Parliament of the
Commonwealth of Australia

# CLEARER COMMONWEALTH LAW

## REPORT OF THE INQUIRY INTO LEGISLATIVE DRAFTING BY THE COMMONWEALTH

House of Representatives Standing
Committee on Legal and Constitutional Affairs

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| | |
|---|---|
| AMPICTA | The Australian Manufacturers' Patents, Industrial Designs, Copyright and Trade Mark Association |
| AGPS | Australian Government Publishing Service - part of the Department of the Arts and Administrative Services (Commonwealth) |
| AQIS | Australian Quarantine and Inspection Service - part of the Department of Primary Industries and Energy (Commonwealth) |
| ARC | Administrative Review Council - established by section 48 of the *Administrative Appeals Tribunal Act 1975* of the Commonwealth |
| ATO | Australian Taxation Office |
| DEET | Department of Employment, Education and Training (Commonwealth) |
| DHHCS | Department of Health, Housing and Community Services (Commonwealth) |
| DILGEA | Department of Immigration, Local Government and Ethnic Affairs (Commonwealth) |
| DSS | Department of Social Security (Commonwealth) |
| DVA | Department of Veterans' Affairs (Commonwealth) |

| | |
|---|---|
| EARC | Electoral and Administrative Review Commission - established by subsection 2.1 (1) of the *Electoral and Administrative Review Act 1989* of Queensland |
| OLD | Office of Legislative Drafting - part of the Attorney-General's Department (Commonwealth) |
| OPC | Office of Parliamentary Counsel - established under subsection 2 (1) of the *Parliamentary Counsel Act 1970* of the Commonwealth |
| VLRC | Law Reform Commission of Victoria - established by subsection 5 (1) of the *Law Reform Commission Act 1984* of Victoria and dissolved by subsection 4 (1) of the *Law Reform Commission (Repeal) Act 1992* of Victoria |

# CONCLUSIONS AND RECOMMENDATIONS

This report is about making laws, particularly Commonwealth laws, easier to understand.

At present too many of our laws are difficult to understand.

This makes it hard for people to understand their obligations or entitlements and are much more costly to administer and comply with.

For a law to be effective its purpose must be clear, its language and structure must aid comprehension and people must have easy access to it. These aims are not always met in the production of Commonwealth legislation.

While there have been some dramatic improvements in the quality of Commonwealth legislation in the last five years or so, the Committee believes that more can be done to make legislation easier to understand and use.

Improvements can be made at each stage of the legislative process - in the preparation, making and publishing of legislation.

The Committee's recommendations are directed toward making these improvements.

## Clearer Policies for Clearer Laws

One of the main sources of complexity in legislation is complex policy.

The chances of clear legislation will be improved if, before drafting starts, the policy of the legislation has been clearly thought out, has

been framed to make it easy to understand, and is widely accepted.

The key to making clearer policy is better consultation:

- instructing officers should consult with drafters early in the process to ensure that all elements of the policy have been examined and are capable of clear legal expression; and

- more effort should be made to consult with interested parties outside government as well as within government.

**The Department of the Prime Minister and Cabinet should re-write the *Legislation Handbook* to state that the government department or agency responsible for a proposal to make primary or subordinate legislation should consult on the proposed legislation unless:**

**(a) the proposed legislation would only alter fees or benefits in accordance with the Budget; or**
**(b) the proposed legislation would contain only minor machinery provisions that would not fundamentally alter existing legislative arrangements; or**
**(c) advance notice of the proposed legislation would give a person an advantage that he or she would not otherwise receive.** (Recommendation 1, Paragraph 2.61)

**The Department of the Prime Minister and Cabinet should re-write the *Legislation Handbook* and *Cabinet Handbook*:**

**(a) to advise government departments and authorities that when a policy for legislation has been developed to the point where it is proposed to seek Ministerial or Cabinet approval, the government agency responsible for the policy should consult the relevant drafting office to ensure that the policy can be expressed simply in legislation; and**
**(b) to emphasise the desirability of preparing preliminary drafting instructions at the same time as Cabinet submissions relating to the legislation.** (Recommendation 2, Paragraph 2.62)

**The Department of the Prime Minister and Cabinet should re-write the *Cabinet Handbook* to require that Cabinet submissions dealing with proposed legislation include a section stating:**

**(a) whether consultation has taken place outside the Commonwealth Government about the proposed legislation;**
**(b) if no consultation has taken place outside the Commonwealth Government–the reasons why no consultation has occurred; and**
**(c) what consultation on the proposed legislation is recommended if Cabinet approves the proposal for legislation.**
(Recommendation 3, Paragraph 2.63)

## Drafting Instructions

The preparation of drafting instructions plays a very important part in the drafting of legislation. Good instructions will make a drafter's task much easier and leave more time to create a clear legislative expression of the policy.

Unfortunately there is a wide variation in the standard of instructions given to the drafting offices.

To help raise the standard of instructions, and make them more even, the Committee believes that:

- government agencies must retain sole responsibility for giving instructions to drafters;
- specialist legislation sections, where they exist, should give instructions to drafters;
- drafting instructions should be conveyed in writing initially although they can usefully be supplemented by oral instructions;
- drafting instructions should be issued in a narrative form rather than as a lay draft;
- drafting instructions should be in a standard format and should always include a statement of the object or purpose of the proposed legislation;

- drafting offices should provide extra training for instructing officers in the standards expected in drafting instructions; and

- the current manuals for guiding officers in the preparation of instructions should be substantially revised and updated.

**The Department of the Prime Minister and Cabinet should re-write the *Legislation Handbook* to recommend that departments and agencies use their legal or legislation areas to instruct the Office of Parliamentary Counsel or the Office of Legislative Drafting in the preparation of legislation.** (Recommendation 4, Paragraph 3.20)

**The Department of the Prime Minister and Cabinet should re-write the *Legislation Handbook* to make it clear that oral instructions, given by telephone or in meetings, form an acceptable part of the instructing process once written instructions have been given.** (Recommendation 5, Paragraph 3.31)

**The Department of the Prime Minister and Cabinet should re-write the *Legislation Handbook* to emphasise the need for instructions to identify clearly:**

(a) **the objects of the proposed legislation;**
(b) **legislative provisions affected by the proposed legislation;**
(c) **other provisions relevant to the proposed legislation; and**
(d) **related matters in any other drafting instructions.**
(Recommendation 6, Paragraph 3.48)

**Drafting and instructing agencies should co-operate to develop more, regular training programs for officers who will be giving instructions to drafters.** (Recommendation 7, Paragraph 3.61)

**The Department of the Prime Minister and Cabinet, in consultation with the Office of Parliamentary Counsel, the Office of Legislative Drafting and agencies which give instructions, should re-write the *Legislation Handbook* to deal comprehensively with the preparation of instructions for Bills and subordinate legislation.**
(Recommendation 8, Paragraph 3.66)

## Who Should Draft Legislation?

It was put to the Committee that Commonwealth legislative drafting would be more effective if the government monopoly on drafting were broken and drafting work were contracted out to private lawyers. The Committee disagreed with this proposition.

The Committee considered that:

- conflicts of interests could possibly arise if drafting work were contracted out;
- legislative drafting is a specialist skill that is acquired and refined through practice;
- the standard of general drafting in the private practice is very uneven;
- there is little evidence that private law firms are interested in developing a market in legislative drafting;
- it would be difficult to control the quality of legislation drafted outside the government; and
- on current costs, it would be considerably more expensive to have laws drafted by private lawyers.

The current division of responsibility between the two main Commonwealth drafting offices is appropriate and there is little evidence to suggest that amalgamating the Office of Parliamentary Counsel and the Office of Legislative Drafting would produce better legislation.

The fact that not all subordinate legislation is prepared in one agency has produced a disturbing variation in the quality of subordinate legislation. While it is impractical to expect all pieces of subordinate legislation to be drafted in one agency, the Committee agrees with the Administrative Review Council that the Office of Legislative Drafting should be responsible for ensuring that all subordinate legislation be prepared to an appropriate standard.

**The Government should implement the following recommendations made by the Administrative Review Council in its report *Rule Making by Commonwealth Agencies*:**

**(a) recommendation 4 to give the Office of Legislative Drafting responsibility for ensuring that subordinate legislation is prepared to an appropriate standard; and**
**(b) recommendation 5 to require that all subordinate legislative instruments be drafted by, or under arrangements approved by, the Office of Legislative Drafting.**
(Recommendation 9, Paragraph 4.109)

**The agency responsible for a subordinate legislative instrument must prepare a memorandum, to be tabled with the instrument, stating:**

**(a) whether the instrument was drafted by the Office of Legislative Drafting; or**
**(b) whether the instrument was drafted by the agency and settled by the Office of Legislative Drafting; or**
**(c) whether the instrument was drafted by the agency under other arrangements approved by the Office of Legislative Drafting and, if it was, what the arrangements were.**
(Recommendation 10, Paragraph 4.110)

**The Office of Legislative Drafting should review annually for three years the operation of the system envisaged by the Administrative Review Council in its report *Rule Making by Commonwealth Agencies* for preparation of subordinate legislation to assess the effectiveness of quality controls on drafting.**
(Recommendation 11, Paragraph 4.111)

## Staffing Drafting Offices

Developing the skills of drafters is a central part of any attempt to make legislation that is more understandable.

Most training is conducted on-the-job and, although it is an imperfect system, it does form an important part of a drafter's education.

An alternative to on-the-job training is formal training by course work. Several universities offer undergraduate courses in drafting as part of a law degree and some offer courses in legislative drafting. A number

of drafting offices around the country, including the Office of Legislative Drafting, have been active in their support for these courses. Such courses may help promote an interest in legislative drafting and make it easier to recruit people into drafting offices.

There is little evidence to suggest that the establishment of a legislative drafting institute would be any more successful now than it was in the mid-1970s when it was tried and rejected.

Both the Office of Parliamentary Counsel and the Office of Legislative Drafting have given some training to drafters in other Commonwealth agencies. This is important and should be continued.

Both agencies could make more effective use of placements and secondments to broaden the experience of their drafters.

**The Office of Legislative Drafting should provide more training for drafters of subordinate legislation in other agencies.**
(Recommendation 12, Paragraph 5.32)

**The Office of Legislative Drafting should develop and implement a program of placements for training officers from the Office of Legislative Drafting and drafters of subordinate legislation from other agencies.** (Recommendation 13, Paragraph 5.43)

**The Office of Parliamentary Counsel should strengthen its current program of placements for its officers in private law firms or Commonwealth policy agencies.**
(Recommendation 14, Paragraph 5.44)

Many of the recommendations in this report will require more resources to be allocated to the drafting agencies.

The Committee is convinced that the potential benefits to the community of making legislation that is easier to understand and use far outweigh the cost of the additional resources needed to implement the recommendations.

**A team including a person with legislative drafting experience and a human resource management expert should review the staffing of the Office of Legislative Drafting and the Office of Parliamentary Counsel to determine appropriate numbers and levels of drafting staff in each agency.** (Recommendation 15, Paragraph 5.59)

**The Office of Legislative Drafting and the Office of Parliamentary Counsel should be allocated the extra resources they need to implement the recommendations of this report.**
(Recommendation 16, Paragraph 5.68)

## The Readers

It is essential that the needs and interests of the reader are considered when legislation is being drafted. Without this focus it will be difficult for the reader to find out what he or she needs to do to comply with the law.

There are often many different groups of people that can be thought of as potential readers of a piece of legislation, but as far as possible primary emphasis should be placed on drafting for the people who may be affected by the legislation. An awareness of the reader should influence the way in which the legislation is structured, the language that is used and the layout and visual form of the legislation.

The instructing agency will generally be in a better position to know what audience the legislation affects and so:

**The Department of the Prime Minister and Cabinet should re-write the *Legislation Handbook* to emphasise the need for drafting instructions to identify if there is a target audience for the legislation.** (Recommendation 17, Paragraph 6.16)

The only way to know whether a piece of legislation is communicating its message effectively is to test it.

Testing for the readability of legislation by using a computer program is of limited value. The most effective way of testing legislation is to ask people whether they can understand it - a comprehension test. Ideally this type of testing should occur before the legislation is made.

Testing for the readability of draft legislation offers the potential of considerable benefits - not only for ensuring that legislation is clarified as much as possible before it is made, but also for identifying effective drafting techniques. Some work is already planned and the Committee believes it should be given a high priority.

**The Office of Parliamentary Counsel and the Office of Legislative Drafting should engage consultants to carry out, in consultation with agencies responsible for administering the relevant legislation, a program of testing several Bills and several pieces of subordinate legislation each year.** (Recommendation 18, Paragraph 6.42)

**The cost of programs of testing legislation should be shared between the agencies responsible for administering the pieces of legislation tested, and the drafting agency involved.** (Recommendation 19, Paragraph 6.44)

## Structuring Legislation

Writing legislation that can be understood involves more than just using the rules of plain writing and avoiding traditional legal expressions. It also involves questions like what material should be included and how it should be structured.

The Committee strongly supports the use of readers' guides and explanatory notes of the type found in some recent Commonwealth legislation. Innovations such as these have been very effective in making clear the purpose, structure and operation of the legislation.

The Committee does not support the proposition that primary legislation should be simplified by moving much of the detail currently found in Acts into subordinate legislation. While this may make it easier for a reader to grasp the main principles of a legislative scheme, it would make it no easier to comprehend the full extent of the scheme.

The criteria proposed by the Administrative Review Counsel for dividing material between primary and subordinate legislation are appropriate and the Committee agrees that the criteria should be published in the *Legislation Handbook*.

**The Government should implement recommendation 2 from the Administrative Review Council's report *Rule Making by Commonwealth Agencies* by revising the *Legislation Handbook* to set out matters that should be dealt with only by Acts.**
(Recommendation 20, Paragraph 7.21)

Nevertheless a clearer separation of the main principles in a piece of legislation and its operational or supporting provisions could be very helpful to readers. A more appropriate way of dividing this material would be to place supporting provisions in a schedule to the Act or regulations. This offers no great inconvenience for the reader who is interested in the full detail of the scheme, while assisting those who want only to gain a general picture of the legislation.

**Drafters in the Office of Parliamentary Counsel, the Office of Legislative Drafting and other Commonwealth agencies should make greater use of schedules to deal with discrete topics, such as procedural matters, constitution of authorities etc., that do not go to the essence of the scheme established by legislation.**
(Recommendation 21, Paragraph 7.26)

In the Committee's view the arguments in favour of retaining current structural conventions, such as the location of commencement provisions and definitions, are more compelling than those advanced in favour of changing current practice. Likewise, the proposal to introduce a decimal numbering system for legislation has problems which would outweigh any benefits that such a system may bring.

## Style

The Committee believes that the plain English style developed by the drafting agencies since the mid-1980s has made new Commonwealth legislation much easier to understand. The Office of Parliamentary Counsel in particular has developed a number of new aids to understanding. Innovations such as flow charts, examples, 'road map' clauses, readers' guides and rate calculators have been well received and have helped simplify difficult concepts.

However, there is scope for further improvement.

More use could be made of purpose clauses as a way of encouraging purposive interpretation in the Courts, and reducing the need for detailed prescriptions in legislation.

The *Acts Interpretation Act 1901* should be reviewed to help promote brevity, consistency and gender accuracy in Commonwealth legislation, and to encourage moves toward nation-wide consistency in interpretation legislation.

**The Attorney-General's Department and the Office of Parliamentary Counsel should publicly review and re-write the *Acts Interpretation Act 1901*.** (Recommendation 22, Paragraph 8.18)

**The Department of the Prime Minister and Cabinet should re-write the *Legislation Handbook* to draw the attention of instructing officers to section 15AC of the *Acts Interpretation Act 1901* (or its equivalent in re-written interpretation legislation) and to point out that amending legislation need not follow all the linguistic conventions of the legislation being amended.** (Recommendation 23, Paragraph 8.22)

**Commonwealth interpretation legislation should provide that in all principal legislation made after 1 January 1994, or legislation amending principal legislation made after 1 January 1994, words of masculine or feminine gender include the neuter gender, but words of masculine gender do not include the feminine gender and words of feminine gender do not include the masculine gender.** (Recommendation 24, Paragraph 8.31)

**When a piece of legislation is being amended for other reasons, drafters should also amend it to use words of the feminine gender where appropriate.** (Recommendation 25, Paragraph 8.32)

One significant stylistic change which was proposed was the suggestion that Commonwealth legislation be drafted in general principles.

Although general principles drafting is not suitable for all types of legislation, in many instances there would be significant advantages to be gained from using a general principles style of drafting. Such a style would mean the law could be expressed far more briefly and that it would be far easier for readers to understand and use. In the Committee's view, the fears that legislation drafted in general principles will generate uncertainty can be overstated.

**The Department of the Prime Minister and Cabinet should re-write the *Legislation Handbook* to require departments and instructing officers to have legislation drafted in general principles where appropriate, while recognising the need to use 'black-letter law' in many circumstances.** (Recommendation 26, Paragraph 8.57)

While new Commonwealth legislation has become easier to understand in recent years, many of the current laws pre-date the development of the plain English approach.

The most effective way of improving the quality of existing legislation is to institute systematic programs to re-write primary and subordinate legislation.

Such programs will require a major commitment of time and resources from drafting and policy agencies, but the benefits that can be expected to arise are substantial. The value of re-writing legislation is shown by the praise which has greeted the re-writes of the Social Security Act, the sales tax laws and the Austudy Regulations.

**The Attorney-General should develop a sunset program to promote regular re-writing of all subordinate legislation and introduce a Bill to provide a legislative basis for the program.** (Recommendation 27, Paragraph 8.82)

**The Office of Legislative Drafting, in co-operation with agencies administering subordinate legislation, should develop a program to identify and re-write subordinate legislation that:**

(a) **is heavily used or affects many people;**
(b) **is difficult to use; and**
(c) **is not due to expire under the proposed sunset system in the short or medium term.** (Recommendation 28, Paragraph 8.83)

**The Department of the Prime Minister and Cabinet and the Office of Parliamentary Counsel, in consultation with all departments, should develop for the consideration of the Parliamentary Business Committee of Cabinet a program for re-writing Acts based on the following criteria:**

(a) **the number of people using, or affected by, each Act; and**
(b) **the difficulty in use of the Act attributable to its drafting or structure.** (Recommendation 29, Paragraph 8.86)

**A law revision unit should be established in the Office of Legislative Drafting to undertake the proposed program of re-writing subordinate legislation.** (Recommendation 30, Paragraph 8.91)

## Presentation of Legislation

The Committee received a number of suggestions about layout and presentation which could make legislation easier to use.

One suggestion was that amending legislation would be easier to comprehend if the amendment contained sufficient information to give it context and meaning. The Committee supports any move to make the effect of amending legislation more immediately apparent, but is wary of proposing that the volume of legislation be further increased. The recent Office of Parliamentary Counsel practice of grouping related amendments may be a useful compromise.

**The proposed law revision unit of the Office of Legislative Drafting should investigate changing the presentation of amendments of subordinate legislation to group amendments of an instrument with similar effects under a heading outlining the purpose of the amendments.** (Recommendation 31, Paragraph 9.17)

Other suggestions the Committee endorses are that:

- running headings be used in legislation;
- all legislation contain a table of provisions; and
- all lengthy pieces of legislation and reprints contain an index.

**The Office of Parliamentary Counsel, the Office of Legislative Drafting and the Australian Government Publishing Service should acquire software that will enable the automatic insertion of informative running heads on each page of original legislation, and, as far as possible, on each page of amending legislation.**
(Recommendation 32, Paragraph 9.29)

**The Office of Parliamentary Counsel, the Office of Legislative Drafting and the Office of Legal Information and Publishing should ensure that tables of provisions are prepared for all new legislation and reprints of Acts and Statutory Rules.** (Recommendation 33, Paragraph 9.37)

**The Australian Government Publishing Service should prepare, in consultation with the drafter and instructing officer, an index for each long piece of principal legislation or reprint.** (Recommendation 33, Paragraph 9.44)

Another suggestion worthy of further investigation and testing is that defined terms be highlighted in some way so that readers are warned that they have a special meaning.

## Making Legislation

The current processes of making legislation can have an impact on the quality of legislation in two ways. First, the legislative process often imposes strict time limits on drafting. Secondly, the processes of Parliamentary scrutiny can act as a quality review.

A lack of time is one of the most serious problems drafters face in producing clear legislation. It was agreed by many giving evidence that it takes time to write simply.

One way of gaining time is for instructing agencies to give provisional drafting instructions to the drafter in situations where waiting for final instructions is likely to reduce substantially the time available for drafting.

**The Department of the Prime Minister and Cabinet should re-write the *Legislation Handbook* to indicate that compliance with deadlines for giving instructions is important but that provisional instructions should be given to a drafting office if there is likely to be a substantial delay in finalising instructions.** (Recommendation 35, Paragraph 10.24)

Parliamentarians are ultimately responsible for making legislation and have it within their power to exert control over the quality of legislation.

In the Committee's view, much can be done to improve the quality and effectiveness of parliamentary scrutiny of legislation.

**The Government should discontinue the practice of grouping amendments of legislation administered by one department in a portfolio Bill and instead group amendments of legislation dealing with a single subject into a single Bill.** (Recommendation 36, Paragraph 10.36)

**To improve the scrutiny of primary legislation, a minimum of ten days should elapse between the introduction and second reading of a Bill.** (Recommendation 37, Paragraph 10.42)

**The Government should prepare every six months, and propose for inclusion in Sessional Orders of the House and Senate, an indicative calendar of activities for the Parliament. The calendar could indicate the proposed legislative timetable and allow set times for the consideration of particular Bills.** (Recommendation 38, Paragraph 10.57)

**Ministers should refer any exposure drafts of legislation to the parliamentary committees responsible for the matters covered by the legislation.** (Recommendation 39, Paragraph 10.58)

**The Government should consult the Opposition with a view to amending Standing Orders of the House of Representatives to facilitate more effective forms of scrutiny of primary and subordinate legislation.** (Recommendation 40, Paragraph 10.66)

## Access to Legislation

The final stage of the legislative process is to ensure public access to the legislation. There is little point having clearly drafted legislation if it is difficult for people to gain access to it.

The Commonwealth should make its legislation available as widely as possible in both printed and electronic form. As a first step in enabling electronic access to legislation, the Attorney-General's Department should ensure that all Commonwealth legislation is in electronic form as soon as possible.

**The Office of Legislative Drafting should establish and maintain an electronic register of images and text of all subordinate legislative instruments made after the establishment of the register.** (Recommendation 41, Paragraph 11.58)

**The Office of Legislative Drafting should be responsible for publishing in the Commonwealth Government Gazette the title and date of entry of a subordinate legislative instrument in the proposed electronic register as soon as practicable after the instrument has been entered in the register.** (Recommendation 42, Paragraph 11.59)

The last complete consolidation of Acts was in 1973, while the last official consolidation of Statutory Rules dates was in 1956. In more recent times there have been pamphlet reprints of individual pieces of legislation, with an emphasis on reprinting Acts. The delay in publishing official consolidations makes it exceedingly difficult for readers to use legislation.

The Commonwealth has a responsibility to ensure that accurate, up-to-date versions of all Commonwealth legislation are available to the community. Urgent attention should be paid to making up-to-date consolidations available in printed and electronic form.

**The Attorney-General's Department, in conjunction with public and private sector partners as appropriate, should by 30 June 1994:**

(a) **consolidate, in electronic form and as the official consolidation, all Commonwealth primary and subordinate legislation;**
(b) **publish, in printed form, a complete consolidation of all Commonwealth primary and subordinate legislation; and**
(c) **put in place means of ensuring ready public and parliamentary access to the complete consolidation in electronic form.** (Recommendation 43, Paragraph 11.66)

As explanatory materials are allowed to be used in interpreting legislation, it is important that they too be made readily available.

**The Department of the House of Representatives and the Department of the Senate should establish and maintain a public-access database that contains the text of explanatory materials referred to in subsection 15AB (2) of the *Acts Interpretation Act 1901* (e.g. explanatory memorandums, second reading speeches, Parliamentary debates and relevant parliamentary committee reports) for each Bill passed by both Houses of Parliament.** (Recommendation 44, Paragraph 11.71)

The Office of Legislative Drafting should establish and maintain a public-access database of the text of the explanatory statement tabled in Parliament with each subordinate legislative instrument. (Recommendation 45, Paragraph 11.72)

Resources should be allocated:

(a) to the Office of Legislative Drafting to enable it to establish and maintain an electronic register of subordinate legislation and a database of the explanatory statements accompanying subordinate legislation;
(b) to the Attorney-General's Department to complete electronic consolidation of all Commonwealth legislation by 30 June 1994; and
(c) to the Department of the House of Representatives and the Department of the Senate to enable them to establish and maintain a database of the text of explanatory material associated with Bills. (Recommendation 46, Paragraph 11.74)

# PREFACE

For centuries, people have been concerned about the language used in the legal systems of the English-speaking world. In the last 20 years in particular, legal documents ranging from contracts and mortgages to Acts of Parliament have been heavily criticised for the difficulties they create for the reader.

While problems have been identified for several decades in the process of drafting legislation, it is only in the last decade that concern has focused on the difficulties of understanding legislation.

Against this background, the Committee sought from the Attorney-General a reference to inquire into Commonwealth legislative drafting. The terms of reference are reproduced at Appendix I. The Committee received evidence in the 36th Parliament, but was not able to consider the evidence fully and prepare a report until the 37th Parliament. By then the membership of the Committee had largely changed.

Four themes emerged clearly from the evidence gathered by the Committee:

- people are concerned that there is currently too little consultation in the process of developing and making legislation;
- people are concerned that much legislation is too difficult to read and understand;
- people are concerned about the difficulty of gaining access to an up-to-date version of legislation; and
- people are concerned about the volume of legislation being made.

Not all of the concerns which underlie these themes arise from current practices in drafting processes and style. The volume of legislation, for example, is influenced more by the diversity and complexity of policy - matters which were beyond the scope of the Committee's inquiry - than

by drafting style. But in so far as the concerns can be addressed by changes to the process and style of drafting, they are at the heart of the report.

The structure of the report reflects the series of steps from conceiving the policy to be embodied in a piece of legislation, through drafting the legislation to making and publishing the legislation.

The first chapter of the report provides a limited historical background to a number of the issues that arose during the inquiry.

The main subject of the second chapter is the process of developing policy to be given effect by legislation. A major part of the chapter addresses generally the question of consultation, which is a key aspect of policy development but is also important at other stages in the legislative process.

The report then considers how drafters should be informed of the policy to which they are to give effect by drafting legislation.

Chapter 4 discusses question of who should be involved in drafting legislation, while Chapter 5 addresses some of the considerations involved in staffing government drafting agencies.

A series of chapters then address a number of key issues in the actual drafting process. They basically follow the sequence of drafting. Just as a drafter might think first about the people for who he or she was writing, then consider how to organise the material and what style to use to convey the ideas, Chapters 6, 7 and 8 consider issues relating to readership, structure and style respectively. Having considered these basic issues, the drafter might then think about finer details of presentation that would help the reader, and how to make sure the reader understood the drafter's message. Accordingly, Chapter 9 discusses presentation of legislation to make it easier for a reader to understand and use.

Chapter 10 examines the effect of the processes of making legislation, particularly Acts of Parliament, on the legislation and the people involved in preparing and passing it.

Finally, the report considers in Chapter 11 the issue of access to legislation once it has been made.

# 1

# HISTORICAL BACKGROUND

## Introduction

*1.1* Many of the issues raised by the Committee's terms of reference and in submissions to the Committee are not new.

*1.2* Throughout the 1960s and the early 1970s, Parliament's attention was repeatedly directed to problems in the process of drafting Commonwealth legislation.[1]

*1.3* It was largely in the 1980s that the difficulties people faced in reading and understanding Commonwealth legislation became a subject of major concern.

## Commonwealth Drafting: Earlier Problems

*1.4* Originally, the Secretary to the Attorney-General's Department was the Parliamentary Draftsman,[2] and there was no specialised drafting area within the Attorney-General's portfolio. In 1946, the position of Parliamentary Draftsman was separated from the Secretary's position.[3] By 1954, a Parliamentary Drafting Division had been formed within the Attorney-General's Department to draft both

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1 Australia, Parliament, *Joint Committee of Public Accounts: Fiftieth Report: The Reports of the Auditor-General--Financial Year 1958–59* (F.J. Davis, Chairman), Parl. Paper 84, Canberra, 1960.
Australia, Parliament, *Joint Committee of Public Accounts: Sixty-Fifth Report* (R. Cleaver, Chairman), Parl. Paper 45, Canberra, 1964.
Australia, Parliament, *Joint Committee of Public Accounts: One Hundred and Third Report: Financial Regulations* (R. Cleaver, Chairman), Parl. Paper 216, Canberra, 1968.
Australia, Parliament, *Twenty-Fifth Report from the Senate Standing Committee on Regulations and Ordinances* (I. Wood, Chairman), Parl. Paper 243, Canberra, 1968.
Australia, House of Representatives, *Debates* 1970, vol. HR.66, pp.380–383.
Australia, Senate, *Debates* 1973, vol. S.55, pp. 216–219.
Australia, Senate, *Debates* 1973, vol. S.58, pp. 2703–2705.

2 Australia, House of Representatives 1970, *Debates*, vol HR.66, p. 382.

3 D. St L. Kelly, 'Preface', in D. St L. Kelly (ed.), *Essays on Legislative Drafting in Honour of J Q Ewens, CMG, CBE, QC*, The Adelaide Law Review Association, Adelaide, 1988, p. 2.

Bills and regulations.[4]

*1.5* A series of reports by parliamentary committees noted that a chronic shortage of staff in the Parliamentary Drafting Division throughout the 1950s and 1960s had led to a serious backlog in the drafting of regulations.[5] In considering the problem and possible solutions, the committees addressed a range of issues remarkably similar to those that confronted this Committee. These issues included:

- recruitment and retention of suitable staff;
- training of drafters;
- use of the private legal profession to do legislative drafting;
- separation of the drafting of Bills and subordinate legislation;
- the quality of instructions given to drafters; and
- earlier involvement of drafters in the legislative process.

*1.6* The Government appeared to see the recruitment and retention of drafters as the highest priority issue. In his second reading speech on the Parliamentary Counsel Bill 1970, the Attorney-General of the day said:

> *I am satisfied that the main reason for the existence of these arrears [of legislative drafting work] is the great difficulty experienced in recruiting sufficient competent and experienced draftsmen, or people who are capable, with training, of becoming competent draftsmen.*[6]

He considered that the causes of the difficulty were the low status and relatively poor remuneration of drafters,[7] and went on to outline the Government's proposed solution:

> *The Government has accordingly decided that the role of the Parliamentary Draftsman should be defined by statute; that there should be established an organisation of appropriate status and with sufficient resources to meet the increasing demands for*

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4 Australia, Parliament, *Joint Committee of Public Accounts: Fiftieth Report: The Reports of the Auditor-General–Financial Year 1958–59*, p.19.

5 Australia, Parliament, *Joint Committee of Public Accounts: Fiftieth Report: The Reports of the Auditor-General–Financial Year 1958–59.*
Australia, Parliament, *Joint Committee of Public Accounts: Sixty-Fifth Report.*
Australia, Parliament, *Joint Committee of Public Accounts: One Hundred and Third Report: Financial Regulations.*
Australia, Parliament, *Twenty-Fifth Report from the Senate Standing Committee on Regulations and Ordinances.*

6 Australia, House of Representatives, *Debates* 1970, vol. HR.66, p. 380.

7 Australia, House of Representatives, *Debates* 1970, vol. HR.66, pp. 380–381.

*Commonwealth legislative drafting; and that this organisation should be placed under the direct control of an officer designated as First Parliamentary Counsel who will be subject to the general direction of the Attorney-General. The title 'Parliamentary Counsel' is thought by the Government to be a more appropriate recognition of the important functions and status of the persons concerned.*[8]

*1.7* By itself, the *Office of Parliamentary Counsel Act 1970* did not overcome the problems. In 1973, the then Attorney-General announced the separation of drafting legislation for Parliament from drafting subordinate legislation:

*In 1970 the Office of Parliamentary Counsel was established. But the shortage of draftsmen remains, and the arrears of work which are the consequence of this shortage, particularly in the drafting of ordinances and regulations, is incompatible with a proper system of government. Under the new arrangements, the Office of Parliamentary Counsel will, generally speaking, be responsible only for the drafting of Bills for the Parliament, and amendments of Bills. The drafting of regulations and of ordinances for the Territories ... will be performed by lawyers in the Attorney-General's Department.*[9]

He expected that the division of responsibility for legislative drafting would improve recruitment, by allowing lawyers to try drafting while retaining the option to move on to other sorts of legal work within the Attorney-General's Department.[10]

*1.8* The new arrangements helped improve the efficiency of drafting, but the Government recognised later in 1973 that:

*More needs to be done to ensure that there will be a continuing flow of draftsmen to meet the requirements both of the Parliament and in respect of subordinate legislation. To this end, the Government proposes by this [Legislative Drafting Institute] Bill to establish a Legislative Drafting Institute that will be the instrument of meeting this need.*[11]

8 Australia, House of Representatives, *Debates* 1970, vol. HR.66, p. 382.

9 Australia, Senate, *Debates* 1973, vol. S.55, p. 216.

10 Australia, Senate, *Debates* 1973, vol. S.55, pp. 216–217.

11 Australia, Senate, *Debates* 1973, vol. S.58, p. 2704.

It was hoped that:

> *Apart from training, the Institute will serve to improve standards of legislative expression, to simplify the statement of the law and thereby to make the law more certain and more understandable to the persons affected by it.*[12]

*1.9* Lack of postgraduate students and budgetary constraints led to closure of the Institute in 1981,[13] just as the demand for plainer English in legislation was starting to grow.

