

PLAIN LANGUAGE AND LEGISLATION

The Office of the Scottish Parliamentary Counsel have prepared this booklet about the use of plain language in legislation. The Counsel in that office are responsible for drafting Bills for the Scottish Executive. They are committed to drafting legislation in plain language.

The booklet is divided as follows:

Chapter 1 – *what is plain language?* – explains what plain language is and gives some historical context to its association with the law.

Chapter 2 – *drafting legislation in plain language* – makes some objective observations about the interaction between the desire to use plain language and the constraints placed on the legislative drafter.

Chapter 3 – *international comparisons* – describes steps which legislative drafters in other countries have taken to enhance the clarity and accessibility of legislation.

Chapter 4 – *plain language techniques* – gives some examples of techniques currently associated with plain language drafting.

Bibliography

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CHAPTER 1

WHAT IS PLAIN LANGUAGE?

Background

Plain language is language which is direct and straightforward. It is designed to deliver its message to its intended readers clearly, effectively and without fuss.

Writing in plain language involves doing more than simply using intelligible words and expressions. Good grammar is needed for any written text to be readily understood. Organising material logically and structuring sentences simply allows information to be absorbed more easily. Designing a simple physical layout makes a document easier to read.

Campaigners encouraging the use of plain language usually focus on legal and other official documents which affect the public. People are generally considered to have the right to be informed of benefits they are entitled to, and of obligations imposed on them, in language which is self evident to them. Misunderstanding and ignorance of the law increases the likelihood of non-compliance and jeopardises the exercise of rights.

History of plain language and the law

Attempting to make the law more readable and more accessible is not a modern aim. A commission was appointed in Scotland as long ago as 1425 “to see and examine the bulkis of law of this realme ... and mend the laws that needs amendment”. Early critics of legislative drafting include Edward VI who declared in the 16th century that he wished “that the superfluous and tedious statutes were brought into one sum together, and made more plain and short, to the intent that men might better understand them”.¹

¹ Report by the Committee appointed by the Lord President of the Council, chaired by Rt. Hon Sir (later Lord) David Renton (The Renton Committee), *The Preparation of Legislation*, Cmnd. 6033, HMSO, London, May 1975, at para 2.8

The Parliamentary Counsel's Office was established in 1869 with a view both to improve the form of statutes and to reduce the government's drafting costs. Lord Thring, the first ever Parliamentary Counsel, considered that legislative drafters should use the best popular language² and his 1877 pamphlet "Instructions to Draftsmen" is credited as having materially improved the style and arrangement of statutes. One of his successors as parliamentary counsel remarked that legislative language since the establishment of the Office was "in its simplicity and clearness far superior to the verbose and obscure language of enactments of forty or fifty years ago"³. Despite these improvements, and the desire of subsequent drafters to prepare Bills as clearly and simply as possible, criticism of the style of legislation has not diminished.

The plain language movement started to gain momentum a century or so after Lord Thring proclaimed the virtues of drafting in a simpler style. Insurance and other consumer contracts were initially subjected to the most attention in the drive towards simplifying legal documents but the use of plain language in legislation quickly became a core part of the debate. The Renton Committee's 1975 Report on the preparation of legislation⁴ reignited interest in how UK legislation can best be drafted. The Committee's principal term of reference was to review the form in which public Bills are drafted with a view to achieving greater simplicity and clarity in statute law. There are now various movements across the world that promote the use of plain language in legislation and the drafting offices in most English speaking countries are committed to drafting legislation in "plain English".

There have been some official and unofficial attempts to rewrite statutes in plainer language. Chapter 3 provides more detail of the most prominent UK project, the Tax Law Rewrite, and of other official projects undertaken elsewhere in the world. One of the more notable unofficial attempts to improve UK legislation occurred when a director of the Plain Language Commission rewrote and redesigned the Timeshare Act 1992. The resultant

² Thring, *Practical Legislation*, London, 1902

³ Sir Courtenay Ilbert, *Legislative Methods and Forms*, Clarendon Press, 1901

⁴ *The Preparation of Legislation*, as before

“Clearer Timeshare Act” was published. There followed a series of public exchanges between the author and Parliamentary Counsel (who drafted the original Act). The revised Act was undoubtedly shorter but no conclusion was agreed as to whether it achieved its goal of being more comprehensible without changing the law. One matter on which both seem to agree is that rewriting an Act in plain language is in many ways easier when freed from the pressures of the legislative process.⁵

Legislation on plain language

Legislation has itself been used to tackle the prevalence of obscure, excessively lengthy and confusingly structured language in other forms of legal documents. The Unfair Terms in Consumer Contracts Regulations 1999⁶ implemented the European Union directive on unfair terms in consumer contracts in the UK. They require the use of “plain, intelligible language” in consumer contracts.⁷ And they go on to set out a “most favourable interpretation” rule which stipulates that where there is doubt as to what a term means, the meaning most favourable to the consumer will apply.⁸

The Office of Fair Trading polices compliance with the regulations. It interprets the regulations as requiring terms which ordinary members of the public, not just lawyers, can understand. It expects consumer contracts to use ordinary words, in their normal sense, as far as it is possible to do so. It considers the size and legibility of typography, the use of colour and background and the quality of paper to all be capable of influencing the intelligibility of a contract.⁹

⁵ Martin Cutts, *Unspeakable Acts? Clarifying the Language and Typography of an Act of Parliament*, Words at Work, Stockport, 1993

Euan Sutherland, *Clearer Drafting and the Timeshare Act 1992: A Response from Parliamentary Counsel to Mr Cutts* (1993) 14 Stat. LR 163

Martin Cutts, *Plain English in the Law* (1996) 17 Stat. LR 50

Martin Cutts, *Lucid Law* (2nd edition, 2000) Plain Language Commission, Stockport

⁶ S.I. 1999/2083

⁷ Regulation 7(1)

⁸ Regulation 7(2)

⁹ OFT's Unfair Contract Terms Guidance, February 2001: this guidance and other information on unfair contract terms is available at www.of.gov.uk

The UK Government recently asked the Law Commission for England and Wales and the Scottish Law Commission to consider the desirability and feasibility of replacing the existing regime on unfair contract terms with legislation which is “clearer and more accessible to the reader, so far as is possible without making the law significantly less certain, by using language which is non-technical with simple sentences, by setting out the law in a simple structure following a clear logic and by using presentation which is easy to follow”¹⁰.

It was with a view to achieving a simpler and more accessible style that the Law Commissions took the unusual step of including sample clauses drafted by Parliamentary Counsel in their subsequent joint consultation paper in order to gather views on presentation as well as substance.¹¹ Those clauses formed the basis of the draft Bill appended to the Commissions’ joint final report.¹²

Criticism of plain language

Plain language continues to have its critics. Some consider its populist style to be inelegant, unsophisticated or even patronising. But writing statutes is not a literary exercise. The purpose of legislation is not to entertain or captivate its readers so drafters should not be concerned as to whether their audience enjoys reading their product. It is more important that statutes be easy to read and understand – goals which using plain language can help to achieve.

Some accuse plain language of being a simplified, restrictive version of the language created solely to benefit authors and readers who are unsophisticated or uneducated. Experts in a field which is the subject of plain language writing sometimes accuse the authors of “dumbing down” the topic. But plain language does not involve using “poor” English. And it is definitely

¹⁰ Reference by the Parliamentary Under Secretary of State for Consumers and Corporate Affairs under section 3(1)(e) of the Law Commissions Act 1965, January 2001 (the Scottish Law Commission also received a parallel reference from the Scottish Ministers).

¹¹ Law Commissions’ Joint Consultation Paper, *Unfair Terms in Contracts*, (Law Com No. 16, Scot Law Com No. 119), 2002

¹² Law Commissions’ Joint report, *Unfair Terms in Contracts*, (Law Com No. 292, Scot Law Com No. 199), 2005

not a pidgin. Ordinary words and good grammar are both essential elements of making language understandable.

So suggestions that plain language is simpler to use, or that it is somehow anti-intellectual, are entirely unfounded. Plain language does not tend to come naturally to the author of any work and the legislative drafter is no exception. Only the clearest thinkers and writers can absorb the most complicated subject-matters and present information in a way which is accessible to a wide audience. The end product may look easy to write – the reality is that it is much more difficult to simplify than to complicate when writing about a complex topic. Skill and time are both essential if writing is to be made clearer.

CHAPTER 2

DRAFTING LEGISLATION IN PLAIN LANGUAGE

Audience

The focus of plain language writing is the reader. Anticipated readership will influence the author of any document when choosing linguistic style and in deciding how best to set out text. Specialist writings (such as medical or architecture journals) will often adopt language with a meaning which is self evident only to those with knowledge or experience of the topic in hand. It is generally accepted that only a relatively small proportion of the public ever read Bills or Acts and those that do usually appreciate the need to consult a legal expert in order to understand them. Public law nevertheless has the potential to, and in many cases does, affect the rights of every citizen. It is for that reason that the case for the average person with no specialist knowledge being able to understand legislation is compelling.

