



ARTICLES

David St.L. Kelly*

LEGISLATIVE DRAFTING AND PLAIN ENGLISH

A Perennial Problem

Dissatisfaction with legal language and with legislative drafting, in particular, appears to be reaching a new peak.¹ However, it is a phenomenon with a long and distinguished history. Edward VI is reported to have said:

“ I would wish that . . . the superfluous and tedious statutes were brought into one sum together, and made more plain and short, to the intent that men might better understand them.”²

More than two centuries later, Thomas Jefferson spoke of the style both of British statutes and of American Acts of Assembly which:

“from their verbosity, their endless tautologies, their involutions of case within case and parenthesis within parenthesis, and their multiplied efforts at certainty by *said*s and *aforsaid*s, by *ors* and by *ands*, to make them more plain, do really render them more perplexed and incomprehensible, not only to common readers but to the lawyers themselves.”³

Jeremy Bentham was even less flattering:

“ . . . in the composition of statute law, the treacherous assistance of the professional lawyer has, by a disastrous necessity, been forced upon the legislator. Words being heaped together at so much a dozen, the consequence is alike necessary and obvious. In this case, too, lest the virtues of tautology and surplusage should not be sufficient, the aid of disorder, and a religious exclusion of those helps to elucidation with which no other species of composition is unprovided, have been called in and carefully preserved.”⁴

* Chairperson, Law Reform Commission of Victoria.

1 See Current Topics, “The problem of drafting styles” (1986) 60 ALJ 369.

2 Renton Committee, *The Preparation of Legislation* (1975) Cmnd 6053 at 6.

3 Id 7.

4 Rationale of Judicial Evidence, Ch XVII, in Vol 11, *Works of Jeremy Bentham* (1838, John Bowring ed), William Tait, Edinburgh, 1838, 281.

Concerns such as these over the style of legislative drafting were an important factor in a fundamental change in the organisation of drafting which took place in Britain in the 19th century. In the first half of the century, a substantial amount of legislation was drafted by members of the Bar. But there was a trend towards in-house drafting in some departments of the British Government, particularly the Home Office and Treasury. By a Treasury Minute of 1869, Henry (later Lord) Thring, then Home Office draftsman, was appointed Parliamentary Counsel to the Treasury. The responsibilities of the new office were to be system-wide. Thring was to draft or oversee the drafting of all Bills, except those relating exclusively to Scotland or Ireland.⁵ A similar development, against much the same background, took place in the Australian colonies. A centralised office for legislative drafting was established in New South Wales in 1878 and in Victoria in 1879.⁶

Thring's appointment had an immediate effect on the drafting of British statutes. He imposed a structure and order on Bills which was aimed at improving the form and comprehensibility of legislation:

"Following in some degree the example of the American codes, I divided the Bill into parts and then divided the parts under separate titles, arranging the clauses of the Bill in a logical order so that a glance at the table of contents would convey to the reader a correct idea of the effect of the Bill."⁷

Despite the improvements made by Thring, the consolidation of centralised drafting services and the gradual emergence of professional drafting elites, the critics were not silenced. In the 20th Century, both their number and their frustrations appear to have increased.⁸

Judges, in particular, have regularly voiced their complaints. Mackinnon LJ was once moved to remark in relation to the Trade Marks Act 1938:

"In the course of three days hearing of this case I have, I suppose, heard s.4 of the Act of 1938 read, or have read it for myself, dozens if not hundreds of times. Despite this iteration I must confess that, reading it through once again, I have very little notion of what the section is intended to convey, and particularly the sentence of two hundred and fifty-three words, as I make them, which constitutes sub-s I. I doubt if the entire statute book could be successfully

5 Sir Courtenay Ilbert, *Legislative Methods & Forms* (1901) 80-86; C. Bennion, *Statute Law*, (2nd edn 1983) 22-4.

6 R. Parsons, *Lawyers in the New South Wales Parliament 1870-1890: A study of the legislative role of private members* (PhD thesis, Macquarie University, 1972) at 275f.

7 *Practical Legislation* (1902) at 4.

8 For a recent review of the American literature, see Benson, "The End of Legalesse: The Game is Over" (1985) 13 *Review of Law & Social Change* 519. For England, in addition to the Renton Committee Report (n1), see Statute Law Society, *Statute Law Deficiencies* (1970) para 80f; *Statute Law: A Radical Simplification* (1974) para 69f, 138; Sir William Dale, *Legislative Drafting: A New Approach* (1977); C. Bennion, *Statute Law* (1983) "Statute Law Obscurity and the Drafting Parameters" (1978) *British Journal of Law & Society* 235; "The Controversy over Drafting Style" [1983] *The Law Society's Gazette* 2355; Thomas, "Plain English and the Law" [1985] *Statute Law Review* 139.

searched for a sentence of equal length which is of more fuliginous obscurity.”⁹

Even more colourful were the comments made by Harman LJ in *Davy v Leeds Corporation*:¹⁰

“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”