## Commonwealth Drafting: Later Problems

*1.10* The 1970s saw growing demand in the English-speaking world for legislation that was easier for the reader to understand and use. There was considerable debate in the United Kingdom on the subject, with a committee inquiring into the preparation of legislation,[14] and a prominent author calling for more Acts to be drafted in general principles.[15] In the United States of America, legislation was passed in some jurisdictions to set readability standards for private legal documents,[16] and President Carter required subordinate legislation to be drafted in plain English.[17]

*1.11* These developments appeared to have little influence on legislative drafting in Australia in the 1970s, although the Victorian Government set up a committee to advise on the simplification of written law.[18]

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12 Australia, Senate, *Debates* 1973, vol. S.58, p. 2705.

13 Baxt summarises the history of the Legislative Drafting Institute: R. Baxt, 'Should there be a Drafting Institute in Australia?', in D. St L. Kelly (ed.), *Essays on Legislative Drafting in Honour of J Q Ewens, CMG, CBE, QC*, pp. 4–12.

14 Renton Committee, *The Preparation of Legislation*, Cmd. 6053, Her Majesty's Stationery Office, London, 1975.

15 W. Dale, *Legislative Drafting: A New Approach*, Butterworths, London, 1977.

16 This legislation is referred to in a number of Australasian articles: J. Willis, 'Making Legal Documents Readable: Some American Initiatives', (1978) 52 *Law Institute Journal* 513; R. Eagleson, 'Plain English in the Statutes', (1985) 59 *Law Institute Journal* 673; M. McLaren, 'The case for plain legal English in New Zealand' [1992] *New Zealand Law Journal* 167.

17 M. McLaren, 'The case for plain legal English in New Zealand' [1992] *New Zealand Law Journal* 167, 168.

18 J. Willis, 'Making Legal Documents Readable: Some American Initiatives', (1978) 52 *Law Institute Journal* 513, 514.

*1.12* During the 1980s, however, a strong Australian movement developed, seeking the drafting of legislation in a way that could easily be understood by readers.

*1.13* In 1984, the Senate Standing Committee on Education and the Arts recommended establishment of a national task force to advise on reform of the language of the law.[19]

*1.14* In 1985, the then Attorney-General of Victoria started a process of simplifying the expression and organisation of that State's legislation.[20] As part of the process, he asked the Victorian Law Reform Commission (VLRC) to report on plain English drafting in the law.[21]

*1.15* In the mid-1980s, a number of prominent critics, including Professor Robert Eagleson,[22] the then Victorian Attorney-General,[23] and the VLRC[24], pointed out problems in the expression and organisation of Commonwealth legislation. The critics claimed that Commonwealth legislation suffered from:

- use of lengthy or convoluted sentences;
- creation of unnecessary concepts; and
- problems with organisation of material.

*1.16* Initially, Commonwealth drafters made a very defensive response to these criticisms, arguing that critics did not understand the constraints that applied to legislative drafting.[25]

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19 Australia, Senate Standing Committee on Education and the Arts, *Report on a National Language Policy*, Parl. Paper 3, Canberra, 1985, p. 20.

20 Victoria, Legislative Council, *Debates* 1987, vol. 5, pp. 8–13.

21 This led to the report *Plain English and the Law*, VLRC, Melbourne, 1987.

22 R. Eagleson, 'Plain English in the Statutes', (1985) 59 *Law Institute Journal* 673, 674.

23 See, for example, J.G. Starke, 'The problem of drafting styles', (1986) 60 Australian Law Journal 368.

24 VLRC, *Plain English and the Law*, VLRC, Melbourne, 1987, pp. 30 & 38.

25 See, for example: Attorney-General's Department and OPC, *Attorney-General's Department and Office of Parliamentary Counsel Annual Reports 1984-85*, AGPS, Canberra, 1986, pp. 259-260.

*1.17* However, in 1986, the Office of Parliamentary Counsel (OPC) commenced a review of its style with a view to drafting legislation in plainer language without losing precision. The review was completed in 1987, when a new plain English style was implemented.[26] The 3 main elements of the style were:

- to use well-known rules of simple writing;
- to avoid traditional legal expressions if simpler ones could be used instead; and
- to use aids to help the reader understand the legislation.[27]

*1.18* Later, the Commercial and Drafting Division of the Attorney-General's Department, which was then responsible for drafting regulations, started developing a plain English style.[28]

*1.19* Many people now acknowledge that Commonwealth drafting offices have improved the readability of legislation in recent years.[29]

*1.20* But equally, there are many who say that Commonwealth legislation is still too complex and hard to understand.

*1.21* Some critics are unable to explain what it is that makes legislation hard to understand or what could be done to improve it. Some say that Commonwealth drafters still have not overcome the problems of complex legislative language and structure identified in the mid-1980s.[30] Others argue that the amount of detail in legislation obscures the basic principles, making the laws difficult to grasp.[31] Indeed legislative drafters themselves recognise that there is considerable scope for making legislation easier to understand and use.[32]

*1.22* It is these criticisms and concerns which gave rise to the inquiry, and which this report explores.

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26 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Submission*, p. S274.

27 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Submission*, p. S275.

28 Attorney-General's Department, *Annual Report 1989-90*, AGPS, Canberra, p. 23.

29 See, for example: D. Murphy Q.C., Parliamentary Counsel for New South Wales, *Submission*, p. S181; DHHCS, *Submission*, p. S363; G. Hackett-Jones Q.C., Parliamentary Counsel for South Australia, *Submission*, pp. S365 & S369; DVA, *Submission*, p. S486; Mallesons Stephen Jaques, *Transcript*, p. 30; Centre for Plain Legal Language, *Transcript*, pp. 67–68; Mr John Green, *Transcript*, p. 127.

30 See, for example, VLRC, *Transcript*, pp.152–153.

31 Probably the best-known recent criticism of the obscuring detail in Commonwealth law has come from John Green. See, for example: J. Green, 'A Fair Go for Fuzzy Law', in 'Making Legislation More Intelligible and Effective: Proceedings of a Conference held in Parliament House, Canberra 6 March 1992', Joint Parliamentary Committee on Corporations and Securities and VLRC, Canberra and Melbourne, 1992.

32 See, for example, I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Submission*, pp. S276–277.

# 2

# CLEARER POLICIES FOR CLEARER LAWS

## Introduction

*2.1* Many of the people who gave evidence to the Committee and many other writers on the subject of legislative drafting recognised that a major cause of complexity in legislation is complexity in the policy to be given effect by the legislation. Professor Eagleson has written:

> *The cause of much complicated language is frequently ill-conceived and poorly devised policy. No amount of simplification of language can remove unnecessary complications of content.*[1]

*2.2* It has been suggested that if policy is too complicated to be expressed simply in legislation, the policy should be changed.[2] While desirable, this may not always be possible: the intrinsic complexity of the subject, or considerations of fairness, may require complex policy.[3]

*2.3* It was also generally recognised that changes in policy while legislation is being drafted or by amendment of legislation can complicate legislation. Mr Ian Turnbull QC, the First Parliamentary Counsel from 1986 to 1993, observed:

> *It is a common experience for OPC drafters to have to deal with changes in policy while a Bill is being drafted. New material is added, existing policy decisions are changed, and other policy decisions are dropped entirely. Naturally, these changes have a very bad effect on the quality of the final product ... it is like having to build a sports car, and then, while you are building it, being told to turn it into a sedan, and then being told to turn it into a bus. This is no way to win a design award.*

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1 R. Eagleson, 'Plain English in the Statutes', (1985) 59 *Law Institute Journal* 673.

2 *Merkur Island Shipping Corp* v *Laughton* [1983] 1 All ER 334, 351 per Donaldson MR, approved unanimously by the House of Lords in [1983] 2 All ER 189, 198 (quoted by I.M.L. Turnbull Q.C., First Parliamentary Counsel, pp. S278–279; noted by the Attorney-General's Department, p. S504). See also the evidence of Dr Robyn Penman, *Transcript*, pp. 362–363.

3 DEET, *Submission*, p. S580.

*... Another important factor is that when Acts are amended over and over again they lose their original design and become more and more complex through accumulated additions and modifications.*[4]

*2.4* Policy changes will be minimised and the chances of clear legislation maximised if, before drafting starts, the policy of the legislation:

- has been clearly thought out;
- has been framed to make it easy to express in writing; and
- is widely accepted.

*2.5* These considerations are dealt with one by one in the following sections of this chapter, and conclusions and recommendations presented in the last section of the chapter.

## Carefully Considered Policy

*2.6* Policy is most likely to be clear if all its ramifications are considered before it is settled.

*2.7* Evidence to the Committee suggested that there are a couple of measures that could be taken to ensure that policy is clearly thought out:

- involvement of lawyers in the agency developing the policy; and
- preparation of drafting instructions in parallel with seeking policy approval.

*2.8* Speaking to officers from policy development agencies at a seminar on subordinate legislation, an experienced instructing officer from the Department of Transport and Communications said:

*It may not always be possible, but for those agencies who have their own in-house legal areas, it makes good sense to get the legal area involved as early as possible, and at least before policy approval is sought. Your legal area can advise you on whether there are any alternatives to making delegated legislation, ie. whether there might*

4 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Submission*, p. S280.

*be some administrative solution to satisfy the policy requirements, and they can advise you on the general legal policy and administrative law implications of each option.*[5]

*2.9* Problems inherent in a policy are often not identified until the details have to be worked out in preparing drafting instructions or legislation. A witness from the Department of Veterans' Affairs (DVA) told the Committee:

*sometimes the discipline of actually doing drafting instructions at the same time [as preparing material to seek approval of the policy] could clarify the haziness about some of the policy options.*[6]

*2.10* Commenting on the desirability of developing written drafting instructions, the Queensland Electoral and Administrative Review Commission (EARC) has recently said:

*Requiring departments and statutory authorities to outline the objectives of proposed legislation in writing is both a useful discipline and a necessary part of the policy development process.*[7]

*2.11* The *Legislation Handbook* and *Cabinet Handbook* outline a procedure for simultaneous preparation of preliminary drafting instructions and documentation for Cabinet approval of policy. The *Legislation Handbook* provides:

*Preliminary drafting instructions should be prepared and circulated to interested departments and authorities at the time of preparation of a Cabinet submission which involves legislation. This ensures that the precise nature of the proposal is understood when it is put to Cabinet and that all the major issues are raised. Drafting instructions should not be attached to the submission.*[8]

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5 A. Chalmers, 'Drafting Instructions - an instructing officer's perspective', in Attorney-General's Department, Attachment D to *Submission*, p. S549.

6 DVA, *Transcript*, p. 308.

7 Electoral and Administrative Review Commission (Queensland), *Report on Review of the Office of Parliamentary Counsel* [in Queensland], EARC, Brisbane, 1991, p. 36.

8 Department of the Prime Minister and Cabinet, *Legislation Handbook*, AGPS, Canberra, 1988, para. 5.1.

The *Cabinet Handbook* places less emphasis on the procedure:

> *Preliminary drafting instructions may also be prepared at this time [i.e. when comment is being sought on a draft Cabinet submission] and circulated to departments and agencies which the originating department considers will have an interest in the draft Bill (normally the departments and authorities consulted on the Submission).*
>
> *Copies of the draft Cabinet Submission need not accompany copies of the preliminary drafting instructions sent to departments or authorities other than those consulted on the Submission.*[9]

*2.12* However, a witness from the DVA told the Committee:

> *It has been my experience ... that those* Cabinet *and* Legislation Handbook *directions are honoured usually in the breach, rather than by being followed acutely.*[10]

## Policy Easily Expressed in Writing

*2.13* Experience gained by drafters dealing with a wide range of legislation helps them judge whether a particular policy can be clearly expressed in writing. The Tasmanian Office of Parliamentary Counsel submitted:

> *Often, due to [legislative drafters'] expertise and past experience, they can help in formulating a policy as well as designing a practical scheme of legislation to give effect to that policy.*[11]

*2.14* The Committee received evidence from many people suggesting that Commonwealth drafters are currently involved too late in the legislative process for others to be able to gain from the drafters' experience. This section considers the extent to which legislative drafters should be involved in shaping the policy that is to be reflected in legislation.

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9 Department of Prime Minister and Cabinet, *Cabinet Handbook*, AGPS, Canberra, 1991, paras. 5.19 & 5.20. The emphasis in the quotation is original.

10 DVA, *Transcript*, p. 308.

11 Tasmania, Office of Parliamentary Counsel, *Submission*, p. S168. See also VLRC, *Plain English and the Law*, para. 129.

*Current Practice*

*2.15* Legislative drafters are not usually involved in the process of developing legislation until the government agency gives instructions after obtaining Ministerial or Cabinet approval for the policy that is to be reflected in legislation.[12]

*2.16* Mr Turnbull explained some of the reasons why drafters are not involved in policy formulation:

> *OPC drafters do not involve themselves in policy formulation. This is because the policy is determined by Ministers on the advice of Departments, and the drafters have no background in policy, and no responsibility to the Ministers involved. On the other hand, they help the sponsors refine the policy by pointing out gaps, anomalies or ambiguities in the proposals.*
>
> *It follows that drafters cannot simplify the policy. They may make suggestions to simplify the policy with a view to simplifying the legislation, but in the last resort the sponsors decide the policy.*[13]

A similar view was expressed by the Office of Legislative Drafting (OLD).[14]

*Should Drafters Be More Involved in Policy-Making?*

*2.17* A wide range of people who gave evidence considered that the division between drafting and policy formulation inhibited development of good legislation.

*2.18* South Australian Parliamentary Counsel, Mr Geoffrey Hackett-Jones Q.C. considered:

> *The Commonwealth has traditionally separated the formulation of legislative policy and the writing of legislation into separate compartments of the bureaucracy. This is, perhaps, as it should be, but the differentiation of roles has I think been pursued rather more*

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12 See, for example: OPC, *Transcript*, p. 329; DSS, *Transcript*, pp. 391–392; DHHCS, *Transcript*, p. 415.

13 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Submission*, p. S270.

14 Attorney-General's Department: *Submission*, p. S513.

*rigorously than it should have been. A parliamentary counsel does in fact have a very necessary and very creative role to play in the formulation of legislative policy. That role is to achieve the legislative object in the simplest, clearest and most effective way. The parliamentary counsel therefore needs to be able to discard or reformulate elements of the legislative instructions that are not essential to the attainment of the legislative object and which have an adverse effect on the intelligibility of the legislation.*[15]

*2.19* DVA commented:

*At the moment the process [of developing legislation] tends to segregate the various steps in decision making and converting policy into legislation. As a result this affects the ability to undertake detailed consideration of legislation, legal, administrative and technical matters as part of the highest or first level of decision making. In some instances, it is not until drafting instructions are prepared and when details associated with decisions are examined that problems are identified.*[16]

*2.20* Mallesons Stephen Jaques submitted:

*Parliamentary counsel and private sector experts must be involved early in the legislative process. They should work with the instructing government officers in developing the legislation. In this way, they will be able to advise and help government to formulate workable policies.*

*We are not suggesting that parliamentary counsel should assume the role of policy officers. However, their expertise should be available to departments at a much earlier stage.*[17]

*2.21* The Taxation Institute of Australia expressed the view that:

*OPC should not continue to see its role as passive in receiving instructions to draft Bills. Rather, it should be taking a far more active role in promoting and assisting agencies to produce clear, readily understandable laws, encouraging policy changes, where*

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15 G. Hackett-Jones Q.C., *Submission*, p. S366.

16 DVA, *Submission*, p. S479.

17 Mallesons Stephen Jaques, *Submission*, p. S214.

*necessary, to achieve this result. Only in this way can better laws be produced.*[18]

*2.22* Witnesses from OLD explained to the Committee that two problems can arise if drafters are involved too early in the policy formulation stage of the legislative process.[19] First, if a drafter is involved, people may prematurely decide on the form of legislation without exploring other ways of solving policy problems. Secondly, it wastes drafters' time if they are involved when technical matters to which the drafter cannot contribute are still under discussion.

*2.23* Nevertheless, both OPC and OLD indicated that they saw benefits in involving drafters in the policy process to help develop policy that could be expressed simply in legislation. They envisaged that drafters would simply point out the complications that might be associated with a particular policy,[20] and would not advise on the merits of the policy, or produce a series of drafts to help develop the policy.[21] However, both drafting agencies pointed out that routinely involving drafters in policy formulation would require a change in drafters' roles and increased resources for drafting agencies.[22]

## Consulting to Gain Acceptance of Policy

*2.24* Changes to policy, and therefore complication of legislation, are likely to be minimised if the policy is widely accepted. An important way of generating acceptance of a policy is to consult widely about the policy when it is being formulated. Some organisations pointed out that legislation that has been the subject of consultation is less likely to consume valuable Parliamentary time in debate of contentious matters.[23] A common view among people giving evidence was that consultation generally improves legislation.[24]

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18 Taxation Institute of Australia, *Submission*, p. S238.

19 Attorney-General's Department, *Transcript*, pp. 278–280.

20 Attorney-General's Department, *Transcript*, pp. 278–280; OPC, *Transcript*, pp. 329–330.

21 Attorney-General's Department, *Transcript*, p. 279.

22 Attorney-General's Department, *Transcript*, p. 279; OPC, *Transcript*, pp. 330.

23 DVA, *Submission*, p. S485; New South Wales Bar Association, *Transcript*, pp. 108–109.

24 See, for example: DSS, *Submission*, pp. S143–144; New South Wales Bar Association, *Transcript*, pp. 106–107.

*2.25* This section addresses the issue of consultation during preparation of legislation by considering the following questions:

- what should be the subject of consultation?
- who should be involved in consultation?
- when should consultation occur?
- what form should consultation take?

*What Should Be the Subject of Consultation?*

*2.26* There appears to be a widespread feeling among people and bodies who are not part of government that too much secrecy surrounds the preparation of legislation.[25]

*2.27* On the other hand, there are some situations when consultation on proposed legislation appears to be contrary to public interest, either because of the nature of the proposed legislation, or because the cost of the consultative process outweighs its benefits.

*2.28* In its report on rule making, the Administrative Review Council (ARC) considered the issue of consultation in the preparation of subordinate legislation and tried to balance the competing interests for and against consultation.[26] The Council recommended that proposals to make subordinate legislation should be subject to consultation unless:

- the legislation is to adjust fees or charges in accordance with the Budget;
- the legislation is to make minor changes that do not fundamentally alter existing arrangements;
- the Attorney-General certifies that the Act under which the legislation is to be made provides adequately for consultation;
- advance notice of the legislation would enable individuals to gain advantages that they would not otherwise gain; or
- the Attorney-General (or, in the case of rules of court, the court) certifies that the public interest requires that consulta

25 See, for example: AMPICTA, *Submission*, p. S33; Law Society of the Australian Capital Territory, *Submission*, p. S472.

26 ARC, *Report to the Attorney-General: Rule Making by Commonwealth Agencies: Report No. 35*, AGPS, Canberra, 1992, Chapter 5.

tion not occur.[27]

Based on a survey of the 1991 Statutory Rules series, the ARC estimated that under its recommendation consultation would be required for about 15% of pieces of subordinate legislation.[28]

*2.29* The ARC's recommendation received support from a variety of people and organisations who gave evidence to the Committee, including:

- the Australian Council of Social Service;[29]
- the Business Council of Australia and Australian Institute of Company Directors;[30] and
- the Department of Health, Housing and Community Services (DHHCS).[31]

*2.30* Parts of the Commonwealth Government, however, expressed some reservations about a requirement for mandatory consultation. The Hon. Ralph Willis MP, Minister for Finance, considered that implementing the ARC's recommendation:

> *would have a significant impact on the operations of Departments. It would inevitably lead to significant increases in costs and to delays in the introduction or amendment of legislation.*[32]

The Department of Employment, Education and Training (DEET) was also opposed to mandatory regime of consultation, on the basis that it would add unduly to the time required for the legislative process.[33] The Department of Defence and the Department of Immigration, Local Government and Ethnic Affairs (DILGEA) opposed a requirement for mandatory consultation, suggesting that consultation should not occur in certain circumstances, but the cases the Departments identified appeared to fall within the exceptions identified in the ARC's recommendation.[34]

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27 ARC, *Rule Making by Commonwealth Agencies*, pp. 38–39.

28 ARC, *Rule Making by Commonwealth Agencies*, p. 37.

29 Australian Council of Social Service, *Submission*, p. S441.

30 Business Council of Australia and Australian Institute of Company Directors, *Submission*, p. S429.

31 DHHCS, Submission, pp. S362–363.

32 Hon. R. Willis M.P., Minister for Finance, *Submission*, p. S222.

33 DEET, *Submission*, pp. S582–583.

34 Department of Defence, *Submission*, p. S565; DILGEA, *Submission*, p. S568-569.

*2.31* The ARC's recommendation was concerned only with subordinate legislation. Nevertheless, it is a useful basis for considering the circumstances in which there should be consultation when preparing Bills, although differences between primary and subordinate legislation prevent direct application of the recommendation to the issue of consultation in the preparation of primary legislation.[35]

*2.32* Even taking into account the differences between primary and subordinate legislation, the basic principles of the ARC recommendation would be reflected in a requirement that consultation occur in the preparation of primary legislation unless:

- the legislation is to adjust fees or charges in accordance with the Budget;
- the legislation is to make minor changes that do not fundamentally alter existing arrangements; or
- advance notice of the legislation would enable individuals to gain advantages that they would not otherwise gain.

### *Who Should be Involved in Consultation?*

*2.33* It is generally accepted that government agencies sponsoring legislation should be responsible for consultation in developing legislation. There were a few suggestions, however, that others could take some responsibility for running a consultative process in relation to the development of pieces of legislation.

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35 It might be argued that the automatic public scrutiny of primary legislation through Parliamentary processes diminishes the need for public consultation in the preparation of legislation. However, if the aim of public consultation is to maximise clarity of legislation by minimising the need for amendment, it is desirable that a Bill be introduced into Parliament in a form which embodies generally accepted policy.

Some of the situations in which the ARC envisaged proposed subordinate legislation would be exempt from public scrutiny are not relevant to primary legislation (e.g. where a court determines that it is in the public interest that rules of court not be the subject of consultation; or where an Act provides for adequate consultation in making subordinate legislation under the Act).

The nature of primary legislation and the mixture of machinery and substantive provisions in portfolio Bills mean that a smaller proportion of Bills than of subordinate legislation would be exempt from consultation requirements under the ARC's minor machinery provisions exemption. Despite the greater administrative burdens this would impose on preparation of primary legislation, this may be appropriate, given that primary legislation generally deals with subjects of greater public interest than does subordinate legislation.

*2.34* A few submissions called for consultations directly between drafters and interested parties.[36] However, OLD pointed out:

> *Except in very special circumstances, it would not serve any useful purpose for drafters to be required to consult more widely than within the instructing agency. The instructing agency is, after all, the policy maker, and bears the responsibility to consult more widely if that is appropriate.*[37]

*2.35* The Clerk of the House of Representatives suggested that Parliamentary general purpose standing committees could play a role in the consultative process by considering green papers and exposure drafts of legislation.[38] The Clerk explained the advantages of the proposed role:

> *one beneficial feature claimed for the parliamentary committee system is that it provides the opportunity for the legislature to be taken to the people. The suggestions made in this submission in this regard would enable the people on whom the legislation will impact to comment directly to legislators on perceived consequences, and for legislators to explore the options accordingly.*[39]

*2.36* Regardless of who undertakes consultation, there are two broad groups of people to consult: government agencies and people outside government.

*2.37* The *Legislation Handbook* sets out the current requirements and procedures for consultation within the Commonwealth Government during the preparation of primary legislation. The procedures outlined by the *Handbook* include:

- circulation of preliminary drafting instructions to interested departments and authorities when the Cabinet submission relating to legislation is prepared;[40]

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36 See, for example: Business Council of Australia and Australian Institute of Company Directors, *Submission*, p. S422; and Law Council of Australia, Intellectual Property Committee, *Submission*, p. S572.

37 Attorney-General's Department, *Submission*, p. S515.

38 Clerk of the House of Representatives, *Submission*, p. S42.

39 Clerk of the House of Representatives, *Submission*, p. S43.

40 Department of the Prime Minister and Cabinet, *Legislation Handbook*, para. 5.1.

- consultation of the Attorney-General's Department about a range of legal policy issues;[41]
- consultation of the Department of the Environment, Sport and Territories about legislation proposed to apply to external Territories;[42]
- consultation of the Australian National Audit Office and the Department of Finance about financial and auditing matters to be dealt with in proposed legislation;[43] and
- circulation of draft Bills to appropriate departments and authorities.[44]

*2.38* There is evidence that these procedures are not always followed.

*2.39* The Attorney-General's Department commented:

> *Client agencies are not always aware that this Department has a role in developing legal policy and ensuring that it is carried out. ... Consultations with the Department should take place before drafting instructions are given to OPC or OLD. This is not always recognised by instructing Departments and there is often insufficient follow-up on the advice given by the appropriate area of this Department.*[45]

*2.40* The department responsible for Territories has written to other departments a number of times to draw attention to failures to consult on legislation affecting external Territories, and remind departments of the requirement to consult.

*2.41* The Australian National Audit Office noted that 'in some cases the ANAO [Australian National Audit Office] has not been consulted where necessary or unrealistic time frames have been given for consultation on proposals'.[46]

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41 Department of the Prime Minister and Cabinet, *Legislation Handbook*, paras. 5.14–5.23.

42 Department of the Prime Minister and Cabinet, *Legislation Handbook*, para. 5.11.

43 Department of the Prime Minister and Cabinet, *Legislation Handbook*, paras. 5.28–5.31.

44 Department of the Prime Minister and Cabinet, *Legislation Handbook*, para. 6.1.

45 Attorney-General's Department, *Submission*, p. S516.

46 Australian National Audit Office, *Submission*, p. S258.

*2.42* It appears that the main reasons for failure to consult adequately within government are ignorance of the appropriate procedures and a lack of time.

*2.43* Many of the government agencies that gave evidence to the Committee said that they consulted outside government in the preparation of legislation.[47] However, there was widespread concern among people and organisations outside the government that there was insufficient consultation outside government when legislation is prepared.[48] Lawyers in private practice and people affected by proposed legislation were identified as key groups for consultation.

*2.44* Most proposals for primary legislation are considered by Cabinet, but the *Cabinet Handbook* is silent on the issue of consultation outside government when developing legislative proposals, although it notes that preliminary drafting instructions should be treated as Cabinet documents for security purposes.[49] The *Legislation Handbook* does nothing to encourage consultation outside government during the preparation of legislation, as the following passage indicates:

> *Draft bills and all associated material, including related correspondence, drafting instructions and typed or manuscript versions of a bill, are confidential to the Government. Access should be on a 'need to know' basis. ...*
>
> *Details of bills are not to be made public before their introduction into the Parliament unless disclosure is authorised by Cabinet or the Prime Minister.*[50]

*2.45* The ARC has recommended that proposals to make subordinate legislation be advertised in a national daily newspaper, any relevant trade or professional journals and local newspapers circulating

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47 See, for example: AQIS, *Transcript*, pp. 254–255; DVA, *Transcript*, pp. 309–310; DSS, *Transcript*, pp. 380–381; DHHCS, *Transcript*, p. 408; ATO, *Transcript*, pp. 453–454; DILGEA, *Submission*, p. S568.

48 See, for example: A. Walsh, *Submission*, p. S3; AMPICTA, *Submission*, p. S33; T. Falkiner, *Submission*, p. S37; New South Wales Bar Association, *Submission*, p. S202; Mallesons Stephen Jaques, *Submission*, pp. S213–214; Taxation Institute of Australia, *Submission*, p. S240; Australian Bankers Association, *Submission*, p. S377; Business Council of Australia and Australian Institute of Company Directors, *Submission*, pp. S418 & S428; Australian Council of Social Service, *Submission*, pp. S440–441; Law Institute of Victoria, *Submission*, pp. S459–460; Law Society of the Australian Capital Territory, *Submission*, pp. S471–472.

49 Department of Prime Minister and Cabinet, *Cabinet Handbook*, AGPS, Canberra, 1991, Chapter 5.

50 Department of the Prime Minister and Cabinet, *Legislation Handbook*, paras. 6.6 and 6.7.

in any region particularly affected by the proposed legislation.[51] This would provide a basis for consultation with the general public as well as interest groups that might be particularly affected by proposed legislation.

*Timing and Form of Consultation*

*2.46* In contrast to the general agreement on the desirability of consultation in preparation of legislation was the range of opinions on the question of when and how consultation should occur to be most effective.

*2.47* Some people thought that it would be more productive to consult on policy before starting drafting than to seek comments on draft legislation. Mr John Green told the Committee:

> *A mistake in recent years has been to have consultation mainly at the Bill stage. By then it is too late. Arguing about words is not terribly fruitful; arguing about the policy is far better for the community. The words should then be a mere detail.*[52]

*2.48* The Australian Bankers Association thought that instructions to the drafter 'should be settled after full consultation and agreement (as far as is possible) with interested parties'.[53]

*2.49* The Council of Small Business Organisations of Australia Ltd. observed that material, including legislation, circulated for comment was unintelligible to people who are not specialists in the relevant field, and concluded:

> *It would help a lot if the issues of principle were isolated from legislative drafts and circulated for formal comment.*[54]

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51 ARC, *Rule Making by Commonwealth Agencies*, pp. 40–41.

52 J. Green, *Transcript*, p. 127.

53 Australian Bankers Association, *Submission*, p. S377.

54 See, for example, Council of Small Business Organisations of Australia Ltd., *Submission*, pp. S23–24.

*2.50* At the other end of the spectrum were those who thought that it was futile to seek comments before legislation was drafted. Mr Geoffrey Kolts Q.C. said:

> *The problem is that you want input from the experts and you never get it until you have a text. It is no good saying that you want them to come in at the policy stage, unless you have a committee of experts that actually produces the policy. No matter how you try, they will never produce their comments until there is a piece of legislation for them to look at; and the more that happens the better, of course.*[55]

*2.51* Some who gave evidence considered that consultation should take place at more than one stage in the development of legislation.

*2.52* The Business Council of Australia and Australian Institute of Company Directors recommended 'effective consultation at policy and drafting stages with external experts and interested parties'.[56] They suggested that consultation before and after preparation of a draft would help not only to clarify policy, but also to improve drafting, because 'consultation [on an exposure draft] would then be more about the technical drafting aspects rather than disagreements on whether or not the policy objectives are being met'.[57] If consultation resulted in substantial changes to the legislation, the Council and Institute considered that there should be a second round of consultation.[58]

*2.53* The ATO also believed that, although consultation on draft legislation is most effective,[59] consultation needs to be repeated throughout the legislative process:

> *It is an iterative process of seeking comment, refining it, then going back with more specific proposals, and so on, until you get a fairly good result at the end. A difficulty is ... that some people find it difficult to respond to general principles.*[60]

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55 G. Kolts Q.C., *Transcript*, p. 442.

56 Business Council of Australia and Australian Institute of Company Directors, *Submission*, p. S418.

57 Business Council of Australia, *Transcript*, p. 238.

58 Business Council of Australia and Australian Institute of Company Directors, *Submission*, p. S429.

59 ATO, *Transcript*, p. 454.

60 ATO, *Transcript*, p. 457.

*2.54* A witness from DSS told the Committee:

> *As we said, consultation can occur at various phases. Certainly, during the development of policy that is reflected in legislation, it is useful to have consultation. There can be consultation during the process of the drafting of the drafting instructions, and that is fairly well entrenched in our Department in the maintenance of the data-matching legislation. ... There can certainly be consultation during the drafting process. We have had some experience there and we have also had experience with the release of exposure drafts. Our experience with all those types of consultation has been that they are useful and that they produce a better result.*[61]

*2.55* The Committee heard that the form of consultation tends to influence the response. Mr Dennis Murphy Q.C., the New South Wales Parliamentary Counsel, indicated that comments on exposure drafts of legislation are almost exclusively on matters of policy, rather than drafting.[62] Mr Edward Kerr, of Mallesons Stephen Jaques, attributed this to:

> *the perception in the community that they are not being invited to comment on drafting matters [raised by exposure drafts of legislation]. I suppose it is almost an unwritten law amongst lawyers that you do not criticise another lawyer's drafting ... so I think that that is not the framework within which you can really expect to get comments on drafting.*[63]

A witness from NRMA echoed this view.[64]

*2.56* The ARC recommended that public consultation on subordinate legislation be based on draft legislation and a rule making proposal that:

- summarises the proposed legislation;
- states the objects of the proposed legislation;
- analyses alternative means of achieving the objects;
- estimates the costs and benefits of the proposal to the government and affected public; and

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61 DSS, *Transcript*, p. 381.

62 D. Murphy Q.C., Parliamentary Counsel for New South Wales, *Transcript*, p. 17.

63 Mallesons Stephen Jaques, *Transcript*, p. 34.

64 NRMA Insurance Ltd, *Transcript*, p. 60.

- gives reasons for the preferred approach.[65]

*2.57* This recommendation was supported by the Australian Council of Social Service[66] and the New South Wales Bar Association.[67] While the recommendation assumes that consultation will occur after drafting, it provides a basis for comments on either the policy underlying the proposed legislation or the detail of the legislation itself.

