all, a parliamentary counsel ought to be a person with a wide knowledge of the law and of statute law in particular. He or she knows how a vast range of legal problems have been dealt with in the past and, on the basis of that knowledge and a certain amount of

22 At paragraph 4.18.

23 At paragraph 5.4.

24 At paragraph 5.5.

25 The *Legislation Handbook* itself states that 'preliminary drafting instructions need not normally be sent to the Office of Parliamentary Counsel': paragraph 4.6.

26 At paragraph 152.

innate ingenuity, should be able to suggest possible ways of approaching any problem that is likely to be thrown up. A parliamentary counsel is—at least according to my perception—a legal theoretician who plays a central role in the shaping of legislative policy. This is not to say that the parliamentary counsel imposes policies on the client. He or she is in this respect like an architect who works within the client’s reasonable specifications and will not design a mansion for clients who have asked for plans of a home unit. But, like the architect, the parliamentary counsel should be responsible for designing the juristic and linguistic structures of statute law and for ensuring that the structures are sound. The traditional view of the parliamentary counsel’s function grossly demeans that function. A parliamentary counsel is, according to that view, rather like a medical practitioner who insists on his patients diagnosing their own illnesses and prescribing their own remedies while he merely sits at his desk translating the prescriptions into appropriate language for the pharmacist.<sup>27</sup>

- 130 According to Mr Hackett-Jones, the result of adopting the traditional approach is that drafting instructions are elaborated in more detail than is necessary or desirable. As a result, the instructions dictate not only the policy but also the juristic and linguistic structures of the Bill. The drafter loses control of the structure to the client. In functional terms, the logic of the traditional approach is pursued in the following manner:

When the first draft of a Bill has been prepared, it is often apparent that, despite the instructors’ best endeavours to cover every eventuality, important gaps remain. The draftsman does not consider it appropriate to use his own experience and imagination to fill these, so the instructors are assembled and a process known as ‘drafting in committee’ takes place. In this process, the draftsman acts as a kind of midwife and tries to squeeze instructions from constipated bureaucratic minds. The draftsman stands ready to catch them as they emerge and often amends the draft on the spot. When this process is completed, the draft is sent out for comment. Someone may point out that the incipient legislative creature has no arms. Arms are taped on. Someone may point out that it has no head. A head is improvised and stitched on. No-one dares to mention the unmentionable truth: that it would be better to cut its throat and secrete it in the nearest drain. The draft ends up resembling an accident victim—covered in linguistic bandages from head to foot. It is, by now, riddled with cross-references—these are often primary indicators of a basic structural malaise.<sup>28</sup>

- 131 None of this suggests that parliamentary counsel should assume the role of policy officers. The development of policy is a matter for ministers and their departments. But the development of complex policies which are to be translated into legal form requires the early involvement of those who must make the translation. Ministers are entitled to early advice from experts on whether their policies can be put into a legal form which is consistent with the Government’s legal policies. There is a growing awareness of this fact in Victoria. Although parliamentary counsel should not take over the role of policy officers, neither should they be divorced from the development of policy. They are in a far better position than policy officers to work out the details of a legislative scheme. They are experts in the alternative methods by which a formulated policy may be put into legislative form, and the amount of detail which must be put into legislation if the policy is to be made effective. Often enough, policy officers are forced to amend aspects of their policy because it is not practicable to implement them in legislative form. Insights such as these are the province of parliamentary counsel almost alone; they are not normally enjoyed by the general run of policy officers, many of whom have no legal training.

- 132 Early involvement of parliamentary counsel in a major policy development would contribute to the clarity of the legislation designed to implement it and would also reduce the risk of inconsistency in the statute book. There are, or should be, general themes running through all legislation. The statute book should be as coherent as possible in



matters of legal principle. These include such disparate matters as government structures, the division between judicial and administrative powers, the liberty of the subject, the presumption of innocence, and controls over administrative decisions.

## Recommendation

Appropriate amendments should be made to the Cabinet Handbook to give positive encouragement to instructing officers and parliamentary counsel to consult with one another during the development of detailed policy proposals in respect of major new legislation and major rewriting of existing legislation. These consultations should not be restricted to the period immediately before the making of the Cabinet submission for a Bill in principle. A Cabinet submission should not go forward for consideration by the normal procedures unless parliamentary counsel have indicated that the drafting instructions are appropriate and adequate. Where consideration of the Bill in Principle cannot await the production of revised instructions, the defects noted by parliamentary counsel should be attached to the Cabinet submission when it goes forward for consideration.

## Duties of instructing officers

- 133 A lack of early consultation with parliamentary counsel in relation to major policy developments is only one factor contributing to inadequacy in drafting instructions. Another is a lack of clarity concerning the duties of policy officers with respect to the preparation of instructions for Parliamentary Counsel.<sup>29</sup> Suggestions have been made that Chief Parliamentary Counsel should arrange seminars on the subject with policy officers and should develop a set of guidelines, or a check-list, to assist policy officers in understanding the matters and the level of detail required to be covered in drafting instructions. Detailed sets of questions could be developed to guide instructing officers in relation to the detail that is needed by parliamentary counsel. On the subject of powers of entry, search and seizure, for example, the questions might include the following:
- a) Are powers of entry, search and seizure necessary?
  - b) Who is to exercise the power?
  - c) Is a warrant or other authority required?
  - d) What limitations as to time or prior notice should be included?
  - e) Is provision required for an obstruction offence?
  - f) Is a power to stop and search a person or vehicle necessary?
  - g) Is a power to take samples for analysis or a power to seize records necessary?
  - h) Is a power to take names and addresses necessary?
  - i) Should there be provision for compensation; if so, in what circumstances?

29

This problem may be compounded by the practice adopted in some departments and agencies of requiring a legislation officer rather than the responsible policy officer to prepare the instructions: meeting with policy advisers, 25 May 1987.



## Recommendation

Chief Parliamentary Counsel should take urgent steps to develop guidelines and sets of questions to assist instructing officers in drawing up drafting instructions, and to arrange periodical seminars involving parliamentary counsel and instructing officers to increase understanding on all relevant matters.

### Improving regulations

#### Split responsibilities

- 134 Acts and regulations form part of a single and coherent legislative message. Ideally, the persons involved in drafting an Act should also be involved in drafting the regulations. That is likely to produce a clear and consistent message. It is also likely to be the most efficient use of resources. In Victoria, however, while parliamentary counsel are responsible for drafting Bills, subordinate legislation officers of departments and agencies have the prime responsibility for drafting regulations. A similar division of responsibility exists nowhere else in Australia, apart from Tasmania. In New South Wales, South Australia, Western Australia and the Northern Territory, parliamentary counsel draft regulations. In the Commonwealth, the Australian Capital Territory and Queensland, the Office of Parliamentary Counsel does not draft regulations, but neither do departments and agencies. The task is performed centrally, by the Commercial and Drafting Division of the Attorney-General's Department in the case of the Commonwealth and the Australian Capital Territory; and in the Solicitor-General's Office in the case of Queensland.

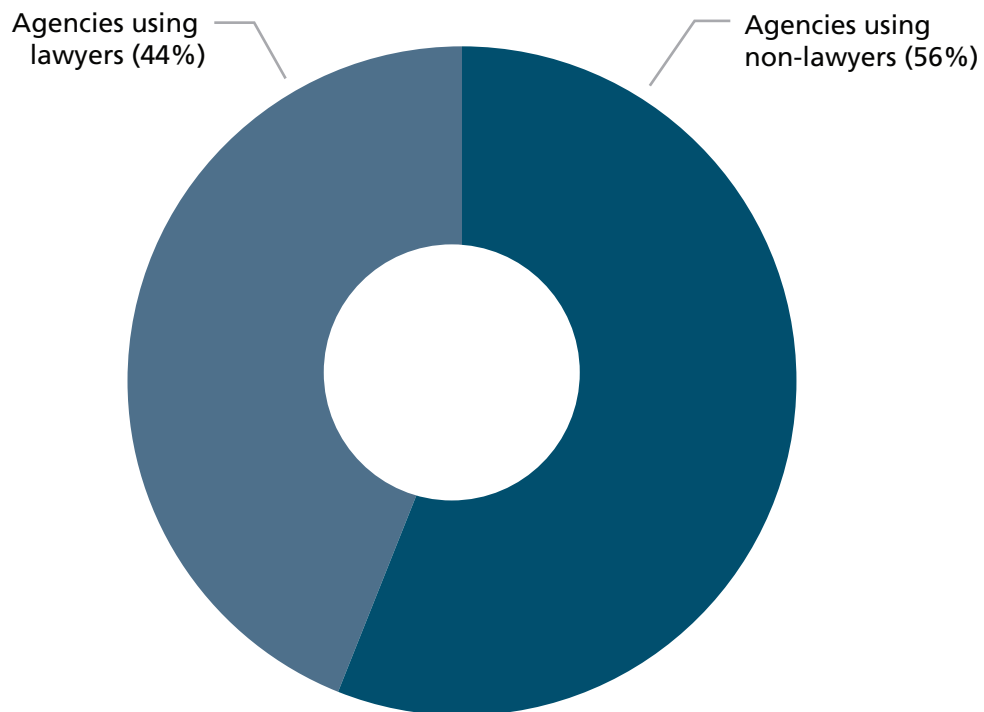
#### Role of Chief Parliamentary Counsel

- 135 Although subordinate legislation officers are primarily responsible for drafting regulations, the Office of Chief Parliamentary Counsel plays an important role in the process. For some time, it has had the responsibility of settling the regulations drafted by subordinate legislation officers. Since 1986, it has taken sole responsibility for drafting regulations under Acts administered by the Attorney-General. Moreover, since 1984, it has had statutory functions with respect to regulations by virtue of the *Subordinate Legislation Act 1962* (Vic). Under subsection 13 (3), a proposed regulation must be submitted to Chief Parliamentary Counsel for advice on a number of questions including whether it 'is expressed as clearly and unambiguously as is reasonably possible'.

#### Reasons for concern

- 136 There are two main reasons for concern about the present division of drafting duties between Chief Parliamentary Counsel and subordinate legislation officers. The first is one of efficiency. Except in relation to the Attorney-General's areas of responsibility, there is a double handling of regulations, first by departments or agencies and then by parliamentary counsel. This inevitably wastes resources. It may put parliamentary counsel in the difficult position of making judgments on matters without adequate background knowledge. Moreover, while Chief Parliamentary Counsel is required to advise whether regulations are expressed as clearly and unambiguously as is reasonably possible, Chief Parliamentary Counsel has no formal say in whether a particular regulation should be made despite its perceived defects. While the *Subordinate Legislation (Review and Revocation) Act 1984* (Vic) requires Chief Parliamentary Counsel's advice to be given to the Governor-in-Council, it might be better if Chief Parliamentary Counsel's approval were normally required before subordinate legislation is proposed.

137 The second reason for concern is that, as Chart 2 demonstrates, by no means all subordinate legislation officers in departments and agencies are lawyers. Drafting is for many of them a part-time job. There is no coordinated system of training. Subordinate legislation officers cannot be expected to acquire the level of technical skill required for marrying precision and clarity in legislative drafting. Inevitably, some regulations are less well drafted than they might be. Poorly drafted regulations, like poorly drafted Acts, impose large and unnecessary costs on the community. In some cases, the regulations are the most important part of a legislative scheme. They should be as well drafted as the Acts under which they are made.



**Figure 2: Subordinate legislation officers: required qualifications by agency**

### Achieving quality control

138 Adequate quality control of regulations is not likely to be achieved indirectly by the vetting of regulations under section 13 of the *Subordinate Legislation (Review and Revocation) Act 1984* (Vic). It is only likely to be achieved if the function is directly managed. Clear lines of accountability should be created between those who perform the task and those who are responsible for quality control. There are several ways in which that might be done:

- The function and resources could remain decentralised, but Chief Parliamentary Counsel could be given specific responsibility, perhaps in conjunction with the Public Service Board, for the training and development of officers and for the maintenance of standards across the system.
- The function and resources could be located centrally in the Office of Chief Parliamentary Counsel, but officers could be seconded out in appropriate cases to maintain the desired level of client services.

- The function and resources could be located centrally in the Office of Chief Parliamentary Counsel, but the function could be organised along client services lines, with specific expertise being developed for particular program areas.
- The function and the resources to perform it could be located centrally in the Office of Chief Parliamentary Counsel and the resources organised on the same basis as for primary legislation.

139 It is unlikely that adequate quality control could be achieved by Chief Parliamentary Counsel if the function of drafting subordinate legislation and the resources necessary for that function were to remain decentralised. Split accountability of the relevant officers is likely to lead to confusion about responsibilities, uncertainty of priorities and ineffectiveness in management. The main benefit of decentralisation is said to lie in the immediate responsiveness of subordinate legislation officers to the relevant program managers.<sup>30</sup> Subordinate legislation is said to be inseparable from management of programs: an understanding of the problems facing management is essential if the drafting of subordinate legislation is to correspond with the needs of program managers. The Commission does not doubt the need for drafters to understand the nature of the problems which legislation is intended to resolve. But the point applies equally to drafters of primary legislation as to drafters of subordinate legislation. Indeed, the need is greater in the former case than in the latter, since primary legislation establishes the framework within which regulation and management must take place. Once enacted, it is much more difficult to alter than subordinate legislation. Despite this, no-one suggests that the function of drafting primary legislation should be decentralised.

## Recommendation

Urgent consideration should be given to the possibility of transferring to Chief Parliamentary Counsel responsibility for the drafting of all regulations. The necessary reorganisation should take account of the need not to interfere with the obligation of departments and agencies, under section 5 of the *Subordinate Legislation (Review and Revocation) Act 1984* (Vic), to update and re-enact 1962–1972 regulations by 30 June 1988. If it is decided not to transfer drafting responsibility to Chief Parliamentary Counsel, consideration should be given to other organisational options to ensure proper training of subordinate legislation officers and the system-wide monitoring of standards by Chief Parliamentary Counsel.

The first of these recommendations would require the transfer to the Attorney-General's Department of funds representing the present cost to each Department of drafting its own regulations. A reduction in the total cost of drafting regulations would more than compensate for the costs associated with implementation of the proposal.

## Drafting assistance from private practitioners

140 The greater the understanding of the subject matter possessed by a drafter, the better the chances of a clearly intelligible draft. The Office of Parliamentary Counsel may not always contain experts in the field to which the Act refers. Expertise may be restricted to the private legal profession or the universities. The possibility of engaging members of the private profession for appropriate drafting tasks has been raised from time to time. Not surprisingly, there has been some resistance to the suggestion.

141 A Management Review of Chief Parliamentary Counsel's Office in 1986 recorded some of the reasons behind this resistance.<sup>31</sup> They included:

- The need to preserve confidentiality in relation to government business.
- The ignorance of the private profession in relation to the machinery of government and related legislative measures.
- The inability of the private profession to meet tight deadlines and to be available at short notice during the passage of legislation through Parliament.

On this basis, and on the ground of high cost and lack of accountability and control, the Review Team rejected the suggestions that legislative drafting be contracted out.

142 The need for confidentiality must be recognised, but should not be exaggerated. Details of proposed legislation are often announced in advance by Ministers and consultation often takes place with interested groups and individuals in connection with the development of policy and its translation into Bill form. *The Credit Act 1984* (Vic) and the legislation which comes from the Ministerial Council on Companies and Securities Law are outstanding examples. In other cases, where confidentiality is regarded as important, there is no reason to believe that members of the private profession are more likely to break confidences than members of the public service. Confidentiality is, after all, fundamental to the lawyer-client relationship. There may be some reason for concern that a member of the profession who is engaged to do drafting work may subsequently make use for another client of 'inside' information which is obtained. This might be against the interests of the relevant Government department. But that risk could easily be met by appropriate contractual terms between the Government and the relevant member of the private profession.

143 It is true that members of the private profession are subject to a wider variety of demands on their time than members of the Office of Parliamentary Counsel. Many of them may also lack the specialist knowledge of government processes possessed by members of the Office. That may preclude handing over total responsibility for particular Bills to members of the private profession. But it is no objection to involving the profession in the drafting of legislation under the ultimate authority and control of Chief Parliamentary Counsel. Management of the general drafting program itself demands that the Office coordinate all relevant work. The need to maintain legal consistency and the highest level of intelligibility across the statute book as a whole also demands centralised control. However, none of these factors requires that the Office and the Government be deprived of the benefits which would flow from involvement of members of the private profession in legislative drafting in appropriate cases. Their expertise and their insights, particularly in relation to the practical operation of legal rules, would be invaluable. They would also bring a fresh approach to language. They could be engaged, in appropriate cases, to prepare drafts of legislation themselves and to comment on, and correct, drafts prepared within the Office.

144 Lying behind some of the objections to the engagement of members of the private profession for legislative drafting is the view that drafting is a job for an expert in drafting rather than an expert in the subject matter of the draft. A member of the United Kingdom Parliament once colourfully referred to this view as the 'fanatical belief that writing law is a monopolistic mystery of the Parliamentary draftsman's impenetrable monastery.'<sup>32</sup> While the belief may not be fanatical, it is certainly in error. Leaving technical aspects to one side, drafting legislation is, in principle, little different from drafting private legal documents.

145 Before the establishment of centralised parliamentary counsel offices<sup>33</sup> most legislative drafting was done by members of the private profession. In most cases they were conveyancers, not expert in the areas in which they were drafting. Their efforts were far from outstanding. Drafting has improved substantially since the creation of centralised legislative drafting offices. The structure of legislation and its language have been improved. Greater consistency has been achieved across the statute book. Even so, some of the best examples of legislative drafting are to be found in statutes drafted by people other than parliamentary counsel, notable cases being the *Sale of Goods Act 1893* (U.K.), the *Bills of Exchange Act 1882* (U.K.)<sup>34</sup> (both drafted by Chalmers),<sup>35</sup> and the *Queensland Criminal Code 1901* (drafted by Sir Samuel Griffith, Chief Justice of the Supreme Court of Queensland, later Chief Justice of the High Court).<sup>36</sup> There are many improvements which still need to be made in legislative drafting. A monopoly in the Office of Chief Parliamentary Counsel may be unhealthy and undesirable. As an English commentator has said, 'competition, in a co-operative sense, should broaden the experience and expertise available to the drafting office'.<sup>37</sup> It should also ultimately lead to improvement in the intelligibility of legislation.

## Recommendation

In appropriate cases members of the private profession should be retained to assist the Office in drafting legislation. Chief Parliamentary Counsel should retain ultimate authority and responsibility for the legislation. Members of the private profession should be retained only with the knowledge and approval of the Minister responsible for the legislation in question. The risk of the subsequent use of 'inside' information should be dealt with by contractual arrangements between the Office of Parliamentary Counsel and the private practitioner.

## Private legal documents

146 Implementation of the Government's plain English policy in relation to private legal documents is more difficult. The control that exists in relation to legislative and Government documents is lacking. One possibility is the passing of a plain English law requiring that all legal documents or certain types of documents achieve an appropriate level of intelligibility. This might be modelled on the Federal and State plain English laws in the United States.<sup>38</sup> The Federal laws apply only to a narrow field of consumer documents. The scope of the State laws is also limited by reference to types of document or a monetary maximum or both. The types of document covered include credit purchase, money lending, leasing and insurance contracts. The monetary limits range from \$25,000 to \$200,000.<sup>39</sup> Of the seven American States which had general plain English legislation by 1984, three imposed legibility requirements, dealing with such matters as type size, spacing and contrast. All seven States imposed language requirements as well. In New York the relevant documents had to be written in 'a clear and coherent manner using

33 Britain in 1869; New South Wales in 1878; Victoria in 1879. See R Parsons, *Lawyers in the New South Wales Parliament, 1870–1890: a Study of the Legislative Role of Private Members* (PhD thesis, Macquarie University) 1972, 275f.