Legislative drafting in Australia has also had its critics, though they have not often been as outspoken as their English counterparts. Mr Justice Rich once observed that the Commonwealth income tax legislation was “a thing of shreds and patches” which resembled “a kind of statutory Joseph’s coat”.¹¹ Mr Justice Kitto described the Succession and Probate Duties Act 1892 (Qld) as a “dark jungle, full of surprises and mysteries”.¹² More recently, Bray CJ observed of the Planning & Development Act 1967 (SA) and regulations made under it:

“The luxuriant growth of this legislative jungle abounds in ambiguities, inconsistencies, incoherences and lacunae and it is too much to hope that every judge who has had to consider these proceedings would choose to enter the jungle at the same point, still less to emerge from it by the same route.”¹³

The problem is not limited to isolated provisions or to particular types of legislation. It is typical of much of the statute book, particularly as it deals with complex subject-matter. As a consequence, many laws are unintelligible to the vast majority of citizens. As Lord Radcliffe said in 1950:

“a sort of hieratic language has developed by which the priests incant the commandments. I seem to see the ordinary citizen today standing before the law like the laity in a medieval church: at the far end the lights glow, the priestly figures move to and fro, but it is in an unknown tongue that the great mysteries of right and wrong are proclaimed.”¹⁴

But it is not only the ordinary citizen who suffers. Much legislation is incomprehensible to experts in the relevant field. In many cases, even lawyers themselves are excluded from the priestly caste.

Recent Developments

In 1984, the Senate Standing Committee on Education and the Arts, in its report, *A National Language Policy*, recommended that a national

9 *Bismag Ltd v Amblins (Chemists) Ltd* [1940] 1 Ch 667, 687.

10 [1964] 3 All ER 390, 394.

11 Current Topics, “Unintelligible Acts” (1930) 4 ALJ 105 at 106.

12 *Livingston v Commissioner of Stamp Duties (Q)* (1960) 107 CLR 411, 446.

13 *City of Marion v Lady Becker* (1973) 6 SASR 13, 29.

14 “Some Reflections on Law and Lawyers” (1950) 10 Cambridge LJ 361, 368.

Task Force be established to recommend reforms to the language of the law.¹⁵ The Task Force was to make recommendations to government, the profession and the law schools on all aspects of legal language. Although no task force has been established, major developments are in train in Victoria in relation to legislative drafting, in particular.

On 7 May 1985, the Attorney-General, the Hon JH Kennan MLC, made a Ministerial Statement, 'Plain English Legislation', in the Legislative Council. Mr Kennan referred to growing dissatisfaction with the style of legislative drafting and announced the adoption of a plain English policy. A number of particular problems were to be dealt with immediately. These included:

- the abandonment of long titles, reference to regnal years, the archaic form of the enacting words, and the use of Latin
- the insertion of a purpose clause at the beginning of each Bill
- the simplification of commencement and definition provisions
- the removal of unnecessary qualifications such as "notwithstanding anything in this Act" and "unless inconsistent with the context or the subject matter".

These changes were seen as only the first step in an eventual transformation of legislative drafting:

"What needs to happen now is to have a process whereby Parliamentary Counsel draft Bills and legislation officers draft subordinate legislation from the outset in plain English. This requires a radical departure from tradition and a break with the thinking of the past. It requires imagination, a spirit of adventure and a boldness not normally associated with the practice of law or with the drafting of legislation or subordinate legislation."¹⁶

Two major steps in this direction were taken late in 1985. The first was the secondment of Professor Robert Eagleson of the Department of English, University of Sydney, to the office of Chief Parliamentary Counsel from 1 January to 31 December 1986. Professor Eagleson is a leading authority on plain English. He was a consultant to NRMA Insurance Ltd in connection with the development of its plain English policies. In 1985 he was an adviser to the Commonwealth Government on plain English. He was involved in a number of special projects, including the rewriting of tax forms, the revision of the Social Security Department's standard letters, and the development of a manual dealing with the Commonwealth Employees (Redeployment & Retirement) Act. Professor Eagleson's task for the Victorian Government was to assist Parliamentary Counsel in moving from the traditional drafting style to one which is more in accordance with plain English principles.

The second step occurred on 10 September 1985 when the Attorney-General gave the Law Reform Commission a reference on plain English drafting in connection with both legislation and public service forms. Professor Eagleson was appointed a part-time Commissioner from 1 January 1986 to take charge of work on the reference. The central task is:

¹⁵ Para 3.17.

¹⁶ The Hon JH Kennan, Ministerial Statement, Legislative Council, "Plain English Legislation", 7 May 1985, 7.

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

The reference requires the Commission to make particular reference to the following matters:

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

On 3 September 1986, the Commission released its discussion paper on the reference.¹⁷ Much of that paper is devoted to legislative drafting. It identifies a significant number of general problems with the structure and style of Victorian legislation. These include excessive sentence length, poor sequencing of components, persistent repetition, over-use of the passive voice, the use of archaisms and the over-use of definitions. The conclusion reached is that the present legislative drafting style is seriously defective. It impedes understanding not only by ordinary people but by lawyers and judges as well. In doing so, it imposes unnecessary costs on the community. These are of two types. First, there is the social cost of a system in which ordinary people may be deprived of benefits or of the opportunity of complying with the law because of its needless complexity. Secondly, there are the financial costs associated with an increased need for expert legal advice, both for members of the public and for those who administer the law. These costs are a waste of public and private funds. In the Commission's view, they could be avoided by a commitment to drafting legislation in plain English.