*2.58* The rule making proposal recommended by the ARC would also meet the need perceived by a number of the business people and organisations that gave evidence to the Committee for cost-benefit analysis of proposed legislation.[68] Opinions about cost-benefit analysis of legislation varied among Commonwealth Government agencies, which would be affected by the requirement to carry out the analysis. The Australian Quarantine and Inspection Service (AQIS) expressed concern that special procedures to assess the economic impact of legislation created an unnecessary burden without achieving their aim.[69] The Australian Taxation Office (ATO), however, considered that 'there would be real value in estimating the impact within the community of costs and other flow-on effects of legislative proposals'.[70]

## Conclusions

*2.59* The ARC's recommendation appears to strike an appropriate balance between public consultation and administrative efficiency in preparing subordinate legislation. The disadvantages identified by the Minister for Finance need to be considered in light of the improvements in legislation that can be expected from consultation process.

*2.60* The Committee generally supports wider consultation in the preparation of legislation than appears to occur at present. The Committee considers that government agencies sponsoring legislation should have the primary responsibility for undertaking consultation, although the Committee acknowledges that parliamentary committees

65 ARC, *Rule Making by Commonwealth Agencies*, Recommendation 11, p. 41.

66 Australian Council of Social Service, *Submission*, p. S441.

67 New South Wales Bar Association, *Submission*, p. S202.

68 See, for example: A.Walsh, *Submission*, p. S4; Australian Bankers Association, *Transcript*, pp. 180–181; Business Council of Australia, *Transcript*, pp. 236–237.

69 AQIS, *Transcript*, p. 259.

70 ATO, *Transcript*, p. 453.

can play an important role in the consultative process (see Chapter 10). The Committee believes that there can be value in consulting people outside government as well as within government, and in consulting at several stages during the preparation of legislation.

2.61 Recommendation 1

*The Department of the Prime Minister and Cabinet should re-write the* Legislation Handbook *to state that the government department or agency responsible for a proposal to make primary or subordinate legislation should consult on the proposed legislation unless:*

*(a) the proposed legislation would only alter fees or benefits in accordance with the Budget; or*

*(b) the proposed legislation would contain only minor machinery provisions that would not fundamentally alter existing legislative arrangements; or*

*(c) advance notice of the proposed legislation would give a person an advantage that he or she would not otherwise receive.*

2.62 Recommendation 2

*The Department of the Prime Minister and Cabinet should re-write the* Legislation Handbook *and* Cabinet Handbook*:*

*(a) to advise government departments and authorities that when a policy for legislation has been developed to the point where it is proposed to seek Ministerial or Cabinet approval, the government agency responsible for the policy should consult the relevant drafting office to ensure that the policy can be expressed simply in legislation; and*

*(b) to emphasise the desirability of preparing preliminary drafting instructions at the same time as Cabinet submissions relating to the legislation.*

2.63 **Recommendation 3**

*The Department of the Prime Minister and Cabinet should re-write the* Cabinet Handbook *to require that Cabinet submissions dealing with proposed legislation include a section stating:*

*(a) whether consultation has taken place outside the Commonwealth Government about the proposed legislation;*

*(b) if no consultation has taken place outside the Commonwealth Government–the reasons why no consultation has occurred; and*

*(c) what consultation on the proposed legislation is recommended if Cabinet approves the proposal for legislation.*

# 3 DRAFTING INSTRUCTIONS

## Introduction

*3.1* Instructions to the drafter from the agency responsible for developing policy play a vital role in the legislative process, as Mr Turnbull explained:

> *The preparation of drafting instructions plays an extremely important part in the drafting of legislation. The better the instructions, the less time it takes to draft ...[because] a considerable part of the drafter's work is analysing instructions, asking for clarification, and pointing out gaps, anomalies and ambiguities in the legislative proposals.*[1]

*3.2* Principal Legislative Counsel from OLD pointed out that good instructions 'make the drafter's job much easier' and mean that there is 'more time to focus on the way the draft is expressed, rather than focusing solely on trying to find out what it is that the client wants'.[2]

*3.3* Mr Turnbull indicated that the attributes of an instructing officer could also contribute to clear legislation:

> *... in one important respect the instructor can simplify the legislation. This is when the instructor has enough knowledge of the subject matter, and enough authority, to decide how much detail is to be covered by the legislation.*[3]

*3.4* While the benefits of good instructions and able instructing officers are clear, the Committee was informed that 'there is a large variation in the quality of drafting instructions given by different Departments and agencies'.[4]

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1 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Submission*, p. S298.

2 Attorney-General's Department, Transcript, p. 278.

3 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Submission*, p. S299.

4 I.M.L. Turnbull, Q.C., First Parliamentary Counsel, *Submission*, p. S298.

*3.5* Therefore, with the aim of improving legislation by ensuring that drafters receive instructions of a higher, more even standard, this chapter considers the following issues:

- who should give instructions;
- when instructions should be given;
- what form instructions should take;
- what instructions should contain; and
- what assistance can be given to instructing officers to give good instructions.

## Who Should Give Instructions?

*Team Approach*

*3.6* A number of submissions proposed that the development and issuing of instructions should involve people from outside government as well as officers of the relevant government agency. The form of outside involvement proposed varied.

*3.7* Some people considered that teams including people from outside government should be formed to develop legislation.[5] At least some of the people advocating the formation of teams appeared to have considered that the team would instruct the drafter.[6]

*3.8* Several people thought that the lack of direct consultation between legislative drafters and people in the private sector was a problem that should be overcome.[7] Although the submissions did not spell out the details of interaction proposed, it seems to have been envisaged that the people in the private sector would perform some of the functions of an instructing officer, in terms of giving information and shaping legislative schemes.

*3.9* Other submissions saw a role for lawyers and others from the private sector in finalising the instructions to be given to drafters.[8]

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5 *See, for example: Mallesons Stephen Jaques, Submission*, pp. S213–214; AMPICTA, *Submission*, p. S33.

6 AMPICTA, *Submission*, p. S33; Centre for Plain Legal Language, *Submission*, p. S310.

7 Business Council of Australia, *Transcript*, pp. 237–238; Mallesons Stephen Jaques, *Transcript*, pp. 32–33; Law Council of Australia, Intellectual Property Committee, *Submission*, p. S572.

8 Australian Bankers Association, *Submission*, p. S377; Law Society of the Australian Capital Territory, *Submission*, p. S471.

*3.10* A team approach to policy development and consideration of draft legislation offers the benefit of bringing different perspectives to the same problem. However, having more than one interested party instructing the drafter is likely to make the drafter's job harder if he or she has to reconcile differing views in addition to his or her other tasks.[9]

*Conclusions on Team Approach*

*3.11* The Committee therefore believes that government agencies must retain sole responsibility for giving instructions to legislative drafters to prepare Government Bills and amendments, and subordinate legislation. This responsibility should not discourage the relevant agency from consulting with interests outside government when formulating policy, developing drafting instructions, or considering draft legislation.

*The Role of Specialist Legislation Sections*

*3.12* The Attorney-General's Department submission notes:

> *Many Departments have established internal areas that concentrate on the legislative process and are responsible for the instruction of OPC and OLD for all areas of the Department concerned. This assists the smooth running of that process because the instructing officers are familiar with the steps required to achieve the making of their legislation.*[10]

*3.13* The value of specialist legislation sections in the legislative process appears to be widely appreciated within government.

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9 Department of the Prime Minister and Cabinet, *Federal Executive Council Handbook*, AGPS, Canberra, 1983, paragraph 5.34. The desirability of having a single interest group instruct the drafter is reflected in the *Legislation Handbook*, which requires that only one government department instruct OPC on a particular piece of legislation: Department of the Prime Minister and Cabinet, *Legislation Handbook*, paragraph 5.4.

10 Attorney-General's Department, *Submission*, p. S513.

*3.14* The Department of Defence, the Australian Customs Service, DSS and DVA all acknowledged the benefits of having specialist legislation sections.[11] The benefits are seen to include:

- centralised knowledge of the legislative process, leading to a consistent approach and development of expertise;
- independence from the policy-making process, allowing a more objective approach to the preparation of instructions;
- co-ordination of the agency's legislative proposals;
- efficient handling of legislation; and
- development of good working relationships with OPC and OLD.

*3.15* The Commonwealth drafting agencies also appreciate the benefits of receiving instructions from specialist legislation areas.

*3.16* Mr Turnbull advised the Committee:

> *We [OPC] generally find it easier to work from instructions given by a specialised legislation section. The officers know their own legislation, and can direct us to areas of the legislation that are affected by the proposals. They understand the Constitutional framework. They also have a better appreciation of the alternative ways in which the policy can be put into law.*[12]

*3.17* Speaking to public servants at a conference on delegated legislation, an experienced drafter from OLD said:

> *As a general rule, I find that the sooner the centralised legal section of your Department is involved in the instructing process the smoother the path to successful regulations will be. They have the experience in instructing ... They can act as co-ordinators and they don't take up precious time reinventing the wheel. If they are involved in all your Department's instructions, they may be able to assist in assessing the priorities to be allotted to the various tasks given us by your Department or Portfolio.*[13]

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11 Department of Defence, *Submission*, p. S564; Australian Customs Service, p. S433; DSS, *Submission*, pp. S142–146; DVA, *Submission*, p. S480.

12 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Supplementary Submission - Responses to Questions, and Additional Material*, p. S602.

13 R. Mackay, 'A Drafter's View of Drafting', in Attorney-General's Department, Attachment D to *Submission*, p. S560.

*3.18* There is, however, a risk that a specialist legislation section's lack of familiarity with policy may delay drafting to implement the policy.[14]

*3.19* Nevertheless, the Committee is satisfied that there are considerable benefits to be gained from using specialist sections to give instructions to drafters, and notes concerns that under-utilisation of these sections has disrupted the legislative process.[15]

*3.20* **Recommendation 4**

***The Department of the Prime Minister and Cabinet should re-write the Legislation Handbook to recommend that departments and agencies use their legal or legislation areas to instruct the Office of Parliamentary Counsel or the Office of Legislative Drafting in the preparation of legislation.***

*Desirable Attributes of an Instructing Officer*

*3.21* As Mr Turnbull noted, the qualities of an instructing officer can play an important role in determining the quality of legislation. They can also be important factors in the efficiency of the legislative process.

*3.22* A senior drafter from OPC has noted that:

> *Among the various skills that instructors need are:*
> * *good communication skills (to act as efficient and effective translators between the policy sponsors and the drafters);*
> * *good conceptual analysis (to get quickly to the fundamentals of a legislative proposal and make sure that it is workable);*
> * *imagination (to envisage how a legislative proposal might work in practice when it comes to be administered).*[16]

*3.23* Mr Turnbull noted that 'instructions are better if they are given by people with the necessary qualifications to understand the

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14 Attorney-General's Department, *Submission*, pp. S513–514.

15 A. Chalmers, 'Drafting Instructions - an instructing officer's perspective', in Attorney-General's Department, Attachment D to *Submission*, p. S550.

16 V. Robinson, Letter dated 10 November 1992 from OPC to DSS, supplied to the Committee as an attachment to DSS, *Second Supplementary Submission*, p.S665.

constitutional and legal framework in which proposals [for legislation] must be developed'.[17]

*3.24* The Attorney-General's Department identified some other important attributes of instructing officers:

> *... it is essential that the instructors are able to answer technical queries with authority ... If those officers are not familiar with the operational side of policy, ... they may be unable to give instructions without reference to operational areas and may be unable to assess whether advice given by this [Attorney-General's] Department can be realistically implemented or be in a position to negotiate an acceptable compromise. This leads to confusion and delays in implementing policy.*[18]

*3.25* The development of these skills is considered further in a later section of this chapter.

## What Form Should Instructions Take?

### *Written and Oral Instructions*

*3.26* The *Legislation Handbook* states that 'instructions must ... be in writing, oral instructions will be accepted only in exceptional circumstances and must be confirmed in writing'.[19] OLD has given similar advice to many of its clients.[20]

*3.27* There appeared to be some criticism of Commonwealth drafting agencies for their emphasis on written communication, rather than oral communication.[21]

*3.28* OPC appears to appreciate the value of meetings in the instructing process. One drafter pointed out that 'face-to-face meetings can be useful to sort out issues at an early stage in the drafting process, particularly if ... it is necessary, advisable or most efficient to involve

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17 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Submission*, p. S298.

18 Attorney-General's Department, *Submission*, pp. S513–514.

19 Department of the Prime Minister and Cabinet, *Legislation Handbook*, paragraph 5.6.

20 R. Mackay, 'A Drafter's View of Drafting', in Attorney-General's Department, Attachment D to Submission, p. S559.

21 Centre for Plain Legal Language, *Submission*, p. S310; DHHCS, *Submission*, pp. S359–360; AQIS, *Transcript*, p. 254.

the policy area in discussion between the instructors and OPC'.[22] Mr Turnbull indicated that meetings offer the additional benefit of training, and suggested that more meetings of drafters and instructors could be held 'so that junior instructors can watch their seniors in action and learn how to deal with the problems raised by drafters'.[23] OLD is also aware of the value of oral communications.[24]

*3.29* OPC has commented favourably on the inclusion of graphic and tabular material in instructions:

> *We have noticed the increasing use of diagrams and time lines as aids to instructions and we would like to encourage this. Diagrams and time lines often show a proposal or problem quickly and comprehensively ... They also tend to be conceptually clear and detailed and can be very useful in concentrating attention on time relationships and procedural flow.*
>
> *Tables can similarly be used to summarise otherwise diffuse material ...*[25]

*3.30* The Committee accepts that the preparation of legislation is so important that the preparation of written instructions (including graphic and tabular material where appropriate) is desirable, but considers that the benefits of meetings should not be overlooked.

*3.31* **Recommendation 5**

***The Department of the Prime Minister and Cabinet should re-write the* Legislation Handbook *to make it clear that oral instructions, given by telephone or in meetings, form an acceptable part of the instructing process once written instructions have been given.***

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22 V. Robinson, Letter dated 10 November 1992 from OPC to DSS, supplied to the Committee as an attachment to DSS, *Second Supplementary Submission*, p. S667.

23 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Submission*, p. S298.

24 R. Mackay, 'A Drafter's View of Drafting', in Attorney-General's Department, Attachment D to *Submission*, p. S561; Attorney-General's Department, 'Principles and Practice of Legislative Drafting: Supplementary Submission to the Standing Committee on Legal and Constitutional Affairs January 1993', submitted to the Committee under cover of a letter dated 6 January 1993, p. 11.

25 V. Robinson, Letter dated 10 November 1992 from OPC to DSS, supplied to the Committee as an attachment to DSS, *Second Supplementary Submission*, p. S667.

*Lay Drafts*

*3.32* A couple of submissions suggested that there may be some advantages in instructing officers giving drafts of legislation to drafters as instructions.

*3.33* The VLRC suggested that presentation of instructions in the form of draft legislation prepared by experienced instructing officers 'could act as an encouragement to drafters to express themselves more simply and to avoid the complex style which they have inherited'.[26]

*3.34* The Tasmanian Office of Parliamentary Counsel explained that a first draft of subordinate legislation is usually prepared by the Tasmanian Government department that administers the legislation, and commented:

> *This approach has the advantage of requiring the departmental officers to think out their policies and possible consequences in a concrete form.*[27]

*3.35* The ATO noted that until 1985, it used to provide draft provisions as part of its instructions, and that this process had some unspecified benefits as well as some disadvantages.[28]

*3.36* An experienced drafter from OLD explained to instructing officers the problems in using a draft prepared by an instructing officer (a 'lay draft') as instructions:

> *As a general rule, time is not saved by working from a lay draft - it is usually quite the opposite ... generally the use of a lay draft as drafting instructions is counterproductive because, irrespective of the quality of the draft from a formal point of view, the drafter cannot be sure of what precisely you are trying to achieve or whether, in fact, you have achieved it.*[29]

OPC expressed similar views.[30]

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26 VLRC, *Submission*, p. S410.

27 Tasmania, Office of Parliamentary Counsel, *Submission*, p. S172.

28 ATO, *Transcript*, pp. 452–453.

29 Attorney-General's Department, Attachment D to *Submission*, p. S560.

30 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Supplementary Submission - Responses to Questions, and Additional Material*, p. S615.

*3.37* A witness from the legal section of AQIS described to the Committee the difficulties AQIS experiences with the use of lay drafts as a basis for legislation:

> *The way that it works in AQIS is that, to a large extent, the policy areas present [the legal section] with a lay draft of the orders they want made and then it is a matter of allocating a lawyer to work with somebody within the policy area to ... turn it into a reasonable set of orders ... it seems to me that that really just lengthens the process, rather than doing it by the policy area providing a narrative form of instructions ... I think that would simplify it, really.*[31]

*3.38* The evidence from other jurisdictions in which lay drafts are submitted as drafting instructions (for subordinate legislation) does not suggest that there are net benefits in the practice.

*3.39* Having noted the advantage of lay drafts of subordinate legislation, the Tasmanian Office of Parliamentary Counsel pointed out that 'legislative drafters re-write each draft to such extent as may be necessary to give proper effect to the required policy and to ensure that it is within the powers conferred by the relevant Act'.[32]

*3.40* Parliamentary Counsel for New South Wales, Mr Dennis Murphy Q.C., commented:

> *We still accept draft regulations as instructions, but invariably we rewrite them. We even start again in most cases.*[33]

*3.41* As part of its review of the Queensland Office of Parliamentary Counsel in 1991, EARC received compelling evidence against the practice of submitting lay drafts, and concluded that:

- instructions should concentrate on the intention, rather than form, of legislation; and
- it would be more efficient for instructing agencies to prepare descriptive written instructions rather than draft legislation.[34]

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31 AQIS, *Transcript*, pp. 253–254.

32 Tasmania, Office of Parliamentary Counsel, *Submission*, p. S172.

33 D. Murphy Q.C., Parliamentary Counsel for New South Wales, *Transcript*, p. 6.

34 EARC, *Report on Review of the Office of the Parliamentary Counsel*, pp. 35–36.

*3.42* The Committee believes that the practice of using lay drafts as instructions should not be used within the Commonwealth Government.

*3.43* The next chapter discusses some of the other issues associated with drafts prepared by people other than professional drafters.

## What Matters Should Instructions Cover?

### *Contents of Instructions*

*3.44* The *Legislation Handbook* gives a general indication of some of the matters that should be dealt with in instructions for a Bill, then provides a detailed list of matters that need to be considered in preparing instructions and, where appropriate, addressed in instructions.[35] The matters include:

- commencement of the legislation;[36]
- retrospectivity;
- application of legislation to external Territories;
- whether the Act is to bind the Crown;
- savings and transitional provisions;[37]
- legal policy issues such as jurisdiction of courts, evidentiary matters, administrative law matters, legal aid and human rights;
- delegation and financial provisions; and
- regulation-making powers.

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35 Department of the Prime Minister and Cabinet, *Legislation Handbook*, Chapter 5.

36 The Australian Law Librarians' Group noted that commencement of Acts is in some cases dependent on events that may be difficult for an ordinary person to discover: Australian Law Librarians' Group, *Submission*, pp. S252–253. The examples the Group gave appeared to reflect problems that would have been outside the drafter's control, suggesting that, in some cases, instructing officers may need to give greater consideration to commencement arrangements.

37 Transitional provisions were the subject of particular concern: see Administrative Appeals Tribunal, *Submission*, p. S31. A former South Australian Supreme Court judge has expressed a similar concern:

> '... the judicial officers who give those decisions [dealing with transitional problems] are uncomfortably aware (and they often say so) that their real task is not to ascertain the intention of Parliament, but to decide what to do where Parliament has not formed an intention at all.
>
> To deal explicitly with transitional problems and to eschew that task represents the difference between a job well done and a job ill done. The fault in performance occurs towards the end of the stage where the draftsman is being given his instructions.'

(*The Hon. A. Wells, A.O., Q.C., 'Law-makers and their instructions to parliamentary counsel', in D.* St L. Kelly (ed.), *Essays on Legislative Drafting in Honour of J Q Ewens, CMG, CBE, QC*, p.129.)

OLD has advised many instructing officers that several of these matters also need to be addressed before instructions for subordinate legislation are finalised.[38]

*3.45* A notable omission from the general matters indicated in the *Legislation Handbook* is a statement of the objects of the proposed legislation. Both AQIS and DVA noted the importance of explaining in instructions the purpose of the proposed legislation.[39]

*3.46* The *Federal Executive Council Handbook* merely indicates that instructions need 'to explain the precise nature and purposes of the proposed Regulation or Ordinance'.[40] A drafter from OLD has, however, advised instructing officers:

> *Your instructions should, ideally, set out the objects of your proposals and, in detail, the way these objects are to be achieved. Difficulties of a legal, administrative or other nature should be covered in the instructions ...*
>
> *Background information and copies of relevant material on which the instructions are based should be included with your instructions. They should not form part of the actual instructions, however, as submission documents, agreements, treaties etc are prepared for different audiences and require different considerations from instructions. In my view it is better to give us [drafters] too much material rather than too little as we really can't begin to draft satisfactorily without full knowledge of your requirements. In other words, the drafter needs to be given the complete picture of the policy intentions.*[41]

*3.47* OPC has indicated it is desirable that instructions be in a standard format that clearly distinguishes between instructions and background material and includes the headings for sections indicating:

- legislative provisions affected by the proposed legislation;
- other provisions relevant to the proposed legislation;

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38 R. Mackay, 'A Drafter's View of Drafting', in Attorney-General's Department, Attachment D to *Submission*, pp. S557–559.

39 AQIS, *Submission*, p. S444; DVA, *Submission*, p. S484.

40 Department of the Prime Minister and Cabinet, *Federal Executive Council Handbook*, paragraph 5.34.

41 R. Mackay, 'A Drafter's View of Drafting', in Attorney-General's Department, Attachment D to *Submission*, pp. S559–560.

- related matters in any other drafting instructions;
- commencement arrangements for the proposed legislation;
- application of the proposed legislation;
- the authority for the proposed legislation; and
- the contact officer in the instructing agency.[42]

*3.48* **Recommendation 6**

***The Department of the Prime Minister and Cabinet should re-write the* Legislation Handbook *to emphasise the need for instructions to identify clearly:***

***(a) the objects of the proposed legislation;***
***(b) legislative provisions affected by the proposed legislation;***
***(c) other provisions relevant to the proposed legislation; and***
***(d) related matters in any other drafting instructions.***

*Level of Detail in Instructions*

*3.49* The *Legislation Handbook* prescribes that:

> *Instructions must ... be complete, accurate and comprehensive, instructions should not just paraphrase a Cabinet Minute. Instructions must provide accurate information on all relevant matters of detail intended to be covered by the legislation.*[43]

OLD has indicated a similar desire for detail in instructions.[44]

*3.50* There is, however, a view that too much detail can be provided in instructions. Mr Geoffrey Hackett-Jones Q.C., South Australian Parliamentary Counsel, has written:

> *The main danger in asking the client to provide instructions on every detail of a legislative scheme is that the client will accede to the request. This already tends to happen in the Commonwealth, where legislative instructions are commonly prepared in oppressive*

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42 V. Robinson, Letter dated 10 November 1992 from OPC to DSS, supplied to the Committee as an attachment to DSS, *Second Supplementary Submission*, p. S669.

43 Department of the Prime Minister and Cabinet, *Legislation Handbook*, paragraph 5.6.

44 R. Mackay, 'A Drafter's View of Drafting', in Attorney-General's Department, Attachment D to *Submission*, pp. S559–560.

*detail. However as instructions increase in volume and complexity, so is the role of Parliamentary Counsel diminished. Diminution of this role will inevitably seriously prejudice the quality of legislation.*[45]

*3.51* Parliamentary Counsel for New South Wales, Mr Dennis Murphy Q.C., told the Committee:

*In some cases we say we do not need instructions because there is sufficient information in a Cabinet minute and all we will get is a request to draft a Bill based on the information contained in the Cabinet minute. We take it from that point on. If we do not understand where a policy is going then we will speak to the department by just picking up the phone or writing them a note. We find that far more efficient than going through a process of getting a department to write out what it thinks the policy should be in great detail.*[46]

*3.52* However, there appears to be a risk in providing the drafter with too little detail in instructions: the drafter's lack of knowledge of the subject may mean that, unless he or she is given enough detail in instructions, the legislation may fail to cover important matters. The New South Wales Bar Association stated:

*It is the Bar Association's impression that the greatest difficulties of interpretation of statutes arise where "the Legislature" has plainly not turned its mind at all to the circumstances under consideration. This responsibility must rest with the administrative agency [instructing the drafter] and may only be avoided by adequate knowledge of the circumstances to be regulated ...*[47]

*3.53* The Committee does not believe that there is a case for urging Commonwealth agencies to provide less detail in their instructions to drafters. If, as the Committee has recommended in Chapter 2, the drafter is involved in the legislative process before instructions are given, the policy reflected in the instructions should be at a level of detail that makes for clear expression in legislation. A reduced level of

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45 G. Hackett-Jones Q.C., 'The scar of Odysseus and the role of parliamentary counsel in the legislative process', in D. St L. Kelly (ed.), *Essays on Legislative Drafting in Honour of J Q Ewens, CMG, CBE, QC*, p. 54.

46 D. Murphy Q.C., Parliamentary Counsel for New South Wales, *Transcript*, pp. 6–7.

47 New South Wales Bar Association, *Submission*, p. S200.

detail in instructions may:

- negate the value of preparing preliminary drafting instructions in helping ensure that the ramifications of policy have been considered; and
- lead to hasty policy-making during the drafting process if the drafter must ask the instructing agency about details that would have been considered earlier and more thoroughly had it been necessary to include them in the instructions.

## Aids for Preparation of Better Instructions

### *Training Instructing Officers*

*3.54* The Committee received evidence that instructing officers' skills grow both on the job and with training.[48]

*3.55* Drafting agencies and some instructing agencies have given training to instructing officers.[49] However, many of the organisations that gave evidence to the Committee considered that instructing officers should receive more training.[50]

*3.56* There was a widespread expectation that drafting agencies should provide much of the extra training that was seen to be needed.[51]

*3.57* AQIS seemed to suggest that improved instructions resulting from better-trained instructing officers would more than offset the resources used by drafting agencies in providing training.[52] Other evidence suggested that drafting agencies could charge for providing

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48 V. Robinson, Letter dated 10 November 1992 from OPC to DSS, supplied to the Committee as an attachment to DSS, *Second Supplementary Submission*, p. S665.

49 Attorney-General's Department, *Submission*, pp. S515 & S517; Attorney-General's Department, *Supplementary Submission*, p.S650; I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Supplementary Submission - Responses to Questions, and Additional Material*, p. S602; DVA, *Submission*, p. S480; DVA, *Exhibit 16(iii)*; Australian Customs Service, *Submission*, p. S432. DHHCS is in the process of developing a training package for its instructing officers: *Submission*, p. S359.

50 Mallesons Stephen Jaques, *Submission*, p. S215; VLRC, *Submission*, p. S410; AQIS, *Submission*, p. S444; Attorney-General's Department, *Submission*, p. S519; DSS, *Second Supplementary Submission*, p. S661.

51 VLRC, *Submission*, p. S410; AQIS, *Submission*, p. S444; Attorney-General's Department, *Submission*, p. S519; DSS, *Second Supplementary Submission*, p. S661.

52 AQIS, *Submission*, p. S444.

training.[53]

*3.58* Despite these possible offsets, it is not clear that drafting agencies could provide extra training without additional resources. OLD expressed a willingness to provide the extra training if additional resources were available.[54] It explained why it considered extra resources were needed:

> *[Training programs] are ... resource intensive and could result in the deployment of experienced drafters away from their main drafting tasks for varying periods of time.*
>
> *For training to be effective, the drafting [agency] components need to be provided by experienced senior drafters. From the [Attorney-General's] Department's point of view, senior experienced drafters are a scarce resource.*[55]

*3.59* Mr Turnbull noted that there are a number of measures that instructing agencies could take to increase instructing skills of their officers without requiring any extra assistance from drafting agencies:

- allowing officers to build up experience as instructing officers;
- adopting a system in which more experienced instructing officers acted as mentors to less experienced officers;
- holding more meetings with drafting agencies to allow less experienced instructing officers to learn by watching more experienced colleagues discuss matters with drafters; and
- sending instructing officers to courses and conferences about legislative drafting.[56]

*3.60* The Committee sees value in provision of extra training for instructing officers, particularly in agencies that do not have a centralised instructing area, as a means of increasing the efficiency of the legislative process in both instructing and drafting agencies. Drafting agencies will need to play a role in providing training. At least in the short term, provision of extra training for instructing officers by drafting agencies is likely to impose a net burden on these agencies.

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53 DSS, *Second Supplementary Submission*, p. S661; Attorney-General's Department, *Supplementary Submission*, p.S650.

54 Attorney-General's Department, *Submission*, p. S 519.

55 Attorney-General's Department, *Supplementary Submission*, pp.S650-651.

56 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Submission*, pp. S298–299.

3.61 **Recommendation 7**

***Drafting and instructing agencies should co-operate to develop more, regular training programs for officers who will be giving instructions to drafters.***

*Manuals and Checklists for Instructing Officers*

3.62 The *Legislation Handbook* states:

> *The purpose of this handbook is to provide a description of the procedures involved in making Commonwealth Acts. It is intended as a guide for departmental officers and focuses on matters which require action by departmental officers.*
>
> *... procedures for making subordinate legislation, such as regulations and ordinances, are set out in the ...* Federal Executive Council Handbook ... [57]

3.63 DHHCS commented:

> *The* Legislation Handbook *acts as a guide to instructing officers as to what should be included in drafting instructions. It concentrates on specific legal policy and financial provisions. Whilst the* Legislation Handbook *is of some benefit, it could more clearly define the matters which should be considered in preparing drafting instructions.*[58]

3.64 There is no guide like the *Legislation Handbook* available for preparing instructions for subordinate legislation. The *Federal Executive Council Handbook* provided minimal guidance on preparation of instructions for drafting of subordinate legislation,[59] and is in any case out of print.

3.65 The Committee is concerned about the deficiencies in manuals for guidance of officers preparing instructions for preparation of legislation, especially subordinate legislation.

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57 Department of the Prime Minister and Cabinet, *Legislation Handbook*, p. 1.

58 DHHCS, *Submission*, p. S359.

59 Department of the Prime Minister and Cabinet, *Federal Executive Council Handbook*, paragraph 5.34.

*3.66* Recommendation 8

***The Department of the Prime Minister and Cabinet, in consultation with the Office of Parliamentary Counsel, the Office of Legislative Drafting and agencies which give instructions, should re-write the*** Legislation Handbook ***to deal comprehensively with the preparation of instructions for Bills and subordinate legislation.***[60]

*3.67* A number of submissions suggested that OPC should provide checklists or sets of questions, possibly embodied in a computerised expert system, to instructing officers to help them ensure that their instructions address all relevant issues.[61]

*3.68* OPC has already provided at least one department with a suggested form for instructions that prompts the instructing officer to address some important issues.[62]

*3.69* The diversity of possible proposals for legislation makes it very difficult to draw up a comprehensive checklist for instructions. The diversity of legislative proposals and computer equipment within the Commonwealth Government make it likely that preparing a computerised expert system to guide instructing officers would be a complex, expensive exercise.

*3.70* It may well be more productive and less confusing for an instructing officer to follow the approach laid down in the *Legislation Handbook*. This provides that when a legislative proposal raises a particular broad issue (e.g. review of administrative decisions) the instructing officer should consult the relevant specialist area of the Government.[63] This procedure allows a specialist to identify the relevant matters that need to be addressed in drafting instructions, and could save the instructing officer from being confronted with a checklist containing an array of questions, the relevance of which may not be immediately apparent.

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60 While the *Legislation Handbook* would cover all types of legislation, there is still a place for a *Federal Executive Council Handbook* to explain procedures for submitting to the Council documents other than legislation.

61 Mallesons Stephen Jaques, *Submission*, p. S215; DHHCS, *Submission*, pp. S359–360; VLRC, *Submission*, p. S410.

62 V. Robinson, Letter dated 10 November 1992 from OPC to DSS, supplied to the Committee as an attachment to DSS, *Second Supplementary Submission*, p. S669.

63 Department of the Prime Minister and Cabinet, *Legislation Handbook*, Chapter 5.

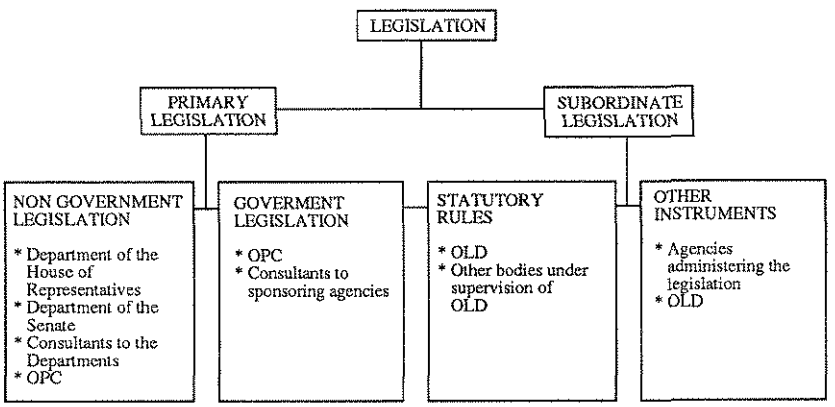
*3.71* The changes to the *Legislation Handbook* suggested in this chapter and elsewhere should help make it a more useful guide for instructing officers.