34 The *Bills of Exchange Act 1882* was described by Mackinnon LJ as 'the best drafted Act of Parliament which was ever passed'. *Bank Polski v Mulder* [1942] 1 All ER 396, 398.

35 Subsequently appointed to the Office of Parliamentary Counsel and made First Parliamentary Counsel in 1902.

36 See A Castles, *An Australian Legal History*, Law Book Co, Sydney, 1982, 487.

37 A Samuels, 'Improving the Quality of Legislation', (1974) 3 *Anglo-American Law Review* 523, 532.

38 For details, see H Lloyd, 'Plain English Statutes: Plain Good Sense or Plain Nonsense?' (1986), *Law Library Journal*, 683, 686–688.

39 J Wetter, 'Plain Language in Pennsylvania: Fading Issue or Development on the Horizon?', (1985) 89 *Dickinson Law Review* 441, 444–445.

See also B Leete, 'Plain English Legislation: A Comparison of Approaches', (1981) 18 *American Business Law Journal* 511; R Moukad, 'New York's Plain English Law', (1980) 8 *Fordham Urban Law Journal* 451; A Millus, 'Plain Language Laws: Are They Working?' (1983) 16 *Uniform Commercial Code Law Journal* 147; B Bowen, T Duffy & E Steinberg, 'Analysing the Various Approaches of Plain Language Laws', (1986) Communications Design Center, Carnegie Mellon University, Pennsylvania.

words with common and everyday meanings'.<sup>40</sup> Only one State imposed an objective test as well, requiring an average word length of less than 1.55 syllables, an average sentence length of fewer than 22 words, an average paragraph length of fewer than 75 words, no sentence in excess of 50 words and no paragraph in excess of 150 words.<sup>41</sup> However, State legislation dealing solely with insurance contracts commonly uses objective standards based mainly on the Flesch Test.<sup>42</sup> Remedies for breach of the United States plain English laws include damages awards with relatively low ceilings and the recovery of lawyers' fees. In most States, class actions may be brought. Injunctive relief is also available.<sup>43</sup>

147 There is no legislation in Australia comparable with Northern American plain English laws. However, minimum legibility and intelligibility standards are set in some Commonwealth and Victorian statutes. The most extensive treatment of the subject is in the *Credit Act 1984* (Vic). That Act is limited to a range of consumer contracts. It forbids the issue of documents that are 'not readily legible'. The Credit Licensing Authority may direct that a document not be used if in the opinion of the Credit Tribunal, it is:

- a) expressed in language that is not readily comprehensible;
- b) written or printed in a colour, or on paper of a colour, that detracts from the legibility of the document; or
- c) written or printed on a page in a style or manner that detracts from the legibility of the document.<sup>44</sup>

Documents may also be submitted to the Credit Licensing Authority for clearance by reference to these standards.<sup>45</sup> *The Insurance Contracts Act 1984* (Cth) deals with the problem differently. It is not restricted to consumer contracts. It contains a number of provisions which simply require that an insured be 'clearly informed' of certain matters which are relevant to a decision whether or not to enter into a particular contract of insurance.<sup>46</sup>

148 In a recent assessment of North American plain English legislation, Professor Reed Dickerson concluded that they had performed a valuable function.<sup>47</sup> A survey of banks, credit unions, finance companies, real estate firms and other groups affected by the plain English law in New York revealed that 75 per cent of the 200 or more businesses surveyed were complying with the law. Most firms acknowledged that they would not have revised their forms if it had not been for the plain English law.<sup>48</sup> However, there have been reports suggesting that some plain English laws may actually impede bodies in redrafting their documents to make them more comprehensible.<sup>49</sup> Certainly, the limitations of 'objective' plain English tests, such as the Flesch test,<sup>50</sup> are enough to suggest that any plain English laws should not impose objective criteria.

149 Considerable resistance to the enactment of generally applicable plain English standards was exhibited in some responses to the discussion paper. In the case of legal documents relating to consumers much of the field is already covered. Competitive forces are bringing further changes, particularly in the field of insurance. In the case of commercial documents, very little of the field is covered. But the need for many commercial clients to use their contracts not only to establish rights and duties, but as working documents

40 New York General Obligation Law §5-702.

41 J Wetter, 'Plain Language in Pennsylvania: Fading Issue or Development on the Horizon?', (1985) 69 *Dickinson Law Review* 441, 448.

42 R Flesch, *The Art of Readable Writing*, 25th Anniversary Edn, Harper & Row, New York, 1974, 247f. The Flesch test and other 'objective' tests are useful in detecting incomprehensibility of language. However, they are mechanical in nature. The Flesch test, for example, relies on average syllables and words per sentence; it takes no account of word familiarity, let alone grammar, syntax and structure. There is, therefore, considerable doubt whether such tests are useful as statutory standards. See H Lloyd, 'Plain English Statutes: Plain Good Sense or Plain Nonsense?' [1986] *Law Library Journal* 683, 692.

43 J Wetter, 'Plain Language in Pennsylvania: Fading Issue or Development on the Horizon?', (1985) 69 *Dickinson Law Review* 441, 449.

44 s 152.

45 s 153.

46 For more restricted examples, see s 19, *Penalties and Sentences Act 1981* (Vic) and ss 36 (5) and 37 (4) *Prisons Act 1981* (WA).

47 'Plain English Statutes and Readability', (1985) 64 *Michigan Bar Journal* 567, 569.

48 Department of Justice, Canada: *Access to Justice, Report No 1*, 41.

49 H Lloyd, 'Plain English Statutes: Plain Good Sense or Plain Nonsense?', [1986] *Law Library Journal* 683, 692.

50 Paragraph 146.

to ensure compliance by them, and by other parties, is leading to a simpler and more straightforward style of drafting in many commercial documents. The movement towards simplifying the language and structure of legal documents is already well under way on a voluntary basis. That movement is not restricted, as are the North American plain English laws, to consumer contracts. The Commission believes that the introduction of North

American style plain English laws might be counterproductive. The need for a general plain English law has not been established.

- 150 The Attorney-General's Department has already had discussions with the Law Institute of Victoria and the Victoria Law Foundation concerning the setting up of a project to encourage implementation of a plain English policy throughout the legal profession and the business community. Such a project would constitute a valuable complement to the steps already taken by the Government and to the recommendations contained in this report for further implementation of the Government's plain English policy in the public sector.

## Recommendation

The Secretary to the Attorney-General's Department should consult with the Law Institute of Victoria and the Victoria Law Foundation with a view to setting up a program to implement the Government's plain English policy in the private sector. That program should concentrate initially on the standard forms which have been prepared with the authority of the Law Institute. It should then be extended to forms used by business houses, including banks, real estate agents and insurers. The steering committee for the program should include representatives of the Law Reform Commission of Victoria and of the proposed Legal Drafting Institute at Monash University.



# Improving Acts and regulations: recommendations

**72** The structure of legislation

**76** The design and appearance of legislation



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## 7. Improving Acts and regulations: recommendations

- 151 Adequate drafting training of lawyers and recruits to the Office of Chief Parliamentary Counsel would lead to improved drafting. However, attention must also be given to certain factors which contribute to the difficulty faced by readers of Acts and regulations. These are of two types. The first is a lack of a coherent policy in relation to the structure of legislation. The second is the relatively unimaginative design and appearance of Acts and regulations.

### The structure of legislation

#### Relationship between the body of an Act and the schedules

- 152 Legislation consists of two main parts, an Act and regulations made under it. The Act itself is often divided into the body of the Act and appendages called 'Schedules'. The division of material between these components is made largely on the basis of precedent. Restricted use is made of Schedules.<sup>1</sup> Most of the legislative material is normally contained in the body of the Act. As a result, Acts regularly state numerous particular and quite narrow rules from which it is extremely difficult to extract the underlying principles. The central message is overwhelmed by a mass of peripheral detail.<sup>2</sup>
- 153 If the same amount of detail is to be preserved in legislation, improvements ought to be made in the way in which that detail is presented. One improvement would be to restrict the Act to a statement of the principles of the legislative scheme, the details being transferred either to Schedules to the Act, or to regulations made under it. The Renton Committee proposed the first of these changes in those areas of the law where it was necessary to maintain precision in detail:
- Where such detailed guidance is required in the Bill, it should be contained in Schedules, and the main body of the statute should be confined to statements of its principles. This would enable those concerned primarily with principle to find it set out uncluttered by the details of its application and qualifications.<sup>3</sup>
- 154 The removal of many essential but not central provisions from the body of an Act to a Schedule would be a considerable improvement. Transitional provisions and provisions which set up a Tribunal or Board and regulate its procedure are obvious candidates. This change appears already to be under way.<sup>4</sup> But the greatest benefit is likely to come from the relegation to Schedules of qualifications and exceptions which at present obscure an Act's central message. Take, for example, the *Companies (Acquisition of Shares) (Victoria) Code*. The aim of that Act is to regulate takeovers. It does so by requiring certain disclosures of shareholdings and by imposing certain limits on the acquisition of shares.

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1 Compare their use in *Statute Law (Miscellaneous Provisions) Acts* (Cth).

2 The problem is widespread. See Lord Scarman, *English Law—The New Dimension*, Stevens & Sons, London, 1974, 4.

3 *The Preparation of Legislation*, Cmnd 6053, Sweet & Maxwell, London, 1975, paragraph 10.13. See also paragraph 11.25.

4 See, for example, *Guardianship and Administration Board Act 1986* (Vic).

But the level of shareholdings can be affected not just by ordinary takeover conduct, but also by numerous other acquisitions. These include acquisitions of shares—

- by will
- by allotment or purchase under varying types of prospectus
- by *pari passu* allotment
- by the exercise of a renounceable option, or an option or right conferred by a convertible note
- by the acquisition in certain circumstances of shares in another corporation.

None of these is intended to be regulated by the Act. Nor are a number of other acquisitions, including certain acquisitions in proprietary companies having less than 15 members, and the acquisition of not more than 3 per cent of shares in each six months.

- 155 The original deals with all this by proscribing all acquisitions of shares where that would result in a person being entitled to more than the prescribed percentage of shares, and then setting out a long list of exceptions. No less than five pages of exceptions follow the proscription. Only then does the Act get to its central message, namely, that acquisitions by means of a takeover scheme or a takeover announcement (each of which is regulated by the remainder of the Act) are exempt from the prohibition. This way of setting out the material is needlessly confusing. What is of major importance is submerged by the sheer volume of what is of lesser importance. In contrast, the plain English version states the central principles at the beginning. The detail has been relegated to a Schedule, with only a brief reference to it being preserved in the body of the Act.<sup>5</sup>

## Recommendation

Chief Parliamentary Counsel should ensure that the body of an Act commences with a clear statement of the relevant principles and that, as far as practicable, the details and qualifications which have to be included in the Act are relegated to Schedules.

## Relationship between Acts and regulations

- 156 The possibility of relegating some of the detail now contained in Acts not to Schedules but to subordinate legislation (mainly regulations) was also noted by the Renton Committee. However, it agreed with a submission by the Law Society that:

the body of the Bill itself should contain the general principles set out as clearly and simply as possible; detailed provisions of a permanent kind should be contained in Schedules to the Bill; and only details which may require comparatively frequent modification should be delegated to statutory instruments.<sup>6</sup>

Whether that provides an adequate basis for deciding upon the allocation of legislative material may be open to doubt. The need for ease of modification is certainly a relevant factor. But that must be balanced against the need for Parliamentary scrutiny of material which affects private rights. Yet the regulation making power sometimes includes a power to alter the effect of an Act by excluding persons or transactions from its operation.<sup>7</sup> There may well be a need for guidelines to assist Ministers and Parliamentary Counsel in deciding what material should go into an Act and what should be left to

<sup>5</sup> Appendix 2 (Schedule 3).

<sup>6</sup> *The Preparation of Legislation*, Cmnd 6053, Sweet & Maxwell, London, 1975, paragraph 11.25.

<sup>7</sup> For example, *Credit Act 1984* (Vic) s 19. Generally, see D Pearce, *Delegated Legislation*, Butterworths, Sydney, 1977, paragraph 12f.

regulations. The development of those guidelines might result in a reduction in the material contained in some Acts and a consequent improvement in the communication of its central message.

- 157 A proposal to increase the amount of material left to regulations would give rise to two practical concerns. The first is the fact that the requirements imposed on departments by the *Subordinate Legislation (Revocation and Review) Act 1984* (Vic), particularly in relation to regulatory impact statements in respect of substantial changes to regulations, have resulted in departments seeking to have more, rather than less, detail incorporated in the Act itself. The second is the fact that Acts tend to be much more accessible than regulations made under them. The reprint program and Anstat Pty Ltd services provide up to date information on Acts. Anstat Pty Ltd provides a similar service in relation to regulations. However, many regulations are unavailable because they are out of print. The Gazettes in which they were originally printed may be the only place in which they can be located. An improved service will ultimately be provided by electronic means. But not all users will have access to that system. If more detail is to be left to regulations, a better system of publishing and updating them will have to be developed.
- 158 A proposal to increase the amount of material left to regulations might also give rise to constitutional concern about the shift of power from the Parliament to the Executive. However, the approach to the allocation of material between an Act and the regulations made under it, already differs markedly from one Australian jurisdiction to another.<sup>8</sup> Moreover, the concern should be alleviated by the role played by the Legal and Constitutional Committee of the Parliament under the *Subordinate Legislation Act 1962* (Vic).<sup>9</sup> That Committee has wide responsibilities in respect of all delegated legislation. The Attorney-General is required, in consultation with the Legal and Constitutional Committee, to prepare guidelines with respect to the preparation and content of statutory rules and the procedures to be implemented for ensuring consultation, coordination and uniformity in their preparation. In a wide variety of cases, a regulatory impact statement must be prepared and public comment must be invited and considered before the statutory rule is made. Such a statement and all submissions on it must be forwarded to the Legal and Constitutional Committee and the Department of Management and Budget. On a variety of bases,<sup>10</sup> the Legal and Constitutional Committee may recommend that a statutory rule be disallowed or amended and may even suspend the operation of a rule pending its consideration by Parliament. Given these protections, the risk arising from a transfer of detail from Acts to regulations would appear to be minimal.

## Recommendation

In consultation with the Cabinet Office, the Regulation Review Unit and other interested bodies, Chief Parliamentary Counsel should develop guidelines to assist Ministers, Departments and parliamentary counsel in the allocation of legislative material between an Act and the regulations made under it. In developing the guidelines, Chief Parliamentary Counsel should take account of the practical and constitutional concerns referred to in this report. The guidelines should be presented for consideration by the Government.

8 Compare, for example, the *Crimes (Confiscation of Profits) Act 1986* (SA) with the *Crimes (Confiscation of Profits) Act 1986* (Vic). The former is less than one-third the length of the latter, partly because greater use will be made of subordinate legislation.

9 As amended by the *Subordinate Legislation (Review and Revocation) Act 1984* (Vic).

10 Including the fact that the legislation 'requires explanation as to its form or intention': *Subordinate Legislation (Review and Revocation) Act 1984* (Vic) and s 14 (1) (z).

## Reducing the total amount of legislative material

159 The comprehensibility of legislation would certainly be improved by the development of criteria for the allocation of legislative material between the Act, its Schedules, and regulations made under it. But a more radical change, involving an actual reduction in the total amount of legislative material, may ultimately prove necessary. Concern over the amount of detail contained in Acts is widespread. In 1975, the Renton Committee examined this problem in some detail. It concluded that the ‘general principle’ approach to drafting which is followed in some European countries should be adopted wherever possible. However, it recognised that this would involve some sacrifice of certainty and would place a heavier responsibility on the courts in applying the resulting legislation. It also recognised that such an approach would probably not be acceptable in relation to fiscal and other public laws defining the rights and obligations of individuals in relation to the State. For that reason, its recommendation was highly qualified:

We recommend that encouragement should be given to the use of statements of principle, that is to say, the formulation of broad general rules, whether or not the subject matter of the Bill is considered by the Government to call for detailed legislative guidance, through one method or another ... Where such detailed guidance is required in the Bill it should be contained in Schedules, and the main body of the statute should be confined to statements of its principles. This would enable those concerned primarily with principle to find it set out uncluttered by the details of its application and qualifications.<sup>11</sup>

160 The relationship between statements of principle and detail has also been examined by Sir William Dale.<sup>12</sup> Dale contrasted the English legislative drafting style with those adopted in France, Sweden and Germany. He did so against the background of the English and Scottish Law Commissions’ criterion of intelligibility: a statute should be drafted so that it ‘can be understood as readily as its subject matter allows, by all affected by it’.<sup>13</sup> English legislation did not meet this criterion. Its obscurity was the result of several factors including ‘much detail, little principle’.<sup>14</sup> By contrast, lucid and often succinct drafting was to be found on the Continent:

The continental lawmakers, influenced by their heritage of codes, think out their laws in terms of principle, or at least of broad intention, and express the principle or intention in the legislation. This is the primary duty of the legislator—to make his general will clear.<sup>15</sup>

By no means all Continental legislation was drafted in terms of principle. However, even when it contained detail comparable with that in an English statute, it rarely suffered from the defects common to the latter.<sup>16</sup> Dale concluded that English drafting would be improved if drafters were to be ‘less fussy over detail ... more general and concise’. Much could be done by improvements in style and arrangement. But a more profound change was also desirable:

A determination to seek the principle, to express it, and to follow up with such detail, illuminating and not obscuring the principle, as the circumstances require.<sup>17</sup>

161 Nowhere has a reduction in legislative detail been more forcefully advocated than in the judgment of Sir John Donaldson MR in *Merkur Island Shipping v Laughton*.<sup>18</sup> Having noted the difficulties faced by unions and management in understanding the relevant legislation, the Master of the Rolls absolved the drafter of the legislation from responsibility for those difficulties:

I do not criticise the draftsman. His instructions may well have left him no option. My

11 *The Preparation of Legislation*, Cmnd 6053, Sweet & Maxwell, London, 1975, paragraph 10.13.

12 *Legislative Drafting: A New Approach*, Butterworths, London, 1977.

13 *The Interpretation of Statutes*, Law Com No 21, Scottish Law Com No 11, 1969, 3.

14 W Dale, *Legislative Drafting: A New Approach*, Butterworths, London, 1977, 331.

15 At 29.

16 At 332–3.

17 At 335.

18 [1983]1 All ER 334, 351.

plea is that Parliament, when legislating in respect of circumstances which directly affect the 'man or woman in the street' or 'the man or woman on the shop floor', should give as high a priority to clarity and simplicity of expression as to refinements of policy ... When formulating policy, ministers, of whatever political persuasion, should at all times be asking themselves and asking parliamentary counsel: 'Is this concept too refined to be capable of expression in basic English? If so, is there some way in which we can modify the policy so that it can be so expressed?' Having to ask such questions would no doubt be frustrating for ministers and the legislature generally, but in my judgment this is part of the price which has to be paid if the rule of law is to be maintained.<sup>19</sup>

- 162 Any proposal for a reduction in the detail contained in legislation and for greater reliance to be placed on statements of principle raises complex questions of two types. The first is a constitutional one. A reduction in legislative detail might be seen to involve a transfer of power from the legislature to the judiciary and the executive. The less the detail contained in an Act, the more necessary it would become for administrative tribunals or the courts to 'flesh out' the relevant provisions. The role of administrative bodies might expand. Developments of these types would take place at the expense of the legislature. The legislature would need to retreat from ground it now occupies. The second question is one of costs. It concerns the impact of such a change on the general public, on administrators and on the courts. The less detailed the legislation, the more open it would become to dispute in its application to particular circumstances. Additional costs would be involved in the increased exercise of administrative or judicial discretions and in increased litigation. These would have to be set against the benefits of simpler legislation, including, in particular, the flexibility which might be introduced in relation to the exercise of administrative discretions.<sup>20</sup> These matters are not considered further in this report. They would require a separate study. That study would only become necessary if it proved impossible to achieve an appropriate level of intelligibility of legislation while preserving the present level of detail.