Demonstrating Plain English

The discussion paper sets out a number of examples of unnecessarily complex and convoluted legislation, mainly taken from 1985 Victorian statutes. These examples are analysed and rewritten in simpler language. Perhaps the best example is s 35 of the Fair Trading Act 1985 (Vic). That section is substantially the same as section 80A of the Trade Practices Act 1974 (Cth). Despite its length, that section bears setting out in some detail. Subsection (1) gives a court power to make orders in

¹⁷ 'Legislation, Legal Rights and Plain English'. Copies of the discussion paper are available free of charge from the Commission, 160 Queen Street, Melbourne. Telephone (03) 602 4566.

respect of a contravention of other provisions in Part II of the Act. There are two types of order: an order to disclose certain information and an order to publish certain advertisements. Subsections (2), (3) and (4) set limits on those orders by reference to the amount that a person would have to expend in order to comply with them. They read as follows:

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

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

(4) Where —

(a) on an application made under sub-section (1), the Court is satisfied that a person has committed, or been involved in, a contravention or contraventions of a provision of Part II; and

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

the Court shall not, in respect of the contravention or contraventions mentioned in paragraph (a), make an order or orders under sub-section (1) that the Court considers would be likely to require the expenditure by the person or persons to whom the order or orders is or are directed of an amount that exceeds, or of amounts that, in the aggregate, exceed, the amount

(if any) by which \$50,000 is greater than the amount, or the sum of the amounts, that has or have been or that the Court considers would be or be likely to be, expended in accordance with the previous order or previous orders first mentioned in paragraph (b)."

As the discussion paper notes, this provision contains numerous stylistic problems. For example, the parenthesis in s 4(b) ("whether or not . . .") contains 46 words — almost double the limits of comfortable sentence length. Moreover, this parenthesis is a subordinate clause within a subordinate clause within a much larger structure. Readers have to cope with two major subordinate clauses with several subordinate clauses built into one of them, before reaching the main clause. They must bear in mind subsections (2) and (3) as well. The approach adopted by the drafter places enormous strains on readers. In fact, there is a considerable amount of repetition in subsections (2), (3) and (4). The essential message is a simple one. It is set out in the following, relatively readable, plain English version of s 35(2)-(4):

(2) A court may not make an order under sub-section (1) if it would be likely in the Court's opinion to require the person or persons to whom it is directed to spend more than \$50,000, either alone or together with any other orders in respect of contraventions which

- (a) Are of the same provision of Part II;
- (b) are of the same or a substantially similar nature; and
- (c) occurred at or about the same time.¹⁸

The significant point is that the content of the original and of the rewrite is the same. The plain English version conveys the message relatively easily. The original hides it in a maze of unnecessary repetition and complicated sentence structure. It is not a question of the drafter having insufficient time to complete the task. The time taken to draft the original must have been much more than that required for the plain English version. The drafter dealt with a number of particulars without paying sufficient attention to the general theme. The drafter seems to have lost the wood for the trees.¹⁹

Section 35 of the Fair Trading Act 1985 (Vic) is not unique in the barriers it puts in the way of comprehension. Another example which has been brought to the Commission's attention is section 150 of the Futures Industry Act 1986 (Cth). Like s 35 of the Fair Trading Act 1985 (Vic), it is very lengthy. Its central purpose is to ensure that a failure to comply with the Act's requirements continues to be an offence even if the time for complying has passed and even if the offender has already been convicted of the relevant offence. So complicated is the method of

18 This is a revision of the version set out in the discussion paper. The revision was made as a consequence of criticisms by Mr. P. Balmford, Senior Lecturer in Law, Monash University, 21 November 1986.

19 More elegantly, 'Ce que L'on concoit bien s'enonce clairement, Et les mots pour le dire arrivent aisément.' N. Boileau-Despreaux, *L'Art Poétique*, (1972) Riegert ed. Cited by Sir William Dale, *Legislative Drafting: A New Approach* (1977). v

dealing with the subject matter that no fewer than eight special concepts are established and defined. Section 150 reads:

“150 (1) Where —

- (a) by or under a provision, an act is required to be done within a particular period or before a particular time;
- (b) failure to do the act within that period or before that time constitutes an offence; and
- (c) the act is not done within that period or before that time, then —
- (d) the obligation to do the act continues, notwithstanding that that period has expired or that time has passed, and whether or not a person is convicted of a primary substantive offence in relation to failure to do the act, until the act is done; and
- (e) sub-sections (3) and (4) apply.

(2) Where —

- (a) by or under a provision, an act is required to be done but neither a period within which, nor a time before which, the act is to be done is specified;
- (b) failure to do the act constitutes an offence; and
- (c) a person is convicted of a primary substantive offence in relation to failure to do the act, then —
- (d) the obligation to do the act continues, notwithstanding the conviction, until the act is done; and
- (e) sub-sections (3) and (4) apply.

