

# A survey of user attitudes to the use of aids to understanding in legislation



***Peter Quiggin, PSM<sup>1</sup>***

## **Overview**

1 In this paper I review a recent survey of the attitudes of users to the aids to understanding that the Australian Office of Parliamentary Counsel (OPC) uses in legislation.

2 I would like to acknowledge the work of ORIMA Research, and in particular Mr Chris Sadler, who conducted the survey. Some sections of this paper that report on the survey reproduce the text of the report that ORIMA Research produced for OPC. The report from ORIMA Research is reproduced in full on our website at <http://www.opc.gov.au/plain/docs.htm>.

3 OPC has made substantial use of aids to understanding in legislation since the mid-1990s. This has been done on the basis that we believe that these aids make it easier for readers of legislation to comprehend it. Although the aids are generally easy to include in legislation and we strongly believe that they work, the use of such aids has not been adopted to any great extent by other Australian offices (or other offices outside Australia that we are aware of). In fact, in some drafting circles they have been derided as “gimmicks”.

4 To obtain feedback from users of legislation on the aids, OPC engaged a professional survey firm to undertake a survey of a range of users of legislation to gauge their attitudes to the aids. The users included judges, barristers, private sector solicitors, public sector solicitors and prosecutors, public service staff who work with legislation and parliamentary staff who work with legislation.

5 In general, there was strong support for the use of the aids. There was a small number of aids that were not supported and we are now reconsidering the use of those aids.

6 The survey was a useful exercise and the first that we are aware of to survey this type of group on this particular subject.

## **Making legislation more readable**

7 A strong movement came to prominence in the 1980s in Australia to make legislation more readable. In general, this movement went under the banner of “plain English”. Similar movements occurred in many other countries.

8 The initial response to this by many legislative drafters in Australia was less than enthusiastic. However, by the end of the 1980s, OPC, along with other Australian drafting offices, was reviewing its style and seeking ways to improve it.

---

<sup>1</sup> First Parliamentary Counsel, Australian Office of Parliamentary Counsel

9 At that time, much of the focus was on language and structure. This is quite sensible as this was the most obvious area for improvement and is also the fundamental aspect that must be done well if a text is to be readable.

10 Despite the changes made by Australian drafting offices, there continued to be a strong demand for more to be done. The income tax law came in for particular criticism and it was decided in the early 1990s that it should be rewritten. Similarly, the government decided to rewrite the corporations law. Special teams were set up to undertake these projects. The teams included drafters, policy officers, private sector policy experts and private sector plain English experts.

11 The teams developed a number of new aids that were intended to improve the readability of the rewritten legislation. While some of the aids developed by the teams were the same or similar, others were unique.

12 At the same time, the other drafters in OPC were developing aids that they considered would improve the readability of legislation generally.

13 This period of innovation gave rise to a range of aids to understanding. Some of these were very short lived (such as the singular use of “they”) but many were adopted for use in OPC. OPC also published the Plain English Manual which remains an outstanding guide to drafting clearly.

### **The aids to understanding**

14 It was decided that the survey should test as many of the aids to understanding as possible. However, it was very important that we could be sure that the survey respondents understood the aid that they were being asked to comment on. A small number were not included as it was considered that it would be too difficult to explain them in a way that would ensure that people understood the issue.

15 The aids that were covered in the survey were:

- (a) commencement provisions;
- (b) overviews;
- (c) guides;
- (d) decentralised tables of contents;
- (e) objects provisions;
- (f) examples;
- (g) notes;
- (h) using asterisks to identify words that have been defined;
- (i) the use of tagging of concepts;
- (j) headings in the form of questions;
- (k) subsection headings;
- (l) using tables to organise large amounts of information;
- (m) diagrams;
- (n) method statements;
- (o) drafting legislation in the second person;
- (p) the new format for Bills (introduced in 1996) including indenting conventions.

16 The main features of the new format for Bills are:

- wider left and right margins;
- greater line spacing between units;
- section numbers appearing before section headings;
- greater prominence given to section headings;
- standardised tables of contents for every Act;
- definitions appearing in bold, italicised font; and
- running headers on each page.

### **The range of users**

17 There is of course a wide range of users of legislation. While the general public is potentially a user of legislation, I considered that it would be difficult to select an appropriate sample. We therefore decided not to include the general public in the survey.