## The design and appearance of legislation

- 163 The comprehensibility of legal documents is often affected by poor design and layout and by a lack of adequate aids for finding information. This is a particular problem with legislation. Improvements could be made in a number of areas, including typography, headings, the use of visual aids, cross-referencing, the provision of examples, and indexing.

### Typography

- 164 Possible improvements include:
- The use of running heads at the top of each page to indicate the sections included on the page, and the Part and Division in which they are located.
  - The use of larger type for the section number and its relocation in the margin to make it easier to find.
  - The positioning of the section number beside the section heading to make the heading an integral part of the section and to use the number and heading in combination to divide the section from the previous one.
  - The making of a sharper contrast between the style of section headings and Part and Division headings to facilitate access to information.

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At 351.  
This was the basis for the call by the Victorian Attorney-General for a Takeovers Code which stated general principles and reposed substantial discretion in the National Companies and Securities Commission.

- The printing of Schedules in the same size of type as the body of the Act; it is not necessary to use a smaller type to differentiate the Act from its Schedules; other typographical devices could be used for this purpose.
- The use of an attractive, modern typeface that is as readable as the type used in popular publications.

A number of these proposals have been adopted in the revision of the *Companies (Acquisition of Shares) (Victoria) Code* in Appendix 2. None would increase costs for the Government. They would save costs for the community and for the legal profession, in particular.

## Headings

165 Headings should also be improved. At present, they are often cryptic and uninformative. In some cases, a radical approach may be required. Headings, particularly headings to sections, could be phrased in the form of questions to which the relevant provisions then provide the answer. That was tried in early drafts of the Residential Tenancies Bill 1985 (Vic). Headings such as:

- What form must a tenancy agreement be in?
- What if the agreement is not in the standard form?
- What are the allowed terms for ending a tenancy?
- What if the premises are specially needed by the landlord?
- How much rent must a tenant pay?
- How often can rent be increased?
- Does a receipt have to be given for rent?

add substantially to the accessibility of a Bill to affected members of the public—in this case, landlords, agents and home renters. This device has been used recently in the *Planning and Environment Act 1987* (Vic). It should be used much more widely.

166 Considerable use could also be made of headings in order to limit the scope of the sections themselves. A heading which makes it clear that the section only deals with takeover schemes, for example, saves continual reference to those schemes in the body of the section. There has been considerable confusion over the status of section headings. Under section 36 (1) of the *Interpretation of Legislation Act 1984* (Vic), headings to Parts and Divisions form part of an Act. Section headings, however, do not.<sup>21</sup> Section headings were originally marginal notes. It was often said that marginal notes could not be used to assist in the interpretation of a statute. However, this approach was questioned by Street CJ in 1983:

The often-repeated authoritative statements that marginal notes are inadmissible guides to construction are generalities based upon the danger of taking them at face value. If this danger be wholly removed by authenticating the marginal note, then the reason underlying the inadmissibility principle ... is displaced and that principle ceases to apply to the marginal note in question. To the objection that Members of Parliament take no responsibility for the reliability of marginal notes as distinct from the text of sections, it could be answered that it is high time that they did. Marginal notes are plain to be seen in the printed Bill as well as the Act, and it could well come as a surprise to many Members of Parliament, and to the public at large, to be told there is an arbitrary and inflexible rule precluding any reference to marginal notes as an aid to construction. I not only see no justification for such an arbitrary and inflexible rule, but I see every reason in common sense and in law to permit such reference when the marginal note is properly authenticated.<sup>22</sup>



Whatever the position at common law, the *Interpretation of Legislation Act 1984* (Vic) makes it clear that any relevant matter or document may be used to assist in the interpretation of a statute. Consequently, while section headings may not be part of an Act, they may be used in interpreting a statute and this fact should be borne in mind by those who draft them.

## Cross-referencing

- 167 There is considerable scope for cross referencing in the margin in both Acts and subordinate legislation. One case where that might be done is in relation to definitions. The use of definitions provides a particular difficulty for readers of sections using defined words. This difficulty could be readily overcome if the reader's attention were drawn to the fact that a particular word or phrase in a given section is defined elsewhere in the Act. Word processing equipment readily identifies every use of a word in a document. Each use of a defined word could be highlighted in some way and a cross-reference to the location of the definition could be included in each case. This has been done in the case of the re-drafted *Companies (Acquisition of Shares) (Victoria) Code* in Appendix 2.\*
- 168 A more ambitious form of cross-referencing would provide valuable assistance in understanding the importance of amending legislation. At present, an amending Bill can often be understood only if read with the principal Act. For example, the 1985 amendment to the *Nurses Act 1958* (Vic):

In section 45 of the principal Act—(a) in paragraph (ja) after the words 'nurses' agents' there are inserted the words 'and inspection of the mode of business of nurses' agents'...<sup>23</sup>

gives no indication at all of the significance of the change. It is necessary to refer to the *Nurses Act 1958* (Vic) as well to make sense of the amendment. That causes quite unnecessary difficulty for Members of Parliament, in particular. To assist them, at least, amending Bills should substitute, in appropriate cases, whole paragraphs or subsections for the existing ones rather than simply delete, insert or substitute words or phrases. The words and phrases to be deleted, inserted or substituted might be highlighted by bold type or italics. The latter practice is sometimes followed in the Commonwealth Parliament in relation to substantial amendments. It does not affect the Bill itself but takes the form of a memorandum from the responsible Minister, showing relevant sections of the principal Act with the proposed amendments. A similar procedure should be considered in Victoria. The possibility of printing amended Acts in a similar manner for members of the public should also be examined. Some commercial organisations have used highlighting techniques to indicate corrections to reports or amendments to articles of associations. These systems allow readers to see at a glance where the changes have occurred and what words have been added or deleted.

## Use of examples

- 169 The intelligibility of Acts could also be improved by the use of examples showing how provisions apply to particular cases. Tests at the Communications Design Centre in Pittsburgh have shown that readers construct stories or episodes to help them understand abstract rules or complex procedures. This is known as the scenario principle.<sup>24</sup> Drafters should capitalise on it. Newspapers sometimes adopt the practice when they are trying to explain government policies on such matters as fringe benefits tax or assets exemptions. The St Paul Fire and Marine Insurance Company followed the same principle in its Personal Liability Catastrophe Policy, setting out the policy first and then providing illustrations printed in italics:

\* Published separately.

<sup>23</sup> *Nurses (Amendment) Act 1985* (Vic), s 13.

<sup>24</sup> L Flower, J Hayes & H Swartz, *Revising Functional Documents: The Scenario Principle*, Communications Design Centre, Carnegie-Mellon University, Pittsburgh, 1950, Technical Report No 10.

If a liability covered by this policy is not covered by another policy of yours or anyone else insured, we'll pay claims you legally have to pay up to the limit listed on the attached declarations page. However, you'll have to pay a small deductible of 50% up to the first \$500—in other words, no more than \$250.

You've boarded your neighbours' poodle while they're away on vacation. You're careless and the poodle runs away and gets lost. Your neighbours insist on you paying for the loss. If he was an ordinary poodle worth say \$400, you pay \$200 and we pay \$200. But if he was a prize-winning show dog worth \$4,000, you pay \$250 and we pay \$3,750.

- 170 The *Consumer Credit Act 1974* (UK) is an example of what might be done in the case of legislation. Schedule 2 to that Act contains no less than 24 examples of the application of the Act's new terminology to particular circumstances. These are preceded by a table setting out the new terms, the sections where each is defined and the examples relevant to each of them. Examples 1 and 11 are set out below:

Example 1

*Facts.* Correspondence passes between an employee of a money-lending company (writing on behalf of the company) and an individual about the terms on which the company would grant him a loan under a regulated agreement.

*Analysis.* The correspondence constitutes antecedent negotiations falling within section 59 (1) (a), the money lending company being both creditor and negotiator.

Example 2

*Facts.* X (an individual) borrows 500 pounds from Y (Finance). As a condition of the granting of the loan X is required—

- (a) to execute a second mortgage on his house in favour of Y (Finance), and
- (b) to take out a policy of insurance on his life with Y (Insurance).

In accordance with the loan agreement, the policy is charged to Y (Finance) as collateral security for the loan. The two companies are associates within the meaning of section 184 (3).

*Analysis.* The second mortgage is a transaction for the provision of security and accordingly does not fall within section 19 (1), but the taking out of the insurance policy is a linked transaction falling within section 19 (1) (a). The charging of the policy is a separate transaction (made between different parties) for the provision of security and again is excluded from section 19 (1). The only linked transaction is therefore the taking out of the insurance policy. If X had not been required by the loan agreement to take out the policy, but it had been done at the suggestion of Y (Finance) to induce them to enter into the loan agreement, it would have been a linked transaction under section 19 (1) (c) (t) by virtue of section 19 (2) (a).

Similar initiatives should be tried in Victoria, either in Acts themselves or in accompanying explanatory material.<sup>25</sup>

## Use of visual aids

- 171 Words are not the sole means for conveying ideas. Formulas, charts and maps are sometimes preferable vehicles. Take subsection 13 (4) of the *Construction Industry Long Service Leave (Amendment) Act 1985* (Vic):

For the purposes of subsection (3) the 'prescribed amount' is an amount equal to the amount that bears the same proportion to the amount paid to the person as the period of service bears to the total period of service in respect of which payment was made.



To apply this provision, it is necessary to construct a mathematical formula:

$$\text{Prescribed amount} = \text{amount paid} \times \frac{\text{period of service in the construction industry in Victoria}}{\text{Period of service for which payment was made}}$$

While some readers may be able to make the necessary translation in this case, in others, formulas are quite indispensable.<sup>26</sup>

- 172 Similar considerations apply to the use of maps and charts, particularly in relation to complex survey or geographical descriptions. Can anyone doubt that a map would have been preferable to the following description of a 'controlled area' in the *Transport (Tow Truck) Regulations 1983* (Vic)?

*Division 2—Operation Within a Controlled Area*

60. The following area is declared to be a controlled area for the purposes of these Regulations (hereinafter referred to as 'the controlled area'), namely that area bounded by a line drawn from the coastline at Mornington Jetty along Schnapper Point Drive, Main Street, Tyabb Road, Yuilles Road to its intersection with the railway line, following the railway line to its intersection with Moorooduc Road, along Moorooduc Road, to its intersection with Frankston-Flinders Road· then in an easterly direction to the intersection of Robinsons Road and Dandenong-Hastings Road, along Dandenong-Hastings Road to its intersection with Bayliss Street, then in an easterly direction to the intersection of Narre Warren-Cranbourne Road and Punt Road, then in a northerly direction along Narre Warren-Cranbourne Road to its intersection with Main Street, along Main Street to its intersection with A'Beckett Road, then north to the intersection of Belgrave-Hallam Road and Horswood Road, along Belgrave-Hallam Road, Mountain Flat Road and Wellington Road to its intersection with Belgrave-Gembrook Road, then in a northerly direction to the intersection of Queens Road and Lewis Road, along Lewis Road to its intersection with Hunter Road, along Hunter Road to ... [and so on, for another 28 lines].

## Providing indexes

- 173 The absence of indexes is a major defect in legislation. This fact was noted by the Legal and Constitutional Committee in its 1983 report on the Interpretation of Legislation Bill 1982 (Vic). It recommended that:

All future Bills and, where appropriate, subordinate instruments should be accompanied by indexes and tables of contents. These should be produced in a detachable form so as to facilitate their updating when amendments to Acts and Regulations are made.

The development of appropriate word processing programs and the emergence of professional indexers has made the production of indexes simpler and less costly. In the case of complex legislation, in particular, indexes are indispensable aids to understanding. Discussions are taking place between Chief Parliamentary Counsel and the Victorian Government Printer with a view to the production of indexes for all major Acts. That program should be extended to subordinate legislation. Indexes are simply indispensable to clear communication in a highly complex functional document.

## Recommendation

In consultation with the Cabinet Office, the Regulation Review Unit, the Victorian Government Printer and other interested bodies, Chief Parliamentary Counsel should develop a new design for Acts and regulations. The new design should incorporate improved cross-referencing systems and indexes for all major legislation. It should be presented for consideration by the Government.

- 174 The Commission has experimented with a number of page formats which might replace the present one. Two pages of the *Mental Health Act 1986* are reproduced as Appendix 6 of this report. The revised format is on the left-hand page; the original is on the right. The revised format is presented only to indicate the extent to which improvements might be made. It is not put forward as a final revision.



# Rewriting existing legislation and government forms

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## 8. Rewriting existing legislation and government forms

### Recommendations

175 The recommendations in the preceding chapters would leave untouched the vast amount of legislation and other legal documents which incorporate defects of the types examined in Chapter 2. Special recommendations are required if the Government's plain English policy is to be implemented in those documents. Given the costs which they impose on Government and on the community there can be little doubt of the need to rewrite and redesign major items of legislation and forms and documents in common use.

### Rewriting legislation

176 The redraft of the *Companies (Acquisition of Shares) (Victoria) Code* contained in Appendix 2 establishes that existing legislation can be redrafted in plain English without loss of precision. But a redrafting program raises questions of cost. Changing existing legislation is different from writing new legislation. New legislation has to be drafted anyway. For the reasons given earlier, drafting it in plain English should involve savings rather than costs. In the case of redrafting existing legislation, however, all the costs are additional ones. Those costs would only be justified if substantial benefits will be gained from a rewriting program. Most of the benefits of a rewriting program are the same as those discussed earlier in relation to the drafting of new legislation. They include a significant reduction in administrative costs for the Government and compliance costs for business and the general community. But a number of additional benefits would flow from a rewriting program. These include:

- staff development opportunities in the form of extensive training in plain English drafting, leading to considerable early improvement in the drafting of original legislation
- the symbolic and educational value for the legal profession and the business community in the expression of the Government's commitment to plain English in legislation.

It is, of course, not possible to quantify the benefits of a rewriting program in money terms. Moreover, the benefits and the costs of rewriting legislation would vary from one subject to another. In the case of rarely used legislation, the benefits would be small and would not justify the costs of the rewriting. In the case of heavily used legislation, such as the *Credit Act 1984 (Vic)*, the benefits would be substantial and would outweigh the associated costs of rewriting.

177 In *Victoria, the Next Decade* the Government announced its decision to establish new programs for business deregulation.<sup>1</sup> The areas in which initiatives are to be taken include the review and rewriting of Acts in plain English. The Commission has conferred on this

subject with Mr Robert Miller, the Director of the Regulation Review Unit, and with Chief Administrators of Government departments and agencies. It has concluded that the most cost-effective approach would be to establish a program which gives priority to legislation whose rewriting would produce the greatest benefits.

## Recommendation

**A legislation rewriting program should be established. It should be aimed at a limited number of important Acts (say, 50) and regulations made under them.**

The program should be monitored closely and should be reassessed after it has been in operation for an adequate period. To minimise interference with the discharge of the on-going duties of the Office of Chief Parliamentary Counsel and to provide the necessary management and consultative mechanisms, the Commission recommends that responsibility for the program should be given to it in the form of a reference from the Attorney-General. To minimise interference with the Government's legislative program, special procedures should apply to the consideration of the redrafted legislation. Chief Parliamentary Counsel should be required to examine the plain English redraft to draw attention to any differences between it and the original legislation before it goes forward for consideration. A standing reference should be given to the Legal and Constitutional Committee of Parliament to report on the accuracy of the redrafted legislation.<sup>2</sup>

- 178 During consultation, concerns were expressed about the rewriting of Acts whose policy was being substantially revised by the responsible department. It was suggested that the rewriting program should not apply to those Acts; they would be rewritten by the Office of Chief Parliamentary Counsel when policy revision was complete. The Commission recognises that if the revised policy is radically different from the original, it would be preferable to leave the original alone pending the development of the new legislation. However, those cases would be rare. In most cases, a rewriting program should go hand in hand with the policy revision. Policy revisions, including changes which ministers decide upon as the result of the discovery of anomalies during the course of the rewriting program, should be accomplished in the usual way, by means of inclusion of a Bill in the Government's ordinary legislative program. The plain English Bill would incorporate all policy changes and its passage through Parliament would take place as soon as convenient after the passing of the amending Bill. In some cases, the amendments might even be incorporated in the plain English Bill itself, the policy changes being clearly noted in the Minister's second reading speech and open for debate in the usual way. Under the Commission's recommendations, the decision on these matters would be made by Cabinet. In setting priorities within the rewriting program, Cabinet would be able to reallocate particular tasks to the ordinary legislative program.

## Rewriting government forms

- 179 Implementation of the Government's plain English policy in relation to existing forms has already commenced in some Government departments and agencies, notably the Attorney-General's Department, the Ministry of Planning and Environment and the Ministry for Police and Emergency Services. The experience in England,<sup>3</sup> and in Victoria<sup>4</sup> so far, shows that there would be considerable benefit to the Government and to the general community if the plain English policy were implemented throughout the public

<sup>2</sup> The details of a proposed program, including management and consultative procedures and castings, are set out in Appendix 7.

<sup>3</sup> Paragraph 101.

<sup>4</sup> Paragraph 105.

sector. However, implementation is likely to be uneven, and the realisable benefits put at risk, unless a clear program is established, monitored and reported on.

- 180 Two main possibilities have been suggested. Under the first, implementation would be the responsibility of individual departments and agencies. An administrative direction could be given to all departments and agencies requiring them to implement the Government's plain English policy. The direction would be accompanied by guidelines which indicate priorities, methods and deadlines. Each department and agency would be required to include in its annual report details on its response to the direction and on costs and benefits of its work on implementing the plain English policy. Under the second possibility, a special unit would be established and responsibility would be given to it for the implementation of the plain English policy throughout departments and agencies. It would identify areas where benefits could be maximised. It would assist departments and agencies in developing action plans. It would provide consultancy services, particularly in relation to training. It would monitor performance and provide overall reports to the Government on the implementation of the plain English policy.
- 181 The Commission believes that the latter of these two approaches would be far more effective than the former. In the absence of an established infrastructure within individual departments and agencies, administrative directions are unlikely to produce a sufficient response. Moreover, both the Government and the general community would be best served if priorities were to be established on a system-wide basis and if areas of greatest benefit were to be targeted immediately.

## Recommendation

**A small Plain English Unit should be established to assist in the implementation of the Government's plain English program in relation to existing forms and documents. The Unit should provide consultancy services to Departments and Agencies and should monitor implementation of the plain English policy. It should be dissolved within three years.**

- 182 Given the leading role played so far by the Attorney-General and his Department in the implementation of the Government's plain English policy, the Unit should be attached to the Attorney-General's Department. However, it should report to a Steering Committee which should include representatives of other bodies as well. Given its overall responsibility for promoting efficiency in the public service, the Public Service Board should be represented. The Regulation Review Unit should also be represented in view of its related proposal for a Forms Management Centre and a proposed *Paperwork Reduction Act*. Because of the importance of the project to the community at large, consumer and business interests could also be represented. The Unit's work should be split into three phases. In phase 1, the Unit's efforts should be concentrated on departments and agencies which are heavily involved in the delivery of services involving a high level of contact with clients, and on departments and agencies whose responsibilities involve regulation of the business community, in particular. In phase 2, the Unit's efforts should be concentrated on departments and agencies with high levels of internal standardised communications. If poorly designed, these can lead to delay and inconvenience for members of the public through inefficiency of decision making. In phase 3, the Unit should monitor progress against lodged action plans. The Unit's tasks should be completed, and the Unit dissolved, within three years.<sup>5</sup>

# Appendix:

# Drafting Manual

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# Introduction

- 1 This manual\* has been prepared to help implement the Government's policy to have legislation written in plain English. It should be read with the Law Reform Commission's Report *Plain English and the Law* which explains what plain English is, the reasons why it should be used and how it should be written. The Law Reform Commission of Victoria believes that Acts, regulations and associated forms and statements should be not only legally sound but also easy to read. This will benefit the whole community and increase the efficiency of government.
- 2 The main aim of this manual is to help people involved in legislative drafting to prepare Acts which communicate their message efficiently and effectively. It is not a complete guide to plain English drafting and does not cover the technical legal matters that are dealt with in traditional manuals on legislative drafting. It focusses on particular forms of language which research has indicated lead to difficulties and misunderstanding. These deficiencies in language arise independently of the other causes of faulty legislation and can be eliminated by drafters themselves.
- 3 The manual is intended to be more than a set of guidelines. It draws on findings, knowledge and skills outside the law to explain why certain steps need to be taken to achieve effective communication. The object is to give drafters greater freedom and to help them to take a broad view of their role as communicators of the law. Although the manual is directed principally to drafters of legislation, it applies to all types of legal documents.
- 4 The basic principles and objectives set out in the manual are not novel. They have long been accepted and followed by many in the legal profession and leading writers on legislative drafting have proposed rules aimed at improving the intelligibility of legislation since the middle of the last century. The history of the plain English movement, particularly in its application to legislation, is described by the Law Reform Commission in its Report.
- 5 The measure of success for legal writing is not how well drafters manage to *sound like lawyers* but how well they achieve accuracy of content combined with plainness of expression. This manual is directed towards achieving that plain expression.

