Legislative Drafting

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Chapter 2

Syntax

INTRODUCTION

Sense is communicated not only by the dictionary meaning of words but also by their arrangement in sentence patterns. A sentence is more than just a series of words. It is a structure or pattern in which the component words are grouped in a particular way. The nature of the grouping contributes to and in most cases controls the sense conveyed.

Palmer describes a sentence as 'the largest unit to which we can assign a grammatical structure'.[1] It is a sentence that is recognised as a complete thought or statement able to stand independently in speech or writing.

Syntax is the study of sentence patterns, the study of words working in association with one another. It deals with the way words and related groups of words are customarily arranged to form larger constructions such as phrases and clauses to make sentences. Thus, the concern of syntax runs from the word to the sentence. Syntax is defined by the *Shorter Oxford English Dictionary* (1993) as 'the order of words in which they convey meaning collectively by their connection and relation'.

The word 'relation' in this definition is especially significant because syntax is not only concerned with word order but also with the relationship between the groupings of words in the sentence. The construction of sentences is essentially concerned with relative values and functions. The sentence that is right, T. S. Eliot wrote, is one 'where every word is at home, taking its place to support the others'.[2]

Traditional grammar

Grammar—A Nasty Experience. This is the heading which begins a grammar book published some years ago, and undoubtedly there are many drafters whose experience of grammar in their schooldays was equally nasty.[3] English grammar was to most of the writer's generation dull and confusing but its validity was accepted without question. As Cattell says, 'The grammar book had something of the awesome infallibility of the Bible.' One may not have known what useful purpose it served, but one knew it had to be treated with respect.

1 F. R. Palmer, *Grammar* (Pelican, 2nd edn) p68.
2 T. S. Eliot, *Little Gidding* (Faber & Faber).
3 N. R. Cattell, *The Design of English*.

Traditional grammar was, in fact, not infallible. On the contrary, it was to some extent misconceived. The fundamental error was that grammar was seen as a set of rules that had to be obeyed. There was no understanding that correctness is no more than what the speech community accepts as correct at the time. In fact, most of the rules had foundations of straw such as the assumption that the rules applicable to Latin grammar were of universal application and were suitable for application to the English language.[4] There was a tendency also to endeavour to apply the rules of logic to language and this was a mistake. Teaching centred around the traditional eight parts of speech and too much attention was paid to form while inadequate attention was paid to function.

Classification of words according to parts of speech failed to take proper account of the capacity of many English words of the same form to perform more than one function. Emphasis on part of speech classification tended to overshadow any constructive study of the arrangement of groupings of words in structural patterns to form sentences.

In more recent times, grammarians have seen that the English language has its own unique grammar and have turned from prescribing what is correct to describing how sentences work. Prescription is out, description is in. During the same period, the teaching of grammar in schools has declined in many places with dubious results.

For nearly 30 years, a revolution surrounding grammar has raged and scholars remain locked in violent disputation. The development of transformational generative grammar on the basis of Chomsky's work has captured the minds of many scholars, but Burchfield has pointed out that its weakness lies in its failure to produce a grammar that can be 'consulted and cherished as an aid to the disentangling and ascertainment of the language that lies about us'.[5]

Notable landmarks along the way to the general acceptance of descriptive grammars were the publication in 1972 of a comprehensive descriptive grammar by Randolph Quirk and three colleagues and in 1985 *A Comprehensive Grammar of the English Language* by Quirk, Greenbaum, Leech and Svartvik.[6]

The significance of syntax

If grammar is now essentially descriptive rather than prescriptive, does the drafter need to get involved? The answer is certainly yes.

Legislation is inevitably a formal or standard use of language and what is acceptable and what is not acceptable will be decided in that context. Those parts of a society which are likely to draft, enact, read, administer or judicially interpret legislation will be the real arbiters of what is a suitable form of language in the relevant context. Judgments will still be made and will be based largely on clarity and effectiveness. The drafter must draft according to the syntactical rules and practices conventionally accepted for formal communications. An understanding of those conventions requires an understanding of sentence analysis.

An ability to understand and analyse the elements of a sentence will facilitate the birth of well-formed sentences and the gift of succour to ailing ones. To achieve that, the drafter must be able to recognise:

4 See *Cattell*, pp2 et seq; *Palmer*, pp15–27. For interesting historical accounts of English grammar, see *Burchfield*, supra, and David Crystal, *The Cambridge Encyclopedia of the English Language* (Cambridge, 1995) pp190–197.
5 *Burchfield*, supra, p154.
6 Published by Longman.

(a) the function of the elements, whether words, phrases or clauses, that together compose a whole sentence; and
(b) the classes of words and groups of words (classified according to function not form) that make up those elements.

It is the misfortune of many legislative sentences to be obliged to communicate complicated meanings. In such cases the sentence patterns are unavoidably complex and the careful arrangement of the groupings of words in the sentence pattern is absolutely vital. The inappropriate placement of words or grouping of words is a major cause of uncertainty of intended meaning. For the drafter, one of the prime purposes of the study of syntax is to detect, analyse and remove ambiguity.

No cut and dried rules may be prescribed for the avoidance of syntactic ambiguity. The most this chapter can hope to do is to shed a little light on sentence structure, to emphasise that sentence structure is concerned with the relationship of the constituent groupings of words in the sentence and to indicate a few syntactic ambiguities and other errors to which the drafter is most prone.

Of course, compliance with syntactical conventions is just a beginning. A sentence may be well-formed and unobjectionable grammatically but may, nevertheless, be clumsy, inelegant, too complex, too long, and too difficult to understand.

THE LEGISLATIVE SENTENCE[7]

Subject-predicate relationship

A legislative sentence is structurally no different from a sentence in any other domain. The framing of legislative sentences offers the same possibilities for communication and is subject to the same limitations as other sentences. George Coode asserted more than a century ago that legislation should resort to 'the common popular structure of plain English'.[8]

The core of all sentence patterns of the kind likely to be used by the legislative drafter is the subject-predicate relationship. Two descriptive terms describe the subject-predicate relationship: the topic and the comment upon it.[9] G. H. Vallins has referred to the subject as the text and the predicate as the sermon.[10] Sentence patterns that do not have a subject and a predicate are common, for example single words such as 'Rubbish!' or 'Wow!' spoken as a response, or 'Who?' asking a question. Sentence patterns of this kind need not concern the drafter, however.

The importance of establishing the two main elements of the sentence, the subject and the predicate, is very great. Simeon Potter has written:

> If I utter a defective sentence it is probably because, for some reason or other, I have failed to keep these two things clear in mind. In order to put it right, I have only to ask myself the simple questions: What am I talking about? What have I to say about it? Or, in other words: What is my subject? What do I predicate of that subject?[11]

7 See Simeon Potter, *Our Language*, Chapter VIII; Simeon Potter, *Language in the Modern World*, Chapter VI; G. H. Vallins, *Good English*, Chapter II; Sir Ernest Gowers, *The Complete Plain Words* (3rd edn by S. Greenbaum and J. Whitcut) Chapters 9–13; Harry Fieldhouse, *Everyman's Good English Guide* (Dent, 1982) p154; C.K. Cook, *Line by Line* (Houghton Mifflin,1985) ppxiii–xx, 139–159.
8 George Coode, *On Legislative Expression* reprinted in E. A. Driedger, *The Composition of Legislation* (2nd edn) pp317 et seq.
9 See Barbara M. H. Strang, *Modern English Structure*, p70.
10 G. H. Vallins, *Good English* (Pan) p13.

The subject may not always be readily apparent in a complex sentence, particularly when one or more modifying elements precedes it. In such a case, it is necessary to first find the verb and any phrase that contains the verb. The predicate is associated with the verb and the phrase that contains it. What remains is the subject. In cases where the verb is an active form, the subject may be identified by questioning 'what' or 'who' in front of the verb. The answer will be the subject. It must be remembered also that a sentence element, whether subject or predicate, may be a single word or a phrase or clause.

More elaborate structures are built upon the foundation of subject and predicate. A sentence may have more than one subject and more than one object or complement but the predicate must always contain a verb. Both the subject and the predicate are subject to modification in many ways. Modifiers are secondary constituents consisting of words, phrases or clauses describing or qualifying other elements of the sentence.[12]

> The major functional unit of speech, the sentence ... is the linguistic expression of a proposition. It combines a subject of discourse with a statement in regard to this subject. Subject and predicate may be combined in a single word, as in Latin dico; each may be expressed independently, as in the English equivalent, I say; each or either may be so qualified as to lead to complex propositions of many sorts. No matter how many of these qualifying elements (words or functional parts of words) are introduced, the sentence does not lose its feeling of unity so long as each and every one of them falls in place as contributory to the definition of either the subject of discourse or the core of the predicate.[13]

Understanding that the basic subject/predicate structure constitutes the core of the sentence is of immeasurable importance; it is the gateway to successful sentence construction. With a continuing awareness of the core, the drafter builds on such modifications to the core as may be required. The importance is just as great in construing legislation. The first task must be to penetrate the structure of the sentence and isolate the core. Having done that, the next task is to determine what modifies what.

Elements of the sentence

Traditional terminology is open to criticism but is sufficient for present purposes. Some readers may find the following brief summary unnecessary and should pass on, but others may find it useful to refresh knowledge acquired years ago.

The **subject** of a sentence is the noun, or word or group of words performing the function of a noun, about which something is stated in the predicate. The subject identifies the thing or quality or person that is the theme or topic of the sentence.[14]

11 Simeon Potter, *Our Language*, p91.
12 See E. A. Driedger, *The Composition of Legislation* (2nd edn) pp4 et seq.
13 Edward Sapir, *Language*, p36 (quoted by Simeon Potter, *Our Language*, p91).
14 The text uses the following abbreviations: S = subject; P = predicate; V = verb; O = Object; C = complement.

S P
Schedule 1 has effect.

S P
The Commissioner may be represented by counsel at the hearing of the application.

The **predicate** of a sentence is a statement about the subject or the subject's action, experience or state of being. A verb is the central necessary element of a predicate and the predicate may contain an object or a complement or more than one object or complement.

S P
This Act *binds the Crown.*

S P
The Commissioner *must keep a register of limited partnerships registered under the Act.*

The **object** of a sentence is a word or group of words that receives the mental or physical action conveyed by the verb and performed by the subject of a transitive verb.

S V O
This Act binds *the Crown.*

A **complement** is a word or a group of words that adds to the meaning or completes the sense of a subject or a verb.

S V C
This Act commences *on 1 January 1996.*

A **phrase** is a group of related words functioning as a sentence element but without either a subject or a predicate or a subject and a predicate.

without delay
in this section
in accordance with the regulations

A **clause** is a group of related words that contains a subject and a verb. A clause may be a sentence but may not be. For example, a subordinate clause is incomplete in itself and must be combined with another clause to form a sentence. A clause is said to be subordinate if it begins with a word indicating that the clause has a subordinate relationship to another clause. A subordinate clause can never stand alone. In the second example below, 'if a suspect so requests' is a subordinate clause.

