

## PLAIN LANGUAGE AND LEGAL DRAFTING: A NEW ZEALAND COMMENT

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In this paper I

- (1) illustrate the proposition that the plain drafting of legal documents is an idea whose time has come - again,
- (2) mention some of the steps already taken in New Zealand relevant to the drafting of legislation,
- (3) indicate further steps which I expect will be taken in New Zealand, and
- (4) emphasize what I think is the most important reason for the plain drafting of legislation.

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\* Deputy President, New Zealand Law Commission. Hardly a word in this paper is original. The influences are too extensive to allow adequate acknowledgement.

## 1. PLAIN DRAFTING OF LEGAL DOCUMENTS: AN IDEA WHOSE TIME HAS COME

David Mellinkoff, an outstanding writer on our topic says that legal writing has a strong tendency to be (1) wordy, (2) unclear, (3) pompous, and (4) dull, The Language of the Law (1963) 24. Another trenchant critic and law professor, Fred Rodell, puts it even higher. "There are two things wrong with almost all legal writing. One is its style. The other is its content" (1962) 48 Virginia L Rev 279.

The criticism can still be made notwithstanding the fact that it has long been made and long been the subject of severe penalty. Thus Mellinkoff mentions the steps taken by one sixteenth century Chancellor to curtail verbosity in legal pleadings. The plaintiff's replication had been stretched from an adequate 16 pages to 120. The Chancellor not only fined and imprisoned the litigant (not the draftman) but subjected him to ridicule. The Warden of the Fleet was ordered to take the litigant into custody and to bring him into Westminster Hall.

... and there and then shall cut a hole in the myddest of the same engrossed replication ... and put the said Richard's head through the same hole, and so let the same replication hang about his shoulders with the written side outward; and then, the same so hanging, shall lead the same Richard, bare headed and bare faced, round about Westminster Hall, whilst the courts are sitting, and shall shew him at the bar of every of the three courts within the Hall (p.191).

Francis Bacon as Chancellor extended the penalties (although not the humiliation) to counsel as well as to the litigants.

To be fair, important steps have at various times and now are being taken to meet the criticism. In New Zealand, as elsewhere, insurance companies increasingly see the advantages of better drafting and presentation of their policies - for marketing, for comprehension by customers (and their satisfaction), and for internal administration (and accordingly for costs and profits).

The Public Trust Office has successfully redrafted its standard wills and other documents with some of the same advantages. Wills (no longer wills and testaments) now simply give (rather than give, devise and bequeath) the property in question. Major law firms - and no doubt smaller ones too - are beginning to see the advantages of hard work in this area.

The most extensive recent demonstrations of the great values of plain drafting come from the United States. So a 1984 publication by its Department of Commerce, How Plain English Works for Business: Twelve Case Studies gives detailed evidence of businesses succeeding by simplifying consumer documents.

When a company simplifies its language, it builds business and saves time and money. It streamlines procedures, eliminates unnecessary forms, and reduces customer complaints. Its employees, as well as its customers, get a better grasp on how the company does business. This increases productivity and customer satisfaction.

The Director of Consumer Affairs adds the important caution and encouragement:

Simplifying documents is not easy. These case studies show there are false starts, uncertainty, and internal questioning as companies organize and manage their simplification projects. But each project results in useful plain English products that improve the company's image and its competitive position.

The case studies illustrate the improvements in language and design - and substance. The last often arises since the plainer drafting and structure of the document present more clearly or even for the first time the question whether substantive elements of the document are necessary. Thus Citibank, when simplifying its promissory note in 1973, found that many provisions in the original note either arose so rarely or added so little real benefit that while theoretically useful they could reasonably be deleted.

On language, Citibank applied the rules for good writing stated over the years by White and Strunk, George Orwell and others:

Sentences quickly became shorter; passive constructions became active; negatives became positives; and compound and complex sentences became simple.

On design, the Bank acted on studies showing the most effective line length, distances between lines, type size and design, margin formats, and different colours.

And the payoffs?

- . The new promissory note supported Citibank's efforts to increase its market share among New York consumers.
- . Praise poured in from consumer advocates who had traditionally been wary of the large banks.
- . In a joint experiment, Citibank and Ralph Nader's staff worked together to write a publication telling consumers how to use small claims court.
- . Within a few years of introducing the simplified note and the new collection processes, Citibank considerably reduced the number of suits it brought against consumers.

