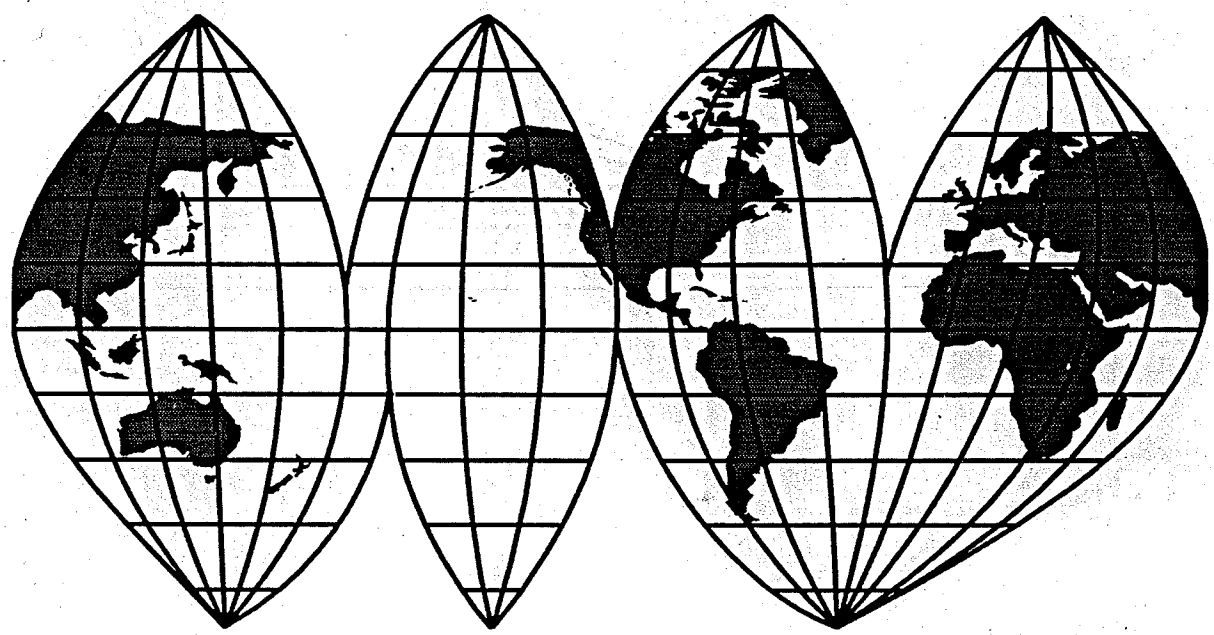
# The Loophole

The newsletter of the Commonwealth Association of Legislative Counsel (CALC)



## October 1998

Please ensure that a copy of this issue is circulated to each CALC member in your jurisdiction.

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# Introduction

*The Loophole* is the newsletter of the Commonwealth Association of Legislative Counsel established on 21 September 1983 in the course of the 7th Commonwealth Law Conference held in Hong Kong.

The constitution of the Association provides for an elected Council. The present Council consists of:

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This issue is published on behalf of the Association by the Parliamentary Counsel's Office, New South Wales. Thanks to Caroline Aow, Garry Wilson, Kevin Dillon and Kate Hannah for their assistance in preparing this issue.

## A message from the President of CALC

It is my privilege to present this edition of *The Loophole* containing articles contributed by members of various legislative drafting offices in Australia. Our sincere thanks to the contributors. They deal with a variety of issues relating to the theory and practice of the art of legislative drafting.

It is appropriate at this point to note the close relations that exist between the drafting offices in Australia and New Zealand. This manifests itself in the work and meetings of the Parliamentary Counsel's Committee, and of the Information Technology Forum, which operates within the context of the Committee. Some of the Forum's history and valuable work is described in one of the articles contained in this edition.

The speeches and most of the papers presented at the Conference held in August 1995 to mark the 25th Anniversary of the establishment of the Office of Parliamentary Counsel in Canberra have so far not been published. It is very pleasing that the entertaining though important two opening speeches can be given a wider circulation by their inclusion in this edition, and that two of the articles in this edition were originally presented at the Conference.

This edition demonstrates the long history of parliamentary counsel in Australia, and yet the desire by parliamentary counsel to be at the forefront of modern drafting theory and practice, to lead in the field of legal written expression, and to embrace modern electronic technology. This desire is of course one that we share with legislative counsel from all around the world and particularly within the fold of CALC where we have so much in common.

Legislative drafting is an art that is constantly developing and that continually surprises us with its intricacies and challenges. It is difficult to think of a profession whose role is more important to the community and whose outputs have a wider audience. My colleagues on the Council of CALC would certainly wish that CALC can continue to be a forum to present ideas and to share experiences that might illumine this art.

Finally, I thank Anne-Marie Maplesden of the NSW Parliamentary Counsel's Office for her editorial assistance in the preparation of this edition. Anne-Marie was formerly working with the Centre for Plain Legal Language associated with the University of Sydney, and it is a pleasure to have her working with us in this Office.

Dennis Murphy
NSW Parliamentary Counsel

### General meeting of CALC

The Commonwealth Association of Legislative Counsel was formed in conjunction with the Commonwealth Law Association, and holds its general meetings to coincide with those of CLA.

CALC's next meeting will therefore coincide with the general meeting of CLA scheduled for 13-18 September 1999 in Kuala Lumpur, Malaysia. Further details will be circulated when they become available.

# Show, don't tell!
# A graphic approach to amendment of legislation

Nicholas Horn[1]

## Introduction

Since its genesis in 1989, the Legislative Assembly for the Australian Capital Territory ("ACT") had passed 808 Acts when last I counted (August 1998). Of these, 643, or 80%, were amending Acts. Moreover, the ACT is Australia's newest self-governing Territory.[2] It would thus be surprising if the ratio of amending laws to other statutes were any smaller in any State or other Territory jurisdiction, or in the Commonwealth sphere.

Increasing attention has been paid in recent years to presenting the substantive law in "plainer English", in the form of the enactment of clearer primary laws and the insertion of more easily comprehensible provisions into existing law. However, the clarity of the amending mechanisms involved has rarely been addressed with any rigour, despite the preponderance of this type of legislation.[3] I think it is worth spending a short time considering the style of amending legislation.

The first task of the drafter of amending legislation is to ensure that clear, effective directions are given of how the primary law is to be changed. The style of legislative amendment generally adopted in Australia is certainly effective. The techniques proposed here, however, have the capacity to make amending legislation clearer.

## The existing situation

In the past few years, I have compiled a couple of editions of an "Amending Manual" for use in the ACT Parliamentary Counsel's Office.

This task highlighted for me the artificiality of the language and syntax of legislative amendment. It is not just that absolute consistency is impossible to achieve, although this is true. More consistency could be achieved by the adoption of quite straight forward reforms. Moreover, incremental improvements in the accessibility of amending legislation are certainly possible (in many Australian jurisdictions, for example, there is a marked increase in the use of shorthand forms of amending formulae). But it is not these sorts of improvement that concern me here.

The basis of the technique of amendment itself ought to be very much simpler.

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[1] Principal Assistant Parliamentary Counsel, ACT Parliamentary Counsel's Office.
An earlier version of this paper was given at the conference on legislative drafting hosted by the Commonwealth Office of Parliamentary Counsel's Office, 10-11 August, 1995. Thanks are due to Mr Walter Munyard, Deputy Parliamentary Counsel in the Western Australian Parliamentary Counsel's Office and to Mr Greg Calcutt (the WA Parliamentary Counsel) and Mr David Harrold (WAPC Office System Manager) for the provision of information relating to developments in that State, and for comments on a draft version. The views expressed in this paper are my own, and do not reflect those of the ACT Parliamentary Counsel's Office.

[2] Admittedly, its statute book contains laws for the Territory going back to 1911, and applied NSW and Imperial laws going back much further.

[3] A notable exception is in the Law Reform Commission of Victoria's Report No. 33 (1990) *Access to the Law: The Structure and Format of Legislation* cf. 13-14, note 36 and Appendix 2.

Under the Australian system of textual amendment, changes to the text of a law are themselves directed textually ("Section 13 of the Principal Act is amended by inserting after subsection (7) the following subsection: . . ." and so on). The artificial syntax involved in the application of the "formulae" is a necessary consequence of the need for consistency in using one level of language (the "operative" text of the amending law) to direct the changes required to an "object" text (the text of the primary law). This difference in linguistic register has two effects:

- In reading an amending law, the question "**How** is the law to be changed?" must be broached at the same level as the more important question "**What** is the change to the law?";

- The answer to both questions is expressed in the same language (standard English), and at virtually the same time, giving the user of the law the task of untangling the two registers.

The combination of these two effects results first in the necessity for drafters (and their proof-reading colleagues) to undertake the painstaking work of "reading in" amendments while they are in draft form. Very high rates of accuracy are achieved, of course.[4] But in doing so, we set the same task for those who wish to follow the directions of the amending law in order to arrive at the effect of the amendments on the primary law. A time-consuming process is involved which focuses attention on the "how?" question at the expense of the "what?" question.

Theoretically, we inflict this task on all the different audiences of the primary law. Actually, of course, the problem is not as serious as that. Sessional amending legislation is being read less and less due to the increasing availability, from both Government publishers and the private legal publishers of up-to-date reprints as well as up-to-the-minute electronic consolidations from SCALE, CD Rom, instant "off-prints" and so on. The "end-user" of legislation is not so badly off these days, although such up-to-date access to the consolidated law is of no great assistance if she is particularly concerned with the question of exactly what has been changed by any particular piece of amending legislation.[5]

There remains, however, an important audience for the directions enacted by amending laws. The primary audience is perhaps the first audience of any amending Bill—the members of Parliament debating the law. The most significant secondary audience would then be the judiciary, the legal profession and associated para-legal personnel such as the editors of loose-leaf consolidations. Both of these audiences could be better catered for by our system of amendment. In particular, we serve our legislators ill by an overly technical approach to drafting amendments. In debating an amending law, they should expect to understand as clearly and easily as possible *from its face* what its textual effects are.

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[4] The new systems implemented in the Tasmanian Parliamentary Counsel's Office circumvent this particular problem in an ingenious way: by automatically "translating" changes to the primary law drafted on screen by the drafter into a draft amending law incorporating the requisite amending formula. This does not take anything away from the major thrust of the argument suggested here, however; indeed it reinforces it by highlighting the artificial nature of conventional amending laws and acknowledging that the task of complying with the technical formulae required to draft them is an unnecessary diversion from the task of considering the substantive changes themselves.

[5] Of course, increased access to "historical" consolidations showing the law as it was immediately preceding particular amending laws is of great help to the legal researcher.

At present, drafters present lawmakers (and all other persons interested in a proposed or enacted amendment) with the potentially complex task of reading in the amending law to the primary law to ascertain these textual effects. All the amending styles in current use in Australia are structured so as to work inherently against those principles of clear communication and readability to which most drafters subscribe (in these enlightened times).

There is no need for this. The textual effect of much amending legislation could be shown clearly on the face of the amending law if the simple reform outlined here were to be adopted.

## A graphic style of amendment

The approach I propose is routinely taken in the United States to the presentation of amending legislation.[6] Instead of the amending law *telling* its readers what the amendment is to be, it *shows* it graphically by using the device of struck-through text and underlining rather than the language of omission and substitution.[7] This makes clear what is being left out (which no Australian style does), what is being put in and precisely where it is being put. Moreover, some of the existing context of the amendment is able to be set out.

Such a method of presenting the amendment also draws direct attention to the most important aspects of the amendment—the text underlined or struck-out—in marked contrast to the indirect "operative" language of textual instruction used in any conventional amending formulae.

Consider the following example of an amending direction in textual form taken from an ACT law (the *Smoke Free Areas (Enclosed Public Places) (Amendment) Act 1994*):

> **7. Grant of certificate**
> Section 8 of the Principal Act is amended—
> **(a)** by omitting from paragraph (2) (a) "air cleaning";
> **(b)** by omitting from subparagraph (2) (b) (i) "air cleaning";
> **(c)** by omitting subparagraph (3) (a) (iii) and substituting the following subparagraph:
> "(iii) is within premises that are fitted with equipment capable of maintaining air quality in accordance with Australian Standard 1668.2;";
> **(d)** by omitting from subparagraph (3) (b) (i) "air cleaning";
> **(e)** by adding at the end of subparagraph (3) (b) (ii) "and"; and
> **(f)** by adding at the end of subsection (3) the following paragraph:
> "(c) the determined fee has been paid.".

As indicated earlier, a number of Australian jurisdictions now use this long form of amendment only rarely, preferring to employ as standard various forms of shorthand amendment. But the point I wish to make does not depend on the difference between short and long form, but between *any* textual style of amendment and a graphic style of amendment.

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[6] It has also been experimented with in NSW, for example in the *Constitution (Parliamentary Secretaries) Amendment Act 1988* (see Law Reform Commission of Victoria, cited above, at note 36).

[7] It would also be possible to use other graphic devices such as bolded or italicised text. See Law Reform Commission of Victoria, cited above, at Appendix 2 for a slightly different approach that also incorporates explanatory non-legislative material into the amending law.

With either this or a "short form" style, and without reference to the Explanatory Memorandum, it is impossible to appreciate with any certainty what the significance of the removal of the references to "air cleaning" is, nor of what is the context of s. 8 (3) (a) (iii), nor whether the new s. 8 (3) (a) (iii) is radically or only formally different from the old s. 8 (3) (a) (iii), nor whether the addition of s. 8 (3) (c) imposes a substantial new constraint on the grant of certificates (for example, it could have been simply relocated from s. 8 (3) (a) (iii)).

If, on the other hand, the amending law didn't tell us *how* section 8 would be amended, but simply showed us *what* the textual effect of the amendment would be, with text to be omitted struck out, and text to be inserted underlined (two graphic devices rarely, if ever, employed in legislation in its primary form), the result would be as follows:

**7. Amendment of section 8**
Section 8 of the Principal Act is amended as follows:

**Grant of certificate**

**8. (1)** On receiving an application in accordance with section 7 and subject to this section, the Minister shall—
- (a) if the application relates to a restaurant—grant a certificate for the restaurant; or
- (b) if the application relates to part of licensed premises—grant a certificate of exemption for that part.

**(2)** The Minister shall not grant a certificate under paragraph (1) (a) unless—
- (a) satisfied that the restaurant to which the application relates is fitted with ~~air cleaning~~ equipment capable of maintaining air quality in accordance with Australian Standard 1668.2; and
- (b) the occupier agrees to allow inspectors to—
  - (i) regularly inspect the ~~air cleaning~~ equipment; and
  - (ii) monitor air quality within the premises.

**(3)** The Minister shall not grant a certificate under paragraph (1) (b) unless—
- (a) satisfied that the part of the premises to which the application relates—
  - (i) is not greater than 50% of the public area of the premises;
  - (ii) is a clearly defined area; and
  - ~~(iii) is fitted with air cleaning equipment capable of maintaining air quality in accordance with Australian Standard 1668.2; and~~
  - (iii) is within premises that are fitted with equipment capable of maintaining air quality in accordance with Australian Standard 1668.2; and
- (b) the occupier agrees to allow inspectors to—
  - (i) regularly check the ~~air cleaning~~ equipment; and
  - (ii) monitor air quality within the premises; and
- (c) the determined fee has been paid.

With this graphic presentation of the amendment, we can get a better general idea of the answers to the questions left hanging over the amendment in its textual style. The omission of the reference to "air cleaning" would appear to have the consequence of broadening the class of equipment in relation to which exemptions can be granted. The omission and substitution of s. 8 (3) (a) (iii) would seem to result in a further slackening of the constraints on the issue of exemption certificates; the relevant part of the premises does not need to be fitted with the equipment if it is installed elsewhere in the premises. The addition of s. 8 (3) (c) does indeed seem to involve the imposition of a new fee for the issue of the certificate.

Naturally, the amended section must still be read in the context of the whole Act, and the full effects of the amendments can only be understood if the facts about air quality control equipment and the actual premises to which the section could potentially apply are known. All this should still be dealt with by a competently prepared Explanatory Memorandum. However, it is contended that the amended law would speak significantly more clearly for itself if the graphic style were to be adopted than it does through the use of the textual style of amendment.

The heading and actual amending words are presented in a larger font than the reproduced section of the primary law showing the amendments, and in a slightly different (though closely related) font style (Helvetica as opposed to Times). Certainly, this is not an ideal solution; improving on this suggestion should not, however, prove to be a major obstacle to the adoption of the graphic style.[8]

If underlining of inserted text is regarded as too "busy", making the inserted text difficult to read, there are any number of alternative graphic devices available; most obviously, inserted text could be printed in a different colour, or whole inserted provisions could be marked with a line or other device in the margin of the text.

An additional advantage of this approach would be the greater ease with which consolidations of legislation could be prepared following the passage of amending legislation in this form; the facility known as "revision marking" in word-processing systems could be adapted to mark text to be omitted or inserted and subsequently to up-date the legislation automatically.[9]

## Constraints

There are some fairly evident constraints on the use of the graphic style of amendment.

I stress that for maximum effectiveness, the graphic amendment style should only be adopted as being a potential device *additional to* and not in substitution for the textual style of amendment. Moreover, I can see no reason why these styles should not be mixed in single amending laws.

### Best suited for amendments within sections or smaller units

It is best suited for amendments within sections and smaller legislative units (internal amendments to definitions, for example). To apply this method to repeals and insertions and substitutions of new sections, Divisions, Parts, Chapters etc

[8] For alternative approaches, see Law Reform Commission of Victoria, cited above, at note 36 and Appendix 2.