(3) Where —

- (a) at a particular time, a person is first convicted of a substantive offence, in relation to failure to do the act; and
- (b) the failure to do the act continues after that time, the person is, in relation to failure to do the act, guilty of a further offence in respect of so much of the period throughout which the failure to do the act continues as elapses after that time and before the relevant day in relation to the further offence.

(4) Where —

- (a) a body corporate is guilty of a primary substantive offence in relation to failure to do the act; and
- (b) throughout a particular period (in this sub-section referred to as the “relevant period”) —

- (i) the failure to do the act continues;
- (ii) a person (in this sub-section referred to as the “derivative offender”) is in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the failure to do the act; and
- (iii) the derivative offender is an officer of the body corporate,

then —

(c) in a case where either or both of the following events occurs or occur:

- (i) the body corporate is convicted, before or during the relevant period, of the primary substantive offence;
- (ii) the derivative offender is convicted, before or during the relevant period, of a primary derivative offence in relation to failure to do the act,

the derivative offender is, in relation to failure to do the act, guilty of an offence (in this paragraph referred to as the "relevant offence") in respect of so much (if any) of the relevant period as elapses —

- (iii) after the conviction referred to in sub-paragraph (i) or (ii), or after the earlier of the convictions referred to in sub-paragraphs (i) and (ii), as the case may be; and
- (iv) before the relevant day in relation to the relevant offence; and

(d) in a case where, at a particular time during the relevant period, the derivative offender is first convicted of a secondary derivative offence, or is convicted of a second or subsequent secondary derivative offence, in relation to failure to do the act — the derivative offender is, in relation to failure to do the act, guilty of a further offence in respect of so much of the relevant period as elapses after that time and before the relevant day in relation to the further offence.

(5) Notwithstanding sub-section 148(6), where a person is guilty by virtue of sub-section (3) or (4) of this section, of an offence in respect of the whole or a part of a particular period, the penalty applicable to the offence is a fine of the amount obtained by multiplying \$50 by the number of days in that period, or in that period of that period, as the case may be.

(6) In this section —

"act" includes thing;

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

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

"provision" means a section, or a sub-section of a section, of this Act;

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

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

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

"required" includes directed;

"secondary derivative offence", in relation to failure to do an act, means an offence or further offence of which a person is, in relation to failure to do the act, guilty by virtue of paragraph (4)(c) or (d);

“substantive offence”, in relation to failure to do an act, means
 (a) a primary substantive offence in relation to failure to do the act; or
 (b) a further offence of which a person is, in relation to failure to do the act, guilty by virtue of sub-section (3).”

Instead of simply continuing offences, the drafter takes the unnecessary step of separately creating continuing obligations, and then makes breach of them an offence. But worse follows. Ossa is piled on Pelion as distinctions are drawn:

- (a) between offences in failing to do an act within a specified time and offences in failing to do an act where no time is specified;
- (b) substantive offences and derivative offences; and
- (c) primary substantive and primary derivative offences, on the one hand, and secondary offences, on the other.

As in the case of the earlier example, the message is a relatively simple one. It is set out in the following plain English version which reduces the total length of the provision from approximately 960 words to 208:

- (1) Even if the period specified for an act has ended —
 - (a) a person is guilty of an offence if he or she continues to fail to do an act after being convicted of an offence in relation to failure to do the act; and
 - (b) an officer of a body corporate is guilty of an offence if he or she is knowingly concerned in a continuing failure of the body corporate to do an act if either the body corporate has been convicted of an offence, or the officer has been convicted of an offence under section 151, in relation to failure to do the act.
- (2) A person may be guilty of successive offences in relation to a continuing failure to do an act.
- (3) The penalty for a further offence is \$50 multiplied by the number of days in the period during which the further offence continued between
 - (a) the person's or officer's most recent conviction for failure to do the act or, in the case of an officer's first offence in relation to a continuing failure to do an act, an earlier first conviction of the body corporate for failure to do the act; and
 - (b) the earlier of
 - (i) the laying of the information;
 - (ii) the day specified in the information.²⁰

There can be little doubt of the original drafter's skill in juggling the numerous concepts created. There can be equally little doubt of the drafter's failure to communicate the message in the most economical and effective way. A fugue was composed when a plainsong would have done.

Parliamentary counsel may not be solely to blame for the obstacles to comprehension contained in s 35 of the Fair Trading Act 1985 (Vic) and

20 An earlier version was tabled at the Ministerial Council on 23 July 1986. Modifications have been made to meet subsequent criticisms by the Office of Parliamentary Counsel. The plain English version is perhaps longer than it needs to be. Subsection (3) is probably otiose. The policy expressed in subsection (4) is unnecessarily complex.

s 150 of the Futures Industry Act 1986 (Cth). Factors such as poor quality instructions, variations in policy and lack of time for revision of drafts may make their task particularly difficult. As Sir Robert Megarry has said, the debt owed to parliamentary counsel by the legal profession is incalculable.²¹ However, s 35 of the Fair Trading Act 1985 (Vic) and s 150 of the Futures Industry Act 1986 (Cth) cannot be explained solely on the basis of external constraints. They demonstrate an excessive regard for drafting conventions, a failure to synthesise the various elements of the subject matter, and a neglect of the needs of the audience. These faults are regularly found in other legislation, particularly where the subject matter is complex. The Credit Act 1984 (Vic) and the Companies (Acquisition of Shares) Act 1980 (Cth) are good examples. Their language and structure add unnecessarily to the difficulties for comprehension which are inherent in their subject matters. A plain English redraft of the latter Act (the "Takeovers Code") will be attached to the Commission's final report. So, too, will a Drafting Manual aimed at assisting drafters to avoid defective language structures of the type identified in the Commission's discussion paper and report. The Commission's report is to be delivered to the Attorney-General by 31 March 1987.