# 4 WHO SHOULD DRAFT LEGISLATION?

## Introduction

*4.1* At present, the work of legislative drafting is divided between many Commonwealth agencies and a few consultants according to a variety of criteria. Figure 1 illustrates this division.

**Figure 1. Current Distribution of Responsibility for Drafting Commonwealth Legislation**




*4.2* This chapter considers the issue of who should be involved in drafting legislation.

*4.3* The general question of who should be involved in legislative drafting is addressed by considering a series of issues, initially broad, then becoming more refined. The issues are:

- Should lawyers or non-lawyers be responsible for drafting legislation?
- Should government or private lawyers be responsible for drafting legislation?
- Should one government drafting agency be responsible for the drafting of all legislation?
- Should one government drafting agency be responsible for drafting all Bills?
- Should one government drafting agency be responsible for the drafting of all subordinate legislation?

## Should Lawyers or Non-lawyers be Responsible for Drafting Legislation?

*4.4* One submission proposed that legislation should not be drafted by lawyers, arguing that the most precise English was written by people who prepare technical manuals.[1]

*4.5* Most of the people who gave evidence to the Committee on the subject, however, recognised that there was a role for lawyers in drafting.

*4.6* Mr Turnbull's description of the drafter's job indicated why it is important to have lawyers involved in drafting:

> *Many people think that the role of the drafter is merely to put the policy of the sponsors into "proper legal language". This is far from the case. Normally, less than half the time of the drafter is spent in formulating the language. Some of the matters involving the drafter are:*
>
> - *considering the constitutional powers and prohibitions surrounding the subject matter;*
> - *considering the existing legal framework in which the proposals are to be formulated;*
> - *finding out the exact wishes of the sponsors;*

1 J. Russell, *Submission*, p. 850.

- *pointing out gaps in the proposed scheme, or anomalies that may result from the expressed wishes of the sponsors;*
- *pointing out where the proposals may offend against civil liberties or involve other matters of legal principle;*
- *anticipating legal and practical problems in carrying out the policy.*[2]

*4.7* Several people argued that the lawyer's role in drafting should not exclude people who are not lawyers.

*4.8* People who are not lawyers can bring to the drafting of a particular piece of legislation technical expertise in the subject of the legislation, or in communication.[3] In particular, Mallesons Stephen Jaques and DEET noted the benefits of involving an expert in plain English in drafting legislation.[4] SoftLaw Corporation said that the delivery of legislation to users through knowledge-base systems could be improved if drafters worked with computer programmers who develop knowledge-base systems, so legislation is made more amenable to this form of access.[5]

*4.9* A number of witnesses considered that these people could be grouped in teams with a legislative drafter to develop a piece of legislation, although ultimately only one person would prepare the basic draft.[6]

*4.10* Dr Robyn Penman pointed out that involving a non-lawyer in the development of legislation would bring to the job a different perspective: one closer to that of many users of the legislation:

> *legal training does do something to the way people think. I think it is very important that you have got somebody who does not think like that amongst the group, particularly when you are developing the basic structure of the legislation and the basic concepts–the backbone–because the way in which it is thought through legally can be quite different from the way in which somebody who wants to use it will think about it.*[7]

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2 *I.M.L. Turnbull Q.C., First Parliamentary Counsel, Submission*, p. S270.

3 *See, for example: D. Murphy Q.C., Parliamentary Counsel for New South Wales, Transcript*, p. 15; Business Council of Australia, *Transcript*, pp. 245–246.

4 *Mallesons Stephen Jaques, Submission*, p. S212; DEET, *Submission*, p. S581-582.

5 *SoftLaw Corporation, Submission*, p. S413.

6 *Mallesons Stephen Jaques, Transcript*, p. 38; Attorney-General's Department, *Transcript*, p.281.

7 *Dr R. Penman, Transcript*, p. 375.

*4.11* The Committee believes that people who are not lawyers can make a great contribution to the development of legislation, especially in development of policy and by commenting on drafts. However, the Committee considers that lawyers should have ultimate responsibility for drafting legislation to ensure (as far as possible) that it is legally effective.

## Should Government or Private Lawyers be Responsible for Drafting Legislation?

*4.12* At present, most Commonwealth legislation is drafted by Commonwealth public servants. With the approval of First Parliamentary Counsel, some jobs are contracted out to private drafters, who are generally former senior members of OPC.

*4.13* The Law Institute of Victoria, the VLRC, the Taxation Institute of Australia and the Law Society of the Australian Capital Territory called for dismantling of the government monopoly on drafting so more drafting work could be contracted out to private lawyers.[8]

*4.14* In considering whether the government role in drafting should be diminished to facilitate private legislative drafting, three issues need to be considered:

- public policy considerations associated with the public nature of legislation;
- the quality of legislation that would be produced; and
- efficiency.

### *Public Policy Considerations*

*4.15* Professor John Farrar, Professor of Commercial Law at the University of Melbourne, told the Committee that 'Legislation is the ultimate expression of public interest. One needs to be very careful who handles it...'.[9]

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8 Law Institute of Victoria, Submission, pp. S460–461; VLRC, *Submission*, pp. S402–404; Taxation Institute of Australia, *Submission*, p. S241; Law Society of the Australian Capital Territory, *Submission*, p. S470.

9 Business Council of Australia, *Transcript*, p. 241. Professor Farrar indicated that these views were 'not necessarily institutional views'.

*4.16* The VLRC noted that arguments of confidentiality and conflict of interest might be raised against the proposal to allow more private drafting. The Commission dismissed these arguments, saying that 'The private profession is used to dealing with confidential matters. Public servants have no monopoly over integrity.'[10]

*4.17* While both points raised by the VLRC are valid, they do not deal fully with the issues. The VLRC argued that one of the advantages of contracting drafting work out to the private profession was that private lawyers would have expertise in the field to be covered by the legislation. A private lawyer with expertise in a field may also have clients with particular interests in that field. Those interests may well not coincide with the intentions for legislative regulation of the field. Professor Farrar said:

> *As regards farming [drafting work] out to the private sector, I have a slight problem with that because of the risk of conflict of interest very easily incurred by people in the private sector.*[11]

*4.18* The Committee accepts that lawyers in private practice are used to dealing with confidential matters, and that, where necessary, it is possible to try to protect confidentiality by contractual arrangements. The Committee remains concerned, however, about the possibility of conflict of interest that may arise if drafting work is contracted out to drafters in the private legal profession.

*Quality of Legislation Drafted*

*4.19* Four issues are considered in the following sections of this discussion of the relative quality of legislation drafted by private lawyers and government drafting agencies:

- whether legislative drafting is a specialist skill;
- Australian experience with the quality of legislation drafted by private lawyers;
- whether development of a market in legislative drafting services would improve the quality of drafting by private law firms; and

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10 VLRC, *Submission*, p. S404.

11 Business Council of Australia, *Transcript*, p. 241. Professor Farrar indicated that these views were 'not necessarily institutional views'.

- control of the quality of legislation.

*Drafting is a Specialised Skill*

*4.20* Both OPC and OLD accepted that private lawyers can draft, but said that legislative drafting was best done by people who specialised in it, and under the control of a central body that provided an assurance of quality.[12] This part of the report considering the relative quality of drafting done by government and private lawyers looks first at the issue of specialisation, then at quality and quality control.

*4.21* Professor Kelly of the VLRC told the Committee:

> *I do not accept that there is a huge level of skill required for parliamentary drafting, as put around by Parliamentary Counsel themselves quite often.*[13]

He elaborated his view:

> *Legislation is no different from other legal documents in relating to drafting. If you can write a letter, you should be able to draft legislation.*[14]

*4.22* As Professor Kelly predicted, his view was disputed by parliamentary counsel who gave evidence supporting specialisation in drafting.

*4.23* Parliamentary Counsel for New South Wales told the Committee:

> *I think it [legislative drafting] has a specialist nature. I think that legislative drafting falls outside the mainstream of legal work—that is the ability to look into the future and to generalise the principles in a way that perhaps the average lawyer is not required to do. The average lawyer is either looking at things and sorting out what has happened in the past or he is looking at arrangements that happen on a one-to-one basis between particular parties in the immediate*

12 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Submission*, p. S295; Attorney-General's Department, *Submission*, p. S495.

13 VLRC, *Transcript*, p. 158.

14 VLRC, *Transcript*, p. 170.

*future. We say that it takes a degree of training, as well as aptitude, to reach this stage and that we need to make it a career function so that people with the special skills can be developed and nurtured.*[15]

Mr Turnbull endorsed this view.[16]

*4.24* The Tasmanian Office of Parliamentary Counsel submitted that 'drafting is a skill that is acquired and refined mainly through years of practice'.[17]

*4.25* Mr Turnbull pointed out that experience from English-speaking jurisdictions outside Australia suggested that specialisation in drafting is desirable to promote quality drafting.[18]

*4.26* Legislative drafters were not the only people who considered that legislative drafting is a speciality. A number of Commonwealth bodies recognised that legislative drafting was best done by specialists.[19]

*4.27* Mr Geoff Gosling, manager of the AQIS legal section that drafts some legislation and instructs drafting agencies to draft Acts and regulations, said:

*I do not think a law degree is a guarantee that the person [holding the degree] is going to be a good drafter.*[20]

### *Relative Standards of Private and Government Drafting*

*4.28* Many witnesses connected with the legal profession told the Committee that the standard of general drafting in the private legal profession is very uneven, and that an appreciable quantity of the

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15 D. Murphy Q.C., Parliamentary Counsel for New South Wales, *Transcript*, p. 9.

16 I.M.L. Turnbull, Q.C., First Parliamentary Counsel, *Supplementary Submission - Responses to Questions, and Additional Material*, p. S619.

17 Tasmania, Office of Parliamentary Counsel, *Submission*, p. S169. See also the similar view expressed by a former First Parliamentary Counsel: G. Kolts Q.C., *Transcript*, p. 434.

18 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Submission*, pp. S290–294.

19 See, for example: Department of the Senate, *Submission*, p. S124; Australian Customs Service, *Submission*, p. S433.

20 AQIS, *Transcript*, p. 258.

drafting is bad.[21] Some of these witnesses said that there was some very good drafting done by a few private lawyers.[22]

*4.29* With one exception,[23] the evidence indicated that draft legislation prepared by private lawyers without considerable drafting experience in a government drafting agency was unsatisfactory.

*4.30* Victorian Chief Parliamentary Counsel told the Committee:

> *What we find with drafts submitted to us is that all the hard bits have been left out. No-one ever attempts to do consequential amendments, which is a hideously boring job, and yet it is an essential part of it. Transitional provisions are very difficult, and they are usually left out. It is the nice bits that are done, and they are not always right either.*[24]

*4.31* Parliamentary Counsel for New South Wales outlined experience in that State:

> *Some agencies on big jobs have gone to some of the larger law firms and someone in the law firm ... will produce a draft Bill to cover a particular situation. ... We [Parliamentary Counsel's Office] then have to go through it [the draft] and point out what problems there are in it ... there are usually a number of problems, positive mistakes and omissions and they are almost invariably expressed in a fairly complex way.*[25]

*4.32* The Tasmanian Office of Parliamentary Counsel indicated that draft Bills on new subjects prepared by consultants have often had deficiencies.[26]

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21 Mallesons Stephen Jaques, *Transcript*, p. 33; New South Wales Bar Association, *Transcript*, p. 119; VLRC, *Transcript*, p. 160; Law Institute of Victoria; *Transcript*, p. 202; Mr Geoffrey Kolts Q.C., *Transcript*, p. 434.

22 Mallesons Stephen Jaques, *Transcript*, p. 33; VLRC, *Transcript*, p. 160; Law Institute of Victoria, *Transcript*, p. 202.

23 VLRC, *Transcript*, p. 170.

24 R. Armstrong Q.C., Chief Parliamentary Counsel for Victoria, *Transcript*, p. 221.

25 D. Murphy Q.C., Parliamentary Counsel for New South Wales, *Transcript*, p. 10.

26 Tasmania, Office of Parliamentary Counsel, *Submission*, p. S172.

*4.33* A former First Parliamentary Counsel for the Commonwealth observed:

> *Where we have tried [contracting drafting work out to people who are not trained legislative drafters] from the Bar and from other areas, the people concerned have never been satisfactory. It is not that they are not intelligent or not good lawyers but they are just not trained drafters. Experience has shown that the work has to be done again.*[27]

*Would Market Forces Improve Private Sector Legislative Drafting?*

*4.34* It was put to the Committee that the development of a market in legislative drafting would act as a stimulus to private law firms in, or planning to enter, the market to improve drafting skills.

*4.35* The Committee heard that some of the larger firms have recognised general drafting skills as a marketing tool and have spent time, effort and money in training their staff to draft clearly.[28]

*4.36* On the other hand, Mr Geoffrey Kolts Q.C., a former First Parliamentary Counsel who now does some legislative drafting work as a consultant with a private law firm, did 'not think that the law firms would be particularly interested' in developing a market in legislative drafting.[29] He suggested a firm wanting to establish a private practice in legislative drafting would need to hire experienced drafters currently working for government.[30]

*4.37* None of the submissions to the Committee from law firms or individuals who identified themselves as private lawyers expressed any interest in undertaking legislative drafting work, although one lawyer expressed interest in joining a government drafting agency. The only body that gave evidence to the Committee and expressed interest itself

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27 G. Kolts Q.C., *Transcript*, p. 433. See Attachment B to I.M.C. Turnbull Q.C., *Supplementary Submission - Response to Questions, and Additional Material*, pp. S623-626, for a discussion of the results of an experiment in 1964 where 6 private barristers were engaged to draft legislation. In short, none of the resulting drafts were 'suitable for dispatch as settled drafts' and 'In most cases, the alterations made to the drafts were so extensive that the legislation that was eventually enacted bore little resemblance to the drafts prepared by Counsel.'

28 Law Institute of Victoria, *Transcript*, p. 202.

29 G. Kolts Q.C., *Transcript*, p. 433.

30 G. Kolts Q.C., *Transcript*, p. 434.

in taking on legislative drafting work commercially was the VLRC,[31] which already had legislative drafting skills and experience.

*4.38* It is possible that the widely held view, discussed above, that legislative drafting is a specialist activity would inhibit development of a market in drafting by deterring private lawyers from entering the market.

*Difficulty of Quality Control*

*4.39* The people proposing that the government monopoly on legislative drafting be dismantled suggested that government drafting agencies would retain a role in providing quality control for all legislation.[32]

*4.40* Satisfactory quality control of something as diverse as legislation is likely to require a set of relatively objective criteria. If the criteria were purely subjective there would probably be difficulties in maintaining a market in legislative drafting services, especially if government drafting agencies were both competitors in providing, and regulators of, legislative drafting. Mr Turnbull pointed out a fundamental difficulty:

> *Professor Kelly [of the VLRC] ... said that the drafting of legislation by private drafters would have to be "subject to supervision from [central office] and subject to standards from the centre". This overlooks the fact that if the central office supervised drafting and imposed its own standards, it would have the very effect that Professor Kelly deplores, namely that Parliamentary Counsel impose their style on legislative drafting.*[33]

*4.41* Professor Kelly thought that this problem could be overcome:

> *if you can ... get proper drafting standards within the Office of Parliamentary Counsel, then it can impose those on the people who are drafting outside. Those guidelines can be government guide*

31 VLRC, *Transcript*, pp. 156–157.

32 Law Institute of Victoria, *Submission*, pp. S460–461; VLRC, *Submission*, pp. S402–404; Taxation Institute of Australia, *Submission*, p. S241; Law Society of the Australian Capital Territory, *Submission*, p. S470.

33 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Submission*, p. S291.

*lines, not just applicable to the Office, but applicable to anybody who is going to do any drafting ...*[34]

*4.42* This, however, does not solve the problem of establishing appropriate standards. For reasons discussed in Chapter 8, it is likely to be very difficult to set objective standards.

*4.43* Senior, experienced drafters would be needed in government drafting agencies to carry out quality control work on draft legislation prepared by private drafters. There may be a shortage of experienced senior drafters in government service if they were to be recruited by law firms entering the legislative drafting services market.

*4.44* The question of quality control for legislation drafted outside a drafting agency was considered in EARC's review of the Office of Parliamentary Counsel in Queensland. The Office advised the Commission that 'a quality control role ... is difficult to carry out effectively'.[35] The system that the Commission recommended and that is embodied in the *Legislative Standards Act 1992* of Queensland, reflects current Commonwealth practice by giving Parliamentary Counsel the power to decide whether a drafter outside the Office should be engaged,[36] effectively creating a government monopoly on legislative drafting.

*4.45* A further problem in having a central quality control function over decentralised drafters was identified by Mr Turnbull who pointed out that 'it is more difficult for [drafters outside a drafting agency] to keep in touch with the Office's developments in plain English drafting'.[37]

### *Conclusions on Quality of Drafting by Private and Government Lawyers*

*4.46* The weight of evidence received by the Committee suggests that specialisation in drafting is likely to produce better quality drafting.

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34 VLRC, *Transcript*, p. 161.

35 EARC, *Report on Review of the Office of Parliamentary Counsel*, p. 34.

36 EARC, *Report on Review of the Office of Parliamentary Counsel*, p. 36; *Legislative Standards Act 1992* (Qld), subsection 8 (1).

37 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Supplementary Submission - Responses to Questions, and Additional Material*, p. S613.

*4.47* The Committee considers that there is no reason to conclude that allowing private drafters to draft legislation will improve the quality of legislation.

*Efficiency of Government or Private Lawyers Drafting Legislation*

*4.48* The consideration in the following sections of the relative efficiency of having legislation drafted by private lawyers or government drafting agencies looks at five issues:

- giving effect to government priorities;
- current levels of satisfaction with the services of government drafting agencies;
- the amount of work needed to instruct private lawyers;
- cost; and
- timing.

*Government Priorities*

*4.49* Parliamentary Counsel for New South Wales identified possible problems in giving effect to government priorities if all government agencies were allowed direct access to private drafters:

> *If agencies were to be given direct access to private drafting facilities, there would be the substantial risk that agencies would be able to determine legislative priorities without central supervision, so that low priority matters would be promoted (and paid for) when more important matters should be dealt with.*[38]

*Current Satisfaction with Drafting Offices*

*4.50* In spite of criticism of Commonwealth drafting offices by others, many of the Commonwealth bodies that gave evidence to the Committee indicated that they were pleased with the standard of service the drafting offices provide.[39]

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38 D. Murphy Q.C, Parliamentary Counsel for New South Wales, *Submission*, p. S193.

39 See, for example: Clerk of the House of Representatives, *Submission*, p. S 41; Standing Committee for the Scrutiny of Bills, *Submission*, p. S48; Senate Standing Committee on Regulations and Ordinances, *Submission*, p. S226; DVA, *Submission*, pp. S481 & S486; Department of Defence, *Submission*, p. S564; DSS, *Transcript*, p. 381; ATO, *Transcript*, p. 453.

*Extra Work in Instructing a Private Drafter*

*4.51* DSS noted that its recent use of a private drafter to draft a Bill 'required more work by departmental staff in instructing the drafter' and concluded that 'as a model for general adoption it was not a success'.[40]

*Relative Costs of Private and Government Drafters*

*4.52* The Committee was informed that it would cost more to engage private drafters than use a government drafting agency.[41] Mr Turnbull supplied figures showing that engaging on a full-time basis either of the consultant drafters currently used by the Commonwealth would be more than twice as expensive as employing an officer capable of doing the same level of work:

> *One consultant charges $325 an hour, the other $160. Extrapolating these into a yearly salary based on, say, a 45-hour week, less 4 weeks leave, I calculate their annual costs as being $702,000 and $345,600 respectively (this is conservative, because they often work much longer hours).*
>
> *Their most difficult tasks could be drafted by a First Assistant Parliamentary Counsel (SES Band 2), and less difficult tasks could be drafted by a Senior Assistant Parliamentary Counsel (SES Band 1) or a more junior officer with some supervision by an SES officer.*
>
> *I set out below the relative annual cost of employing the officers referred to above, comprising salary, benefits and administrative on-costs. I should add that they are not entitled to extra pay for overtime.*
>
> | | |
> |---|---|
> | *First Assistant Parliamentary Counsel:* | *$138,875* |
> | *Senior Assistant Parliamentary Counsel:* | *$114,834* |
> | *Legal 2 Assistant Parliamentary Counsel:* | *$ 76,592* |
> | *Legal 1 Assistant Parliamentary Counsel:* | *$ 66,951*[42] |

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40 DSS, *Submission*, p. S158.

41 D. Murphy Q.C., Parliamentary Counsel for New South Wales, *Transcript*, p. 11

42 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Supplementary Submission - Response to Questions, and Additional Material*, p. S614.

*4.53* Development of a market for legislative drafting skills might reduce consultancy charges. However, market forces would obviously need to reduce consultancy fees considerably to make private drafting competitive with government drafting. As discussed above, it is not clear that a market would develop to a great extent. It is hard to envisage how private firms could reduce fees to a competitive level in the short term if, as seems likely, development of a market depends on firms attracting skilled senior drafters from government drafting agencies by paying higher salaries.

*4.54* An additional cost that would result from use of private drafters is the step of a separate quality check by government drafting agencies on private drafters' work.

*4.55* In a passage quoted by Mr Turnbull,[43] the Canadian drafter Professor Driedger observed:

> *Even assuming that a perfect Bill is submitted to the draftsman, he must still subject it to the complete drafting process, for how else can he discover that it is a perfect Bill and satisfy himself that it will give legislative effect to the intended policy?*[44]

*4.56* The evidence of Victorian and New South Wales Parliamentary Counsel quoted above suggests that a government drafting agency might need not only to check, but also to do more work on, draft legislation submitted by private drafters. It is possible, however, that the cost of extra work needed might diminish over time as private drafters' skills increased.

### *Timing of Work by Private Lawyers*

*4.57* The VLRC raised and dismissed the argument of involvement of the private legal profession in drafting causing difficulties with timing:

> *There may, of course, be cases where experts in the private profession cannot make sufficient time available to tender for or accept a job of drafting legislation for a Department or Agency. But*

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43 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Supplementary Submission - Responses to Questions, and Additional Material*, p. S615.

44 E. Driedger, 'The Preparation of Legislation', (1953) 31 *Canadian Bar Review* 33, 41.

*that is no reason for not using the private profession in a case where that problem does not exist.*[45]

*4.58* Two problems with timing can arise that could create difficulties if a private drafter were involved.

*4.59* First, although there may seem to be time when the job is contracted out, government priorities could change, making the job more urgent. Mr Turnbull advised the Committee that one of the reasons that he tried to avoid engaging consultant drafters is that he has 'very little control over priorities of their work, and the Government's priorities often change during a Sittings period'.[46]

*4.60* Secondly, Parliamentary Counsel for New South Wales observed:

*Preparation of legislation by the [New South Wales Parliamentary Counsel's] Office facilitates the preparation of amendments in committee, which often have to be done within a timetable of minutes and under great pressure. Without the prior involvement of the Office in the legislation, the drafting of such amendments in accordance with such a tight timetable would be virtually impossible in many cases.*[47]

There is no reason to suppose that similar problems would not arise at the Commonwealth level. Given the uncertainties of Parliament, it will not always be possible to predict when parliamentary amendments of a Bill may be needed, or have the private drafter of a Bill 'on stand-by' to prepare amendments.

*4.61* On balance, the Committee doubts whether the involvement of private drafters in preparation of legislation will increase the efficiency of the legislative process.

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45 VLRC, *Submission*, p. S404.

46 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Supplementary Submission - Responses to Questions, and Additional Material*, p. S612.

47 D. Murphy Q.C., Parliamentary Counsel for New South Wales, *Submission*, p. S195.

*Conclusion on Using Government or Private Drafters*

*4.62* The Committee considers that the adoption of proposals to dismantle the government monopoly on legislative drafting is unlikely to lead to improvements in preparation of legislation.

## Should One Government Drafting Agency be Responsible for Drafting All Legislation?

*4.63* A number of people giving evidence to the Committee were concerned that related primary and subordinate legislation do not present a coherent message. Mallesons Stephen Jaques commented:

> *Administrative processes need to be re-examined to enable the preparation of related legislation documents to be undertaken in a more coherent fashion.*[48]

*4.64* At present, responsibilities for legislation are divided among many Commonwealth bodies. In particular, OPC has primary responsibility for drafting Bills and OLD is responsible for subordinate legislation published in the Statutory Rules series as well as drafting some other subordinate legislation.

*4.65* Several people criticised the division of responsibilities between OPC and OLD, arguing that it reduced efficiency and resulted in legislation that is harder to understand.[49]

*4.66* The Taxation Institute of Australia remarked:

> *Since the division of drafting services between the Attorney-General's Department and the Office of Parliamentary Counsel ... the process of legislative drafting would appear to have operated far less effectively.*[50]

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48 Mallesons Stephen Jaques, *Submission*, p. S215.

49 AMPICTA, *Submission*, p. S32; Taxation Institute of Australia, *Submission*, p. S238; VLRC, *Submission*, p. S402; Law Society of the Australian Capital Territory, *Submission*, pp. S469–470.

50 Taxation Institute of Australia, *Submission*, p. S238.

*4.67* The VLRC proposed that a single drafting office take responsibility for Acts and regulations, arguing:

> *Regulations implement the policy established by an authorising Act. It is important that this link be reflected in the structure, language and content of both documents. This is most likely if both the Act and the Regulations are drafted by the same person. Efficiency is also likely to be maximised.*[51]

*4.68* This section considers whether a single drafting agency should take responsibility for both Acts and regulations, by examining:

- whether Acts and regulations that are drafted by different people or in different agencies are harder to read; and
- whether it would be more efficient for a single agency to be responsible for drafting both Acts and regulations.

*Readability of Legislation Drafted in a Single Drafting Office*

*4.69* Only one example of difficulty in understanding legislation was attributed to the division of responsibility between OPC and OLD. Discussing the patents legislation, AMPICTA commented:

> *The drafting of the regulations by a different draftsman increased the difficulties in understanding the legislation.*[52]

*4.70* The Committee received other evidence suggesting that readers would not experience difficulty merely because the drafting for Acts was done in OPC while regulations were drafted in OLD.

*4.71* The Senate Standing Committee on Regulations and Ordinances noted that drafting done by OLD is of high quality, comparable to the drafting of Acts.[53]

*4.72* Asked by the then Committee Chair 'Would I pick [legislation] up and think that the Act and then the subsequent regulations were

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51 VLRC, *Submission*, p. S402.

52 AMPICTA, *Submission*, p. S32.

53 Senate Standing Committee on Regulations and Ordinances, *Submission*, p. S226.

drafted by the same person?', Principal Legislative Counsel of QLD asserted:

> *Largely, yes. The basic principles that both our Offices [OPC and QLD] use in the drafting of legislation are the same.*[54]

*4.73* Mr Turnbull commented:

> *I do not think that having all the drafting [of Acts and regulations] done by a single office would make the laws easier to understand. It did not do so from Federation to 1973 [when the responsibilities for drafting primary and subordinate legislation were split].*[55]

He went on:

> *I do not see how having the same drafter do both Act and Regulations would make them easier to understand. The drafter's ability or inability to draft in plain English would be reflected to the same extent in both Act and regulations.*[56]

*Efficiency of a Single Drafting Office*

*4.74* The people who proposed that a single agency draft both Bills and regulations did not explain why they thought this would be more efficient. However, in most Australian jurisdictions, parliamentary counsel are responsible for the drafting of both Acts and Regulations.

*4.75* Some efficiency-related arguments against division of responsibilities for drafting primary and subordinate legislation were raised by EARC in its review of the Office of Parliamentary Counsel in Queensland:

> *Separating responsibilities for drafting Acts and subordinate legislation tends to:*
> *(a) fragment scarce drafting resources;*

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54 Attorney-General's Department, *Transcript*, p. 275.

55 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Supplementary Submission - Responses to Questions, and Additional Material*, p. S610.

56 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Supplementary Submission - Responses to Questions, and Additional Material*, p. S611.

*(b) increase inefficiency because the same drafter cannot draft both the Act and the subordinate legislation; and*

*(c) place pressure on the drafter to leave matters to subordinate legislation which will be the drafting responsibility of someone else.*[57]

*4.76* Material supplied by OPC and OLD questions the validity of comparisons with other Australian jurisdictions and contradicts each of the arguments mounted by EARC.

*4.77* OLD argued that:

*The Commonwealth situation is not comparable with the States. The Commonwealth has a more complex legislative system (stemming from constitutional requirements) and the figures show the Commonwealth has a greater workload.*[58]

*4.78* As noted in Chapter 1, during the 1950s, 1960s and early 1970s there was a substantial backlog in drafting of Commonwealth subordinate legislation. OLD considered that:

*The outcome of the split between OPC and [what is now] OLD has, in fact, resulted in more resources being available to draft subordinate legislation and in elimination of the backlog.*

*If OPC and OLD were merged there would be pressures placed upon the merged body to complete government business by way of devoting the maximum number of resources to drafting Bills. The First Parliamentary Counsel would be unable to resist the inevitable pressure from Government to deploy resources to drafting Bills–even if that meant a backlog in subordinate legislation. The resources available for subordinate legislation would decrease. This would set the clock back to the 1960s so far as subordinate legislation is concerned, which would, in turn, be unacceptable given the volume and complexity of all legislation today. One likely outcome could be to place more detail in Bills, which would put more pressure on Bills drafters and the vicious circle would continue.*[59]

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57 EARC, *Report on Review of the Office of Parliamentary Counsel*, p. 30.

58 Attorney-General's Department, *Supplementary Submission*, p. S654.

59 Attorney-General's Department, *Supplementary Submission*, p. S653.

Mr Turnbull agreed with this analysis.[60]

*4.79* He also explained that even if a single organisation were responsible for drafting both Bills and regulations it might not be more efficient to have the same drafter drafting a Bill and the related subordinate legislation:

> *It would be more efficient, in the sense that the drafter of the Act would have the background knowledge to draft the regulations. However, more often than not the problem of conflicting priorities would prevent this happening. The officer concerned might be engaged on another Bill when the time came to allot [the job of drafting] the regulations. Also a task must be allotted according to the difficulty of the task and the ability of the drafter. A difficult Bill might need simple regulations, and vice versa.*[61]

*Conclusions on a Proposal for a Single Drafting Office*

*4.80* While acknowledging the importance of ensuring that related legislation be well articulated, the Committee is not convinced that the current separation of drafting of Bills and regulations makes related legislation harder to understand. There is little evidence to indicate that making a single agency responsible for drafting both Bills and regulations will necessarily result in any improvement of the comprehensibility of related legislation. Indeed, if past experience is any indication, an amalgamation of responsibilities might well lead to an overall decrease in the efficiency with which legislation is drafted.

## Should One Government Drafting Agency be Responsible for Drafting All Bills?

*4.81* Section 3 of the *Parliamentary Counsel Act 1970* states:

> *The functions of the Office of Parliamentary Counsel are:*
> *(a) the drafting of proposed laws for introduction into either House of the Parliament;*

60 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Supplementary Submission - Responses to Questions, and Additional Material*, p. S610.

61 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Supplementary Submission - Responses to Questions, and Additional Material*, pp. S610-611.

*(b) the drafting of amendments of the proposed laws that are being considered by either House of the Parliament; and*

*(c) functions incidental to the functions referred to in paragraphs (a) and (b).*

*4.82* OPC has noted:

> *One of the functions of the Office is to draft Bills for Private Members. However, because of the limits on resources, there has been a long-standing direction by the Government that drafting for Private Members must not divert resources from the Government program. In past years it had proved impossible to draft Private Members' Bills, and members had ceased asking the Office for drafting services. During the year 1990–91 the Clerk of the House of Representatives and First Parliamentary Counsel agreed that when a member asked the Clerk for a Bill to be drafted, the Clerk would refer the request to First Parliamentary Counsel who would then tell the Clerk whether or not a drafter could be given the task.*[62]

OPC went on to explain that Bills were drafted by the Clerk's office or consultants engaged by the Clerk if OPC was unable to assist.

*4.83* As the Clerk of the Senate explained, a slightly different arrangement applies for drafting non-government legislation in the Senate:

> *Private Senators who wish to have legislation [Bills or amendments] drafted provide their instructions to the Clerk-Assistant (Procedure). If the proposed legislation is reasonably simple, it is drafted in-house by one of the officers of the Procedure Office. If it is complex or raises complex or difficult technical issues, it is referred to one of the consultant drafters who provide drafting services for the Senate Department.*[63]

*4.84* It might be thought that some of the advantages of a centralised drafting office noted in the previous section and the next section would apply to drafting Bills if additional resources were made available to OPC so it could draft all Bills and amendments.

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62 OPC, *Annual Report and Financial Statements 1991–92*, AGPS, Canberra, 1992, p. 12.

63 Department of the Senate, *Supplementary Submission*, p. S632.

*4.85* OLD, which had proposed that it could draft private Members' and Senators' legislation if it had extra resources, identified a problem in providing additional resources to OPC for the purposes of non-government drafting:

> *Drafting resources allocated to OPC tend to become subsumed in that Office's primary goal of servicing the Government's requirement for Bills.*[64]

*4.86* The Committee acknowledges that it might be advantageous to have all parliamentary drafting done in one office to ensure greater consistency in drafting style. For this reason, it does not favour further division of responsibility by allowing OLD to draft non-government legislation.

