

Chapter 6

Plain Language Drafting

6.1 Introduction

The general Commonwealth trend has been to move away from the traditional drafting styles of the past involving the use of largely unfamiliar words and expressions and lengthy sentences, which were thought to be necessary in the interests of conveying precise meaning.

Recent changes in perception have recognised that legal writing generally, and legislation in particular, should be able as far as possible to be readily understood by those to be affected by it. It has come to be seen as a waste of resources for legal documents to have to be ‘translated’ into everyday language by lawyers. It has also come to be recognised that the former styles (sometimes mockingly known as ‘legalese’) can take on a life of their own, so that drafters using them can fall into patterns of both thought and writing that may cause a failure to adequately address the drafting problems.

There are still many people who remain unconvinced by some of these changes (including the move away from the auxiliary ‘shall’, discussed in Chapter 5), especially in more conservative jurisdictions and especially among some MPs and members of the legal profession. It may thus not be a matter of individuals (unless in very senior positions) being able to take it upon themselves to change things in the ways proposed. The introduction of new drafting practices is thus an issue that may require tact and perseverance.

6.2 Reasons why legislation may fail to communicate clearly

The most obvious of these is that legislative provisions are imprecise or difficult to understand because the thinking behind them is unclear:

- (2) A person shall be deemed to deposit or dump waste under this Act if he deposits or dumps the waste, whether solid, semi-solid or liquid, in such circumstances, or for such period that he may be deemed:
 - (a) to have abandoned it where it is deposited or dumped; or
 - (b) to have brought it to the place where it is so deposited or dumped for the purpose of its being disposed of or abandoned whether by him or any other person.

See further the examples in section 6.4 relating to the passive voice and modifiers.

However, even though the thinking behind them is probably clear and the language attempts to be precise, they may still for various reasons be difficult to read and understand (see the other examples in section 6.4).

6.3 General objective of plain English in drafting legislation

To communicate more effectively with those to whom a document is addressed, and in doing so to:

- use language that is simple, direct, economical and familiar
- omit unnecessary or repetitious words or phrases
- use sentence structures that avoid ambiguity or undue complexity
- organise and present sentences in a way that enables their meaning to be grasped as quickly as possible.

6.4 The most common specific problems that need to be addressed

6.4.1 Excessively long sentences

Sentences that exceed 20 to 30 words present problems of understanding unless the text is broken up (see Chapter 7).

No action, suit, prosecution or other proceeding whatsoever shall lie or be brought, instituted or maintained in any court or before any other authority against the Government, a State Government, the Central Bank, any officer or employee of any such Government or of the Central Bank, either personally or in his official capacity, or any person lawfully acting on behalf of any such Government or the Central Bank, or on behalf of any such officer or employee, either personally or in his capacity as a person acting on such behalf, for or on account of, or in respect of, any act done or statement made, or omitted to be done or made, or purporting to be done or made or omitted to be done or made, in pursuance or in execution of, or intended pursuance of, this Act, or any order in writing, direction, instruction, notice or other thing whatsoever issued under this Act.

Difficulty in reading and understanding this sentence arises because it is not concise and contains too many detailed and confusing references to persons and complex context conditions.

6.4.2 Legislative sentences do not follow standard English usage

Complex verb constructions or inconsistencies with modern grammatical practice make for difficulty in understanding, for example, different uses of the auxiliary 'shall' (see further Chapter 5); use of deeming provisions; and use of provisos:

A person who shall have received a fee for advising another person in relation to an investment shall be deemed to have advised that person in the course of business:

Provided that he shall not be deemed to have done so in the course of business if he shall prove that...

Rather state:

A person who receives a fee for advising another person about an investment is to be regarded as having done so in the course of business, unless the person advising proves that...

The word 'deem' in provisions that create a legal fiction or (as here) a rule of interpretation is slightly archaic and needs to be replaced by a modern equivalent such as that used in the example above (or others such as 'be treated as'). Discouragement of the use of provisos will be considered further in Chapter 7 ('Structuring legislative drafts', section on grouping provisions). Note also that the redrafted version is in gender-neutral language (see further Chapter 10).

6.4.3 Use of archaic or pretentious words and expressions

Avoid meaningless or cumbersome words and expressions of reference or stress such as 'aforesaid', 'hereby', 'hereinbefore mentioned' and 'whatsoever'. See further examples in the list at the end of this chapter.