I have scarcely mentioned official documents. One interesting piece of evidence of the growing acceptance of plain writing at the official level comes from changes promoted in the United Kingdom. An earlier version of a pamphlet produced by the Cabinet Office had a Junior Civil Service department minister on the back page. The last version I have seen has Mrs Thatcher on the front page. (The Word is ... Plain English (1984); Making it Plain (1988)).

The proposition in the pamphlet is that the Government wishes to communicate in a more straightforward and direct way with the governed. One of the advantages of this direct communication is great savings of government spending arising for instance from the fact that official forms do not have to be sent back and forth for correction.

A New Zealand example is the improvement a few years ago of the electoral enrolment forms. That did cost valuable Parliamentary Counsel Office time. But now that time has been recovered many times over in the offices of the Chief Electoral Officer - forms are now more often accurately completed - not to mention the time of all the prospective voters (Legislation and its Interpretation (NZLC PP8 1988) 55 and 80).

More important than those savings of time and money is that those better forms help ensure that the people exercise their democratic rights. That is to say the better preparation of legislative forms helps promote the better enforcement of the law and the more effective realisation of rights.

At last I have come to legislation. My lengthy introduction is deliberate. The drafting of legislation does of course have special characteristics, but legislation, like the other documents mentioned, is designed to communicate rules and principles governing behaviour. In this case there is the difference that the rules are stated with the authority of the State. I do not think that that reduces the lessons that can be learned from the practice I have mentioned and from the disciplines that practice draws from.

## 2. PLAIN DRAFTING OF LEGISLATION IN NEW ZEALAND: SOME RELEVANT STEPS ALREADY TAKEN

Many have brought together the criticisms of the drafting of legislation. In New Zealand, as a counter point, we can point to a very positive beginning: a direction by Queen Victoria in 1840 to her first Governor that all laws "be drawn up in a simple and compendious form, avoiding as far as may be all prolixity and tautology". 145 years later Parliament gave a similar direction to the Law Commission; it is to advise on ways in which the law can be made as understandable as is practicable, and as well is to have regard to the desirability of simplifying the expression and content of the law, again as far as that is practicable.

It is easier to state those principles than to apply them. But over the past 150 years in New Zealand (if I may engage in the invidious business of giving examples)<sup>1</sup> we have some outstanding examples of good drafting reaching from the very first Supreme Court and conveyancing ordinances, through the criminal code of 1893 (heavily influenced of course by the Stephens work), the native land legislation of 1909 (and much else for which Sir John Salmond was responsible), the consolidation statutes of the 1920s, the shipping and seamen consolidation of 1952, the family law reforms of the 1960s and 1970s, the Ombudsmen legislation of 1962 (a major New Zealand export) ...

The high quality of such statutes is of course the consequence of several factors, including usually clear thinking and decision making (a matter I come back to at the end of this paper), good instructions to Parliamentary Counsel, a good grasp by those involved (in the executive branch and in Parliament) of the wider political, administrative, legal and constitutional context, and sufficient time. As Parliamentary Counsel point out with good reason, all those elements do not often coexist, eg Walter Iles QC in Legislation and its Interpretation (NZLC PP8 1988) 79-80.

### Design of statutes

Steps have however been taken to ensure better legislation and more can be, even in the face of great pressure. I now mention some of the steps already taken. The design of the statute book has been changed throughout this century. So the page is now smaller than a century ago, the setting easier on the eye, and the line length shorter. Numbers are no longer spelled out in words and references to statutory provisions are shorter.

### Statements of purpose

More statutes now include an express statement of purpose, in the title, a preamble, or more commonly in a substantive provision, see eg respectively the Matrimonial Property Act 1976, the Maori Language Act 1987 and the Labour Relations Act 1987 (which has several object provisions in separate Parts).

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<sup>1</sup> I do that here and later to make my points concretely. For a related discussion see "A Lawyer looks at Parliament" in Sir John Marshall (ed) *The Reform of Parliament* (1978) 26.

### Accessibility of inherited law

Parliament, building on work done throughout the Commonwealth (especially in Australia), recently provided a definitive list of our inherited statute law, Imperial Laws Application Act 1988 (see Imperial Legislation in Force in New Zealand (NZLC R1 1987) for the texts and for a more direct draft Bill than the original). It thereby made that part of our law more comprehensible and accessible.