Legislation differs from many other types of formal writing in that it has a very disparate potential audience. It is also unusual in that it has two distinct stages of existence, as a Bill and as an Act, and its readership differs at each stage. Bills are read by parliamentarians and others skilled in the ways of parliament. Parliamentarians come from a wide range of backgrounds. Not all have formal legal training or experience. But they should all be able to make sense of the laws they are being asked to enact. The increasing involvement of lobby groups and interested individuals, during both pre-legislative consultation and parliamentary scrutiny, means that a drafter may also have cause to consider the needs of those likely to participate in the legislative process when deciding the form and content of a Bill.

It is the practitioners in the field regulated by a Bill who will read and use it once it becomes an Act. Drafters must in all cases assume that legislation might at some point become the subject of litigation and for that reason the needs and practices of lawyers and judges are always considered. Designing legislation primarily for those who may be involved in litigating on its terms

may however reduce the chance of it being understood by the persons it will affect directly. Some laws are unlikely ever to face challenge in a court and will have most practical impact on practitioners in a field or on those who are required to administer. The people administering legislation or seeking to operate in accordance with it may include such diverse groups as the police, health inspectors, planning officers, school inspectors, trade unionists and company directors.

Drafters who consider who can reasonably be expected to read and make use of legislation are more likely to strike the appropriate balance. Style and language can be varied to suit the topic of a particular piece of legislation. Certain legislation will be more relevant to particular types of bodies or individuals and, where it is, the needs of those particular users should have more weight. Doing so may allow drafters to assume a commonly held knowledge of the topic of the Bill and, in some cases, of the legal rules which underpin it.

Clarity and accuracy

The main purpose of legislation is to create or amend law in a manner which implements policy accurately and effectively.

The precise nature of legislation in the UK is a reflection of the historical and cultural context within which it has been enacted. The style contrasts dramatically with the more generalised drafting approach adopted in European nations with legal systems rooted in civil law. The expansive and detailed UK statute book reflects the Westminster Parliament's traditional dual desires to impose an effective shackle on the executive's power and to ensure that those affected by the law know how it applies in differing circumstances. And the judiciary's tendency to interpret legislation narrowly means drafters throughout the UK have long followed Lord Thring's observation that they must seek to attain a degree of precision which a person reading in bad faith cannot misunderstand and that it is even better if they can prevent the reader from being able to pretend to misunderstand¹³.

¹³ Thring, *Practical Legislation*, London, 1902, quoting Mr Justice Stephen

Although Scots common law has much more in common with continental civilian tradition than its English counterpart the fact that responsibility for legislating for Scotland lay with the Westminster Parliament for almost 3 centuries means that the degree of precision in Scottish Acts reflects that which appears in Acts which apply to other parts of the UK (not least because many Acts apply to the UK as a whole). The establishment of the Scottish Parliament has presented an opportunity for divergence in the style of Scottish legislation and it has been noticed that Acts of the Scottish Parliament seem to be remarkably short and succinct compared with legislation enacted at Westminster albeit that factors other than drafters drawing on the civilian traditions of Scots law may be at least partly responsible for this shift.¹⁴

The desire for legal certainty and the accompanying pressure to legislate for every imaginable scenario means that the need for absolute precision has become paramount. The statement made in the Renton Committee's Report that a drafter "must never be forced to sacrifice certainty for simplicity"¹⁵ still holds good today. But the once commonly held view that the principles of plain language conflict with the need for accuracy has now lost much of its credence. Clarity and certainty are now more accepted as comrades rather than as enemies – a drafter striving to make elaborate propositions as clear as possible need not compromise one for the other.

It is a common misunderstanding that plain language drafters prefer to legislate in general principles rather than by elaborate detail. Plain language drafting need not be any less precise in its substantive effect. Seeking ways to make the law clearer and more comprehensible will often reveal flaws which may otherwise remain hidden beneath the surface of more obscure provisions.

¹⁴ The Rt Hon, The Lord Hope of Craighead, *What a Second Chamber Can Do for Legislative Scrutiny*, Statute Law Rev 2004 25: 3-18; John McCluskie, *New Approaches to UK Legislative Drafting: The View from Scotland*, Statute Law Rev 2004 25: 136-143

¹⁵ *The Preparation of Legislation*, as before, para 11.5

Plain language therefore has a big role to play when shaping legislation which needs to regulate with pinpoint accuracy. It can, for example, be a guard against what has been described as “false accuracy”¹⁶, a phenomenon which manifests itself when over-precise attempts to cater for every scenario lead to unintentional anomalies or infelicities. General legislative propositions which go on to deal specifically with an improbable case may make courts disinclined to fill the legislative gap when asked to apply the general provision to an improbable case which was not similarly anticipated.

Complexity of law and topic

The law is highly intricate and technical and all legislation requires to be written and read in that context. An individual Bill or Act cannot be fully understood on its own. The law it creates weaves into and must be read together with both the common law and other legislation on the statute book. The myriad of laws with which each piece of legislation interacts consists not only of substantive law but also rules on statutory interpretation which can influence or determine the meaning of a legislative provision.

Some areas of law are particularly sensitive in political terms. This can lead to successive administrations continuously amending certain statutes. Heavily amended legislative text may eventually start to creak under the weight of the extensive change as any coherence in the structure of the original text is lost.

Added to these difficulties is the fact that the subject-matter of legislation can be difficult to understand. There are some laws which can be set out by way of a few simple propositions. Other topics do not lend themselves to being regulated in such a straightforward manner. All but the simplest changes to the law in some areas can often result in an intricate web of linked propositions and exceptions which appear impenetrable to the untrained eye.

The aim of plain language drafting is not to make matters simple but to express them in the simplest way available. This distinction can seem lost to those who continue to argue that loss of accuracy is a fundamental flaw in

¹⁶ *Craies on Legislation*, 8th edition, ed. Daniel Greenberg, Sweet & Maxwell, 2004, para 8.1.24

plain language drafting. Some subject-matters are inherently complex and it must be accepted that it may not be possible to legislate on those matters in a way which everyone can easily understand. Perhaps the main advantage of plain language is that describing certain concepts in simpler ways will increase the likelihood of them being understood.

Despite protestations that plain language cannot be used in relation to the most complicated matters the opposite has been shown to be the case. The topics chosen for plain language rewrites are usually the most highly technical – tax and company law being the principal examples. The general success of rewrite projects demonstrates that using plainer language can make any area of law more accessible. More details of rewrite projects are given in chapter 3.

Precedent and consistency

The key role of legal precedent in the development of any legal system is a major inhibitor to the modernisation of the language used in legal documents. Policy makers, lawyers and others working in a sector governed by a particular area of law tend to be more comfortable with the retention of existing language which has a well established meaning.

Entrenched language gives the certainty which people seeking and relying on legal advice wish to have. This in turn makes lawyers cautious about deviating from long established terminology. The reluctance to modernise established terms is perhaps understandable when considered together with the degree of scrutiny to which words in a legal document may be subjected.

Clinging to the safety blanket of precedent can however be a mistake. The English language is particularly diverse and develops over time. The modern populace is less likely to understand legislation which fails to develop alongside the language. Inertia in changing legal language to suit the needs of the time explains the preponderance of antiquated words and Latin in legal documents.

Drafters can usually devise innovative ways of restating or referring to established rules or concepts which will make them more understandable to the modern day reader but will not change their meaning. But there is always a risk associated with change – there is often much to be said for the continued use of words with a well established legal meaning and any difference in the wording of a law will be analysed closely.

It is often presumed that a substantive reason lies behind every legislative change – Parliament does not legislate in vain. This presumption can result in the courts finding reasons for different approaches which were not in the minds of those who made the changes. But the courts are now more likely to treat a desire to make the law more understandable (or to at least make it as understandable now as it was at the time it was originally created) as a valid ground in itself for change – a trend which encourages drafters to take a more robust approach to modernising legislative texts.

Only those who understand an existing regime fully are likely to benefit from a failure to excise old-fashioned language from legislation or to otherwise improve the intelligibility of the law. And even they would probably agree that the longer term advantages of moving to new prose which is easier to read will outweigh any short term costs incurred in adjusting to a modernised system.