18 The groups that we considered it would be useful, and practical, to survey were:

- (a) Federal Court and Family Court judges;
- (b) associates/research staff of Federal Court and Family Court judges;
- (c) Federal Magistrates;
- (d) associates/research staff of Federal Magistrates;
- (e) Administrative Appeals Tribunal members;
- (f) associates/research staff of Administrative Appeals Tribunal members;
- (g) solicitors (with groups drawn from Sydney, Melbourne and Brisbane);
- (h) barristers (with groups drawn from Sydney and Melbourne and from both junior and senior counsel);
- (i) parliamentary Table Office staff;
- (j) Australian Government Solicitor employees;
- (k) employees of the Commonwealth Director of Public Prosecutions;
- (l) Commonwealth Public Servants from instructing areas and advising areas in Departments.

19 To obtain actual respondents, we contacted the relevant courts and agencies, the bar associations and a number of large and medium firms and asked them to put forward the names of people who would be willing to respond to the survey.

20 We did not cull or edit the provided lists of respondents in any way. These names were then forwarded to ORIMA Research. As the survey results went directly to ORIMA, OPC was never aware of which particular people responded to the survey. Results were broken up into the groups set out above, although for a number of groups the results of similar groups were combined when the reports were provided to OPC.

## Structure of survey

- 21 The survey asked respondents to rank how useful they consider a range of aids to be and to provide comments on the different aids.
- 22 The survey was done electronically with users logging on to a website to work through a series of examples and questions.
- 23 Excerpts from Acts that contain the aids were provided to the respondents. The excerpts were marked up to make the various aids obvious.
- 24 For some aids we produced provisions drafted in a number of different ways (e.g. using formulas compared to method statements).
- 25 The aim was to make the survey fairly easy to respond to while ensuring that respondents understood what they were being asked about. It is estimated that it took respondents about half an hour to respond to the survey. This is longer than we had aimed for, but was necessary to cover the broad range of aids.
- 26 Respondents were given space to add additional comments and provided with an option of requesting that OPC contact them to enable them to provide more detailed feedback on particular issues. The respondents included a large number of comments in the survey responses. These comments indicated a high level of understanding of the issues.

## Responses to the survey

- 27 Responses were received from 224 out of the 378 users of legislation invited to take part in the survey. For reporting purposes, respondents were grouped by legislation user types, as shown in Table 1.

**Table 1: Response Numbers and Rates, Grouped by Respondent Type**

Group	Sample	Count of Responses	Response Rate
Judges/Magistrates	47	24	51%
Judges/Magistrates staff	40	23	58%
Private sector lawyers	120	64	53%
Parliament Table Office staff	16	8	50%
AGS/DPP employees	38	25	66%
Commonwealth Public Servants	117	80	68%
<b>Grand Total</b>	<b>378</b>	<b>224</b>	<b>59%</b>

- 28 I was very happy with this response rate and the fact that we got a good range of respondents. I consider that the sample was large enough to be representative of the groups that we surveyed.

## Summary of Results

- 29 Most respondents were aware of the aids covered in the survey and generally find them useful in helping make legislation easier to read and understand, particularly for the lay reader. Most aids were found useful by over three-quarters of respondents.

30 Some respondents commented that the aids had been a great improvement. Although there was substantial support for nearly all of the aids, some respondents were concerned that the apparent over-simplification of legislation through the use of new aids could be inappropriate in some cases, as it may cause the lay reader to misinterpret the legislation, or miss subtle complexities of the law. Others emphasised that the focus needed to continue to be on the expression of the law.

31 The majority of aids rated very positively, with 12 of the 16 aids achieving a net balance satisfaction rate across all respondents of around 70% or more. In particular:

- The new form of commencement provisions and new format for Bills including indenting conventions were rated positively by a net balance of around 90% of respondents.
- Notes, use of tagging of concepts, subsection headings and use of tables were rated positively by a net balance of 80–85% of respondents.

32 For a few aids (use of asterisks, diagrams and method statements) the views were less positive, with a net balance of around 50%.

33 In the case of the use of the second person, the net balance result was close to zero, indicating that the proportion of respondents dissatisfied with the usefulness of the aid almost matched those satisfied with the aid. Indeed, the negative net balance results for the judges, magistrates and lawyers group indicates that a greater proportion of these respondents were dissatisfied than satisfied with this aid.

34 In general, Commonwealth public servants were more satisfied with the usefulness of the aids covered in the survey than the judges, magistrates and private lawyers.

- For a few aids (decentralised tables of contents, questions as headings and diagrams), the net balance results were almost identical across the two main survey groups.
- The greatest disparity in results was for examples and use of the second person, where the net balance results for Commonwealth public servants was around 25 percentage points higher than that for judges, magistrates and lawyers.

35 The more positive view of Commonwealth public servants compared to judges, magistrates and private sector lawyers was reflected in a number of general comments about OPC and its drafting.