*4.87* However, the predominance of government work in OPC is likely to cause OPC to give lower priority to private parliamentarians' work, even if additional drafting resources were made available to OPC. The Committee does not recommend any change from current arrangements, as long as private Members and Senators continue to have access to drafting services.

## Should One Government Drafting Agency be Responsible for Drafting All Subordinate Legislation?

*Current Arrangements for Drafting*

*4.88* Subordinate legislation is now drafted in many Commonwealth agencies. OLD has responsibility for the Statutory Rules series, although it does not draft all instruments in the series,[65] and drafts some other instruments.

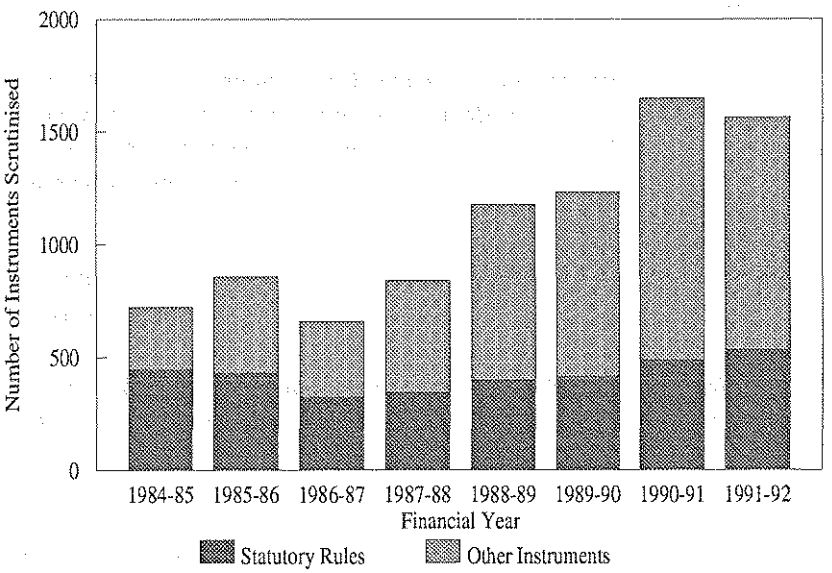
*4.89* The growing numbers of pieces of subordinate legislation, particularly legislative instruments outside the Statutory Rules series, has meant that a smaller proportion of subordinate legislation is being drafted in OLD. In the 1982–83 financial year, Statutory Rules made up nearly 80% of the number of legislative instruments scrutinised by the Senate Standing Committee on Regulations and Ordinances. By

64 Attorney-General's Department, *Supplementary Submission*, p. 8654.

65 ARC, *Rule Making by Commonwealth Agencies*, p. 25.

1990–91, less than 30% of the instruments examined by the Committee were in the Statutory Rules series.[66] Figure 2 illustrates the trend.

**Figure 2. Subordinate Legislation: Statutory Rules and Other Disallowable Instruments**




Notes:
The graph shows the number of subordinate legislative instruments scrutinised by the Senate Standing Committee on Regulations and Ordinances each financial year. It may not accurately reflect the number of instruments made each year because:
(a) there is a lag between making and tabling of a subordinate legislative instrument for scrutiny (and in some cases failure to table disallowable subordinate legislative instruments); and
(b) there may have been other subordinate legislative instruments made each year that were not disallowable, and so were not scrutinised by the Senate Standing Committee on Regulations and Ordinances.

Sources:
ARC, *Rule Making By Commonwealth Agencies*, Table 1; Senate Standing Committee on Regulations and Ordinances, *Submission*, p S226.

66 The percentages are based on figures presented in: ARC, *Rule Making by Commonwealth Agencies*, Table 1. Over the last decade a specialist drafting area within the Attorney-General's Department has been responsible for the drafting of instruments within the Statutory Rules series.

*Problems with Current Arrangements*

*4.90* This trend has been accompanied by comments, particularly by the Senate Standing Committee on Regulations and Ordinances, on the uneven standard of drafting across the range of subordinate legislation.

*4.91* The Senate Standing Committee on Regulations and Ordinances stated:

> *delegated legislation often has a greater impact than Acts on individual Australians in their life and work. It follows that the Committee believes that drafting of delegated legislation should be of a quality no less than Acts.*
>
> *In this context, perhaps the most important feature of Commonwealth delegated legislation is that there is a sharp and unacceptable distinction between ... the drafting of instruments in the statutory rules series and ... the drafting of most other series. The Committee finds that drafting of statutory rules, which is generally done or supervised by the Office of Legislative Drafting in the Attorney-General's Department, is of good quality, comparable to that of Acts. However, the drafting of instruments other than statutory rules, drafted in individual agencies without OLD input, is often defective.*[67]

*4.92* Although AQIS noted that in some cases 'the finished product [of legislation drafted by OLD] is no higher than that produced internally',[68] most of the evidence the Committee received supported the view expressed by the Senate Standing Committee on Regulations and Ordinances.

*4.93* Asked 'How do you go about making sure there is a consistency of approach between different documents and over a period of years?', a witness from DVA replied:

> *I do not think we have any sort of structured approach to the stuff that is drafted in house, to be honest. ... But it is probably something we could give more attention to.*[69]

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67 Senate Standing Committee on Regulations and Ordinances, *Submission*, p. S226.

68 AQIS, *Submission*, p. S447.

69 DVA, *Transcript*, p. 314.

*4.94* A witness from DHHCS described the standard of subordinate legislation, some of it drafted by OLD and some drafted in house, administered by his Department:

> *Some of it is better than others and in some of it there is quite a real effort. For example the disabilities area [of DHHCS] are working very hard on producing documents that can be understood by as much of their clientele as is achievable, but it is a whole range. It certainly would not be described across the board as plain language.*[70]

*Solutions Proposed by the Administrative Review Council*

*4.95* In its report *Rule Making By Commonwealth Agencies*, the ARC noted the problem of 'the poor quality of drafting of some delegated legislative instruments'.[71] The Council made the following recommendations to overcome the problem:

> *[ARC] Recommendation 4*
>
> *The Office of Legislative Drafting should be given responsibility ... for ensuring that delegated legislation is prepared to an appropriate standard.*
>
> *[ARC] Recommendation 5*
>
> *(1) Where an instrument is legislative in character, it should be drafted by the Office of Legislative Drafting or arrangements for drafting should be made with that Office.*
>
> *(2) Better drafting in agencies should be encouraged by:*
> - *'settling' arrangements where the agency undertakes primary drafting and then sends it to the Office of Legislative Drafting for clearance;*
> - *the supply of drafting precedents by the Office of Legislative Drafting;*
> - *temporary placement of agency drafters in the Office of Legislative Drafting; and*

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70 DHHCS, *Transcript*, p. 418.

71 ARC, *Rule Making by Commonwealth Agencies*, p. 9.

- *temporary placement of drafters from the Office of Legislative Drafting in agencies.*[72]

*4.96* These recommendations drew support from many of the organisations, representing a wide range of interests, that gave evidence to the Committee. Organisations supporting the recommendations included:

- the Attorney-General's Department;[73]
- the Australian Council of Social Service;[74]
- AQIS;[75]
- the Business Council of Australia and the Australian Institute of Company Directors;[76]
- the Law Society of the Australian Capital Territory;[77] and
- the Senate Standing Committee on Regulations and Ordinances.[78]

*4.97* On the other hand, the Hon. Ralph Willis MP, Minister for Finance, considered that in-house drafting offered advantages of informality and speed.[79]

### *Quality Control Under Administrative Review Council Proposals*

*4.98* At the heart of the ARC's recommendations is the notion that OLD should exercise quality control, rather than doing all the drafting itself. The Council did not believe that it would be currently feasible, or necessarily desirable, to centralise all drafting of subordinate legislation in OLD.[80]

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72 ARC, *Rule Making by Commonwealth Agencies*, pp. xi, 26 & 27.

73 Attorney-General's Department, *Submission*, p. S517.

74 Australian Council of Social Service, *Submission*, p. S441.

75 AQIS, *Submission*, p. S447.

76 Business Council of Australia and Australian Institute of Company Directors, *Submission*, p. S423.

77 Law Society of the Australian Capital Territory, *Submission*, p. S469.

78 Senate Standing Committee on Regulations and Ordinances, *Submission*, p. S228.

79 The Hon. R. Willis MP, Minister for Finance, *Submission*, pp. S222–223.

80 ARC, *Rule Making by Commonwealth Agencies*, p. 26.

*4.99* The Committee received some evidence supporting the Council's conclusion. AQIS commented:

> *OLD's priorities are directed to instruments falling within the Statutory Rules series and Proclamations that have been approved at a high level of government. OLD would not be able to cope with the sheer volume of drafting of other instruments regardless of priorities or the resources available.*[81]

*4.100* Some of the difficulties of the quality control role for OLD envisaged by the Council have already been discussed in this chapter. The problems identified above in relation to private drafters may be reduced to some extent because the drafters of subordinate legislation would be within government. This may make it slightly easier to arrange training and ensure the application of consistent drafting styles.

*4.101* However, there may be other difficulties in some of the quality control measures proposed by the Council. For example, the Council proposed that OLD supply precedents for use by drafters in other agencies. Commenting on the practice in one area of DHHCS, a witness from the Department said:

> *My understanding is that they would initially go to the Office of Legislative Drafting to create a precedent and then, after they had their precedent, they would seek to do amendments and maybe even replacement instruments based on that instrument without necessarily going back to the Office of Legislative Drafting to have their comments. But as one can see from the Senate Standing Committee on Regulations and Ordinances in respect of some of our delegated legislation, there are problems there; and that is one of the things the Department will be seeking to address with respect to the [Administrative Review Council's] rule making proposal.*[82]

*4.102* Two of the other recommendations of the ARC would, if implemented, provide a basis for monitoring the effectiveness of particular types of quality control measures, although they would not directly control quality of subordinate legislation.

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81 AQIS, Submission, p. S447.

82 DHHCS, *Transcript*, pp. 417–418.

*4.103* The Council recommended that OLD forward every piece of subordinate legislation to Parliament for tabling.[83] This would at least ensure that every piece of legislation passed through OLD, although OLD might not see a draft of the legislation before it was made (because the requirement for tabling arises only after an instrument is made).

*4.104* The Council also recommended that OLD provide with each piece of legislation to be tabled in Parliament a memorandum stating whether the instrument was:

- drafted by OLD;
- drafted by another agency and settled by OLD; or
- drafted by the agency under arrangements approved by OLD.[84]

*4.105* Implementation of these two recommendations would make it possible to check what quality control measures had applied to an instrument that was found to be defective or warranted criticism. This might be of particular assistance to the work of the Senate Standing Committee on Regulations and Ordinances. Over time, correlation of unsatisfactorily drafted instruments with the method of preparation might indicate whether particular quality control mechanisms were effective or not. To ensure that the data provided a good basis for assessing the effectiveness of quality control measures, it would be helpful if each memorandum explaining that legislation was drafted under arrangements approved by OLD outlined the nature of those arrangements (e.g. use of a precedent supplied by OLD, drafting done by a drafter who received some training from OLD).

*Conclusions on Centralising Responsibility for Subordinate Legislation*

*4.106* The Committee accepts that the present fragmented responsibility for drafting subordinate legislation is leading to unsatisfactory standards of drafting of some pieces of subordinate legislation.

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83 ARC, *Rule Making by Commonwealth Agencies*, p. 45.

84 ARC, *Rule Making by Commonwealth Agencies*, p. 28.

*4.107* The Committee believes that implementation of the ARC's recommendation that OLD take responsibility for ensuring that all subordinate legislation be prepared to an appropriate standard offers an avenue for improving the overall standard of drafting of subordinate legislation. The Committee accepts that it is not realistic for OLD to draft all subordinate legislation, and considers that the standard of subordinate legislation will improve under the scheme envisaged by the Council only if an effective quality control system is established and maintained.

*4.108* Establishing and maintaining the effective quality controls that are essential to successful implementation of the Council's recommendation will not be easy. It certainly has the potential to result in a significant increase in the workload of OLD. The resource implications for OLD of this and other proposals are discussed in the following chapter.

*4.109* **Recommendation 9**

***The Government should implement the following recommendations made by the Administrative Review Council in its report*** **Rule Making by Commonwealth Agencies:**

***(a) recommendation 4 to give the Office of Legislative Drafting responsibility for ensuring that subordinate legislation is prepared to an appropriate standard; and***

***(b) recommendation 5 to require that all subordinate legislative instruments be drafted by, or under arrangements approved by, the Office of Legislative Drafting.***

4.110 **Recommendation 10**

*The agency responsible for a subordinate legislative instrument must prepare a memorandum, to be tabled with the instrument, stating:*

*(a) whether the instrument was drafted by the Office of Legislative Drafting; or*

*(b) whether the instrument was drafted by the agency and settled by the Office of Legislative Drafting; or*

*(c) whether the instrument was drafted by the agency under other arrangements approved by the Office of Legislative Drafting and, if it was, what the arrangements were.*

4.111 **Recommendation 11**

*The Office of Legislative Drafting should review annually for three years the operation of the system envisaged by the Administrative Review Council in its report* Rule Making by Commonwealth Agencies *for preparation of subordinate legislation to assess the effectiveness of quality controls on drafting.*

# 5 STAFFING DRAFTING OFFICES

## Introduction

*5.1* This chapter considers the skills and resources needed by legislative drafters, particularly those working in government drafting offices.

*5.2* The question of drafting skills is addressed largely by looking at training, recruitment and retention of drafters in drafting offices.

*5.3* The discussion of resources for drafting offices takes account of material in earlier and later chapters in formulating recommendations for resource allocation.

## Training Drafters

*5.4* Opinions on training drafters varied greatly, but there was agreement on the fundamental point that training is essential to develop drafters' skills.

*5.5* This section considers five facets of training:

- on-the-job training;
- formal training;
- seminars and conferences;
- training for in-house drafters; and
- placements and exchanges of drafters.

### *On-the-job Training*

*5.6* It was generally accepted by people who gave evidence to the Committee about the subject that drafters' training needs to include at

least some on-the-job training.[1]

*5.7* Commonwealth drafters informed the Committee that two basic forms of on-the-job training are used in Commonwealth drafting offices. OPC uses a pairs system, in which a junior and senior drafter work together on each Bill.[2] The exact role played by each drafter can vary according to the nature of the job.[3] OLD operates a system under which new drafters are initially given relatively simple work, which is settled by experienced drafters who work closely with them. The complexity of work given to junior drafters in OLD is gradually increased.[4]

*5.8* Some disadvantages of on-the-job training were identified in submissions to the Committee.

*5.9* The VLRC commented:

> *An apprenticeship system [of training] is essentially conservative. An experienced drafter's habits are passed on to an inexperienced one.*
>
> *The habits that have been passed on fall well short of being ideal.*
> ...
>
> *One of the worst aspects of this system is that drafters are often ignorant of theories of communications and practical linguistics.*[5]

*5.10* The Tasmanian Office of Parliamentary Counsel pointed out that on-the-job training means that senior drafters can spend less time on their own work.[6]

*5.11* The Committee acknowledges that on-the-job training is not a perfect system for training drafters, but considers that it forms an essential part of a drafter's training.

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1 See, for example: Business Council of Australia and Australian Institute of Company Directors, *Submission*, p. S424; Tasmania, Office of Parliamentary Counsel, *Submission*, p. S169; D. Murphy Q.C., Parliamentary Counsel for New South Wales, *Submission*, p. S185; Centre for Plain Legal Language, *Submission*, p. S312; DHHCS, *Submission*, p. S360; R. Armstrong Q.C., Chief Parliamentary Counsel for Victoria, *Transcript*, p. 220; OPC, *Transcript*, p. 333; G. Kolts Q.C., *Transcript*, p. 425.

2 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Submission*, p. S296.

3 OPC, *Transcript*, p. 336.

4 Attorney-General's Department, *Submission*, p. S501.

5 VLRC, *Submission*, p. S405.

6 Tasmania, Office of Parliamentary Counsel, *Submission*, p. S169.

*Training by Course-work*

*5.12* Many of the people who addressed the issue of training in their evidence to the Committee considered that there is a role for formal course-work in drafters' training. It was generally conceded, however, that training by course-work alone would be inadequate.

*5.13* This section considers a number of issues associated with training drafters by course-work:

- what is the value of course-work in training?
- where should courses be offered?
- who should be involved in teaching courses?
- what should be taught in courses?

*5.14* Some considered that course-work could play only a very minor role in developing drafters' skills. South Australian Parliamentary Counsel wrote:

> *I should say something about the question of training parliamentary counsel. The drafting of legislation engages to a pre-eminent degree the analytical and synthetic capacities of the mind, ie. the capacity to pull ideas to pieces and put them back together in a logical and coherent way. I am not sure to what extent these mental attributes are inherited and to what extent they can be influenced by education. My own experience, however, suggests that by the time a young recruit appears on ... the doorstep of a parliamentary counsel's office, the die is well and truly cast. At that stage the recruit either has or does not have the necessary mental attributes and it is simply too late to expect to be able to influence significantly attributes which are so basic to the mind's capacity to think. This is not to say that there are not peripheral matters that cannot usefully be taught.*[7]

Some other Australian drafters expressed similar views,[8] but the Committee received evidence that some eminent North American drafters believed that training could be taught in courses.[9]

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7 G. Hackett-Jones Q.C., *Submission*, p. S369.

8 See, for example: R. Armstrong Q.C., *Transcript*, p. 218; G. Kolts Q.C., *Transcript*, p. 425; J.Q. Ewens, 'Legislative Draftsmen: Their Recruitment and Training', (1983) 57 *Australian Law Journal* 567, 568–569.

9 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Submission*, p. S297.

*5.15* Formal training by course-work was seen by some to offer a number of advantages over on-the-job training.

*5.16* The Tasmanian Office of Parliamentary Counsel suggested:

> *By combining in-house training and attendance at a drafting course, the senior drafter would have more time for his or her own work and the junior drafter should be able to develop skills in a shorter time [than under a system of purely on-the-job training].*[10]

*5.17* NRMA Insurance Limited claimed that formal training is 'far more cost effective' than on-the-job training.[11]

*5.18* Two related advantages were seen in academic training. First, an academic interest in drafting would promote greater flow of ideas in the drafting profession.[12] Secondly, the involvement of academics in training would provide an opportunity for ongoing training that would make use of developments in linguistic theory.[13]

*5.19* Several Australian universities offer undergraduate courses in drafting as part of a law degree. Courses with an element of instruction in general drafting are compulsory at a few universities.[14] A few other universities offer optional undergraduate courses in legislative drafting.[15] Some other university law schools have indicated they would like to offer legislative drafting courses if their resources permitted it.[16] An important advantage seen in offering training at an undergraduate level was that it would expose more people to legislative drafting, promoting an interest in legislative drafting that would make it easier to recruit people to legislative drafting offices.[17]

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10 Tasmania, Office of Parliamentary Counsel, *Submission*, p. S169.

11 NRMA Insurance Limited, *Submission*, p. S374.

12 OPC, *Transcript*, pp. 334–336.

13 Centre for Plain Legal Language and Department of English at the University of Sydney, *Transcript*, p. 77.

14 These universities include the University of Wollongong, the University of Western Australia, the University of Technology Sydney, the James Cook University of North Queensland, Murdoch University and Bond University. Murdoch University has indicated that as a result of the Committee's interest in the matter, it will introduce legislative drafting exercises into its general drafting course.

15 These universities include the Australian National University, the Northern Territory University and the University of Melbourne.

16 Law schools in this category included those at the University of Wollongong, the University of Western Australia, the University of New South Wales and Bond University.

17 Business Council of Australia and Australian Institute of Company Directors, *Submission*, p. S424; Attorney-General's Department, *Submission*, p. S500.

*5.20* A number of submissions proposed the establishment of a national drafting institute to provide postgraduate training in legislative and legal drafting.[18] Most of the proponents of an institute suggested that it should be largely funded by the Commonwealth,[19] and some claimed that the cost would be more than offset by benefits of better drafting.[20]

*5.21* Mr Hackett-Jones Q.C., South Australian Parliamentary Counsel, disputed this:

> *I cannot see much point ... in spending a lot of money on establishing a national drafting institute or postgraduate courses in drafting. Such an investment would provide only a very limited and disappointing return. The Canadian experience tends to confirm this. Canada has provided post-graduate courses in legislative and legal drafting for some decades. The general standard of legislative drafting in Canada remains, however, fairly poor.*[21]

*5.22* Other witnesses doubted whether many students would attend courses offered by a drafting institute,[22] and some questioned whether completion of a drafting course by a person would indicate his or her skills as a drafter.[23]

*5.23* Parliamentary Counsel for New South Wales indicated that his Office conducts an in-house academic course on legislative drafting involving a structured reading program.[24]

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18 See, for example: A. Byrne, *Submission*, p. S22; Tasmania, Office of Parliamentary Counsel, *Submission*, p. S169; Centre for Plain Legal Language, *Submission*, p. S315; VLRC, *Submission*, pp. S405–406; Business Council of Australia and Australian Institute of Company Directors, *Submission*, pp. S418 & S424–425; AQIS, *Transcript*, p. 259.

19 Tasmania, Office of Parliamentary Counsel, *Submission*, p. S169; VLRC, *Submission*, pp. S405–406; Business Council of Australia and Australian Institute of Company Directors, *Submission*, pp. S418 & S424–425.

20 VLRC, *Submission*, p. S406; Business Council of Australia and Australian Institute of Company Directors, *Submission*, p. S425.

21 G. Hackett-Jones Q.C., *Submission*, p. S369.

22 R. Armstrong Q.C., Chief Parliamentary Counsel for Victoria, *Transcript*, p. 220; OPC, *Transcript*, p. 334; G. Kolts Q.C., *Transcript*, p. 426.

23 D. Murphy Q.C., Parliamentary Counsel for New South Wales, *Transcript*, pp. 11–12; G. Kolts Q.C., *Transcript*, p. 425.

24 D. Murphy Q.C., Parliamentary Counsel for New South Wales, *Submission*, p. S185.

*5.24* Evidence given to the Committee suggested that a range of people should be involved in teaching drafting courses: academics,[25] people affected by legislation,[26] and experienced drafters.[27]

*5.25* There was a range of ideas on what should be taught in a drafting course, including:

- linguistics and communications theory;[28]
- control systems theory;[29]
- drafting in plain English;[30] and
- policy development processes.[31]

*5.26* The Committee considers that course-work can form a valuable part of a drafter's training, but cannot entirely replace on-the-job training. To reach the widest audiences and to attract a suitable range of teachers, it is important that drafting courses be run outside a drafting office, although drafters have an important role in teaching the courses. The Committee believes that it would be better to foster drafting courses at undergraduate level in universities, rather than establishing a national drafting institute to offer postgraduate courses, for two reasons:

- courses based in universities are likely to reach a wider range of students, thus encouraging greater interest in legislative drafting as a career option; and
- university courses are more likely than a national drafting institute to create broad academic interest in drafting and promote diversity of ideas within the drafting profession.

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25 Centre for Plain Legal Language and Department of English at the University of Sydney, *transcript*, p. 77.

26 J. Green, *Transcript*, p. 148.

27 R. Armstrong Q.C., Chief Parliamentary Counsel for Victoria, *Transcript*, pp. 219–220.

28 See, for example: Dr R. Penman, *Exhibit 1*, pp. 13–14; DHHCS, *Submission*, p. S360; VLRC, *Submission*, p. S406; Mallesons Stephen Jaques, *Transcript*, p. 40; Dr R. Penman, *Transcript*, p. 378.

29 T. Falkiner, *Submission*, p. S36.

30 See, for example: Taxation Institute of Australia, *Submission*, p. S239; Australian Council of Social Service, *Submission*, p. S440.

31 DHHCS, *Submission*, p. S360.

*Seminars and Conferences*

*5.27* A number of people who gave evidence to the Committee thought that seminars and conferences were a useful form of training. The benefits of seminars are said to include:

- the opportunity for exchange of ideas between drafters from different Australian jurisdictions;[32]
- giving training to drafters outside specialist drafting offices who might lack good opportunities for on-the-job training;[33]
- promoting understanding between drafters and instructing officers;[34]
- improving drafters' understanding of particular areas of general law (e.g. administrative law) that affect drafting;[35] and
- exposing drafters to the views of experts on plain English.[36]

*5.28* Both Commonwealth drafting offices appear to understand the benefits of seminars, and their staff have been active participants in attending seminars to present material and to learn.[37]

*Training for In-House Drafters*

*5.29* The importance of training for in-house drafters was identified by DHHCS and AQIS,[38] two Commonwealth policy agencies that prepare legislation in house. Other witnesses also noted the importance of giving training to in-house drafters.[39]

*5.30* Both OPC and OLD recognise the importance of training drafters in other agencies,[40] and have already given some training to

32 Centre for Plain Legal Language, *Submission*, p. S312.

33 Attorney-General's Department, *Submission*, p. S495.

34 Australian Customs Service, *Submission*, p. S432; Attorney-General's Department, *Submission*, p. S495.

35 Attorney-General's Department, *Submission*, pp. S501–502.

36 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Submission*, p. S297.

37 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Submission*, p. S297; Attorney-General's Department, *Submission*, pp. S495 & S501–502.

38 DHHCS, *Submission*, p. S361; AQIS, *Submission*, p. S445.

39 Mallesons Stephen Jaques, *Transcript*, p. 27; Centre for Plain Legal Language, *Transcript*, pp. 77–78.

40 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Supplementary Submission - Responses to Questions, and Additional Material*, p. S615; Attorney-General's Department, *Submission*, p. S495.

other drafters in the Commonwealth Government.[41]

*5.31* If, as recommended by the Administrative Review Council and the Committee, OLD takes responsibility for ensuring the preparation of subordinate legislation to an appropriate standard, it will clearly be important to improve the training given to drafters of subordinate legislation outside OLD.

*5.32* **Recommendation 12**

***The Office of Legislative Drafting should provide more training for drafters of subordinate legislation in other agencies.***

*5.33* In the long term, training of drafters outside OLD may help decrease the amount of work OLD will need to do in settling drafts prepared by other agencies. However, in the short term at least, provision of training will place extra demands on OLD and especially the more senior drafters in the Office.

*Placements and Exchanges*

*5.34* A number of submissions suggested that specialisation in legislative drafting made legislative drafters too narrowly focused, to the detriment of the legislation they draft.

*5.35* To overcome this perceived problem, several people who gave evidence to the Committee suggested that it would be beneficial to place drafters temporarily outside drafting offices, or exchange drafters either for other drafters from outside the drafting office or even for non-drafters.

*5.36* Although the idea of placing drafters outside drafting offices was quite widely accepted, there was not unanimity on the sort of experience that should be sought, or the value of that experience.

*5.37* The Taxation Institute of Australia proposed that drafters should be placed in areas outside the government sector,[42] while the Business Council of Australia and Australian Institute of Company

41 OPC, *Annual Report and Financial Statements 1991–92*, AGPS, Canberra, p. 12; Attorney-General's Department, *Submission*, p. S495.

42 Taxation Institute of Australia, *Submission*, p. S239.

Directors and AQIS suggested that drafters be placed in policy agencies of government.[43] DHHCS indicated that benefits would arise from placing drafters in either the government or private sectors.[44] Mallesons Stephen Jaques proposed an exchange scheme between drafting offices and law firms.[45]

*5.38* Most of those in favour of placements of drafters appeared to assume that as the placement was to broaden the drafter's experience, he or she would not draft while on placement outside his or her drafting office. However, OLD saw value in exchanges between OLD and OPC,[46] and AQIS suggested that the drafter should do some drafting as well as participating in other aspects of the host agency's work.[47]

*5.39* Some drafters doubted whether the extra experience gained by professional drafters from being placed in another area would improve the quality of laws. Mr Turnbull commented:

> *OPC is already committed to simpler laws, so there is no need to send drafters into these other areas just to perceive the difficulty of dealing with complex laws.*
>
> ...
>
> *On the other hand, we believe that all drafters should have some experience of the law in practice, and OPC has a policy of seconding officers for a term in private practice or policy Departments. This is intended to round out a drafter's training as a lawyer, rather than to improve drafting technique.*[48]

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43 Business Council of Australia and Australian Institute of Company Directors, *Submission*, p. S425; AQIS, *Submission*, p. S444.

44 DHHCS, *Submission*, p. S361.

45 Mallesons Stephen Jaques, *Transcript*, pp. 43–44.

46 Attorney-General's Department, *Transcript*, pp. 275–276.

47 AQIS, *Submission*, p. S444.

48 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Supplementary Submission - Responses to Questions, and Additional Material*, p. S616. See also D. Murphy Q.C., Parliamentary Counsel for New South Wales, *Transcript*, p. 14.

*5.40* Miss Rowena Armstrong Q.C., Chief Parliamentary Counsel for Victoria, placed more emphasis on the link between drafting and other experience:

> *it is, I think, very important that a drafter is not a person without experience in other branches of the law. ... if you do not have some hands-on experience in administering the law from the other side, as it were, then I think all your drafting is at fault. You are not likely fully to appreciate what you are drafting for and the people who have to administer the laws.*[49]

*5.41* Placements have also been seen as a means of improving the drafting skills of people who are not professional drafters based in drafting offices. The ARC recommended placements of OLD drafters in other agencies and the placement of officers from other agencies in OLD to improve the standards of drafting of subordinate legislation outside OLD.[50] To achieve the aim of improving legislative drafting outside OLD, the OLD drafters placed in other agencies would need to be quite senior, to be able to teach officers in the agency. The placement of drafters from other agencies in OLD is likely to give them an opportunity for concentrated on-the-job training that may not be available in their own agencies, if senior drafters in OLD have time to provide guidance.

*5.42* The Committee considers that there is value in placing drafters outside their own agency for three reasons:

- placement of professional drafters in temporary employment outside drafting offices broadens their experience;
- placement of professional drafters in other agencies may help train host agencies' officers in drafting; and
- placement of drafters from other agencies in drafting offices offers an opportunity to improve the drafters' skills by on-the-job training.

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49 R. Armstrong Q.C., Chief Parliamentary Counsel for Victoria, *Transcript*, p. 219.

50 ARC, *Rule Making by Commonwealth Agencies*, p. 27.

Careful consideration needs to be given to placement programs:

- to minimise disruption of the operations of each organisation involved, whether it supplies or hosts officers; and
- to ensure that the officer placed has sufficient skills to make the placement a success as a training exercise.

*5.43* Recommendation 13

***The Office of Legislative Drafting should develop and implement a program of placements for training officers from the Office of Legislative Drafting and drafters of subordinate legislation from other agencies.***

*5.44* Recommendation 14

***The Office of Parliamentary Counsel should strengthen its current program of placements for its officers in private law firms or Commonwealth policy agencies.***

## Recruiting and Retaining Drafters

*5.45* As noted in Chapter 1, recruitment of drafters to Commonwealth drafting offices has historically been a problem. This section considers a number of issues relating to recruiting drafters and retaining them in drafting offices.

*Picking Suitable Recruits*

*5.46* In 1983, a former First Parliamentary Counsel wrote:

> *Searching out the right sort of person to become a draftsman is rather a hit-and-miss affair ... the right person is not always selected and the failure rate is high ... It is easier to say that a person will not make a draftsman than to detect one who will.*[51]

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51 J.Q. Ewens, 'Legislative Draftsmen: Their Recruitment and Training', (1983) 57 *Australian Law Journal* 567, 568.

*5.47* Parliamentary Counsel for New South Wales indicated that his Office was happy with a success rate of about 50% in recruiting people who stay on as drafters.[52]

*What Background Should Recruits Have?*

*5.48* A number of parliamentary counsel have indicated the desirability of a drafter being a lawyer with some experience in other fields of law.[53]

*5.49* The Law Society of the Australian Capital Territory argued that OPC's practice of recruiting people at the conclusion of their law studies had made Commonwealth legislative drafting too narrowly focused, and proposed that more effort be made to recruit people who had experience in private practice.[54] Others have also expressed concern about the lack of recruitment of drafters from private practice.[55] This argument is supported by a former First Parliamentary Counsel's view that 'a young person straight from university does not make the best material [for a drafter]'.[56]

*5.50* A number of reasons have been given for the relatively low numbers of drafters with lengthy experience in private practice.

*5.51* Mr Geoffrey Kolts Q.C. explained to the Committee:

> *the drafting of legislation is generally regarded as one of the least desirable areas of legal practice. Apart from its inability to compete with the greater financial rewards of private practice, it does not even have the glamour of other fields of government practice ...*
>
> *... some ... submissions have criticised the recruitment policies of the Office of Parliamentary Counsel. They fail to realise that the current recruitment practices have indeed been successful in recruiting top law graduates to the Office. ...*

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52 D. Murphy Q.C., Parliamentary Counsel for New South Wales, *Transcript*, p. 20.

53 See, for example: J.Q. Ewens, 'Legislative Draftsmen: Their Recruitment and Training', (1983) 57 *Australian Law Journal*, 567, 568; Tasmania, Office of Parliamentary Counsel, *Submission*, p. S169; R. Armstrong Q.C., Chief Parliamentary Counsel for Victoria, *Transcript*, p. 219.