Political and parliamentary considerations

The way in which legislation is made has inevitable consequences. Because of the constraints under which legislation is prepared, and in particular the need for legal certainty, legislation tends to be written in a rather dull style. This does not always complement the fact that legislation can be a vehicle for delivering core political objectives. There can be pressure to ensure that new laws are presented in a manner which best conveys the desired message of the day. Those with an interest in legislation in Bill form are likely to have far sharper political antennae than those who will read and use the resultant Act.

The authors of most written works use language which they hope will captivate and generate interest among their potential audience. The writers of

policy documents differ little in this regard from those who produce literary fiction but the techniques commonly employed to harness a reader's interest are rarely available to the legislative drafter. Reliance on examples, metaphors, repetition, nuances or implications to communicate a message would only increase the chances of legislation being misinterpreted. Many plain language techniques will however complement and often improve the sometimes terse style of the more traditional legislative monotone without necessarily making the text any more pleasurable to read.

It may however be crucial in political terms for a Bill to convey the right message. A Bill will not serve its purpose if it does not gain favour amongst those asked to enact it. The injection of politically attractive material can make Bills more attractive to those whose role it is to extol its virtues. There is sometimes little to be gained, and there may be much to be lost, by translating political rhetoric into the plainest possible language. The pressure to use jargon which has become inextricably linked with a policy idea will, for example, sometimes be irresistible. And using previously uncommon words or phrases in legislation can by itself catapult them into the mainstream.

There may therefore be sound political reasons for striking a balance between plain language and language designed to make a Bill appealing to those debating its merits. The political worth of material intended to make a Bill's effect more palatable to legislators and so ease its parliamentary passage is frequently negated by the time the Bill becomes an Act. It is perhaps more important to use plain language in Acts than in Bills but (short of consolidation) there is no scope for reworking legislation once it has left the political arena and entered the statute book.

The necessary exposure of Bills to the parliamentary process can also affect their style. Amendments proposed during parliamentary stages are invariably designed to deal with a specific issue. The increasing involvement of lobby groups and other external interested parties can mean that changes to particular provisions of a Bill may be sought to emphasise the importance of a range of varying agendas. This can lead to certain provisions being

developed in a more expansive style. Bills are initially drafted as a whole: they should be internally consistent and capable of being read as a single cohesive document. The tension caused by the political reality of amendments focusing on specific issues has the potential to undermine a Bill's original structure.

Democracy demands that the coherence of a Bill's internal structures must yield to allow Parliament to resolve individual issues as the Bill progresses. The overall structure of most Bills can withstand a few amendments and all Bills can of course benefit from amendments which improve clarity. Accommodating numerous amendments within a Bill is more likely to affect its internal consistency, particularly if those amendments emanate from a variety of sources and deal with topics distant from the original subject-matter.

The way in which a heavily amended Bill hangs together can perplex a reader of the subsequent Act who is unaware of its legislative history. The adverse effect can be alleviated to an extent if the drafter of the Bill prepares the amendments but even then the partisan nature of the legislative process can add pressure to formulate amendments in a way which is more designed to gain approval for the proposed change than to sit easily with the existing style of the Bill.

Legislative timetables can also affect the way in which Bills are drafted. The drafting of Bills is not easy. The high political priorities driving legislation and the desire to publicise and implement swiftly mean that the pursuit of the primary and most important aim – the delivery of legislation which implements policy accurately and effectively – may take up all of the time allocated to the drafter. Extra time might be needed if the drafter is to give added consideration to how effective text can be made plainer: a luxury which is rarely available. The Hansard Society Commission on the Legislative Process observed in 1992 that Bills then being introduced in the UK Parliament were often “half-baked”¹⁷ with a later commentator adding that the partisan legislative process means that Parliament is not usually a competent enough

¹⁷ Report of the Hansard Society Commission on the Legislative Process chaired the Lord Rippon of Hexham, *Making the Law*, 1993

cook to prevent those Bills from emerging still half-baked, or worse¹⁸. There has, since then, been a steadily increasing amount of pre-introduction consultation and scrutiny of Bills with a view to improving matters.

Governments are entitled to expect implementation of their policies without delay and legislatures have the democratic right to the final say on the way laws are expressed. The desire to produce clear, coherent legislation is not the only consideration for either. It is not a mere coincidence that plain language rewrite projects across the globe tend to be shielded from the pressures associated with the highly political process of making law. The substance of provisions is often outwith the ambit of rewrites. The drafters responsible can then be afforded the luxury of control of both timescales and content and need seek parliamentary approval only where the simplification of existing law reveals an ambiguity or error which requires to be rectified.

Textual amendment of existing legislation

One aspect of legislation which distinguishes it from almost all other types of written work is the use of textual amendment as a mechanism to change or repeal existing law. Even if provisions which use this technique are drafted in simple language they will still baffle a reader who does not have access to the legislative text being amended.

This is a good example of different audiences with different needs. A restatement of the law being amended enables the readers of a Bill to understand the changes proposed. Lawyers and others interested in an area of law who read Acts would rather have all related legislation in one place in consolidated form. Navigation through the statute book would be almost impossible if legislation on each topic were to be scattered across it haphazardly.

It is for the drafter to consider, on a case by case basis, whether it is preferable to restate or textually amend existing legislation. Matters which influence this decision will include the amount of new material needed. The

¹⁸ Malcolm Gammie, *Legislation for Business: Is it Fit For Public Consumption?*, Fiscal Studies (1994) vol. 15, no. 3, page 129

language used to express the existing law will also be relevant: restatement can be a good way to modernise outmoded provisions.

The availability of a consolidated statute book will influence the arguments for and against restatement. HMSO now publish all legislation as it is passed in the UK and make it available for free on the internet¹⁹ but there is at present no up to date consolidated version of UK legislation available to the public free of charge. Some commercial organisations provide electronic access to consolidated legislation and some publish printed versions of consolidated legislation by topic. Neither, of course, comes free of charge and unofficial versions of legislation are not authoritative. Until legislation is freely available in consolidated form, added weight will always be given to arguments for restating legislation rather than textually amending it.

Another practical consideration is that restating law may cause it to be subject to parliamentary scrutiny even though there is no intention of amending it. In cases where rules govern admissibility of amendments on grounds of scope, restating provisions can open up topics to parliamentary debate which would otherwise need to be dealt with by way of another Bill. So it is proper to take account of potential handling difficulties and the fact that valuable parliamentary time may be needed to debate law which the Bill's proposer does not wish to change. Politicians would consider it unfortunate, to say the least, if their legislative objectives were compromised solely because of the drafting techniques selected.

Consolidation and codification

The ultimate form of restating legislation is consolidation. Consolidating all existing legislation on a topic brings with it the opportunity to consider how it can best be recast for the benefit of those who will use it. The fact that consolidation does not change the law means that special parliamentary procedures can be used to approve consolidated law; and there is usually some procedural flexibility to make minor changes of substance.

¹⁹ www.hmsso.gov.uk

Legislation can also be codified although codification is more usually associated with formalising the common law. Codifying is distinguishable from consolidating in that codification can change the substance of the law on a topic when it brings it together.

There is undoubted value in having all the law on a particular topic included in a single document. The processes of consolidating and codifying can be used to free the law from constrictions imposed by the existing legal framework. There is no need to attempt to fit in with earlier drafting styles or judicial language, some of which may be decades or even centuries old. There is also scope for cleaning up the structure of existing legislation, some of which may be straining under the weight of textual amendments, and for negating doubt over potentially conflicting judicial decisions.

A common drawback to both consolidating and codifying is the amount of resources they consume. It is not just the cost of redrafting which needs to be considered. There are resource implications associated with the parliamentary consideration of the legislation. And advisory professionals, administrators and others who interpret, use or enforce the existing regime will all need to take steps to adjust to the new format even if the rewrite does not change the law.

Consolidation may not of itself deal with the reasons why the consolidation is needed (e.g. continuously developing underlying policy causing heavy amendment). So the likelihood of consolidated law continuing to be modified, and eventually needing to be consolidated again, is sometimes considered before resources are given to a consolidation project.

Codification of common law carries with it other disadvantages. Despite being drafted with the aim of producing precise and clear law, legislation cannot predict and cater for the minutiae of each potential dispute. The flexibility of the common law is arguably better suited to delivering natural justice in individual cases. So in considering whether to codify common law there is often a fine balance between the advantages of retaining the flexibility

inherent in the common law system and those associated with replacing it with more prescriptive legislative rules.

In practice, the democratic nature of legislating may tip the balance in favour of codifying but additional barriers can arise. Although the attraction of establishing a cohesive set of general rules may have obvious benefits, a codification of common law will inevitably be less detailed than the law being replaced and may therefore give the executive and judiciary greater discretion to apply the law as they think fit. The giving of such discretion may not be welcomed by parliamentarians accustomed to legislating in particularities rather than in more abstract principles.