36 For example, a Commonwealth public servant made the following comment:

“I think Commonwealth legislation is very good, especially considering the volume of it, the complexity required by Government, and the short time usually allowed for its drafting. Improvements in the last 10 to 20 years have been significant—better structures, better language. Long live OPC!”

37 In contrast, the following comment was made by a barrister:

“Where to start? I’ve always considered it to be awful, amateurish, obscure and therefore incompetently drafted. There, I’ve said it. Only creates work for lawyers and judges who can’t write in simple, elegant English.”

38 These comments are at the far ends of the spectrum but may indicate that the closer people work with the drafters and the legislative process the greater the understanding they have of the difficulties in producing clear and simple legislation. In some ways, this is similar to the way in which the outcomes of cases (often in criminal matters) are criticised by those who are not involved in court processes but supported by those who see the whole process.

39 An interesting feature of the responses to the survey was the mixed comparisons with the drafting of legislation in State and Territory jurisdictions. Most of the comments in this area were made by judges, magistrates and private sector lawyers. Some stated that Commonwealth legislation was clearly superior to State legislation whereas others considered that State legislation was superior to that of the Commonwealth.

## Detailed results

40 The detailed results are available on the OPC website.<sup>2</sup> As these run for about 80 pages, they have not been reproduced in this paper.

## Conclusions from the survey

41 The first conclusion is that nearly all of the innovations and aids to understanding that we are using do assist users. Therefore, we should continue to use them and other drafting offices should seriously consider whether they should adopt them.

42 The decision of all Australian jurisdictions to adopt a modern format for legislation has been strongly endorsed by this survey. Any overseas jurisdictions that have not updated the layout of their legislation should strongly consider adopting the main features which are set out earlier in this paper.

43 There has been substantial resistance in State and Territory drafting offices to a number of the other aids to understanding. A number of drafters from other offices have suggested to me that they are “gimmicks”. I consider that this survey shows that they are valuable in assisting skilled users of legislation. I strongly believe that they would be of even greater assistance to less sophisticated users of legislation.

44 Particular aids that I think should be adopted generally are:

- (a) commencement provisions in the form of a table that includes the actual date of the event and that explicitly sets out the commencement date of every provision;
- (b) overviews, guides and objects provisions to give the reader contextual information that they can use when reading specific provisions;
- (c) examples and notes in appropriate cases;
- (d) subsection headings where sections contain more than, say, 4 subsections; and
- (e) using tables to organise large amounts of information.

45 Some of the other aids that we use are probably only relevant for more complex legislation. Consequently, they may have less application in other drafting environments. These include decentralised tables of contents and method statements.

46 The second conclusion is that we need to reconsider the use of some of the aids that we have tried. In particular, the practice of drafting legislation in the second person drew substantial criticism. Comments included:

“I don’t really like this. There are many readers of a statute other than the person to whom it is intended to apply and ‘you’ is too targeted. Is it dumbing down a bit too much? As a reader who is not the ‘you’ cited, I am distracted in my reading.” (Comment by a public servant.)

“It’s not neutral – it doesn’t allow the legislation to be easily interpreted by people on both sides of the fence. That is, it assumes the reader is a member of the public, determining their entitlement to a benefit or licence, for example. It doesn’t facilitate reading by a person, such as Government officers, who are trying to work out what they need to do for a person in a particular case.” (Comment by a public servant.)

“Legislation is best read in the third person. Personalising it is confusing, and presupposes that the person reading it is subject to its provisions. Most often, it will be a legal practitioner, advising his or her client, so

---

<sup>2</sup> <http://www.opc.gov.au/plain/docs.htm>

first person language is inappropriate, comes across as overly directive or condescending, and ignores the reality of how and by whom the legislation is used.” (Comment by a prosecutor.)

“While it is desirable that legislation should be capable of being understood by the man/woman in the street, I find the use of the second person annoying and patronising. I believe it also derogates from the precision of prescribing or proscribing designated acts or activities.” (Comment by a judge.)

47 I was not surprised by this result as I have previously received feedback when at conferences and similar events that this approach is very unpopular with a wide range of expert users of legislation.

48 As a result of this feedback, OPC will not use this approach in new legislation. There are some Acts that are already drafted in this style and, generally, we will continue to use it in those Acts to maintain consistency.

49 The final conclusion that I have is that the survey was a worthwhile exercise. We got a substantial number of responses and it was clear from the responses that the people responding understood the issues and took the time to give considered feedback. I hope that we will be able to undertake further research in the future to assist us to improve the quality of our legislation.

50 OPC is continuing to look at ways of improving its legislation and is open to consider further innovations developed within OPC or by other drafting offices.

---