54 Law Society of the Australian Capital Territory, *Submission*, pp. S469–470.

55 A. Byrne, *Submission*, p. S22; VLRC, *Plain English and the Law: Report No. 9*, VLRC, Melbourne, p. 77.

56 J.Q. Ewens, 'Legislative Draftsmen: Their Recruitment and Training', (1983) 57 *Australian Law Journal* 567, 568.

*Past attempts to recruit suitable people from private practice have simply failed, and there is no reason to believe that fresh attempts would be more successful. ... The only way to get good lawyers is to get them as soon as they leave the universities.*[57]

*5.52* Mr Dennis Murphy Q.C., Parliamentary Counsel for New South Wales, told the Committee:

*A few [recruits] come to us pretty well straight from a law school ... but those would be the ones with outstanding academic qualifications and just present so well. We can put them through a fairly intensive in-house training course and they are capable of being excellent drafters.*[58]

*5.53* It was explained that drafters are usually recruited at lower levels.[59] Miss Rowena Armstrong Q.C., Chief Parliamentary Counsel for Victoria noted:

*Although we can in theory recruit at any stage, it is difficult. It is difficult for a person to come in at a relatively senior level and compete against people who have been in the office and whose drafting skills are proven and so on. That has occasionally happened, but our experience shows that there are two things about drafting. One is that you either have an ability to do it or you do not, and you discover that very quickly. ... And the other thing is simply the experience.*[60]

*5.54* The Committee accepts that although experience in other fields of the law is desirable, good drafters can be recruited regardless of their level of experience in private practice. Drafters' experience can be broadened by placements after they have been recruited to a drafting office.

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57 G. Kolts Q.C., *Transcript*, pp. 425–426.

58 D. Murphy Q.C., Parliamentary Counsel for New South Wales, *Transcript*, p. 13.

59 D. Murphy Q.C., Parliamentary Counsel for New South Wales, *Transcript*, p. 20.

60 R. Armstrong Q.C., Chief Parliamentary Counsel for Victoria, *Transcript*, p. 218.

*Retaining Drafters*

*5.55* It is important to retain good drafters in drafting offices for two reasons. First, it appears that it is not easy to recruit people who make good drafters. Secondly, experienced drafters are essential not only to do more difficult drafting work, but also to train other drafters and instructing officers, and assist in formulating policy that can be expressed clearly in writing. A former First Parliamentary Counsel wrote:

> *Once a competent draftsman has been found, he should be encouraged to make that his life's work. His conditions of service should be such that it is not an advantage for him to leave drafting and go to some other form of work. For promotion, he should not have to look to other forms of legal work.*[61]

*5.56* OLD informed the Committee that it had lost a number of senior drafters in recent years to OPC, the Civil Aviation Authority and the Australian Capital Territory Parliamentary Counsel's Office because it is not competitive with these agencies in terms of career path for drafters.[62] As a result, OLD advised the Committee:

> *OLD lacks sufficient senior drafters to give as thorough consideration as is necessary to all of the work it undertakes. Another consequence of this is an inability to provide adequate mentoring for new drafters, necessarily slowing their development with a commensurate loss of efficiency within the Office.*[63]

*5.57* OLD believes that the key to its lack of competitiveness is the low number and proportion of Senior Executive Service positions in the Office. OPC has five times as many drafters at Senior Executive Service level and above as OLD. The proportion of drafters at the level of Senior Executive Service and above to total drafting staff in OPC is three times that in OLD.

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61 J.Q. Ewens, 'Legislative Draftsmen: Their Recruitment and Training', (1983) 57 *Australian Law Journal* 567, 569.

62 Attorney-General's Department, *Submission*, pp. S499 & S518; Attorney-General's Department, *Supplementary Submission*, p. S636.

63 Attorney-General's Department, *Submission*, p. S499.

*5.58* It is arguable that the staffing structure in OLD may detrimentally affect the Office's effectiveness. The problems in attracting and retaining senior staff are especially serious given the role proposed for OLD in controlling the quality of subordinate legislation, which will place extra burdens on experienced drafters in particular. There may well be a good case for creating and filling more Senior Executive Service drafting positions in OLD to enable it to meet its existing and proposed responsibilities.

*5.59* **Recommendation 15**

***A team including a person with legislative drafting experience and a human resource management expert should review the staffing of the Office of Legislative Drafting and the Office of Parliamentary Counsel to determine appropriate numbers and levels of drafting staff in each agency.***

## Drafting Office Resources

*Current Resource Constraints*

*5.60* The Committee received evidence that Commonwealth drafting offices are stretched to the limit of their resources in dealing in the present way with current volumes of legislation.[64]

*5.61* OPC and OLD have already substantially increased their efficiency in recent years,[65] so the potential for doing more work with the current level of resources is minimal.

*5.62* The drafting offices were receptive to many of the proposals put by other people to the Committee for making legislation easier to understand and use, but indicated that current resource constraints made it impractical to implement the proposals.[66]

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64 See, for example, AQIS, *Submission*, p. S444.

65 Attorney-General's Department, *Submission*, pp. S494 & S497. In 1983, the Legislative Drafting Division, which had 25 legal staff on 30 June 1983, was responsible for producing 1,508 pages of Statutory Rules and Territory legislation. In 1991, OLD, which had 13 legal staff on 30 June 1991, was responsible for the production of 3,170 pages of Statutory Rules and Territory legislation. Figure 5 in Chapter 10 illustrates how the output of legislation per drafter in OPC has increased in recent years.

66 See, for example: Attorney-General's Department, *Supplementary Submission*, p. S659; I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Supplementary Submission - Responses to Questions, and Additional Material*, pp. S601-602.

*5.63* A number of organisations suggested to the Committee that resource constraints on drafting offices could be overcome by greater use of consultant drafters.[67] Present arrangements for drafting consultancies require the instructing agency, not OPC, to pay consultants' fees.[68] However, the Committee believes, for reasons discussed above, that the government as a whole would gain greater benefits from giving drafting offices the resources that might otherwise be used to engage consultants.

*Recommendations with Resource Implications*

*5.64* In Chapters 2, 3 and 4, the Committee has made many recommendations for improving the legislative process with a view to making legislation easier to understand and use. Implementation of many of these recommendations will require drafting offices to do more work:

- helping ensure that policy development leads to policies that can be expressed clearly in writing;
- giving more training to instructing officers; and
- in the case of OLD–improving the overall standard of drafting of subordinate legislation by settling more work from other agencies, providing more precedents to other agencies, giving more training to drafters from other agencies and reviewing and reporting on quality control measures.

It may be that the increased involvement of OLD in the preparation of the full range of subordinate legislation will reduce the amount of drafting work of other government agencies so they can transfer drafting resources to OLD.[69]

*5.65* In Chapter 8, the Committee makes recommendations to improve the clarity of legislation by:

- re-writing old legislation;

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67 See, for example: Taxation Institute of Australia, *Submission*, p. S241; AQIS, *Submission*, p. S446; DVA, *Submission*, p. S487.

68 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Supplementary Submission - Responses to Questions, and Additional Material*, p. S613.

69 Attorney-General's Department, *Submission*, p. S498; Attorney-General's Department, *Supplementary Submission*, p. S651.

- giving the reader more assistance through improved presentation of legislation; and
- testing legislation for its readability and comprehensibility.

These recommendations all mean more work for drafting offices.

*5.66* In Chapter 10, the Committee recommends that drafters be given more time to work on legislation so it can be written more simply and clearly. The only way to achieve this without reducing the amount of legislation made each year is to employ more drafters.

*5.67* Clearly, the recommendations outlined in this section cannot be implemented unless drafting offices are allocated more resources.[70] The Committee believes that the benefits that the government and community will reap from clearer legislation resulting from implementation of the recommendations will offset the additional resources allocated to drafting offices.

*5.68* **Recommendation 16**

***The Office of Legislative Drafting and the Office of Parliamentary Counsel should be allocated the extra resources they need to implement the recommendations of this report.***

70 In Chapter 11, it is recommended that OLD be given additional responsibilities not directly related to drafting. The resource implications of this are considered in Chapter 11.

# 6 THE READERS

## Introduction

*6.1* Although legislation can have additional functions, such as education, the primary aim in drafting legislation is to give legal effect to the wishes of the sponsors of the law.[1] A law will be most effective if the people to be regulated understand the law.

*6.2* Many people who gave evidence to the Committee stressed the importance of considering the reader when drafting legislation.[2] Different readers will obviously have different levels of skills and knowledge, so drafting will need to take account of the particular skills and knowledge of the expected readers of a piece of legislation. The next section therefore deals with the question of selecting the audience for which legislation is written.

*6.3* Although an author may think he or she has written in a way appropriate for his or her target readership, the suitability of his or her writing for the readers will become clear only when they are exposed to it. At present, this usually happens to legislation only when a Bill is introduced into Parliament, or even only after the legislation has been made. By then it may well be too late to make any changes needed to make the legislation easier for the intended readers to understand. The final section of this chapter therefore considers ways of testing legislation to make sure that it actually is easy to understand and use.

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1 Tasmania, Office of Parliamentary Counsel, *Submission*, p. S168; I.M.L. Turnbull, Q.C., First Parliamentary Counsel, *Submission*, p. S269; Australian Customs Service, *Submission*, p. 431; Attorney-General's Department, *Submission*, p. S502; Attorney-General's Department, *Transcript* , p. 289; Department of Defence, *Submission*, p. S565.

2 Tasmania, Office of Parliamentary Counsel, *Submission*, p. S168; D. Murphy Q.C., Parliamentary Counsel for New South Wales; *Submission*, p. S182; Centre for Plain Legal Language, *Submission*, p. S305; Law Institute of Victoria, *Submission*, p. S458; Mallesons Stephen Jaques, *Transcript*, p. 28; NRMA Insurance Limited, *Transcript*, p. 63; Dr R. Penman, *Transcript*, p. 353.

## Writing for a Target Audience

### *The Problem of Multiple Audiences*

*6.4* Many different groups of people deal with a piece of legislation. Among them are:

- parliamentarians who are responsible for making primary legislation and scrutinising much subordinate legislation;
- the people whose behaviour is to be regulated;
- advisers and representatives of people to be regulated; and
- judges and members of tribunals who must resolve disputes in accordance with the legislation.

There are therefore many potential audiences of a piece of legislation, as a number of people pointed out to the Committee.[3]

*6.5* The suggested response to the problem of communicating with many different groups varied. Some people giving evidence to the Committee suggested that legislation should be written for maximum readership, without particular emphasis.[4] Others advocated that in drafting legislation particular attention should be given to some audiences, such as:

- 'ordinary people' or 'citizens';[5]
- the people affected by the legislation;[6]
- people outside the bureaucracy;[7]
- Parliament;[8] or
- the courts.[9]

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3 Tasmania, Office of Parliamentary Counsel, *Submission*, p. S168; Law Institute of Victoria, *Submission*, p. S458; Attorney-General's Department, *Transcript*, p. 287; OPC, *Transcript*, pp. 346–347.

4 See, for example: Centre for Plain Legal Language, *Submission*, p. S306.

5 See, for example: A. Viney, *Submission*, p. S10; Dr R. Penman, *Submission*, p. S25; D. Murphy Q.C., Parliamentary Counsel for New South Wales, *Submission*, p. S182; Australian Law Librarians' Group, *Submission*, p. S249.

6 Senate Scrutiny of Bills Committee, *Submission*, p. S47; Tasmania, Office of Parliamentary Counsel, *Submission*, pp. S168 & S170; DHHCS, *Submission*, p. S356; Australian Customs Service, *Submission*, p. S432; Law Institute of Victoria, *Submission*, p. S458; Mr John Green, *Transcript*, p. 128; Dr R. Penman, *Transcript*, p. 359.

7 New South Wales Bar Association, *Submission*, p. S205.

8 Tasmania, Office of Parliamentary Counsel, *Submission*, pp. S168 & S170; DHHCS, *Submission*, p. S458.

9 Tasmania, Office of Parliamentary Counsel, *Submission*, pp. S168 & S170; DHHCS, *Submission*, p. S356; Law Institute of Victoria, *Submission*, p. S458.

*6.6* A drafter from OPC told the Committee that, except in exercises like re-writes of legislation where relatively more resources and time are available, legislation is not usually drafted with a particular audience in mind:

> *I think we will begin putting more emphasis on the question of a particular audience, as and when we actually get the luxury to look at that particular aspect.*
>
> *I do not want to be misunderstood in describing it as a luxury. However, in very many drafting exercises the key concerns of the department and the instructor are to get the legal effect right; ... and to have a structure which is easy to follow but not aimed at any specific audience.*[10]

*Writing Differently for Different Audiences*

*6.7* Dr Robyn Penman, the Research Director of the Communications Research Institute of Australia, submitted that:

> *The goal [of writing legislation] should be to ensure that citizens are able to understand the law sufficiently that they can choose to act according to it. This requires a very different approach to devising and drafting legislation. It requires starting with what the citizen needs to know to act and writing accordingly.*[11]

She argued that where the same law affects different audiences in different ways, there should be different provisions for each audience:

> *There is nothing wrong with having different sections of laws for different readers. ... you could have sections of the legislation written from a different point of view, because different audiences have different concerns and different points of view.*[12]

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10 OPC, *Transcript*, p. 347.

11 Dr R. Penman, *Submission*, p. S26.

12 Dr R. Penman, *Transcript*, p. 359.

*6.8* Mr Turnbull commented:

> *Only a part of legislation requires citizens to act in a particular way. Legislation has to set out the whole legal framework, and much of this cannot be expressed in the form of directions.*
>
> *Legislation is addressed to many different audiences: the public servants administering it, ordinary citizens, professional advisers, and the courts. The language has to be a compromise. I think that Dr Penman's ideas are most suitable for manuals and information pamphlets, because they can be designed at different levels for different audiences.*
>
> *Nevertheless, I think that her ideas could be very useful in drafting provisions that do give directions or impose prohibitions.*[13]

*Writing for a Very Specific Audience*

*6.9* The VLRC has drafted some legislation, notably the Victorian Road Traffic Regulations 1991, in the second person.

*6.10* Principal Legislative Counsel commented:

> *The problem it [i.e. the practice of drafting legislation in the second person] does create is the legal one of making sure that you have defined the 'you' appropriately. If you have done that, I do not have any difficulty with it at all. But it does, I think, need to be in a piece of legislation that is aimed at an homogeneous audience–one kind of people. ... in that context 'you' can be defined just once and that is not a problem and it is not confusing. It would be difficult in a piece of legislation that contained prohibitions aimed at varying groups of people.*[14]

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13 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Supplementary Submission - Responses to Questions, and Additional Materials*, p. S603.

14 Attorney-General's Department, *Transcript*, p. 288.

*Conclusions*

*6.11* The Committee accepts that there are often many different groups in the readership of legislation. Nevertheless, the Committee considers that it is essential that the drafter bear the readership in mind when drafting.

*6.12* The Committee believes that the problem of multiple audiences should be overcome as far as possible by placing primary emphasis on drafting for the people who may be affected by a particular piece of legislation. There may be difficulties in doing this in cases where the range of people affected by the legislation is very wide, for example in the field of social security.[15]

*6.13* The Committee recognises that different people will be affected in different ways by some legislation, so the people affected by legislation may not be a homogeneous audience. Great care would need to be taken in following Dr Penman's suggestion of writing portions of one piece of legislation differently for the different audiences affected by the legislation.

*6.14* By contrast, there may be some cases in which the audience of people affected by legislation can be clearly identified as a single group with common interests. In these situations, the Committee believes that drafting legislation in the second person may be a valuable aid to communicating with the reader.

*6.15* The instructing agency will generally be in a better position than the drafter to know what skills and knowledge the target audience is likely to have. It is therefore appropriate that the instructing agency should inform the drafter of the composition and attributes of the group of people who form the target audience.

*6.16* **Recommendation 17**

***The Department of the Prime Minister and Cabinet should re-write the*** Legislation Handbook ***to emphasise the need for drafting instructions to identify if there is a target audience for the legislation.***

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15 See, for example, DSS, *Transcript*, p. 382.

## Matching Content with Audience

*6.17* The choice of target audience will affect the content as well as the form of communication in legislation. The Australian Law Librarians' Group suggested that large and complex pieces of legislation would be easier to understand if they were divided into separate, smaller pieces of legislation, each dealing with a different aspect of the larger topic. Using the Commonwealth's copyright law as an example, the Law Librarians' Group argued that rather than covering all aspects of the law of copyright in one piece of legislation (the *Copyright Act 1968*), the law should be set out in separate Acts covering 'copyright law as it related to: printed material in educational institutions; music in churches; archives; institutions assisting the handicapped; and so on'.[16]

*6.18* The Committee accepts that there may be advantages in narrowing the scope of individual pieces of legislation, to allow simpler expression and clearer targeting of material to likely audiences. The use of word processors and the possibility of cognate debate on related pieces of primary legislation mean that the extra time needed to draft and pass separate pieces of legislation dealing with related but different topics can be minimised.

## Making Sure the Readers Understand

*6.19* There is little point in taking great trouble trying to write for a particular audience if the communication does not work. This section looks at two main ways of testing whether legislation communicates its message effectively: testing the readability of legislation on computers, and testing legislation on humans.

### *Testing Readability of Legislation on Computers*

*6.20* There are various computer programs that analyse the readability of passages of writing. The programs give an indication of readability either in terms of a score on a particular index (such as the frequently quoted Flesch index) or in terms of the experience a reader would need to understand the passage.

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16 Australian Law Librarians' Group, *Submission*, p. S257.

*6.21* Several people who gave evidence to the Committee strongly supported testing on computer programs the readability of legislation.[17] They argued that this type of testing would help identify bad (but not good) drafting,[18] and 'box people into a style'.[19]

*6.22* Mr Dennis Murphy Q.C., Parliamentary Counsel for New South Wales, thought these systems were of some use:

> *We test our work on [a readability program] from time to time. We have had [readability programs] for quite some time now and they are useful to us to an extent. We feel that we should have them, that we should use them for whatever purpose they will serve. We do not say that they solve problems for us, but it does at least give us a guide as to how [a draft] stands up against a relatively well-known device ...*[20]

*6.23* Ms Judith Bennett from the Centre for Plain Legal Language noted that style-checking programs:

> *are ... only tools. You can use them in the beginning to help; you can use them to find out what they recommend. But you really need the human to assess whether or not what they are recommending is worthwhile.*[21]

*6.24* Some people considered that a computer test was no better than having a person check the legislation.[22]

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17 Centre for Plain Legal Language, *Submission*, p. S311; VLRC, *Submission*, p. S407; Business Council of Australia and Australian Institute of Company Directors, *Submission*, p. S419; J. Green, *Transcript*, p. 128; D. St L. Kelly, Chairman of the VLRC, *Second Supplementary Submission - Ten Commandments for Better Legislative Drafting*, p. S584.

18 VLRC, *Transcript*, p. 177.

19 J. Green, *Transcript*, p. 128.

20 D. Murphy Q.C., Parliamentary Counsel for New South Wales, *Transcript*, pp. 19–20.

21 Centre for Plain Legal Language, *Transcript*, p. 80. Professor Kelly of the VLRC also discussed some of the limitations of readability and style-checking programs: D. St L. Kelly, 'Are drafting styles just a matter of taste?', in B. Moore (ed.), *Drafting for the 21st Century: Proceedings of Conference at Bond University Gold Coast*, VLRC and Bond University School of Law, Melbourne, 1992, pp. 70–71.

22 Bar Association of Queensland, *Submission*, p. S474; R. Armstrong Q.C., Chief Parliamentary Counsel for Victoria, *Transcript*, pp. 216–217 & 223–224.

*6.25* Others argued that the basis for computer readability testing was fundamentally flawed, and that the results were misleading. Dr Robyn Penman commented:

> *You will not know that a law is more comprehensible by running it through a computer program to work out the reading age necessary for the person reading the legislation. Those reading programs on any computer software are, first of all, extraordinarily primitive. They are also based on a theoretical premise that has been refuted over the last 20 years of research and certainly rejected by the research community. Moreover, the reading age formulae that are used still give you no indication of anybody's capacity to read something in order to act.*[23]

DHHCS and NRMA Insurance Limited echoed these views.[24]

*6.26* Mr Turnbull demonstrated how the results of the Flesch readability test could be misleading, suggesting that some conceptually simple provisions were hard to read while other conceptually difficult provisions were rated as easy to read.[25]

*6.27* OLD indicated that it 'is currently evaluating software designed to identify problems in drafts or to help drafters produce better drafts'.[26] Mr Turnbull said an officer in OPC had tried using one style-checking program but had given it up because it was so time-consuming. He indicated that OPC might try using another program in use in New South Wales Parliamentary Counsel's Office, but cautioned:

> *this program too is time consuming. Dennis Murphy told me that for this reason he does not use it for all Bills, but his policy is for each drafter to test one Bill each [Parliamentary] Session.*[27]

*6.28* It appears to the Committee that there are severe limitations on the value of readability and style-checking computer programs for testing legislation. Nevertheless, these sorts of program may help drafters identify drafting that is difficult to read. The Committee

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23 Dr R. Penman, *Transcript*, pp. 353–354.

24 DHHCS, *Submission*, p. S363; NRMA Insurance Limited, *Transcript*, p. 61.

25 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Exhibit 17*, pp. 37–38.

26 Attorney-General's Department, *Supplementary Submission*, p. S656.

27 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Supplementary Submission - Responses to Questions, and Additional Materials*, p. S596.

therefore believes that OLD and OPC should:

- continue their investigation of readability and style-checking programs; and
- test drafts on the programs if this does not create undue delays in preparation of legislation.

*Testing Comprehension of Legislation*

*6.29* Dr Robyn Penman commented:

> *In the first instance, legislation cannot be effective if it cannot be understood. To judge this effectiveness you need evidence that shows people actually can understand it. Pseudo-evidence that relies of false belief claims (eg. I have applied plain English principles, therefore it must be effective) are totally unacceptable. Demonstrations that ordinary citizens can understand the document are all that can count as evidence of this type of effectiveness. In the second instance, legislation cannot be effective if the information provided does not allow citizens to make rational decisions about action. ... To judge this form of effectiveness you need evidence that citizens can actually use the legislation to make action decisions.*[28]

*6.30* Ms Jenny Burn of NRMA Insurance Limited confirmed the problems with the 'pseudo-evidence' that Dr Penman referred to:

> *The surveys show that from our point of view ... redrafting these documents we simply do not have all the answers, we do not know best. We might write what we think is a terrifically simple, clear explanation of something: we give it to someone else to read and, bingo, they see it completely differently. It is only through that process that we realise that there is some underlying ambiguity or that members of the public simply do not understand the words we ... think are reasonable to use, or that they get the wrong idea from reading through a whole page of it.*[29]

*6.31* Evidence of the sort that Dr Penman says is needed to demonstrate the effectiveness of legislation may come to light after the legislation comes into force. However, this may be too late if the

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28 Dr R. Penman, *Submission*, pp. S26–27.

29 NRMA Insurance Limited, *Transcript*, p. 49.

evidence shows that the people affected by the legislation cannot understand it to comply with it. Testing legislation in draft form may help overcome problems in making legislation effective.

*6.32* A number of people agreed with Dr Penman's proposition that the comprehensibility of legislation can only be discovered by testing it on people,[30] and others supported a program of testing legislation on people.[31]

*6.33* While many people see testing as being very important, evidence given to the Committee suggests that testing legislation can be time-consuming, costly and difficult. Professor Kelly of the VLRC noted:

> *[it] is a very expensive and very difficult process if it is to be done properly. It is not just a question of going out into the street and saying to people 'Read through this and answer the following five questions'. ... [It] is a very difficult thing to do properly because of the way in which you have to structure questions and so on in order to get valid results.*[32]

This was confirmed by the Centre for Plain Legal Language, which has tested documents on users.[33]

*6.34* NRMA Insurance Limited, which has conducted extensive testing in preparing its policy documents, pointed out that there need to be repeated steps of testing and refining drafts.[34]

*6.35* Some people, however, suggested that testing need not be an elaborate exercise, and that even a little testing can be valuable in revealing problems with a draft. Dr Penman said:

> *Just one [opportunity to test a piece of legislation] will do. If I were drafting the Income Tax Act, it would be better than nothing to go out and preferably find a non-bureaucrat in Canberra and get them to read it. That is better than nothing. Even that can be extremely illuminating to the drafter. There is no need to feel compelled to do*

30 DHHCS, *Submission*, p. S362; NRMA Insurance Limited, *Submission*, p. S374.

31 Business Council of Australia and Australian Institute of Company Directors, *Submission*, p. S419; Mallesons Stephen Jaques, *Transcript*, p. 27.

32 VLRC, *Transcript*, p. 176.

33 Centre for Plain Legal Language, *Transcript*, p. 74.

34 NRMA Insurance Limited, *Submission*, p. S375; NRMA Insurance Limited, *Transcript*, p. 50.

*massive broad scale testing. It is not necessary.*[35]

She pointed out that evidence from testing different pieces of legislation can accumulate over time to provide guidance to drafters.[36]

*6.36* Ms Judith Bennett of the Centre for Plain Legal Language commented:

> *There is a whole range of options within testing. You can test a document just by running it past your colleagues so that you get a different viewpoint; you can test it by calling in people from the street, maybe paying them, and getting them to read through a document and answer questions about it; or you can do it in a lot more detail, as NRMA was explaining, by a very controlled program. Each option has benefits and each has disadvantages. All of them have very short term costs for a very long term benefit. You are making sure that the people you are writing legislation for understand it before you actually launch it out there.*[37]

*6.37* Nevertheless, there are some limits apart from confidentiality on testing legislation being drafted.

*6.38* Parliamentary Counsel for New South Wales pointed out that the rapid formulation of policy and urgency of drafting legislation 'sometimes would not allow for effective testing because what you are showing the people who will be looking at the product is something which is still being developed'.[38]

*6.39* At present, there appears to be no formal testing of Commonwealth legislation to check whether people affected by it can understand it. However, DHHCS indicated to the Committee that it planned to test legislation developed in a re-writing exercise.[39]

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35 Dr R. Penman, *Transcript*, p. 375.

36 Dr R. Penman, *Transcript*, p. 355.

37 Centre for Plain Legal Language, *Transcript*, p. 73.

38 D. Murphy Q.C., Parliamentary Counsel for New South Wales, *Transcript*, p. 16.

39 DHHCS, *Submission*, p. S362.

*6.40* Mr Turnbull commented on a testing program being developed by OPC:

> *Statements made by Dr Penman convinced us [OPC] that useful document testing requires a careful selection of the document and a careful definition of the objectives of the testing. It is not simply a matter of picking an Act at random and asking the [Communications Research] Institute to test it in some abstract or general way. An effective document test would involve:*
>
> - *choosing legislation that has an identifiable user group;*
> - *identifying the context in which the users come to the legislation;*
> - *working out user expectations and interests;*
> - *identifying the basic message whose communication to the users can be tested.*
>
> *The Office has decided to undertake a document testing program that would involve testing 2 documents a year. One document would represent the standard or average Bill ... The other document would incorporate experiments in plain English ...*
>
> *Testing the first document would monitor our progress towards plainer and more useable legislation. Testing the second document would establish whether techniques that we think improve readability really have the desired effect. We hope to have the first 2 document tests done in the course of 1993.*[40]

*6.41* The Committee considers that testing user groups' comprehension of legislation offers considerable benefits not only for ensuring that the legislation tested can be clarified as much as possible, but also for identifying effective plain English drafting techniques. The Committee recognises that considerations of confidentiality in some cases, time constraints, resource limitations and the reasons identified by Mr Turnbull mean that it is not practical to test all legislation. Nevertheless, the Committee sees benefits in establishing a testing program larger than that currently envisaged.

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40 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Supplementary Submission - Responses to Questions, and Additional Material*, p. S608.

*6.42* **Recommendation 18**

***The Office of Parliamentary Counsel and the Office of Legislative Drafting should engage consultants to carry out, in consultation with agencies responsible for administering the relevant legislation, a program of testing several Bills and several pieces of subordinate legislation each year.***

*6.43* Government agencies administering the legislation that has been developed through a process of testing should benefit by having clearer legislation that is easier to comply with and administer, so it seems appropriate that they should contribute to the cost of testing. This will spread the burden of the cost of testing.

*6.44* **Recommendation 19**

***The cost of programs of testing legislation should be shared between the agencies responsible for administering the pieces of legislation tested, and the drafting agency involved.***

# 7 STRUCTURING LEGISLATION

## Introduction

*7.1* A number of people, including drafters, stressed the importance of structure of legislation in achieving clear legislation that can readily be understood.[1]

*7.2* This chapter takes a hierarchical approach to structuring a scheme of legislation. First, it considers the issue of what material should be included in the legislation. Once it is clear what material is to be included in legislation, the issues arise of how material should be divided between the primary and subordinate components of a legislative scheme and how material should be ordered within a piece of primary or subordinate legislation. The chapter concludes with a discussion of ordering of material within a section or regulation in the context of the VLRC's proposal for a numbering system that would impose an order on presentation of material within a provision.

## What Material Should Be Included in Legislation?

### *Explanatory Material*

*7.3* The VLRC submitted:

> *Members of Parliament (and others) should not have to search three documents [i.e. the Bill, second reading speech and explanatory memorandum] to discover the meaning of a Bill. The Bill itself should be self-contained.*[2]

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1 Dr R. Penman, *Submission*, p. S26; D. Murphy Q.C., Parliamentary Counsel for New South Wales, *Submission*, p. S181; I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Submission*, p. 280; Centre for Plain Legal Language, *Submission*, p. S309; G. Hackett-Jones Q.C., *Submission*, p. S365.

2 VLRC, *Submission*, p. S408.

The Commission advocated that Bills should contain all the background information needed to understand them.

*7.4* Since 1988, explanatory notes that do not form part of the law have been used in Commonwealth legislation to draw the reader's attention to important information in relation to a specific provision.[3] A number of submissions supported use of these devices.[4] A more recent innovation has been the use of reader's guides to some pieces of legislation.[5] These guides do not attempt to explain the legislation. They are intended simply to help the reader find his or her way around the legislation, and to explain some of the basic concepts underlying the structure of the legislation. Drafters prepare the notes and readers' guides, unlike the explanatory memorandum which is written by an officer of the instructing agency.[6]

*7.5* The VLRC's proposal, supported by the Law Institute of Victoria,[7] goes further in advocating that material now included in the explanatory memorandum that accompanies a piece of legislation be printed as part of the legislation. The Commission's report *Access to the Law: the structure and format of legislation*, proposed that material related to particular provisions be presented in a box immediately before or after the relevant provisions.[8]

*7.6* Government drafting agencies have pointed out problems with this proposal from the reader's point of view. First, boxes of explanation may interrupt the reader by breaking up the text of the legislation, or it may be impractical to place in boxes explanatory material that refers to several provisions at once.[9] Secondly, the Attorney-General's Department commented:

> *If this material [i.e. material found in the explanatory memorandum or second reading speech] became an integral part of legislation,*

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3 OPC, *Transcript*, p. 318; Attorney-General's Department, *Submission*, pp. S507 & S509; AQIS, *Submission*, p. S447.

4 See, for example: Senate Standing Committee on Regulations and Ordinances, *Submission*, p. S230.

5 See, for example, the reader's guide to the *Social Security Act 1991*: DSS, Attachment D to *Submission*, pp. S165–166.

6 Department of the Prime Minister and Cabinet, *Legislation Handbook*, p. 22.

7 Law Institute of Victoria, *Submission*, p. S459.

8 VLRC, *Report No. 33: Access to the Law: the structure and format of legislation*, VLRC, Melbourne, pp. 29 & 37–43.

9 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Supplementary Submission - Responses to Questions, and Additional Material*, p. S607. I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Submission*, p. S287. See also Attorney-General's Department, *Supplementary Submission*, p. S644.

> *there is a risk that it could swamp the legislation and overwhelm the reader. In most instances, resort to explanatory material is not necessary to an understanding of legislation.*[10]

While the first problem could be reduced by printing legislation and explanatory material separately on facing pages,[11] there is no guarantee that this would solve the problem of explanatory material swamping legislation.

*7.7* Incorporation in legislation of material of the sort currently found in an explanatory memorandum would be likely to delay production of legislation. Mr Turnbull explained:

> *The Explanatory Memorandum is written at the end of the process, because it has to be based on the settled text of the Bill. There is normally a great rush to get this done in time, and any further steps of incorporating it with the Bill would cause further delays.*[12]

This process would also require extra resources.[13]

*7.8* The Committee strongly supports the use of readers' guides and explanatory notes of the type increasingly found in Commonwealth legislation, but is not convinced that it would be an efficient use of resources to include in legislation material of the sort found in an explanatory memorandum.[14]

### *Incorporation of Material by Reference*

*7.9* At present, written material can be incorporated in legislation by reference.[15] This saves re-writing material, often of a technical nature, that has already been written. However, the Administrative Review Council has pointed out:

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10 Attorney-General's Department, *Supplementary Submission*, p. S644.

11 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Supplementary Submission - Responses to Questions, and Additional Material*, p. S607.

12 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Supplementary Submission - Responses to Questions, and Additional Material*, p. S607.