# 1. Writing plainly

- 6 Drafters of legal documents must state the relevant rules or standards exactly. But it is not enough to represent the facts accurately and formulate the law correctly. Drafters must do so in language which is immediately intelligible to their audience. They fail in their responsibilities as writers if they have not presented the facts and law clearly. Readers expect to make an effort to understand the subject matter in a document, but they should never be required to struggle with the language of the writers. Obscure or convoluted writing can be avoided for there is an alternative available in plain English. It is language in which the meaning is immediately clear. A document is written in plain English if it conveys the writer's message in an effective and efficient manner. As Professor Dickerson observed:

The ideal draft is the one that the legislative audience will find the easiest to understand and to use.<sup>1</sup>

- 7 The main justification for plain English is simply that people have the right to be informed in language which they can understand, of benefits to which they are entitled, and obligations which are imposed on them. This is only fair. It is part of the rule of law and was strongly endorsed by the Law Reform Commission in its Report. Misunderstanding and ignorance of the law diminish people's ability to comply with laws and jeopardise their exercise of their rights. Moreover, parliamentarians should understand what is submitted to them for enactment. Provisions cannot be properly debated if they are not fully comprehensible.

## Plain language

- 8 Plain English is not a simplified form of English or a type of basic English. On the contrary, it is a full version of the language, including all features of normal adult English. It is not limited to a small vocabulary nor to a simple grammatical structure but it may vary depending on the audience and the subject. It may use an uncommon technical word if the readers are specialists, or introduce alternatives and explanatory notes if they are non-expert. It may differentiate in its treatment of statutes which concern the whole community, such as traffic laws, and those which concern primarily only a special section, such as laws on the admissibility of evidence. Plain English means plain or clear to the intended audience which includes not only judges and lawyers but also parliamentarians, government officials and those affected by the legislation.

## Completeness

- 9 To achieve legal precision, a plain English document contains a complete and accurate statement of the rules or standards. It is not a simplified statement. Every essential item of information is present. It must be if the document is to protect the rights of the affected parties in relation to the benefits conferred, or the obligations imposed. However, plain English is rigorous in excluding material that is unnecessary or outmoded.

## Organisation and layout

- 10 Plain English requires not only plain language but also proper organisation and layout. This was stressed by the Law Reform Commission in its Report. For example, it said that *if legislation is to be readily comprehensible, its central message should be introduced early in the document*<sup>2</sup> and the general layout of the Act should be carefully planned before drafting commences. Poor organisation may obscure underlying principles. The text should be structured according to the interests and priorities of the readers. This will help them to absorb its message. The organisation of the text should be highlighted by its design features. These guide readers to the relevant information.

## Modern approach to communication

- 11 The use of plain English does not alter or jeopardise the law. It makes it clearer and easier to understand. It is an efficient and modern form of communication. It incorporates knowledge from linguistics, psychology and typography about how people write and how they read. It is not a new style of writing that is alien to the legal profession or is being imposed from outside. There are lawyers today—as there always have been—who write plainly.

## An illustration

- 12 The following example, although it is not a legislative provision, illustrates the major principles set out in the following chapters. It is the charge or direction given by a court official to jurors in Victoria. The version in use in 1986 read:

Members of the jury, the prisoner ABC is charged with XYZ. To that charge he has pleaded not guilty and for his trial has placed himself upon God and his country, which country you are. Your duty therefore is to say whether he is guilty or not guilty. Hearken to the evidence.

- 13 The purpose of this direction is to explain to the jurors what they are required to do. Jurors are ordinary citizens with little knowledge of the law and little experience of court cases. For many of them, service on the jury would be their first experience of a court room. The direction explains to the jury that they must listen to the evidence and decide whether the accused is guilty or not. But look how it does it. First, it introduces archaic legal words which are unfamiliar to jurors. Take for instance, *placed himself upon God and country*. What do these words mean? What has God to do with the trial? From the average person's point of view, a court case involves the police trying to prove a charge against the defendant. It does not involve God at all. Again, take *which country you are*. The jurors have no idea what *country* means in this context. The word *hearken* is even more obviously archaic. These terms have no place in a modern court room. They are more likely to make the legal proceedings seem ridiculous than to add an aura of solemnity to them. The content of the charge may also be criticised. It separates the task of reaching a decision from the method by which jurors reach a decision, that is by weighing the evidence. The direction does not state the important connection between weighing the evidence and making a decision on the basis of that evidence.

14 The jurors would understand their duties better if the direction read:

Members of the jury, the prisoner ABC is charged with XYZ. He has pleaded not guilty. Your duty is to listen to the evidence that is to be placed before you in this trial and to decide from it whether he is guilty or not.

This direction means the same as the first. For example, *listen* means the same as *hearken*. The second direction is more accurate than the first because it spells out the link between listening to the evidence and forming a conclusion. It is clearer and more modern not only because the language is modified but also because the needs of the audience and the real content have been identified. Good clear writing springs from good clear thinking—thinking about the purpose, the audience and the necessary content of the document.

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## 2. The purpose behind writing

- 15 The purpose of a document determines not only its contents but also its format and the language in which it is written. This chapter explains how the purpose of an Act should be taken into account in drafting.

### The impact of purpose on writing

- 16 All writers should consider the purpose of a document before commencing drafting. If the purpose is clearly understood at the outset, the document can be limited to essential information. Readers will not be burdened with irrelevant material which may distract them from the central message. The material can be presented in the right order and with the right emphasis. It can be written in a style which is appropriate for the document. For example, instructional manuals use sparse sentence patterns to enable readers to move quickly from one instruction to another: *Unlock button 1, Depress button 5; Slide button 2 up*. All functional documents refer to concepts meticulously by the same name. In an Act about building societies, readers do not mind having the words *building society*, *Memorandum of Association*, and *Registrar* repeated hundreds of times. This repetition helps readers as they concentrate on the powers, obligations or privileges set out in the Act. If, on the other hand, the document is a literary work, to give readers aesthetic pleasure, such repetition would be tedious.
- 17 When writers have identified the purpose of a document, they should make that purpose clear to the audience. No publication occurs in a vacuum. It is sparked by an identified need and must be interpreted in the context of its background. A statement of purpose provides readers with an understanding of the background to the document and gives them a context in which to interpret it. It allows readers to start from the same point as the writer.

### Revealing the purpose of Acts

- 18 Acts in particular should begin with an informative statement of their purpose setting out what Parliament intends to achieve. Each Act changes the law. If its purpose is clearly stated, readers can readily understand the significance and intended scope of the change.
- 19 Before the Ministerial Statement *Plain English Legislation* 6 May 1985, Victorian Acts contained both a long title and a short title. The long title consisted of a statement of the purpose or scope of the Act. Long titles have now been abandoned and the material which would formerly have been placed in the long title should be placed in the purpose section (section 1).<sup>1</sup>
- 20 Some Victorian Acts also have a separate objectives section (for example, the *Guardianship and Administration Board Act 1986* and the *Mental Health Act 1986*). This distinction is artificial and should not be maintained. It is confusing for readers to

encounter in different places two sets of statements that are obviously related. The purpose section should contain all statements of objectives. It should not be so broad that it does not clearly indicate the scope of the Act.

- 21 In order to avoid listing all minor and ancillary matters covered by the Act, the purpose section may conclude with the words *and for related purposes*. *Related* is more specific than *other* which has been used in the past in Victorian Acts. Statements of purpose may also be used to introduce Parts of an Act.

## Preambles

- 22 Legal documents often start with a preamble which explains their background and the reasons for them. Parliamentary procedures require preambles in private Bills. However, in other legislation, they are outmoded and should be abandoned. They often contain material that is already known, is obviously inconsequential or appears elsewhere in the document. Occasionally they state the historic or socially important reasons for an Act. For example, the preamble to the Aboriginal Cultural Heritage Bill 1986 has obvious political significance:

The Parliament of Victoria acknowledges—

- (a) the occupation of Victoria by the Aboriginal people before the arrival of Europeans;
- (b) the importance to the Aboriginal people and to the wider community of the Aboriginal culture and heritage;

Other examples are the *Australia Acts (Request) Act 1985*, the *Land (Miscellaneous Matters) Act 1985* and the *Forests (Wood Pulp Agreement) (Amendment) Act 1985*. If it is essential to include information on the background to or reason for an Act; that material should be placed in the purpose section of an Act. The *Housing (Commonwealth-State-Northern Territory Agreement) Act 1985* shows how this can be done:

Purpose 1. The purpose of this Act is to ratify the execution of and to approve an agreement between the Commonwealth and other States and the Northern Territory of Australia relating to housing.

The agreement itself was printed in a Schedule.

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## 3. The audience

- 23 In order to prepare documents which are readily comprehensible to their audience, writers must develop an awareness of the audience, its interests and needs. The first part of this chapter examines the audience of legislation. The second part suggests ways of improving communication from the perspective of the audience.

### Part 1: The audience of legislation

- 24 The audience of legislation consists of four main categories of readers: Members of Parliament, the people affected by the Act, the officials administering the Act, and judges and lawyers.
- a) *Members of Parliament.* Parliament has ultimate responsibility for the words in an Act and Members of Parliament are readers of draft legislation prepared for their consideration by Parliamentary Counsel. Draft legislation must therefore be instantly intelligible. This speeds the work of Parliament, saves unnecessary questions and debate and, above all, ensures that Members of Parliament are fully aware of the implications of their decisions. Any obscurity may be dangerous, for experience has repeatedly shown that obscure language or faulty structure may camouflage inadequacies in content.
  - b) *People affected by legislation.* Once an Act has been passed, it is obviously of vital concern to the people affected by it. The statement of law must be clear to help them understand their rights and obligations. It is inefficient if Parliament passes laws that need to be interpreted for the intended audience. People may not understand what they are entitled or required to do and may not appreciate that they need expert advice.
  - c) *Officials.* Officials who administer Acts and regulations may need to read them more frequently than others in the community. Most officials are not lawyers. Acts and regulations must be written in such a way that they can readily appreciate their meaning. Otherwise, they may misinterpret the law and infringe citizens' rights, or impose burdens on Government, in a way not intended by the legislation.
  - d) *Judges and lawyers.* The aim of Parliament is to enact legislation that can be readily understood by those affected by it. The courts should be seen not as the primary audience of legislation but as a remedy if there is a failure in communication. An Act that can be understood by certain sections of the community and officials should not present any difficulties for judges and lawyers but should be even easier for them to comprehend.

## Part 2: Meeting the needs of the audience

25 To communicate effectively to their audience, drafters must consider the knowledge and interest of the readers and the way that they are likely to read the text. Drafters should consider from the readers' perspective questions such as the following:

- What are the main points to be emphasised?
- Are there any misconceptions about the subject in the community?
- How much background material needs to be included?
- What information is new to readers?
- What level of detail must be used to help them understand and act?
- What tasks will readers have to carry out?
- Which terms will readers understand at once and which will need to be explained?

It is impractical to require that every document be immediately understood by everyone who reads it. Some legislation deals with complex or highly specialised subjects which are difficult in themselves for people who have no training or experience in the area. Documents on an advanced part of a subject would run to impossible lengths if writers had to cover first principles and go through every detail each time they wanted to write. However, legislation should be readily comprehensible by those who are immediately affected by it. For example, a company director or a corporate lawyer knows what a *takeover offer* is. Therefore, a drafter may reasonably use the term *takeover offer* in legislation dealing with takeovers without fear of misleading or puzzling the most concerned audience. A certain amount of knowledge in the audience has to be assumed although it must always be remembered that Members of Parliament are also part of the audience of legislation and that they are not all corporate lawyers or economists. The amount of knowledge that can be assumed in drafting legislation is therefore more limited than it may be with other legal documents.

26 The structure of a statute, like the language, should be considered from the readers' perspective. The matters which are most important for readers should appear first. For example, substantive provisions should appear before procedural provisions such as the date of commencement of the Act.

27 Labels for people or things should also be chosen from the readers' perspective. In a section of the *De Facto Relationships Act 1984* (NSW) dealing with court proceedings, *de facto partners* are called *parties to the application*. Most readers to whom the Act might apply would see themselves as partners and not as parties to court proceedings. To draft the Act from the readers' perspective, the court section should have referred to *partner making an application*. Similarly, an amending Act should not refer to the Act to be amended as the *Principal Act* but should refer to it by name. The term *Principal Act* is familiar to drafters but not to readers. The use of *Principal Act* does not necessarily save space. In the *Water Sewerage Authorities (Financial) Act 1985*, six of the seven Parts are concerned with amendments. Each of these six Parts is concerned with amending a different Act. So in the space of eight pages, the reader has to cope with six different meanings of *Principal Act*. In Part VII the convention is raised just to make one change and occupies 2.5 times the space of the title of the Act.

### Using the practices of the community

28 *Formulas, maps, charts and tables.* If formulas, maps, charts and tables are the usual way in which particular items of information are handled in the community, then it is proper to use them in legislation. Section 46A of the *Construction Industry Long Service Leave Act 1983* inserted by section 13 of the *Construction Industry Long Service Leave (Amendment) Act 1985* asks readers to cope with the following wording:



For the purposes of sub-section (3) the 'prescribed amount' is an amount equal to the amount that bears the same proportion to the amount paid to the person as the period of service in the construction industry in Victoria bears to the total service in respect of which the payment was made.

To apply this provision readers have to convert these words into a mathematical formula:

$$\text{Prescribed amount} = \text{amount paid} \times \frac{\text{period of service in the construction industry in Victoria}}{\text{period of service for which payment was made}}$$

It was the job of the drafter to do this job for them (indeed the drafter probably translated some such formula into words to produce the provision!). Acts need to become more like other technical publications in their use of devices in addition to words.

- 29 *Omit unnecessary material.* Drafters must be rigorous in selecting the material to be included in a document. Unnecessary material conceals the main points. Consider, for example, subsection 33 (3) of the *Companies (Acquisition of Shares) (Victoria) Code*:

If, after the making of a take-over announcement in relation to shares in a company and before the end of the period in which offers constituted by the take-over announcement remain open, being a take-over announcement made on behalf of a natural person or on behalf of two or more persons at least one of whom is a natural person, that natural person, or if there are two or more natural persons, either or any of them—

- (a) dies;
- (b) becomes bankrupt; or
- (c) is declared by a court to be incapable of managing his affairs,

such of the offers made by virtue of the take-over announcement as have not been accepted shall be deemed to have been withdrawn on the day on which the person died, became bankrupt or was declared to be so incapable, as the case may be.

Much of the information in this section could have been omitted. Readers are already well into a document on takeovers by the time they reach section 33. They have already been through the procedures for making an announcement so that the context is clear. Even if they are following up a cross-reference and are just consulting this section, they would be aware of its background. The opening four or five lines could be dispensed with for there is no need to traverse again the making of the announcement. The closing lines are repetitious. Without the extraneous material, the subsection may be written as follows:

An offer that has not been accepted is withdrawn when

- a) the offeror or one of the offerors
  - i) dies; or
  - ii) becomes bankrupt; or
  - iii) is declared by a court to be incapable of managing his or her affairs ...
  - iv) is placed under official management; or
  - v) commences to be wound up; or
  - vi) becomes subject to a provisional liquidator.

Pertinently worded sections—such as this one—reduce the burden on readers and help to ensure that they get the essential message.

There is a temptation to regard some material as essential for precision but often this is a false argument as subsection 71 (2) of the *Credit Act 1984* illustrates:

The amount of a charge in respect of the deferral of the payment of an amount payable under a credit sale contract or a loan contract determined in accordance with this subsection is ... (emphasis added)

All the words in italics should be omitted. The use of *the* in front of *deferral* and the fact that subsection (2) follows subsection (1) and is part of section 71 make it obvious that the deferral being talked about in (2) is the same as the one in (1). Subsection (2) can be reduced to:

2) The amount of the charge for the deferral is ...

This taut wording adds to precision by concentrating on the main idea.

30 *Avoid unnecessary concepts.* Similarly, the introduction of unnecessary concepts should be avoided. For example, it is not necessary to introduce the concept *eligible person* in section 19 (2) of the *Adoption Act 1984*. The material could have, been inserted directly into section 19 (1) so that instead of commencing:

19 (1) An eligible person may apply ...

it would read:

19 (1) The adopted child to whom the adoption order relates, or a natural parent of the adopted child, or an adoptive parent of the adopted child, or the Director-General or the Principal Officer of the approved agency by which the adoption was arranged may apply ...

This approach saves readers from having to cope with the information dressed up as a concept whose meaning they then have to master and apply.

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## 4. Organisation

- 31 The success of a document in communicating depends greatly on the careful organisation of the material in it. The right facts must not only be selected, but must also be put in an order that shows the interconnections between the facts, that allows one fact to support or qualify the other. Incisive clarity of thinking, sensitive consideration of the audience, skilful choice of language, and thoughtful attention to all the other components in the writing process can all be undermined by slipshod organisation.
- 32 The first part of this chapter concerns the importance of the organisation of a document in making it comprehensible and discusses the principles to be considered in arranging material. The second part suggests ways in which the structural units of an Act may be used in organising it. The third part mentions some problems in organising material in Acts, such as cross-referencing.

### Part 1: The importance of organisation

- 33 Proper organisation helps both writers and readers. For writers, it provides a valuable internal check on their control of their material. They can see gaps in information, jumps in reasoning, duplication, overlap and omissions. The exercise of arranging the material in order clarifies and tests their thoughts. Are they logical? Do they fit neatly together? Are they needed at all? For readers, proper organisation enables them to grasp the writer's message more quickly. Reading is essentially a learning activity. Readers learn efficiently and effectively if they can proceed by carefully graded steps, moving from easier to more difficult, from known to unknown material.
- 34 Writers must organise their material in order to ease readers into the topic, and to provide them with sufficient background material to interpret it. They must structure the document to give readers the information they want as quickly as possible. If the document flows in a logical sequence, readers see at once how the text will unfold. Proper organisation is as important to readability and comprehensibility as the choice of vocabulary and sentence structure.
- 35 Readers of legislation have particular needs. Often they approach an Act with specific problems or questions in mind. They are not likely to read the Act from beginning to end. This is certainly true if they are consulting the Act for a second or later time. They use the Act by referring to the particular sections and subsections which are relevant to the issue at hand. Proper organisation helps them find the material required without having to read or reread the whole Act. Writers should use all the devices employed in other publications to help readers to locate information quickly.