The challenge for legislative drafters

It is difficult to come across anyone, be they a politician, lawyer, academic, administrator or anyone else who deals regularly with legislation, who now disagrees with the main tenets of plain language legislative drafting – that the law should be expressed in the simplest terms available and in a way which communicates directly and effectively with as much of its intended audience as possible.

Trying to express complex legal propositions in language that is both precise and plain is not however a straightforward task. The diversity of the potential readers of legislation, the need for legal certainty, the role of legal precedent and other constraints associated with the peculiar form of writing that is legislative drafting can all conspire against drafters who pride themselves on both the accuracy and lucidity of their texts.

The challenge for legislative drafters is to produce law which not only implements policy effectively but which does so in a manner which is self evident to all those who can reasonably be expected to read and use both the Bill and the Act. Drafters will always need to frame legislation robustly enough to allow it to withstand the intense scrutiny of legal challenge. They should ideally try to ensure that it is incapable of being misconstrued, even in bad faith. Using plain language helps the drafter to create clear, unambiguous

law. Good drafters will also try to anticipate the potential audience and adapt style accordingly. Aiming to write and present legislation in a style which makes it accessible to parliamentarians enacting it, administrators responsible for operating it, courts required to interpret it and all others whose rights it may affect means that it will usually have a better chance of achieving its goals.

CHAPTER 3

INTERNATIONAL COMPARISONS

The plain language movement has begun to influence the way in which legislation is drafted across the world. Many jurisdictions are now publicly committed to producing legislation in clear and concise language. In some cases the impact has been more significant than others.

United Kingdom

A glance at recent Acts indicates that UK legislation is drafted in plainer language than was once the case. One of the most significant developments has been the establishment of the Inland Revenue's Tax Law Rewrite – a major project to rewrite almost all tax legislation in language which is plainer, and in a simpler structure, than that adopted in the legislation it replaces. The project has been ongoing since 1996 and has produced numerous draft Bills, three of which have been enacted²⁰, which aim to make direct tax legislation clearer and easier to use without changing the law.²¹

The Scottish Parliament adopted a design for its Bills and Acts which is similar in style to that used in the Tax Law Rewrite Project and is more user friendly than the form previously used for Scottish legislation enacted at Westminster. The UK Parliament also adopted a new more readable format for UK statutes in November 2000, although it is worth noting that the typographic font chosen was a compromise between the Lords and the Commons and is not the preferred choice of either.

The Scottish Law Commission and the Law Commission for England and Wales both strive, sometimes working together, to recommend ways to improve, simplify and update the law. The Scottish Law Commission considers that outdated or unnecessarily complex law makes for injustice and

²⁰ Capital Allowances Act 2001 (c.2), Income Tax (Earnings and Pensions) Act 2003 (c.1), Income Tax (Trading and Other Income) Act 2005 (c.5)

²¹ more information about the Tax Law Rewrite is available at www.hmrc.gov.uk/rewrite

inefficiency and leads to the law being out of step with the needs of ordinary people. It considers consolidation to be a vital element of law reform.

The ability of the law commissions to reform the law free from many of the political and parliamentary pressures on style and time allows them to take a more systematic and coherent approach to law reform and many consolidations have begun life as Commission Bills. Both law commissions regularly produce draft legislation and recommend it to the government.²²

Ireland

In December 2000 the Irish Law Reform Commission, in its report “Statutory Drafting and Interpretation: Plain Language and the Law”, recommended that “a comprehensive programme of reform of Irish law, with a view to replacing existing statutory provisions with alternatives expressed in plain language, be undertaken”. The report encourages the use of familiar and contemporary language and shorter and less elaborate sentences but recognises that “this aim should not be achieved at the expense of legal certainty”.²³

The Irish Government had already recognised the need to modernise the Irish statute book. It issued a report in 1999, “Reducing Red Tape – An Action Programme of Regulatory Reform in Ireland”²⁴, as part of its “cutting red tape” initiative. The Government supplemented that report in the detailed action programme set out in its 2004 White Paper, “Regulating Better”, which proposes clarity and accessibility of regulations as the key to better legislative regulation.²⁵

The Irish Government also established a Statute Law Revision Unit in 1999. It forms part of the Office of the Attorney General and has legislative drafters assigned to it from the Office of the Parliamentary Counsel in Dublin. The SLRU’s aim is to consolidate, streamline and simplify Irish statutes and to

²² More information on the Scottish Law Commission is available at www.scotlawcom.gov.uk; more information on the Law Commission for England and Wales is available at www.lawcom.gov.uk

²³ Law Reform Commission Report on Statutory Drafting and Interpretation: *Plain Language and the Law* (December 2000) (LRC 61 – 2000)

²⁴ Government publications, Dublin, July 1999

²⁵ Department of the Taoiseach, *Better Regulation*, Dublin, January 2004, pages 34 and 35

make legislation more accessible to the public.²⁶ The SLRU's programme of statute law restatement gives priority to groups of connected statutes which are considered most likely to benefit from being restated in a more simple and coherent manner.

The first of the SLRU's recommendations paved the way for the Statute Law (Restatement) Act 2002²⁷. That Act allows Ireland's Attorney General to consolidate and restate legislation in a more readable format, and to make those restatements available in printed and electronic form, without having to guide a Bill through the Irish Parliament. Administrative restatements prepared under the Act are "*prima facie* evidence of the law contained in the provisions to which they relate"²⁸ and must be judicially noted. Restatements do not however alter or otherwise affect the substance or operation of those provisions.

Jersey

The Jersey Legal Information Board was established in 1998. One of its main aims is to make the law and legal processes more accessible to the public. To this end it engaged an Australian Law Revision Commissioner to revise all legislation in force. The first revised edition came into force on 1 July 2005 and is arranged in 26 chapters by topics such as Courts and Legal Services, Crime and Sentencing and Financial Services. The intention is to update the revised edition on an annual basis.²⁹

The Law Revision (Jersey) Law 2003 provides that the revised version is the "sole authentic edition of the laws of Jersey". That Law gave power to render all enactments gender neutral, to renumber frequently amended text, to update cross-references and to correct typographical and similar errors of no substance.

²⁶ More information on Ireland's Statute Law Revision Unit is available at www.attorneygeneral.ie/slru/slru.html

²⁷ (No. 33 of 2002)

²⁸ Section 5(1)

²⁹ More information on the Jersey Legal Information Board is available at www.jerseylegalinfo.je

New Zealand

One of the functions of the New Zealand Law Commission is to advise the government on ways in which the law of New Zealand can be made as understandable and accessible as is practicable. In making recommendations it is required to have regard to the desirability of simplifying the expression and content of the law.³⁰

The Commission published a report on the format of legislation³¹ which was advanced and refined by a Steering Committee comprising representatives from the Commission, Office of the Clerk, Inland Revenue Department, Legislative Printers and the New Zealand Parliamentary Counsel Office. It decided that it would be appropriate to survey the views of a broad cross-section of users of legislation before implementing changes. The Parliamentary Counsel Office then consulted users of legislation (including members of the New Zealand Parliament, the judiciary, academics, private and public sector lawyers, librarians, legal publishers, and interested members of the public) on the format of legislation and, after consideration of representations, a new format for legislation was introduced in 2000.³²

The New Zealand Parliamentary Counsel Office is also committed to improving access to legislation³³ and one of its objectives is to ensure that legislation is drafted as clearly and simply as possible. The Office also operates a programme of reprinting legislation in consolidated form. Key users of legislation are consulted to identify which laws they would most like to be reprinted. Statutory powers authorise editorial changes to be made in a reprint (e.g. changes in format and punctuation and removal of referential words) to allow it to appear in a format and style consistent with current legislative drafting practice but changes to the effect of the legislation are not

³⁰ More information on the New Zealand Law Commission is available at www.lawcom.govt.nz

³¹ Report No. 27, *The Format of Legislation*, Wellington, December 1993

³² Source: www.pco.parliament.govt.nz/projects/format/survey.shtml

³³ See mission and vision statements at www.pco.parliament.govt.nz/corporatefile/summary.shtml

permitted.³⁴ Reprints are presumed to correctly state the law as at the date of the reprint.³⁵

The extent of the reprinting programme has become even more ambitious in recent years. The Public Access to Legislation Project is designed to improve the way in which New Zealand legislation (including Bills) is made available to the public. The ultimate aim is to provide public access to up-to-date official legislation in both printed and electronic form. Unofficial versions of legislation have been available free on the internet since 2002. New Zealand's Parliamentary Counsel Office is now undertaking a process under which the legislation is to be given authoritative status.³⁶

Australia

The various legislative drafting offices in Australia have deliberately manoeuvred away from the drafting style inherited from the UK. They consider that style to place too much emphasis on precision and not enough on simplicity and to be typified by badly constructed sentences and outdated words and phrases.³⁷