### The internal organisation of statutes

The organisation of statutes more often places the important substantive provisions first and the less significant institutional and procedural matters last (compare the Dental Act 1988 with its predecessor and other professional and occupational regulation statutes).

### Consistent approach to principle

The substance of statutes increasingly reflects a consistent approach to recurring matters of principle. This is especially so in the legislation stating, limiting and controlling public power. An earlier example is the insistence since 1961 on a narrow objectively worded statement of provisions empowering the making of regulations. The Regulations Review Committee is now building on this and related experience.

The practice of departments, Parliamentary Counsel, and of the Public and Administrative Law Reform Committee has established further principles and practices. Many of them are brought together by the Legislation Advisory Committee in Legislative Change: Guidelines on Process and Content published in 1987 and endorsed by Cabinet later that year.

In the preface to that report Mr Palmer, then Deputy Prime Minister and Minister of Justice, said:

Legislation is a vital function of government. ...

Experience teaches that both the process for the making of legislation and the content of legislation can be improved. This paper ... is designed to set out central aspects of that process and elements of the content of legislation that should always be addressed. ... The intention is that Ministers, departments and other bodies responsible for legislation would be guided by the paper.

The message is clear. If we need legislation - a matter which should not be taken for granted - we must follow proper procedures in preparing it and we must, in the absence of good reason, comply with established principles.

The message in this paper is for the whole of government - for ministers, for senior officials, for departmental lawyers, and for all others concerned with the preparation of legislation.

The administration has the primary responsibility for applying the principles. But the Legislation Advisory Committee has continued to develop those principles both in specific cases and in general statements arising from that particular experience (see its second and forthcoming fifth reports). So it has further developed the principles relating to the conferral of powers on administrative tribunals, their organisation, and appeals from their decisions (Report No 3), it has reported on departmental statutes (recommending that in general they are not needed and should not be enacted) (Report No 4), and is currently considering the practice and principles relating to a range of advisory bodies. The Cabinet has endorsed the general reports - on Legislative Change, Administrative Tribunals and Departmental Statutes, and many (but of course not all) of the Committee's recommendations on particular bills have been accepted.

The Committee's task in examining particular legislative proposals can be put in three questions -

Does the legislation give effect to the policy of the Government?

Does it do so consistently with legal principle?

Is the legislation necessary?

### 3. FURTHER STEPS IN NEW ZEALAND

Central to the further improvement of legislation is the development of the practices reflected in the work of the Legislation Advisory Committee. Those sponsoring and advising on legislative proposals - Ministers and officials - have to address more consistently than they do the three questions just asked.

Is the legislation needed?

The last of the questions - the need for the legislation - is increasingly being answered negatively (illustrated by the absence of detailed departmental legislation for several of the new and reorganised departments of state). But that question has to be asked more rigorously. For instance some statutes appear on the legislative agenda for amendment year after year. In some cases there will be a perceived political imperative (might it not more frequently be resisted), but in many others that does not appear to be so. Let me give an example.

In 1983 the social security and war pensions legislation was amended, at the urging of the Controller and Auditor-General who was concerned by the illegal early payment of benefit increases, to allow the changes to be made by Order in Council. It would not then be necessary to seek timely Parliamentary approval - although that approval was required (after the event) before the end of the session. Those provisions, designed in part to reduce pressure on the parliamentary process, have now each been amended on five occasions in just six years - and that in addition to the confirming statutes enacted essentially on an annual basis since.

Has the policy of the government been clearly stated?

Such instances of detailed repetitive fragmented legislation take up the time, often unnecessarily, of those involved - officials, Ministers, Parliamentary Counsel, Members of Parliament, and members of the public who are affected or interested. That is one cost. Another, to revert to the first question stated at the end of the last section, is that the policy of the government may not appear clearly from such a fragmented approach. One recent example involves the 1989 amendment to the Ministry of Agriculture and Fisheries Act 1953 to regulate the ownership and use of intellectual property developed within that Ministry. That issue arises of course for several other departments of state and at least one other department has specific statutory provision. It is not clear that legislation is needed at all: why cannot the matter be handled by contract as it is in other similar organisations in the private sector? But if legislation is required for the state sector the argument for generally applicable (rather than piecemeal) legislation is strong.

Has the policy been measured against principle?