Views of Parliamentary Counsel

If legislative drafting is to become clearer and existing obstacles to understanding are to be removed, parliamentary counsel must themselves provide the remedy. The leading author on the subject of legislative drafting, Mr. G.C. Thornton, OBE, QC, Chief Parliamentary Counsel for Western Australia, has acknowledged the need for improvement:

"Statute books contain at the present time much that is unsatisfactory and much that is difficult to understand. The need to communicate appears not infrequently to have been overlooked. . . . it is very clear that drafting techniques have a long way to go before they will satisfy all those who have a right to be satisfied with the state of written laws. There is, I think, an acknowledged obligation to take stock of contemporary drafting practices and to improve legislative drafting where this is seen to be possible."²²

However, the response to this call by other parliamentary counsel has not always been unqualified. While everyone acknowledges a need for legislation to be drafted as simply as possible, dire warnings have been given concerning recent moves towards plain English. There are two persistent themes in these warnings. First, complex legislation is the inevitable result of complex subject matter, not of drafting defects. Secondly, clarity and precision are sometimes incompatible goals; attempts to reduce complex legislation to plain English will result in a sacrifice of accuracy and precision.

First Theme : Complex Subject Matter Requires Complex Language

In its 1984-85 *Annual Report*, the Commonwealth Office of Parliamentary Counsel stated that most criticisms of the present style appeared to be based "on the mistaken belief that all statutes ought to be able to be expressed in simple language capable of being understood

21 *Miscellany at Law: A Diversion for Lawyers and Others* (1955) at 349.

22 *Legislative Drafting* (2nd ed 1979) vii.

by the average citizen".²³ Professor Robert Eagleson was given as the example of a critic who holds such a view. But the statement is not correct. Professor Eagleson holds no such belief. His and other recent criticisms of the present drafting style are based on the judgment that much legislation is poorly structured and convoluted in expression and that its style is such as to place quite unnecessary barriers in the way of understanding. It is not only the 'average citizen' who suffers in such a case, but also the lay experts in the relevant field, the lawyers who advise them, and the courts which are required to resolve disputes. One can readily agree with the Office that "it is naive to believe, and simply not true, that laws dealing with complex matters can always be so written as to be easily comprehended". But that is no answer to the criticism made by the proponents of plain English drafting.

The point was well made by Professor Eagleson himself in the *Sydney Morning Herald* in 1985. Responding to a letter from the then First Parliamentary Counsel of the Commonwealth, Mr. G.K. Kolts, OBE., QC.,²⁴ Professor Eagleson specifically rejected the view that a plain English document on a complex subject would be easy to understand without previous knowledge of the subject:

"An advanced text on cancer or a law about the ownership of shares, . . . will remain complex. But the complexity will reside solely in the subject matter, and not be compounded by difficulty in language. For it is an error to assume . . . that difficulty in content must be matched by difficulty in language . . . complexity in subject matter does not call for complicated convoluted language."²⁵

Recent critics certainly encourage drafters to have regard to the needs of the ordinary citizen. But intelligibility to the ordinary citizen is a goal which the critics recognise cannot always be achieved. What can be achieved is the removal of obstacles which unnecessarily impede communication. Regrettably, the failure of some parliamentary counsel to appreciate this fact is not unique to the 1984-85 *Annual Report* of the Commonwealth Office of Parliamentary Counsel. It pervades a number of other statements made on the subject of the call for plain English drafting. Take, for example, the following comments on the recommendations of the Renton Committee²⁶ and of Sir William Dale²⁷:

"No doubt the reason behind [them] is that the ordinary citizen should be able to ascertain the law. Dale rightly declares that this is a desirable objective. However, to believe that it can ever be attained in societies as complex as ours is to live in wonderland. Even Dale recognises that complete comprehension of a statute by a layman is not practicable but he says that the ordinary man should be able by reading a statute to obtain a good idea of what the legislator is telling him. In the case of non-technical statutes

23 At 259.

24 *Sydney Morning Herald*, 12 January 1985, 16.

25 *Sydney Morning Herald*, 20 January 1985, 8. See also *B.P. Australia Limited and Food Plus Pty. Ltd. v State of South Australia* (1982) 31 SASR 178, 180, 211 (Wells J).

26 *The Preparation of Legislation* (1975) Cmnd 6053.