The Victoria Law Reform Commission was one of the main drivers for change in the style of Australian legislation. Its reports in the late 1980s and early 1990s recommended the establishment of a legislation rewriting programme using plain language and proposed changes to the design of legislation.³⁸

The Australian Parliamentary Counsel Office is committed to drafting Australian legislation in as clear a style as possible and has produced a working guide on drafting approaches and a plain English manual.³⁹ All of the

³⁴ Sections 17C to 17F of the Acts and Regulations Publication Act 1989 (inserted by the Acts and Regulations Publication Amendment Act 1999)

³⁵ Section 29A of the Evidence Act 1908 (inserted by Acts and Regulations Publication Act 1989)

³⁶ More information on the Public Access to Legislation Project is available on the New Zealand Parliamentary Counsel Office website at www.pco.parliament.govt.nz/pal

³⁷ Source: Australian Parliamentary Counsel's Plain English Manual, paragraph 7, available at www.opc.gov.au

³⁸ *Plain English and the Law*, Report No. 9, Melbourne, 1987; *The Structure and Format of Legislation*, Report No. 33, Melbourne, June 1990

³⁹ Guide, manual and many other documents about plain language drafting are available on the Australian Parliamentary Counsel Office website at www.opc.gov.au

Australian state drafting offices also now subscribe to the principles of plain language drafting and many have an official plain language policy.

Two major projects, the Corporations Law Simplification Program⁴⁰ and the Tax Law Improvement Project, were undertaken in the 1990s with the purpose of rewriting and simplifying the legislation governing two of the most complex areas of law. Individual enactments on topics such as social security, care for the elderly and offshore mining have also been rewritten – demonstrating that even legislation in highly technical areas can be translated into a much more readable form. The experience has also demonstrated that even expert readers can benefit from efforts to make the legislation they work with easier.

Canada

The Canadian Legislative Drafting Conventions are designed to standardise the way in which statutes in Canada are drafted. They adopt many of the principles of plain language and state that legislation should be written as much as possible in ordinary language suitable for its intended audience.

The Conventions are sanctioned by the Uniform Law Conference of Canada, a national organization of lawyers, legal academics and judges whose aims are to modernize and harmonize Canadian law.⁴¹ Most of the drafting offices across Canada, including the Legislative Services Branch of the federal Department of Justice, are guided by the Conventions when drafting and some have policies of drafting in plain language.

Canada is dual lingual and, although the Conventions originally applied only to the drafting of the English versions of legislation, they now extend to the French text also. The experience of trying to use both plain English and plain French has had some interesting consequences – for example, experiments with the technique of setting out headings in the form of questions revealed that it is not particularly effective in French where questions tend to be lengthier.

⁴⁰ replaced in 1997 by the Corporations Law Economic Reform Program (CLERP)

⁴¹ More information on the Uniform Law Conference of Canada is available at www.ulcc.ca

The Canadian Government embarked on a pilot project in 1995 to rewrite regulations covering family fireworks in a more reader-friendly form. The resultant Consumer Fireworks Regulations were tested with retailers and consumers to see if they were clear and easy to understand. The project was considered a success and the government are now committed to rewriting all Canadian explosive regulations in a more simple style.⁴²

The Canadian Government have also embraced an initiative to rewrite the Employment Insurance Act, a statute providing insurance against unemployment which was considered to be one of the most difficult federal laws to understand. The project's goal is to make this important piece of social legislation more user-friendly and easier to understand while preserving its current fundamental provisions and program principles. As part of the project a consulting firm that specialises in graphic design and communication was commissioned to prepare an independent report on design principles and methods used to improve public access to the law. Another independent firm undertook an extensive study on the readability and usability of plain language draft versions of the Act and reported back evidence that showed a clear preference for the plain language versions over the existing Act. Once completed, the rewritten Employment Insurance Act prototype is expected to serve as a model for future drafting of federal statutes.⁴³

Sweden

Sweden has a long association with plain language drafting. As far back as 1713 the King told the Royal Chancellery to "endeavour to write in clear, plain Swedish". Successive Swedish governments have made using plain language in legislation a high priority for almost 40 years. A recent Ministry of Justice publication pronounced that "a democracy must ensure openness and clarity within the public administration and guarantee that documents are written in a way that meets the readers' needs"⁴⁴. The Swedish way is to lead from the front – the idea being that modernising and simplifying legislation will

⁴² More information on the explosives regulations project is available on the Natural Resources Canada website at www.nrcan.gc.ca/mms/explosif/over/plsummary_e.htm

⁴³ More information on the employment insurance readability project is available on the HRSDC website at www.hrsdc.gc.ca/en/ei/legislation/readability.shtml

⁴⁴ Ministry of Justice information material, *The Swedish Government promotes clear drafting*, 2005

have an impact on the language used in all administrative government documents.

The Office of the Director-General for Legal Affairs, which forms part of the Swedish Prime Minister's office, coordinates legal and linguistic issues and is responsible for ensuring that the language used in legislation is as clear and simple as possible. A linguistic expert was first appointed to the Cabinet Office in 1976 and now a team of linguists and lawyers form the Division for Legal and Linguistic Draft Revision at the Ministry of Justice. The Division review and comment on all government Bills and its approval is needed before they can be printed. The Division also produce guidelines on clear writing, provide training to legal drafters and work with law commissions appointed to redraft legislation.

On joining the European Union the Swedes were disappointed to discover how difficult it was for readers to digest the Swedish translations of directives and regulations. The Swedish government swiftly appointed linguistic experts to advise the Commission on how to simplify European laws, or at least the Swedish versions of them. Sweden wishes to instil a new drafting culture within the EU and, in particular, considers that the old tradition of writing for experts rather than for the citizens of the EU must be changed.

European Union

The European Council of Ministers' resolution of 8 June 1993 on the quality of drafting of Community legislation⁴⁵ states that the general objective of making Community legislation more accessible should be pursued by making systematic use of consolidation and also by implementing certain guidelines. The criteria against which Council texts should be checked as they are drafted are that—

1. the wording of the act should be clear, simple, concise and unambiguous; unnecessary abbreviations, 'Community jargon' and excessively long sentences should be avoided;

⁴⁵ OJ C 166/01, 17.6.1993

2. imprecise references to other texts should be avoided as should too many cross-references which make the text difficult to understand;
3. the various provisions of the acts should be consistent with each other; the same term should be used throughout to express a given concept;
4. the rights and obligations of those to whom the act is to apply should be clearly defined;
5. the act should be laid out according to the standard structure (chapters, sections, articles, paragraphs);
6. the preamble should justify the enacting provisions in simple terms;
7. provisions without legislative character should be avoided (wishes, political statements);
8. inconsistency with existing legislation should be avoided as should pointless repetition of existing provisions. Any amendment, extension or repeal of an act should be clearly set out;
9. an act amending an earlier act should not contain autonomous substantive provisions but only provisions to be directly incorporated into the act to be amended;
10. the date of entry into force of the act and any transitional provisions which might be necessary should be clearly stated.

The interinstitutional agreement on common guidelines for the quality of drafting of Community legislation⁴⁶ builds on these drafting guidelines. It

⁴⁶ (OJ C. 73/01, 17.3.1999)

adopts general principles covering both the drafting techniques to be used within Community legislation and the structure of Community acts. Many of the principles coincide with those of the plain language movement. The first three state that—

- Community legislative acts shall be drafted clearly, simply and precisely,
- the drafting of Community acts shall be appropriate to the type of act concerned, and
- the drafting of acts shall take account of the persons to whom they are intended to apply, with a view to enabling them to identify their rights and obligations unambiguously, and of the persons responsible for putting the acts into effect.

Further support is given to the Council's drafting guidelines by the practical guide for persons involved in the drafting of legislation within the European institutions⁴⁷.

Despite these measures many consider that abstract and baffling provisions continue to plague European Community legislation. The impact of multilingualism on drafting quality should not be discounted but the proliferation of Euro-jargon does not assist the cause. The Swedish presidency in 2001 reignited the drive for use of plain language in European law and in 2002 the European Commission presented an Action Plan for "simplifying and improving the regulatory environment"⁴⁸. It stresses the importance of transposing Community legislation more effectively and proposes a programme to simplify and update the existing body of European law.

⁴⁷ issued by the Legal Services of the European Parliament, of the Council and of the Commission, 16.3.2000

⁴⁸ issued by the Commission, 5.6.2002

CHAPTER 4

PLAIN LANGUAGE TECHNIQUES

This chapter sets out numerous techniques currently associated with plain language drafting. Legislative drafters adopt many different techniques and approaches in searching for the plainest possible approach. There are few techniques which all drafters agree to be of benefit in every circumstance. Some are almost universally approved, some are used occasionally and others have been considered but mostly rejected as incompatible with the drafting of legislation. There is agreement in one respect – applying plain language techniques is not intended to change the substance or accuracy of text. It just makes it easier to read and understand.