[9] This is an aspect of the Tasmanian system described earlier, although the end-product of their system is the translation of the drafter's draft "consolidation" into a conventional amending law. In Western Australia such an approach has also been adopted in preparing "marked" consolidated Acts accompanying draft amending legislation (see below).

might be to overburden the amending law (although if, rather than underlining, contrasting colours or marginal side-bars were used to indicate inserted text, relatively large portions of text might be easily readable in an amending law).

**Not well suited for small amendments in long legislative units**
In the case of extremely long legislative units in which only minor amendments are carried out, the graphic style, on balance, might be regarded as more trouble than it is worth, for the same reason. Where the amendments are too small, or the section too large, the option of reverting to the standard textual style amending forms would still be available.

**Need for amendments to interpretation legislation**
Enabling amendments to interpretation legislation would be necessary to give effect to the graphic style. In the course of doing so, safeguards against error in the presentation of the text of the primary law could be enacted securing the validity of amendments and the integrity of the primary law (see the discussion below on the topic of "error").

**Electronic format constraints**
With any graphic devices adopted for the presentation of amending laws, care must of course be taken to ensure that the devices (strike-through, underline, bolding etc) are able to be translated satisfactorily in any electronic transfer of legislative text, whether before or after enactment.

## Objections

A number of objections might be directed against the proposal to adopt graphic-style amending legislation in Australia, but, in my view, the proposal is able to meet them without serious difficulty.[10]

**Parliamentary procedure**
It may be objected that to introduce this reform would be to lay much legislation before parliaments which Governments would prefer to be kept untouched, due to the operation of standing orders about the scope of parliamentary debates.

Close consultation would be necessary with the legislature, and in particular with the Clerk and the Speaker, before "graphic" amending Bills were introduced. Such consultation would be needed to ensure that the Standing Orders were amended to provide an appropriate method for debating graphic-style amending Bills, and in particular to ensure that the scope of debate about such Bills was continued to be limited to the substance of the relevant amendment.[11]

It should be borne in mind, of course, that it is open to members of parliament under existing procedures in Australian parliamentary institutions to move the suspension of standing orders with the objective of broadening the scope of debate on amending legislation. Indeed, it might be observed that this objection to the graphic style of amendment amounts to little more than a fear that the elected representatives of the people would have access to a more complete explanation of the impact of the laws they are debating. Hardly a worthy consideration!

**Split commencement**
Another objection raised to the graphic

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[10] Some of these were aired in discussion following the presentation of this paper in 1994, or raised at a recent national Parliamentary Counsel's Committee meeting on information technology (as reported to the author by Mr John Clifford of the ACT Office).

[11] Amendments on the floor of parliament to such Bills (or to any Bills, for that matter) could also be effected, where appropriate, using the same graphic techniques. Alternative parliamentary procedures might, of course, need to be adopted where amendments are required to be read out, but with goodwill and creativity one would not think this to be a major obstacle to permitting graphic style amendments.

style is the awkwardness of providing for the commencement of different amendments at different times.

First, it should be observed that any difficulties with the split commencement of graphic-style amendments already exist under conventional amending methods. The graphic style could, in any case, be employed at the level of legislative units smaller than the section where necessary. If, for example, amendments to different subsections were required to commence at different times, the amendments to *each* subsection could each be presented graphically, if to do so would not cause too much confusion.

It needs to be emphasised again that the adoption of the graphic style of amendments is not proposed as being exclusive of the standard textual style of amendment. On occasions on which the graphic style loses its edge in terms of clarity, immediacy or precision, a drafter should always be able to revert to the standard style. She might well do so when confronted with a "split commencement" problem.

These comments would also apply, of course, in the case of saving and transitional provisions.

**Objections to graphics**

It might be objected that the tradition of legislative amendment is a textual one, and to allow graphic presentation to take on significance would be against the spirit of that tradition. We are so accustomed to thinking in terms of language that perhaps "graphic" communication does not seem as valid or precise as purely linguistic communication.

There is no such thing as "pure" linguistic communication, however. Our understanding of what we read is always affected by the presentation of the text. For example, we distinguish advertisements from reportage in newspapers largely by the *look* of each text, and in a magazine it can be very disorienting to find advertisements and text presented in a similar style. The ACT *Electoral Act 1992*, for example, gives clear recognition to the impact of graphic presentation on comprehension in dealing with "advertorials". Section 296 requires newspapers to label electoral advertisements clearly as advertisements if they are presented in the same style as straight journalistic comment or reportage.

In any case, our interpretation of legislation at present is already affected by its style of graphic presentation. We rely on the placement of legislation on the page to decide whether particular text falls within the last paragraph in a series, or the following text (which is taken out to the left margin). The way in which tables and formulae are read in legislation is often by reference to their graphic presentation. Section headings in a number of Australian jurisdictions (including the ACT and the Commonwealth) are technically not part of legislation, but the only way in which they can be distinguished from their legislative surroundings is by their placement on the page, and their typography. The increasing trend in Australian legislation towards the use of tables, charts and other graphic devices demonstrates the growing recognition by drafters of the importance of presentation in conveying information in legislation.

**Space and verbiage**

Another objection is that the graphic method of amendment will consume significantly more space in amending bills, through the necessity of reprinting large chunks of existing legislation. This might be thought to be wasteful.

It is submitted that this is a price worth paying for a dramatic increase in the communicative power of amending laws. The increase in the number of words, and

the number of pages of amending laws, does not in this case mean any loss of clarity. It is a delusion to think that there is a direct relationship between the degree of brevity and compression in a law and the ease with which that law is understood—that "less is best". Actually, it is very often an inverse proportion which operates—sometimes more material, more explanation, more space (in terms of presentation) can make laws more readily accessible. In the case of graphic style amendments, the inclusion of additional contextual text has significant potential explanatory power which could (in many cases) justify the extra text and paper involved.

**Risk of error**

There are a number of associated risks of error which might be foreseen. The validity of an amendment could be threatened by an inadvertent mistake in the text of the legislation printed. An error in printing the consolidated text of the primary law could result in an inadvertent change to the primary law itself. Text to be inserted might be printed without the necessary markings, as might text to be omitted.

Protection against all such risks might be achieved through the insertion of appropriate special provisions in interpretation legislation. Where this is insufficient, in relevant cases the common law rules compensating for errors in the enactment of legislation would apply as a matter of course. In short, the situation is in essence no different from that which attends the risks associated with the enactment of any law.

**Additional work-load**

Would the graphic style of amending legislation result in an appreciable increase in the workload of drafters and support staff in checking draft legislation? This is by no means clear. At present, the checking of amending legislation is made complex by the demands of consistency made by the amending formula, and by the necessarily "busy" paragraphing, spacing and punctuation involved. Admittedly, much more text would need to be checked if the graphic style were to be adopted, but the checking of this text would be far more straightforward.

As far as the initial preparation of the graphic style amendments is concerned, this would be greatly facilitated by the ready availability of the consolidated text of primary laws on computer data-bases, as demonstrated not only by the new systems adopted in Tasmania but in every Parliamentary Counsel's Office in which legislation is drafted and stored electronically.

**Why not reserve the graphic style for use in explanatory material?**

This is perhaps the most obvious of all objections; granted the advantages of the graphic style in showing the effect of a legislative amendment, why not employ it in supplementary material rather than in the primary text of the law?

This approach has been taken up to some extent in Western Australia, where convenient, companion "graphic-style" consolidations of primary laws may accompany draft amending Bills submitted to Cabinet, as well as being included in explanatory material tabled in parliament with amending legislation.[12]

What is proposed in this paper, however, goes beyond the discussion of a useful explanatory device. I propose the relinquishment, where appropriate, of an indirect technique of legislative drafting

[12] The WA Parliamentary Counsel reserves the right to decide whether such a "consolidation" is prepared in any particular case, and whether the whole Act is consolidated or only part of it. To date, only consolidations of whole Acts have been prepared for this purpose.

which unnecessarily requires the readers of amending legislation to go beyond the four walls of the legislation if they are to understand the effect of the amendment. Drafters must think about amendments in terms demonstrated by the graphic style anyway, as illustrated, again, by the new Tasmanian system in which the drafting of amending legislation is undertaken directly in relation to the consolidated text of the primary law. Why not go that extra mile to help the users of amending legislation where possible by presenting the legislation itself in a form in which they can best understand it?

## Conclusion

The conventional approach to the preparation of amending legislation is technical, confusing and information-poor. A graphic style of amending legislation offers the opportunity for drafting such laws in a far more accessible format which automatically incorporates more relevant information about the proposed changes into the law itself. Such a style has been the norm for years in many jurisdictions in the United States, and its presentational advantages are now being discovered by legislators and administrators in Western Australia (although there, the graphic presentational style is still only used in material supplementary to proposed amending legislation).

Moreover, in jurisdictions like Tasmania with sophisticated links between the drafting and consolidating process, such an approach could greatly facilitate the preparation and publication of up-to-date consolidations of current law.

It seems likely that explanatory material incorporating a graphic presentation style of proposed amendments will be increasingly used in Australian jurisdictions, as in the case of Western Australia. It will then become apparent that in many cases the conventional textual amending style is more a hindrance than a help to the parliamentary process. The stage will be set for the incorporation of graphic presentational techniques for the drafting of amending legislation into the repertoire of the Australian legislative drafter.

# Linguistics and legislation: some comments

Jonathan Woodger[1]

In the last issue of *The Loophole*, Nigel Jamieson presented some stimulating and provocative thoughts about the relationship between linguistics and legislative drafting. My comments in what follows certainly do not amount to a coherent thesis on this difficult topic, but I cannot allow some of the ideas Jamieson presents to pass without comment. The quotations are from the original article.

## Radical theory of linguistics

*"There is a theory of language drawn so tight as to outlaw or at least discredit a lot of everyday linguistic endeavour for its lack of mathematical precision."*

How could any theory of language "outlaw" or "discredit" a particular linguistic phenomenon? Like anything purporting to be an empirical science, the task of linguistics is surely to explain how language works, how it came to be and so on; not to prescribe which aspects of language are lawful. For a linguist to "outlaw" someone else's linguistic endeavours makes as much sense as it does for a zoologist to declare all turtles invalid on the ground that they are a rotten example of animals. The empirical scientist holds that speech-acts and turtles are neither lawful nor unlawful. They just are, so we might as well try to find out more about them.

This objection aside, does anyone today really believe in such a radical theory? Let's consider the theory.

Jamieson points out that "Wesel never stated anything of the sort by way of law and language being imprecise since, strictly speaking, what he wrote was '*Recht ist Sprache ist ungenau*'". No—according to the radical theory, he apparently wrote something in German in 1992 using what are reported to be those words, but since that instance of utterance was unique, Jamieson couldn't quite reproduce the exact utterance for you and nor can I and nor could *Die Zeit*. You had to be there.

The problem with this is that an adherent of such a theory could not even coherently describe it, because (according to the theory itself) any description of the theory is a unique instance of utterance. Because the theory "repudiates the existence of synonyms", it repudiates the possibility of its own restatement. Indeed, any statement denying the possibility of restating the same idea cannot itself coherently be stated.

This theory also "dismisses the possibility of translation between one language and another". The world's diplomats must not agree with this theory since they do manage to avoid wars breaking out at least some of the time. You're an English-speaker. You sit down in a Berlin coffee shop, thumb through your pocket phrase book and say "*kaffee, bitte*". The waiter brings you a coffee. Now, just maybe in certain obscure contexts the way *kaffee* is used in German differs from the way *coffee* is used in English. But who cares? You got your coffee, and *that* is successful translation by the author of the phrase book if not by you.

[1]Acting Senior Assistant Parliamentary Counsel, Office of Parliamentary Counsel, Commonwealth of Australia.

So what's the point of formulating a theory of language that denies the possibility of "true" communication between 2 people? After all, no person has direct and verifiably accurate physical access to what's going on in the mind of another—what would this be like anyway? Such a theory would be scientifically valueless, since it would fail to account for the fact that *something* we would call communication is plainly going on, however imperfectly. It would also be philosophically trivial, since, in common with other forms of scepticism, it cannot even be coherently stated.

What does all this mean for drafting? While it may be true in some trivial sense that "every instance of law-making is unique", it does not follow that there are no similarities between any 2 drafting problems. Two things can each be unique and still be similar to one another. Everyone is genetically unique (except for identical twins and clones), yet one child is often quite like its younger sibling.

To take a simple example from drafting, every criminal offence ever drafted might be "unique" in some sense, but most of them have in common, for example, the problem of how to specify the maximum penalty for committing the offence, and it is easy to see how both drafters and readers might benefit from a standard approach to setting out maximum penalties, say, by putting them at the end in a separate line saying "Maximum penalty: *x*".

So deleting your database of drafting precedents is about as smart as sacking all the diplomats or denying the existence of family resemblances. I wonder whether any drafter really thinks precedents are necessarily useless in legislative drafting.

## Artificial intelligence

"*Current aspirations towards establishing artificial intelligence ... promote literality in linguistics and legalism in legislation.*"

I agree that no machine yet invented, or even proposed, can plausibly do anything like human linguistic activity. The ones we do have in general offer a hopelessly impoverished caricature of a real language user. So it is hard to see how they could ever cope with the subtlety and complexity of the language of law.

That current systems have severe limitations does not therefore make them useless. We don't need to design androids that can do everything a person can in order to get some benefit from artificial intelligence: a thing that can't do everything might still be able to do *something*. Some aspects of law are much more "algorithmic" than "heuristic". Contrast the United States Bill of Rights with a social security benefit rate calculator from Australia's *Social Security Act 1991*. The Australian Social Security Department would be in big trouble if it couldn't use its computers to help work out how much to pay people under the law.

More importantly, there is a serious philosophical error in the views that Jamieson ascribes to a "number of linguists". That our current technology is primitive does not prove that we should "reject the *possibility* of artificial intelligence" or that "language is *essentially* a human endeavour" [emphasis added]. Remember that cognitive science is very new. Its proponents are well aware of the limitations of current computing technology. No doubt the critics told Leonardo da Vinci to give up trying to build a flying machine on the grounds that

flying was "essentially" an activity of birds; not humans. He and the Wright brothers were unimpressed by this form of dogmatic essentialism. Consider the analogy of the pelican telling the Boeing Corporation that its Jumbos do not and can never "fly"; they can merely emulate true flight, which is metaphysically reserved for birds, insects and bats. In the same way, it is at best unimaginatively pedantic, and at worst deeply arrogant, for humans to assert that no machine or non-human organic species could ever be capable of linguistic activity.

We may be decades or centuries away from building machines that can talk like we can, or solve legal problems, but this is a reason to quadruple all expenditure on research; not to cancel it.

Jamieson mentions the "eighteenth century *ad absurdum* of Quantz's mechanical musician". I don't know that story, but the philosopher and cognitive scientist Daniel Dennett has described a computer program that, by applying millions of iterations of Darwinian-type natural selection principles to randomly mutating assortments of notes, can write sonatas in the style of your favourite eighteenth century composer. All it needs is a few extremely simple rules about what sorts of musical pattern the composer tended to use. Panels of musicologists are quite unable to distinguish the results from genuine but obscure works by Mozart and Haydn.

Maybe one day we will have a machine that can draft legislation passably well too. Such a machine would need lots of special abilities. It would have to be able to ask questions and understand the answers, make delicate legal and political judgments and see all the implications of the decisions it made. In short, it would need many of the mental powers of a human being, but not all of them. That is not going to happen any time soon, but to deny that it could ever happen seems to be a manifestation of the belief in a "mystical shell associated with legislation as the highest human endeavour". The silliness of that notion should be self-evident, but if anyone thinks not I would be interested to see a modern defence of it.

# Drafting the New South Wales Duties Act 1997

Michael Orpwood QC[1]

In December 1997, the New South Wales Legislature enacted the *Duties Act 1997*. It replaced the greater part of the *Stamp Duties Act 1920*. For the drafter, it afforded a rare opportunity to draft a significant and extended piece of taxation law.

## The previous law

The *Stamp Duties Act 1920* mainly taxed the creation of commercial instruments. The core of the Act was found, of all places, in the Second Schedule to the Act. The Second Schedule contained an alphabetical list of instruments and opposite each instrument was the amount, or rate, of tax to which the instrument was subject.

The purity of the 1920 Act's Second Schedule scheme was sullied over time. The centrality of its provisions became less and less apparent. The complete legislative scheme concerning a particular commercial instrument might be scattered throughout the Act.

Also, to overcome avoidance techniques, the instrument tax, in the case of conveyances of property (the main area of taxation), was extended in 1987 to become, in effect, a transaction tax.

## The influence of the plain language movement

Between the date of first enactment of the *Stamp Duties Act 1920* and its rewrite in 1997, the plain language movement had made an impact on the way in which legislation was drafted. When the drafting of the *Duties Act 1997* commenced, that movement had gone through several phases. The early interest in words, sentence structure and sentence length, and in the relationship between sentences, had passed through document design to an examination of the larger elements of structure, particularly the selection and organisation of thoughts and ideas and their effective communication. The movement had gone from the micro elements of drafting to the macro.

## The task

With some exceptions, the new Act was to tax transactions. Six main areas of taxation were identified—transfers of property (other than transfers of listed shares through a stockbroker), transfers of listed shares through a stockbroker, leases, hire of goods, mortgages, insurance (both general and life), and registration of motor vehicles. Generally, the new Act was to be neutral in policy. It did not have to include the existing deposits tax (known as financial institutions duty). Both those decisions made the task of drafting easier. The Act's sponsors insisted on simplicity. Tax laws needed to be easily understood.

## Some ideas for the task

In the preliminary stages of planning, some principles for drafting the project emerged.