This Act binds the Crown.
If a suspect so requests, the police officer must provide a cup of tea.

When endeavouring to analyse the elements of a sentence, it is important to look beyond single words for subject, verb, object or complement. A phrase or a clause may serve as such.

S V C
At least half of the members of a health and safety committee must be employees of the mine.

Some knowledge is desirable about the kinds of words that may make up the sentence elements. The main thing to remember is that classification of words depends on function not form for one word may perform different functions and be classified differently according to the context. For example, many nouns also perform an adjectival function; the noun 'town' serves as an adjective in 'town hall', 'murder' in 'murder trial', 'meat' in 'meat loaf' and countless more. Many words (eg 'design', 'report', 'mine') perform the functions of both verbs and nouns.

A **verb** states the action or state of being of the subject.

The tenant *notifies* the landlord that the roof is leaking.
The Mines Safety Act 1959 *is repealed.*
A body corporate *is* a person.

A **noun** indicates persons, places, things, qualities, feelings, and ideas.

magistrate, Perth, machinery, danger, fear, democracy

A **pronoun** functions in the same way as a noun but refers back to a noun without naming it. The noun to which it refers is called its 'antecedent'.

she, they, their, this, everyone, it

Adjectives describe or modify nouns or pronouns. A phrase or a clause may also perform an adjectival function.

reasonable grounds for appeal
a suspect *in a police station*
a suspect *who has been arrested*

Adverbs describe or modify verbs, adjectives or other adverbs or groups of words.

A person who *knowingly* or *recklessly* gives false information commits an offence.

The suspect must be given such information as is *reasonably* necessary in the circumstances.

A **preposition** relates the noun or pronoun which it introduces to other words. It is always part of a phrase.

An exercise *of* the power to defer
an entry *in* a record book
except for an appeal made orally

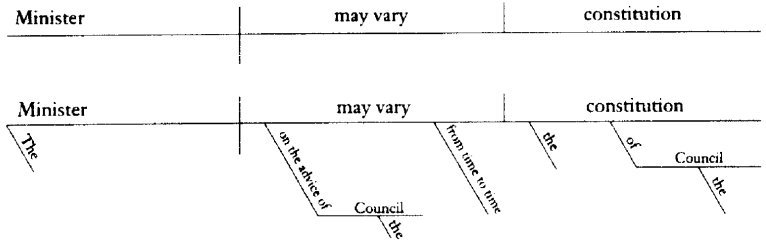
Conjunctions join elements of a sentence, They serve a connective purpose and may be coordinating such as *and, or, but,* or subordinating such as *if, unless, after.*

An inspector *or* a health officer may intervene.
If an arrested person is granted bail, that person must report when required.

Diagram forms

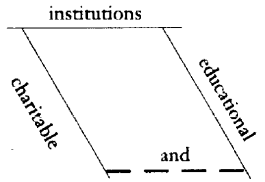
For many people, the use of a visual technique representing the structural patterns and groupings of words in a sentence is of considerable value in clarifying structure and revealing ambiguities. On those occasions when a drafter feels some doubt as to the structure of a sentence or part of a sentence, a little time spent on analysis by diagram will almost certainly assist.

Some people may prefer to develop a personal style of diagramming. The simplest but very basic method is that adopted in the examples below, ie by indicating sentence elements by an abbreviation separated by a vertical line.

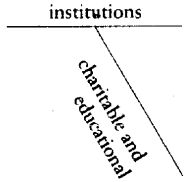


Ambiguity is revealed in attempting to represent a phrase such as 'charitable and educational institutions'.

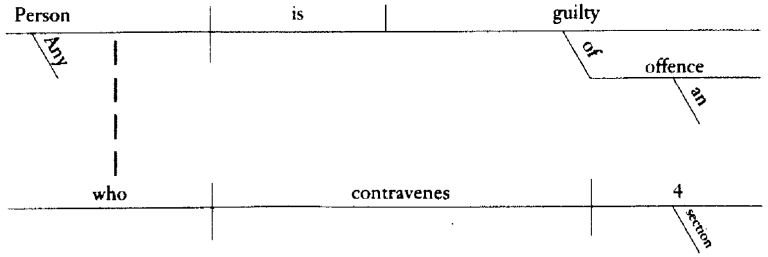
If two classes of institutions are referred to, ie either 'charitable' or 'educational', the form would be



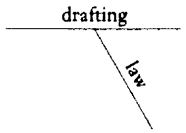
If the institutions are of one class, ie 'charitable and educational', the form would be



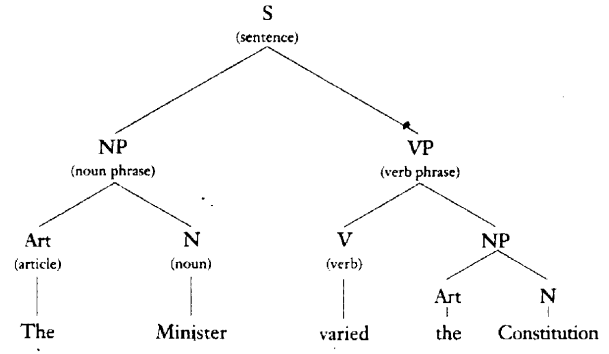
A slightly more complex sentence in diagram form is shown below—



It is important in the use of diagram forms to diagram according to function and not in accordance with traditional part of speech classification. For example, a noun functioning as an adjectival modifier must be shown according to its function as a modifier while a verb form functioning as a substantive must be diagrammed as a substantive. Thus:



Some may prefer to follow the tree-pattern approach to diagrams. For example



Coode's analysis[15]

George Coode's reference to 'the common popular structure of plain English' has been mentioned earlier in this chapter. His pamphlet 'On legislative expression or the language of the written law', which was first printed as part of a report to Parliament in 1843, is a notable landmark in the study of the structure of the legislative sentence.

His aim was to make 'a very few intelligible and simple rules, which any person capable of dividing grammatically a sentence of his native language would be competent to apply'.

Coode's conception of the legislative sentence was declared in this way: The expression of every law essentially consists of, first, the description of the legal Subject; secondly, the enunciation of the legal Action. To these, when the law is not of universal application, are to be added, thirdly, the description of the Case to which the legal action is confined; and, fourthly, the Conditions on performance of which the legal action operates. Coode's terms 'legal subject' and 'legal action' are recognisable as coinciding broadly with the subject-predicate relationship with which we are familiar.

By 'case', Coode referred to the circumstances in which or the occasions when the law was intended to operate. The 'condition' according to Coode was a statement of something that must be done before the law becomes operative.

The essence of Coode's advice was that these four elements in the sentence should be placed in the following order

15 Coode's analysis of the legislative sentence is discussed by E. A. Driedger at pp2–4 of *The Composition of Legislation*. See also E. L. Piesse, *The Elements of Drafting* (8th edn, by J. K. Aitken) pp18 et seq and Robert C. Dick, *Legal Drafting* (2nd edn) pp58 et seq.

1. Case
2. Conditions
3. Legal Subject
4. Legal Action

Here is an abbreviated version of one of his examples

(Case) Where any Quaker refuses to pay any church rates,
(Condition) if any churchwarden complains thereof,
(Subject) one of the next Justices of the Peace,
(Action) may summon such Quaker.

The above rule of practice was intended by Coode to be of application to all legislative sentences, but this went too far. In cases of multiple and complex modification no absolute rules are possible. The arrangement of the sentence elements must depend on the nature of the modification and the meaning.

Multiple and complex modification is a potential source of ambiguity and the sentence must be so constructed in a pattern as to be of unequivocal meaning. Coode's 'case' and 'condition' are not distinguishable in any meaningful way so far as syntax is concerned. Each performs a modifying function and must be arranged in that part of the sentence as will best serve to communicate the intended meaning.

Coode's work remains of value for its care for the structure of the sentence, its attention to the core of the sentence (the subject-verb, or subject-predicate relationship) and finally for Coode's emphasis on the arrangement of the modifying clauses in the best position.

SENTENCE PROBLEMS

Problems with modifiers

A modifier is a word or group of words that makes the meaning of other words more exact by limiting, restricting or describing them. By the process of modification, we can build upon the foundation of the core subject-predicate relationship until the sentence structure is adequate to communicate a complex meaning. The term modifier is a particularly useful one. It serves as a collective label for words and groups of words performing a comparable function.

Nouns, pronouns and other words performing a noun function may be modified adjectivally by single words, phrases and clauses. Verbs and words performing an adjectival or adverbial function also may be modified adverbially by single words, phrases and clauses. The pattern or structure of a sentence must be such that the relationship of the modifiers to the elements they modify is apparent and unambiguous. In other words it must be clear what the modifiers modify and what they do not modify.

An old general rule, which is far from providing a complete answer but does provide a starting point, declares that: 'words or other units that are most closely related should be placed as near to each other as possible, so as to make clear their relationship'.[16]

16 *Gowers*, p91.

A modifier should therefore be arranged as near as possible to the element it modifies so that it logically and naturally connects to that element. This advice seems straightforward enough, but it does not solve the problem that occurs where two or more modifying elements (which may be words, phrases, or clauses or any combination of them) modify the same sentence element and therefore have a similar claim to be near to it. A sentence with too many modifying elements may be beyond repair and may be a candidate for demolition and reconstruction in smaller packages.

A modifier may be said to be misplaced or to 'dangle' when it may be construed as modifying some other element in the sentence in addition to or as an alternative to the element intended to be modified. A modifier is said to be 'squinting' if it can refer both to the sentence element before the modifier and also to the element following it. Ambiguity of these kinds is usually caused by the close proximity to the modifier of more than one sentence element capable of modification. In this situation, the old general rule set out above is found wanting. It is not enough to arrange the modifier and the sentence element which is intended to be modified in close proximity if the modifier is also in close proximity to some other element capable of being intelligibly modified in similar fashion.

The wayward dangling modifier must be tightly secured to the sentence element intended to be modified; preferably tied in a non-slip knot leaving no flapping loose ends that might be attracted to other sentence elements.

Ambiguity arising from a dangling modifier is possible in respect of every kind of modifier. The following groups of examples illustrate the variety of available hazards:

1 ADJECTIVES

Adjectives may only modify nouns or words performing noun functions. So we can first look at the problem without complications with an example in which one adjective may be construed as modifying either one or two nouns.

public hospital or school

Readers tend to read a modifier as modifying the nearest word or word group that the modifier can properly modify and it is clear that 'public' modifies 'hospital'. But does it also modify 'school'? An ambiguity is apparent. If 'school' is not intended to be modified, a change in word order can remove the ambiguity by placing the modifier after the first noun.

school or public hospital

If 'school' is intended to be modified, the ambiguity is best removed by repeating the modifier.

public hospital or public school

A similar ambiguity may be seen in the following phrases:

a registered dentist or medical practitioner
a charitable institution or society
a married woman or man

Chapter 3

Style

STYLE AND THE PURPOSES OF LEGISLATION

The purposes of the two preceding chapters have been to explain the nature of language and to study the arrangement of words into the patterns or structures we call sentences. Words, it has been emphasised, are no more than convenient labels adopted by the convention of society and connected to the objects or things they are intended to signify only through the mind. Language as a medium for communication has been seen to be inexact, and attention has been drawn to the instability and the intrinsic vagueness and ambiguity of words. In Chapter 2, the possibility of ambiguity arising from defective sentence structure has been noted; in particular we have observed problems of ambiguous modification and faulty reference.