Most of the world's legislative drafting offices encourage the use of plain language and support the use of many of the techniques set out in this chapter. A few of those offices have produced drafting manuals aimed at harmonising the way they draft legislation but opinion on whether drafting manuals are useful is sharply divided. Some drafting offices take the view that manuals can restrict a drafter from attempting experimental drafting techniques for fear of being accused of diverging from best practice. It is arguable that it is such barriers to innovation that have given the law a reputation for being unable to adapt to the times.

Plain language is only one aspect of drafting – no manual can ever predict all of the scenarios which drafters will face. Manuals which attempt to be comprehensive can edge towards being unwieldy. Some drafting manuals are more prescriptive than others but, although lists of techniques can resemble a rulebook, it is generally accepted that they should never be viewed as more than an indication of good practice.

Drafting legislation will always be an art rather than a science. Each proposed law requires to be considered individually and according to specific circumstances. It is ultimately for the individual drafter to determine the words, grammar and style to be used in each circumstance. There may be strong reasons to depart from rules of thumb in particular cases: justification

for doing so may stem from political priorities or there may simply be a better way of achieving a clear and effective result. Most drafters agree that, manual or no manual, the only edict which a drafter should ever be true to is that nothing should hinder the drafter's flexibility in deciding how best to implement a legislative goal clearly and effectively.

Some techniques which are peculiar to legislation (textual amendment, restatement, consolidation and codification) are commented on in chapter 2 and are not elaborated on here.

VOCABULARY, GRAMMAR AND STYLE

General

Choose words that are plain and commonly understood.

Technical terms and jargon understood by particular groups only should be avoided where possible; or at the very least explained in ordinary language.

Short words are usually better than lengthier alternatives – but a clear long word will always be better than an obscure short one. The substitution of one short word for a longer one may not improve readability significantly but seeking to use shorter words wherever possible is likely to produce a simpler overall style.

Good grammar is an essential element of plain language. There are however occasions where the breaking of certain strict grammatical rules can improve the rhythm and meaning of text. There may for example be cases where a sentence flows better if it starts with “And”, “But”, “Because” or “So”. And there are probably limits at which drafters can split an infinitive to achieve a more naturally flowing proposition.

Archaic words

Archaic words should be replaced with modern alternatives. Some words are more outdated than others so a degree of judgment is needed, but words

considered archaic by the Oxford English Dictionary should not be used unless exceptional circumstances mean an alternative will not suffice.

Legal words generally considered to have served their time include “aforesaid”, “forthwith”, “foregoing”, “hereinafter”, “notwithstanding”, “said”, “therein” and “whatsoever”.

Descriptions (particularly interpretative labels of groups of people) can come to be considered stigmatising, offensive or politically incorrect over time and, if so, should not be repeated in subsequent legislation on the topic unless absolutely necessary.

Use English

Latin words and phrases are to be shunned. Where possible use an English translation for established Latin maxims (e.g. use “of its own accord” rather than “*ex proprio motu*”). This practice should be followed even if the translation increases the length of the provision (e.g. “by reason only of holding the office” is preferable to “*ex officio*”). Latin which has become English (e.g. “vice versa”, “per cent”) may be used.

Neologisms

New words should be avoided. It is not however unknown for legislation to be the vehicle by which new words enter the common vernacular.

Initialisms and acronyms

Initialisms and acronyms, used sparingly, can be helpful to the reader; especially when used for proper names (e.g. UN, UK, GCHQ, SQA, SNH).

They nearly always need the support of a definition immediately after the first occurrence of the whole name or phrase which they represent.

Consider whether an alternative shorthand reference would better communicate meaning to the reader - e.g. would “the Commission” be clearer shorthand than “the DRC” for the Disability Rights Commission?

Symbols and abbreviations

Common symbols (such as “£”, “%”) shorten text and can make it easier to read.

As can easily understandable abbreviations (such as “para.”, “no.”, “vol.”,). Potential readership may even justify breaking the “no Latin” dictat in the case of some instantly recognisable abbreviations with Latin masters (such as “e.g.”, “i.e.”, “etc.” or “a.m./p.m.”).

Clichés etc.

Legislation is not the place for clichés, puns or metaphors.

Voice

The active voice is nearly always preferable to the passive (e.g. “a director must sign the document” reads better than “the document must be signed by a director”).

There are circumstances where writing in the passive may be preferable – two obvious examples are the avoiding of gender specific reflexive pronouns (e.g. “where the director is satisfied that ...” is a gender neutral alternative for “where the director satisfies herself that ...”) and the placing of strings of nouns after the verb in a sentence (e.g. “the document must be signed by a director, the company secretary, a manager or any other authorised employee”).

Adopt verbal style

Where an idea can be expressed with either a verb or a related noun the verbal style is usually both shorter and easier to follow (e.g. “a person may apply to” rather than “a person may make an application to”).

Tense

The present tense should be used wherever possible. The law should speak at the moment it is being construed.

Person

Some think that using the second person produces clearer law. It certainly helps drafting in an active voice but the readers of legislation include persons not affected directly by it (e.g. judges, legal advisers, officials etc.) to whom references to “you” would be misdirected. Drafting in the third person therefore receives near unanimous support although there may occasionally be circumstances in which it may be advantageous to draft in the second person.

Singular rather than plural

It is usually better to draft in the singular, not least because drafting in the plural is more likely to result in ambiguity. Reliance can often be placed on interpretative rules which provide that the singular includes the plural and vice versa.

Possessives

The shortest form of possessive will generally appear and read best (e.g. use “the person’s” rather than “of the person” or “belonging to the person”).

Negatives

Positive statements tend to be more intelligible than negative ones. Avoiding the negative is not always straightforward given the propensity of legislation to set out restrictions and prohibitions. Use of two or more negatives in a sentence should trigger consideration of an alternative drafting approach.

Synonyms

The common legal practice of using synonyms (e.g. “null and void”, “terms and conditions”) should be avoided where a generic alternative exists. One word should usually suffice.

Care should be taken when using words with overlapping meanings if one presupposes the other (e.g. due and payable). Series of related verbs (e.g. “impede, hinder or block”) deserve particular attention as the lengthier the list

the greater the implication that another related word (e.g. “obstruct”) is excluded.

Duplicated nouns

The practice of repeating nouns in order to link directly with wording elsewhere can be baffling at first glance and is best avoided (e.g. “a person to whom section 1 applies” is simpler than “a person who is a person to whom section 1 applies”).

Shorthand references can be used to refer to an entity described earlier in a provision by two or more words (e.g. “the authority” for subsequent references to “the local authority”).

Be aware that “such” is not always considered to be an ideal demonstrative pronoun (e.g. “those persons” and “that body” are often preferred to “such persons” and “such body”).

Duplicated verbs

Where a provision has singular and plural subjects there is some support for making the verb agree with the subject which is closer to the verb (e.g. “where the body or bodies *have* applied”).

Numbers

The numbers “one” and, usually, “two” are nearly always expressed as words. When to convert other cardinal numerals into figures is personal style but it is becoming increasingly common to start as early as 3 or 4 (using Arabic numbers in preference to Roman).

Ordinal numbers have traditionally been expressed in words (perhaps because figurative expressions are considered to be an abbreviation) but there is no reason to avoid figures (1st, 2nd, 3rd, etc.).

Formality

The use of excessively formalised words is not often helpful (e.g. “send by fax or e-mail” is simpler than “transmit by facsimile or electronic communication”).

Shall, must, is to, will

Debate rages over use of “shall” or “must” when imposing duties. Preference for “must” is gaining momentum: many consider using “shall” to indicate the imperative mood to be more ambiguous as it is more commonly understood as a way of making a statement about the future than as a means of imposing an obligation.

Other options may be available if there is disagreement on preferred style (e.g. “it is for”, “is to” or “are not to”).

Declarations and applications

The most criticised usage of “shall” is when it is used for declaratory or descriptive purposes (e.g. “shall be guilty of”, “shall apply”).

Declarative use can however sometimes find favour because of the resonance it can add (e.g. “there shall be a Scottish Parliament”).

Conjunctions

Where provisions are divided into numerous paragraphs a reader may take some time to reach the conjunctive which follows the penultimate paragraph. Consider using techniques such as “in any of the following” or “in each of the following” to introduce lengthy disjoined or conjoined propositions.

STRUCTURE

Brevity

The shortest sentence which conveys the desired meaning will often be the most transparent. But there may be occasions where a longer sentence, or even two or more sentences, will give greater clarity.