## Important items first

- 36 Some items in an Act are more important than others. These should come first and should be made to stand out. This is what readers expect and they may overlook or underestimate the main point in the Act if it is buried in the middle of the text. Also, if the material is arranged in a hierarchical fashion, reserving the positions at the beginning of the Act, or of a Part or Division, for the most important items, readers are more likely to remember them. Readers pay more attention to the opening Parts and spend more time on them.
- 37 Acts should start with the important substantive provisions. The current practice of *commencing* with a less important provision, such as when the Act commences and whether it binds the Crown should be abandoned.<sup>1</sup> Similarly, definitions need not appear at the beginning of Acts. They are better placed at the end with words which are defined being highlighted in the text.<sup>2</sup> In Parts or Divisions of the Act also, the most important provisions should be placed first. In the setting up of a Commission, for example, the duties of the Commission should precede its composition, the tenure of members, payment, annual reports and so on. Indeed many minor and ancillary matters can be relegated most satisfactorily to Schedules.

## Assessing importance

- 38 Importance is a relative concept. What is important in a given context may vary depending on one's interest or point of view. In writing, drafters should decide what is important from the *readers'* perspective and not from their own. That material should then come first. For example, if injured workers and their representatives consult the *Accident Compensation Act 1985*, their prime concern is the compensation available for injuries and their eligibility for it. They are less interested in the matters with which the Act starts—the establishment of the Accident Compensation Commission and the Accident Compensation Tribunal. The payment of compensation is in fact not dealt with until Part IV. This is to approach the subject from the bureaucrats' or lawyers' orientation rather than from the public's.

## Revealing the organisation

- 39 Writers should reveal a document's organisation to readers so that they can see the direction which it is going to take. Introductory structural or procedural paragraphs may be used to explain what is to come and the order in which it is to appear, for example:

This chapter is about organising, writing, and designing documents so that information is readily accessible to readers. In the following sections, we will:

- Illustrate the problems in two special documents.
- Suggest some techniques for making the information in documents accessible to readers.
- Discuss some of the reasons that non-academic writing is so often poorly organised.
- Consider the applications of these findings for teachers of composition.
- Explore the need for further research on non-academic writers and documents that they write.<sup>3</sup>

There is scope for descriptive statements like this in Acts, especially at the beginning of Parts and Divisions. They give readers an overview of what is to come. It is immaterial that such opening paragraphs are not part of the law. Published Acts should communicate the law and make it clear to the intended audience. There is no reason why they should

1 The current commencement sections are rarely helpful in any event as they frequently say This Act comes into operation on a day or days to be proclaimed. This leaves readers to find out the critical information elsewhere. The commencement provision should appear at the end of the document as the expiry provision generally does..

2 See paragraph 118.

3 J.C. Redish, A.M. Battison, E.S. Gold, 'Making Information Accessible to Readers', Writing in Nonacademic Settings, Guildford, New York, 1985, 129, 131.

be a flat, unhelpful statement of the law. There are, moreover, typographic devices which would enable these paragraphs to be set apart from the rest of the text.

## Title of an Act

40 The title of an Act serves a dual purpose. It identifies the Act by giving it a distinctive label and it broadly indicates its subject matter. The title is used in indexing the Act and, carefully constructed, it helps people find the law more easily. If the Act has a general title which may cover a range of subjects, it may be helpful to indicate its subject matter by a more specific description in brackets, for example:

- Infertility (Medical Procedures) Act.
- Building Control (Plumbers, Gas Fitters and Drainers) Act.
- Sale of Land (Allotments) Act.
- Motor Car (Photographic Devices) Act.
- Forest (Wood Pulp Agreement) (Amendment) Act.

For ease of reference, the title should be as brief as it is informative and as indexing requirements allow.

## Headings

41 The headings in a document are a useful device for revealing its organisation and act as signposts to assist readers in locating information. They allow informed readers to recognise at once the sections they can omit and those that they need to read closely. They assist readers not only in their first contact with the document but whenever they need to refer to the document again. For these reasons, headings must be as informative as possible. For example, Part II Division 2 of the *Professional Boxing Control Act 1985*, which deals with the registration of boxers and not with others connected with the sport such as promoters, managers and trainers, should be headed *Registration of Professional Boxers*, not simply *Registration* as it is at present. The proposed revision is not only more self-explanatory but it is far more useful in locating information.

42 Headings should describe the content and not try to summarise it. Taken together, all the section headings should give a reasonable indication of the contents of an Act. Headings may be in the form of questions resembling the type of questions that users of an Act are likely to ask:

- What are the duties of applicants?
- When does the right to compensation arise?
- When does the Act begin?

Readers seem to find headings in the question form more helpful. They are also useful for drafters when they check the accuracy of a section: does it answer the question satisfactorily?

Each heading should be short and, with sections particularly, no longer than a line. If any heading is longer than this, perhaps the section is too long and should be divided.

## Part 2: Using the structural units of an Act in organisation

### Levels of structure

- 43 The accepted arrangement of Acts, with their various units and levels of structure, is well suited to allow the material to be organised methodically and presented in manageable segments that readers can absorb easily. The possible levels of structure are:

[Contents]

Part

Division

Section

Subsection

Paragraph

Subparagraph

Sub-subparagraph

Schedule

[Index]

The relationship between the levels is hierarchical. Divisions occur within Parts, subsections within sections and so on. However, only the section is an indispensable element. Every Act contains sections. All the other levels are optional; whether any of them is used depends on the nature of the material and its length. As a result, a Part may consist of sections and dispense with Divisions; a section may contain paragraphs and not subsections. Schedules do not form part of the central hierarchy. They are supplementary and contain secondary or subordinate material. A table of contents and an index form an outer layer of structure, functioning as guideposts to the location of items within an Act.

### Parts and Divisions

- 44 Sections in many Acts fall into coherent groups, with each group forming a unit of information. If the groups are presented as Parts, the relationship between the sections in each group is then revealed visually. Readers can immediately identify the Part of the Act which interests them and see all the sections relevant to that matter. Drafters can also refer to a group of sections more easily if a cross-reference is necessary. Parts may be organised in Divisions which show that particular groups of sections within a Part are closely related and function as a unit.

### Labelling of Parts and Divisions

- 45 Parts and Divisions should be labelled with Arabic and not Roman numbers. The beginning of a new Part or Division and its separation from other Parts and Divisions can be emphasised by typographic treatment.

### Sections

- 46 An Act may consist of one provision, a small number of provisions or a range of them which may be grouped in various ways. The section is the vehicle for carrying a provision, so it is the basic unit of structure in an Act. Sections—and subsections also—usually consist of only one sentence, but this is a general practice and not an obligatory rule. When two ideas in adjacent sentences form a close-knit unit, the sentences should be kept together in the same section or subsection, for example:

- 1) To vary an offer, the offeror must serve on the target company a notice
  - a) signed in the same way as Part A statement must be signed; and
  - b) setting out the terms of the proposed variation and particulars of any necessary modifications of the statement; and
  - c) if the variation will postpone the offeror's obligation to provide the consideration for a period exceeding one month—stating the effect of subsection 23(1).

The offeror must copy of the notice to each offeree in an approved manner.

(Plain English version, subsection 21(1) *Companies (Acquisition of Shares) (Victoria) Code*)

There is no justification for contorting the language or producing a cumbersome sentence just to force the ideas into the one sentence. Subsection 80 (1) of the *Property Law Act 1958* provides further evidence that the convention does not need to be followed mindlessly:

A covenant and a bond and an obligation or contract under seal made after the thirty-first day of January One thousand nine hundred and five shall operate to bind the real estate as well as the personal estate of the person making the same if and so far as a contrary intention is not expressed in the covenant, bond, obligation or contract. This sub-section shall extend to a covenant implied by virtue of this Part.

## Labelling of Sections and Subsections

- 47 Sections should be labelled with Arabic numbers in the margin. They should be labelled consecutively from the beginning of an Act even if the Act is divided further into Parts and Divisions. Subsections should be labelled with Arabic numbers in brackets in line with the text.

## Subsections

- 48 Sections may be divided into subsections if this helps to present the material in a more manageable way for readers, for example, if it avoids long complex sentences. Each step in a process or procedure may then be allowed a separate sentence, and each sentence—and hence step—is clearly signposted for the reader by a subsection number. The message is revealed both by grammatical structure and by layout. This approach may be used even if the section itself is not very long.<sup>4</sup>
- 49 Each subsection must form a coherent unit. Its contents must fit in with the heading of the section in which it is included. Because it forms a unit, it is seldom necessary to repeat material from one subsection to the next, for example:

### *Appeals against certified assessments*

s30A (1) An employer or working sub-contractor to whom a certified assessment under section 30 applies may within fourteen days from the date of service of notice of that certified assessment appeal to the Industrial Relations Commission in Court session.

(2) The Industrial Relations Commission in Court session may hear and determine an appeal against a certified assessment ...

(3) If in the hearing of an appeal against a certified assessment evidence is produced which is not available to the Board when making the assessment the Commission upon receiving an application from the Board to do so may return the matter to the Board for a further assessment.

(4) In hearing an appeal against a certified assessment the Commission may determine

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4 See section 74 of the Planning and Environment Act 1987:  
*Objections to applications for permits*

74 (1) Any person who may be affected by the grant of the permit may object to the grant of a permit. (2) An objection must be made to the responsible authority in writing stating the reasons for the objection. (3) If a number of persons make one objection, they must give the responsible authority the name and address of the person to whom the responsible authority is to give notice of the decision.

the amount of long service leave charges to be paid by the employer to the Board and any interest and costs payable in respect of those charges and may by order exercise

any power in relation to the payment of those charges which a Magistrates' Court may exercise ...

The repetition of *an appeal* in (3) and *against a certified assessment* in (2), (3) and (4) is unnecessary and forces the readers to study many superfluous words to reach the main message. Needless repetition conflicts with everyday use of language in which sentences regularly imply obvious material from previous sentences. It also runs counter to the principle of interpretation established by courts that an Act should be read as a coherent whole. It follows from this that a subsection should be read in the light of a previous related subsection.

### Paragraphs and subparagraphs<sup>5</sup>

50 Sections and subsections may be divided into paragraphs and subparagraphs. Again, the purpose is to help the reader by providing a visual aid to comprehension. Provisions can cover items which are parallel to each other. If the items are presented in separate paragraphs this displays parallelism both structurally and visually. Compare versions (A) and (B):

(A) A company must not make a loan to a director, a spouse of the director, a relative of the director or spouse, a corporation that is a subsidiary of the company, or a trustee of a trust that has a beneficial interest.

(B) A company must not make a loan to—

- i) a director, a spouse of the director, or a relative of the director or spouse; or
- ii) a corporation that is a subsidiary of the company; or
- iii) a trustee of a trust that has a beneficial interest.

There is no difference in content nor in the order of material in these two versions. The material has simply been set out differently so that the parallel items stand out in (B). The reader can note each item before proceeding to the next.

51 However paragraphing should not be used unthinkingly. Too many paragraphs or subparagraphs may defeat the intended purpose by overloading readers with too much material. For instance, if a sentence runs to eight or more paragraphs, by the time that readers read paragraph (h), they may have forgotten paragraphs (a) and (b). If the paragraphs are written in plain English, the problem arises from limits on the short term memory, not from any difficulty in the language. It is the accumulation of the paragraphs that leads to lapses in short-term memory. The paragraphing helps readers to retrieve the introductory words easily if they start to forget them, but it is better to group the material differently and spread it over two or more subsections.

52 Paragraphs and subparagraphs are only part of a sentence. Any that belong to a series must be preceded by general words that are applicable to all of them and that make their grammatical structure complete, for example:

73 (1) A referral authority must consider every application referred to it and may tell the responsible authority in writing that—

- (a) it does not object to the granting of the permit; or
- (b) it does not object if the permit is subject to the conditions specified by the referral authority; or
- (c) it objects to the granting of the permit on any specified ground.

*Planning and Environment Act 1987*

5 The meaning of paragraph in legislative drafting is different from its ordinary meaning and clashes with the principle stated by many drafting experts that words generally should not be used in Acts outside their ordinary meaning.



- 53 *Paragraphing to avoid ambiguity.* Paragraphing is a useful device for avoiding ambiguity. Consider the following section of the *Motor Car Act 1909* (Vic) (now repealed):

10 (1) If any person drives a motor car on a public highway recklessly or negligently or at a speed or in a manner which is dangerous to the public *having regard to all the circumstances of the case including the nature condition and use of the highway and to the amount of traffic which actually is at the time or which might reasonably be expected to be on the highway* shall be guilty of an offence against this Act.

In *Chammen v Gilmore*<sup>6</sup> it was held that the words in italics modified all of the four preceding expressions, *recklessly, negligently, at a speed* and *in a manner*; in *Kane v Dureau*<sup>7</sup> they were treated as not applying to *recklessly*.<sup>8</sup> The matter could be put beyond doubt by the following arrangements:

[A] [In order to make the words *having regard to ... highway* applicable to each of the four expressions]:

If a person drives a motor car on a public highway—

recklessly, or

negligently, or

at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature condition and use of the highway and to the amount of traffic which is actually at the time or which might reasonably be expected to be on the highway, he shall be guilty, etc.

[B] [In order to make the words apply only to the last two of the expressions]:

If a person drives a motor car on a public highway—

recklessly, or

negligently, or

at a speed or in a manner which is dangerous to the public having regard in either case to all the circumstances ... highway,

he shall be guilty, etc.

- 54 *Conjunctions between paragraphs.* If the provisions in a set of paragraphs or subparagraphs are to be taken cumulatively, *and* is inserted between each paragraph or subparagraph, for example:

(4) Before making an enforcement order under this section, the Planning Appeals Board must consider—

- (a) whether the application for the enforcement order should be made to the responsible authority under section 130, in the case of an application under subsection (1); and
- (b) what the effect of not making the enforcement order would be; and
- (c) whether the applicant should give any undertaking as to damages; and
- (d) whether it should hear any other person before the enforcement order is made.

*Planning and Environment Act 1987*

If only one of the provisions is likely to apply in a particular case, *or* is inserted between each paragraph or subparagraph, for example:

1) If there is a proposal, or the directors of a target company have reason to believe that there is a proposal, to make offers or if offers that have been made have not been accepted

- a) a person who proposes to make or has made the offers; or
- b) an associate of such a person; or
- c) the target company; or
- d) an associate of the target company or of an officer of the target company; or
- e) if the person or an associate mentioned in (a), (b) or (d) is a corporation, an officer of that corporation or a person associated with such an officer,

must not make a profit forecast to the public or to a member of the target company (except a statement made solely to the target company's officers or advisers).

(Plain English Version, *Companies (Acquisition of Shares) (Victoria) Code*)

Convention has approved the insertion of *and* or *or* only after penultimate paragraphs. However experience and research with general readers have shown that this can lead to misinterpretation, with readers applying *or* especially only to the last two paragraphs.<sup>9</sup>

55 There are occasions when neither *and* nor *or* is correct, and the paragraphs or subparagraphs are presented as a simple list with no linking conjunction, for example:

6 (2) ... a planning scheme may—

- (a) set out policies and specific objectives;
- (b) regulate or prohibit the use or development of any land;
- (c) designate land as being reserved for public purposes;

...

(j) provide for any other matter which this Act refers to as being included in a planning scheme.

*Planning and Environment Act 1987*

The intention here is to allow a planning scheme to contain any or all of the matters set out in paragraphs (a) to (j). Inserting *and* after each paragraph could imply that a scheme had to contain all of the matters. On the other hand, the insertion of *or* after each paragraph could imply that a planning scheme could cover only one of the matters. If there is any possibility of misunderstanding with a series of paragraphs such as this, the series can be introduced with such words as *any of the following*, for example:

2) The responsible authority may serve the enforcement order personally or by registered post on one or more of the following persons

- a) the owner of the land
- b) the occupier of the land
- c) any other person who has an interest in the land.

56 It might be best to adopt a clear practice with respect to conjunctions in order to avoid the risk of misunderstanding. The following is one suggestion:

- *and* means that all the paragraphs apply together
- *or* means that only one of them applies
- the omission of a conjunction means that the paragraphs represent a series of options, any or all of which may apply.

57 *Labelling of paragraphs and subparagraphs.* Paragraphs are indented and labelled with lower case letters with brackets to the right: a), b), c) etc. If a section or subsection is divided twice into paragraphs, the lettering of the second set follows on consecutively from the letters of the first set, for example:

2. The taxation by a State, in common with other salaries earned within the State, of—

(a) the official salaries of officers of the Commonwealth residing in the State after the commencement of this Act; and

(b) the allowances and salaries, paid after the commencement of this Act, of Members of the Parliament...

shall not ... be deemed—

(c) to be an interference with the exercise of any power of the Commonwealth, or

(d) to be inconsistent with any Act by or in pursuance of which the salary is fixed or made payable.

*Commonwealth Salaries Act 1907 (Cth)*

Because the labelling here can mislead readers into regarding (c) and (d) as parallel with (a) and (b), the division of a section or subsection twice into paragraphs should be avoided as far as possible and other ways should be explored for presenting the provision. Subparagraphs are indented and numbered with small Roman numerals with a right hand bracket: i), ii), iii) etc.

## Sub-subparagraphs

58 Subparagraphs should be divided only in very exceptional circumstances. Generally a division into subparagraphs indicates a complicated approach to the material and it should be reconsidered and preferably redrafted. There are occasions, however, when sub-subparagraphs are legitimate because the details belong together. If that is the case, the sub-subparagraphs are indented and labelled with a capital letter in brackets: (A), (B), (C) etc.

## Schedules

59 Schedules are similar in function to appendixes in other documents. They allow secondary matters to be removed from the main body of an Act so that the general principles and main issues can be more readily understood. Schedules may provide for matters such as the appointment of members to a statutory body;<sup>10</sup> plans, maps, or descriptions of areas; the wording of agreements; methods of calculating taxes; repeals and amendments. Schedules can be divided into segments which are generally referred to as clauses, subclauses, paragraphs and subparagraphs. These segments parallel the segments of sections, subsections, paragraphs and subparagraphs in the body of an Act.

## Explanatory footnotes

60 Footnotes or marginal notes are already used in Acts to give technical details, for example, the numbers of amending Acts. Their use may be extended to matters related to content in much the same way as footnotes are used in general publications. For example, if it is necessary to make a cross-reference in an Act, a brief summary of the material in the cross-reference may be given in the footnote: *Part 5 of the XYZ Act sets out the function of the Board.* This practice can be particularly helpful if the cross-reference is to another Act which is not immediately available, or to a matter which is not central to the readers' present concern. Readers can be given some information about the other provision which may be sufficient for their purpose and avoid the need to consult the other document. Footnotes may also be used to answer common questions. Clause 55 (1) of the Residential Tenancies Bill 1985 stated:

A landlord has a right to refuse to allow a tenant to keep a pet on the rented premises, but must not refuse unreasonably.

A footnote to this subsection adds:

A guide dog for a blind person is not a pet under the *Equal Opportunity Act 1984*.

Footnotes may contain brief definitions of technical words, or references to other relevant material in the Act, its Schedules or elsewhere. Although such explanatory footnotes may seem unusual and unconventional, if properly used they may increase the readability of Acts, particularly as reference documents. Other examples of explanatory footnotes are the footnotes to sections 3(1) and 52(1) of the *Road Safety Act 1986* and section 7(3) of the *Retail Tenancies Act 1986* and the endnote to the *Corrections Act 1986*.