An understanding of these matters is basic, and an appreciation of their importance is a necessary foundation for the consideration of style that is the purpose of this chapter. We now study, in a wider and less technical fashion, the manner or style of expression that best suits the purposes of the legislative drafter. In part, this is the study of attitudes for the object is to establish how the drafter is to approach the business of word choice and sentence structure. Style is not a gloss, not something applied at a late stage like icing on a cake; it is an inherent quality. This chapter will identify the qualities of language relevant to the easy and accurate communication of legislative material, and identify also those qualities likely to lead to communication failure or difficulty.

One consequence of the inexactness of language is that the drafting of laws, using language as a medium, cannot aspire to be an exact science.[1] Accordingly, so far as style is concerned no absolute judgments may be passed; no arbitrary line can be drawn between 'good style' and 'bad style'. Style is a relative matter and the same criteria applicable to all prose writing are equally appropriate to the drafting of legislation. Good style must fit the purpose of the communication, and the degree to which the manner of expression achieves the purpose is the sole measure of the quality of the style.

1 See *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] 1 All ER 810 at 842 (Lord Simon of Glaisdale).

Purposes of legislation

If style is to be measured having regard to the purpose of the communication, the essential purposes of legislation must be identified. Such a consideration raises questions which cannot, of course, be answered adequately in the space of a few lines, but, in very general terms, it may be said that legislation has as its purpose the establishment in written form of rules for the regulation and control of future social conduct. In particular, restraints are imposed on individuals and groups of persons and the exercise of various freedoms is regulated. On the other hand, important rights and benefits are conferred or protected. In essence, the principal purposes of legislation are

- to *establish* and *delimit* the law; and
- to *communicate* the law from the lawmaking authority to society and in particular to the persons affected by it.

Communication of legislation

Legislation is communication of a very special kind. The framework of society depends in large measure on it and much that is dear to the heart is frequently affected—liberty, perhaps even life, commercial and industrial relations between persons, property, marriage, taxes, indeed all aspects of human conduct within society.

Communication cannot be considered in a vacuum; it occurs only where the substance of the communication is transmitted to some person or persons. Successful communication depends on the reception of what is transmitted and for this reason one purpose of legislation is stated above to be the communication of law to society. But this statement cannot be accepted as sufficient. Indeed, to speak of communicating anything to society is to adopt the dangerous practice of personifying the label attached to an abstract concept.[2] It is not society that lives, it is people, and it is to people that the law must be communicated.

The people to whom the communication of a law is relevant may be classified in three broad groups. Drafters cannot afford to lose sight of the interests and standpoints of any of them.

1. The lawmakers
2. The persons who are concerned with or affected by the law
3. The members of the judiciary

Communication to the lawmakers

The principal members of this group are the members of the Parliament or other lawmaking authority. The term 'lawmaker' is used in a wide sense in this context to include all who have a hand in the preparatory and legislative process, that is to say the officials who participate in its development and other persons to whom the legislation in draft form is submitted for consultative purposes. In a very

2 Stuart Chase in *The Tyranny of Words* at p15 has written a delightfully mocking tilt at the common tendency to personify what is abstract. 'Here in the centre is a vast figure called the Nation—majestic and wrapped in the Flag. When it sternly raises its arm, we are ready to die for it. Close behind rears a sinister shape, the Government. Following it is one even more sinister, Bureaucracy. Both are festooned with the writhing serpents of Red Tape.'

practical sense, the draft is communicated to these persons. On enactment the law may be said to be communicated by the lawmakers.

Communication to persons concerned or affected

This group may be said to receive the communication transmitted by the lawmakers. Its members are concerned to construe the law but do so non-definitively. The group contains three distinct sub-groups.

First, the persons who are personally affected by the law (for example, the persons obliged by a law to pay a tax).

Secondly, the persons who advise and assist those persons affected by the law (for example, the accountants, tax consultants and legal advisers advising taxpayers).

Thirdly, the persons, usually public officials, who are charged by the law with the duty of administering and enforcing it (for example, the officers of the tax department).

Communication to the judiciary

This group may also be said to receive the communication. Its members are concerned to construe the law definitively, although the construal made by a particular court may be subject to review and possible reversal by a higher court.

Style should help communication

The style which is appropriate to any particular enactment will to some extent depend on the identity of those people in the groups to whom the law will be communicated, particularly the identity of the people in the second group, ie that containing the persons affected by the law.

Although there are many laws, such as road traffic laws, which are applicable to the conduct of all the persons who make up a society, most laws are of narrower application and regulate the conduct only of a segment of society. Such a segment might comprise those who are tenants, or practise a particular profession, or engage in a particular trade or activity, or are liable to pay a particular tax, or are to be members of a statutory body with advisory functions.

It is unrealistic to believe that all laws should, or indeed could, be drafted in language and in a style which is familiar and instantly intelligible to that mythical person who in days gone by used to be referred to as the man in the street. Even excellent drafting does not remove the need for careful study to understand much legislation. Nevertheless the drafter 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 or even legislation necessarily using a few technical terms may not be fully understood by groups 1 and 3, at least without technical explanation. This is inevitable. A law to regulate mining may properly contain words such as 'adit' and 'winze' that convey nothing to most of us. What is vital is that the words be chosen and a style adopted which those whose interests are affected (ie 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. The careful use of definitions may assist the non-technical to comprehend.

A licence to use technical unfamiliar language in a particular context is always subject to significant limitations. The drafter must achieve a sufficient understanding to be confident that the technical language is being used accurately and is unambiguous. It is easy to forget that technical terms are also prone to ambiguity and vagueness.

TRADITIONAL LEGISLATIVE STYLE—IS IT REALLY A PROBLEM?

In recent times, the calls for laws to be drafted in 'Plain English' have become more clamorous. Some jurisdictions have accepted the challenge and accepted 'Plain English' as a policy objective.[3] Other drafters have adopted a defensive attitude to the implied criticism inherent in such calls and consider it unfair and frequently simplistic. All competent drafters subscribe to the golden rule of the plain English movement 'write clearly for your audience'. Many drafters believe that some disciples of the movement underestimate the difficulties; some drafters overestimate the difficulties!

No drafter who has time to give the matter some thought could possibly feel satisfied with the quality of his or her product. All drafters know that the communication process fails frequently and they are aware of their share of the responsibility for such failures. Inadequate instructions and lack of time are the familiar defences. Very few would deny that there is plenty of room for improvement. This needs to be and is usually acknowledged openly and the way should be open to encourage helpful criticism of drafting style. Scholars in linguistics and communication techniques have so much yet to learn and drafting techniques are so inadequate that drafters must remain permanently dissatisfied with their products. Judicial criticism of laws contains at times a bonus of good fun, too. For example here is Lord Harman in tremendous form:

> To reach a conclusion on this matter involved the court in wading through a monstrous legislative morass, staggering from stone to stone and ignoring the marsh gas exhaling from the forest of schedules lining the way on each side. I regarded it at one time, I must confess, as a Slough of Despond through which the court would never drag its feet, but I have, by leaping from tussock to tussock as best I might, eventually, pale and exhausted, reached the other side where I find myself, I am glad to say, at the same point as that arrived at with more agility by Lord Denning MR.[4]

The following extracts are just an example, but an instructive one, of other criticism.

3 Parliamentary Counsel's Office in New South Wales adopted plain English as a policy as far back as 1986. Plain English drafting is discussed in papers by Wallace and Thornton, Conference Papers of the 9th Commonwealth Law Conference (1990) at pp175 and 183; see also Turnbull (1990) 11 Stat LR 161; B. A. Garner, *The Elements of Legal Style* (Oxford, 1991); V. R. Charrow and M. K. Erhardt, *Clear and Effective Legal Writing* (Little Brown, 1986); M. Faulk and I. M. Mehler, *The Elements of Legal Writing* (Macmillan, 1994).

4 *Davy v Leeds Corpn* [1964] 3 All ER 390 at 394, [1964] 1 WLR 1218 at 1224. See also R. E. Megarry, *Miscellany at Law*, pp349 et seq.

Laws should be written with more emphasis on making readers understand what the law commands and with less emphasis on controlling the judges by rigid grammatical constructions. Judges are more likely to be controlled by clear statements of purpose.[5]

One of the things that annoys readers in legal writing is the tireless repetition of words that do not need to be repeated.

Legislation which is unnecessarily difficult to understand is a derogation from the democratic right of the citizen to know by what law he is governed.[6]

Some of the typical sections of modern Acts are a veritable cobweb of words and in the forest of their verbosity, the reader dare not enter, or, if he enters, he is apt to get lost in no time.[7]

Many statutes emerge from the parliamentary process obscure, turgid, and quite literally unintelligible without a guide or commentary.[8]

With communication the object, the principle of simplicity would dictate that the language used by lawyers agree with the common speech, unless there are reasons for a difference.[9]

In sum, the complaints about legal language are directed at both its style and its unintelligibility, and these are separate objections. It is a mistake to assume, as many do, that style is faulty only when it clouds meaning, for there is a cry of anger in these protests against style itself. 'Said dog did bite aforementioned leg' will offend the critics though its meaning is clear.[10]

Even with devices of layout and graphology, the syntactic complexity—probably more than the technical terms—renders legislative texts incomprehensible to all except the specialist reader and increases the possibilities for uncertainty.[11]

ARE SHORT SIMPLE ACTS THE ANSWER?

Demands for short simple Acts establishing purposes and principles which the judiciary can interpret in a liberal manner with a purposive approach have from time to time been made. Such Acts which lack detail but depend for their effect on concepts and principles have been referred to as 'fuzzy' law. Fuzzy law drafting is not new; it has long been used in various contexts large and small. Its use in a limited fashion may be illustrated by the following provision which is typical of many in common use.

A person who knowingly or recklessly furnishes to the Minister a return that is false or misleading *in a material particular* commits an offence.

5 F. Conard, 'New Ways to Write Laws', 56 Yale Law Journal 458, 473 (reprinted [1985] Stat LR 62).
6 Lord Simon of Glaisdale, Hansard, Vol 336, p954.
7 P. M. Bakshi, *An Introduction to Legislative Drafting*, p35.
8 S. Atiyah, *Law and Modern Society*, p127.
9 D. Mellinkoff, *The Language of the Law*, pvii.
10 Robert W. Benson, 'The end of legalese: the game is over', NYU Rev L & Soc, Change XIII 519 at 522.
11 John Gibbons (editor), *Language and the Law* (1994, Longman) p25.

Such a provision leaves it to the courts to decide whether a particular return is false or misleading 'in a material particular'. Similar fuzziness may be of wider application, for example in a statute that requires directors to act 'honestly', or employers to 'take reasonable care to ensure the health and safety' of employees, or licensees to 'use their best endeavours' to do something or other.