Consider dividing any lengthy sections (although length of subsections is also relevant when considering a split). Making use of lists can be a good way of splitting information up.

Large passages of unbroken text can be particularly difficult to read. Where a single passage extends beyond 4 lines careful consideration should be given to whether replacing punctuation with tabulation will make the text clearer. If descent into over-tabulation compromises clarity, consider whether the proposition can be divided into more than one sentence.

Lengthy qualifying clauses should be dealt with by way of separate provision where possible.

Consideration may also be given to using more than one sentence in a subsection (but beware of causing problems with cross-references).

White space

The “white space” principle is sometimes used to indicate the readability of text. Increasing the amount of white space on a page will usually correspond with an increase in the reader’s ability to absorb the text set out on it. There are limits to the principle: unnatural breaks in text can jeopardise rhythm.

Sentence structure

Provisions tend to be more understandable if a subject-verb-object structure is adopted with the subject introduced as early as possible, preferably at the start of the provision.

Try not to split subject and verb with a qualifying clause. Similarly, try to keep the auxiliary and the main verb together.

Titles and headings

Part, schedule and particularly section titles can aid understanding.

Titles, including short titles, should be brief (to ease reference) but this should not prevent including words which are informative or ease indexing (e.g. the “Education (Teachers’ Salaries) Bill” may be preferable to the “Education Bill” or the “Teachers’ Salaries Bill”).

Drafting experiments which frame section titles as questions (sometimes coupled with drafting in second person) have been undertaken in rewrites of procedural legislation which the public at large are likely to use (e.g. “How can a decision be appealed? – (1) You can appeal a decision by ...”). But the technique has not caught on.

Italic headings can be used to divide parts and schedules into more manageable and identifiable chunks. Consider using italic headings within lengthy sections or schedule paragraphs (perhaps as an alternative to splitting sections).

Punctuation

Take care with punctuation but try not to place too much reliance on it. Consider restructuring a provision if a change in punctuation can alter its meaning.

IMPROVING READABILITY

Definitions

Define terms sparingly. Try to use words in their ordinary sense so that they do not need to be defined.

Do not define a term to have a meaning which is broader or narrower than its ordinary meaning without considering whether an alternative term can be used. Giving words unusual meanings is likely to create misunderstanding.

Definitions may be needed to avoid ambiguity where a term has different meanings (either by implication from use in other legislation or elsewhere). They can also be used to prevent excessive repetition of a phrase.

Any Bill with more than a few defined terms will benefit from a general interpretation section containing a comprehensive list of all terms defined in the Bill. Consider also whether it may be useful to set out the meaning of terms defined elsewhere (e.g. in interpretation legislation) even if statutory interpretation make it strictly unnecessary.

An alphabetical index of terms can help navigation of Bills which use many defined terms.

It can be helpful to define a term near to where it is first used (with any general interpretation provision referring back to the principal definition).

Footnotes could be used to set out the meaning of terms on a page. Bold or underlined text can indicate when a term is defined for the purposes of the legislation in which it appears.

Examples

Examples can be used to illustrate the meaning of provisions. Text is often understood more easily when a context is given. But be aware of interpretative rules which restrict generality by reference to examples (*ejusdem generis*) and of the more general danger of “false accuracy” (see chapter 2).

Cross references

Legislation can often be expressed only by way of a series of linked propositions. Careful consideration should be given to whether links between provisions are necessary and, if so, how they are to be established.

Strict restraint should be exercised with cross-references. Consider restructuring legislation with excessive cross-references. Re-ordering propositions can often reduce the need to cross-refer.

There is no need to include words such as “of this Act / Part / section” in cross-references to the same Act, Part or section unless clarity will be

compromised by other references in the provision. Similarly, there is no need to state whether a provision being referred to is above or below the cross-reference.

Subsections within a section (and sections that follow one another) should be read as a whole so there is usually no need to repeat material from or to refer to qualifying clauses in earlier provisions.

If a link between provisions is required, consider whether words such as “but”, “despite”, “however”, “in addition”, “instead”, “concerned” or “in question” can be used instead of the more traditional legislative terminology such as “subject to”, “without prejudice to”, “notwithstanding” or “referred to in”.

Global cross-references (e.g. “subject to any other enactment”, “subject to other provisions of this Act”, “subject to section 2”) are particularly burdensome on readers, especially if they do not have the relevant provisions to hand. Legislation should where possible specify which provisions are relevant.

Signposts

The purpose of a signpost is to be helpful to the reader by indicating a need to look elsewhere in order to understand a provision (e.g. “see section 1”). Signposts are not, unlike cross-references, intended to have independent legal effect. They can be placed in parenthesis, or in margins or footnotes, and are therefore less damaging to the flow of provisions than cross-references. Most readers welcome the use of signposts so long as they are used sparingly enough to avoid distraction.

The intelligibility of textual amendments to existing enactments can be improved by inserting parenthetical descriptions of the provisions being amended to give the reader an indication of what the amendment does (or at least the subject-matter which is being dealt with).

Artificial concepts

It is best to try to steer clear of created concepts which force readers to look elsewhere for meaning (e.g. “the relevant person”, “the appropriate date”).

Labels can however shorten provisions significantly: economy is a benefit which can outweigh other disadvantages. Distinctive labels which help the reader to imply their meaning can be a good compromise (e.g. “the applicant”, “the objector”)

Formulas, diagrams, footnotes etc.

Setting out provisions applying or using mathematical concepts as algebraic formula can often make them easier to follow. Diagrams can also be used to make complicated procedural provisions clearer.

Footnotes can be used to prevent drafting needed for exceptional cases from cluttering provisions which will not usually affect those cases.

RELATED TOPIC

Purpose statements

The purpose or object of legislation can be set out within it, either as a preamble or as a provision stating its general purposes. There is substantial disagreement as to whether purpose statements are desirable. Some consider them to be a good way of informing readers of what the legislation intends to achieve and to illustrate how provisions hang together. Others consider them dangerous because of the risk of causing misinterpretation of the more detailed provisions they describe.

Purpose statements tend, by their nature, to be broadly worded and ambiguous. While they may assist resolution of uncertainties they can also be the source of disputes. Trying to say the same things in different words is bound to create inconsistency, particularly if one version is a compressed summary of the other.

The inclusion of purpose statements can also divert attention from the substance of a Bill during its parliamentary passage. The shape of purpose statements is likely to be the focus of much politically motivated debate and this increases the possibility of divergence between the purpose statement and the specific provisions of the legislation. The legislator's attraction to purpose statements can be diluted when it becomes apparent that they often cede power from parliament to the judiciary.

The parliamentary and political processes will usually provide the opportunity to explain or justify the policy intention behind a Bill: either in debate or in documentation accompanying the Bill. Those responsible for preparing such related material should however bear in mind the increased willingness of the courts to consider it when interpreting Acts.

Application of other provisions

One of the most frequently criticised types of legislative provision is that which applies other provisions, often with modifications (e.g. "the Compensation Act applies for the purposes of calculating compensation payable under this section").

Applying provisions are unintelligible to all but the most informed reader and it may be worth sacrificing certain other tenets of plain language (e.g. brevity) for the sake of making self evident provision.

But the benefit to be gained from applying other provisions will sometimes justify the technique. There is certainty in attracting tried and tested provisions and doing so will avoid the need for repetition of provisions already enacted. There can also be political and practical advantages in not opening up established procedures to fresh legislative scrutiny.

Gender neutrality

Repeating the subject to avoid references to gender can lead to inelegant provisions which offend certain plain language principles. Using both genders can also be unwieldy, and the effect is exacerbated when a non-gender

specific pronoun is also needed to cover the eventuality of the person referred to being a body rather than an individual (i.e. “he, she or it”). But those who otherwise strive to use plain language usually also consider gender neutral drafting to be desirable, and both issues are connected by association with modernising agendas.

BIBLIOGRAPHY

The sheer volume of works commenting on plain language and legislation can be overwhelming. The Journal of the Statute Law Society, the *Statute Law Review*, has recently provided a particularly rich source of articles for those with an interest in plain language drafting. The amount of material on the subject perhaps indicates that it may be more realistic to aim for continuous improvement in the style of legislation than to embark on a quest for the perfect drafting style, not least because of the need for legislative drafters to adapt and innovate as times change and language evolves.

This booklet adds to the mountain of information which is available. The following sources should assist anyone searching for a greater understanding of the relationship between plain language and legislation.