### ■ Seeing the big, big picture first

It seemed logical to deal in separate chapters with each transaction to be taxed. The first statement in the chapter was seen to have two purposes. First, it was to say what the chapter did. It was intended to give the widest possible overview of the content of the chapter in the fewest possible words. Take the chapter on hire of goods, for example. Its opening statement is that a tax is imposed on the hire of goods. Or the chapter on mortgages. Its opening statement is that a tax is imposed

[1] Deputy Parliamentary Counsel, New South Wales.

on mortgages. (For political, and not drafting, reasons, the tax is called a "duty". "Duty" was the name of the old tax and the government of the day, like governments everywhere, did not want to appear to be imposing a new tax!) So, each chapter began with a statement in the simplest possible terms saying what it did.

This foundational statement was followed by a short statement in the form of a note. The note described the major elements of the tax. It was like an executive summary. After reading about a dozen lines of text, the reader was given an overview of the tax and introduced to its main features. Nothing in the following contents of the chapter should take the reader by surprise.

■ **The point of entry**

The second purpose of the first statement in the chapter was to be the logical point of entry into the content of the chapter. It was to be like a doorway that admitted the reader into a narrative that would then unfold from that point in the way that would be most helpful to the reader's understanding of the subject-matter.

■ **A hierarchical structure of ideas**

After reading the foundational statement, questions no doubt arise immediately in the reader's mind. What is a hire of goods? What is a mortgage? What transactions fall within these concepts and are thereby taxed? What transactions fall outside them? So the second statement defines the concept that has just been introduced. Subsidiary concepts that may be embraced within the primary concept are then dealt with as are any other boundaries that narrow or define the scope of the tax. The reader needs quickly to understand whether a transaction is or is not subject to the tax, that is, what the extent of the tax base is.

After defining the tax base, other relevant issues are addressed. What is the rate of duty? Who pays it? When is it liable to be paid? The intention was to take the reader from the foundational statement through gradually descending levels of greater particularity. The process of moving from the general to the particular was like that of an international traveller finding a particular Sydney address. First go to Australia, enter New South Wales, find Sydney, then Balmain, Darling Street, Nicholson Street, Brett Avenue, and finally No 1. The hierarchy was ordered according to what the reader needed to know next in the narrative. To reflect this, the drafting often took a catechismal approach.

■ **Defining concepts in context**

It was thought helpful to introduce the reader to the key concepts needed to understand the chapter as early as convenient in the chapter. But it was considered undesirable to do this out of context. Generally, there was no need to explain something before it had been introduced in the narrative. If a word or phrase was to be included in the dictionary for the Act, it would be defined according to its meaning given to it at its point of introduction into the text. (It remains an aim to draft a Bill of reasonable size that contains no definitions!)

Hopefully, the application of these, and other, principles have resulted in the production of a clear and readable text. They were intended to present information in a way that was familiar. And logical. What do you think?

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## Extract from Duties Act 1997

### Chapter 7 Mortgages

#### Part 1 Introduction and overview

**204 Imposition of duty**

This Chapter charges duty on instruments that fall within the definition of a ***mortgage***. Duty chargeable under this Chapter is called ***mortgage duty***.

**Notes.** (1) Mortgage duty is calculated, in most cases, according to "the amount of advances secured by the mortgage". Contingent liabilities may also be included. This is dealt with in Part 2.
(2) Ad valorem duty is only chargeable on one of a package of mortgages securing the same advance. This is dealt with in section 217.
(3) Provision is also made for the apportionment, for duty purposes, of the amount secured by any mortgage over property in different Australian jurisdictions. This is dealt with in sections 216–218.

### 205 What is a "mortgage"?

For the purposes of this Chapter, an instrument is a ***mortgage*** if it is:

(a) a security by way of mortgage or charge over property wholly or partly in New South Wales at the date of its first execution, or

(b) a security by way of mortgage or charge (not being a floating charge) that does not affect property in New South Wales at the date of its first execution, but within 12 months from that date affects land in New South Wales, or

(c) a security by way of a transfer or conveyance of any property in New South Wales that is held in trust to be sold or otherwise converted into money, redeemable before such a sale or conversion either by express stipulation or otherwise, except where the transfer or conveyance is made for the benefit of creditors who accept the transfer or conveyance in full satisfaction of debts owed to them, or

(d) an instrument that, on the deposit of documents of title to property in New South Wales or instruments creating a charge on property in New South Wales, becomes a mortgage or evidences the terms of a mortgage.

**Note.** Certain instruments that would otherwise be caught by this definition are exempted under Part 4.

### 206 What is an advance?

In this Chapter, ***advance*** means the provision or obtaining of funds by way of financial accommodation, by means of:

(a) a loan, being:
  (i) an advance of money, and
  (ii) the payment of money for or on account of, or on behalf of, or at the request of, any person, and
  (iii) a forbearance to require the payment of money owing on any account whatever, and
  (iv) any transaction (whatever its terms or form) that in substance effects a loan of money, or

(b) a bill facility, being one or more agreements, understandings or arrangements as a consequence of which a bill of exchange or promissory note:
  (i) is drawn, accepted, endorsed or made, and
  (ii) is held, negotiated or discounted to obtain funds, whether or not the funds are obtained from the person who draws, accepts, endorses or makes the bill of exchange or promissory note and whether or not the funds are obtained from a person who is a party to any such agreement, and includes contingent liabilities of the kind referred to in section 215.

### 207 Who is liable to pay the duty?

The person liable to pay mortgage duty is the mortgagor or the person bound.

### 208 When does a liability arise?

(1) A mortgage becomes liable to duty on the date of its first execution.

(2) A mortgage becomes liable to additional duty on the making of an advance or further advance by which the amount secured by the mortgage exceeds the amount secured by it at the time a liability to duty last arose in respect of it, unless section 219 applies.

(3) An instrument of security that does not affect property in New South Wales at the date of first execution but that affects land in New South Wales at any time within 12 months after that date becomes liable to duty

as a mortgage on the date on which it first affects the land.

**209 When must duty be paid?**

A tax default does not occur for the purposes of the *Taxation Administration Act 1996* if duty is paid within 3 months after the liability to pay the duty arises.

Note. Duty is payable, without interest or penalty, within 3 months after the liability to duty arises. Some amount of duty will always be payable within the 3-month period after first execution. The minimum amount is $5. If the amount of the advance is limited by the mortgage, duty will be payable on that amount within the 3-month period (see section 213). If the amount of the advance is not limited (because, for example, it is an all moneys mortgage), duty will be payable on the actual advances (see section 214).

**210 How is mortgage duty charged?**

(1) The amount of duty chargeable on first execution of a mortgage is determined by the amount secured by it, as determined under Part 2. The amount of duty is:

(a) $5.00, if the mortgage secures no amount or if the amount secured by the mortgage is not more than $16,000, or

(b) if the amount secured by the mortgage is more than $16,000—$5.00 plus a further $4.00 for every $1,000, or part, by which the amount secured exceeds $16,000.

(2) The amount of duty chargeable on a mortgage in respect of an advance or further advance is calculated on the amount secured by it as determined under Part 2. The amount of duty is $4.00 for every $1,000, or part, of the amount secured.

Notes. (1) Further provisions that determine how the amount secured by a mortgage is to be calculated are contained in Part 2.
(2) See sections 216-218 as to the assessment of duty in cases where some of the property over which a mortgage, or a package of mortgages, is given is property outside New South Wales.
(3) Some instruments are exempt from payment of mortgage duty. They are dealt with in Part 4.

**211 Consequences of non-payment of duty**

A mortgage on which duty is required by this Chapter to be paid is, while any duty remains unpaid on it, enforceable only to the extent of the amount secured by the mortgage on which duty has been paid under this Act.

**212 Where is property located?**

For the purposes of this Chapter, property in the following forms is taken to be located in the place specified:

(a) shares in or securities of a body corporate—in the place of incorporation of the body corporate,

(b) units in a unit trust scheme:

(i) in the place where the register on which the units are registered is kept, or

(ii) in the place of residence of the manager of the unit trust scheme, if the register on which the units are registered is not kept in Australia,

(c) debt securities of a Government of a State or Territory of the Commonwealth—in the State or Territory concerned.

# Rewriting Australia's income tax law

Kerry Jones[1]


## Synopsis

This article discusses a project that has been in progress to rewrite Australia's income tax law in a simplified form. It begins by discussing the problems with the law that led to the rewrite and the reasons for those problems. It discusses the aims and approach of the rewrite and the process adopted. The article concludes with a comment about the future of the process and the rewritten law.


## Background

For the past 5 years a task force has been rewriting Australia's income tax law. That law was enacted in 1936 and regularly and extensively amended from that time. Because of the problems that resulted (discussed below), a Parliamentary committee recommended in November 1993 that a broadly-based task force be set up to rewrite the income tax law. The task force, called the Tax Law Improvement Project, began its work in December 1993.

## Reasons for the rewrite

### Structure of the income tax law

Extensive amendments made to the 1936 Act over the years resulted in a complex and unwieldy structure. The original structure was quite simple and clear, and the law was relatively short. The Act was divided into Parts dealing with liability to taxation, administration, assessment and collection and recovery. The liability Part dealt with all relevant income items separately from expenditure items, and contained only brief special provisions relating to entities such as trusts and partnerships. In total, the Act covered 81 pages.

By 1993, the simple structure had disappeared, largely because of the piecemeal addition of extensive regimes providing special rules to determine the tax liability of certain taxpayers (eg superannuation funds and controlled foreign corporations) or to determine the tax treatment of certain expenditure (eg mining and petroleum) or certain income (eg dividend imputation). The law had grown to over 40 times its original length, and had even spilled over into other Acts (eg appeal and offence provisions had been removed to another Act).

As the structure of the law became increasingly burdened by complex and lengthy additions, pressure developed to fit changes that would normally warrant a new Subdivision or Division into a single new section or as few new sections as possible. Typically, such a single section would consist of numerous lengthy definitional subsections followed by the operative subsection and further subsections containing qualifications, exceptions and interpretative provisions. Without the assistance of any guidance in the form of summary provisions or subsection headings, the task of understanding such a section became very difficult.

### Style

The 1936 Act was drafted in a relatively simple and clear style. One reason for this was the comparatively simple fact situations that it addressed. Typically, the only activities relevant to determining a person's tax liability for a year were those taking place in that year. The Act therefore

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avoided detailed context-setting by referring throughout simply to "the year of income" and "the taxpayer". However, during the 1960s this style was abandoned in amendments because of the difficulties of using it to describe complex arrangements involving activities taking place over several years and involving a variety of persons.

Also, at about this time, the courts began to favour a literalist rather than a purposive approach to the interpretation of the income tax law, which encouraged a cautious "black-letter law" style of drafting. No value at all was placed on readability.

An example of the excesses of this style is at Appendix A [at page 23].

**Numbering system**
The 1936 Act was numbered in the traditional way. When the Act was amended, new provisions were inserted between existing sections using alphanumeric numbers (eg 133A, 133B etc). Also, the practice was adopted of inserting most new tax liability Divisions at the end of the tax liability Part which, unfortunately, was in the middle of the Act. This placed enormous pressure on the alphanumeric system, which eventually meant that numbers like "159GZZZZH" had to be used at the end of the liability Part. To avoid this, new Parts were later added at the end of the Act. However, by this time the damage had been well and truly done, and deficiencies in the numbering system played a significant role in pressure to rewrite the income tax law.

**Consequences of problems with the law**
Critics of the amended 1936 Act argued that the difficulties in the law had led to increased costs for taxpayers and government administration because of the excessive time and effort being expended in understanding, interpreting and applying the law.

## The rewrite aims and approach

**Aim**
The aim of the rewrite was to make significant savings in the cost of complying with the income tax law by simplifying the law. To redress all of the deficiencies it was considered necessary to rewrite the law completely "from the ground up" with a new structure, mode of expression and numbering system.

In doing so, only minor changes have been made to policy in the interests of reducing complexity. Reduction in complexity and length has been facilitated by the fact that provisions in the 1936 Act that are spent or of limited future operation have not needed to be reproduced, or to be reproduced in the same form.

**Structure**
The new structure of the rewritten law was intended both to facilitate use and understanding of the income tax law and to be robust enough to cope with substantial future amendment without major distortion. After consideration of various models, including overseas income tax laws, the rewrite team decided to adopt what it calls a "pyramid" conceptual structure for the new law. This involves the initial presentation (at the apex of the pyramid) of central or core concepts applicable to determining the tax liability of most taxpayers, followed by general liability provisions applying to a wider group of taxpayers and finally by tax liability provisions relating to a specific groups of taxpayers or imposing special obligations. Then come collection and recovery provisions and other administration provisions. At the end of the new Act (or base of the pyramid) is a provision (called the "Dictionary") in which all terms defined in the Act will either be defined or listed. If listed, the definitions will be located in the provisions in which they are used, at the place that will best aid understanding.

A summary of the new structure, extracted from material tabled in Parliament in connection with the new law, is at Appendix B [at page 24].

**Style**

The hallmark of the rewrite style is the use of clear, plain language, addressed to the widest audience. The audience selected for particular provisions is the broad class of professional tax adviser likely to use those provisions. While the rewrite is generally not intended to be understood by all taxpayers, special attention has been given to improving the readability of those provisions that will have broad application to the typical individual taxpayer. In particular, those provisions will address the taxpayer directly, in the second person (eg "you must lodge a tax return..."). The rewrite team has argued that this will make the law less intimidating and will also impose a discipline on the drafter in favour of simplicity. Critics of this approach have pointed to its potential to patronise the reader, and to the fact that it is not directed at the real user of the provisions ie the tax agents who prepare a large proportion of income tax returns for individuals.

**Presentation of concepts**

The new approach involves much more than mere use of clear, plain language. A considerable amount of attention has also been given to the fundamental question of how best to present the concepts involved. A communication consultant has worked closely with the rewrite team, and also with drafters who continue to work on the day-to-day drafting of amendments to the existing tax law. One result of this process is recognition of the importance of orientation material in the presentation of concepts (discussed below). Other matters of importance to reader cognition include:

- focussing on underlying principles or key conceptual building blocks and separating them from qualifications and exceptions;
- ensuring that concepts "flow down" through the structure to the section level, using the "foothold principle" of moving in successive steps from the familiar to the unfamiliar;
- ensuring that provisions are structured so as not to exceed the limits of short-term memory capacity (about 7 pieces of information);
- giving prominence in a sentence to the verb, which should contain the central idea;
- recognising the need for appropriate visual presentation by having well-designed formats (discussed below) and using graphics such as tables and diagrams;
- recognising the importance of tone, by avoiding words with adverse connotations and adopting a user-friendly style.

**Orientation etc material**

Psychologists and educationists have long stressed the importance of using summary, overview or orientation material to provide a frame of reference to assist in processing information (referred to as "mind-mapping"). The rewrite makes extensive use of such material throughout the new Act. Another function of this material is to assist the reader in locating provisions of relevance as quickly and accurately as possible.

**Guides**

One type of orientation material is what the new law calls a "Guide". A Guide is typically located at the beginning of a unit such as a Division and consists of:

- a brief summary of the purpose or object of the Division;
- a table of contents comprising descriptive section headings; and
- a diagram or chart summarising the operation of the Division.

Additional narrative text may also be included. The intention is to provide a conceptual overview as well as an

indication of the theme or purpose of the operative provisions. Headings are used to separate Guides from operative provisions.

Provisions have been included to clarify the legal status of Guides in the interpretation of the law. While Guides form part of the Act, they are subordinate to the operative provisions and may only be taken into account for such purposes as determining the underlying purpose or object or resolving ambiguities. The potential for inconsistency between the Guides and operative provisions should be minimised as a result of the intended drafting methodology: Guides should not be drafted separately from the preparation of the operative provisions, rather they should emerge as an integral part of the drafting process. For example, conceptual overview diagrams should be drawn from material prepared by the drafter or instructors in analysing the policy content of the law that is to be drafted.

### Signposts

Another kind of orientation material is what the rewrite team describes as "signposts". This material directs the reader to the location of particular provisions. For example, notes are used throughout the new Act at the end of sections to direct readers to other provisions of relevance. Another kind of signpost is the use of checklists in the core provisions. For example, the Act will contain a list of all amounts treated as income for the purposes of determining the tax liability, and of all amounts of expenditure that are taken into account for that purpose.

An example of the use of Guides and signposts is at Appendix C [not reproduced in *The Loophole*].

### Format

The rewrite adopts a new format that is significantly different from that of the 1936 Act. With the exception of some minor differences, the new format has been adopted for all Acts of the Australian Parliament. The new format is the product of extensive consideration, taking into account developments in other jurisdictions as well as the advice of experts in communication and document design. It involves greater use of white space around text, greater prominence for headings and the use of running page headings.

The example at Appendix C shows the new format [not reproduced in *The Loophole*].

### Numbering system

The rewrite has adopted a new numbering system. Its aim is to reduce the need for complex alphanumeric section numbers and at the same time implement a system that is simple and predictable. In essence, the system works by treating each Division in the new Act as an independent unit for section numbering purposes. The sections within each Division begin afresh with the number 1 and the Division numbers themselves increase sequentially throughout the Act, regardless of groupings into Parts and Chapters. As a result, each section can be uniquely identified by a composite of the Division and section number (eg 25-130, where 25 is the Division number and 130 is the number of the section within the Division).

A more detailed description of the numbering system, extracted from material tabled in the Parliament in connection with the new law, is at Appendix D [at page 27].