Drafting of this kind is acceptable under certain conditions. However, it is essential that it be used only when the instructing body are aware of the consequences and agree to that approach. It can be very useful to rely on a simple general proposition if the proposed law is intended to affect a broad range of alternative circumstances and it is difficult or impossible for the details of them all to be foreseen or described.

The unadorned fact is that Ministers and the officials and others who influence and advise Ministers generally insist on a much higher degree of comprehensiveness and certainty than can be provided by 'short simple Acts' or fuzzy law unsupported by detail. Drafting of legislation very frequently is the result of intense pressures applied by pressure groups such as trade unions, employer groups and so on and they want to see what they want expressed in detail. Those who instruct drafters will not generally accept vague broad principles, doubts and uncertainty and do not ordinarily take pleasure in the thought of judicial lawmaking. This is not necessarily because they distrust the judges but because they think it better that the law should be comprehensive, clear and certain before it reaches the judges.

Considerable importance is given to the advantages of certainty. Those affected by or otherwise concerned with a law want to know as soon as that law is in operation where they stand in relation to it. They do not want to endure the trouble, delay and expense of litigation. Citizens should not have to spend money going to court in order to determine their rights or obligations.

A contrary viewpoint is that expressed by Sir William Dale who has argued that it is an illusion that drafting in detail achieves certainty; it inevitably leaves gaps, and, as time passes, growing uncertainty.

The reality is that there is a place for statements of principle and a place for detail and the context will generally stipulate the balance. There are some contexts in which a broad statement of principle or purpose is desirable and valuable and there are others in which detail is desirable. For example, in legislation for the protection of workers a general duty of reasonable care may be appropriate and this will best be done by a statement of principle in general terms. On the other hand, legislation for the control of dangerous drugs may require a detailed list of such drugs. Detailed legislation is much more likely to be necessary in coercive legislation or legislation that might infringe human rights.[12]

Drafters are often powerless when faced with instructions to draft a highly-tangled and complex web of provisions. Experience gives no confidence that Ministers and their advisers will be persuaded (at least to the point of action) by Sir John Donaldson's dicta in *Merkur Island Shipping Corpn v Laughton* [1983] 2 WLR 45 at 66, 67:

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

12 See J. F. Burrows, *Statute Law In New Zealand* (1992) p63.

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.

The quality of the drafting is not always the cause of communication failure. Difficulties may also arise from the imprecise or complex nature of the concepts that the drafter has endeavoured to communicate. 'Fuzziness is an inescapable characteristic of the concepts that language expresses.'[13]

In brief, drafting 'short simple Acts' stating general principles does not provide a general solution to the problems of lawmaking although there is a place for a statement or statements of principles and purposes in most legislation. Such statements do not necessarily lead to 'short simple Acts'. Detail is desirable in some contexts. The proper balance may not always be easy to reach and will depend on the subject-matter. There is a trend towards more open-textured drafting than in days gone by, carefully structured drafting but without intricate and complex relationships and cross-references.

THE PURSUIT OF CLARITY

Simplicity and precision—a tension and a balance

The purposes of legislation are most likely to be expressed and communicated successfully by the drafter who is ardently concerned to write clearly and to be intelligible. The obligation to be intelligible, to convey the intended meaning so that it is comprehensible and easily understood, in other words to communicate successfully, requires the unremitting pursuit of clarity by drafters. Clarity, in the legislative context, requires simplicity and precision.

When considering the two concepts of simplicity and precision, the 'and' that joins them is important because neither concept must be sacrificed at the altar of the other. What is simple will often be precise, and what is precise will often be simple but one does not follow from the other. The concepts are related but the relationship is not one of cause and effect.

The demands of each concept call for compromise. In evidence to the Renton Committee, the Faculty of Advocates said—

> The solution here must ... lie in a compromise between the precision of technical language and the ready comprehensibility of the ordinary use of words... . The words used should be reasonably simple ... the sentences should be reasonably short.

A law which is drafted in simple but imprecise terms will be uncertain in the scope of its application and for that reason may fail to achieve the intended legal result. Vague general purposes may very well lead to the administration of the law being left in the hands of the bureaucrats who may or may not have the same vision of its purposes shared by the members of the legislature. Litigation does not lead to a satisfactory resolution of the problems for it is concerned with the particular resolution of one dispute. An imprecise law may contain the seeds of many different disputes.

A law which is drafted in precise but not simple terms may, on account of its incomprehensibility, also fail to achieve the result intended. The blind pursuit of precision will inevitably lead to complexity; and complexity is a definite step along

13 Jackendoff, *Semantics and Cognition* (1983) p117.

the way to obscurity. An emphasis on detail may omit or obscure the broader issues and unintentionally leave these to be resolved by the bureaucrats and the courts.

The complexity of much of the material that the legislative drafter is compelled to distil and communicate is unavoidable. To some, complexity of material offers a challenge; to those of less stern stuff, it appears to offer the ultimate cop-out. But that is an illusion for 'Everything that can be thought at all can be thought clearly. Everything that can be said, can be said clearly.'[14]

The tension between complexity of material and simplicity of expression must be recognised and a reasonable balance achieved. The style adopted must be as simple and readable as the intended communication permits.

Beware the allure of abstract words

Before considering how the quest for clarity can best be pursued, we should make a positive effort to ensure that our respective feet remain firmly fixed to the ground. Any treatment of style will hoe ground that has been cultivated many times before; it will use words that are familiar but abstract, words such as: simple, concise, orderly, direct, elegant, precise, verbose, pompous, obscure, complex, tautologous, ambiguous. Each one of this round dozen abstract terms conveys an imprecise meaning with blurred edges. Because the significations a person attaches to abstract terms are the product of his or her own life experiences, there is grave danger that writer and reader may achieve only partially successful communication. This is a result of the use of such abstract words as labels for slightly different mental images.

Despite their acknowledged dangers, abstract words are seductive. There is a touch of magic in them. We use them with verve and panache, yet their lack of precision may beguile us into such laziness of thought that we do not always have a clear idea of the exact meaning we intend to convey. Put more crudely, we run the risk of not knowing what we are talking about.

Although the use of abstract words necessarily involves some risk of communication failure, they are both necessary and valuable to enable us to denote qualities or characteristics in general. Like the motor car, they are of great value and can cause great harm.

Sign-posts along the way to clarity

The goal is elusive but some general guidance rules lead in the right general direction. The rules are presented in list form in three groups. The first are general in character, the second applicable to sentences and the third to word choice. Discussion then follows. The content of some rules is discussed elsewhere and page references are given in those cases. Compliance will not necessarily produce clarity although it will increase the chances! The rules are of general application but George Orwell's dictum taken from his famous essay 'Politics and the English Language' is in point: 'Break any of these rules sooner than [do] anything barbarous.'

The pursuit of clarity—general rules

1. Write simply but precisely.
2. Draft for users with their various standpoints always in mind.

14 Ludwig Wittgenstein.

3. Be very clear about the purposes of the legislation and make sure that purpose is manifest.
4. Organise material logically, and chronologically where appropriate, at every level (ie the whole statute, Parts, Subparts, sections, schedules).
5. Consider the use of supplementary aids to facilitate communication (diagrams, examples, notes, etc).
6. Develop consistency of style and approach.
7. Revise the text with simplicity and precision in mind (as often as circumstances permit).
8. Test the draft in relation to comprehensibility.

The pursuit of clarity—rules for drafting sentences

9. Draft in the present tense.
10. Avoid long sentences, particularly if unparagraphed.
11. Prefer the active voice to the passive.
12. Prefer the positive to the negative.
13. Avoid double negatives and beyond.
14. Follow conventional word order.
15. Don't split verb forms unnecessarily.
16. Paragraph with restraint and care.
17. Avoid subparagraphs and sub-subparagraphs.
18. Avoid nominalisations.
19. Use cross-references with restraint.
20. Punctuate conventionally and with restraint.

The pursuit of clarity—word choice

21. Omit unnecessary words.
22. Prefer the familiar word.
23. Choose the exact word.
24. Avoid archaic and legalese words.
25. Avoid non-English expressions.
26. Avoid emotive words.
27. Use informal and recently coined words with discretion.
28. Use one word and not more if one word will do.
29. Use words consistently.

General rules—comment

1. Write simply but precisely

Facets of this major rule are elaborated in the rules that follow. The word 'simple' has been described as a 'soft, frilly, pouting, question-begging, almost a sly and sneaking word'.[15] True, it is an abstract word of inexact and multiple meaning; nevertheless its various facets of meaning conspire to produce a compound effect well understood by most people in most contexts. No single word will do as well

15 C. S. Lewis, *Studies in Words*, p180.

to denote the separate qualities which contribute to simplicity in the sense that it is here used. They are economy, directness, familiarity of language and orderliness.

The connection between simplicity and intelligibility is manifest, but that between precision and intelligibility is in some respects less obvious. Like simplicity, precision is an abstract word commonly used to denote various senses.

In the sense of certainty or definiteness, it may fairly be said that the quest for precision has contributed to the unfortunate obscurity of much statute law. The pursuit of this aspect of precision has led to unsuccessful attempts to foresee all possible contingencies. This has caused great complexities in the law.

On the other hand, when the word precision is used in the sense of exact or accurate expression, its causal relationship with intelligibility is clearer.

In that sense, the term has much in common with economy, an aspect of simplicity, for both demand the removal of that which serves no essential purpose.

The needs of precision go beyond those of economy, however. Economy and precision both require that no unnecessary words be used, and precision also requires that the words chosen express accurately and unequivocally the meaning intended to be communicated. The drafter must distinguish between two processes.

- The drafter must know exactly what he or she wants to say. The problem must be analysed and the response to it must be planned.
- The drafter must say exactly what he or she means. When the draft is complete, the drafter must look at it as objectively as possible in order to assess whether what has been said means exactly what was intended or more or less than intended.

These two processes are frequently confused. Shoddy drafting is often the consequence of shoddy thinking.[16] Muddy concepts are incapable of precise expression.

2. Draft for users with their various standpoints always in mind

Refer pages 47–49.

3. Be very clear about the purposes of the legislation and make sure that purpose is manifest

Refer pages 154–158.

4. Organise material logically, and chronologically where appropriate, at every level

Refer pages 139–141.

It would be difficult to exaggerate the role which orderliness can play in making the complex seem uncomplicated or if not uncomplicated then at least much less difficult to understand than otherwise might be the case. The concept is important in relation to the structure of sentences, sections, Parts, Schedules and Acts.[17]

For the present purpose, it will serve to do no more than to emphasise that whether we are considering the unit of the sentence or a larger unit, an orderly approach is an invaluable aid to intelligibility. However dull the subject-matter,

16 'When a Man's Thoughts are clear, the properest words will generally offer themselves first', Swift.
17 As to sentence structure, see pp16–21; as to the design of Acts, see pp 138–142.

and even the most enthusiastic of drafters must admit that some of the subject-matter that comes before them is dull, if the material is dealt with in a planned manner and in logical sequence, and chronological sequence where appropriate, the writing will flow and be more readable and thus more readily comprehensible.