Elements of the following hypothetical, and, by modern standards, slightly postposterous archaic writing, can still sometimes be seen:

15. (1) Whosoever¹ shall be² seised of³ chattels real⁴ to which the immediately preceding section of this Act⁵ relates⁶, shall not⁷ utilise⁸ the said chattels⁹ for the purposes of¹⁰ hire, reward¹¹ or sale before the expiration of¹² the hereinafter in this section mentioned¹³ relevant period of time.

1 Modern use would be 'A person (who)...'

2 This is the future tense. The present tense should be used.

3 Archaic word for 'possess' in relation to leasehold property.

4 Archaic word for interests in land less than freehold (it usually refers to leaseholds).

5 A pretentious (and potentially confusing) reference, which should be to the relevant section number, and there is normally no need to use 'of this Act'.

6 'Refer' is a more modern word.

7 'Must' and 'must not' are the auxiliaries in everyday use indicating obligation.

8 A pretentious form of 'use'. Even that word can be avoided here.

9 'The said' is an archaic and unnecessary expression of reference.

10 'For the purposes of' means no more than 'for'.

11 'Hire or reward' is a stock lawyer's phrase. Consideration should be given to more apt or precise terms if possible.

12 A pretentious (and often used) alternative to 'expiry of' or 'end of'.

13 Pretentious, clumsy and archaic style. In this context, it is apparent that the specification will be made later in section 15.

Rather, the proposition ought to be stated thus:

15. (1) A person in possession of leasehold premises referred to in section 14 must not offer them for subletting, mortgage or sale until the specified time period has ended.

6.4.4 Careless use of the passive voice

The potential danger caused by this has already been noted in Chapter 4 (section 4.1 on ‘Legal subject’). It is not suggested that this form of expression should be avoided altogether, but unthinking use can cause problems of understanding. The following example is from a Narcotic Drugs Act:

27. Where a medical practitioner is convicted of an offence under this Act, he shall be liable to have his name removed from the register of those licensed or registered to practice as a medical practitioner.

Here the drafter has not addressed his or her mind to who is to do the removing. Is it the registrar (no mention of whom is made in this particular Act), or is it the court? See further Chapter 14 (‘Penal provisions’).

On the other hand, the use of the passive would be convenient in the following example:

If a vessel is wrecked, stranded or in distress on or near the coast, any cargo or other article belonging to or separated from the vessel which is washed on shore or otherwise lost or taken from the vessel must be delivered to the receiver.

Here it is perfectly clear who is addressed by the rule (i.e. anyone finding cargo, etc., from a wreck, etc.) and to draft in the active voice would require many more words (58 as against 45):

If a vessel is wrecked, stranded or in distress on or near the coast, a person who comes into possession of the cargo or any part of it, or any other article belonging to or separated from the vessel which is washed on shore or otherwise lost or taken from the vessel must deliver it to the receiver.

6.4.5 Careless use of dangling modifiers

A potential danger in drafting legislation is that modifiers (adjectival and adverbial words, phrases and clauses) are left ‘dangling’, so that it is unclear to which word or set of words they attach. Extreme care needs to be taken to ensure that this does not happen:

The Board may make annual grants to persons from its general fund or from any of its other funds with the approval of the Minister.

The underlined adverbial phrase dangles because it is possible to read the underlined words either as modifying only grants from ‘other funds’ or

as modifying ‘general fund’ as well. This can be clarified by correct use of punctuation, or by changing the word order, or both. Thus:

The Board may make annual grants to persons from its general fund or, with the approval of the Minister, from any of its other funds.

or, depending on the policy:

The Board may, with the approval of the Minister, make annual grants to persons from its general fund or from any of its other funds.

Where a dangling modifier appears in the middle of a sentence and is capable of applying equally to words or groups of words which precede or follow, it is said to ‘squint’. Thus:

The Commissioner may order an importer within seven days of importation of the goods to file an affidavit stating...

It is not clear whether the underlined adverbial phrase modifies ‘may order’ or ‘file an affidavit’. Again, the ambiguity is avoided by punctuating correctly and placing the underlined phrase in the correct position in the sentence:

The Commissioner may, within seven days of importation of the goods, order an importer to file an affidavit stating...

or, depending on the policy:

The Commissioner may order an importer to file, within seven days of importation of goods, an affidavit stating...

6.4.6 Excessive use of cross-referencing

Reliance on other provisions, in the same or other legislation, while it has a limited place in legislation, often calls for searching in other pieces of legislation that may not be available to the user, and sometimes (e.g. where *mutatis mutandis* or a similar expression is used) for statutory construction of the other provisions.