## The rewrite process

A staff of 2 drafters (later increased to 5), about 50 technical and administrative support officers from the Australian Taxation Office and 2 private sector tax professionals was brought together in the first half of 1994 to form the rewrite team. A leading communication consultant was

engaged to assist the team and a consultative committee consisting of business, professional and community representatives was established to provide guidance. The team then spent about a year developing and testing its basic techniques and approach.

The team decided to rewrite the income tax law progressively through a series of Bills, rather than attempt to do so in a single Bill which would not be complete until the end of the process. It also decided to publish a series of information papers and exposure drafts of provisions to allow community input before the introduction of legislation into the Parliament.

Pilot provisions (dealing with substantiation of expenditure) were initially included in the 1936 Act. The emerging approach was further refined in a series of exposure drafts, culminating in the enactment of the *Income Tax Assessment Act 1997*. That Act contained the core provisions, established the structure of the new Act and included rewrites of 2 major topics. Legislation containing the second and third instalments of the new law was enacted in 1997 and 1998, and further instalments of the new law are in preparation.

The income tax law is currently contained in 2 Acts, a situation that will continue until the 1936 Act is eventually replaced by the new Act. The core tax liability provisions are located in the new Act, while the law about what constitutes income and expenditure is at present found in both Acts. Confusion is reduced by the use of checklists in the core tax liability provisions of the new Act that refer to the relevant provisions of both Acts.

### The future

The future of the rewrite project is, at the time of writing, unclear because of the priority being given to the implementation of recent major Government tax policy reforms. To the extent possible within the time constraints of the Government's reform timetable, it is intended to draft the reform measures using the style, techniques and structure developed by the rewrite team.

The ultimate success of the rewrite will depend very much on the extent to which its approach is imported not only into the drafting of the reform measures, but also into the ongoing "business-as-usual" amendment process that gives effect to tax policy changes. These changes are often extensive, and are made in a radically different environment from that in which the rewrite is taking place—often under extreme pressure and with priority given to political considerations that tend to add complexity. Critical to the success of the new Act in the long term will be the ability of drafters to assimilate the new techniques to the point where they become an integral part of drafting skills rather than an additional overhead, and the willingness of bureaucrats and politicians to eschew what has been described as a "culture of complexity". It also seems that some form of ongoing rewrite team presence is required to guide, monitor and, if need be, rewrite ongoing amendments after they are made.

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## Appendix A—Example from amended 1936 Act

(4) For the purposes of this section, a person shall be deemed to be a person who had, or would have had, a right to receive indirectly for his own benefit the whole or a particular fraction of a dividend that might be, or might have been, paid by a company or of a distribution of capital of a company, or 2 or more persons shall be deemed to be persons who had, or would have had, between them a right to receive indirectly for their own benefit the whole or a particular fraction of such

a dividend or distribution of capital, if, in the event of a payment of a dividend by the company, or of a distribution of capital of the company, the person or persons would, otherwise than as a shareholder or shareholders of the company or as a trustee or trustees, receive or have received the whole or that fraction, as the case may be, of that dividend, or of that distribution of capital, if there had been successive distributions of the relative parts of that dividend, or of that distribution of capital, to and by each of any companies or trustees interposed between the company paying the dividend, or making the distribution of capital, and that person or those persons.

## Appendix B—Proposed structure of the new Income Tax Assessment Act

### Overview of this chapter

This chapter discusses the structure of the proposed new Income Tax Assessment Act.

### Aim of the new structure

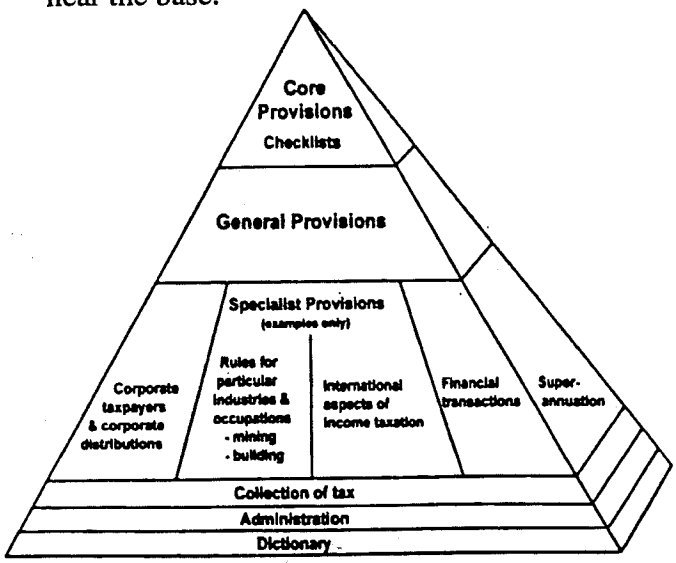
The new-structure will make the law easier to follow and use. Readers will find it easier to:

- understand what the law requires;
- identify the general principles of the law; and
- follow a path to the provisions they need to read.

The new structure will be flexible enough not to be distorted by the future addition of substantial amounts of new law.

### New approach: the pyramid

The pyramid shape helps explain the proposed conceptual structure of the income tax law. It illustrates the way the law will be organised, moving from the central or core concepts at the top of the pyramid to the more specialised topics near the base.




The reader can enter the Act at the beginning, the top of the pyramid, and read the basic concepts of income tax law.

### The top layer—the core

The most basic statement of how much income tax a person must pay can be put as an equation:

**IT = (AI - D) x TR - 0**

That is, *income tax* equals (*assessable income* minus *deductions*) multiplied by the *tax rate(s)*, minus *offsets*.

All the rest is detail. The law details what is assessable income, what is deductible, and what are offsets. Sometimes that detail applies to all or most taxpayers, sometimes only to specialist groups or in particular circumstances.

In the new law, all the concepts relating to that core equation at its most basic level will be in the top layer of the pyramid. They will be known as the core provisions of the Act.

**What the core will do—top level**
The core provisions will operate at different levels of detail. At a conceptual level, it will lead you to:

- what the Income Tax Assessment Act is about, and how to use it;
- who must pay income tax, and when and how they have to pay it;
- how to work out how much income tax a person must pay;
- what happens if a person's income tax is more, or less, than the instalments they have to pay;
- what other obligations a taxpayer has besides paying income tax; and
- how a dispute is resolved between a taxpayer and the Commissioner of Taxation.

**What the core will do—lower level**
At a more direct level, the core will explain:

- how to work out taxable income;
- the relationship between assessable income and exempt income;
- how assessable income consists of ordinary income and statutory income, how these concepts depend on whether a taxpayer is an Australian resident or not, and on the source of the income;
- what makes an amount exempt income;
- about deductions—both general deductions and specific ones;
- what a taxpayer can deduct under the general deduction provision; and
- that there are lists of all the provisions that affect income, exempt income and deductions.

The core provisions will contain the general income and general deduction provisions, which determine whether amounts are assessable income or allowable deductions in the majority of cases.

The core (and the new law generally) will retain concepts that have been developed by an extensive body of court decisions over time. These include the ordinary concepts of income, and the meaning of such key notions as when income is derived and when an expense is incurred.

There will be no general explanation or statement of the purpose of the Act but the new provisions will provide a conceptual and practical framework for the way the Act works.

**The top layer—the lists**

The lists are checklists of, and signposts to, the provisions that specifically affect what is income, exempt income, deductions and offsets. They will help readers quickly find their way to the operative provisions they need. These provisions may be in either the second layer of the pyramid—the general provisions—or the third layer—the specialist provisions.

**The second layer—the general provisions**

The general provisions are provisions that apply to a wide group of taxpayers and some that don't fit into any specialist grouping. They will specify how the law deals with particular kinds of income, deductions and offsets. For example, they will include the rules about depreciation and trading stock (when these are rewritten) because they affect most businesses.

**The third layer—the specialist provisions**

The specialist groupings will bring together provisions that relate to specific groups of taxpayers or special tax obligations. For example, they will eventually include these topics:

- capital gains tax;
- corporate taxpayers and corporate distributions;

- partnerships and partnership distributions;
- trusts and trust distributions;
- co-operative and mutual societies;
- financial transactions;
- superannuation;
- life insurance;
- rules for particular industries and occupations (such as general mining, quarrying and petroleum mining, Australian films, primary production, and research and development);
- international aspects of income taxation;
- attribution of income; and
- anti-avoidance provisions.

Other specialist topics may be added to this list.

**Collection and recovery provisions**

The collection and recovery provisions will cover such topics as:

- the various income tax instalment systems (such as pay-as-you-earn, the prescribed payments and reportable payments systems, provisional tax and company tax instalments);
- withholding tax liability and collection;
- returns and assessments;
- Medicare levy and HECS collection; and
- how unpaid tax is recovered.

The collection and recovery provisions do not directly affect liability to tax. However, they are important aspects of the tax system that can apply to any taxpayer.

They will appear in the Act after the third layer, that is, after the specialist provisions.

**Administration provisions**

The administration provisions will come next. These include such topics as:

- general administration
- tax file numbers
- tax agents
- prosecutions and offences
- penalties
- record keeping and other obligations.

Like the collection and recovery provisions, the administration provisions do not directly affect liability to tax.

**Definitions—the Dictionary**

In the new Act, all defined terms will be listed in the Dictionary in clause 995-1. However, not all definitions will be located there. Many definitions (*just-in-time definitions*) will be located where they can best help to understand the material.

All defined terms (except some frequently used basic terms—see clause 2-15) will be identified by an asterisk appearing at the start of the term. However, defined terms will only be asterisked the first time they occur in each subsection. Any subsequent occurrences in that subsection will not generally be asterisked. The footnote that goes with the asterisk will appear at the bottom of each page and will refer you to the Dictionary starting at clause 995-1.

Definitions in the Bill will only apply to the Bill and not to the 1936 Act unless the 1936 Act expressly adopts them.

A defined term will be used in one sense only throughout the new law. If a different meaning is intended, another term will be used. This has prompted some standardising of terms.

**Sections, Divisions, Parts and Chapters**

While the conceptual structure of the new law can be explained in terms of a pyramid, all the material in it will be presented in a normal publishing format. This will allow for a convenient presentation and grouping of information for use in written or screen based form.

The existing tax law breaks material down into sections, which are the basic unit of information. Each section deals with one main idea only. Related sections are then grouped into Divisions. In turn, related Divisions are grouped together as Parts.

The new law will maintain sections, Divisions and Parts. However, to better support the structure, it will introduce a higher level of grouping of material at the chapter level. There will be six chapters in the new law:

| | |
|---|---|
| Chapter 1: | Introduction and core provisions |
| Chapter 2: | Further liability rules of general application |
| Chapter 3: | Specialist rules affecting liability for income tax |
| Chapter 4: | Collection and recovery of income tax |
| Chapter 5: | Administration |
| Chapter 6: | The Dictionary. |

## Appendix D—the new numbering system

### Overview of this chapter

This chapter discusses the new numbering system proposed for the new Income Tax Assessment Act.

### Problems with the old numbering system

Amendments of the existing law have overloaded its numbering system, so that the *Income Tax Assessment Act 1936* included section numbers such as 159GZZZZH. Numbers like this confuse and disorient readers, and waste their time in locating material. These awkward results happen because of limitations caused by the existing structure of the law. Most new law affecting liability to income tax used to be inserted between sections 158 and 161 of the *Income Tax Assessment Act 1936*. More recently, new law has just been added to the end of the Act.

If the law was renumbered using the existing numbering system this would not provide sufficient flexibility to avoid the same numbering problem arising again over time. Consequently, the Bill adopts a new numbering system that has been carefully designed to minimise the possibility that the old problems will recur.

### Aims of the new numbering system

The new numbering system sets out to meet the following ideals:

- Each unit of law should have a unique number to identify it.
- For any two numbers in the system, it should be immediately apparent which one is higher.
- Numbers should be easy to read.
- Numbers should be able to be said aloud without being ambiguous.
- The system should flow naturally and be predictable.
- Each number should identify the area of law to which it belongs.
- It should cope well if a large amount of new material is inserted later.

### Main features of the new numbering system

#### Section numbers will have two components

Section numbers will have two components, separated by a dash. The first component will be the number of the Division in which the section is located. The second component will be the number of the section within the Division.

> Example: Section 601-22 shows that it is a section of Division 601.

Each Division will number its sections, starting from one.

> Example: The first section of Division 600 will be section 600-1.
> The first section of Division 601 will be section 601-1.

Section numbers will be separated with gaps. Except for the first section in a Division, section numbers will run in multiples of 5, to allow new sections to be inserted without using alpha characters.

Example: 43-1, 43-5, 43-10.

**Part and Division numbers will run in sequence, with gaps**

Unlike section numbers, Part and Division numbers will run in sequence through the new law. They will *not* start again, at one, with the start of each new Part (or chapter).

After the last Division in a Part, or the last Part in a Chapter, the new law will usually leave a gap (of five numbers) in the sequence of Division and Part numbers. By keeping numbers in reserve, when new Divisions and Parts are inserted they will not interrupt the flow by extensively using combinations of numbers and alpha characters as the present law does.

**Part numbers will identify chapter numbers**

Part numbers will identify the Chapters in which the Parts are located.

Example: Part 5-10 means Part 10 of Chapter 5.

**Clearer cross references**

In the new law, cross references to other provisions of the law will usually specify the heading or title of the provision, as well as its number.

Example: See section 10-5 (List of provisions about assessable income).

**Details of the new numbering system**

*Chapters* will have a single component number.

Example: Chapter 5.

*Parts* will be numbered in components separated by a dash. The first number will refer to the Chapter, the second will refer to the Part.

Example: Part 5-10 shows that it is Part 10 within Chapter 5.

*Divisions* will have a single component number.

Example: Division 600.

*Subdivisions* will be numbered in components separated by a dash. The first component is the number of the Division. The second component is a capital letter, identifying the Subdivision, in the sequence A, B, C, etc.

Example: Subdivision 5-A is Subdivision A of Division 5.

*Sections* will have two components, separated by a dash. The first component will be the number of the Division in which the section is located. The second component will be the number of the section.

Example: Section 601-2 is the second section in Division 601.

There will be no change to the way *subsections*, *paragraphs* and *subparagraphs* are numbered. However:

- there will be fewer subsections in a section;
- paragraphs will be less frequently divided into subparagraphs; and
- *sub-subparagraphs* will not be used.

**How the numbering system will cope with new material**

The Bill leaves gaps in the sequence of both Division and section numbers. That will allow space for parts of the law that will be rewritten in later stages as the new Act is built up progressively.

Gaps will also be left, deliberately, to cope with the insertion of extra material in the future without having to clutter the law with Division and section numbers that

also include multiple letters (like section 160ARXA).

Gaps will not guarantee against eventually needing recourse to section and Division numbers that include letters, but they will significantly postpone this eventuality and the possible incidence of it.

The following examples illustrate how new material could be inserted in the law if required:

| | |
|---|---|
| *New Chapters*: | Chapter 5, Chapter 5A Chapter 6. |
| *New Parts*: | Part 5-5, Part 5-5A, Part 5-6. |
| *New Divisions*: | Division 5, Division. 5A, Division 6. |
| *New Subdivisions*: | Subdivision 5-A, Subdivision 5-BA, Subdivision 5-B. |
| *New Sections*: | Section 5-15, Section 5-15A, Section 5-16. |

# The year 2000 problem—a New South Wales perspective

Michael Rubacki[1]

The impact of inaccurate Year 2000 date processing cannot be overestimated as it pervades all aspects of the Information Systems (IS) environment—from home-grown applications and turnkey software solutions to hardware and firmware support. World-wide cost estimates to fix the problem are about $600 billion.

A number of computers, software and other data processing systems track and store dates by two digits only (eg 96 versus 1996). Without the century digits, the last day of the century will be 31-12-99 and after the stroke of midnight this will roll over to 01-01-00.

For information systems that are unable to interpret 00 as a new century, the date may rollover to the year 1900 and represent a number smaller than the day before. This may cause systems to generate errors. Computer files may be automatically deleted or archived. Older mainframe computer systems, many desktop personal computers and software programs may fail on 1 January 2000.

The New South Wales Government's Office of Information Technology has developed policies and strategies to address the Year 2000 problem, including a Business Risk Methodology that all Departments are required to follow. A national Web site has been established to provide assistance (*www.y2k.gov.au*). Year 2000 projects have to be extensively documented and reported to Government at regular intervals. Departments are required to report on progress in their Annual Reports to Parliament and aspects of the project have to be independently audited.

The NSW Parliamentary Counsel's Office has established a Year 2000 project in accordance with the Government's policies and directions and has a team of key staff working on the project, assisted by an IT consulting firm that has been accredited for this work by the Government.

To date, the project has involved the following steps:

- establishing a Year 2000 Steering Committee and Project Team
- conducting workshops to raise awareness of the problem
- analysing the business risks faced by the Office's internal operations arising from the Year 2000 problem
- identifying the business resources that support the Office's critical business functions and assessing their risk and Year 2000 compliance
- introducing procedures to track Year 2000 compliance activities
- preparing an initial Year 2000 compliance plan that identifies the work that needs to be done and estimates costs.

In June 1998 the Office completed a report on its Year 2000 project that included the business risk assessment and project plan. Extracts from the executive summary are provided below:

## Overview of findings and risk assessment

The project so far has involved the systematic investigation and analysis of the Office's operations, systems and external linkages. Also, it has involved early and persistent communication with external

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agencies that provide the following key services:

- building and environmental services
- telephone services
- corporate services (payroll, personnel records, Internet gateway etc).

At this stage of the project, and with the information available, building and environmental services are the main areas of risk and concern.