It is quite impossible for writing which lacks orderly structure to be simple or elegant. Strunk and White go so far as to say 'The first principle of composition is to foresee or determine the shape of what is to come and pursue that shape.'[18]

5. Consider the use of supplementary aids to facilitate communication

Refer pages 158–166.

6. Develop consistency of style and approach

Consistency is a virtue that drafters are prone to undervalue, probably because it is time consuming to achieve. It has value at a number of levels.

- every draft must be consistent and in harmony with the common law and statutory context into which it must fit. Refer pages 132–133.
- a consistent approach to similar problems should be taken by all drafters within a jurisdiction and by the same drafters at different times. Such an approach should not of course stifle development and improvement of earlier approaches. Refer pages 83–84.
- consistency in word choice and usage is desirable.
- consistency is desirable in stylistic practices such as numbering, spelling, capital usage and presentation.
- consistency is desirable in the level of penal sanctions.

7. Revise the text with simplicity and precision in mind (as often as circumstances permit)

Refer pages 143–144.

8. Test the draft in relation to comprehensibility

Refer pages 173–174.

Rules for drafting sentences—comment

9. Draft in the present tense

Refer page 103.

10. Avoid long sentences, particularly if unparagraphed

One Australian jurisdiction has a rule of practice that aims for legislative sentences with a maximum of around 30 words and suggests that a sentence of more than 5 lines should be regarded with suspicion as being too long. The justification for this approach is that the short-term memory of users cannot cope accurately with a large quantity of material.

18 *Strunk and White*, p14.

Although it is easy to accept the proposition that a short sentence is easier to comprehend than a long sentence, the obvious problem is that complicated material, perhaps a proposition that is subject to numerous and extensive qualifications, cannot be communicated in one short sentence. If only short sentences are acceptable, then a series of short sentences will be necessary and they may not be easier to comprehend than one longer sentence. A series of short sentences may involve needless repetition or tiresome and confusing cross-references or both. Communication may be hindered not assisted by a short sentence precept if it is applied without restraint.

For example, here are four short sentences each of which contains a single proposition—

> (1) Subject to subsections (2) and (3), the Legislative Council may by resolution prescribe the rate of levy.
>
> (2) The rate of levy prescribed under subsection (1) shall be based on the value of construction works.
>
> (3) The rate of levy prescribed under subsection (1) shall not exceed 0.35 per cent of the value of construction works.
>
> (4) The rate of levy prescribed under subsection (1) shall come into effect 30 days after the publication of the resolution in the Gazette.

Compare the following single sentence

> The Legislative Council may, by resolution coming into effect 30 days after publication in the Gazette, prescribe the rate of levy which shall be based on and shall not exceed 0.35 per cent of the value of construction works.

One sentence of fairly simple structure has replaced four short sentences, needless cross-references have been eliminated and a tighter, more economic structure has speeded up comprehension. The reader no longer has four subject-predicate structures to contend with; there is one and that one is not modified to the point of obscurity.

Sentence length has some validity as a criterion for intelligibility but is subject to limitations. As Joseph Williams has written—

> What counts is not the number of words in a sentence, but how easily we get from beginning to end, while understanding everything in between.[19]

Williams argues that it is not length of a sentence or the number of clauses in it that we ought to worry about. Rather it is long sentences without shape.[20] To understand a sentence, the reader must understand and recognise its structure. The first essential step must be the identification of the subject-predicate relationship, because no matter how extensively modified they may be, the subject and predicate form the heart of the sentence, declaring its subject and what is said about it. In general, it is the complexity of modifications of the subject or predicate,

19 Joseph M. Williams, *Style: Towards clarity and grace* (University of Chicago Press, 1990) p25.
20 *Williams*, p136.

or both, which tends to obscure the structure of the sentence and thereby make communication more difficult.

The challenge facing the drafter is to arrange and present the material in such a way that everything possible is done to expose sentence structure.

One of the most difficult stylistic problems facing the drafter every day is to decide how much to include in a sentence. The example given above illustrates that breaking things down into a series of short sentences may inhibit communication but the pitfalls in the opposite direction are even more alarming.

Too much must not be stuffed into one sentence. The subject or predicate, or both, must not be loaded with modification to the extent that the reader cannot quickly and easily discover the essential syntactical relationships in the sentence. Phrases and clauses should not be permitted to intrude unnecessarily. It is not enough that intricately organised clauses and other sentence elements are grammatically well formed and unambiguous. The structure of the sentence must be clear and the intended meaning of the sentence not so complex that it cannot be comprehended in one span of attention.

Let us look at another example, a long rambling sentence from an old statute:

> Where it is shown to the satisfaction of a Justice of the Peace that entry on or into any land, premises or thing is reasonably required by the Authority for the purpose of the exercise of a power conferred by this Act or any other Act administered by the Authority but that entry has been refused or the entry is opposed or prevented, or in any case where such land, premises or thing is unoccupied and access cannot be obtained or a notice required by this Act cannot be served without undue delay or difficulty, the Justice may, by warrant in the form prescribed by regulations made under this Act, authorise the Authority by its officers together with such other persons as are named in the warrant, or any police officer, to enter upon the land, premises or thing, using such force as may be necessary, for the purpose therein specified and any such warrant shall continue to have effect until the purpose for which it was granted has been satisfied.

The first impression given by this sentence is that it is overloaded at the front end and as a result the core structure of the sentence is obscured. The reader must embark on a voyage of exploration before discovering that the essence of the sentence is to permit a Justice of the Peace to grant a right of entry in certain circumstances. Two alternative remedies might be considered. The various preconditions to the issue of a warrant could be presented more clearly in a paragraphed form and this device would assist in illuminating the sentence structure. Alternatively, the preconditions could be removed to a separate sentence.

The rear end of the sentence also calls for comment. In a complex sentence, the addition of a second coordinate subject-predicate structure is likely to reduce the level of comprehensibility and a separate sentence would be an improvement. Here is the section presented with the help of some paragraphing and in two subsections instead of one.

(1) Where it is shown to the satisfaction of a Justice of the Peace that entry on or into any land, premises or thing is reasonably required by the Authority for the purpose of the exercise of a power conferred by this Act or any other Act administered by the Authority, but
  (a) entry has been refused;
  (b) entry is opposed or prevented; or
  (c) in a case where such land, premises or thing is unoccupied, access cannot be obtained or a notice required by this Act cannot be served without undue delay or difficulty,

  the Justice may, by warrant, authorise
  (aa) the Authority by its officers together with such other persons as are named in the warrant; or
  (bb) any police officer,

  to enter upon the land, premises or thing, using such force as may be necessary.

(2) A warrant granted under subsection (1) shall
  (a) be in the form prescribed by regulations;
  (b) specify the purpose for which the land, premises or thing may be entered; and
  (c) continue to have effect until the purpose for which it was granted has been satisfied.

One criticism that can be made of the form above is that the initial modification, despite the assistance of paragraphing, is so long and complex that too much is required of the reader before reaching the sentence core. The existence of two series of paragraphs in subsection (1) is also a hindrance to easy communication. A remedy would be to bring the essence of the sentence forward to the beginning so that the reader immediately knows what is at the heart of the sentence even if the scope and qualifications are not yet developed. For example:

(1) A Justice of the Peace may by warrant authorise
  (a) the Authority by its officers together with such other persons as are named in the warrant; or
  (b) any police officer,

  to enter upon any land, premises or thing, using such force as may be necessary, in the circumstances described in subsection (2).

(2) A warrant may be granted under subsection (1) where it is shown to the satisfaction of a Justice of the Peace that entry on or into any land, premises or thing is reasonably required by the Authority for the purpose of the exercise of a power conferred by this Act or any other Act administered by the Authority, but
  (a) entry has been refused;
  (b) entry is opposed or prevented; or
  (c) in a case where such land, premises or thing is unoccupied, access cannot be obtained or a notice required by this Act cannot be served without undue delay or difficulty.

(3) A warrant granted under subsection (1) shall
  (a) be in the form prescribed by regulations;
  (b) specify the purpose for which the land, premises or thing may be entered; and
  (c) continue to have effect until the purpose for which it was granted has been satisfied.

A long sentence is not always bad and a short sentence is not always good. If the material is suitable for presentation in paragraph form, a long sentence may

be acceptable. The drafter should avoid long sentences as a general approach but must choose the sentence structure or technique of presentation that will most clearly communicate the material.

11. Prefer the active voice to the passive

The advantage of the active voice is that the subject of the sentence names the performer of the action stated in the verb. The passive form either omits, or reduces the emphasis on, the person performing the action. In many legislative contexts, the subject of the sentence is given a power or a duty and that person must be identified clearly.

Expression in the passive voice may lead to a lack of directness. For example, a section enabling or requiring certain action to be taken may be grammatically adequate and apparently complete in meaning although the person so enabled or obliged is not specified. The form of the active voice is such that the drafter's attention is necessarily directed to the necessity to identify the person concerned. The following form, in the passive voice, is ambiguous because it is not stated whether the obligation to give notice falls on the transferor or the transferee.

> Notice of the sale or disposal of a licensed printing press must be given to the Registrar within 14 days.

The ambiguity could be removed by inserting the phrase 'by the transferor' after 'Registrar', but the following active form is an improvement.

> The transferor must give notice to the Registrar within 14 days of the sale or disposal of a licensed printing press.

However, if the person performing the action in a sentence is unknown or unimportant, an impersonal style using the passive form may be preferable.

12. Prefer the positive to the negative

Refer page 33.

13. Avoid double negatives and beyond[21]

Negatives cannot always be avoided, but a special effort should be made to avoid double or triple negatives. They are always difficult to understand and easily mislead the careless reader.

Consider the following form for example—

> In proceedings for defamation in which the defendant relies on a defence of honest opinion, the fact that the subject matter attributes a dishonourable, corrupt, or base motive to the plaintiff does not require the defendant to prove anything that the defendant would not be required to prove if the matter did not attribute any such motive.

A double negative does not always equate with a positive. The first of the following examples has a different meaning from the second:

21 See S. Greenbaum and J. Whitcut, *Longman Guide to English Usage* (1988) p221.

> The registrar must not certify that the podiatrist has not been suspended.

> The registrar must certify the the podiatrist has been suspended.

14. Follow conventional word order

In most sentences, legislative or otherwise, the conventional word order is subject-verb-complement. Any variation from that order may cause the reader to have to go back and read the passage again in order to identify the structure of the sentence.

15. Don't split verb forms unnecessarily

Multiple modification and the need to avoid the perils of ambiguous modification encourage drafters to split verb forms in a way that is seen much less frequently in other writing. In some contexts this may be the lesser of available evils, but it should be avoided if possible. Thus

> The Tribunal must give reasons for its decision within 30 days of being asked to do so by an aggrieved person.
> *not*
> The Tribunal must, within 30 days of being asked to do so by an aggrieved person, give reasons for its decision.