## Index

- 61 Acts may be read from beginning to end once or twice, but thereafter readers regard them as reference works to which they return to check on one item or another. This calls for mechanisms to help readers locate information. Long Acts in particular present problems of access. A table of contents offers only limited help. An index offers a more extensive listing of subjects and because its entries are listed alphabetically it can be a more speedy source of reference. Indexes then should be a regular feature especially of long Acts. An index need not be confined to words used in an Act. It may include commonly used alternative words. This helps readers who approach the Act with a different set of technical or colloquial terms from those used in the Act. By using the index, they can readily locate relevant provisions, including definitions, even if they use a different reference term.<sup>11</sup>

## Part 3: Special problems in organisation

### Cross-references

- 62 Strict restraint should be exercised with cross-references. They may distract the reader and make the text difficult to read, for example subsection 107 (4) of the *Credit Act 1984*:

107 (4) The notice referred to in paragraph (d) of subsection (1) or paragraph (b) of subsection (2) is complied with if within the period of one month after service of the notice (or where a longer period is specified in the notice, that longer period) the default is remedied (except as referred to in sub-paragraph (1) of paragraph (b) of sub-section (3)), the amounts referred to in sub-paragraph (ii) of paragraph (b) of sub-section (3) have been paid or tendered and the enforcement expenses referred to in sub-paragraph (iii) of paragraph (b) of sub-section (3) (if any) have been paid.

Here in the space of nine lines the reader is confronted with five cross-references. The construction may have been unnecessary as the message appears to be implied in subsection (3). If it was essential to make the point explicit, a general statement would have been sufficient:

A debtor complies with the notice if he or she meets its requirements within the specified time.

If a lot of cross-referencing seems necessary in an Act, it may indicate a fault in its organisation. Drafters should not have to refer readers back and forth but should lead them through the material in a steady progression.

- 63 Global cross-references should be particularly avoided, for example:
- 21 (1) Subject to any other provision made in this Act or in any other enactment with respect to the constitution of the Tribunal ...

*Administrative Appeals Tribunal Act 1984*

Global cross-references place an unfair burden on readers. They require readers to find the relevant reference themselves and leave them with the constant fear that they might have missed a provision. Drafters should indicate whether provisions apply or not.

- 64 Cross-references to provisions in other Acts may be tiresome if readers do not have those Acts to refer to. Explanatory footnotes may be used to provide some idea of the content of the cross-reference. Even within an Act, a cross-reference by number alone can be irritating, especially if the reference is not pertinent. The practice followed in some United Kingdom Acts of including the heading after the cross-reference number is recommended, for example:

103 (7) ... sanctioned in accordance with section 425 (company compromise with creditors and members) or section 582 (liquidator in winding up accepting shares as consideration for sale of company property) ... *Companies Act 1985* (U.K.)

- 65 References should be specific rather than general. A cross-reference to another provision by its number (for example 5 (2) a)) cannot be misconstrued and is easy to find. Relative descriptive labels such as *preceding*, *previous*, and *following* (for example *the preceding section*) are less precise for readers. Moreover, they create confusion if an additional section is inserted later.

- 66 The forward method of cross-referencing should be used, that is: 5 1) a) rather than *paragraph a) of subsection 1) of section 5*. Practice varies over which descriptive label should be used—the name of the section or the name of the paragraph, for example *section 5) 1) a)* or *paragraph 5 1) a)*. The Commonwealth practice of referring to the lowest subdivision down the scale is preferred, for example *subsection 10 9)* or *paragraph 6 2) b)*. This means that the cross-reference specifies the precise segment to which readers are directed. An even simpler form would omit the descriptive label altogether, for example *the rules in 5 1) a) require*.

- 67 It is not necessary to include the words *of this Act*, *Part*, or *section* in cross-references to items in the same Act, Part or section (section 19, *Interpretation of Legislation Act 1984*). One may refer to *Part 3* (not *Part 3 of this Act*); *Division 4* (not *Division 4 of this Part*); and *subsection 1)* (not *subsection 1) of this section*). However, if a reference includes a section of the same Act and a section of another Act, to avoid confusion it is necessary to write, for example, *section 3 of this Act and Part 3 of the Audit Act 1958*.

## Special circumstances

- 68 Special circumstances are often treated erroneously as exceptions. This forces drafters into a type of cross-reference, for example:

- 1) This Act, except sections 4 and 6, begins on 1 January 1988.
- 2) Section 4 begins on 1 March 1988.
- 3) Section 6 begins on 1 July 1988.

This approach forces readers to hold sections 4 and 6 in suspense while they absorb the rest of 1). Only then can they have the situation with sections 4 and 6 resolved. Consequently their attention is divided. It is better to reorganise the information so that the special circumstances are dealt with before the general provision, for example:

- 1) Section 4 begins on 1 March 1988.
- 2) Section 6 begins on 1 July 1988.
- 3) The rest of the Act begins on 1 January 1988.

This arrangement allows the material to flow naturally. It does not introduce an item only to have to reintroduce it later; readers can finish with it before they have to deal with any other items. A similar approach needs to be adopted when it is desired to exclude some activities from the effects of a repeal. A common approach is to introduce the repeal and then to countermand its effect in part through a subsection introduced by *notwithstanding*, as occurs in subsection 8 (3) of the *Water and Sewerage Authorities (Financial) Act 1985*:

8 (3) Notwithstanding the repeal by sub-section (1) of section 71 of the Principal Act where, immediately before the commencement of this section, a Sewerage Authority within the meaning of the Principal Act has as a term or condition of the issue of a debenture or mortgage under that Act provided a sinking fund in respect of that debenture or mortgage, the Sewerage Authority shall continue to provide a sinking fund in respect of that debenture or mortgage during its currency as if section 71 of the Principal Act had not been repealed.

To avoid frustrating readers and asking them to live out a fiction as if the section had not been repealed, it is better to reorganise the material along some such lines as:

1. A Sewerage Authority must continue any sinking fund for a debenture or mortgage in existence immediately before the beginning of this Act under the same conditions as applied to it under section 71 of the *Sewerage Districts Act 1958*.
2. Section 71 of the *Sewerage Districts Act 1958* is repealed.

If approaches similar to this are adopted readers are saved from having to go through the steps of cancelling an item in their minds only to find that they then have to cancel the cancellation. It means organising material so that there is a logical flow of ideas without backtracking.

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## 5. Grammatical structure

- 69 Convoluted and awkward grammatical structure is a far greater hindrance to readability than the occasional occurrence of a technical word. Again, there are structures which are difficult only for some readers but for which equally acceptable alternatives are available. This chapter examines aspects of grammatical structure which are a recurring source of difficulty in Acts. It explains the principles that should be followed to avoid difficulties.

### Length and complexity of sentences

- 70 Every authority on legislative drafting condemns long and complicated sentences even if they are accurate and grammatical. Readers' short-term memory cannot handle large stretches of material. The volume of detail obscures the central message. The longer a sentence is, the greater the danger that details will be overlooked or a connection missed.
- 71 Some writing manuals propose an average length of 20–25 words for sentences in a text. Some sentences would of course be longer, and others shorter, but this average may be taken as a guide. If writers find that they are exceeding this limit, especially when the material is complicated, then they should check their sentences. The structure may be unduly complex. It is this complexity rather than the length of the sentence which leads to incomprehensibility, for example, subsection 27 (12) of the *Companies (Acquisition of Shares) (Victoria) Code*:

Where an offeree who has accepted a take-over offer that is subject to a prescribed condition receives a copy of a notice under subsection (10) in relation to a variation of offers under the relevant take-over scheme, being a variation the effect of which is to postpone for a period exceeding one month the time when the offeror's obligations under the take-over scheme are to be satisfied, the offeree may, by notice in writing given to the offeror within one month after receipt of the first-mentioned notice and accompanied by any consideration that has been received by the offeree (together with any necessary documents of transfer), withdraw his acceptance of the offer and; where such a notice is given by the offeree to the offeror and is accompanied by any such consideration and any necessary documents of transfer, the offeror shall return to the offeree within 14 days after receipt of the notice, any documents that were sent by the offeree to the offeror with the acceptance of the offer.

This sentence contains 174 words. But the excessive complexity of the sentence comes not simply from its length but mainly from the compression of too many ideas and qualifications into the one sentence. It begins with a conditional clause in which the subject is modified by a relative clause. The flow is interrupted again while the subject is modified by a relative clause, which contains another relative clause modifying an item in it, and which in turn has another relative clause built into it. It is only after all this that readers come to the main clause, to be confronted with another round of entangled interruptions to the main idea, including a parenthetical phrase. This structure forces readers to break up the sentence into smaller components so that they can assimilate it.



The sentence should have been divided into more manageable parts, as is provided for in the plain English version of subsection 27 (12):

- 1) If an offeree who has accepted an offer that is subject to a defeating condition receives under subsection 21(1) a copy of a notice of a variation that would postpone the fulfilment of the offeror's obligations for a period exceeding one month, the offeree may withdraw his or her acceptance by
  - a. giving the offeror written notice of the withdrawal within one month after receiving the notice; and
  - b. returning any consideration received by the offeree, together with any necessary documents of transfer.
- 2) Within 14 days after receiving the offeree's notice, the offeror must return any document that the offeree sent with the acceptance of the offer.

Each sentence introduces a new piece of information which readers may note before proceeding to the next.

- 72 Far from being the products of haste or lack of time, many long sentences are the result of the greater amount of time available in writing to reflect, to elaborate and to revise. This is one of the reasons that writing is different from speech. But it may present hazards for writers. They may be led to integrate more information into each sentence especially in view of the conviction that each section of an Act should contain only one sentence.<sup>1</sup> The ultimate result is often that readers are presented with language which is different from the type they are familiar with in speech and which is therefore more demanding. While writing is not the same as speech, drafters of Acts should aim to keep written forms as close as possible to speech. Above all, their approach to sentences should be to keep discrete items of information apart. They should use the many devices that are available to link sentence to sentence—and hence idea to idea—rather than compressing all the ideas into one sentence. The use of short sentences does not require that they be limited to one clause. An unrelieved series of such sentences is tedious to read. Also, extra clauses are usually necessary to show the interrelationships between ideas. What is required is that sentences should be as brief as possible and well constructed.

### Order of clauses within a sentence

- 73 A conditional clause presents readers with a task of reasoning, and the use of more than one conditional clause at the beginning of a sentence should be avoided. If there are a number of conditional clauses linked together, they require a complex chain of reasoning, as paragraph 25 (3) (d) of the *Credit Act 1984* demonstrates:

Where, by reason of sub-section (1), a tied loan contract is discharged when a contract of sale is rescinded or discharged—

... and, where the contract of sale is a contract of sale of goods or services—

(d) if the goods are in the possession of the buyer—

- (i) where, before the rescission or discharge of the contract of sale, there was not a mortgage relating to the tied loan contract, the buyer shall deliver the goods to the supplier; ...

Contributing to the difficulty in applying the conditionals here is their arrangement at the beginning. Readers have no context in which to interpret them until they reach the main clause at the end of the sentence. This is no problem for the drafters because they already know the solution before they write. The arrangement may also be satisfactory for lawyers who are familiar with it from experience. But it does not seem so well-suited for general readers. It is better for them if drafters put the main clause first and if they break up a series of conditionals. As Thornton<sup>2</sup> recognised, this often allows the conditions to

<sup>1</sup> This is no longer necessary, see paragraph 46.  
<sup>2</sup> G.C. Thornton, *Legal Drafting*, 3rd ed, Butterworths, London, 1987, 62.



be set out in a series of paragraphs which helps readers negotiate the various steps in reasoning that they have to take. If there is only one conditional clause and it fits in with the structure of the discourse, it may be stated first without causing any problems for readers.

## Order of sentence components

- 74 The structural components of a sentence in the form of a statement are subject, verb, complement (including the object) and adverbial, for example:

The boy [subject] chased [verb] the cat [complement] yesterday [adverb]

The subject and verb, or subject, verb and complement are essential components of a sentence and should be kept together.

- 75 *Do not separate the auxiliary and the main verb.* In speech, and in most writing, the auxiliary and the main verb are kept together. This is often not the case in legislative drafting where readers may be confronted with unexpected separations of these components. For example, section 74 (1) of the *Credit Act 1984* interposes 107 words, including three paragraphs, between the auxiliary and the main verb:

Where a debtor by reason of illness unemployment or other reasonable cause is unable reasonably to discharge his obligations under a regulated contract, the debtor may, where he reasonably expects that he would be able to discharge his obligations—

- (a) if the period of the contract were extended and the amount of each payment due under the contract accordingly reduced (without a change being made to the annual percentage rate);
- (b) if the dates on which payments due under the contract during a specified period were postponed (without a change being made to the annual percentage rate);  
or
- (c) if the period of the contract were extended and the dates on which payments due under the contract during a specified period were postponed (without a change being made to the annual percentage rate) ...

apply to the credit provider for a variation of the contract.

There is no advantage to be gained from this arrangement. Readers cannot be expected to retain the auxiliary in short-term memory across a gap of 200 or more words. By the time they reach the main verb, *apply*, they may have forgotten the auxiliary and would need to look for it again to make sense of the verb group. Alternatively, having passed the auxiliary they may not concentrate fully on the adverbial because they may be looking for the main verb to complete the verb structure. This difficulty could be avoided by placing the words *apply to the credit provider for a variation of the contract* immediately after the auxiliary, *may*.

- 76 *Do not separate the subject and the verb.* Similarly, the subject and verb should not be separated by lengthy relative clauses. For example, section 226 of the *Accident Compensation Act 1985* reads:

Any person who—

- (a) fails or neglects duly to furnish any return or information or to comply with any requirement of the Commission as and when required by this Part or the regulations, or by the Commission;
- (b) without just cause refuses or neglects duly to attend and give evidence when required by the Commission or any person employed in the administration of this Part and

duly authorised by the Commission, or to answer truly and fully any questions or to produce any books or papers required by the Commission or any such person to be produced by that person;

- (c) makes a statement of remuneration in response to a request under section 200 that is false in any particular;
- (d) makes or delivers a return which is false in any particular or makes a false answer whether orally or in writing; or
- (e) contravenes any provision of this Part for the contravention of which no penalty is expressly provided—

shall be guilty of an offence.

There is too large a gap in this provision between the subject *any person* and the verb *shall be*. Select instead alternative structures that avoid this difficulty, for example, *A person is guilty of an offence if that person ...* or *A person is guilty of an offence who ...* Both of these forms keep the subject next to its verb which promotes comprehension.

- 77 *The adverbial.* Misplacement of the adverbial weakens the emphasis that it should receive. Adverbials carry an important part of the message and in most cases should come towards the end of their clauses so that they receive the normal end stress which is associated with the final position in English sentences. For example, in section 12 (1) of the *Fundraising Appeals Act 1984*, the adverbial is placed between the auxiliary and the verb and so loses the impact it would have if it were placed at the end of its clause. The subsection reads:

Subject to this Act, a person who has given notice pursuant to section 11 and *who has not within 21 days of giving that notice received from the Minister a direction as provided for in section 14* may conduct a fundraising appeal ... (emphasis added).

The italicised words should be rearranged:

who has not received a direction from the Minister as provided for in section 14 within 21 days of giving that notice ...

## Active or passive voice

- 78 Legislation often confers a power or imposes an obligation on a person and if the reduced form of the passive voice is used it does not specify who is to have the power or obligation, for example, *A copy shall be given to the woman*; who is to give the copy? Similarly section 44A of the *Superannuation Act 1958*<sup>3</sup> reads:

If any refund or benefit payable to a person under this Act *is not paid* within 2 months of the person becoming eligible for the refund or benefit, the Board must pay to that person, in addition to the refund or benefit, interest ... (emphasis added).

It is not clear who is responsible for the original payment. The mention of the Board in the second clause does not resolve the uncertainty. Its omission from the first clause could suggest that it was being appointed to salvage the situation. The active voice, on the other hand, clearly indicates who is to have a duty or obligation, for example *The doctor (hospital, etc) must give a copy to the woman*; *The employer (Board, etc) must pay any refund*. In these situations the active voice is more precise than the reduced passive because it identifies all the parties involved explicitly.

- 79 Although the full version of the passive voice (for example *Any declaration may be revoked by the Treasurer*) includes the agent and therefore indicates the agent's responsibilities, it is often less satisfactory than the active. The passive uses more words and reverses the expected order in which the agent occupies the subject position. It may lead to a confusing series of reversals:

4 (3) If an employer has after the appointed day and before the commencement day made a payment which should have been by reason of the coming into operation of this section, made by the Board out of the Fund and which would have been authorized by this Act to have been made from that Fund the employer is entitled to be reimbursed from that Fund the amount of that payment.

*Construction Industry Long Service Leave (Amendment) Act 1985*

Only once in this sentence does the agent appear in the subject position before the action; on the four other occasions it occurs after the verb.

80 Use of the passive may also lead to uncommon expressions, for example, *for subsection (1) there shall be substituted ... ; after the expression 'subsection (5)' (where respectively occurring) there shall be inserted ...* The structure *there shall* is unusual in general writing. It should not be used in Acts. The active imperative is clearer, for example, *for subsection (1) substitute ... ; and after 'subsection (5)' insert ...*

81 There are many occasions, however, in which the passive is the proper voice to use, for example where the agent is unimportant or universal and therefore does not have to be specified. The *Infertility (Medical Procedures) Act 1984* has two clear illustrations:

1. This Act may be cited as the *Infertility (Medical Procedures) Act 1984*.

10(3) A procedure to which this section applies shall not be carried out unless ...

Also the passive may assist in allowing writers to arrange their material so that known and old information occurs in the subject position and unknown or new information occurs in the final position where it can receive end stress. At the same time it may promote a smooth transition from one sentence to the next, for example:

5 (d) ... The Minister may ... cancel the approval of the hospital ...

(6) Where the approval of a scheduled hospital ... is cancelled under this section, the Minister ...

*Infertility (Medical Procedures) Act 1984*

In subsection (6) the passive allows the approval to be shifted to the subject position so that it establishes an immediate link with subsection (5).

82 The use of the active or the passive voice depends on the aspect of the message that is important both informationally and contextually. The principle for legal and official writing is not *never use the passive* but rather *do not use it excessively*. Above all, writers should avoid it in those contexts in which it creates vagueness and imprecision.

## Nouns from verbs

83 Using nouns derived from verbs tends to rob an event of its sense of action and to introduce a degree of abstractness and detachment. It is preferable to retain the verb—to write *to apply* not *to make an application*; *to consider* not *to give consideration* and *to conclude* not *to reach a conclusion*. The single verb is shorter and more precise, especially when used in the active voice, for example *unless the buyer has asked the supplier in writing to satisfy the judgment* is clearer and more direct than *unless a written demand has been made on the supplier for satisfaction of the judgment*. Similarly, *if the objector does not appear before the Tribunal* is clearer than *in default of the appearance of the objector before the Tribunal*. It also expresses the conditional nature of the action more explicitly.

## Positive or negative

- 84 When an idea can be expressed either positively or negatively, it should be expressed positively. Using the negative forces people to convert to the positive to find out what they can do. Positive statements are therefore generally easier to understand than negative ones. For example *Wait until the subscriber answers and then insert your money* is more quickly understood than *Do not insert your money until the number answers*. Similarly, *Indigents with children may ...* is better than *Indigents other than those with no children may ...*
- 85 Multiple negatives in particular should be avoided. They force readers to follow a tangled web, subtracting, and then adding, and then subtracting again, so that they cannot get the basic information easily, for example:
- 49 (1) The Court shall not make an order under section 45, ... if it is satisfied that the order would unfairly prejudice any person.
- Companies (Acquisition of Shares) (Victoria) Code*
- This could be redrafted: *A Court may make an order only if it is satisfied*. The construction *may ... only* is easier to understand than a negative and *unless*, particularly for those who do not speak English as their native language. A structure such as *A company must not send out a notice unless it has the consent of the Commission* does not occur in many languages. It is better expressed *A company may send out a statement only if it has the consent of the Commission*.
- 86 Negatives should of course be used for prohibitions, for example *Do not walk on the grass*. This negative form states the prohibition more effectively and precisely than a positive alternative such as *Walk on the paths*.