The Office's internal systems (ie those it controls) used to serve its key functions of legislative drafting and publishing are based on standard computer software applications running on standard hardware platforms. The key software applications (for word processing and publishing) are to be replaced in early 1999 as part of a 3-year Legislative Drafting and Database System (LDDS) project that has been funded from 1 July 1998. This new software will be Year 2000 compliant. Any possible delay in the implementation of the project poses a further element of risk.

The other critical equipment in use (computer hardware and printing equipment) is standard equipment purchased on Government contract and is thought to be largely compliant but will be tested during the next 12 months to ensure that it is.

There are no other critical aspects of the Office's activities (ie services to stakeholders, contractual obligations, revenue raising) that have been identified as significant in terms of the Year 2000 problem. It is also noted that the critical period (1.1.2000) coincides with a period of low activity for the Office—Parliament rarely sits in December-January, at least half the staff are on leave and little legislation is usually required or requested.

## Rectification project

This project has been divided into 11 subprojects and most of these are expected to be completed within the next 12 months. Some are relatively simple (such as the contingency purchase of stocks of office consumables and spare parts). Other subprojects involve the updating of contingency and disaster recovery plans and the actual testing of equipment and systems. The drawing up of plans and the testing (and any necessary fixing) work may need external technical assistance, although it is anticipated that Office staff will undertake much of this work. It is required that the project be reviewed by external auditors as an extension of the Office's existing audit plans.

## Contingency plans for managing residual risk

The most significant risk appears to be that associated with building and environmental services and is beyond the control of the Office. In the event that the Office is unable to operate in its current premises, or there are major problems affecting the entire Sydney CBD, standalone equipment with all necessary data and precedents will be established in other locations. In the event that there are delays in the LDDS project, the key elements of the existing software used for legislative drafting and publishing will be tested for compliance and modified, if necessary, to enable key services to be maintained.

## Costs

These are mainly for staff and specialist consultant costs and have been estimated at $60,000. Of this amount, $40,000 will be met from recurrent expenditure and $20,000 will be drawn from capital funds in connection with the LDDS project.

## Conclusion

Subject to implementation of this plan and the maintenance of basic utilities and transport services in the general community, the Office should be able to continue operating into and beyond the Year 2000 without any significant

interruption to its operations or management obligations.

Although the methodology followed by the Office is somewhat laborious and perhaps more suited to the larger Departments, it has focused attention on the Year 2000 problem and the broader issues of resource management and disaster recovery. It is regrettable that at this stage there is no reliable central source for establishing the Year 2000 compliance of many standard items of equipment and software and that there will be a massive duplication of effort as a result. Also, there are several definitions of Year 2000 compliance and it will be necessary to actually test most equipment and applications during the next year and not merely rely on stated compliance.

# Drafting from a blueprint

Adrian Van Wierst[1]

The following is an edited transcript of a talk given at the conference on legislative drafting hosted by the Commonwealth Office of Parliamentary Counsel, 10-11 August, 1995.

## Introduction

Today I will talk about my experiences over the last four or five years in developing an approach to drafting that differs radically from my previous approach.

I refer to my previous approach as the "traditional method". In essence, it involved the preparation of a draft Bill, often incomplete, at a very early stage. The draft was then revised to take account of the developing policy. In effect the draft Bill was a vehicle for policy development. I decided that the new approach needed a name. It was referred to as "outline drafting" in preliminary versions of the conference program, but that didn't quite capture the idea. I eventually settled on the word "blueprint", which suggests a plan that is sufficiently detailed to allow a building or machine to be constructed. This led to the acronym "ABS" (Adrian's Blueprint System). You might have noticed that it is advertised on many modern cars!

In today's session, I also refer to the blueprint as a "plan".

## What is the new system?

The system involves spending about 70% to 80% of your total project time in settling a detailed, written, agreed plan of what you need to do and how you are going to do it. By "agreed", I mean agreed with your instructors and with anyone else whose agreement is relevant. It is not merely a set of drafter's notes that you keep to yourself.

You prepare the plan in consultation with your instructors. By the time the plan is settled, you should have a high degree of confidence that your view of what they want corresponds with their view of what they want. After that, the actual drafting of the Bill ought to be fairly "mechanical". In the remaining 20% or so of your total project time, perhaps even as low as 10%, you convert the blueprint into a draft Bill.

## Does the system work?

A great idea you might say, but is it just theory?

I have used the system for my own work since about 1991, when I began the sales tax rewrite.

That project lasted about 18 months, from the time of our first meeting until the time when the Bills were introduced into Parliament. Almost 12 of those 18 months were spent in producing the plan. Later I will circulate a fairly advanced version of the actual plan that was used for that project, dated October 1991. You can then see what a complete plan looks like.

I used the system for the rewrite of the Commonwealth Audit Act.

I used the system on a much smaller scale for a rewrite of the income tax company instalment system, working to fairly tight deadlines. About three weeks total project time. Two weeks were spent preparing the plan and one week was spent doing the drafting and tidying it up.

I have used the system on drafting jobs that you might call "bits and pieces". For

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example, miscellaneous amendments to the Commonwealth Electoral Act.

The system can't always be used. I have found situations where, given the time frame and the circumstances, I decided at the outset to use the traditional method. I didn't like doing it, but it was obvious from the outset that it was my only option.

In summary, the system has worked for me for quite a range of drafting projects over a period of four to five years. That is no guarantee that it will work for other people. But at least you could say that it has some sort of track record.

## What should be in the plan?

The plan should be as informative as you can make it. You don't limit yourself to including only those things that you believe will end up in the draft Bill. Rather, you include whatever information is needed for the instructors to fully understand how the end product is going to work. For example, your plan might say that something will *not* be done in the Bill but will be done by regulations or administratively. That kind of statement is useful in the plan, because everyone involved is then clear on the point. You won't then have someone believing that it will be included in the Bill, and you believing that it won't, and find out at the last moment that you are in disagreement.

You make great efforts to make the plan easy to use and easy to understand. Because the prime goal is that all interested parties are in agreement, it is a fundamental feature of the plan that everyone can readily understand it. So you have to make a lot of effort to make it as readable as possible.

Only when you draft the Bill will you know for sure whether the plan is sufficiently detailed. It will be sufficiently detailed if you can draft the Bill with very little need to go to the instructors for additional instructions.

The ideal outcome, of course, is that the first draft of the Bill is also the final draft. I don't claim that you will ever achieve that, but you can get to the point where you need only two or three drafts with relatively minor changes in order for the instructors to be satisfied with the Bill.

## What are the main difficulties in using the system?

### Fear

I believe that *fear* is one of the biggest obstacles to using this system.

At least for me it was a big obstacle. Under the traditional method, the draft serves various functions. It will end up being the final product, it is a vehicle for policy development and it also represents the state of play on any given day. If someone asks about your progress, you can say, I have a draft Bill but it still needs some work. It may be quite rough and it may need a lot of tidying up. But there is comfort in knowing that, if someone asks for the Bill to be ready for Parliament in three days time, you can say, I can have a Bill ready by then.

And that is an enormous comfort. You don't realise what an enormous comfort it is until it is removed. With the sales tax rewrite, I made the somewhat risky decision to experiment with the new system on a rather big job. I didn't think to test the system first on a small job. Instead, I thought, I have a new idea on how to approach drafting, this is a good opportunity. I telephoned the instructors, and said don't bother giving me any written instructions, come over and we will start talking.

By the end of the first day, we were not quite sure if it was such a good idea. We spent a long time in a room together over a whiteboard trying to work out what we

were trying to achieve with the sales tax law? What are the goals? What are a reasonable set of concepts for achieving the goals? What is the simplest set of rules that can achieve those end results? We went down many blind alleys. Many difficult questions arose.

At about the six month mark, the instructors started saying, we are happy with progress so far, but people back at the office are wondering when they will see a draft Bill. And I replied, don't worry, converting the plan into a draft is going to be a very quick job. We still have plenty of time. Nine months came along, and I was still telling them not to worry. But I *was* starting to worry. My confidence that translating the plan into a draft Bill would be a small job was based on theory, rather than experience.

As it turned out, the translation was a pretty quick job. It took only a few weeks to draft a 95% settled draft Bill for the Assessment Act.

My next project involved company tax instalments. It had to be completed within three weeks. I spent the first day agonising—will I do this the old way or will the new system work in such a short time frame. I changed my mind a dozen times in the space of the first day. I eventually said to myself "if this system is any good I have to give it a chance". And we used the system. We spent two weeks preparing the plan and used the remaining week to draft the Bill.

Quite naturally, the more successes you have, the less the fear is. Now when I tell somebody that it won't take long to prepare the draft Bill, my confidence is based on my experience. But trying to do it the first time is a bit like bungee jumping: a difficult psychological exercise, quite aside from whatever practical problems there might be.

I would like to be able to give you lots of hints about how to solve the fear problem, but I'm not sure that I have many. Here are a few suggestions that might make it easier. Try out the system on a smaller job, or maybe a job that does not have severe time constraints. That might be a good way of experimenting with the system, rather than trialing it on the most difficult case. Apart from that, I am not sure what you can do to deal with the fear problem.

**Getting others to accept the system**

Another potential problem is getting others to accept the system.

Instructors who are accustomed to the traditional approach might expect a first draft Bill at an early stage.

You may even have a problem gaining acceptance within your own drafting office. I am fairly thick skinned, fortunately, but I do know that after I had been working on the sales tax project for about six months, questions were being asked. What is Adrian doing? Has he gone mad? I am very pleased that at the time I had a boss who was willing to trust me. A less trusting boss might have said, get this silly idea out of your head and prepare a draft Bill.

Here are a few suggestions on how to handle instructors who prefer to get a draft Bill quite early. My own approach is based on the "boiling frog" experiment. I reveal the system gradually, rather telling them at the outset that I intend to use a new system under which there will be no draft Bill until a late stage. It starts with a meeting at which we have general background discussions. What is the problem to be solved? How did it arise? Are there particular things that might cause difficulties but haven't been mentioned in written instructions? Let's jot down some things on the whiteboard and see if we even agree as to what the job involves; see if we agree on what the problem is or,

more drastically, whether there is a problem at all.

At the end of the first meeting I might say "Things are becoming clearer, we are getting an understanding of what it is about. I will do some notes just to record where we are on this." Within a day or two, I send them a first draft of the plan and suggest a further meeting "to see if we can get a few more pieces in place". I have found that it doesn't take long for the instructors to start seeing sense in this approach, particularly if these discussions have revealed to them that they had perhaps seriously misconceived some issues, or hadn't considered some very good answers to problems.

This process goes on, and before they know it, they are participating in the system (like the frog that didn't realise the water was getting warmer until it was too late!).

So that is a suggested method of dealing with instructors who might regard this system as being too frightening to contemplate if you explain the full details in advance.

**Recording and updating the plan**

A crucial feature of the system is that you have a written record of exactly where you are at any given point in time.

The record is in the form of a plan, not in the form of a draft Bill. So you will need to develop some methods of preparing the written record. In drafting the Bill you don't need to make nearly as many decisions—there are fairly standard ways of including material in a draft Bill. You have Parts, sections and subsections, etcetera and if you have some notes maybe you put them in italics somewhere in the draft. But if your goal is to record something in a plan that is easy to understand and easy to amend, you may need to develop different approaches to preparing that record.

Later I will show you some of my plans, which rely quite heavily on the use of tables. That happens to be my preferred method, but it certainly is not essential for the system. In some cases you might use database programs. Or you might develop a flowchart or structure chart or other diagram which can be used to test the development of the plan from a different point of view.

I happen to be a computer enthusiast and I am fairly proficient with a lot of computer programs. So I use computers in a variety of ways as part of the system. If that doesn't suit you, you will need to come up with some other way. Different drafting jobs might call for different types of plan.

The blueprint system does not see a fixed demarcation between the drafter's role (drafting) and the instructor's role (policy). I think it is very important to emphasise to instructors that development of the plan is a co-operative task. This plan is not *my* plan, this is *our* plan. In preparing the plan, the drafter should make an effort to do lots of things that will make life easier for the instructors. Small things, such as including a table of contents (for a large plan) or including an easy-to-use cross-referencing system. Changes between versions of the plan can be indicated by markings, or perhaps summarised at the next meeting.

Summing up, it will probably be a challenge to work out an efficient method of preparing and updating your plan.

**Adapting the system to different work practices**

In most cases when I have used the system I have been working as the sole drafter on the project. Being the sole drafter makes the system easier to use.

I have since been working with other drafters under our pairing system and I

have yet to work out satisfactory ways of using the system when there is another drafter involved. Who prepares the plan? If it is just one person, then the other one may be left out of the exercise a bit. If you have two people working on the plan then perhaps it starts to lose a bit of consistency, which might make it a less useful document. I haven't yet solved all of these issues.

If you work under a system where draft Bills are prepared at a moderately junior level in the organisation and then "settled" by a senior drafter, I am not quite sure how you would implement the system. Perhaps the logical thing would be for the junior person to do all the development and then present the senior drafter with the final plan. However, some things could go seriously wrong at the planning stage and the senior person would not then be involved until too late.

**Transition from the plan to the draft Bill**

At some point, you start drafting the Bill. In my early attempts I tried to keep both the plan and the draft Bill up to date during the time when the Bill was being drafted. If certain aspects needed to be changed in the draft Bill, I would change them in the draft Bill and then also update the plan.

My feeling now is that there should be a clean break. After you start the draft Bill, the plan doesn't get touched any more. To keep both up to date is too much of an overhead for the drafter. I think it would also be confusing for the instructors.

**Consultation requirements**

Consultation requirements can present a difficulty. Increasingly, there are requirements to consult on legislative proposals.

There is a view that a draft Bill is the only thing worth looking at. This is from the point of view of the people being consulted. They may take the view that there is no point in commenting on an "issues paper" because there are likely to be huge differences between that and the Bill. It might be better to wait for a genuine draft Bill and then make comments.

I don't believe that this view is necessarily an obstacle to using the system. If the aim of consultation is to obtain policy and technical input, then a detailed, informative and easy to follow plan is probably a better vehicle for consultation than a draft Bill.

Put yourself in the shoes of an outsider, being asked to comment on policy or technical aspects of a 50 or 100 page draft Bill. This is a difficult task, because there may be many things that will affect the operation of the legislation, but are not included in the draft Bill. For example, matters covered by the *Acts Interpretation Act*, *Crimes Act*, or other Commonwealth legislation.

By way of contrast, the plan can, and I believe should, make an effort to explain the crucial legal outcomes, whether or not those legal outcomes are going to be specified in the ultimate Bill. If the plan contains this information, then people have a much better chance of understanding the legal effect of the proposals.

If the purpose of consultation is to get a reaction to readability aspects of a draft Bill, then obviously the draft Bill is the only method for consultation. You are not asking people whether they like the policy. You are asking, did you find it easy to read, and did you like our graphics and so on.

So to put that into a bit of context, the sales tax project included two consultation sessions. Each one was a two-day conference attended by Tax Office officials and private sales tax practitioners.

The Tax Office proposals were considered on the basis of the plans, not draft Bills. I circulated a questionnaire to the participants and one of the questions was "Would you have preferred consultation on the basis of the draft Bill?" And I had only one response which said yes. The others, about 15 to 20, said no, the plan was fine, we found it helpful to be getting all this extra information that probably would not have been in a draft Bill.

Summing up, it is feasible to have a meaningful consultation on the basis of a detailed plan.

### What are the benefits of the system?

A better Bill is the fundamental benefit. That is the reason for using the system.

A side benefit might be that life becomes a little less annoying and frustrating. Using the system, it is far less likely that late "clarifications" or changes in policy will require a hasty, substantial re-drafting of the Bill.

My working definition of a good Bill is one that provides an effective solution to the right problem in a way that is as simple as possible, given the subject matter and surrounding constraints (eg political sensitivities).

Consistency of concepts is also an important feature of a good Bill. For example, it can be confusing if one section proceeds on the basis that company means an incorporated company and another section appears to assume that a company can be an incorporated or an unincorporated company. By developing the plan before you draft the Bill, you have much more of a chance to check that concepts are used consistently.

I believe that 90% of the quality of a Bill results from correctly identifying the goal and developing sound, simple solutions. A good deal of effort is often needed to come up with a simple solution. Quite often you will find that there is a simple solution and a complicated solution. If you didn't look for alternatives, you might have implemented the complicated one.

Using the system, you aim through the plan to correctly identify the goal or problem, and develop the simplest solution that is consistent with all the other requirements about legal certainty and presentation and political factors and so on.

My definition of a good Bill involves many features that won't be very noticeable on the face of the Bill. Nobody will read a draft and notice the *lack* of inconsistencies of concept. Similarly, if you have come up with a simple solution to a problem, the solution will be unremarkable, except for someone who is aware of more complicated solutions.

The plan can also be used to refine terminology. When you are discussing things for an extended period, efficiency demands that you should use words that are not continually confusing people. If you initially chose a label for a particular concept and the instructor finds it confusing or misleading, that suggests you should look for another label. I believe that a considered choice of the labels adds a lot to comprehension at the end of the day. The blueprint system actually gives you a chance to test those labels through a long period, not only on your instructors but perhaps on other people who need to be consulted.

### Does it take longer?

By now you might have the impression that the system always adds significantly to the length of the project. My belief is that it sometimes takes longer, and sometimes it takes less time.

It will take less time for those drafting jobs

that would otherwise have gone through a large number of revisions on the basis of constantly changing policy. We probably all know the kind of job I am talking about. That kind of job takes up a lot of time because a lot of time has been wasted. You have drafted many versions of the same broad idea when it would only need to be drafted once using the blueprint system.

Yes, the plan also has to be revised. But the overhead in revising a plan, depending on the method you use, is considerably less than for revising a draft. For example, you don't have the overheads of constantly revising the structure to match the current content.