16. Paragraph with restraint and care[22]

The most effective technique for presenting complicated sentences in a digestible state is that of paragraphing. Dick refers to the device as 'paragraph sculpture', a good description because it emphasises the visual aspect.[23]

Careful paragraphing is beneficial in four ways.

- The structure of the sentence is made more apparent to the reader.
- Paragraphing is an analytical tool for the drafter; (it demands the study and analysis of the structure of the sentence).
- Needless repetition is avoided.
- Syntactic ambiguity is removed.

Let us look at an example, first in an unparagraphed form and then paragraphed.

> A person is entitled to have his or her name entered in the register if that person is immediately prior to the commencement of this Act registered as a pharmacist under the provisions of the Pharmacy and Poisons Act; or is the holder of a pharmaceutical diploma recognised by the Board as furnishing sufficient guarantee of the possession of the requisite academic knowledge of pharmacy and after obtaining such diploma, has worked in full time employment under the supervision of a registered pharmacist for not less than 12 months in such capacity and such circumstances as to satisfy the Board that he or she has acquired sufficient knowledge and skill for the efficient practice of pharmacy and passes an examination held by an examiner appointed by the Board for the purpose of testing his or her knowledge of such aspects of theoretical, practical and forensic pharmacy as the Board may decide to make the subject of the examination.

22 The recommended practice for identifying paragraphs by a sequence of letters is dealt with at p81.

23 Robert C. Dick, *Legal Drafting* (2nd edn) pp117 et seq.

More than one reading is necessary to discover how many clauses modify the subject 'A person'. This difficulty might be resolved by breaking the section into two but this course of action has two defects. First it involves the needless repetition of the principal words which begin the section ('A person shall be entitled to have his name entered in the register'). Secondly, it involves the separation into two spans of attention of what should logically be together, that is the fact that there are two classes of people entitled to have their names entered on the register and a statement of the details of such classes.

In the form below, the basic structure of the sentence is communicated even at a cursory glance. The subject and the predicate are immediately apparent and it is also clear that the subject is modified by the two paragraphs, (a) and (b), and that paragraph (b) is in turn modified by subparagraphs (i) and (ii).

A person is entitled to have his or her name entered in the register if that person
- (a) is immediately prior to the commencement of this Act registered as a pharmacist under the provisions of the Pharmacy and Poisons Act; or
- (b) is the holder of a pharmaceutical diploma recognised by the Board as furnishing sufficient guarantee of the possession of the requisite academic knowledge of pharmacy and
  - (i) after obtaining such diploma, has worked in full time employment under the supervision of a registered pharmacist for not less than 12 months in such capacity and such circumstances as to satisfy the Board that he or she has acquired sufficient knowledge and skill for the efficient practice of pharmacy; and
  - (ii) passes an examination held by an examiner appointed by the Board for the purpose of testing his or her knowledge of such aspects of theoretical, practical and forensic pharmacy as the Board may decide to make the subject of the examination.

Paragraphing is a flexible device.[24] Very often, as in the example set out above, clauses modifying either the subject or the predicate are presented in a paragraphed form. But the same method of presentation may be adopted in the case of multiple subjects or predicates or indeed any other element in a sentence. In every case, the indispensable requirement is that the elements to be set off in paragraphs must perform an equivalent function in the sentence.

Sound paragraphing depends on observing the following practical guidelines.

GUIDELINE 1—DO NOT PARAGRAPH UNNECESSARILY

Paragraphing is only useful if the sentence is of sufficient length and complexity to require the illumination of its structure. If the structure is manifest without paragraphing, there is nothing to be gained by paragraphing and it amounts only to pointless artificiality. The paragraphing is not beneficial in the following example:

premises includes
- (a) a caravan; and

24 A comprehensive treatment of the various uses of paragraphing is to be found in E. A. Driedger, *The Composition of Legislation* (2nd edn) pp53 et seq.; Reed Dickerson, *The Fundamentals of Legal Drafting* (2nd edn) pp115 et seq.; Robert C. Dick, *Legal Drafting* (2nd edn) pp117 et seq.

- (b) a mobile home; and
- (c) a houseboat.

The following is preferable:

premises includes a caravan, a mobile home, and a houseboat.

GUIDELINE 2—AVOID TWO SERIES OF PARAGRAPHS IN ONE SENTENCE

See the example on page 59. This kind of sentence structure is invariably difficult to read and that is sufficient to warrant abandonment of the practice. The complexity is such that it may cause the drafter to stumble as well as the reader.

GUIDELINE 3—AVOID SANDWICH CLAUSES

A sandwich clause is one in which a series of paragraphs is preceded and succeeded by other text. For example

Where an application is made under section 10 for the incorporation of an association, the Commission must, unless it is satisfied that
- (a) the association is not an association within the meaning of the Act;
- (b) the association was formed or is carried on for an immoral or illegal purpose; or
- (c) the incorporation of the association is otherwise against the public interest,

issue a certificate of incorporation.

The awkward separation of the subject from the verb and complement is an unnecessarily difficult structure to impose on readers. Restructuring sentences of this kind is almost always an easy matter. In the above example, the words 'issue a certificate of incorporation' should be inserted after 'must' in the second line. In addition to imposing hardship on readers, such clauses may lure the drafter into grammatical error.

However, if in breach of this guideline the sentence is to continue beyond the final paragraph in the series, that which follows the final paragraph must be appropriate to each paragraph. The reader should never be left in doubt as to whether concluding words are intended to relate to the whole series of paragraphs or just to the final paragraph. This is a matter that must be checked again by the drafter later in the process, because even if the concluding words are placed accurately at the drafting stage, the possibility of a misplacement at the typing or printing stage must be guarded against. It does happen and is easily overlooked.

GUIDELINE 4—EVERY PARAGRAPH MUST FLOW GRAMMATICALLY AND NATURALLY FROM THE INTRODUCTORY WORDS

The two errors illustrated in the following example are typical of those that embarrass drafters regularly.

A person who shows to the satisfaction of the registrar that the person
- (a) is of good character; and
- (b) holds a Commonwealth qualification in veterinary surgery; and
- (c) that has the requisite practical skill and experience; and
- (d) shall be entitled to have his or her name entered in the register.

Paragraph (c) should not begin with 'that' and paragraph (d) is not an appropriate part of the series. Similar elements of a sentence should be dealt with in the same way. The above example would be even worse if it began:

A person who shows to the satisfaction of the registrar that the person is of good character and
(a) as (b) above etc.

GUIDELINE 5—TAKE CARE WITH THE LINKING OF PARAGRAPHS IN A SERIES

It must be apparent to the reader whether the paragraphs are conjunctive or disjunctive. Great care must be taken in the use of 'and' and 'or'.[25]

The problem of linking a series of paragraphs is not only one of choosing between 'and' and 'or'. There are also occasions when no linking word should be used and the use of an 'and' or an 'or' may give rise to misleading inferences. For instance

An order under this section
(a) may impose duties and restrictions on any person having control of a slaughterhouse,
(b) may restrict the cutting of carcasses before they are marked,
(c) may require records to be kept relating to dealings with carcasses,
(d) may authorise the Minister to give directions to the Commission as to the operation of the scheme.

The insertion of an 'and' between paras (a) and (b), (b) and (c), (c) and (d) opens the door to the argument that an order must be made in respect of the matters specified in all the paragraphs. Alternatively if 'or' had been used instead of 'and' it could be argued that an order could be made only in respect of one paragraph.

In paragraphing, 'and' and 'or' should be used only when it is desirable to show that the series is conjunctive or disjunctive. In the case of other series of paragraphs, such as those introduced by 'the following' or 'as follows' in a manner similar to the following, the safest course is to omit these potentially dangerous words.

The Minister may give directions with respect to the following matters:

The Minister may grant a permit in the following cases:

Where the series of paragraphs is either conjunctive or disjunctive it is usual to insert the 'and' or 'or' after the penultimate paragraph only. This, subject to context, raises the implication of a similar 'and' or 'or' to separate each of the previous paragraphs in the series.[26] Thus

A local authority
(a) must provide for the medical inspection of children after their admission to elementary school;
(b) must make arrangements for attending to the health and physical condition of children attending any such school; and
(c) so far as appears necessary, shall encourage and assist the establishment and continuance of voluntary agencies.

25 See pages 95–97.
26 See R. E. Megarry, 'Copulatives and Punctuation in Statutes', 75 LQR 29. See also 'Re The Licensing Ordinance' (1968) 13 FLR 143.

The placing of the 'and' or 'or' in just this one position rather than between each paragraph is a matter of custom only and it is probably more helpful to the reader to add the conjunction after each paragraph. If the reader is not acquainted with the custom, it may constitute a puzzle. In any event, if the conjunction is inserted after each paragraph, the reader may be saved the time it takes to avert to the penultimate paragraph in the series in order to discover the 'and' or 'or'.

In some cases, where it is specially desirable to show that the paragraphs are to be taken together or each separately, then the 'and' or 'or' should certainly be added after each paragraph. For example

No person shall sell an article of food that
(a) has in or on it any poisonous or harmful substance; or
(b) is unfit for human consumption; or
(c) is adulterated; or
(d) was manufactured under insanitary conditions.

17. *Avoid subparagraphs and sub-subparagraphs*

This rule is really just one feature of the major rule 'write simply'. Any sentence containing subparagraphs should be viewed with suspicion. If the material can be communicated in a less complex and artificial way, that should be done. Sub-subparagraphs are just too complex to be readily understood and should not be used.

18. *Avoid nominalisations*

A noun derived from a verb is called a nominalisation. Such nouns should not be used when a sentence using the verb form would be more direct and clearer.

The Commissioner must investigate every complaint lodged in writing.
not
The Commissioner must conduct an investigation of every complaint lodged in writing.

The Authority must consult representatives of parents before fixing the dates of school terms.
not
The Authority must engage in consultations with representatives of parents before fixing the dates of school terms.

19. *Use cross-references with restraint*

Some cross-references between provisions are essential to achieve certainty and to assist readers. For example, if a statute provides for two distinct permits, it may well be necessary in some contexts to refer to 'a permit granted under section xx' in the interests of precision. Similarly, some cross-references may be desirable as sign-posts to assist readers of a long and complex statute (but notes may perform the function better without muddying the text).

A cross-reference should only be included if it is either essential or useful. It must be admitted that drafters have in the past been inclined to use them far too readily. A law replete with countless cross-references may be technically correct but its 'legal' appearance will irritate ordinary readers. Precision is admirable but

over-precision is painful. The following example illustrates how unattractive a multitude of cross-references can be:

> (4) The notice referred to in subsection (1)(d), (1)(e) or (2)(b) is complied with if within one month after service of the notice in accordance with section 15(3) the default is remedied to the extent referred to in subsection (3)(b)(i), the amounts referred to in subsection (3)(b)(ii) have been paid and the enforcement expenses referred to in subsection (3)(b)(iii) have been paid.

It is not unusual for the relationship of subsections within a section to be spelled out with quite unnecessary cross-references. This can be particularly tiresome when subsections that complement an earlier subsection refer back to it needlessly. For example, suppose subsection (1) provides for the appointment of inspectors, there is no need for subsequent subsections to refer repeatedly to 'an inspector appointed under subsection (1)'. It would be necessarily implied that in the remainder of the section 'inspector' meant an inspector appointed under that subsection.