27 *Legislative Drafting: A New Approach* (1977).

this proposition is indisputable. In the case of technical statutes it is surely an unattainable objective."²⁸

Neither the Renton Committee nor Sir William Dale believed that all statutes can be drafted in such a way as to be intelligible to the ordinary man. Sir William Dale²⁹ specifically adopted the Law Commission's criterion of intelligibility: a statute should be drafted so that it "can be understood *as readily as its subject matter allows*, by all affected by it".³⁰ Surely that is neither "to live in wonderland" nor to set an "unattainable objective". It is simply to require that an effort be made to write as clearly as possible, bearing in mind the needs of any special audience as well as those who may directly benefit from, or must comply with, the law.

Regrettably, the misunderstanding by parliamentary counsel of the nature of the criticisms made of the present drafting style appears to be shared by the Federal Attorney-General (the Hon Lionel Bowen MP). In a *News Release* of 7 April 1986, Mr Bowen responded to criticisms of the Commonwealth drafting style made by the Victorian Attorney-General (the Hon Jim Kennan MLC) in his *Report as Retiring Chairman of the Ministerial Council for Companies and Securities Law*. Mr Kennan had stated his belief that the Commonwealth should give more attention to a plainer drafting style.

"The existing provisions in the various codes are convoluted enough. However, some of the recent amendments have been almost indecipherable. The first draft of the Partial Takeovers Bill contained clauses which were simply incomprehensible. We must never accept the tyranny of some legal experts and some Parliamentary Counsel who assert that there is something legally more effective about a Bill which is drafted in clauses which average say 80-100 words per clause rather than a Bill which is drafted in short simple sentences of 20-30 words."³¹

Mr Bowen's reply was that:

"A law dealing with a matter such as the regulation of takeovers must of its very nature be complex because the subject-matter dealt with by the law is complex. Such a law cannot be drafted so as to be comprehended by a person who does not have a close knowledge of the subject. . . Any difficulty in understanding much of the legislation relating to companies and securities lay in the nature of the subject and did not result from any defects in drafting techniques."³²

As the editor of the *Australian Law Journal* quickly pointed out, this response appeared to have missed the point made by the Victorian Attorney-General. The gravamen of Mr Kennan's criticism had been that some of the takeover provisions could not be understood even by those

28 Kolts, 'Observations on the Proposed New Approach to Legislative Drafting in Common Law Countries' [1980] *Statute Law Review* 144, 147.

29 *Legislative Drafting: A New Approach* (1977) 331.

30 *The Interpretation of Statutes* (Law Com No 21, Scot Law Com No 11, 1969) 3 (emphasis added).

31 21 March (1986) at 4.

32 The Hon L. Bowen MP, *News Release*, 7 April 1986.

persons who had a close knowledge of company law and the regulation of takeovers. Experience of recent takeovers had demonstrated that "elements of unintelligibility for such experts abound in the takeover provisions". It was a fair comment on certain of the takeover provisions that "more words have been used in parts of these provisions than necessary, and that streamlining would not have resulted in objectionable compression".³³

Second Theme : Precision and Clarity are Inconsistent Goals

The 1984-85 *Annual Report* of the Commonwealth Office of the Parliamentary Counsel stated that:

"Critics of legislative drafting fail to appreciate that the reason that even a well-drafted law may be difficult to understand (even to an expert on the subject matter of the law) is that the law has to be unambiguous. This contrasts with literary English where the main object of the writing is to convey an idea readily to the reader and it does not matter that it may not be conveyed precisely. The drafter of legislation is not likely to receive any thanks from the Government for drafting a law that is easily comprehensible but is imprecise. As Sir Ernest Gowers pointed out in *The Complete Plain Words*, . . . [l]ack of ambiguity does not go hand in hand with intelligibility, and the nearer you get to the one, the further you are likely to get from the other."³⁴

This statement, like other similar statements by parliamentary counsel, begs the question whether accuracy and intelligibility really are inconsistent goals. Typically, it relies not on detailed argument but on authority. Gowers is not the only authority relied upon by parliamentary counsel. Two others deserve mention. The first is Sir John Rowlatt, former First Parliamentary Counsel in the United Kingdom.³⁵ Sir John is reported to have said that "the intelligibility of a Bill is in inverse proportion to its chance of being right". This aphorism may appear to offer support to those who question the movement towards plain English drafting. However, it must be read in context. The context is set out in Sir Harold Kent's *In On The Act*.³⁶ Kent was a colleague of Rowlatt's before becoming Treasury Solicitor. He recalls how he had been complimented by the Lord Chancellor on a Bill he had drafted: "Why can't they all draft like you? Perfectly clear and easy to understand." Kent continues:

"Walking across the park on our way to lunch, I recounted this gratifying incident to Rowlatt. He delivered himself of one of his famous dicta, comparable with Parkinson's law. 'The intelligibility of a Bill is in inverse proportion to its chance of being right'. That seemed to put the matter in a

33 Current Topics, "The problem of drafting styles" (1986) 60 ALJ 369.

34 At 260. Whether precision and a lack of ambiguity are in fact achieved by the present style is by no means free from doubt. Cf D. Mellinkoff, *The Language of the Law* (1963) 293f.