I have even had the experience where the planning process revealed that there was no need to have a Bill at all!

In cases where the system requires more time, I believe it produces benefits that more than compensate for the extra time. Firstly, there are benefits for the users who don't have to spend many hours wrestling with an over-complicated law. There are also more direct savings. If your Bill is better, then it is not going to need as much amendment to overcome technical flaws. If it's a better Bill, then it will be easier to amend. The drafter who has to amend it doesn't have to spend as much time trying to work out what it means, or how to deal with the fact that the proposition on page 10 seems to be totally inconsistent with an assumption on another page. This might seem like a justification after the event, but the point I am trying to make here is that the mere fact that the system sometimes takes longer oughtn't to be regarded as saying it is not worth using. If it is possible to get that extra time, it will be time well spent.

## Role of the drafter in policy development

To what extent should the drafter be involved in policy development? As you can probably work out, the blueprint system involves a very active role on the part of the drafter. At the end of the day, the instructor has the final say on policy matters, but the drafter makes lots of comments and suggestions on policy matters. One way of viewing the blueprint system is that you and the instructors are getting together to help the instructors write a perfect set of drafting instructions. So if you believe that drafters should not get involved in policy, then the blueprint system might not be for you.

Using this system, it can be helpful to begin discussions at a fairly early stage, without requiring detailed, written instructions. Detailed written instructions can cause problems. The instructors may have spent a lot of time developing the details of a particular solution to a particular problem, and then discover at the first meeting with the drafter that the solution is over-complicated or unworkable; or even that they have wrongly identified the problem. If the drafter's involvement can start at an early stage, it is quite probable that a lot of these things can be sorted out in a more efficient way.

Sometimes I do receive written drafting instructions, because it wasn't known in advance who the job would be allocated to. I will skim through them to get a general idea of the task. But rather than trying to do anything at all on the basis of those instructions, my first reaction will be invite the instructors to a meeting. Not for the purpose of going line by line though the written instructions, but more or less on the basis of putting the instructions to one side and saying "Tell me in your own words what is going on here and let's see if we can get an agreed picture".

## Typical planning tables

Tables are a very good way of recording information of many kinds. They have two

particular features that you don't get in a narrative text presentation.

Firstly, you can put related bits of information next to each other. If you want to comment on a particular statement, you can put the comment near it in another column. In a narrative form the comment might end up being at the bottom of a long block of text, and not easily found.

Tables have another very important feature. A blank cell in a table functions as a prompt. For example, if you have a grid showing three types of taxpayers, and three types of situations, then any blank cell in that table highlights a case that has not been dealt with. If you present that information in a narrative form, it is not nearly so obvious that you have not dealt with some of the situations. Whenever you have a blank cell you can just put a comment in it, suggesting an answer, or requesting further instructions.

I'll mention a few of the types of tables that I commonly use for plans.

**Table of concepts**

The first is one that I call a concepts table. It depends on a view that legislation has "building blocks" or key concepts. Certain ideas that serve as the foundations for the thing that you are building.

This table is often divided into four columns: Concept; Meaning; Relevance; Comments.

In this table I list the concepts involved in the *total* scheme. It might include concepts that will not appear in the final Bill. It is not merely a pre-draft of your definition section.

I'll illustrate this with an example from the Audit Act rewrite project. During discussions the instructors often referred to "the ledger". So I said, "If you are often going to be referring to this ledger in response to my questions, let's make sure that we have a shared understanding of what it is".

It is in fact the "big book" (these days kept by computer) that records receipts and expenditure and so on. It was quite important to understanding the complete picture of the new accounting structure. We agreed that it didn't need to be mentioned in the Bill. It was nevertheless part of the administration that was going to underlie the actual operation of the accounting system. And so it was included in the concepts table.

This table also contains words that will be used in the final Bill, but without being defined in the Bill. A classic example, in the Commonwealth sphere anyway, is the word "Australia". The default meaning of the word is to be found in various sections of the *Acts Interpretation Act*. In some cases, the exact content of that word is quite crucial to the legislative scheme.

For example, I once received instructions to allow a "Product of Australia" label to be used on fish "caught in Australia". I explained to the instructors that, under the *Acts Interpretation Act*, "Australia" covers 12 nautical miles from the low water mark. Therefore, if a fisherman in Nowra happens to go out fifteen miles to catch the fish, then it will no longer qualify for this label. The instructors said that was the wrong result and decided to re-consider the policy. The revised policy was that fish would qualify for the label if the first unloading of the fish from the boat occurs in Australia, regardless of where the fish were caught. I am not criticising the policy. I mention this example simply to illustrate how the concepts table can help clarify policy.

I'll mention a few other features of the concepts table. "Relevance" is a very important column, because it forces you to consider each concept *in a context*. It is all

very well to say that something seems like a nice concept, or that something seems like a reasonable definition of "associated company". But you can't really know whether it is the right one unless you are explicit about the purposes for which it is going to be used in the Act.

Sometimes you will start with a single concept and note that it is relevant for 2 or 3 different purposes. It might later become clear that the concept must have different meanings for different purposes. In effect, it isn't a single concept, but several different concepts. You would then revise the table to include them as separate concepts.

There is a constant interplay between the "Meaning" column and the "Relevance" column. If there is a tension between the two then something has to change.

"Comments" is also a good general purpose column. That's where you put all the extra information that you think might be relevant. It might be a request for further instructions. It might emphasise an unusual consequence of the rules. It might highlight something that the drafter believes will be politically sensitive. "Comments" is a multi-purpose column.

**Table of topics**
Moving on to the topics table. Sometimes I have found it convenient to divide a Bill into topics. Reference numbers are useful for cross-referencing purposes, and also facilitate discussions.

Sometimes I carry the topic number through to the draft Bill. This can help both drafter and instructors. For example, if a particular amendment merely substitutes "must" for "may" in a particular section, the topic number indicates what the amendment is about. Topic numbers can be particularly useful if there is a last-minute request to delete a particular topic from the Bill (which might involve many scattered amendments).

**Table of rules**
A rules table is another possible way of organising information. If you are trying to give a structure to a plan you might view it as a series of rules. This table has 4 columns: Topic; Rule; Purpose/Effect; Comments.

The Topic column is a brief description of the topic of the rule. For example, "cancellation of licences". The Rule column will contain a detailed statement of the rule.

The Purpose/Effect is important. You can often have a useful interplay between the Rule column and the Purpose/Effect column. You say to the instructors, you asked me to put in a rule to this effect, but what are you hoping to achieve by it? You might find that once they tell you what they want to achieve, the rule is starting to look a bit implausible as a means of achieving that end. By making the purpose or effect explicit in the plan, you have much more chance of knowing whether at the end of the day you are going to achieve the goals of the instructors.

## Handy hints

I've already mentioned tables. Here are some other things that I use as part of the system. Whether or not you use them is a matter of your own preferences.

**Meetings**
For me, over-the-table meetings are a crucial aspect of the system.

Preferably with more than one person from the instructing department. Fairly often, instructors will disagree among themselves about the answer to one of my questions. The disagreement invariably leads to a useful clarification of ideas. On the other hand if you develop a plan by correspondence, you are less likely to have the opportunity for such clarifications. So

having more than one instructor at a meeting is a useful method for double checking where you are going.

Over-the-table meetings are also a great way of finding out what is really going on. Exchange of information at a meeting is usually more frank than by correspondence. For example, "Yes that's what we said in our written instructions because the boss wanted it, but I thought it would be better to use a different approach". Or "I can tell you, in confidence, that the real problem is ...". These are crucial bits of information for the drafter.

**Electronic whiteboards**
I am a great fan of electronic whiteboards. In my meetings, I am continually sketching propositions, ideas or drawings or whatever, and I keep reworking them until we reach agreement. I give the others a photocopy of whiteboard contents. I then use the whiteboard printouts as the basis for doing my next revision of the plan. For me that has been a really great system and a fundamental part of the way I operate.

The more you use an electronic whiteboard, the better you get at it. At first you worry that your squiggles don't look very good, and probably they don't. But eventually you will become quite comfortable and proficient.

**Computerised databases**
A computer database can be useful for some types of projects. I will show you later a computer database that I set up for the exemptions and classifications part of the sales tax project. It consisted of lots of bits of information with various characteristics and it was convenient to put them into a database rather than a word processing document.

**Computerised diagrams**
Computerised diagrams are also handy. If you start preparing a diagram right at the outset as a vehicle for your clarification, inevitably that diagram is going to change, sometimes on an hourly basis, sometimes on a daily basis. Re-drawing it by hand would be tedious. If you do it electronically it is easier to keep the diagram up to date with the current state of analysis.

**Database of background materials**
Another useful tool is an electronic searchable database of all your background materials. I won't say much more on this. It is handy regardless of your drafting approach.

## Balloon-modelling demonstration

I'll finish up with a quick demonstration of balloon modelling. The hardest part of this is to actually inflate the balloon, unless you use a pump. The twisting procedure is actually quite simple. Hold the completed part in one hand, twist with the other hand. Always twist in the same direction. Otherwise it unravels.

What does this have to do with the blueprint system? It demonstrates how useful it is to know what you are making before you start. [laughter]

# The Information Technology Forum

Michael Rubacki[1]

The Forum was established following a legislative drafting conference held in Canberra in 1995. It consists of a voluntary group of interested drafters, IT and administrative staff from all drafting offices in Australia and New Zealand and is organised in conjunction with the Australasian Parliamentary Counsel's Committee. The Forum involves 11 drafting offices:

Australian Capital Territory
New South Wales
New Zealand
Northern Territory
Office of Legislative Drafting (OLD), Canberra
Office of Parliamentary Counsel (OPC), Canberra
Queensland
South Australia
Tasmania
Victoria
Western Australia.

## Purpose and scope

During the 1990s, all drafting offices have witnessed the reduced involvement of traditional government printers in the production of legislation and have moved towards producing print-quality legislation direct from the desk-top. The majority of drafting offices now employ IT support staff. The rapid introduction of personal computers, word processing software, fast printers and copiers, networked systems and the Internet has generated many technological issues that directly affect legislative drafting and publishing. The Forum is intended to facilitate the regular exchange of information and to hold occasional meetings where the systems in the different offices are demonstrated, guest speakers provide information about new technology, and topics of special interest can be discussed in detail. Since the establishment of the Forum, the broad areas of interest can be summarised as follows:

- **Existing systems**

The focus has been on the exchange of information and experience about common software and equipment already in use. System diagrams and inventories have been exchanged and there has been considerable interest in processor capacity and speeds and monitor specifications. Networked printers and high volume copiers are regularly reviewed. The majority of offices now use Word for Windows for drafting, marking a shift from WordPerfect, which was the predominant word processing package used earlier in the 1990s. (Eight of the 11 offices use PCs, the other 3 use Macintosh machines. Four Offices still use WordPerfect and the others all use Word.) A major interest has been the adaptation of word processing software for drafting purposes by the use of customised macros and templates. Text retrieval software, document management, document compare, and practice management packages are regularly discussed.

- **New technology**

This has involved the regular review of Internet use and web pages, as more offices have established legislation databases and a presence on the Internet, either directly or via other government agencies or the university-based Australasian Legal Information Institute (AustLII) site. The topic of SGML (Standard Generalised Mark-up Language) and its application to legislative drafting

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and publishing has been covered by a number of guest speakers at Forum meetings and at a meeting in Tasmania to preview the EnAct system in July 1997. This system is SGML-based and enables point-in-time searching and has an automatic consolidation component that has generated much interest.

- **General operations, work practices and problem solving**

This area covers the ways the various offices approach publishing activities, such as printing new legislation, maintaining a reprinting program or developing and maintaining an up-to-date database of legislation. Quality control issues and the management of large and complex documents are frequent topics. The translation and portability of data and migration from one system to another are also popular areas for discussion, together with training methods. The Year 2000 problem (millennium bug) has been a recent addition.

## Meetings and contact

To date, there have been 5 meetings of the Forum—held in Sydney, Canberra, Melbourne, Hobart and Brisbane. The meetings generally span two days and between 20 and 30 members attend. All members are now connected by e-mail so regular contact will become even easier. Notes of meetings, agendas and occasional newsletters are distributed via heads of office constituting the Parliamentary Counsel's Committee.

## Benefits

The Forum has been an invaluable mechanism for exchanging information and forming links across drafting offices. Some jurisdictions have collaborated closely in matters such as macro and template design, the development of new print designs, the selection of hardware, and the evaluation of software development options. This approach can save considerable time and resources. The Forum has increased awareness of new technology and of alternative work methods, and has fostered a more uniform approach to a range of issues.

## Australasian Internet sites

Drafting offices and databases featuring Australasian legislation:

| | |
|---|---|
| Australian Capital Territory | *www.dpa.act.gov.au* |
| New South Wales | *www.pco.nsw.gov.au* |
| New Zealand | *www.pco.parliament.govt.nz* |
| Northern Territory | *www.notes.nt.gov.au* |
| OPC, Canberra | *www.opc.gov.au* |
| Queensland | *www.legislation.qld.gov.au* |
| South Australia | *www.sacentral.sa.gov.au* |
| Tasmania | *www.dpac.tas.gov.au* |
| | [and] *www.thelaw.tas.gov.au* |
| Victoria | *www.dms.vic.gov.au* |
| Western Australia | *www.justice.wa.gov.au* |
| | [and] *www.slp.wa.gov.au* |
| AustLII | *www.austlii.edu.au* |
| SCALEplus | *scaleplus.law.gov.au* |

# "from time to time"

Fabian Flintoff[1]

*The Scene: A quiet courtroom, 1998.*

*Counsel: So Mr Smith, how often did you go to the hotel with the accused?*
*Witness: From time to time.*
*Counsel: From time to time! Surely you can give us a more accurate answer than that, Mr Smith.*

The words "from time to time" are often used in the statute book. Dictionaries variously define the phrase as meaning occasionally, once in a while, or at intervals. The Shorter English Oxford Dictionary defines it to mean:

(a) at more or less regular intervals, now and again, occasionally;
(b) continuously, at all times.

The words are often intended to allow a person empowered to do a thing by an Act to have more than just one bite of the cherry in exercising a power, without setting a timetable for the exercise of that power. In the words of Lord Penzance in *Lawrie v Lees* (1881) 7 App Cas 19 (at 29-30), these are "words which are constantly introduced where it is intended to protect a person who is empowered to act from the risk of having completely discharged his duty when he has once acted, and therefore not being able to act again in the same direction".

The phrase can also refer to monetary measurements such as fees payable or the like. In *Lemair (Australia) Pty Ltd v Cahill* (1993) 30 NSWLR 167, the phrase was used in relation to the monetary sum applicable in calculating whether a person was able to be awarded compensation for pain and suffering relating to injuries sustained within the operation of the now partially superseded *Workers Compensation Act 1987*. Kirby P (at 171) observed that the reference to the amount "from time to time referred to" contemplated an occasional variation in the amount. However the case did not turn on the use of the phrase, but on whether the applicable monetary sum was that specified in the Act, or that prescribed under the Regulations.

The utility of the phrase has been acknowledged by Mason J in the High Court of Australia in relation to fees payable under a provision of the *National Health Act 1953* (see *R v Hunt, ex parte Sean Investments Pty Ltd* (1979) 25 ALR 497, at 502). The case involved an application for review of (the still very topical subject of) the scale of fees that could be charged on the basis of costs incurred by a person providing nursing care. Section 40AA (6) (c) (i) of the Act applied to "such fees as are from time to time applicable...in accordance with such scale of fees as is determined by the Permanent Head". Mason J relied on the phrase to say that the provision applied to changes to fees (although it may be arguable that the nature of the Act alone demonstrated that).

In New South Wales, the court in *Carter v Carter* [1959] SR (NSW), with considerable force, rejected a submission that the words "from time to time" in s21 (4) of the now repealed *Deserted Wives and Children Act 1901* allowed only one variation of an order to pay maintenance. That subsection directed that a maintenance order could be varied, suspended or discharged as from a date prior to the application, and could be

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varied or suspended from time to time. Street CJ, delivering the main judgment, ruled that the phrase meant "repeatedly" in this context.

The submission in *Carter* was based on the judgment of Jordan CJ in the more interesting case of *McNeil v McNeil* (1942) 59 WN 202. That case concerned the issue of whether a husband had to pay maintenance to his wife once she had committed adultery. An argument was made that s56 of the *Justices Act 1902* applied to place a six month limitation on the operation of s21 (1) of the *Deserted Wives and Children Act 1901,* which allowed the variation, suspension or discharge of a maintenance order "from time to time".

Although in this case the court found that the provisions of the *Justices Act 1902* did not impact on s21 of the *Deserted Wives and Children Act 1901*, Jordan CJ at least envisaged that as an alternative to "at any time", "from time to time" could also mean "repeatedly, but subject to any limitations as to time". These comments suggest that care must be taken when using the phrase "from time to time" if there are further qualifications as to time within other related Acts.

In New South Wales legislation the phrase appears to have been used frequently, though in a number of subtly different contexts. A good illustration of a common context in which the phrase is used is the power of a Minister to prohibit (for example, the taking of fish from time to time, as in s8 of the *Fisheries Management Act 1994*). The phrase also commonly relates to the power to direct, calculate, make by-laws and so on.

The phrase may be accompanied by further qualification, such as making "rules...as from time to time *seem necessary for better carrying the provisions and objects of this Act*" (*Infants Custody and Settlements Act 1899*, s4), or to provide land for urban development "from time to time, *as prevailing circumstances require*" (*Housing Act 1976*, s9). Arguably, the second example demonstrates an abundance of caution, as the italicised words in themselves suggest that there will not be a one-off provision of land under the section.