13 R. Armstrong Q.C., Chief Parliamentary Counsel for Victoria, *Transcript*, p. 228.

14 The question of access to explanatory memorandums is discussed in Chapter 11.

15 See, for example, *Acts Interpretation Act 1901*, section 49A.

*In effect, this means that material that is part of the law escapes parliamentary scrutiny. This raises problems of the standard of the instrument [that is incorporated in the law] ...*

*Where the incorporated material is not prepared by a skilled drafter, it can give rise to an instrument that is ambiguous and unclear in its effect.*[16]

*7.10* If there were a mechanism for Parliamentary scrutiny of material that is incorporated by reference in legislation, agencies might exercise greater care in incorporating material and preparing material likely to be incorporated in legislation. The Committee believes that the ability to incorporate material by reference is useful, but provision should be made in a central piece of legislation, such as the *Acts Interpretation Act 1901* or the proposed Legislative Instruments Act, for Parliamentary scrutiny of incorporated material.[17] This might not involve tabling the incorporated material in every instance, but should provide a mechanism for ensuring that incorporated material is tabled when necessary.[18]

## How Should Material Be Divided Between Primary and Subordinate Legislation?

*7.11* Several submissions pointed out that dividing related material between primary and associated subordinate legislation can make it harder for the reader to grasp the message of the whole legislative scheme,[19] particularly where subordinate legislation amends primary legislation or vice versa.[20]

*7.12* Nevertheless, the Taxation Institute of Australia and DVA argued that primary legislation could be simplified by putting much of the detail currently found in Acts into subordinate legislation.[21]

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16 ARC, *Rule Making by Commonwealth Agencies*, p. 55.

17 ARC, *Rule Making by Commonwealth Agencies*, p. 55.

18 Attorney-General's Department, *Submission*, pp. S511–512.

19 AMPICTA, *Submission*, pp. S32–33; Australian Council of Social Service, *Submission*, p. S439; I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Supplementary Submission - Responses to Questions, and Additional Material*, p. S609; Mallesons Stephen Jaques, *Transcript*, p. 27.

20 Australian Law Librarians' Group, *Submission*, p. S255.

21 Taxation Institute of Australia, *Submission*, pp. S237–238; DVA, *Submission*, p. S484.

*7.13* The Minister for Finance commented:

> *There may ... be a risk that drafting primary legislation simply may lead to the complexities having to be dealt with elsewhere, eg in delegated legislation.*[22]

*7.14* Mr Turnbull noted that the proposal put by the Taxation Institute and DVA would make it easier for readers to grasp the main principles of the Act. However, he pointed out that, under the proposal, regulations could be at least as complex as Acts are now, because 'the regulations would have to deal with the details they handle now as well as the details that would be transferred from the Act'.[23]

*7.15* Mr Dennis Murphy Q.C. described pressure in New South Wales to include in Acts material that might otherwise be dealt with in regulations:

> *I think with regulatory impact statements there might be a temptation to push a particular policy out of regulations back up into the Act, inappropriately.*[24]

*7.16* In recommendation 2 of its report on rule making, the ARC recommended that the *Legislation Handbook* set out criteria for matters that should be dealt with only by Acts. Matters that the Council thought should be dealt with only by Acts were:

- significant questions of policy;
- rules with significant impacts on individual rights and liberties;
- administrative and significant criminal penalties;
- taxes and significant fees and charges;
- procedural matters going to the essence of the legislative scheme; and
- amendments of Acts.[25]

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22 Hon. R. Willis MP, Minister for Finance, *Submission*, p. S221.

23 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Supplementary Submission - Responses to Questions, and Additional Material*, p. S609.

24 D. Murphy Q.C., Parliamentary Counsel for New South Wales, *Transcript*, p. 22.

25 ARC, *Rule Making by Commonwealth Agencies*, p. 18.

*7.17* One commentator on this recommendation has suggested that this list of matters to be dealt with only by Acts could be expanded, and that some of the items in the list could advantageously be spelt out in more detail.[26]

*7.18* Nevertheless, the Administrative Review Council's recommendation was explicitly supported by the Australian Council of Social Service.[27] DILGEA, the Attorney-General's Department and Mr Turnbull supported the Council's criteria in principle, but pointed out that the urgency of some requirements for legislation might make it desirable to deal in subordinate legislation with some of the matters identified as being appropriate for Acts only.[28]

*7.19* The Business Council of Australia and the Australian Institute of Company Directors suggested that criteria for division of material between primary and subordinate legislation be set out in the proposed Legislative Instruments Act.[29]

*7.20* The Committee supports the recommendation of the Administrative Review Council as a basis for division of material between primary and subordinate legislation. Incorporating the criteria in the *Legislation Handbook*, rather than an Act, would make clear the general principle to be observed while leaving sufficient flexibility to deal with contingencies foreseen by some government agencies.

*7.21* **Recommendation 20**

***The Government should implement recommendation 2 from the Administrative Review Counsel's report*** **Rule Making by Commonwealth Agencies** ***by revising the*** **Legislation Handbook** ***to set out matters that should be dealt with only by Acts.***[30]

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26 M. Orpwood Q.C. (Deputy Parliamentary Counsel for New South Wales), 'Trends in Subordinate Legislation–No. 1', paper delivered on 17 July 1992 to a conference on legislative drafting held in Canberra, pp. 4–5.

27 Australian Council of Social Service, *Submission*, p. S441.

28 DILGEA, *Submission*, p. S568; Attorney-General's Department, *Submission*, p. S508; I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Supplementary Submission - Responses to Questions, and Additional Material*, p. S609.

29 Business Council of Australian and Australian Institute of Company Directors, *Submission*, p. S424.

30 Recommendation 2 from the ARC's report *Rule Making by Commonwealth Agencies* is set out in Appendix 4.

## Division of Material Between Schedules and Other Parts of Legislation

*7.22* Many pieces of legislation are divided into the main body of text and one or more schedules. The schedules form part of the legislation,[31] but, being at the end of the piece of legislation, offer a place to set out details without interrupting the reader.

*7.23* In 1975, the Renton Committee recommended that in United Kingdom legislation 'general principles should be set out in the body of a statute [and] detailed provisions of a permanent kind in the Schedules'.[32] In 1987, the VLRC suggested that this principle should be adopted in Australian legislation and pointed out the advantages:

> *The removal of many essential but not central provisions from the body of an Act to a Schedule would be a considerable improvement. Transitional provisions and provisions which set up a Tribunal or Board and regulate its procedure are obvious candidates. ... But the greatest benefit is likely to come from the relegation to Schedules of qualifications and exceptions which at present obscure an Act's central message.*[33]

*7.24* The Attorney-General's Department acknowledged that 'greater use of schedules might also be beneficial in making the policy goals of the legislation stand out' and suggested further consideration of use of the technique in legislation.[34] The Business Council of Australia and Australian Institute of Company Directors considered that the appropriate place for detail was in schedules to legislation.[35]

*7.25* The Committee agrees that detailed material that is likely to be of limited interest to most readers should be set out in schedules to Acts (and subordinate legislation, if it sets out a substantial part of a legislative scheme). Greater use of this division of material is unlikely to inconvenience the reader who is interested mainly in the detail of a particular topic, and should assist the reader who wants to gain a general picture of the legislative scheme.

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31 *Acts Interpretation Act 1901*, section 13.

32 Renton Committee, *The Preparation of Legislation*, p. 151.

33 VLRC, *Plain English and the Law*, p. 96.

34 Attorney-General's Department, *Submission*, p. S510.

35 Business Council of Australia and Australian Institute of Company Directors, *Submission*, pp. S420 & S 421.

*7.26* **Recommendation 21**

***Drafters in the Office of Parliamentary Counsel, the Office of Legislative Drafting and other Commonwealth agencies should make greater use of schedules to deal with discrete topics, such as procedural matters, constitution of authorities etc., that do not go to the essence of the scheme established by legislation.***

*7.27* Relegating detail to schedules is unlikely to cause readers any difficulties when the topic to be treated in detail is self-contained and can be dealt with almost entirely in a schedule. However, there is more potential for difficulty when an attempt is made to separate qualifications and exceptions from matters of principle.

*7.28* It is important that readers not be misled into believing that the principle stands alone and that there are no qualifications or exceptions. The potential for this type of misunderstanding would be minimised if the principle and its exceptions both appeared in the main body of the legislation.

## Ordering Material in Legislation

*7.29* A considerable body of evidence given to the Committee identified the importance of presenting material in legislation in a logical order that meets the reader's needs.[36]

*7.30* Although there was agreement on the basic principle, there was considerable disagreement on what order best suits the reader.

*7.31* The debate focused on where provisions currently found at the beginning of legislation in all Australian jurisdictions would best be placed. These provisions include commencement provisions and interpretation provisions.

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36 DSS, Attachment A to *Submission*, p. S159; Tasmania, Office of Parliamentary Counsel, *Submission*, p. S170; A. Cannon, Supervising Magistrate, South Australia, *Submission*, p. S173; Taxation Institute of Australia, *Exhibit 7*; Centre for Plain Legal Language, *Submission*, p. S309; AQIS, *Submission*, p. S448; J. Green, *Transcript*, p. 136; VLRC, *Transcript*, p. 153; Attorney-General's Department, *Transcript*, p. 293; I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Supplementary Submission - Responses to Questions, and Additional Material*, pp. S598-599 and p. S604.

*7.32* In his 'Ten Commandments for Better Legislative Drafting', Professor David Kelly of the VLRC wrote:

> *The Act should begin with the central operative provisions. The main messages should come first. ... Enactment, commencement and similar peripheral material should be placed at the end of the Act.*[37]

The VLRC has previously suggested that definitions should be placed at the end of legislation.[38] This suggestion was endorsed by AQIS,[39] and tentatively supported by the Centre for Plain Legal Language.[40]

*7.33* While both OPC and OLD indicated their agreement with the general principle that main messages should come first,[41] a number of arguments were advanced against the specific order of provisions proposed by the VLRC.

*7.34* Mr Turnbull noted:

> *We put commencement provisions at the beginning. Some Acts also include sections dealing with extra-territorial application, binding the Crown and constitutional matters. These too are put at the beginning.*
>
> *They are usually quite short, and indeed few Acts have all these provisions. We do not think they cause sufficient difficulty for the reader to warrant moving them from their traditional position where people expect to find them.*
>
> *We have been influenced by the fact that people who read Acts expect to find certain provisions in certain places; and throughout Australia ... it has been the practice to put this kind of provision at the beginning.*[42]

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37 D. St L. Kelly, Chairman of the VLRC, *Second Supplementary Submission - Ten Commandments for Better Legislative Drafting*, p. S588.

38 VLRC, *Plain English and the Law: Appendix 1 Guidelines for Drafting in Plain English – A Manual for Legislative Drafters*, VLRC, Melbourne, 1987, p. 18.

39 AQIS, *Submission*, p. S448.

40 Centre for Plain Legal Language, *Submission*, p. S309.

41 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Supplementary Submission - Responses to Questions, and Additional Material*, p. S598; Attorney-General's Department, *Supplementary Submission*, p. S658.

42 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Supplementary Submission - Responses to Questions, and Additional Material*, p. S599.

7.35 Another drafter has written:

> *Structural conventions ... are an essential element in the language of the law. They tell the user how to consult the legislation with best effect. Conventions do not always conform to a nice logic and it is not really necessary that they should do so. What is important is that they should be stable, certain and known. ...*
>
> ...
>
> *Divergent legislative practice within Australia would have grave effects. To an increasing extent, Commonwealth and State legislation must be consulted across jurisdictional boundaries and may need to be consulted very fast. Structural compatibility greatly simplifies the task.*[43]

7.36 In addition to the convention, three other arguments have been put forward for continuing to place definitions at the beginning of a piece of legislation.

7.37 OLD advised:

> *OLD still produces legislation that commences with definition provisions because it helps the reader to know what is defined at the outset.*[44]

7.38 Mr Maurice Kelly wrote:

> *The definition section of legislation would nearly always win hands-down on a frequency of consultation test. Arguably, use should rate highly in determining placement. It is not just prejudice born of habit to suggest that definitions are well placed at the beginning. When the contents of a volume of legislation is scanned, the reference to each law is to the first page. The seeker after definitions can go straight to it, knowing they will be adjacent. This argument also applies when the legislation is consulted. Working from a provision to a definition at the beginning is quite convenient.*[45]

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43 M. Kelly, 'The drafter and the critics', (1988) 62 *Law Institute Journal* 963, 965.

44 Attorney-General's Department, *Supplementary Submission*, p. S658.

45 M. Kelly, 'The drafter and the critics', (1988) 62 *Law Institute Journal* 963, 965.

Mr Turnbull confirmed the last view, noting an experiment in which extensive definitions were placed last in an Act but were hard to find because their length meant that they started near the middle of the Act.[46]

*7.39* The Committee acknowledges the importance of the principle of putting the main message first as an aid to communication. However, the Committee believes that the advantages of the current well-established order of preliminary provisions more than offset its disadvantages. The disadvantages can be minimised by providing aids for the reader, such as a table of provisions and an index, that enable him or her to identify the location of provisions in which he or she is interested.

## Numbering Systems

*7.40* The numbering system provides an important guide to help the reader understand the structure of a piece of legislation. Currently, most Commonwealth Acts and many Commonwealth regulations use a traditional alpha-numerical system that has been in use throughout Australia for many years. Decimal numbering is used to identify subregulations in amending regulations that are themselves almost never amended,[47] in Parts of a few Acts,[48] and more generally in a few sets of regulations.[49]

*7.41* Professor Kelly of the VLRC identified the instruction to use the VLRC's decimal numbering system as the most important of his 'Ten Commandments for Better Legislative Drafting'.[50] He explained the system and reasons for using it as follows:

> *Under [the VLRC's decimal numbering system], the first portion of each section is given a whole number. For each subsection - and further divisions of the section - a decimal point is added.*

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46 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Supplementary Submission - Responses to Questions, and Additional Material*, p. S599.

47 Attorney-General's Department, *Supplementary Submission*, p. S657.

48 See, for example: *Trade Practices Act 1974*, Part 10; Corporations Law.

49 Attorney-General's Department, *Supplementary Submission*, p. S657.

50 D. St L. Kelly, Chairman of the VLRC, *Second Supplementary Submission - Ten Commandments for Better Legislative Drafting*, pp. S584-589. See also VLRC, *Transcript*, p. 156.

*The main message goes in the part of the section that is numbered with the whole number - for example 1, 2, 3. All other material, including the qualifications, exceptions and procedural detail, goes in sub sections - for example 1.1, 1.2, 1.3, paragraphs 1.1.1, 1.1.2, 1.1.3.*

*The decimal numbering forces the drafter to focus on what the main message is in each provision and to put it first. It also means that each provision has only one main message. That prevents confusion of ideas.*[51]

*7.42* The VLRC numbering system was supported in submissions from Ms A. Byrne and the Law Institute of Victoria,[52] and described as 'attractive' in terms of its format by DSS.[53] Mr A. Viney expressed general preference for decimal numbering systems over alphanumerical systems like the present one.[54]

*7.43* Government drafting agencies have criticised several aspects of the VLRC's numbering system, pointing out that in some respects the VLRC system is no better than the present system, and in other respects is worse.

*7.44* The major advantage identified by the VLRC in its numbering system is that it forces the drafter to put the main points of a provision first, in the 'whole number' part of the provision. Other drafters made three arguments against this arrangement providing particular advantages.

*7.45* First, the other drafters pointed out that the present system does not prevent them from putting the main message first, and that they already do this using the present system.[55]

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51 D. St L. Kelly, Chairman of the VLRC, *Second Supplementary Submission - Ten Commandments for Better Legislative Drafting*, p. S587. The emphasis is original.

52 A. Byrne, *Submission*, p. S22; Law Institute of Victoria, *Submission*, p. S459.

53 DSS, *Supplementary Submission*, p. S577.

54 A. Viney, *Submission*, p. S10.

55 R. Armstrong Q.C., Chief Parliamentary Counsel for Victoria, *Transcript*, p. 226; Attorney-General's Department, *Transcript*, pp. 291–292; Attorney-General's Department, *Supplementary Submission*, p. S657; I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Supplementary Submission - Responses to Questions, and Additional Material*, p. S597.

*7.46* Secondly, the other drafters pointed out that it is difficult to know what a cross-reference to the whole number means–does it refer to the whole provision, or only the main message?[56] This is likely to cause particular difficulties in amending legislation, unless the whole provision is omitted and substituted every time an amendment of the main message is made.[57] The VLRC has suggested that this problem could be overcome by use of bold typeface and setting some conventions.[58]

*7.47* Thirdly, the system relies on a subjective distinction between what is a main message that should go in the whole number portion of a section and what is a qualification that should be relegated to a decimally numbered portion of a section.[59] Mr Turnbull pointed out a number of examples in legislation drafted by the VLRC where qualifications appeared to be included arbitrarily in the whole number portion of a section.[60]

*7.48* Government drafters have also raised a number of other objections to the VLRC numbering system, including:

- the difficulty of identifying different levels of the hierarchy of provisions within a section from a reference using the VLRC system;[61]
- the fact that all existing legislation is written using different numbering systems with which most readers are already familiar;[62] and
- the system proposed for numbering provisions inserted by amendments would bear a confusing resemblance to the current system of numbering subsections and would produce provision numbers that would be no easier to follow than

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56 Attorney-General's Department, *Transcript*, p. 292; I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Exhibit 8(vi)*, p. 5.

57 The question of how much material should be included as 'context' for amendments is considered below in the discussion of amendments in the section on presentation of material to help the reader.

58 D. St L. Kelly, Chairman of the VLRC, 'Plain English: Practicalities', paper delivered at the Parliamentary Counsel's Committee conference on legislative drafting, Canberra, 15 July 1992, p. 8.

59 R. Armstrong Q.C., *Transcript*, p. 226; I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Supplementary Submission - Responses to Questions, and Additional Material*, p. S597.

60 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Supplementary Submission - Responses to Questions, and Additional Material*, p. S597.

61 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Exhibit 8(vi)*, pp. 3–4.

62 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Exhibit 8(vi)*, p. 1; R. Armstrong Q.C., Chief Parliamentary Counsel for Victoria, *Transcript*, p. 225.

those produced by the current system.[63]

*7.49* Some people suggested to the Committee that a decimal numbering system was more difficult to read than the current system.[64] This probably reflects personal preference, as Professor Kelly has advanced evidence disputing this,[65] and another submission claimed that 'a straight system of numeric identification ... would be much more clean and clear'.[66] Nevertheless, it is interesting to note the comments of Queensland Parliamentary Counsel:

> *A part-based decimal numbering system [different from the VLRC's decimal numbering system] has been widely used in Queensland for several years. The experience in Queensland has not been that a decimal based numbering system is more convenient than other methods when giving locations in spoken language. Indeed, the Queensland practice may have to be abandoned to deal with sustained criticism from the Queensland Parliament based on the difficulty of handling decimal numbers in debate.*[67]

*7.50* The Committee agrees it is generally most desirable to place the main message of a provision first. However, the Committee concludes that the numbering system proposed by the VLRC to force the drafter to place the main message first has other problems which would outweigh any benefits that adoption of the system might bring.

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63 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Exhibit 8(vi)*, p. 5; R. Armstrong Q.C., Chief Parliamentary Counsel for Victoria, *Transcript*, p. 226; Attorney-General's Department, *Transcript*, p. 291; I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Supplementary Submission - Responses to Questions, and Additional Material*, p. S598. D. Murphy Q.C., Parliamentary Counsel for New South Wales, 'Comments on paper presented by David St L Kelly [entitled 'Are drafting styles just a matter of taste?']' in B. Moore (ed.), *Drafting for the 21st Century: Proceedings of Conference at Bond University Gold Coast 6–8 February 1991*, VLRC and Bond University School of Law, 1992, p. 90.

64 R. Armstrong Q.C., Chief Parliamentary Counsel for Victoria, *Transcript*, p. 225; I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Supplementary Submission - Responses to Questions, and Additional Material*, p. S597.

65 *D. St L. Kelly, 'Are drafting styles just a matter of taste?', in B. Moore (ed.), Drafting for the 21st Century: Proceedings of Conference at Bond University Gold Coast 6–8 February 1991*, p. 73.

66 A. Viney, *Submission*, p. S10.

67 J. Leahy, Queensland Parliamentary Counsel, 'Comments on paper presented by David St L Kelly [entitled 'Are drafting styles just a matter of taste?']' in B. Moore (ed.), *Drafting for the 21st Century: Proceedings of Conference at Bond University Gold Coast 6–8 February 1991*, p. 94.

# 8 STYLE

## Introduction

*8.1* This chapter does not attempt to consider all the elements of good drafting–that is something more appropriate to the many textbooks and manuals on the subject. Instead, the chapter considers some of the issues raised in evidence given to the Committee in relation to the drafting and presentation of legislation.

*8.2* The chapter discusses the following matters related to style:

- perceptions of the effect of adopting in recent years the policy of using plain English in Commonwealth legislation;
- the effect that judicial interpretation and interpretation legislation have on legislative drafting style;
- the case for a move to a style of drafting that sets down general principles rather than spelling out details;
- whether it is desirable to fix standards for legislative drafting; and
- what can be done to ensure that the style of legislation remains up to date.

## Plain English in Commonwealth Legislation

*8.3* Evidence given to the Committee indicates that there is a widespread appreciation of the desirability of using plain English in legislation.[1]

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1 See, for example: Mallesons Stephen Jaques, *Submission*, p. S212; Senate Standing Committee on Regulations and Ordinances, *Submission*, p. S230; Australian Law Librarians' Group, *Submission*, p. S249; Australian Institute of Company Directors, Queensland Division, *Submission*, p. S464; Bar Association of Queensland, *Submission*, p. S473; Attorney-General's Department, *Submission*, p. S507; DEET, *Submission*, p. S581; J. Green, *Transcript*, p. 132.

*8.4* For several years, OPC and the legislative drafting area of the Attorney-General's Department have had a policy of using plain English in legislation.[2] Over this time, their plain English style has been evolving, and is not simply limited to the language used in legislation.[3] As OLD's *Plain English Guidelines* point out:

> *"Plain English" has become a catch-all phrase that refers to more than the words and sentences used in a document. It now includes layout and various other techniques that serve to make a document easier to read and to understand.*[4]

*8.5* Many of the people who gave evidence to the Committee considered that the Commonwealth drafting agencies' policy of using plain English in legislation has made it easier to use.[5] The submission from Mr Turnbull identified several other commentators who had noted improvements in Commonwealth drafting.[6]

*8.6* Although strong criticism of Commonwealth drafting continues, some of the criticism seems misplaced.

*8.7* As the Department of the Senate pointed out, people often criticise the drafting of legislation when they are really concerned about the policy behind the legislation:

> *The convenient phrase that a provision has been "inadequately drafted" usually really means that the policy has been poorly fashioned, has not been sufficiently refined or is imposing excessive intrusions and controls over the matter which is being regulated.*[7]

*8.8* Other criticism suggests that the critic is not aware of changes in drafting practice. The Committee received evidence that several criticisms were based on legislation drafted before adoption of the plain English policy, so do not accurately indicate faults in current

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2 See, for example: I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Submission*, p. S274; Attorney-General's Department, *Annual Report 1989–90*, AGPS, Canberra, 1990, p. 23.

3 See, for example: I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Submission*, pp. S275–276.

4 Attorney-General's Department, Attachment C to *Submission*, p. S525.

5 See, for example: D. Murphy Q.C., Parliamentary Counsel for New South Wales, *Submission*, p. S181; DHHCS, *Submission*, p. S363; G. Hackett-Jones Q.C., Parliamentary Counsel for South Australia, *Submission*, pp. S365 & S369; DVA, *Submission*, p. S486; Mallesons Stephen Jaques, *Transcript*, p. 30; Centre for Plain Legal Language, *Transcript*, pp. 67–68; J. Green, *Transcript*, p. 127.

6 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Submission*, pp. S277–278.

7 Department of the Senate, *Submission*, p. S126. See also Clerk of the House of Representatives, *Submission*, p. 542.

Commonwealth drafting style.[8] The authors of some submissions proposed the adoption of certain drafting practices, apparently unaware that they were already in use.

*8.9* While some of the criticism of Commonwealth drafting can be discounted, there is a widespread feeling, that more needs to be done to clarify Commonwealth legislation.[9] The most common call is for plainer language to be used.

*8.10* The Committee encourages the use of plain English in legislation to the greatest extent possible. The Committee recognises, however, that legal reasons (especially in amending legislation and subordinate legislation under old Acts) or complex policy may limit the simplicity of the language which could otherwise be used.

## Statutory Interpretation and Drafting Style

### *Purposive Interpretation and Drafting*

*8.11* Several people and organisations pointed out in their evidence to the Committee that the approach of the courts to statutory interpretation has a considerable influence on the style of legislative drafting.[10] G.B. Scanlan argued that:

> *law simplification can only be achieved if the High Court and the Federal Courts are to rigorously enforce the intent of the legislation.*[11]

*8.12* Section 15AA of the *Acts Interpretation Act 1901* requires courts (and others) to prefer an interpretation of a legislative provision that would promote the object of the legislation to an interpretation that would not. The extent to which this section has affected judicial attitudes and the extent to which judicial attitudes have changed for

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8 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Submission*, p. S282; OPC, *Transcript*, pp. 324–326.

9 See, for example: DSS, *Submission*, p. S 148; DEET, *Submission*, p. S581; Mallesons Stephen Jaques, *Submission*, p. S216; J. Green, *Transcript*, p. 127; VLRC, *Transcript*, pp. 155–156.

10 G. Scanlan, *Submission*, p. S8; Dr R. Penman, *Submission*, p. S25; I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Submission*, p. S274; Taxation Institute of Australia, *Transcript*, pp. 97–98; Taxation Institute of Australia, *Submission*, p. S238.

11 G. Scanlan, *Submission*, p. S7.

other reasons towards a preference for purposive interpretation of legislation are not entirely clear.

*8.13* Nevertheless, it is clear to the Committee that many people, including a number of drafters, believe that purposive interpretation is well enough established to encourage a less detailed style of drafting.[12]

*8.14* One feature of this style that can be used to reinforce purposive interpretation and generally make legislation easier to read is the use of purpose or object provisions. The Centre for Plain Legal Language recommended use of these provisions, commenting:

> *Research shows that readers are better able to understand and interpret texts when they have a context for reading them. Purpose clauses can give the reader a context in which to immediately interpret the legislation, as well as making sure that the law makers are clear as to why they are enacting such a law.*[13]

The Bar Association of New South Wales, the Law Society of Western Australia and Mr John Green all commented favourably on the increasing use of objects provisions in Commonwealth legislation.[14] The Committee too applauds this development and encourages Commonwealth drafting agencies to make more use of these sorts of provisions as one way of promoting purposive interpretation and clarifying legislation by reducing the need for detailed prescriptions.

*8.15* The Taxation Institute of Australia argued that the *Acts Interpretation Act* should be redrafted to further embed the purposive approach to statutory interpretation.[15] The VLRC also stressed that the approach to interpretation established by the *Acts Interpretation Act* would influence a court more than the style of drafting employed

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12 Centre for Plain Legal Language, *Submission*, p. S307; VLRC, *Transcript*, pp. 162–163; E. Moran, 'The relevance of statutory interpretation to drafting' in B. Moore (ed.), *Drafting for the 21st Century: Proceedings of Conference at Bond University Gold Coast 6–8 February 1991*, pp. 106–108; J. Leahy, Queensland Parliamentary Counsel, 'Comments on paper presented by Eamonn Moran ['The relevance of statutory interpretation to drafting']' in B. Moore (ed.), *Drafting for the 21st Century: Proceedings of Conference at Bond University Gold Coast 6–8 February 1991*, p. 115. A different view was expressed by G. Hackett-Jones Q.C., Parliamentary Counsel for South Australia, 'Comments on paper presented by Eamonn Moran ['The relevance of statutory interpretation to drafting']' in B. Moore (ed.), *Drafting for the 21st Century: Proceedings of Conference at Bond University Gold Coast 6–8 February 1991*, pp. 117–119.

13 Centre for Plain Legal Language, *Submission*, p. S307.

14 New South Wales Bar Association, *Submission*, p. S203; Law Society of Western Australia, *Submission*, p. S476; J. Green, *Transcript*, p. 135.

15 Taxation Institute of Australia, *Transcript*, pp.97-99.

in the legislation being interpreted. [16]

*Interpretation Legislation and Drafting*

*8.16* Although one lawyer making a submission argued that 'the interpretation statutes encourage bad law' and should be repealed,[17] there is considerable evidence that interpretation legislation plays a fundamental role in promoting desirable features in drafting, such as brevity and consistency between different pieces of legislation. Mr Eamonn Moran has noted:

> *Thanks to interpretation legislation, the overall volume of the statute-book is much less than it would otherwise be. ... This reduction in volume is made possible by Interpretation provisions that–*
>
> - *define words and phrases commonly used in legislation*
> - *contain rules about gender and number and the use of other parts of speech*
> - *assist cross-referencing*
> - *enable the use of shorthand methods of creating offences or imposing penalties or providing for the delegation of powers or the service of documents*
> - *relate to the calculation of time or the measurement of distance.*[18]

The Attorney-General's Department observed:

> *The disadvantage of separating certain principles from the specific legislative scheme in which they are to operate may be outweighed by the achievement of consistency in these areas. The disadvantage may be overcome by providing in the specific legislative scheme "signposts" by notes referring to the principles contained in the central Act.*[19]

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16 VLRC, *Transcript*, p. 163.

17 A. Walsh, *Submission*, p. S3.

18 E. Moran, 'The relevance of statutory interpretation to drafting' in B. Moore (ed.), *Drafting for the 21st Century: Proceedings of Conference at Bond University Gold Coast 6–8 February 1991*, p. 103. The Commonwealth *Acts Interpretation Act 1901* contains most of the features described by Moran, but the general provisions relating to offences and penalties are found in the *Crimes Act 1914*.

19 Attorney-General's Department, *Submission*, pp. S512–513.

*8.17* The Committee accepts that interpretation legislation is generally of great importance to legislative drafting, and helps promote legislation that is easy to read. The *Acts Interpretation Act* is an amalgam of provisions based on the oldest Commonwealth legislation still in force, and the expression of many provisions is far from plain English. The Committee believes that there would be substantial advantages in reviewing and re-writing the *Acts Interpretation Act*, especially given the moves for uniform interpretation legislation throughout Australia and the proposal for a Legislative Instruments Act that would deal with some of the matters currently covered by the *Acts Interpretation Act*. The benefits of reviewing and re-writing interpretation legislation would not be limited to making interpretation legislation easier to use, but would also include raised awareness of interpretation legislation.

*8.18* **Recommendation 22**

***The Attorney-General's Department and the Office of Parliamentary Counsel should publicly review and re-write the Acts Interpretation Act 1901.***

*8.19* In a review of the *Acts Interpretation Act*, some provisions are likely to attract particular interest. Three sections of the Act were seen by people giving evidence to the Committee as being especially important in facilitating desirable features of drafting:

- section 15AC, which provides that different expressions of the same idea should be interpreted in the same way if the later expression differed from the earlier for the purposes of using a clearer style;
- section 15AD, which provides that the provision should prevail over an inconsistent example given in legislation to illustrate the working of the provision; and
- section 23, which provides (among other things) that 'words importing a gender include every other gender'.

*Clearer Style: Section 15AC of the Acts Interpretation Act 1901*

*8.20* There was not consensus among people giving evidence as to the effectiveness of section 15AC in promoting plain English. OLD considered that section 15AC gave considerable scope for new expres

sion of old concepts in plainer English.[20] Mr Turnbull acknowledged that there were some problems that section 15AC could not overcome:

> *Even though we put ... section 15AC in the Acts Interpretation Act, it is still difficult to branch off into an entirely new set of words when you are amending an Act. Indeed, the departments and the people instructing us feel very unhappy about that and like us to stick to the words they are familiar with.*[21]

His comments were borne out by a witness from DHHCS.[22]

*8.21* The Committee believes that section 15AC might be more effective in promoting plainer English if it were more widely publicised, to allay the concerns of instructing agencies about innovations in the language of amending legislation.

*8.22* **Recommendation 23**

***The Department of the Prime Minister and Cabinet should re-write the* Legislation Handbook *to draw the attention of instructing officers to section 15AC of the* Acts Interpretation Act 1901 *(or its equivalent in re-written interpretation legislation) and to point out that amending legislation need not follow all the linguistic conventions of the legislation being amended.***

*Use of Examples: Section 15AD of the Acts Interpretation Act 1901*

*8.23* Many people considered that the use of examples in Commonwealth legislation to illustrate the application of provisions helps the reader.[23]

*8.24* Some people, however, were concerned that section 15AD of the *Acts Interpretation Act* undermined the value of including

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20 Attorney-General's Department, *Submission*, pp. S496–497 & S510.

21 OPC, *Transcript*, p. 321

22 DHHCS, *Transcript*, pp. 418–419.

23 See, for example: DSS, *Submission*, pp. S151 & S154; New South Wales Bar Association, *Submission*, p. S203; Senate Standing Committee on Regulations and Ordinances, *Submission*, p. S230; Centre for Plain Legal Language, *Submission*, p. S311; J. Green, *Transcript*, p. S135; G. Kolts Q.C., *Transcript*, p. S423.

examples in legislation,[24] and called for repeal of the section.[25] The VLRC argued:

> *Regrettably, while examples are used to some extent in Bills and Acts, the Parliament has adopted the rule that, if an example is inconsistent with the words used in a section, the example must give way. That is absurd. What is the use of an example if one cannot rely on it? The drafter is more likely to record Parliament's intention accurately in a specific example than in a section generally describing that intention. The example is more likely to be correct and should prevail.*[26]

*8.25* Mr Turnbull rebutted the VLRC's arguments and argued that, if text and example conflicted, then text should prevail for the following reasons:

- *The text is in general terms, but an example deals with only one set of facts.*
- *The example is an aid to understanding. Its purpose is to illustrate the text, not define it.*
- *It is therefore subordinate to the text, and indeed the text should be drafted so as to operate even if there were no examples.*
- *Making a mistaken example paramount would result in one set of facts changing the text, which could change the application of the text to very many different sets of facts.*

...