If policy does not appear clearly in such provisions it may also not be possible properly to measure the policy against relevant principle. So, when the port companies were being established a short time ago, the general question of the application to local authority

commercial companies of the Ombudsmen and official information legislation appears not to have been squarely faced. That is to be contrasted with the comprehensive way in which that question arose, was debated, and was answered in respect of the central government State-Owned Enterprises. Fortunately, the matter is now on the agenda in a general way with the report of the State-Owned Enterprises (Ombudsmen and Official Information Acts) Committee (1990 AJHR I 22A) which recommends that local authority trading enterprises be made subject to that legislation.

#### The preparation of a Legislation Manual

That further development and application of principle will be assisted by the preparation of a Legislation Manual which will build on the practice as found in part in Legislative Change, manuals found elsewhere, and related expertise. This is the next major project of the Law Commission in meeting its broad responsibilities in respect of legislation. Success in it depends of course on close co-operation with the Parliamentary Counsel Office. Related to that is the adequate resourcing of that office - a matter on which I understand action is also being taken.

#### Improvements in style

That manual project will involve, in addition to matters of principle, questions of style and design. The Commission has already made several relevant proposals and illustrated them in its reports. So it

- . includes purpose provisions rather than long titles in its draft Bills
- . uses different typography and different settings of the words on the page to facilitate reading
- . removes capital letters which in the present statute book appear inappropriately in the middle of sentences
- . uses Arabic rather than Roman numbers for parts of Bills
- . avoids archaic or unusual words such as "thereof" and "hereby"
- . removes unnecessary fictions
- . removes unnecessary qualifications on propositions
- . tries to present the material in a clear, logical order
- . writes the provisions in the present text
- . in general writes in the active voice rather than the passive
- . in general uses short sentences

#### A new Interpretation Act

Related to those matters is the preparation of a new Interpretation Act. That draft is part and parcel of a clearer, better organised statute book. To use the words of the purpose provision included in the latest Commission draft, an Interpretation Act should

- (a) state principles and rules for the interpretation of legislation,
- (b) shorten legislation by avoiding repetition, and

- (c) promote consistency in the language and form of legislation.

#### The potential of computers

A final matter, being considered by the Conference of Commonwealth Legislative Counsel at its meeting in Auckland this month, is the use of computers to help both access to the statute book and the drafting of legislation. The New Zealand statute book will soon all be available on computer - as are the last three years of statutes. We have yet, I think, properly to assess the computer's potential for a much more accessible, principled and coherent statute book.

#### 4. THE MOST IMPORTANT REASON FOR THE PLAIN DRAFTING OF LEGISLATION

I have mentioned several reasons for the plain drafting of legal documents. This is not just a matter of form or of misplaced pedantry. The examples mentioned show that customers can better understand and comply with the documents, those who apply then can more easily administer them, rights are more effectively realised, and costs are saved. All those are important, even critical matters.

Even more important, I suggest, is the democratic value of the plain drafting of legislation. The confused, poorly drafted and fragmented character of legislation must sometimes mean that Ministers have not made knowledgeable decisions on that legislation. Clear proposals have not been put to them or finally been worked out by them. Members of Parliament and those making submissions to them are similarly not able to address clear proposals<sup>2</sup>.

The consequence of this can be that the legislation when finally understood is seen to incorporate serious errors and policies which no Minister ever intended to present to Parliament. Our important select committee process means that these errors are sometimes discovered - but in the meantime serious consequences may have ensued. And the errors will not always be caught, or adequately remedied if they are.

I should make it clear that I am not striving for unattainable perfection. The best can be the enemy of the good. Governments are to govern. Reforming governments will make major demands on the legislative process. Our system has been under enormous strain and has produced much legislation of quality. But if governments are to have their will done, they must be enabled to elaborate that will in such a way that they can endorse it as their own, and present it for debate, acceptance or rejection, and application in practice - all on the basis that it is understood. The first purpose in the Official Information Act 1982 makes the general point in a closely related context. That purpose is to increase progressively the availability of official information to the people of New Zealand

- (a) to enable their more effective participation in the making and administration of laws and policies, and
- (b) to promote the accountability of Ministers of the Crown and officials

and thereby enhance respect for the law and promote the good government of New Zealand.

My thesis is that legislative information must not only be available. It must also be of good quality, if respect for the law is to be enhanced and good government promoted.

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<sup>2</sup> That may mean that the relevant select committee with appropriate Ministerial and official input (itself a delicate matter) will develop a clearer position - but in that event those who have made submissions have made them on the wrong Bill.