There is sometimes friction between crisp language, and the lawyer's ongoing desire to put an issue entirely beyond doubt. So where is the line to be drawn with a standard old phrase like this?

Although a degree of vagueness can sometimes be justified, perhaps the purpose of the phrase can be expressed more precisely. Perhaps "periodically", although the use of this word may be thought to introduce some compulsion to make the decision. If we are talking about the necessity of making a decision, then "as the need arises" is possibly a clearer and more meaningful alternative to "from time to time" (and certainly preferable to the phrase "from time to time as is necessary").

Is the phrase necessary at all? Is the suggestion of some plain language advocates correct, that the tone of the section should be sufficient to achieve the purpose of the phrase?

Michele Asprey, in a Chapter provocatively entitled "Legal Affectations and Other Nasty Habits", says in relation to this phrase: "The key point is to use those words *only if there is likely to be any doubt* about whether the provision should be interpreted as applying more than once." (Asprey *Plain Language for Lawyers* (1996) 2nd Ed, at 157). Asprey has a similarly low regard for the overuse of the phrase "at any time". Asprey suggests the phrases are not often necessary if one properly regards the law as something which is "constantly speaking".

If we are to accept this point of view, then perhaps the drafter should be at pains to emphasise when a power can be exercised once only, rather than when it can be exercised more than once.

# Opening speeches

## —at the conference marking the 25th anniversary of the OPC in Canberra 1995

The following is an edited transcript of opening speeches delivered at the conference to mark the 25th anniversary of the OPC in Canberra 10-11 August 1995.

### Introduction—Dennis Murphy, Parliamentary Counsel, NSW (extracts)

Ladies and Gentlemen, we might make a start and even though I'm really only a guest here, I guess I can welcome you. You've all heard that Hilary Penfold isn't able to be with us tonight, as she has fallen ill, so I'm sure that we all send our best wishes to her and hope she has a very speedy recovery. This is the opening session of the conference for legislative drafters to mark the 25th Anniversary of the establishment of the Commonwealth Office of Parliamentary Counsel and we are very much looking forward to participating in the program. The topics cover technical drafting matters, document testing, information technology, relations with Parliament and much much more, so it is going to be a feast of important matters for us drafters.

This conference is the second one that has been held in Canberra. Those of us who were at the first conference in 1992 will be most interested to note the developments that have taken place in this most difficult art—the art of legislative drafting—during this period of almost exactly three years.

Tonight we have two speakers. The first speaker this evening is the Honourable Justice Mary Finn. Justice Finn has been a Judge of the Family Court since 1990. She was appointed to the Appeal Division of that Court in 1993. Before her appointment to the Family Court, she was an officer of the Commonwealth Attorney-General's Department for the best part of ten years. She has also held a number of positions on various Boards and was a researcher for the Parliamentary Inquiry into the Family Law Act in the 1970s. So she has a wide experience with legislation from a number of angles and most recently as a judicial stakeholder. Please welcome Justice Mary Finn.

### Speaker—Justice Mary Finn, Family Court

Thank you Dennis.

Within a few months of going to Attorney-General's, I was assigned to work on a fairly large Family Law Amendment Bill and I had to work with Hilary Penfold and that was the first time I met, at least in a professional capacity, a Parliamentary Drafter and it wasn't very long after meeting Hilary and her colleagues, that I recognised that here at last was perhaps the real source of power in the Commonwealth Government.

I must say over the succeeding 10 years in working in the Department, I never came to recant of that view. I don't think it is, as I was saying a few moments ago, perhaps recognised as widely as it should be, but I do believe that real power in our legal and political system does lie with the Parliamentary or Legislative Drafters. I know that you used to, probably you still do, try to perpetuate the myth that you only draft and policy remains a matter for others, but I think it is true that it's not what you say, but how you say it and in the end legislative ideas will only work depending on how they are in fact put onto the statute book. So I think that it has to be recognised that you have a great responsibility and a great deal of power.

Having said that, I'd go on to say that I

consider it a very great honour to be asked to speak to you tonight, and particularly to perform the role of opening the Conference. I am particularly sorry, as I am sure you all are, that Hilary is not here. As I've said, she was my first introduction, in a professional sense, anyway, to a drafter, and I believe she was the person who helped me to see the real potential that drafters have to exercise influence, for good or for bad, I suppose.

Having said that about your position, I must say it always amazes me how little recognition the importance of the drafting role gets. That was certainly my impression in the years I worked in the Government. I can't say what the situation is now among other public servants and Parliamentarians, but I did feel in the years I was there, there wasn't sufficient recognition of the importance of your role and the significant impact you can have.

It surprises me that political scientists and perhaps more importantly serious political journalists don't focus more on what is going on in the various Offices of Parliamentary Counsel around the country. No doubt you are grateful they don't, and I for one wish they would stop focussing on the Court. But I think it's an interesting illustration of the point I am trying to make, that in a world where there is much agitation that we don't have enough women in positions of power, be it in Cabinet or Parliament itself, in the judiciary, or on Boards of major public companies, nobody, it seemed to me, gave sufficient prominence to the appointment of Hilary, into what I consider as perhaps one of the most significant positions in the entire Commonwealth Government.

Similarly, I think that when there is reference made to women who have made a great contribution in Australia, I am always surprised that there is not a greater recognition of Rowena Armstrong. Now, in saying those things, I don't wish to embarrass either Hilary or Rowena, and I am sure they would not want the recognition in that context. The point I am trying to make though is that, where these offices are so very important, there just does not seem to be the recognition that I believe there should be.

But leaving aside the media and the public recognition, what really does trouble me is the fact that, I believe, the judiciary for the most part, and the legal profession and the legal academics too, don't understand the distinction between the drafters and the instructors in the Public Service. I still have people who accuse me of being the drafter of significant portions of the Family Law Act and worse still, of the Child Support Act, but I think this is a problem because if there is ignorance about this matter, one wonders how much other ignorance there is about people who are trying to make the legal system work.

I draw on this particular matter because, as I say, I did wonder why Hilary asked me of all people to speak tonight, but she did say to me that I might be able to bring some practical perspective, I think Dennis referred to it as stakeholder's perspective, on the work that you have to do and particularly against that background, I have referred to this matter of the lack of even appreciation of your existence and the work you do by those who have to apply and work with your products.

In this regard, I think the best that can be done is to try to encourage a practice (it was developing when I was in Attorney-General's—some experience I have had in the last year or so suggests to me that it is still happening) and that is that when significant legislation, particularly that which affects the workings of the legal system, is in the process of development, it is a good idea for there to be consultations between members of the profession, the judiciary, the instructing officers in the relevant public service department, but

more importantly, to also involve the drafters in those conferences.

Back when I was in Attorney-General's, I always found, and I was an instructing officer then, that it was very fruitful to be able to get judges or members of the profession. I'd have to say that I formed the view then, so it is not a view that I have only formed because of my current position, but some of the best input we got, in those days when I was involved in the preparation of legislation, was from the judges, because I felt they did not have the same barrows to push, so to speak, as many members of the practising profession do.

I similarly have found since I have been on the court, where there have been one or two instances where the court has been invited to comment on legislation, but I find the sessions that we have with the relevant officers of the relevant departments, are really only useful if one does have the drafter there, and I think to the extent you have any capacity to influence what your instructors do in the consultative process, it's terribly important that you be involved in those consultations because I think it ends with the best product.

I appreciate that there is a view among much of the judiciary, I suppose, that we shouldn't be too closely involved with the executive. Nevertheless I do think that this consultative process that needs to go on for important legislation does need to involve the judges, and yet, it is perhaps difficult to do, because of the distinction between drafting and policy again (and judges try to stay out of policy), but if we can have some input into the drafting I think it is quite important.

It had also occurred to me that if you were thinking about ways that you might improve your work, or that we generally might improve perhaps the quality of legislation (I am not here saying that I see a fault in it, but just to improve what I'd call the consultative process between those who make it, and those who have to use it), that often when hearing a case, and writing the judgment, you come across what you think is an ambiguity in the legislation in question (you may well be wrong, but you are having difficulty using it) and you draw attention then in your judgment to what seems to be a conflict between a couple of sections or a problem with the definition.

Now, of course if you put that in a judgment, it doesn't mean anything to the legal profession, let alone to the clients, they can't do anything about it. Sometimes, if it is a significant enough comment, it seems to me that your Chief Justice may send it on to the Attorney-General or to another relevant Minister and it will probably go to the relevant officers in the Departments and it would be put at the bottom of the filing cabinet.

I can remember in Attorney-General's, there was a vast filing cabinet of complaints about sections of the Family Law Act that weren't seen to be working very well, and nobody ever really got those out except perhaps at the last minute when some legislation was going through and I think there must be scope for developing a system whereby if a judge genuinely feels there is a problem with some legislation, that that can be sent on direct, and again this would be a system that would have to have the approval of the Attorney-General, but that could go straight to the First Parliamentary Counsel or the head of the Office.

Now they obviously can't act to fix up that piece of legislation then, but it perhaps serves to highlight problems that the users of the legislation might be having with the particular drafting technique and that leads me to the final practical matter that I want to draw upon tonight, and that is that I

don't think it is recognised as much as it should be, but it does seem to me that the greatest problem facing the administration of justice in this country, at the moment the legal system as a whole, is the increase in the number of people who are either choosing to, or have to for financial reasons, represent themselves in the courts.

As Dennis said, I sit on the Full Court of our Court quite regularly and you know in every five days sitting, the first two days are usually taken up with cases involving people trying to appear for themselves and invariably after they've finished with us, they are all going off to the High Court and making special leave applications there, and the High Court is having to cope with them and indeed there has been a decision—a short decision came out of Victoria but it was a High Court decision—recently, where the High Court has said that the judges have a duty to do the best we can to assist these people in person.

But I think those who are preparing legislation, and indeed some of you in the room who may have worked with me over the years I was in Attorney-General's, would probably remember I was always worrying that the legislation we were preparing would not be intelligible to the country magistrates, indeed I think people got sick of me saying that, but I think the problem has moved beyond the country magistrates to those trying, and indeed being actively encouraged by a lot of government policy, to appear for themselves in the various courts and tribunals around the country. But it's an impossible task for them if the legislation is difficult to work with...

Having said that, I believe in some recent Family Law amendments that I have seen, that there is an attempt to try to make legislation more consumer-friendly by setting out lots of headings and lots of explanatory notes and examples, but it is my view that that is only going to serve to confuse the users of the legislation and I really do wish we could get back to a much simpler form of drafting. I think the more we put in, the more encouragement we are giving to those trying to represent themselves and the more difficult their task, or the task of the Courts, is going to become.

I think that covers the practical issues that I thought might be useful to share with you tonight and all that remains for me to do is to wish the Office of Parliamentary Counsel a very happy 25th birthday, to congratulate it on what it's done, to wish it well for the future and to welcome visitors to Canberra. I feel perhaps quite an old resident here now, so I trust that those of you who are visiting Canberra will enjoy it and I wish you all well with your conference.

**Speaker—Dennis Murphy (extracts)**

Thank you, Judge, very much indeed for that very positive talk, for those positive thoughts and also for the suggestions that you made.

Our second speaker tonight was of course to be Hilary Penfold, the First Parliamentary Counsel and head of the Commonwealth Office of Parliamentary Counsel. Tom Reid has agreed to take over from Hilary and deliver her speech, so I will say a little bit about each of them.

First of all, Hilary—I have known her for quite a long time now, right from the time when she was a rather junior officer in OPC and, without wishing to sound patronising, she impressed me then as a very able young officer and, over the years, my impression, and I am sure the impression of every one who knows her, have been confirmed. In fact she is a very competent person. She also has a very well-developed sense of humour. She is a very worthy successor to her eminent

predecessors and I can mention the five that I have known, who are John Ewens, Charles Comans, Bronte Quayle, Geoff Kolts and Ian Turnbull. Three of those are with us tonight and Hilary certainly is, as I said, a very worthy successor to them.

Tom Reid joined the OPC in 1982 and was promoted to Second Parliamentary Counsel in early 1994. Tom has had a very wide drafting experience in the Commonwealth and I came to know him quite well when we were members of the Corporations Law Steering Committee. He also is a very able officer and the Commonwealth is very fortunate indeed to have people of this calibre. At present he is engaged in the Income Tax Simplification Project, which is going to have ramifications not only for other Commonwealth laws, but also for drafting practices elsewhere. Please welcome Tom Reid.

**Speaker—Tom Reid, Second Parliamentary Counsel, Commonwealth**

Thank you Dennis, Justice Finn, fellow drafters. I'd like to begin by thanking Mary Finn for her very interesting and kind words on the subject of our craft and for opening this conference. I think we are very honoured that she was willing to give up her time to return, as it were, to the scene of some very testing and often frustrating experiences during her former career, which she has kindly forborne to mention, but which are referred to in Hilary's remarks so I guess they must have happened. As Dennis has already mentioned, it is rare to find a Judge particularly, I think, who understands what we do and is so interested in it and so prepared to offer constructive suggestions.

I need to say a little bit about Hilary's absence. She is quite ill. She has been diagnosed with pneumonia. However, she is stable and when I spoke to her this morning was bearing up despite considerable discomfort and I am sure she is with us in spirit, but I think I speak for all of us, when I say how much I regret her absence, particularly given the amount of hard work and careful planning that she and others have put into setting up this conference and I second Dennis' motion that we wish her a speedy recovery and a comfortable recovery.

Next I would like to welcome all of you to Canberra and to this conference. It's wonderful and indeed extraordinary to see so many drafters gathered together in the one place. It is a sobering thought to imagine what would happen to the legal system if the earth suddenly opened up and swallowed us all and it is particularly pleasing that, as well as drafters from all the drafting offices in Australia, there are visitors from other parts of the Commonwealth, several drafters from New Zealand including one who is originally from Canada, and I understand that the UK Parliamentary Counsel will be joining us if he is not already here—Christopher Jenkins.

It is also, as Dennis has mentioned, the case that all surviving former First Parliamentary Counsel are here tonight—Charles Comans, Geoff Kolts and Ian Turnbull, and I'll be saying a bit more about them later on. This conference, as you know, is organised to mark the 25th anniversary of the establishment of the Commonwealth Office of Parliamentary Counsel. There are a number of things that led us to the view that a conference might be an appropriate way to celebrate this. Most of these reasons really come down to the same thing—that legislative drafting is in many ways a lonely craft and drafters don't have very many opportunities to talk to each other about their work. So in the course of the next two days, there will be substantial opportunity for all of us to share our problems, our difficulties and our questions, and also our ideas, suggestions and solutions, all of which are

things that very few other people than legislative drafters would either understand or care about.

In recent years, all the drafting offices have been subjected to a variety of pressures. Obvious ones are the pressures relating to drafting style and what's generally known as the Plain English debate, but there have also been pressures relating to resources. Some of us are under pressure to do more with less, while others have been given increased financial resources but find ourselves under pressure to produce an expanded pool of trained drafters within unrealistically short time frames. You can't buy drafting expertise, in a sense.

Each office is dealing with these challenges in its own way and, while there is some degree of similarity in the responses that the different offices are adopting, there is also enough diversity to suggest that an exchange of views may enable us to identify examples of best practice from all around Australia and New Zealand and further afield. So at a conference to celebrate 25 years of the Commonwealth OPC, perhaps it's appropriate to reflect on the history of that office and of the other drafting offices represented here.

The older drafting offices have histories that reveal certain common themes. Originally, statutes seemed to have been drafted by barristers in private practice or in some cases by Ministers themselves. In due course, the appointment of a parliamentary draftsman or parliamentary counsel was made, either because of criticism of inconsistencies in the style and standard of Bills produced by the private Bar or because the costs of having those Bills produced by the private Bar were thought too high.

It seems that in most jurisdictions, the parliamentary draftsman himself, as it was in those days, produced all the legislation and only very gradually did parliamentary draftsmen begin to acquire legally trained staff to do some of the drafting work. From the arrangement in which the parliamentary draftsmen did all the drafting, we have moved now in the larger drafting offices to the stage where the head of the office is mainly involved in management and does much less: in some cases, little or no drafting.

Now, as we've said, the Commonwealth OPC is 25 years old, which makes it a mere pup amongst drafting offices.

The New South Wales, Victorian and New Zealand offices have been in existence in some form or another since the 1870s, which is only a short time after the appointment of Henry Thring, who was a barrister, later Lord Thring, as the Parliamentary Counsel of Great Britain.

In Queensland, there has been a parliamentary draftsman since as far back as 1860, although the position was empty from the 1870s until the turn of the century, when it was again filled as a part-time position.

The Commonwealth didn't need a parliamentary counsel until Federation. At that time, a drafting office was not seen as necessary, and drafting was handled within the Attorney-General's Department. Sir Robert Garran, who had the distinction of being the first Commonwealth public servant, was a very good example of what nowadays we'd call multi-skilling. On the day of Federation, he composed the first Commonwealth *Gazette* in longhand and then, it is said, he hopped onto his bicycle and delivered the manuscript to the New South Wales Government Printer. Over the next few months, he drafted a number of basic Bills, presumably including the *Acts Interpretation Act*, which would be required whatever incoming Government was elected.

In the Commonwealth, legislative drafting stayed within the Attorney-General's Department for nearly 70 years. The Secretary to the Attorney-General's Department was also the holder of titles of Solicitor-General and Parliamentary Draftsman and drafting was only one of the tasks assigned to the officers in that Department, who also wrote opinions, developed legal policy and performed other tasks as required.