35 See eg, Turnbull, 'Problems of Legislative Drafting' (paper delivered to the Australasian Law Reform Agencies Conference, Brisbane, 1983) 13 Qld Law Society J 225.

36 (1979).

nutshell, and punctured any inflated idea of my skill as a draftsman."³⁷

This extract suggests that Sir John Rowlatt's aphorism was a witty put-down, not a premise from which to argue against plain English or to develop a defence for existing practices.

Another authority relied upon by parliamentary counsel is Sir James Stephen.³⁸ The statement quoted is:

"[I]t is not enough to attain to a degree of precision which a person reading in good faith can understand; but it is necessary to attain, if possible, to a degree of precision which a person reading in bad faith cannot misunderstand. It is all the better if he cannot pretend to misunderstand it."³⁹

But nowhere in this passage is it suggested that precision and clarity are inconsistent goals. Indeed, Stephen J appears to have assumed precisely the contrary. It is clear from his emphasis on understanding that he was assuming the ready intelligibility of the provisions in question. Indeed, in the clause immediately preceding the passage quoted, Stephen J referred to "Acts of Parliaments, which, *although they may be easy to understand*, people continually try to misunderstand . . ."⁴⁰

However, the leading authority relied upon by parliamentary counsel⁴¹ is undoubtedly Sir Ernest Gowers, author of *The Complete Plain Words*. Support he undoubtedly offers. In a chapter entitled "A Digression on Legal English", Gowers noted that "the peculiarities of legal English are often used as a stick to beat the official with", but argued that the reason for those peculiarities lay in the necessity of being unambiguous. He continued:

"That is by no means the same as being readily intelligible; on the contrary, the nearer you get to the one, the further you are likely to get from the other . . . It is accordingly the duty of a draftsman of these authoritative texts to try to imagine every possible combination of circumstances to which his words might apply and every conceivable misinterpretation that might be put on them, and to take precautions accordingly. He must avoid all graces, not be

37 *Id* at 97.

38 See eg, Turnbull, 'Problems of Legislative Drafting' (paper delivered to the Australasian Law Reform Agencies Conference, Brisbane, 1983) 3; 13 Qld Law Society J 225, 227.

39 *In re Castioni* [1891] 1QB 149, 167-8.

40 Emphasis added. The alleged need to draft legislation in such a way that a person cannot pretend to misunderstand it has been diminished in any event by enactments requiring the adoption of a purposive approach to interpretation: Acts Interpretation Act 1901 (Cth) s 15AA; Interpretation Act 1984 (Vic) s 35; Acts Interpretation Act 1986 (SA) s 22; Interpretation Act 1984 (WA) s 18; Interpretation Ordinance 1967 (ACT) s 11A; Companies & Securities (Interpretation & Miscellaneous Provisions) Act 1980 (Cth) s 5A.

41 See eg, Koits, "Observations on the Proposed New Approach to Legislative Drafting in Common Law Countries" [1980] *Statute Law Review* 144, 148; Turnbull, 'Problems of Legislative Drafting' (paper delivered to the Australasian Law Reform Agencies Conference, Brisbane, 1983) 3; Attorney-General's Department (Cth), *Drafting style, policy formulations and the role of the Courts with reference to the Takeovers Code* (discussion paper tabled before Ministerial Council on Companies & Securities Law), 12 September 1986, 6.

afraid of repetitions, or even of identifying them by aforesaids; he must limit by definition words with a penumbra dangerously large, and amplify with a string of near-synonyms words with a penumbra dangerously small; he must eschew all pronouns when their antecedents might possibly be open to dispute, and generally avoid every potential grammatical ambiguity."⁴²

Gowers has been described by Professor Robert Benson, an American advocate of plain English, as "the patron saint of sensible writing".⁴³ Referring to Gower's near apostasy in relation to legal English, Benson says it is "as if the Sunday preacher had unveiled himself as Judas Iscariot".⁴⁴ Gowers was, of course, a lawyer and a civil servant. Like many lawyers, he appears to have been seduced by the claim of parliamentary counsel that clarity must be sacrificed to precision. Benson rightly compares Gower's defence of this claim with the response made by the Swiss clockmaker to the mayor's criticism of a clock of great precision which had been installed in the tower of the main square:

"But Johann," complained the mayor, "the clock has no hands or numbers and the citizens cannot tell the time!" "I give you the finest precision-instrument in Europe," grumbled Johann, "and you are ungrateful. Besides, if the citizens want to know the time, they can pay me to climb the tower, inspect the workings, and announce it."⁴⁵

As Benson points out, Gowers was guilty of legerdemain in altering the concept of precision by removing from it the requirement of communicability. It is hardly surprising to find that Gowers "Digression" was removed by a subsequent editor⁴⁶ and that the treatment of legal English as a separate dialect has been all but abandoned in the most recent edition.⁴⁷

In fact, precision and clarity are not competing goals. Precision is desirable in order to minimise the risk of uncertainty and of consequent disputes. But a document which is precise without being clear is as dangerous in that respect as one which is clear without being precise. In its true sense (as distinct from the sense in which it amounts to a synonym for "detail"), precision is not compatible with a lack of clarity. Thornton can again be called in aid:

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

42 *The Complete Plain Words* (1962) 18-20.