## Cohesion among sentences

- 87 Because sentences that follow one another are read together, it is not necessary to repeat material from earlier sentences. For example, subsection 112 (1) of the *Mental Health Act 1986* outlines the powers of inspection of a community visitor:
- A community visitor is entitled when visiting a mental health service to—
- (a) inspect any part of the premises; and
  - (b) see any person who is receiving treatment or other services unless that person has asked not to be seen; and
  - (c) make enquiries relating to the admission, detention, care, treatment and control of patients or residents; and
  - (d) inspect any document or medical record relating to any patient or resident if he or she has given informed consent in writing and any records required to be kept by or under this Act.
- Subsection 112 (2) then provides that:
- 112 (2) Where a community visitor wishes to perform or exercise or is performing or exercising any power, duty or function under this Act, the person in charge and every member of the staff or management of the mental health service must provide the community visitor with such reasonable assistance as the community visitor requires to perform or exercise that power, duty or function effectively.
- The opening clause of (2), *Where a community visitor ... under this Act*, is unnecessary: its content has already been stated in (1). Because (2) follows immediately on (1) and is part of the same section, it is obvious that it relates to (1) and could appear more briefly as:

(2) Members of the mental health service must give any reasonable help that the community visitor requires to carry out any of these activities.<sup>4</sup>

Subsection (2) also ignores internal connections. The last clause virtually repeats the material in the first clause. Some drafters defend repetition on the ground that it makes the meaning of the text absolutely certain. This defence conflicts with a basic rule of interpretation that an Act should be read as a whole—a rule which drafters expect readers to observe. Rather than adding to the precision of the text, the excessive caution detracts from its sharpness.

88 If it is necessary to show the links between certain subsections pointedly, then there is a set of words available to express the connection, for example *alternatively*, *however*, *in addition*, *instead*, *moreover*, *nevertheless* and *similarly*. There can be no objections to using these words because one of their class—*notwithstanding*—is already in constant use in legislation. The *Companies Act 1985* (U.K.) shows what can be done:

103 (4) But sub-section (3) does not exclude the application of sub-section (1) unless under the arrangement it is open to all the holders of the shares in the company in question (or, where the arrangement applies only to shares of a particular class, to all the holders of shares in that other company, being holders of shares of that class) to take part in the arrangement. In determining whether that is the case, shares held by or by a nominee of the company proposing to allot the shares in connection with the arrangement, or by a nominee of a company which is that company's holding company or subsidiary or a company which is a subsidiary of its holding company, shall be disregarded.

(5) Sub-section (1) also does not apply to the allotment of shares by a company in connection with its proposed merger with another company; that is, where one of the companies proposes to acquire all the assets and liabilities of the other 41 42 in exchange for the issue of shares or other securities of that one to shareholders of the other, with or without any cash payment to shareholders.

108 (2) However, where it appears to the independent person (from here on referred to as 'the valuer') to be reasonable for the valuation of the consideration, or part of it, to be made (or for him to accept such a valuation) by another person who—

- (a) appears to him to have the requisite knowledge and experience to value the consideration or that part of it; and
- (b) is not an officer or servant of the company or any other body corporate which is that company's subsidiary or holding company or a subsidiary of that company's holding company or a partner or employee of such an officer or servant,

he may arrange for or accept such a valuation, together with a report which will enable him to make his own report under this section and provide the note required by sub-section (6) below.

To use these linking devices is to adopt the normal and natural methods of English.

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It might be argued that this wording is narrower in import than power, duty or function under this Act of the original. The argument does not affect the point being made here, but if the original (2) is wider in scope, it should not be part of s12, but should form a separate section.

## 6. Vocabulary

- 89 There is probably no section of legal language that gives rise to more extreme and clouded debate than vocabulary. On the one hand, there are some in the community who condemn the words of the law utterly, as if the great bulk of them were unnecessary, or intentionally difficult and obscure, to keep general readers in the dark. On the other hand, there are some in the legal profession who are equally dogmatic in their advocacy of legal words, defending all of them as if the fabric of the law would collapse without them. Part 1 of this chapter looks at some aspects of legal vocabulary. Part 2 concerns the use of words in amending legislation. And Part 3 concentrates on the meaning of words and the practical aspects of definitions.

### Part 1: Aspects of legal vocabulary

#### Litigated words

- 90 Writers should not assume that because a word or phrase has been a subject of judicial interpretation, they should continue to use it instead of a simpler, more widely understood alternative. While it is true that in some cases the substitution of another word may change the meaning of legislation, that is not always so. Indeed, the fact that the meaning of a word has been constantly litigated may indicate that its meaning was not, and perhaps is not yet, clear. Moreover, a court's ruling on the meaning of a word is limited to a particular context. Its meaning is judicially settled—if it is settled at all—only for that context. And, in any event, the meanings of words change, even judicially settled words. The meaning determined fifty years ago by a court may no longer be the established usage of the word. For these reasons, writers should check every uncommon word or phrase for possible alternatives and should consider expressing the idea in a way which does not require the use of a litigated word, for example:

41 (4) (i) Where the evidence for the prosecution has, in the opinion of the Justice or Justices, established a *prima facie* case ...

*Justices Act 1902* (New South Wales) (emphasis added)

was rewritten to help 1985 readers as:

Where the Justice or Justices form the opinion referred to in subsection (2) (b) *that the evidence is capable of satisfying a jury beyond reasonable doubt* that the defendant has committed an indictable offence ...

Schedule 1, *Justices (Amendment) Act 1985* (New South Wales) (emphasis added)

This version sets out more clearly what is required of jurors: there has been gain rather than loss by the change. The success of many plain English versions of traditionally worded documents supports substituting modern day alternatives as a general rule. If necessary, explanatory notes may be used to indicate the changes from the traditional terminology.

## Terms of art and other technical terms

91 Words that are genuine terms of art or technical terms may be used in appropriate contexts. They include words such as *affidavit*, *habeas corpus*, *hearsay*, *hereditaments*, *easement* and *mandamus*. They also include words which have a particular meaning in a legal context, such as *incapacity*, *dependant*, and *tax-free threshold*. These words have precise meanings and there is often no convenient substitute for them in common language. Explanatory notes or footnotes may be used to help readers understand them. For example, a recent mortgage form reads:

I waive my right to require the note holder to do certain things. Those things are: (1) to demand payment of amounts due (known as 'presentment'); (2) to give notice that amounts due have not been paid (known as 'notice of dishonour'); (3) to obtain an official certificate of nonpayment (known as a 'protest').

National Mortgage Association and the Federal House Loan Mortgage Corporation

92 The use of legal and technical terms calls for delicate decisions and sound knowledge. Explanation of a concept may not be enough. It may be equally essential to counteract any misconceptions which members of the public may have. In a study of default clauses in consumer contracts, Davis found that many consumers believed that negligent injury to the collateral could not constitute default if all the instalments had been paid on time.<sup>1</sup> As Davis recognises, it is of little use giving a definition of default which does not also tackle this misconception. Often the everyday situation does not match the legal situation; for example, negligence in law may not be the same as what members of the public understand by negligence.

## Ordinary words with a special legal meaning

93 As well as the technical words for which there are no everyday equivalents, there are also technical legal words which occur in everyday language with much the same meaning, for example, *contract*, *husband*, *mortgage* and *motor vehicle*. The distinction is one of greater specification or implication rather than conflict or contradiction. In general usage, a *contract* is an agreement, or the document containing the agreement; for lawyers, it includes notions of offer, acceptance and consideration that are necessary for contractual obligations to be imposed. While words of this type may have more precision in law than in ordinary language, they are readily intelligible and there is sufficient common agreement about their meaning so that there is no need to use substitutes.

94 Some of the words which are shared by both the general language and legal language do not overlap so closely in meaning. There is still a core element, but the words have a limited meaning in a legal context, for example *cattle*, *domicile* and *good faith* (in insurance). It may not be possible to avoid using such terms because suitable synonyms are not available, but again drafters may improve the understanding of non-experts by providing explanatory notes.

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J. Davis, 'Protecting Consumers from Overdisclosure and Gobbledygook: An Empirical Look at the Simplicity of Consumer Credit Contracts' (1977) 63 *Virginia Law Review* 878, 879.



## Archaic words

- 95 Archaic words should generally be replaced by more modern words or entirely omitted. For example, words such as *indenture*, *hereto*, *hereinafter*, *part (of the one part)*, *chattels*, *situate*, *execution*, *instrument*, *presents*, *aforesaid*, *said* and *witnesseth*, which are frequently used in legal documents cannot be justified in the late twentieth century. They are often redundant or imprecise as well as off-putting for readers. For example, *hereby* adds nothing in the context *I hereby promise* or *the XYZ Act is hereby amended*. Other words such as *aforesaid*, *hereinafter*, *abovementioned*, *preceding* and *the same* may also be uncertain and misleading in their reference.
- 96 Drafters need not fear that legal documents will be unenforceable if they depart from traditional legal terminology. There is no risk that a court would rule that *rented premises* is different from *demised premises*; particularly in view of the recent Victorian and Commonwealth legislation requiring a purposive, rather than a literal, reading of statutes.<sup>2</sup> The Attorney-General, in his Ministerial Statement of 7 May 1985, took an important step towards ridding legislative language of archaic forms when he directed that *must* should replace *shall* in its obligatory sense, and *where* should no longer be used as a synonym of *if* to introduce a condition.
- 97 As well as avoiding archaic words, writers should avoid using words in an archaic sense. There are a number of words which have archaic meanings when they are used in legal documents which are different from their meaning in general usage, for example *action* (in court proceedings) and *instrument* (for document). As with archaic words, these archaic senses should be abandoned wherever there are acceptable equivalents in general usage.

## Latin and French words

- 98 Latin and French words should generally be avoided unless they have become part of the English language. For example, words such as *adjudicate*, *appeal*, *court*, *exception*, *indictment*, *jury*, *legal*, *perjury* and *verdict* are obviously acceptable. Words such as *ab initio*, *corpus delicti*, *in re*, *de novo*, *in custodia legis*, *ejusdem generis*, *chose in action*, *cy-pres*, *mesne* and *presents* (document) should be replaced with English words. *The Commercial Arbitration Act 1984* gives a neat illustration that Latin and French words do not have to be used. The heading to section 22 contains the French *amiable compositeur* and the Latin *ex aequo et bono*, but the drafter correctly abandoned them in the text and expressed the ideas clearly through general English words:

22 (2) If the parties to an arbitration agreement so agree in writing, the arbitrator or umpire may determine any question that arises for determination in the course of proceedings under the agreement by reference to considerations of general justice and fairness.

The pity is that the drafter did not use these effective English words in the heading as well. As this example shows most foreign terms have no essential role to play.

## Doublets and triplets

- 99 The unnecessary synonyms that are often used in legal language should be omitted, for example, *acknowledge and confess*, *act and deed*, *goods and chattels*, *in my stead and place*, *give, devise and bequeath*, *terms and conditions*, *made and signed*, *cease and desist*, *fit and proper*, *keep and maintain*, *force and effect*, and *have and hold*. Such tautologies confuse readers who strain to see a difference between the terms, believing that the writer would not use two or three words where one would do. Even lawyers have been misled into trying to find differences in meaning where none exist, for example in *null and void*, *cease and desist* and *rest, residue and remainder*, and are afraid to omit one of a set of synonyms.



## Overlapping words

100 Similarly, writers should take care when using words which overlap, for example *authorise and direct*, *due and payable*, *obtain and consider*, *extend and apply to*, and *read and construed as*. In each of these pairs, the second term presupposes the first. If officials are directed to carry out a task, they are authorised by the direction. If a debt is due, it is also payable. It would be better to use only the second term as the use of both terms may confuse readers or lead to a limited meaning being given to each word. This is even more so with a series of related words, for example:

112 (3) (c) *assaults, obstructs, hinders, threatens, intimidates* or attempts to obstruct or intimidate a community visitor ...

*Mental Health Act 1986* (emphases added)

Here, the use of five different verbs may lead readers to question whether they are exclusive. What of *thwart, curb, impede, block, delay or frighten*? Are they covered or has the drafter overlooked them? In effect this practice of drafters is self-defeating. One generic term such as *interfere with* would be more effective in conveying the meaning than a string of words. By including closely related words like *threaten* and *intimidate*, the drafter encourages readers to look for gaps between the words, especially when only some of the verbs after *attempts* are repeated.

## Inflated words

101 A simple or common word should generally be used in legal documents rather than a grander or more unusual word. For example, *divide* is better than *allocate*, *tell* than *appraise*, *car* than *automobile*, *get* than *come into possession of*, *try* than *endeavour*, *fair* than *equitable*, *end* than *expiration*, *if* than *in the event that*, *rank* than *prioritise*, *send* than *transmit*, and *about* than *with reference to*. Part of the problem for writers is that many of these inflated words have an established place in the custom of their organisations. They are used by force of tradition rather than through any real merit. These words may function satisfactorily in internal documents but because of their limited local use, they let writers down seriously in documents which go to wider audiences.

## Elegant variation

102 Similarly, there is no need in legal writing to use different words to refer to the same object or idea in order to avoid the monotony caused by repeating the same word. Often this may not cause any harm, especially when the alternatives are equally familiar, for example *author–writer*, *holiday–vacation*, *oppose–resist*, and *frank–candid–honest*. However, in some cases, change simply for the sake of variation, elegant variation, may confuse readers. They may wonder if the same matter is being discussed. For this reason, the same word should be used for the same concept throughout a document. For example, there is no need to change from *person* to *defendant* in the following section:

47 39 (6) In a prosecution of a *person* for failing to serve a notice on a securities exchange under this section, it is a defence if the *defendant* establishes ...

*Companies (Acquisition of Shares) (Victoria) Code* (emphases added)

## Part 2: The use of words in amending legislation

- 103 Amendments to legislation should be written in plain English even if the principal Act is not in plain English. Drafters may be concerned that if they use different words in an amending Act, those words will be given a different meaning from the words in the original Act. This fear is unfounded. It arises largely from a confusion between words and substance and the mistaken belief that an idea can be expressed in only one way. But provisions can be expressed in various ways without altering the content. For example, in pairs of tautological words, such as *each and every* and *order and direct*, one word may be omitted. Similarly, *same*, *such*, and *aforsaid* could generally be deleted. *It shall be the duty of* and *shall* may be replaced by *must*. Punctuation may be improved. Inserting commas in a series, for example, may improve the readability of an Act and occasionally remove an ambiguity. If the principal Act contains confusing or archaic terms, these should not be repeated in amending legislation. The idea should be paraphrased.

## Part 3: The meaning of words

### Definition section

- 104 Efficient communication depends on writers using words in the same way as the rest of the community does. They only create confusion and hinder communication if they give words unusual meanings. A definition section should be seen as a last resort, to be used only in an extreme contingency. It should be kept as short as possible. The primary goal for drafters is to use words in their ordinary sense so that they do not need to be defined. If a word is defined in a statute, it suggests that it is not being used in its ordinary sense. This in turn implies that readers must continually refer to the definition section to check the meaning of the word because it is unreasonable to expect them to memorise an unusual meaning.

- 105 If a concept is used only once in an Act, writers should avoid coining a special term for it which needs to be defined; it is better to spell out the concept. For example, the term *substantial period* is used in the *De Facto Relationships Act 1984* (NSW): ·

15 (1) A court shall not make an order under this Part unless it is satisfied ...

(b) that—

(i) both parties were resident within New South Wales for a substantial period of their de facto relationship; or

(ii) ...

(2) For the purposes of sub-section 1 (b) (t), the parties to an application shall be taken to have been resident within New South Wales for a substantial period of their de facto relationship if they have lived together in the State for a period equivalent to at least one-third of the duration of their relationship.

*Substantial period* is imprecise and so in subsection (2) the drafters have defined it. This is a wasteful procedure. A much briefer solution is to omit *substantial period* and to merge (1)(b)(i) and (2):

1) both parties were resident within New South Wales for at least one-third of their relationship.

This approach is much easier for readers who in the original version are compelled both to grapple with the concept *substantial period* and are left in the dark about its meaning until they have passed through (b) (ii) to (2).

## Functions of definition section

106 Definitions may serve several functions:

**a. To confine a word to only part of its range of meanings.** Although the context usually makes it clear which meaning is intended in a given sentence, there are times when writers want to confine the use of a term to one segment of its range of meanings and not to leave the matter to chance, for example *'oil' means any liquid hydrocarbon; 'property' means only personal property*. The object of these definitions is to obtain clarity; it is not to introduce new meanings or to depart from ordinary usage. A liquid hydrocarbon, for instance, is an oil, just as personal property is property. In other cases, the purpose of a definition is to specify that particular meanings are being used, for example:

a. 'employee' means—

(a) in relation to Part 11—a public employee;

(b) in relation to the remainder of this Act—a person appointed to the Public Service (including a Chief Executive Officer)

*Government Management & Employment Act 1985 (UK)*

**b. To promote understanding where a usage is only partially established in the community,** for example, *in vitro fertilisation, disinflation and joint float*. This function offers a way of handling new words which may not yet appear in dictionaries.

**c. To avoid ambiguity where a word has competing usages,** for example, *'bimonthly' means twice a month*.

**d. To remove uncertainty,** for example, *'spouse' includes de facto spouse; 'amended' includes 'altered'; and 'construct' includes reconstruct, make structural changes*. (Note the use of a comma in the third example, rather than a conjunction, because it is a list of alternatives. If both elements are necessary, connect them with *and*, for example, *'trading' includes buying and selling*).

**e. To explain technical words, especially legal ones,** for example, *information in the sense of laying a charge*.

**f. To make the document shorter and more readable by using a shorthand expression,** for example, *'odd lot' means a parcel of shares that is less than a marketable parcel*. This follows the frequent practice of using one or two words to replace a group of words in referring to a concept. This procedure should only be used if the concept appears several times in an Act. Otherwise, readers are required to learn a new word for a concept for no advantage. Abbreviations, however, should not be introduced into definition sections, for example, *'Commission' means the Accident Compensation Commission established under this Act; 'Court' means Supreme Court*. Since the Accident Compensation Act was concerned with only one Commission, it is not necessary to clutter the definition section with this item. Similarly, since *Supreme Court* is not much longer than *Court*, the space saving is not sufficient to warrant a special definition. The short form (*Court*) could be allowed to arise naturally from the context because if the long form (*Supreme Court*) occurs several times in the same section, it can be safely abbreviated on the second or later occasion without having to list the short form in the definition section. The same principle applies to long titles within a section—use the full title in the first reference and then a short form; the meaning will be clear from the context without the need for a formal definition. For an abbreviation to be justified in an Act, it should be so obvious that it would not need to be listed in the definition section. If it is not obvious to readers, then the full form should be used.

**g. To identify words which have the same referent.** While as a general principle only one word should be used to refer to the same concept in an Act, another word or phrase may occasionally be used to refer to the same concept. For example, one section

of an Act may set out the duties of de facto partners, another the duties of parties to an application. In the Act, the terms *de facto partners* and *parties to the application* may refer to the same individuals. It is not that they have the same meaning, but in the given context they are equivalent in their referents. In the past, the following device has been used to show this overlap: *A reference to 'parties to the application' is a reference to 'de facto partners'*. The items treated in this way appeared in a separate section after the definitions. Instead of this form, it is preferable to rephrase these items as: *'parties to the application' refers to 'de facto partners'*. Having one of the equivalent words first rather than the words *a reference in this Act to* means that the treatment of the equivalents is similar to the treatment of words being defined. As a result equivalents can be incorporated in the appropriate alphabetical order along with the other items in the definition section. This saves readers from having to look to at least two separate places, as happens at present, if they want to check the meaning of a word. However, before introducing equivalents, writers should consider whether both terms are essential. In the De Facto Relationships Act, for example, one may say *the partner who applied for an order* and omit entirely *parties to the application*.<sup>3</sup>

## Equivalents and definitions

107 Items are sometimes presented as equivalents when they are really definitions or explanations of meaning, for example:

5 (10) In this Act, a reference to remuneration does not include a reference to allowances for travelling or accommodation paid or payable at a rate in a particular case or class of cases that does not exceed such rate as is prescribed in respect of that case or class of cases.