In 1946, the position of Parliamentary Draftsman was separated from the position of Secretary to the Department and in 1948, the late John Ewens became only the second person to hold the title without also being Secretary to the Department. John Ewens had a distinguished career as the Parliamentary Draftsman, but for those of us of the younger generation, he is probably best remembered as the person responsible for pushing for the establishment of the Commonwealth Office by statute, which happened in 1970, and he became the first First Parliamentary Counsel under the new Act.

Now just before we began, a member of the Office of Legislative Drafting supplied me with a number of classic Ewenisms that I might interpolate into Hilary's remarks at this point. It is said that John Ewens was of the opinion that there is no such thing as a simple Bill, and also that he said that "everything anyone tells you is *prima facie* wrong". I guess that indicates an appropriate degree of caution, but I wonder whether it leads to a somewhat one-sided view of the world.

John Ewens was succeeded as First Parliamentary Counsel by Charles Comans, who is with us tonight and, according to Hilary's notes, he has the distinction of being referred to by Gough Whitlam as the lugubrious First Parliamentary Counsel. Charles was followed by Bronte Quayle, who apparently was far from lugubrious. He is the subject of many anecdotes, most of which relate to his love of fast cars and slower boats and one of his unusual experiences was to be called upon to draft a new Constitution for the Republic of Pakistan in 1965.

Bronte was succeeded by Geoff Kolts, who is also here tonight, and who was head of the Office when I joined. Geoff was First Parliamentary Counsel for 5 years until he was appointed Commonwealth Ombudsman in 1986. He was followed by Ian Turnbull, also with us tonight, who retired in 1993. Ian is best remembered within the Commonwealth Office as the person who steered us through the difficult early years when the pioneers of Plain English were aiming most of their attacks at the Commonwealth drafters.

The Office was created by the *Parliamentary Counsel Act 1970*, which commenced on 12 June 1970. Queensland, as far as I am aware, is the only other office in Australia with a statutory base. The New Zealand office was set up by statute as the Law Drafting Office in 1920.

In the late 1960s, there was a great ferment in drafting offices around Australia. The Commonwealth Office was the only one to get its own Act, but there were developments in other offices as well. As I mentioned before, the New South Wales and Victorian offices have been in existence since the late 1870s and, in 1970, each of those offices had the name of its head changed to Parliamentary Counsel. In that year also, the Parliamentary Draftsman's Office in Western Australia was split from the Solicitor-General's Office to become a separate branch of the Crown Law Department. In 1972, a separate drafting office was established in the Northern Territory and in 1973, the New Zealand Law Drafting Office became the Parliamentary Counsel's Office.

Since the Commonwealth OPC was established in 1970, it has grown substantially. At that time there were around 20 drafters in the Office, currently we have 28. The real growth of the Commonwealth Office has actually been much more spectacular, because in 1970, the Office also handled the work that is now done by the Office of Legislative Drafting and the ACT Parliamentary Counsel's Office. So in fact the work that was handled in 1970 by 20 drafters is now handled by a total of 62.

There are other offices that have grown even faster or to a greater extent. The New Zealand office has grown from 3 drafters in 1905 to 11 in 1995. The Queensland Office has gone from 1 drafter in 1937 to 19 drafters in 1995. New South Wales had 3 drafters in the early 1890s and now has 21. Victoria had 2 in 1935 and now has 13. Western Australia has gone from 2 in 1952 to 11 full-time, and 5 part-time, drafters now.

At the Commonwealth level, the explosion in the number of drafters has been accompanied by at least a corresponding increase in the volume of legislation drafted. Since 1970, the number of Acts passed has increased only to a small extent, but the number of pages has increased enormously. In the period 1973 to 1976, the Commonwealth Parliament averaged 179 Bills per year, whereas in 1989-1992, the average was 204. But the average length of a Bill increased over that period from just under 10 pages to just over 25.

I don't have the figures for other jurisdictions, but I'd be very surprised if any drafting office has increased its resources to a greater extent than the volume and demand of legislation has increased.

Now, at the Commonwealth level, we are fortunate that we have received a big boost in our resources over the last 18 months because funding has been approved for 2 extra drafting teams, 6 extra drafters in all. These resources have been provided not so much at the request of the Office, but on the initiative of other parts of Government and they are intended to allow the Office to take on an ongoing project of rewriting existing Commonwealth Acts. One team was provided specifically to rewrite business regulatory legislation, and the other is to have a more general brief.

There is an obvious benefit of growth in the size of drafting offices as is evident here tonight. We now have in Australia a large pool of drafting expertise, and conferences like this one can bring together experienced drafters, and enough different views, to ensure a valuable exchange of ideas.

However, to the extent that growth in drafting offices reflects a growing demand for legislation, it is perhaps not quite so clear that, the more and bigger, the better. It seems that the business-as-usual workload of the Commonwealth Office may very nearly have reached a natural peak. At the end of the Budget Sittings of Federal Parliament in June this year [1995], there were 100 or more Government Bills banked up in the Parliament. This backlog has been building up over several periods of Sittings and it relates to the developing desire of Senators, especially from the minor parties, to give thorough scrutiny to legislation, and it's hard to see the passage of legislation speeding up again without either the Government regaining control of the Senate or a significant extension in the number of Senate sitting days. Both of these seem, at the moment, more or less unlikely. In due course, that will probably lead to a levelling out in the demand for legislation, as Departments and Ministers recognise the legislative bottleneck and look for alternative means of implementing policy changes.

Now that sort of detailed statistics gives you one kind of picture of the history and development of drafting offices in Australia in the last quarter century, but there are more interesting and perhaps just as revealing stories or information about the real traditions of the drafting offices and the experiences of individual drafters.

The United Kingdom Parliamentary Counsel's Office, unlike most Australian offices, is fortunate to have various versions of a written history. Francis Bennion has written, not always kindly, about various aspects of the United Kingdom office and Sir Harold Kent has published a book "In on the Act—Memoirs of a Law Maker", which gives a fascinating account of his own career in the United Kingdom office from 1933 until the early 1950s. He published that book in 1977, and from it one can see that a number of aspects of the Commonwealth Office's establishment, organisation and operation had their origins in the practices and traditions of the United Kingdom Office.

One example is the pairs system, which is fundamental to the way the Commonwealth Office operates, and that was copied from the United Kingdom. That system, as in use in the Commonwealth, has been modified in various ways in the past few years, but the basic concepts have been retained, namely that all legislation is looked at by at least 2 drafters and all new recruits learn the mysteries of legislative drafting by working closely with experienced drafters on real drafting work. However, as far as we know, OPC has never copied the UK tradition of referring to trainee drafters as "devils". We've had some interesting discussions about the terminology for referring to trainee drafters, but that suggestion hasn't come up, I don't think.

Another tradition that Kent records is that the client should always come to the drafter, never the other way round and these days that tradition might be seen as a bit precious, but the Commonwealth office has had some recent experience with outposted drafters—drafters who are outposted to projects based in policy departments—and some of that experience suggests that there were some good reasons underlying the traditional approach.

An interesting feature of Sir Harold Kent's book is a number of anecdotes he records that are mirrored in the experience of individual Australian drafters. Almost as if, for the past 25 years, we have all been simply playing out a script adapted for us by John Ewens from Kent's book. One example that Kent records in his work, is that during the war years, he worked often with the Bank of England on foreign currency regulations.

> *Every now and then, my Treasury colleague and I were invited to a conference at the "Bank Parlours", usually presided over by the Deputy Governor. The grandeur of the place, coupled with the sartorial perfection of the Bank contingent, filled me with awe. Not so my colleague, who wore a beard and was in advance of his time. On a Saturday morning (we worked on Saturdays then) he would appear at the Treasury in his hiking outfit, which included corduroy shorts, an unspeakable jacket and an officer's knapsack dating from the First World War. On such a morning, we were unexpectedly summoned to the Bank Parlours to stop some minor breach in our financial defences. The head flunkey, visibly shaken, announced us in less than the usual ringing tones: "Mr Deputy Governor, the er gentlemen from the Treasury". My colleague advanced unabashed, placed his knapsack with tender care on a Louis XVI chair, and took his seat at the conference*

*table. We had the best of the encounter; the Bank never recovered from the initial shock.*

Now many of you will know, or know of, Adrian van Wierst, one of the senior drafters in the Commonwealth office, who has always been known for devoting his attention more to his drafting skills than to his wardrobe. Adrian's dress sense figures in a story that is part of our oral tradition, although the story really demonstrates the quick thinking of Geoff Kolts. Some time in the 1970s, during the Fraser Government, Adrian and Geoff were summoned to a Cabinet Committee meeting in Parliament House to explain a complicated tax Bill. Is there any other kind? At one point during the meeting, Geoff found himself in the Cabinet ante-room with Jim Killen, who was, of course, a very proper and indeed a dapper dresser. "There's some fellow in there with a pullover", said Jim Killen in tones of disgust. "Who is he?" Geoff realised immediately that this must be Adrian, but he wasn't fazed. Without batting an eyelid, he said "Oh, he's from the Tax Office".

One of the dramatic changes in the UK office recorded by Kent was the appointment in 1939 of the first female drafter ever employed by that office. The recruitment of female drafters is no longer noteworthy and I just actually have to break from here to note the discrepancy between Hilary's account and Mary Finn's. Hilary goes on to write "... and indeed, the recent history of legislative drafting offices in Australia is such that even the appointment of a female drafter as the head of a drafting office is barely noteworthy". Well, Mary begs to differ and so do I.

The appointment of female drafters in the UK office does not appear to have caused the world to end. It did, however, lead to an incident which again bears an eerie resemblance to subsequent incidents in the Commonwealth office. Kent records his work with the second female drafter to be appointed in the UK.

*I was doing a miscellaneous Agriculture Bill which contained a clause about the artificial insemination of cows. My chief instructor ... absolutely refused to discuss artificial insemination in the presence of a woman. I didn't take him seriously at first, but he was adamant, and in the end, scarlet in the face, Betty left the room. "Much the best thing" said Dobbie complacently. "I could see that the poor girl was embarrassed." She wasn't embarrassed by artificial insemination," I said, "She was just enraged by your fatuous, masculine behaviour."*

Hilary records a similar experience that she had in the early 1980s when working with Mary Finn on amendments of the Family Law Act. The Attorney-General was not prepared to see the words "artificial insemination" in a Bill. "They don't worry me, of course", he said, "but some of my colleagues in the Senate ...". Hilary says that she managed to restrain herself from pointing out that, in those days, most of his colleagues in the Senate were farmers, who would have been engaged in similar activities with their cows for years.

Now, I have spent a bit of time comparing events in Britain with events in the Commonwealth, but the other drafting offices, of course, have their own traditions. There is a story that the late Frank Sands, who is one of Greg Calcutt's predecessors as Western Australian Parliamentary Counsel, once told the Minister that his scheme of having new industrial relations legislation drafted in three weeks was "an impossible dream". When miraculously, or perhaps by dint of much hard work on the part of the drafters, the Bill was in fact finished within the three weeks, the Minister in question sent a

dictaphone tape to Frank Sands on which was recorded a version of the song "The impossible dream"—not sung by the Minister fortunately.

The real point of this story, it seems, was hidden in an aside in a note from Greg Calcutt to Hilary in which he recounted this story. The note didn't identify the Minister, but it did mention that he was someone who unfortunately now enjoys the hospitality of another Division of the Ministry of Justice—this seems to have been a bit of an occupational hazard for Western Australian Ministers and indeed, Ministers from other States, at various times. So we are not sure exactly who we are talking about, but whoever it is, it's nice to think of this as a cautionary tale for Ministers who are tempted to make jokes at the expense of drafters.

It is well known that in some jurisdictions with relatively undeveloped legal structures, the position of Parliamentary Draftsmen has been, and often remains, a mere stepping stone on the way to the judiciary or even to the post of Attorney-General. By contrast, drafting in Australia and New Zealand has tended to be regarded as a lifetime career. Nevertheless, there are some drafters who have recorded important achievements outside the field of legislative drafting.

In Western Australia, the first Chief Parliamentary Counsel went on to become, in Greg Calcutt's words, "a fearsome, but very capable Supreme Court Judge".

Bernard O'Dowd, who was Parliamentary Draftsman in Victoria from 1931 to 1935, was a noted poet before his appointment. He also wrote or edited a number of legal texts, including a book on company law and practice.

Sir Robert Garran, whom I mentioned before, published a volume of translations of German poetry. His son, Andrew Garran, was Victorian Parliamentary Draftsman for just two years before being appointed Chairman of the Victorian Public Service Board.

Professor Salmond, who was appointed Counsel to the New Zealand Law Drafting Office in 1907, is probably much better known as the author of "Salmond on Torts".

The Commonwealth's own Geoff Kolts, as I mentioned before, went on to become Commonwealth Ombudsman.

Perhaps more interesting are the aspiring drafters who didn't make it. An unsuccessful applicant for the post of New South Wales Parliamentary Draftsman in 1875 was Edmund Barton, who had to settle for becoming Prime Minister instead (it also reflects what Mary was saying before about the real repository of the legislative power of the Commonwealth).

In drawing up the program for this conference, we've tried to identify a set of hard core drafting topics. It has been our experience that conferences that attempt to deal with legislative drafting topics tend to focus on matters that are peripheral to the actual drafting tasks. Programs are littered with sessions such as consolidation of legislation, training of legislative drafters and Parliamentary scrutiny of legislation. These are all important topics and we make no apology for including them on the program for this conference. However, we also don't apologise for suggesting that they are not core activities of the legislative drafter. All of these matters and many others may be relevant to the drafter as he or she embarks on the task of creating a coherent and comprehensive legislative document from what may often be no more than a gleam in the instructor's eye but they are not fundamental components of the performance of that task.

So what then are the fundamental components of the drafting task? This is a difficult question to answer and one that most of us manage to avoid thinking about for most of the time and that is unfortunate, for a number of reasons.

If we don't articulate what we are really doing or what we are actually doing, we have trouble judging how well we do it and inventing ways of doing it better.

If we don't articulate what we are actually doing, we will have trouble teaching others how to do it.

If we do not articulate what we are actually doing, we are at risk of being sold short by outsiders who do not understand what we do and Justice Finn's remarks give testimony to that as well, I mean in terms of what she has described.

This isn't the time or place to propose a theory of legislative drafting, you will be relieved to hear. However, I would like to mention a number of things and to link those with some of the topics for sessions for the next two days.

To the uninitiated, legislative drafting involves the mere writing of laws. In our experience, many outsiders cannot see what is difficult about legislative drafting, what special skills are involved, why the job needs to be done by specially trained people or finally, how anyone can bear to do such a boring job. Sometimes one gets the feeling that people believe that we are simply human dictaphones or monkeys with word processors, as Hilary recently put it to a Senate Committee.

But this sort of view seriously underestimates both the challenge of writing to communicate and the job of the legislative drafter, which involves far more than the difficult job of using the written word to communicate complex information. Some of our sessions will deal with aspects of the difficult job of using the written word to communicate complex information. We have sessions entitled: "Definitions"; "Headings"; "Setting the Context"; "Tables and Graphics". There are sessions about tools of communication, and we also have a session on a more technical subject to do with approaches to amending legislation. On Friday, there will be demonstrations by Tony Golsby-Smith of what is officially called "Protocol Analysis", but is known to us lay folk as "think-aloud document testing" and that should yield some interesting and challenging insights into how our drafting approaches operate as communication techniques.

Now, this next anecdote, I read only because Hilary put it in here. Coming from me, it might be taken the wrong way. She refers to James Christie, the New Zealand Law Draftsman from 1918. He was apparently fond of quoting advice he'd received from Sir Francis Bell, the Attorney-General of the day, in relation to a difficult draft he was working on. *Make it clear Christie, make it clear so that the judges can understand. Make it so clear that even the judge's wife can understand.*

As already indicated, we believe that the job of using the written word to communicate complex concepts to unknown readers is quite difficult enough. However, we'd sell ourselves short if we accept that this is all we do. A former trainee drafter in the Office, no longer with the Office, I should make it clear, made the point in a counselling interview that is recorded in an ancient office file, that he wasn't really getting the hang of drafting. "It's not the kind of job I expected", he said. "I thought there'd be more writing and less thinking".

Some further consideration of the kind of thinking that drafters do is worthwhile. Drafters have generally been reluctant to claim that we have more than the most

tables in the conference rooms. We will be providing extra chairs and, as we get to know each other better, we may find that extra chairs can be squeezed in around the table. However, other people obviously have to sit around the perimeter of that and so our advice is that, if there is a session that you particularly want to contribute to, you arrive at it earlier rather than later.

Another result of the session groups being larger than expected, is that there may be some problems with acoustics. There will be electronic equipment there in the session rooms, but it is there for recording, not for amplifying. So we'd remind you that if you have something to say, please speak up so that others can hear you and also feel free to ask other speakers to speak up if you are having trouble hearing them and don't be deterred from participating in the discussions by the fact that there is a large number of participants. I mentioned the recording equipment a short time ago. For the sake of that, could you always be sure, when you are making a contribution at the sessions, to speak directly into the microphone rather than wander away from it as I have been doing.

In the conclusion to her paper, Hilary records a conversation she had some 18 years ago with Professor Geoffrey Sawer, the distinguished constitutional lawyer. In the course of that he described legislative drafting as a useful and honourable profession. In the face of all the different kinds of criticisms levelled at us and our work from time to time, let us not forget the truth of Professor Sawer's words: "legislative drafting is both a useful and an honourable profession". It would be a fitting celebration of the 25th birthday of the Commonwealth Office of Parliamentary Counsel for us all over the next two days to share our thoughts, and to open our minds to the thoughts of others, about how we can improve the practice of our most useful and honourable profession.