20. Punctuate conventionally and with restraint

Refer pages 34–35.

Rules concerning word choice—comment

21. Omit unnecessary words

All good writing uses words sparingly. 'Omit needless words' is one of the fundamental principles of composition stated by Strunk and White in their classic, *The Elements of Style*.[27] In legislation, a word used without purpose or needlessly is not merely a tedious imposition upon the time and attention of the reader; it creates a danger because every word in a statute is construed so as to bear a meaning if possible. A superfluous word is therefore a potential source of contention. If one word will communicate the intended sense exactly, two words or more should never be used.[28] 'Each word should pay for its passage... . nothing superfluous should be added and nothing essential should be omitted.'[29]

Economy in the use of language must be distinguished from brevity. Brevity has been said to be 'a fickle goddess to pursue too passionately' and certainly is better regarded as a welcome by-product of the economic use of language than as a virtue in its own right.[30] If the sense to be conveyed is capable of a treatment which is simple, precise, and brief then so much the better, for a reader is more easily able to grasp and comprehend brief provisions than lengthy ones. However, Horace identified the overwhelming danger in striving for brevity when he wrote 'I labour to be brief and become obscure'.[31] It is easy for a drafter who has become totally familiar with the subject to assume too much knowledge on the part of users.

27 William Strunk Jr. and E. B. White, *The Elements of Style* (Macmillan, 3rd edn) p17.
28 See Chapter 6, Sir Ernest Gowers, *The Complete Plain Words* (3rd edn).
29 Robert C. Dick, *Legal Drafting* (2nd edn) p20.
30 See G. V. V. Nicholls, 'Of Writing by Lawyers', 27 Canadian Bar Review.
31 For a criticism of brevity at the expense of clarity, see Lord Reid in *W & J B Eastwood Ltd v Herrod* [1970] 1 All ER 774 at 781.

It is far better to risk including something that might be unnecessary than to omit something that might be very helpful although strictly unnecessary.

Economy of language is not a virtue that comes easily to the lawyer.[32] Traditional practice, particularly with regard to the drafting of conveyances, contracts, wills and other legal documents, has always preferred a spread of shot to the single bullet. The practice results from an understandable desire to achieve certainty and to narrow the possibilities of dispute.

Advocacy of the merits of economy of language does not imply that the single general term must always be preferred to multiple particular terms. Exactness of meaning must be sought and very often this can only be achieved by particular language.

However, an unfortunate consequence of the traditional, cautious approach is a tendency to verbosity and redundancy. Phrases are included that add nothing to the meaning. This is illustrated by the following examples in which redundant words are italicised:

> The company may make reasonable charges for carrying passengers, animals, goods, *merchandise, commodities, minerals and parcels.*

> The corporation has *full* power to ...

> If the particulars requested by the respondent are not provided within 3 months after they are requested, the notice given and all proceedings thereupon shall be *utterly* void ...

> In this Act, *the following expressions have the following meanings respectively, that is to say* ...

> Every person who is registered as a pharmacist under *the provisions of* the Pharmacy Act ...

> This Act shall continue in operation until 31 June 1988 *and no longer.*

Tautology, the repetition of the same thing in different words, is incompatible with economy of language.

> Any person who acts otherwise than in accordance with these regulations or in contravention of these regulations shall commit an offence ...

'To act otherwise than in accordance with' is no more nor no less than 'to contravene'.

22. Prefer the familiar word

Words that are familiar are more easily communicated and understood.

Advice is sometimes given that short words should be preferred to long words and also that words of Anglo-Saxon origin should be preferred to those of Latin or French origin. This is very questionable advice, better forgotten. 'The quest

32 See *Mellinkoff*, pp339 et seq. Abraham Lincoln is quoted as saying of a fellow lawyer: 'He can compress the most words into the smallest idea of any man I ever met': Kupferberg, *An Insulting Look at Lawyers*, p62.

for Saxonisms is an unrealisable nationalistic dream.'[33] We should not however succumb to the temptation of displaying our erudition with a vocabulary of exotic Latinisms and a pretentious kind of writing. A definition recently encountered in a New Zealand statute begins

> 'territorial authority' has the meaning ascribed to it ...

Surely 'given' would be a simpler and more familiar word than 'ascribed'?

The familiar word may be short or long and it may be of any origin; if it is well known in current usage, its use will contribute to intelligibility. The rule that the familiar word should be preferred to the unfamiliar must be recognised as a subsidiary rule. It must always give way to the necessity to find and use the word which most exactly and precisely conveys the intended sense.

It is relevant to recall that one consequence of the vagueness of language is that, for practical purposes, no word when used in a context will have an exact synonym, although the same word in a pure or dictionary state may have a number of synonyms. The choice of a word to fit a particular context entails therefore a choice of meaning. The significations of two words in a context may correspond approximately but they are very unlikely to be identical. A concern to write with simplicity makes familiar words attractive. Nevertheless, if only an unfamiliar word is capable of communicating the intended sense exactly then that unfamiliar word must be used. It may cause a blockage in communication but this may be cleared by definition or otherwise and such a blockage is preferable to a complete failure of communication.

Perhaps it is consciousness of the importance or gravity of the proposed law or possibly a perceived need for dignity or formality that beguiles drafters to choose stiff rather pompous words in preference to simpler, more familiar but equally appropriate alternatives. The words in the first column should be preferred to those in the second.

after	subsequent to
before	prior to
begin	initiate, inaugurate, institute
end	terminate, conclude
find out	ascertain
give	furnish, accord
inform	acquaint, apprise
send	transmit
try	endeavour
use	utilisation, usage
happen	transpire, eventuate

The familiar need not be excluded from legislation because it is informal or colloquial so long as the usage is stable and well established. Some statutes are markedly less formal than in the past. For example, an English Act imposes an obligation on an authority to 'do all they can to secure that ...'.

23. Choose the exact word

When discussing the preference for familiar words, it was conceded that this preference must always give way to the requirement that the exact word to fit the

33 *Burchfield*, p11.

context must be used. It is possibly misleading to speak in this way of the 'exact' word for as we have seen language in ordinary use is with few exceptions far from exact because of its vagueness and ambiguity. What is really meant is that the drafter, being conscious that no two words in a context will convey an exactly identical meaning, must not be satisfied until the word which will communicate the intended meaning most accurately is found.

Many years ago, A. P. Herbert exhorted his readers to 'worry' about words. He wrote:

> I exhort you ... to worry about words, to have an affection and a respect and a curiosity about words.[34]

A drafter who establishes a standard in vague terms may be accused of—

- laziness in not thinking out all possible contingencies and providing for them;
- 'passing the buck' to the judiciary to draw a line that the legislature should have drawn, thus causing a variety of interpretations from a variety of courts;
- creating uncertainty in the law.

On the other hand the drafter may respond by urging that—

- in many areas legislation should aim at the general with a clear statement of purpose, rather than aim at the particular;[35]
- the drafter cannot foresee all possible contingencies and a word like 'nearby' when construed in the context with regard to the obvious aims of the legislation is not unduly vague;
- any particular precise line such as 'within 600 metres' would be arbitrary and could result in injustice by not permitting particular circumstances to be taken into account.

The deliberate use of vague words is in some circumstances both defensible and valuable.[36] It is a curious paradox that the careful use of vague words in laws may result in more humane laws and greater justice. In a very real sense the vague word may be the exact word required. When a deliberate choice of a vague word is justifiable is a matter for careful judgment but two factors should always be present.

First, the drafter should ensure that those instructing him require that, or acquiesce in the decision that, the vague word be used knowing that its interpretation is to be left to the courts. This involves an acceptance that the judiciary should in the particular circumstances share in the lawmaking function.[37]

Secondly, the general purpose and the intended scope of the provision must be clear from the context.

34 A. P. Herbert, *What a Word*, p2.

35 'The whole of our modern drafting technique seems to be based upon the obviously fallacious assumption that it is possible to cover every particular eventuality. Is it not time we gave up trying to do the impossible and concentrated instead in laying down broad general principles?' Gowers, 13 Mod LR 487.

36 'It may indeed be the chief merit of a statute that by its employment of general words it is possible to adapt it to changing social needs ... The experienced draftsman will not try to keep the judges on too tight a rein.' D. J. Payne, 'The Intention of the Legislature in the Interpretation of Statutes', 1956 Current Legal Problems, pp96, 107.

37 'But the draftsman should not forget that "Litigation is an activity that does not markedly contribute to the happiness of mankind" ', *Gallie v Lee* [1969] 2 Ch 17 at 41 per Russell LJ.

It is bad practice to lay down in vague undefined terms a standard for application by the courts or by any other authority unless the criteria to be applied are either declared specifically or are reasonably ascertainable from the context. Unless the purpose of the provision is beyond doubt, a vague standard can only lead to uncertainty in the law and inconsistent, and therefore bad, administration. For an example, let us look at an old section from Hong Kong's Marriage Ordinance:

> 15. If there is no parent or lawful guardian of such party residing in the Colony and capable of consenting or if such party satisfies the Registrar that after diligent inquiry such party is unable to trace any such parent or guardian, the Registrar may give his consent in writing to the marriage, *if on inquiry the marriage appears to him to be proper*, and such consent shall be effectual as if the parent or guardian had consented.

In this example it is by no means clear what criteria the Registrar should adopt in forming his opinion whether a proposed marriage appears to him proper. If the term is intended to mean no more than lawful, then 'lawful' should have been used. If it means more than that, then the section converts the Registrar into a moral arbiter. Quite clearly, such a person should not apply personal views of moral propriety, but what should the Registrar apply? Is the marriage of a rich old man with a poor young girl proper? Is the marriage of a poor young man with a rich old girl proper? Is the marriage of a divorced person proper? There are of course no absolute answers to moral questions like these and the section is indefensible.

Even though the purposes of the legislation are clear, vagueness is indefensible if the context is such that certainty in the law is necessary. There should, for example, be no doubt as to the maximum punishment the breach of a statutory provision may attract and the word 'reasonable' is insufficiently exact in the following illustration:

> Regulations may impose reasonable fines on persons who contravene any of the regulations.

The drafter must take care in the choice of words and must approach the task with an understanding of their qualities. Many problems arise from the use of abstract words and legislation cannot be drafted without their extensive use. Legislation regulating human conduct must frequently fix a standard of general application, a degree of conduct which the law requires or permits. Consider the following words:

acceptable	necessary
adequate	normal
appropriate	ordinary
due	proper
equitable	reasonable
expedient	requisite
fair	satisfactory
fit	sufficient
just	suitable

Every one of these words is found so often in legislation that it is used as a matter of course. Each word purports to fix a standard but does it really do so? Is the signification of any one word demonstrably different from that of the others? It is suggested that what all these words do is to hand over to the courts the task of fixing a reasonable and appropriate standard in the light of the circumstances before them.[38]

There are many similarly vague and to some extent subjective terms in common use. For example, words denoting time such as brief, immediate, forthwith, permanent and temporary. There are also very many words denoting quantity or degree. The following is a small sample:

average	regular
disorderly	serious
excessive	several
few	trivial
gross	unconscionable
large	unjust
many	usual
objectionable	

These terms and others depending on a generalised concept are far from precise in the sense of certain or definite, although they may be used precisely in the sense of accurately expressing the legislative intention to provide flexibility and judicial discretion. The handing over of a lawmaking function to the courts by the use of a vague word should only be done by the deliberate act of the drafter where it is considered that the circumstances justify such a course.[39]

24. Avoid archaic and legalese words

Refer to pages 91–95.