Subject to the provisions of the Evidence Act, and to any rules made under section 356(1)(f) of this Act, the record of a confession made in accordance with this section is admissible in evidence against the person who made it.

In this Act “bank” has the meaning given in Part II of the Banking Act, and “financial institution” has the meaning given by section 3 of the Financial Institutions Act.

“interest in a share” is to be construed as provided under section 225(2) to (10) of the Companies Act, read with the following modifications:

- (a) the substitution of “including” for “otherwise than” in subsection (6)(d);
- and
- (b) the deletion of subsection (9)(b).

6.5 The aims of plain English in legislation

- To limit the ideas expressed in a legislative sentence
- Not to allow sentences to get too long so as to interfere with communication of the central message of the provision
- Where necessary, to break up the format of sentences into paragraphs (see Chapter 7)
- To follow the standard usage and styles of modern English
- To use words in common use rather than elaborate or obscure ones (see the lists below)
- To eliminate unnecessary words and expressions
- To avoid cumbersome and unnecessary words of reference or emphasis
- To avoid archaic words and expressions
- To avoid Latin and French words or expressions as far as possible (see the lists below)
- To use the active rather than the passive form as a general rule
- To avoid dangling modifiers
- As far as possible, to limit the use of cross-referencing to other parts of the legislation and, even more so, to other legislation.

6.6 Words and phrases to avoid or use with care

Archaic words to avoid or replace	Replace with
aforesaid, said	the, that
hereby	[omit]
hereinafter/before	in section(s)... etc.
lessee	tenant
lessor	landlord
provided that	but, however
servant	employee
such (pronoun: 'if such was the case')	it, that, they
thereafter (-in, -under, etc.)	after (in, under) it
thereupon	then
the same (pronoun: 'if the same has been declared unfit...')	it, they

Words and phrases to avoid or use sparingly	Corresponding words to be preferred
as a consequence of	because of
by means of	by
by virtue of	by, under
despite the fact that	although
endeavour	try
expiration of	end of, expiry of
for the purpose of	to
in accordance with	as, under
in pursuance of	as, under
in relation to	about, concerning
in the event that	if
notwithstanding	despite
prior to	before
purchase	buy
subsequent to	after
such (adjective: 'such persons who...')	the, that, those
until such time as	until
with a view to	to
with reference to	about, concerning
with regard to	about, concerning
with respect to	on, about
Pairs of words meaning the same thing	
due and payable	due, payable
fit and proper	fit, suitable
just and equitable	just, equitable, reasonable, fair
null and void	void, of no effect
save and except	except, unless
unless and until	unless, until
Latin phrases to avoid or use sparingly	English equivalents [or literal translations]
<i>ab initio</i>	from the outset, ...beginning
<i>ad valorem</i>	related to the value
<i>bona fide</i>	in good faith
<i>de facto/jure</i>	in fact/law
<i>de novo</i>	again, re-...
<i>doli incapax</i>	incapable of (committing) crime
<i>ex parte</i>	without notice to the other party
<i>in camera</i>	in closed court
<i>in extremis</i>	on the point of death

Latin phrases to avoid or use sparingly	English equivalents [or literal translations]
<i>in loco parentis</i>	in place of a parent
<i>in pari materia</i>	analogous with
<i>inter alia</i>	among(st) other things
<i>inter alios</i>	among(st) other persons
<i>mutatis mutandis</i>	with the necessary changes
<i>per se</i>	in itself
<i>pro rata</i>	proportionately
<i>sine die</i>	with no fixed date, indefinitely
<i>sui generis</i>	of its own kind, in its own category
<i>sui juris</i>	under no legal disability
<i>But note that the following Latin expressions have gained common acceptance as technical legal ones that do not easily translate into a convenient plain English equivalent</i>	
<i>certiorari</i>	[to be more carefully informed]
<i>ex gratia</i>	as a matter of favour, without legal obligation
<i>ex officio</i>	by virtue of appointment/post/office
<i>habeas corpus</i>	[you have the body]
<i>intra/ultra vires</i>	[within/beyond the powers]
<i>mandamus</i>	[we command]
<i>mens rea</i>	[guilty mind]
<i>nolle prosequi</i>	[unwilling to prosecute]
<i>post mortem</i>	[after death]
<i>prima facie</i>	[at first glance]
<i>pro forma</i>	[for form's sake]