BOOKS

Michèle M Asprey, *Plain Language for Lawyers*, 3rd edition, The Federation Press, 2003

Peter Butt & Richard Castle, *Modern Legal Drafting: A Guide to Using Clearer Language*, Cambridge University Press, 2001

Craies on Legislation, 8th edition, ed. Daniel Greenberg, Sweet & Maxwell, 2004, Chapter 8

Martin Cutts, *Lucid Law*, 2nd edition, Plain Language Commission, 2000

Sir Ernest Gowers, *The Complete Plain Words*, Penguin, 1987

REPORTS & CONSULTATIONS

Report by the Committee appointed by the Lord President of the Council, chaired by Rt. Hon Sir (later Lord) David Renton (The Renton Committee), *The Preparation of Legislation*, Cmnd. 6033, HMSO, London, 1975

Inland Revenue, *Tax Law Rewrite: The Way Forward*, Consultative Document, London, 1996

Report of the Hansard Society Commission on the Legislative Process chaired the Lord Rippon of Hexham, *Making the Law*, Hansard Society, London, 1992

The Law Reform Commission (Ireland), *Report on Statutory Drafting and Interpretation: Plain Language and the Law*, LRC 61 – 2000, Dublin, 2000 (and preceding consultation paper, LRC – CP14 , Dublin, 1999)

Law Reform Commission of Victoria, *Plain English and the Law*, Report No. 9, Melbourne, 1987

Law Reform Commission of Victoria, *Access to the Law: The Structure and Format of Legislation*, Report No. 33, Melbourne, 1990

ARTICLES IN STATUTE LAW REVIEW

Francis Bennion, *If It's Not Broke Don't Fix It: A Review of the New Zealand Law Commission's Proposals on the Format of Legislation*, Vol. 15, No.3, 1994

Duncan Berry, *Legislative Drafting: Could our Statutes be Simpler?*, Vol. 8, No. 2, 1987

Mr Justice Brooke, *The Role of the Law Commission in Simplifying Statute Law*, Vol. 16, No. 1, 1995

Peter Butt, *Modern Legal Drafting*, Vol. 23, No. 1, 2002

Martin Cutts, *Plain English in the law*, Vol. 17, No. 1, 1996

Edward Donelan, *Recent developments in statute law revision in Ireland*, Vol. 22, No. 1, 2001

Editorial, *Clarity of the Law Again*, Vol. 14, No. 1, 1993

Editorial, *Lucid law II*, Vol. 22, No. 1, 2001

George Engle, "Bills are made to pass as razors are made to sell": practical constraints in the preparation of legislation, Vol. 4, No. 1, 1983

R. F. V. Heuston, *Lord Chancellors and Statute Law Reform*, Vol. 9, No. 3, 1988

The Rt Hon, The Lord Hope of Craighead, *What a Second Chamber Can Do for Legislative Scrutiny*, Vol. 25, No. 1, 2004

Brian Hunt, *Plain Language in Legislative Drafting: An Achievable Objective or a Laudable Ideal?*, Vol. 24, No. 1, 2003

Brian Hunt, *Plain Language in Legislative Drafting: Is it Really the Answer?*, Vol. 23, No. 1, 2002

The Rt Hon. Sir Patrick Mayhew, *Can Legislation Ever be Simple, Clear and Certain?*, Vol. 11, No. 1, 1990

John McCluskie, *New Approaches to UK Legislative Drafting: The View from Scotland*, Vol. 25, No. 2, 2004

Timothy Millett, *The House of Lords as a Re-Writing Chamber*, Vol. 9, No. 2, 1988

The Hon. Mr Justice Nazareth, *Legislative Drafting: Could our Statutes be Simpler?*, Vol. 8, No. 2, 1987

Sheriff C. G. B. Nicholson, *Codification of Scots Law: A Way Ahead, or a Blind Alley?*, Vol. 8, No. 3, 1997

The Rt Hon. Lord Renton, *Current Drafting Practices and Problems in the United Kingdom*, Vol. 11, No. 1, 1990

Alec Samuels, *Consolidation: A Plea*, Vol. 26, No. 1, 2005

Alec Samuels, *Statements of purpose and principle in British statutes*, Vol. 19, No. 1, 1998

Jack Stark, *Should the Main Goal of Statutory Drafting Be Accuracy or Clarity?*, Vol. 15, No. 3, 1994

Ruth Sullivan, *Some Implications of Plain Language Drafting*, Vol. 22, No. 3, 2001

Euan Sutherland, *Clearer Drafting and the Timeshare Act 1992: A Response from Parliamentary Counsel to Mr Cutts*, Vol. 14, No. 3, 1993

Edwin Tanner, *Clear, Simple and Precise Legislative Drafting: Australian Guidelines Explicated Using an EC Directive*, Vol. 25, No. 3, 2004

Richard Thomas, *Plain English and the Law*, Vol. 6, No. 3, 1985

Ian M. L. Turnbull, *Clear Legislative Drafting: New Approaches in Australia*, Vol. 11, No. 3, 1990

Ian M. L. Turnbull, *Legislative drafting in plain language and statements of general principle*, Vol. 18, No. 1, 1997

Ian M. L. Turnbull, *Problems of Legislative Drafting*, Vol. 7, No. 2, 1986

OTHER ARTICLES

Justice R I Barrett, *A judicial response to plain language*, Clarity, No. 49, May 2003

Duncan Berry, *Audience Analysis in the Legislative Drafting Process*, The Loophole, Commonwealth Association of Legislative Counsel, June 2000

Martin Cutts, *Unspeakable Acts? Clarifying the Language and Typography of an Act of Parliament*, Words at Work, Stockport, 1993

Barbro Ehrenberg-Sundin, *Plain language in Sweden, the results after 30 years*, Speech given at plain language conference, Lenguaje Ciudadano, Mexico, 2004, available at www.plainlanguage.gov

David C. Elliott, *Constitutions in a Modern Setting – The Language of the Practice of Law*, a paper presented at Lawasia Conference, Hong Kong, September 1989, available at www.davidelliott.ca

Malcolm Gammie, *Legislation for Business: Is it Fit For Public Consumption?*, Fiscal Studies, vol. 15, no. 3, 1994

Nick Horn, *A Dainty Dish to Set before the King: Plain Language and Legislation*, presented to the Fourth Biennial Conference of the PLAIN Language Association International, September 2002 (available at www.plainlanguagenetwork.org)

Nick Horn, *Legislative Drafting in Australia, New Zealand and Ontario: Note on an informal survey*, The Loophole, Commonwealth Association of Legislative Counsel, March 2005

David Hull, *Drafters' Devils*, The Loophole, Commonwealth Association of Legislative Counsel, June 2000

John Mark Keyes, *The democratic challenge to drafting readable laws*, Clarity, No. 51, May 2004

Joseph Kimble, *Answering the Critics of Plain Language*, The Scribes Journal of Legal Writing, 1994-95 (available at www.plainlanguagenetwork.org)

Joseph Kimble, *The Great Myth That Plain Language Is Not Precise*, The Scribes Journal of Legal Writing, 1998-2000 (available at www.plainlanguagenetwork.org)

Hilary Penfold, *When words aren't enough: Graphics and other innovations in legislative drafting*, Paper for Language and the Law Conference, university of Texas, 2001, available at www.opc.gov.au

Ruth Sullivan, *The Promise of Plain Language Drafting*, 47 McGill Law Journal 97, 2001

Peter Tiersma, *The Plain English Movement*, available at www.languageandlaw.org

MANUALS AND GUIDES

Hawaii Legislative Drafting Manual, 9th edition, 1996, available at www.hawaii.gov/lrb

Interinstitutional agreement on common guidelines for the quality of drafting of Community legislation (OJ C. 73/01, 17.3.1999)

Joint Practical Guide of the European Parliament, The Council and the Commission for persons involved in the drafting of legislation within the Community institutions, 2003

Maine Legislative Drafting Manual, 1st edition, 1990, revised through 2004, available at www.maine.gov

Ministry of Justice (Sweden), *The Swedish Government promotes clear drafting*, Stockholm, 2004

The National Conference of Commissioners on Uniform State Laws, *Drafting Rules for Uniform or Model Acts*, Chicago, 2003

Office of the Parliamentary Counsel (Australia), Plain English Manual, available at www.opc.gov.au

WEBSITES

Clarity: www.clarity-international.net

The National Conference of Commissioners on Uniform State Laws, www.nccusl.org

Office of the Parliamentary Counsel (Australia): www.opc.gov.au

Parliamentary Counsel Office (New Zealand): www.pco.parliament.govt.nz

Parliamentary Counsel Office (UK) : www.parliamentary-counsel.gov.uk

Plain English Campaign: www.plainenglish.co.uk

Plain Language Association International: www.plainlanguagenetwork.org

Plain Language Commission: www.clearest.co.uk

Statute Law Review: <http://slr.oupjournals.org/>

US Government: www.plainlanguage.gov