25. Avoid non-English expressions

Numerous Latin and French words and phrases were once used by lawyers in the interests of precision. Many of these, for example appeal, alibi, indictment and verdict, have become part of the English language but others have not. Very few readers of statutes learn Latin these days and drafters should choose an English equivalent for a foreign term in order to facilitate easy communication. Some equivalents follow:[40]

a priori	by deduction
ab initio	from the beginning
ad valorem	according to value
bona fide	in good faith
ex aequo et bono	by reference to considerations of general justice and fairness
in pari delicto	equally at fault
inter alia	amongst other things
mutatis mutandis	subject to necessary modifications
prima facie	at first sight, on the face of it
pro tanto	to that extent
seriatim	one after another

38 See also p50.
39 See also p51.
40 See the list published in *Explain* Issue 1 published by the Centre for Plain Legal Language (NSW).

sine qua non	a necessary condition
sui generis	in a class of its own, one of a kind
viva voce	spoken
in esse	in being

26. Avoid emotive words

The drafter must attempt to draft laws in such a way that choice of language does not affect the intended meaning by adding emotional overtones. The content of the law will inevitably generate some emotion in those concerned to enact, apply or interpret it but its expression should be as nearly devoid of emotion as is possible. It is quite wrong, for example, to refer to 'the abominable crime of buggery' as does s49 of the Offences against the Person Ordinance [HK] (following 24 & 25 Vict c 100 s61).

It is quite wrong to set a standard in legislation based on emotional effect. For example, the use of the word 'loathsome' in the following passage taken from an old immigration law is indefensible:

> The landing may be prohibited of a person who is suffering from a contagious disease which is loathsome or dangerous.

27. Use informal and recently coined words with discretion[41]

Legislation must keep pace with social and technological needs arising from the passage of time and when appropriate must use the new words that social and technological change has spawned. Technological change particularly introduces many new words and such words as 'laptop', 'software' and 'modem' might now be safely used. Words must have attained some apparent stability as standard English (ie not just slang or used in a trendy vogue sense) before being used. There is at present a visible trend to use nouns as verbs and in some cases the usage may not be accepted as standard English.

An increasing preference for familiar everyday language has increased the acceptability of new popular terms as well as new words from technology. For example, the Dogs (Fouling of Land) Act 1995 [UK] uses the word 'pooper-scooper'. Some jurisdictions have enacted legislation for the protection of 'whistleblowers'.

28. Use one word and not more if one word will do

This guideline might be subtitled 'Avoid circumlocution'. In order to be simple and direct, writing must be straightforward, direct and devoid of circumlocution. Every draft needs to be scrutinised for the roundabout or circuitous expression. Directness is akin to economy for both require the rigorous pruning of unnecessary words and phrases. The use of circuitous expressions is usually the result of habit. A person's thinking is so intertwined with patterns of speech which are natural to that person that a conscious effort will commonly be necessary to detect troubles of this kind. Drafters have to be aware of the kind of mindset that induces people to write 'Passengers are urged to refrain from smoking' instead of 'No smoking'.

Paragraph 84 of 'Statute Law Deficiencies' quotes this tortuous gem from s139(2) of the Transport Act 1968:

41 See also pp 12–13.

> **direct access** means access otherwise than by means of a highway which is not a special road, and **indirect access** means access by means of such a highway as aforesaid.

This guideline is particularly concerned with the couplets and phrases that are so often seen in legislation in contexts where one word would have been simpler and more direct. There are many couplets in widespread use in which one word is redundant in most contexts. The following should be used only where the second word serves a useful purpose:

all and every	due and payable
final and conclusive	from and after
complete and full	undertake and agree
have and hold	if and when
power and authority	release and discharge
save and except	sole and exclusive
permit or suffer	true and correct
null and void	give and devise
cease and desist	fit and proper
read and construed	good and sufficient
perform and discharge	let or hindrance
force and effect	goods and chattels
residue and remainder	just and reasonable
will and testament	aid and abet

Some phrases are commonly and unnecessarily used when one word would be simpler and more direct. Examples are almost beyond number but the following examples are illustrative of what is a very common drafting defect. The preferred word precedes the phrase to be generally avoided:

because	because of the fact that
because	by virtue of the fact that
because	for the reason that
because	on the grounds that
if	in the event that
if	if it should happen/eventuate/transpire that
if	under circumstances in which
by	by means of
think	of the opinion that
while	during such period as
except	except for the fact that
near	in close proximity
about	in connection with
about	concerning the matter of
about	as regards
about	in reference/relation to
although	notwithstanding/despite the fact that
usually	the majority of instances
when	at the time when
during	during such time as
may	is entitled to
until	until such time as

29. Use words consistently

In contexts where a choice must be made from a number of synonymous or near synonymous words, the choice should be adhered to once made. Different words should not be used to express the same meaning and, conversely, the same word should not be used to express different meanings. Consistency in the use of words is most desirable. For example, if one provision of a statute requires that a notice be 'given', other provisions of the statute should not require notices to be 'furnished', 'lodged', 'submitted', 'delivered' or 'filed'. If one provision of a statute refers to the 'issue' of a licence, another should not refer to the 'grant' of a licence.

Six rules instead of twenty-nine[42]

For readers who think that twenty-nine rules are immoderate and far too many to remember, here are six major sign-posts along the way to clarity:

- Write simply but precisely *(Rule 1)*
- Draft for users *(Rule 2)*
- Organise material logically *(Rule 4)*
- Avoid long sentences, particularly if unparagraphed *(Rule 10)*
- Omit unnecessary words *(Rule 21)*
- Choose the exact word *(Rule 23)*

STYLE AND GENDER

In a growing number of jurisdictions, lawmakers have accepted that sexist language offends the sensitivities of many women and now draft legislation in gender-neutral language. This has been a social response to the assertion that the enactment of legislation in 'masculine' language contributes to the perpetuation of a male-oriented society in which women are seen as having a lower status and value. It has been argued that the general use of masculine nouns and pronouns 'implies that personality is really a male attribute and that women are a human sub-species'.[43] The argument is a social rather than a legal one for interpretation legislation generally declares that masculine pronouns in legislation are taken to refer to both males and females. Such legislation does no more than follow common usage in the community, particularly with regard to spoken language. Nevertheless, changes in written language have been rapid and widespread. Many publishing companies now recommend authors to avoid language that may be regarded as sexist.

42 On the other hand, readers who consider 29 rules rather parsimonious may refer to the 135 principles in Laulk and Mehler, *The Elements of Legal Writing* (Macmillan, 1994). C. K. Cook in *Line by Line* lists five categories of stylistic faults that she considers most often impede reading and obscure meaning. They are 1 needless words, 2 words in the wrong order, 3 equivalent but unbalanced sentence elements, 4 imprecise relations between subjects and verbs and between pronouns and antecedents, and 5 inappropriate punctuation.

43 C. Miller and K. Swift, *The Handbook of Nonsexist Writing* (Harper and Row). See 'Avoidance of Sexist Legislation in Legislation', [1985] Commonwealth Law Bulletin 590.

It is accepted that what is seen as a sexist use of language is unacceptable to a large sector of society. It is therefore suggested that legislation should treat men and women equally and that gender-neutral legislation should become the general rule.

Unisex grammar

The challenge is to get rid of the male pronouns 'he', 'his', and 'him' in contexts where females are intended to be included. It arises because there is no gender free singular pronoun in English. In some sentences the challenge cannot be met without some loss of elegance but in general the benefit obtained outweighs any burden of awkwardness. There are a number of ways of dealing with the problem and the drafter must decide which technique best communicates the message with a reasonable degree of elegance in the particular context. One of the following techniques may be satisfactory or it may be necessary to recast the sentence, perhaps using a passive form, a nominalisation or some other phrase.

1 Repeat the noun in place of a pronoun

An employer at a mine must take reasonable care to ensure the employer's own health and safety at work.

On reaching the age of 80, a director must resign the director's office.

2 Use 'his or her' in place of 'his'

An employer at a mine must take reasonable care to ensure his or her own health and safety at work.

3 Recast the sentence using the plural

Employers at mines must take reasonable care to ensure their own health and safety at work.

4 Omit the pronoun

On reaching the age of 80, a director must resign office.

5 Replace a nominalisation with a verb form

If satisfied that an applicant has the specified qualifications, the Minister must consent to the application.
not
... give his consent ...

6 Recast the sentence using a relative clause

A person who has lodged a memorandum of appeal may ...
not
If a person has lodged a memorandum of appeal, he may ....

7 *Recast the sentence using a participle*

A person must give 7 days' notice before lodging an appeal.
not
A person must give 7 days' notice before he lodges an appeal.

Some authorities favour using 'they', 'them' and 'their' as singular unisex pronouns, a usage which goes back centuries but has never been fully accepted.[44]

Avoid demeaning or patronising language

Men and women should be dealt with in legislation as individuals in the same fashion and shown the same respect. Care should be taken to use parallel language when referring to men and women. For example:

husband and wife, ladies and gentlemen
not
man and wife, ladies and men

So far as possible, occupational references should be the same for men and women. By referring to a 'lady doctor' or a 'woman barrister' it is implied that the standard is male and that a female is non-standard. Conversely, 'male nurse' is unacceptable. In many instances the form perhaps ending in -ess that was formerly used for females is now obsolete or obsolescent. Examples of such forms are actress, stewardess, hostess and manageress. Care must be taken to avoid gender stereotypes.

The following are recommended:

ambulance worker	*not*	ambulanceman
drafter	*not*	draftsman
fisher	*not*	fisherman
firefighter	*not*	fireman
worker	*not*	workman
staffed, crewed,	*not*	manned
homemaker	*not*	housewife
administrator	*not*	administratrix
manager	*not*	manageress

If examples referring to hypothetical persons are included by way of notes or otherwise, the persons should not always be of one sex.

Avoid 'man' words

The battle between 'chairman', 'chair' and 'chairperson' continues. As yet there is no clear winner although 'chairman' appears to be losing ground. Acceptable alternatives to 'chairperson' are

president presiding member convenor coordinator.

44 See *Howard*, p397.

Avoid words containing 'man' that are used to refer to humanity generally.

the average person	*not*	the average man
humanity, people	*not*	mankind, man
workers, work force	*not*	manpower
staffing levels	*not*	manning levels
adulthood	*not*	manhood
manufactured	*not*	man made
maintenance worker	*not*	repairman