*Accident Compensation Act 1985*

This provision can be written more briefly and accurately as a definition: *'remuneration' does not include allowances for ...* Not only does this revision identify the item correctly as a definition but it also eliminates the verbiage of *a reference to*.

## Commonness of definitions

108 Definitions should not give words or concepts strange or novel meanings. They should indicate the specific aspect of a word's ordinary meaning that is relevant. This may be one part of its ordinary meaning or an extended meaning beyond its ordinary meaning. An example of an extended meaning for a word is *'boat' includes motors and sails, but does not include personal effects and water-ski equipment*. This is an acceptable definition because motors and sails are things associated with boats and may reasonably be regarded as part of at least some boats. To extend the meaning in this way does not depart from the usual meaning of the word *boats*. The following definition of *formal search*, however, is not only an extended form of the general meaning but also an unusual meaning:

44 (1) A person who wishes to enter or remain in a prison as a visitor must, if asked, submit to a formal search.

(2) In this section *'formal search'* means a search to detect the presence of drugs weapons or metal articles carried out by an electronic or mechanical device.

*Corrections Act 1986* (emphasis added)

This idiosyncratic definition is not what readers of subsection (1) would expect and in any event is not necessary. The two subsections could be simply amalgamated: *A person who wishes to enter or remain in a prison as a visitor must, if asked, submit to a search to detect ...*

## Unnecessary definitions

109 Words and concepts whose meanings are obvious should not be defined, for example:

5 (1) *unsolicited goods* means goods sent to a person without any request made by or on behalf of that person.

*Fair Trading Act 1985*

Also there is normally no need to define words which have already been defined in the *Interpretation of Legislation Act 1984*. Such words should be defined only if their meaning is crucial to the understanding of the Act being drafted. The repetition of definitions in an Act clutters it with unnecessary detail. The definition sections in the *Interpretation of Legislation Act 1984* includes sections 21 (meaning of certain expressions in Act); 23 (construction of subordinate instruments); 37 (gender and number); 38 (definitions); 39 (parts of speech and grammatical forms); 44 (time); 45 (*may* and *shall*); 46 (references to the Sovereign); 47 (references to officer in general terms); 48 (references to officers, localities etc.); 49 (service by post) and 55 (construction of references to British subjects etc).

## Generality of definitions

110 Drafters should endeavour wherever possible to use a definition which is consistent with the way in which the word is used in other Acts. If the definition is only suitable in one Act, that may be an indication that a word is being defined in an unusual way and the definition should be reconsidered. If a word is used in the same way as it has been defined in another Act, a deceptively simple solution is to refer to the definition in that Act, for example:

3 (1) *Insolvent under administration* has the same meaning as in section 5 (1) of the *Companies (Victoria) Code*.

*Building Societies Act 1986*

This should not be done. Not only does it force the reader to look elsewhere, but the other Act may not be immediately accessible. An exception to this principle is amending legislation where a reference from an amending Act to the Act being amended is unnecessary, for example:

4 (5) *Board* has the same meaning as in the Principal Act. *Employer* has the same meaning as in the Principal Act.

*Construction Industry Long Service Leave (Amendment) Act 1985*

## Consistency in definition

111 If a word is defined in an Act, the word should be used with only that meaning. It is confusing for readers to see a word which has been defined in a particular way used in a different sense. Similarly, parts of speech which are related to the defined word should be used consistently. If a noun is defined with a particular meaning, its related verb should be used with the same meaning. For example, if *associate* (the noun) is defined in a particular way, the corresponding verb *associate (with)* and its past participle *associated (with)* should be used in the same sense. This of course agrees with general linguistic principles since a *look* is an *act of looking*; *knowledge* is *what one knows*; *(to) contact* is *(to) make contact with*. But subsection 7 (4) of the *Companies (Acquisition of Shares) (Victoria) Code*, defines *associate* in one way and subsection 7 (5) defines *a person who is associated with another person* in a different way. This may confuse readers who are likely to treat *associate* and *associated with* alike.

## No substantive material in definitions

112 Definitions should contain only an explanation of the meaning or use of terms. They should not contain substantive material. For example, readers of the *Building Societies Act 1986* would not expect to find details of the appointment of directors in the definition section:

3 (4) The composition of a corporation's board of directors is controlled by a building society or company if the building society or company can appoint or remove all or a majority of the directors by the exercise of a power exercisable whether with or without the consent or concurrence of any other person;

(5) For the purposes of sub-section (4), a building society or company is deemed to have power to make an appointment of directors if—

(a) a person cannot be appointed as a director without the exercise of such a power by the building society or company in that person's favour; or

(b) a person's appointment as a director follows necessarily from the person being a director or other officer of that building society or company.

(6) Sub-section (4) does not limit by implication the circumstances in which the composition of a corporation's board of directors is to be taken to be controlled by a building society or company.

## Drafting definitions

113 The analytical approach is generally used in drafting definitions. That is, a meaning of the word is divided into its separate components of general class, sub-class, and distinctive features of the sub-class. A definition of kookaburra could appear in the form of:

Kookaburra: bird of the kingfisher family with cackling cry, found in Australia.

This definition consists of these components:

general class: a bird

sub-class: kingfisher family

distinctive features: cackling cry, found in Australia.

While this approach distinguishes the creature from all other birds and from all other objects, it also enables us to see its relationship with other types of birds and creatures.

114 A second approach to definitions is to illustrate the meaning of a word by listing some of the items to which it refers. For example, 'books' includes any register or other record of information; 'send' includes dispatch, forward, post. The defined word is intended to have the full range of its normal meanings. The items are listed to ensure that readers understand that they are definitely included. All possible items are not listed. In fact, the list should contain the minimum number of items so that it does not appear an exhaustive explanation of the meaning of the word.

115 Occasionally the two approaches are combined: *X means Y, and includes Z*. This type of definition is used if there is uncertainty about whether Z is included. It says clearly that it is included. The following wording allows all the words requiring special attention to appear in one alphabetical list for the convenience of readers:

a means b.

a includes c, d.

a means b, and includes c, d, e.

a refers to b.

a is a short form for b.

a has the same meaning as in section 000 of the XYZ Act.



- 116 Sometimes a definition includes the phrase *in relation to*, to indicate that the word is to have a specific meaning in a particular case or context. For example, ‘owner’, *in relation to land, means the person for the time being entitled to receive the rent of the land*. This method must be used cautiously. It may imply that outside a particular context or case, the word is being used in its ordinary sense in the Act. If it has been used elsewhere to convey those wider senses, then it may not be the most appropriate word to use in the nominated context.

### Using the computer to prepare definitions

- 117 Programs are available to enable a computer to produce either an alphabetical list of every word in the text, or a concordance which sets out every occurrence of a given word with some surrounding context. A concordance may be produced at any time after a draft has been entered into a word processor. It should be prepared at least on a final draft. This is the most efficient stage to draw up a complete definition section. The concordance enables writers to produce exact and complete definitions economically and without tedium. Writers should check that they have included every word that might cause readers difficulty and that all the material included is relevant. For example, if a definition contains the word *includes*, it is counterproductive to add to the list items which are not affected by the provision. The list should only be as full as necessary. The concordance also shows the various uses of a word and whether the word has been used in more than one sense. If that occurs, the word should be replaced where necessary so that it is used in only one sense in the text.

### Where to put definitions

- 118 The present system is to place definitions at the beginning of an Act. This gives readers early warning of any special ways in which terms are used in the Act. But, on the other hand, it may provide them with a hurdle before they reach the main provisions of the Act. Generally, the principal substantive matters in an Act should come first and less important or procedural matters later. It would therefore be better to put the definition section at the end of the Act—see Appendix 2. This could be done quite conveniently if defined words were identified typographically (for example, by italics or bold type)<sup>4</sup> to warn readers that they should check the definitions of those words. A footnote should then refer the reader to the section in which the word is defined. This saves readers from continually turning to the definition section at the front or the back of the Act. But if words are defined in a Part or Division, there should not also be a definition section in the Act. Readers should know that definitions are either in the definition section or in the body of the Act; they should not need to check both positions.

## 7. Usage of certain words

- 119 This chapter concerns the usage of certain words in legislation which may give rise to dispute, especially in the context of introducing plain English. The *Style Manual* produced by the Australian Government Publishing Service,<sup>1</sup> which is followed by the Victorian Government Printer, should be consulted on routine matters.

### And—or—and/or

- 120 The meaning of *and* and *or* appears straightforward. *And* is seen as conjunctive, cumulative, adding items together, for example, Penalty: *A fine of \$1000 and 6 months imprisonment*. On the other hand *or* is disjunctive, taking items separately, proposing alternatives. For example Penalty: *A fine of \$1000 or 6 months imprisonment*. But practice is more complex than this and sometimes *and* and *or* overlap in use. Certainly *or* can have inclusive senses. For example, *A or B may do X* can be interpreted either as *A may do X, B may do X, both A and B may do X, or either A or B may do X, but not both of them*.
- 121 The confusion and ambiguity that this overlap may cause in practice may be counteracted by other linguistic devices. For example, to make the conjunctive force of *and* certain, writers may use *both ... and: organisations that are both political and educational*. The disjunctive use of *or* can be highlighted by *either ... or ... but not both: organisations that are either political or educational but not both*. Other ways of making the meaning certain include: *for any of A, B and C* and *A or B or both*. The solution will depend on the context.<sup>2</sup>
- 122 *And/or* should not be used in legal documents. It can readily be replaced. For example, *shares and/or options* may be written *shares, or options, or both*.

### Any—all—each—every

- 123 The particular force of these words should not be weakened by overuse. Frequently the determiner may be omitted or the indefinite article may be used, for example, *Any director may be re-appointed* may be written *A director may be re-appointed* or *directors may be re-appointed*. *Any* is best reserved for situations where there are no qualifications or limitations, for example, *A secretary may be dismissed at any time*. *Each* and *every* should be used if an obligation is to apply to all members of a class and not just to a single member, for example, *Each qualified state officer may; Every qualified state officer may*.

### Deem

- 124 *Deemed* is obsolete. It should be replaced by *considered, regarded, taken* or *treated as*. It should not be used even in the technical sense of expressing a hypothetical case or legal fiction.

<sup>1</sup> *Style Manual for Authors*, 3rd ed. Editors and Printers, AGPS, Canberra, 1978.  
<sup>2</sup> For the treatment of *and* and *or* in a series of paragraphs, see paragraph 52.



## Duty (it shall be the duty of)

125 Use *must* to express obligations, not *it shall be the duty of*.

## Forthwith

126 *Forthwith* is obsolete. It is better to use *as soon as possible*.

## Gender neutral language

127 *Gender neutral pronouns*. It is now Government policy not to use language in legislation which specifies gender, such as the pronouns *he* and *she* and words such as *chairman*. Since there is no gender neutral singular pronoun for the third person in English, the following devices may be used:

- Repeat nouns, for example: *If a person holds particular shares in a class of shares, the shares which the person holds on account of another person ...*
- Use *he or she*, for example, *A tenant may renew a lease if he or she gives the landlord notice*. Repetition of *he or she* can become ungainly, for example, *The offeree contravenes this subsection if he or she knows that he or she is not entitled to give the notice*. It would be better in these cases to repeat the noun in at least one instance, for example, *The offeree contravenes this subsection if the offeree knows that he or she is not entitled to give the notice*. Do not use *he/she* or *s/he*.
- Replace third person singular pronouns wherever possible, for example, say *A director must submit the application* not *A director must submit his application*. The possessive can sometimes be omitted altogether, for example *A member of a Tribunal may resign his office by writing a letter signed by him and delivered to the Minister* may become *A member of a Tribunal may resign by writing to the Minister*.
- Change nouns to plural, for example, *A tenant may renew a lease if he or she gives the landlord notice* may be written *Tenants may renew a lease if they give their landlords notice*.

128 *Gender neutral words*. Avoid using sex-specific nouns such as *chairman*, *manpower*, *mailman*, *mankind*, *mothering* and *statesman*. Try to select words which are gender neutral, for example, *personnel* for *manpower* and *(to) staff* for *(to) man*. Be prepared to consider the use of recently invented words such as *chairperson*. This word is now recognised in dictionaries, and may become as acceptable as other words which were once opposed, like *presidential*, *advocate*, and *speculation*. In amendments, introduce non-sexist forms despite what might appear in the provisions in the Act that are not being amended. It is against Government policy not to do so.

## Hereby

129 The use of *hereby* is generally unnecessary. It should be omitted in contexts such as *it is hereby agreed* and *section 5 is hereby amended*. Words such as *agree*, *amend*, *declare*, and *promise* are effective without the addition of *hereby*.

## Lawful (it shall be lawful for)

130 Use *may* instead of *it shall be lawful for*.

## Money

131 Use the word *money*. The form *moneys* or *monies* is obsolete and should not be used.

## Other—otherwise

- 132 *Other* is an adjective; *otherwise* is its adverbial counterpart. They should be used correctly, for example, *she faced many hardships, financial and other* and not *financial and otherwise*; *other* parallels *financial*. Similarly, *say an employee may not appeal otherwise than in the prescribed manner not other than*; *otherwise* is an adverb modifying *appeal*.

## Punctuation

- 133 The *Style Manual* sets out the generally accepted conventions of punctuation. Punctuation assists readers. It is important for avoiding ambiguity and confusion in meaning. Drafters should adhere to conventions that are used elsewhere in the community. For example, the absence of commas between items in a series is confusing for readers who would expect commas in other writing:

55 (1) (c) require the production at the time and place specified by the Inspector of any books registers certificates notices records and documents required to be kept under this Act and the production of any pay-sheets or books in which ...

*Construction Industry Long Service Leave Act 1983*, amended by section 16 of the *Construction Industry Long Service Leave (Amendment) Act 1985*

The following subsection is better:

24 (3) On and from the commencement of section 10, unless the context otherwise requires, any reference in any Act or in any proclamation, appointment, Order in Council, order, rule, regulation, legal proceedings, instruments, document or writing of any kind whatsoever ...

*Construction Industry Long Service Leave (Amendment) Act 1985*

Similarly, the following passage would read better if commas were inserted before and after the group of words *a copy ... Melbourne Magistrates' Court*:

30A (6) An order made under subsection (4) a copy or certificate of which has been filed with the Clerk of the Melbourne Magistrates' Court is deemed to be an order requiring the payment of money made by a Magistrates' Court and may be enforced accordingly.

*Construction Industry Long Service Leave Act* inserted by section 11 (6) *Construction Industry Long Service (Amendment) Act 1985*

## Quantity

- 134 The problem in dealing with quantity concerns the point of reference. There is a danger that it may be omitted from a provision. For example, the phrases *more than X* and *less than X* do not take in *X*. If we wish to include *X* then we need to use forms such as *not less than X*, *X or more*, *not more than X*, and *X or less*. Similar problems occur with *above*, *below*, *nearer than* and *further than*.

## Referential words

- 135 These are words that we use in references to another part of a document, for example *above*, *abovementioned*, *aforesaid*, *below*, *herein*, *hereinafter*, *hereinbefore*, *preceding*, *said*, *same*, and *succeeding*. They should be avoided because they are imprecise and frequently archaic. *Herein*, for example, could refer to the section being read, a subsection, a Division, a Part or even the whole Act. It is more satisfactory to use specific labels such as *5 1) a*). Also, these words are often unnecessary. This is particularly true of *said* and *aforesaid*. In *the said person*, for example, *said* is superfluous. The definite article *the* is a specific reference. If there is a possibility of ambiguity, the use of *said* cannot eliminate it. *Below*, for example, *in section 7 below*, is also redundant; *section 7* is sufficient to indicate the location of the reference. Even *following* can cause problems if the reference does not come immediately after it.

## Save

- 136 *Save* is obsolete in the sense of *except* or *but*, for example, *save as otherwise expressly provided*. It should be replaced by current words, especially *except*.

## Shall

- 137 Use *must* to describe obligations and not *shall*, for example, *the Minister must seek the advice* not *the Minister shall seek the advice*.<sup>3</sup>

## Spelling

- 138 Spelling should follow Australian practice. The preferred spelling in the latest edition of the *Macquarie Dictionary* should be used if a word has an alternative spelling. If a word cannot be found in that dictionary, then the *Shorter Oxford English Dictionary* should be used. The *Style Manual* is also a useful source of information, for example, on matters of capitalisation and the position of breaks in words.

## Such

- 139 The use of *such* is often redundant, as for example, in *such regulations* and *such officer*. It should generally be replaced with *a*, *the* or *these*. For example, *such persons as* should read *the persons that*.

## Subjunctive mood

- 140 The subjunctive mood occurs more frequently in American English than in Australian or British English. It occurs in subordinate *that* clauses and conditional clauses, for example, *The Board may require that the company secretary retire* and *If any person be found guilty*. The subjunctive is apparent only if the subject is singular. It disappears with the plural. Compare: ·

On condition that he retire (subjunctive)

On condition that he retires (indicative)

On condition that they retire (both subjunctive and indicative)

The indicative mood is far more frequent in everyday speech and can be safely used in most constructions.

## That—which—whose

- 141 As a relative pronoun, *that* is not wrong, in fact, in most contexts *that* and *which* are interchangeable. In some structures, however, *which* alone can be used, for example, *The company, which was acquired only last year; That was the meeting during which I kept falling asleep*.

Because *that* may refer to both personal and non-personal referents, for example *the member that the Government appointed* and *the building that the company erected*, it is useful when there is both a personal and non-personal referent in the same sentence, for example, *A person or body that is given power*. This is better than *A person who or a body that is given power*. The relative pronoun *whose* may be used with a non-personal referent, for example *the building whose roof collapsed*. This saves the awkwardness of *the roof of which*.

## Time

- 142 With some expressions of time it is certain that they include the reference point, for example, *on*, *not later than*, *not earlier than*, *after beginning with*, and *ending with*. As a result, *ending with 31 December* includes 31 December. Other terms are doubtful, for example, *between ... and*, *from*, *to*, *before* and *until*. To be certain of including the reference point, writers must strengthen these terms. For example, *to* should read *to and including*. *Between ... and ...* should be supported with *inclusive*, for example, *between 1 January and 28 January inclusive*. To include a date, *before* is often associated with *on*, for example, *on or before 31 December*. To save readers from having to cope with the two prepositions, the expression could be rendered more simply as *before 1 January*. Similarly, *after 31 December* is clearer than *from and including 1 January* or *on and after 1 January*. Although *on* would seem to include the day, section 44 (1) of the *Interpretation of Legislation Act 1984* has the effect that *beginning on 1 January*, would not include 1 January. Somewhat inconsistently section 44 (2) provides that *ending on 1 January* includes that day.
- 143 Avoid superfluous words in expressions of times. For example, *not less than* and *at least* are unnecessary in *not less than 90 days notice* and *at least 90 days notice*. The person subject to this provision must give 90 days notice with or without these introductory words. Also, try to specify time requirements precisely and accurately. Instead of words such as *within a reasonable time*, which is imprecise, and *immediately*, which is rarely what is meant, say *within fourteen days* or *within twelve hours*.

## Whatever—wheresoever—whosoever

- 144 These archaic expressions can be safely abandoned. They usually contribute nothing to the meaning. For example, *I hereby revoke all wills and testamentary dispositions of every nature or kind whatsoever*. *Whatsoever* adds needless emphasis to *all*. Current forms are *whatever*, *wherever* and *whoever* but *a person who* is preferable to *whoever* in most contexts in Acts.



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