43 Benson, "The End of Legalese: The Game is Over" (1985) 13 *Review of Law & Social Change* 519, 559.

44 *Ibid.*

45 *Id.* 560.

46 Fraser, 1972.

47 Greenbaum & Whitcut, 1986.

to complexity; and complexity is a definite step along the way to obscurity."⁴⁸

In summary, neither precision nor simplicity should be sacrificed at the altar of the other.⁴⁹

Conclusion

Recent criticisms of legislative drafting in Victoria and the Commonwealth are well-founded. A considerable amount of legislation is unnecessarily complex and overwritten. If greater attention were paid to plain English principles, legislation could be made much clearer and much more intelligible without a loss of accuracy and precision. The rejection by parliamentary counsel of recent criticisms appears to have been based on misunderstandings of those criticisms. Plain English does not require that legislation be drafted in such a way as to be intelligible to the average citizen. It requires the removal of unnecessary obstacles to comprehension which are created by circumlocution and poor structure. Nor is clarity incompatible with precision. Precisely the same amount of detail can be contained in plain English legislation as in legislation drafted in the existing style.

Eradication by parliamentary counsel of the particular defects noted in the Commission's discussion paper would add considerably to the intelligibility of legislation. Even so, the resulting standard might still not be a sufficient response to the perceived need to make laws available to a wider audience. The importance of that task is implicit in Lord Radcliffe's question: "what willing allegiance can a man owe to a canon of obligation which is not even conceived in such a form as to be understood?"⁵⁰ It has recently been reinforced by Sir John Donaldson MR:

"The efficacy and maintenance of the rule of law, which is the foundation of any parliamentary democracy, has at least two prerequisites. First, people must understand that it is in their interests, as well as in that of the community as a whole, that they should live their lives in accordance with the rules and all the rules. Second, they must know what those rules are . . . My plea is that Parliament, when legislating in respect of circumstances which directly affect the 'man or woman in the street' or the 'man or woman on the shop floor', should give as high a priority to clarity and simplicity of expression as to refinements of policy. . . . When formulating policy, ministers, of whatever political persuasion, should at all times be asking themselves and asking parliamentary counsel: 'Is this concept too refined to be capable of expression in basic English? If so, is there some way in which we can modify the policy so that it can be so expressed?' Having to ask such questions would no doubt be frustrating for ministers and the legislature generally, but in my judgment this is part of the price

48 Thornton, *Legislative Drafting* (2nd edn 1979) 48-9).

49 *Id.* 48.

50 "Some Reflections on Law and Lawyers" (1950) 10 *Cambridge LJ* 361, 368.

which has to be paid if the rule of law is to be maintained."⁵¹

If this plea is to receive a positive response, changes will be needed to the content as well as the style of the statute book. There is a growing concern over the amount of detail which is contained in legislation. Lord Scarman has said that English statutes "are complex and detailed often to the point of unintelligibility, and seldom contain any broad declaration of principle".⁵² A similar criticism underlies the Victorian Attorney-General's call for a redrafted Takeovers Code in which broad principles are stated, their application to particular circumstances being left to the exercise of discretions reposed in the National Companies and Securities Commission.⁵³ The Renton Committee suggested that greater use be made in legislation of statements of principles, but it recognised that, in some cases at least, those statements would have to be supplemented by detailed provisions.⁵⁴ Sir William Dale subsequently suggested the adoption of the Continental approach to drafting, in which general statements of principle are often preferred to obfuscating detail.⁵⁵

A general change of this type might be seen to raise complex questions concerning the relationship between the roles of the legislative, executive and judicial arms of government.⁵⁶ It might also be thought to require a detailed cost-benefit analysis which focussed, in particular, on the additional costs, if any, which would be involved either in the increased exercise of administrative and judicial discretions⁵⁷ or in increased litigation resulting from uncertainty over the application of principles in particular circumstances. Consideration of these matters may be a high priority. But it would require a study which is beyond the scope of the Law Reform Commission's present inquiry into plain English.

51 *Merkur Island Shipping v Laughton* [1983] 1 All ER, 334, 351. For a similar statement that legislation should be intelligible to those whose actions it regulates, see *BP Australia Limited and Food Plus Pty Ltd v State of South Australia* (1982) 31 SASR 178, 180 (Wells J).

52 *English Law - The New Dimension* (1974) at 4.

53 The Hon JH Kennan, *News Release*, 28 April 1986.

54 *The Preparation of Legislation* (1975) Cmnd 6053, para 10.12-10.13.

55 *Legislative Drafting: A New Approach* (1977) 332-3. Not all Continental drafting is of that type: Id 323; Renton Committee, *The Preparation of Legislation* (1975) Cmnd 6053, para 9-10.

56 Cf Kolts, "Observations on the Proposed New Approach to Legislative Drafting" [1980] *Statute Law Review* 144, 147. The point could easily be exaggerated. The difference in this respect between, say, South Australia and Victoria is already remarkable.

57 Cf Atiyah, *From Principles to Pragmatism* (1978).