> *In actual fact there should be very few cases of conflict between text and examples, because it is our policy to take every care to see that they agree. I therefore think that the existence of paragraph 15AD(b) does no harm. It is merely a backstop.*[27]

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24 VLRC, *Submission*, pp. S408–409; J. Green, *Transcript*, p. 135.

25 VLRC, *Submission*, p. S409.

26 VLRC, *Submission*, pp. S408–409.

27 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Supplementary Submission - Responses to Questions, and Additional Material*, pp. S601-602. The New South Wales Bar Association agreed that examples should merely illustrate, not define, the law: *Submission*, p. S203.

*8.26* OLD advanced a further reason against making examples prevail over general provisions:

> *OLD takes the view that, to allow examples to override the provision to which they are attached would be, to some extent, self defeating. It would make drafters less ready to include examples in case there is a conflict with the substantive provision.*[28]

*8.27* The Committee believes that inconsistencies between examples and the provisions they are intended to illustrate are likely to occur only rarely. However, in view of the potential for uncertainty and relatively widespread changes in the law if a single example were to prevail over a more general provision, it is appropriate that the general provision should prevail over an example if the two are inconsistent.

### *Language and Gender: Section 23 of the Acts Interpretation Act 1901*

*8.28* The National Foundation for Australian Women submitted that:

> *The Acts Interpretation Act 1901 should be amended so that terms that import only one of the masculine or feminine gender are to [be] used only where there is an intention to refer only to males or females as the case may be. The feminine should not be taken to apply to the masculine and vice versa.*[29]

*8.29* In recent years, Commonwealth drafters have taken care to use both masculine and feminine pronouns when legislation is intended to apply to both males and females. Cases in which legislation is to apply only to one sex are quite rare, and the Committee is unaware of any recent examples in which words of inappropriate gender have been used in legislative provisions applying to only one sex. There are, however, many older provisions intended to apply to both males and females in which words have been used that would import only one gender if it were not for section 23 of the *Acts Interpretation Act*. Replacing all these words with both masculine and feminine equivalents would require a major revision of the Commonwealth statute book.

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28 Attorney-General's Department, *Supplementary Submission*, p. S659.

29 National Foundation for Australian Women, *Submission*, p. S177.

*8.30* Nevertheless, legislative drafting should ensure that women are not 'invisible' in the law, and the Committee believes that interpretation legislation should require phasing in of use of words of appropriate gender in all legislation. However, the Committee recognises that it would help keep legislation simpler if interpretation legislation were to extend the meaning of words of either feminine or masculine gender to include equivalent meanings in the neuter gender. This would allow pronouns for 'person', which is defined by the *Acts Interpretation Act* to include a body corporate as well as a natural person, to be limited to 'he or she' rather than 'he, she or it'.

*8.31* **Recommendation 24**

***Commonwealth interpretation legislation should provide that in all principal legislation made after 1 January 1994, or legislation amending principal legislation made after 1 January 1994, words of masculine or feminine gender include the neuter gender, but words of masculine gender do not include the feminine gender and words of feminine gender do not include the masculine gender.***

*8.32* **Recommendation 25**

***When a piece of legislation is being amended for other reasons, drafters should also amend it to use words of the feminine gender where appropriate.***

*Explanatory Memorandum: Section 15AB of the Acts Interpretation Act 1901*

*8.33* Section 15AB of the *Acts Interpretation Act* allows reference to explanatory memorandum when interpreting legislation. However, the Senate Standing Committee for the Scrutiny of Bills commented that:

> *... in its experience, not enough care is taken in the drafting of explanatory memoranda to bills and that not enough use is made of explanatory memoranda as a means of actually* explaining *what legislation is about. In scrutinising legislation, the Committee frequently encounters explanatory memoranda which either contain errors or are misleading. Further, in the Committee's experience, it is common for explanatory memoranda to be of little or no help as an aid to interpreting the legislation with which they deal. More*

*significantly, however, the Committee finds that responses given to the Committee's comments about provisions in bills which possibly offend against the Committee's terms of reference are often such that the explanation eventually given should, properly, have been contained in the explanatory memorandum.*[30]

*8.34* The Senate Standing Committee on Regulations and Ordinances also submitted that:

*[explanatory materials] should be of comparable quality to the legislation itself and must reflect its intentions accurately and comprehensibly.*[31]

*8.35* One way of overcoming the problems identified with explanatory memoranda would be to have the drafter of the legislation check the memorandum prepared by the instructing agency before it is finalised.

## Drafting in General Principles

### *Proposals for More General Principles Drafting*

*8.36* In March 1992 Mr John Green presented the paper 'A Fair Go for Fuzzy Law' at the conference 'Making Legislation More Intelligible and Effective', held by the Joint Parliamentary Committee on Corporations and Securities and the VLRC in Canberra. The paper sparked renewed interest in drafting in general principles. This interest was reflected in much of the evidence received by the Committee.

*8.37* As Mr Green recognised, the concept of drafting in general principles, rather than at the level of detail now often described as 'black letter law', is not new.[32] In 1975, the Renton Committee in the United Kingdom recommended that the general principles of legislation should be drawn out clearly, although it did not recommend complete abandonment of detail.[33] In 1977, Sir William Dale commended the way in which some European clearly stated the general principles of

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30 Senate Standing Committee for the Scrutiny of Bills, *Submission*, pp. S48-49.

31 Senate Standing Committee on Regulations and Ordinances, *Submission*, p. S231.

32 J. Green, 'A Fair Go for Fuzzy Law', in *Making Legislation More Intelligible and Effective: Proceedings of a Conference Held in Parliament House, Canberra 6 March 1992*, p. 24.

33 Renton Committee, *The Preparation of Legislation*, p. 150.

their legislation and recommended that other countries follow this lead.[34] In Australia, Dale's work provoked comment.[35]

*8.38* Some Commonwealth law has already been drafted in general principles. Well-known examples include section 51 of the *Income Tax Assessment Act 1936*, section 52 of the *Trade Practices Act 1974* and sections 232 and 1022 of the Corporations Law.[36]

*8.39* In his paper, Mr Green argued that current detailed legislation was unnecessarily costly to administer and comply with, and not necessarily effective in regulating behaviour. He went on:

> *So, my solution is that where possible we move right away from black-letter, detailed, heavily proscriptive law.*
>
> *What we would replace it with is law that meets these 4 criteria as far as possible:*
> - *short and simple*
> - *clear and intelligible*
> - *based on broad principles or concepts, not detailed rules*
> - *promoting certainty.*[37]

He explained that:

> *Our laws would be much more conceptual, not too detailed. I'm not saying no detail; only just enough. And that will vary with the subject-matter of the law.*[38]

*Support for General Principles Drafting*

*8.40* Many commercial and legal organisations gave evidence to the Committee supporting greater use of general principles drafting. They included:

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34 W. Dale, *Legislative Drafting: A New Approach*, pp. 332–336.

35 G. Kolts, 'Observations on the Proposed New Approach to Legislative Drafting in Common Law Countries', [1980] *Statute Law Review* 144. This article was also tendered in evidence to the Committee as Exhibit 18.

36 Other examples of general principles drafting are set out in *Exhibit 17* at pages 19–21.

37 J. Green, 'A Fair Go for Fuzzy Law', in *Making Legislation More Intelligible and Effective: Proceedings of a Conference Held in Parliament House, Canberra 6 March 1992*, p. 23.

38 J. Green, 'A Fair Go for Fuzzy Law', in *Making Legislation More Intelligible and Effective: Proceedings of a Conference Held in Parliament House, Canberra 6 March 1992*, p. 24.

- the Centre for Plain Legal Language;[39]
- the Business Council of Australia and the Australian Institute of Company Directors;[40]
- the Law Society of South Australia;[41]
- the Law Society of the Australian Capital Territory;[42]
- the Law Institute of Victoria;[43] and
- the Australian Bankers Association.[44]

*8.41* The supporters of greater use of general principles drafting believe that it would overcome some of the disadvantages they see in use of 'black-letter law': difficulties in grasping the basic purpose of the law and difficulties in enforcement created by technicalities. Mr Green argued:

> *Fuzzy Law [i.e. law drafted in general principles] would encourage our business community and our courts to keep moving away from technicalities and towards substance. It would discourage loopholing, because without black-letter law, it would be harder.*[45]

### *Concerns about General Principles Drafting*

*8.42* Some people who gave evidence to the Committee opposed the use of general principles drafting.[46] Others, including some who doubted whether it was needed if drafting were reformed in other ways,[47] expressed concerns about general principles drafting. There were two basic concerns about use of general principles drafting:

- that it would create uncertainty unless people resorted to the courts for interpretation; and
- that it would transfer power from the elected legislature to the unelected executive and judiciary.

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39 Centre for Plain Legal Language, *Submission*, p. S306.

40 Business Council of Australia and Australian Institute of Company Directors, *Submission*, p. S428; Australian Institute of Company Directors, Queensland Division, *Submission*, p. S464.

41 Law Society of South Australia, *Submission*, p. S438.

42 Law Society of the Australian Capital Territory, *Submission*, p. S471.

43 Law Institute of Victoria, *Transcript*, p. 211.

44 Australian Bankers Association, *Transcript*, p. 189.

45 J. Green, 'A Fair Go for Fuzzy Law', in *Making Legislation More Intelligible and Effective: Proceedings of a Conference Held in Parliament House, Canberra 6 March 1992*, p. 26.

46 DEET, *Submission*, p. S580; New South Wales Bar Association, *Transcript*, pp. 116–117.

47 Taxation Institute of Australia, *Submission*, p. S237; Mallesons Stephen Jaques, *Transcript*, p. 25.

*8.43* DHHCS commented:

*Greater reliance on statements of principle raises a number of complex issues, including:*

- *it gives increased power to the Judiciary and the Executive at the expense of the Legislature. It will become more the job of the Executive and subsequently the Judiciary to "flesh out" what was meant by the statements of principles;*
- *the less detailed the legislation, the more open it would be to dispute its application to particular circumstances. Benefits of simpler legislation and greater flexibility may be offset by the cost of litigation and uncertainty.*[48]

*8.44* The New South Wales Bar Association submitted:

*If the idea of legislative drafting is to make meaning, so far as practical, indisputable then general principles will not do.*[49]

*8.45* Mr Turnbull observed:

*With "fuzzy law" there would be areas where it would be anyone's guess how the courts would interpret a provision. There would be many questions that nobody could answer until they had been settled by the courts.*[50]

*8.46* The ATO told the Committee about the pressures it faces:

*with a plea for certainty, we are constantly barraged by the professions about the need to provide extensive rules and to enunciate them exactly in neat black letters.*[51]

*8.47* Mr John Fitzgerald argued:

*The adoption of less comprehensively worded legislation involves the supply of less rules to users. Yet the adoption of less comprehensively worded legislation will not diminish the demand for rules among users of the legislation. Once the legislature supplies less*

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48 DHHCS, *Submission*, p. S363. Similar views were expressed by the Attorney-General's Department, *Submission*, p. S505; D. Murphy Q.C., Parliamentary Counsel for New South Wales, *Submission*, pp. S183–184; and Mallesons Stephen Jaques, *Submission*, p. S213.

49 New South Wales Bar Association, *Submission*, p. S206

50 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Submission*, p. S288.

51 ATO, *Transcript*, p. 454.

*rules then users will, of necessity, turn elsewhere for supply of rules. Some institution or body other than the legislature will meet this demand.*[52]

*8.48* Mallesons Stephen Jaques considered:

*It needs to be recognised that a shift to the European practice [i.e. drafting in general principles] would require important changes to the way our community functions. It would mean a transfer of power from the legislature to the executive and judiciary. The role of administrative bodies and tribunals would expand to explain the practical application of the principles.*[53]

*8.49* Mr Viney expressed particular concern about the transfer of power to the executive that would flow from drafting legislation in general principles,[54] while the New South Wales Bar Association was concerned about the judiciary being placed in a law-making role.[55]

*8.50* Both of the major concerns with general principles drafting arise from the uncertainty that people expect would result from drafting in general principles: if people affected by the laws felt clear about what the laws allowed them to do, they would not test it in the courts.

*8.51* Mr Green argued that:

*Australian fuzzy law ... must be drafted so as to make it blindingly obvious what it is about.*

*But if people want to operate on the line of the legal playing field, then going to court might well be the price they have to pay for that. That is their choice. There will be plenty of room in centre court where recourse to the umpire will be entirely unnecessary.*[56]

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52 J.D. Fitzgerald, *Submission*, pp. S243–244.

53 Mallesons Stephen Jaques, *Submission*, p. S213. A similar view was expressed by the Attorney-General's Department, *Submission*, p. S206.

54 A. Viney, *Submission*, p. S10.

55 New South Wales Bar Association, *Transcript*, p. 116. Other people also indicated that the judiciary might be reluctant to take on a law-making role: D. Murphy Q.C., Parliamentary Counsel for New South Wales, *Submission*, p. S184; I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Submission*, pp. S288–289.

56 J. Green, 'A Fair Go for Fuzzy Law', in *Making Legislation More Intelligible and Effective: Proceedings of a Conference Held in Parliament House, Canberra 6 March 1992*, p. 37.

The Committee received evidence that, however legislation is drafted, the nature of language makes complete certainty in legislation unachievable.[57] Drafters acknowledged this.[58]

*When Should Legislation Be Drafted in General Principles?*

*8.52* Even supporters of general principles drafting do not foresee it completely replacing other styles of drafting.[59] Legislative drafters have suggested to the Committee that general principles drafting is not very suitable for a number of areas, including:

- subordinate legislation, which by its very nature is intended to provide detail;[60]
- legislation setting out the eligibility criteria for payment of benefits and the amount of benefits payable;[61] and
- legislation making provision for deductions and exemptions from tax;[62] and
- legislation that imposes restrictions which are likely to be evaded if possible, or deals with bodies that can afford very high legal costs to try to manipulate the law.[63]

*8.53* Mr Turnbull told the Committee 'we [OPC] are not opposed to [Mr Green's approach to fuzzy law], and indeed we have tried to work out principles for applying fuzzy law'.[64] He explained the principles in his submission:

> *When using this style, OPC believes that very important conditions apply, not only to the whole law, but to each provision. These are:*
> - *The sponsor must be advised of the lack of certainty and its possible consequences, including the fact that people affected by the law may have to go to the courts to find out what it*

57 Dr R. Penman, *Submission*, p. S26.

58 Attorney-General's Department, *Transcript*, p. 285; OPC, *Transcript*, p. 340.

59 Centre for Plain Legal Language, *Submission*, p. S306; J. Green, *Transcript*, p. 132; Business Council of Australia, *Transcript*, pp. 239–240.

60 Attorney-General's Department, *Submission*, p. S505; Attorney-General's Department, *Transcript*, p. 282.

61 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Supplementary Submission - Responses to Questions, and Additional Material*, p. S617.

62 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Supplementary Submission - Responses to Questions, and Additional Material*, p. S617.

63 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Submission*, p. S290.

64 OPC, *Transcript*, p. 343.

*means.*

- *The sponsor must agree to the use of general principles drafting. This requires a full understanding of the effect of the provision and a conscious decision to accept it.*
- *The sponsor must agree to the degree of generality to be used.*[65]

*8.54* Asked about this approach to deciding when to use fuzzy law, Mr Green said:

> *I think we [i.e. Mr Green and Mr Turnbull (First Parliamentary Counsel)] are actually probably saying the same thing. I do not have any difficulty except perhaps to the extent of what you have described Mr Turnbull as saying. I do believe strongly that the decision to go black-letter versus fuzzy should not be a decision solely for the drafter. It is clearly a question of policy and it depends very much on the nature of the law that you are dealing with, the nature of the activity which you are seeking to regulate and the type of people even, in some cases, that you want to regulate.*[66]

*Conclusion*

*8.55* The Committee believes that there are significant advantages to be gained from use of general principles drafting in many instances. These were succinctly stated in Mr Turnbull's submission:

> *This style has obvious advantages in that the law could be far more briefly expressed in this way, and it would be far easier for users to read it and to understand the general thrust of the law.*[67]

*8.56* There is some evidence that the advantages are not being fully realised because of the fear that legislation drafted in general principles will generate uncertainty.[68] The Committee believes that these concerns can be overstated, although it believes that general principles drafting does not suit all types of legislation.

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65 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Submission*, p. S290.

66 J. Green, *Transcript*, p. 132.

67 I.M.L. Turnbull, Q.C., First Parliamentary Counsel, *Submission*, p. S288.

68 Centre for Plain Legal Language, *Submission*, p. S306; J. Green, 'A Fair Go for Fuzzy Law', in *Making Legislation More Intelligible and Effective*, p. 26.

*8.57* **Recommendation 26**

***The Department of the Prime Minister and Cabinet should re-write the*** Legislation Handbook ***to require departments and instructing officers to have legislation drafted in general principles where appropriate, while recognising the need to use 'black-letter law' in many circumstances.***

## Setting Standards for Drafting

*8.58* Once it has been decided what features good drafting should include, it would be helpful to set standards to assess drafting and encourage maintenance of desirable forms of drafting. Some submissions called for the establishment of standards for legislative drafting in Australia.[69] This section considers whether standards should be set for drafting.

### *What Standards Are There Now?*

*8.59* A number of Australian commentators on drafting have noted that legislation has been passed in the United States of America to ensure that drafting (mainly of private legal documents) meets acceptable standards.[70]

*8.60* Unlike the situation in the United States of America, there is no legislation in Australia that expresses specific and objective standards for drafting.[71]

*8.61* Guidelines issued under the *Subordinate Legislation Act 1962* of Victoria require that 'a statutory rule ... be expressed plainly and unambiguously ... and in accordance with modern standards of drafting applying in Victoria'.[72] Clause 4 of Schedule 1 to the *Subordinate Legislation Act 1989* of New South Wales requires that a statutory rule

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69 A. Walsh, Submission, p. S4; Business Council of Australia and Australian Institute of Company Directors, *Submission*, p. S422.

70 See, for example: J. Willis, 'Making Legal Documents Readable: Some American Initiatives', (1978) 52 *Law Institute Journal* 513, 519–521; VLRC, *Plain English and the Law*, pp. 92–93; I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Submission*, p. S292.

71 Tasmania, Office of Parliamentary Counsel, *Submission*, p. S170.

72 See Note 4 to Reprint No. 5 of the *Subordinate Legislation Act 1962* of Victoria (reprinted as at 2 September 1992).

'be expressed plainly and unambiguously'. The *Subordinate Legislation Act 1992* of Tasmania imposes the same requirement as the New South Wales Act. Despite its title, the *Legislative Standards Act 1992* of Queensland provides little guidance on standards of legislative drafting, although it sets out a number of matters of legal policy to be considered in drafting.

*8.62* Although they give legal recognition to the desirability of clear legislative drafting, these standards give little practical assistance in determining the quality of drafting.

*8.63* Both OPC and OLD issue directions to their staff on a range of matters relating to drafting.[73] Although some of these directions give general guidance on a range of matters relating to plain English,[74] most of them address special legal policy issues or specific types of provisions. They are intended mainly to help drafters, and do not provide a good basis for objective assessment of the quality of drafting.

*8.64* The evidence received by the Committee included several checklists of features considered desirable in drafting,[75] but even these leave scope for considerable individual interpretation and do not really form a clear standard.

### *Is it Desirable or Feasible to Set Drafting Standards?*

*8.65* The Clerk of the House of Representatives observed:

> *The issue of what might be described as "good" or "bad" legislative drafting is a sensitive subject, on which there is continuing debate, and which resists a definite conclusion, involving as it does, a number of value judgments.*[76]

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73 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Submission*, p. S297; Attorney-General's Department, *Submission*, p. S501.

74 See, for example: Attorney-General's Department, Attachment C to *Submission*, pp. S524–546; OPC, Drafting Instruction No. 2 of 1987.

75 See, for example: DSS, Attachment A to *Submission*, pp. S159–160; D. Murphy Q.C., Parliamentary Counsel for New South Wales, Appendix A to *Submission*, p. S188; D. St L. Kelly, *Second Supplementary Submission - Ten Commandments for Better Legislative Drafting*, pp. S584-589.

76 Clerk of the House of Representatives, *Submission*, p. S41.

*8.66* Parliamentary Counsel for New South Wales noted that his Office had 'developed ten simple practical tests for plain language', but went on, 'Of course there is far more to good legislative drafting than merely applying these kinds of tests'.[77] This view was echoed by the Centre for Plain Legal Language.[78]

*8.67* NRMA Insurance Limited made the point that there are many versions of plain language and that 'The arbiter of the best version should be the users'.[79]

*Conclusion*

*8.68* For reasons discussed in Chapter 6, the Committee believes that there is little merit in accepting as a standard any of the quantitative readability tests as a standard for legislative drafting.

*8.69* The Committee believes that although there are many useful guides to drafting clearly, the ultimate test of whether legislation is well drafted is whether the law-maker's intention is clearly communicated to the person affected by the law. This is obviously a subjective test. Given the many different classes of people affected by legislation, it seems unlikely that it would be possible to develop a set of standards that should apply objectively to all legislation, or even broad classes of legislation. As OLD observed:

> *While there is much to be said for a consistent approach to drafting style, standardisation for its own sake is something to avoid.*[80]

## Keeping Style Up-to-Date

*8.70* Although it may not be practical to set standards to determine whether drafting is good or not, it is clear that many people believe that the quality of drafting Commonwealth legislation has improved in recent years.[81] With the changes already underway in the drafting offices and the adoption of the Committee's recommendations, further improvements can be expected.

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77 D. Murphy Q.C., Parliamentary Counsel for New South Wales, *Submission*, p. S182.

78 Centre for Plain Legal Language, *Transcript*, pp. 72–73.

79 NRMA Insurance Limited, *Submission*, p. S375.

80 Attorney-General's Department, *Supplementary Submission*, p. S636.

81 See paragraph 8.5 and footnotes 5 and 6 in this Chapter.

*8.71* Changes in language, general education and expectations over time make it inevitable that perceptions of what is good drafting will also change over time. It is therefore important that the expression in legislation be kept up to date.

*8.72* While changes in drafting style will be reflected in the drafting of new legislation, other measures are needed to update existing legislation. In the case of Commonwealth legislation, this will be a major task.[82] Arguably the most effective way of making existing legislation easier to read and use is to re-write it.

### *Re-Writing Legislation*

*8.73* The Committee believes that powers to make stylistic changes when reprinting legislation[83] are no substitute for re-writing Commonwealth legislation to make it easier to understand and use. The effectiveness of re-writing legislation in making legislation easier to use has been well demonstrated by a number of pieces of Commonwealth legislation, such as the *Social Security Act 1991*, the sales tax laws and the Austudy and Migration (1993) Regulations. Indeed, many of the Commonwealth Acts that have received the most praise for their plain English are Acts that have been re-written.

*8.74* Currently, however, re-writing is not undertaken on a systematic basis. Mr Turnbull wrote:

> *At present the priorities [in re-writing legislation] do not depend solely on the need for simple laws - they depend on the wish of a particular Minister or Department, their ability to get the necessary priority on the legislative program, and also whether the policy of*

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82 DSS, *Submission*, p. S148; VLRC, *Supplementary Submission*, p. S467.

83 In 1990, the VLRC reviewed Australian State legislation governing changes to legislation in reprinting. It found that many States have legislation allowing a range of minor changes to Acts to be made administratively when the Acts are reprinted. Some of the types of changes that can be made are:

- corrections of spelling, punctuation and numbering;
- changes of words denoting numbers to numerals;
- correcting cross-references; and
- shortening internal references by omitting phrases like 'of this section'. (See: VLRC, *Report No. 38: Statute Law Revision and Miscellaneous Amendment*, VLRC, Melbourne, 1990, pp. 5–6.)

Queensland has given Parliamentary Counsel considerably wider powers under the *Reprints Act 1992* to make reprinted legislation consistent with current legislative drafting practice, as long as the changes do not alter the effect of the legislation. These stylistic changes have effect as if they had been made by an amending Act.

*the existing Act is to be substantially changed.*[84]

Both OPC and OLD explained that re-writing legislation requires the commitment of considerable drafting resources,[85] and noted that with their current resources they cannot meet the increasing demand from other agencies for re-writing of legislation.[86]

*8.75* The Committee received evidence from organisations outside government strongly urging that the *Income Tax Assessment Act 1936* and the Corporations Law should be rewritten and simplified.[87]

*8.76* The Committee considers that the benefits of re-writing legislation will be best realised if a program is set up to re-write legislation. This raises the following issues:

- how should legislation be selected for re-writing?
- what resources should be allocated to re-writing legislation?

These issues are considered below.

*8.77* Mr Turnbull suggested that:

*priorities in rewriting a law should be set by combining 2 factors: the number of people who use it, and the state of the law.*[88]

*8.78* There are two possible bases for a program of re-writing. Re-writing can be compelled by sunset clauses, or undertaken voluntarily.

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84 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Supplementary Submission - Responses to Questions, and Additional Material*, p. S611.

85 Attorney-General's Department, *Submission*, p. S499; I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Supplementary Submission - Responses to Questions, and Additional Material*, p. S611. Re-writing each of the *Social Security Act* and sales tax laws required the commitment of a drafter to the task full-time for well over a year, and re-writing the Migration Regulations took the full-time services of a Senior Executive Service officer for 4 months together with considerable assistance over a much longer period from other drafters in OLD.

86 Attorney-General's Department, *Submission*, p. S499; I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Supplementary Submission - Responses to Questions, and Additional Material*, p. S611.

87 See, for example: Taxation Institute of Australia, *Submission*, pp. S238–240; Business Council of Australia and Australian Institute of Company Directors, *Submission*, p. S418; Law Society of South Australia, *Submission*, p. S438; VLRC, *Transcript*, pp. 156–157. Recent public comments by the Attorney-General, the Hon. M. Lavarch MP, suggest he is contemplating a re-write of the Corporations Law (see *Financial Review*, 18 June 1993, p. 1 and p. 64).

88 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Supplementary Submission - Responses to Questions, and Additional Material*, p. S611.

*8.79* The Committee received some evidence supporting sunset clauses in legislation generally.[89] Both the Senate Standing Committee on Regulations and Ordinances and the Attorney-General's Department endorsed the Administrative Review Council's recommendation that a sunset regime be applied to all Commonwealth subordinate legislation.[90]

*8.80* A sunset system will require all legislation to be re-written periodically (unless repeal of the legislation is accepted). However, periodic re-writing may not in the short term direct attention to the pieces of legislation that are assessed by Mr Turnbull's criteria to be most urgently in need of re-writing.

*8.81* A system of sunsetting subordinate legislation appears to the Committee to be a practical way of ensuring that all legislation is regularly re-written. The Committee accepts that a sunset system may need to be supplemented in the short to medium term by a program to re-write complex, heavily used pieces of legislation that are not due to expire soon.

*8.82* Recommendation 27

***The Attorney-General should develop a sunset program to promote regular re-writing of all subordinate legislation and introduce a Bill to provide a legislative basis for the program.***

*8.83* Recommendation 28

***The Office of Legislative Drafting, in co-operation with agencies administering subordinate legislation, should develop a program to identify and re-write subordinate legislation that:***

***(a) is heavily used or affects many people;***
***(b) is difficult to use; and***
***(c) is not due to expire under the proposed sunset system in the short or medium term.***

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89 P.J. Boyle, *Submission*, p. S6; K. Seppanen, *Submission*, p. S21; Centre for Plain Legal Language, *Transcript*, pp. 74–75.

90 The recommendation for sunsetting was made in: ARC, *Rule Making By Commonwealth Agencies*, p. 60. The endorsements were by: Senate Standing Committee for Regulations and Ordinances, *Submission*, p. S229; Attorney-General's Department, *Submission*, p. S511.

*8.84* Although the Committee appreciates the benefits that a sunset program offers, it doubts whether a practical sunset program could be developed to ensure that Acts were re-written. Given that Acts are passed by Parliament, there are likely to be difficulties in fixing the life of all Acts to enable a regular program of re-writing and finding time in the Parliamentary schedule to pass a substantial volume of re-written Acts. Resource constraints would not only affect Parliament–greater drafting resources are likely to be needed to re-write an Act than to re-write a piece of subordinate legislation, because of the generally greater length of an Act.

*8.85* However, the Committee is encouraged by evidence of increasing demand from agencies for Acts to be re-written, and believes that substantial benefits could flow from a systematic program of re-writing legislation.

*8.86* **Recommendation 29**

***The Department of the Prime Minister and Cabinet and the Office of Parliamentary Counsel, in consultation with all departments, should develop for the consideration of the Parliamentary Business Committee of Cabinet a program for re-writing Acts based on the following criteria:***

***(a) the number of people using, or affected by, each Act; and***
***(b) the difficulty in use of the Act attributable to its drafting or structure.***

*8.87* Both Commonwealth drafting agencies will need extra resources to implement these programs of re-writing legislation.

*8.88* The Attorney-General's Department has proposed establishing a law revision unit in OLD 'to focus not only on the simplification of the language of legislation, but also on rewriting old and complex laws in more acceptable, reader-friendly form'.[91] The Department pointed out that 'ideally, a legislation simplification program would involve re-writing at least some existing legislation immediately',[92] and went on:

*There will still be a need for the law revision unit if the sunsetting process [recommended by the Administrative Review Council] is*

91 Attorney-General's Department, *Submission*, p. S519.

92 Attorney-General's Department, *Supplementary Submission*, p. S638.

*fully implemented. Drafters will have to examine soon-to-be sunsetted legislation with a view to revising it before its reenactment [sic].*[93]

The Department commented that 'any dedicated rewriting program would need to be adequately resourced and include a component for communications-related training'.[94] It envisaged that:

*The [law revision] unit ... could also include communications experts on a consultancy basis ... to train drafters in modern techniques of expression and to develop simplification principles and test their effectiveness.*[95]

*8.89* Mr Turnbull commented that:

*The best way to achieve these aims [of drafting clearer new laws and re-writing old ones] would be to build up resources in OPC. The skills and expertise are the same for both kinds of task and both kinds of task will continue indefinitely. The training methods presently adopted are producing drafters with the necessary experience, and will continue to do so.*[96]

*8.90* While deployment of additional resources needed to allow OPC and OLD to undertake programs of re-writing legislation is largely a matter for the agencies concerned, the Committee believes that the establishment of a law revision unit in OLD would provide a good basis for simplifying old subordinate legislation.

*8.91* **Recommendation 30**

***A law revision unit should be established in the Office of Legislative Drafting to undertake the proposed program of re-writing subordinate legislation.***

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93 Attorney-General's Department, *Supplementary Submission*, p. S640.

94 Attorney-General's Department, *Supplementary Submission*, p. S439.

95 Attorney-General's Department, *Supplementary Submission*, p. S640.

96 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Supplementary Submission - Responses to Questions, and Additional Material*, p. S611.

## Help for the Drafter

*8.92* Whether drafters are drafting new legislation or re-writing legislation, it is obviously important to give them as much assistance as possible to maximise their efficiency and help them write clearly.

*8.93* Four broad ideas were put forward in submissions to help drafters:

- development of style guides;
- use of style editors;
- creation of precedents; and
- use of computers.

### *Style Guides*

*8.94* The Centre for Plain Legal Language suggested that a style guide be developed for all legislation.[97]

*8.95* As mentioned above, both OPC and OLD have extensive sets of directions to drafters. These provide guidance on a range of stylistic questions. OLD has given its staff guidelines on plain English and general notes on drafting legislation,[98] while OPC has a manual on plain English in draft form.[99]

*8.96* There are also a range of other reference materials, including texts on drafting, available to drafters in OPC and OLD through libraries in OPC and the Attorney-General's Department.[100]

*8.97* The Committee believes that when OPC completes its manual on plain English, drafters in the two Commonwealth drafting agencies will be well-equipped with reference material to assist them.

*8.98* No evidence was given to the Committee on the material available to provide stylistic guidance to drafters in other Commonwealth agencies. The Committee considers that, as part of its

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97 Centre for Plain Legal Language, *Submission*, p. S311.

98 Attorney-General's Department, Attachment C to *Submission*, pp. S524–546; Attorney-General's Department, 'Notes on Drafting of Delegated Legislation and Other Legislative Instruments'.

99 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Submission*, p. S298.

100 One reference frequently cited in evidence to the Committee was a Drafting Manual prepared by Professor Robert Eagleson for the VLRC. The Manual was published as Appendix 1 to VLRC, *Plain English and the Law*.

proposed responsibility to ensure that subordinate legislation is prepared to an appropriate standard, OLD should draw the attention of drafters in other agencies to material that provides suitable stylistic guidance.

*Style Editors*

*8.99* Both the Bar Association of Queensland and the Centre for Plain Legal Language suggested that editors could be used to check style to enhance clarity.[101]

*8.100* The Committee sees that editors could help ensure clearer style, but is concerned that unless there were large numbers of editors available, an editing step could become a bottleneck that delayed production of legislation. Many of the benefits that might be realised from employing an editor to check draft legislation could be realised through consultation on exposure drafts if people were encouraged to comment on both the form and substance of exposure drafts.

*Precedents and Computers*

*8.101* The author of a book of commercial tenancy precedents and the Centre for Plain Legal Language proposed that drafting agencies should develop sets of precedents for commonly used provisions.[102]

*8.102* The Attorney-General's Department acknowledged that 'greater use, and identification, of standardised provisions would also enable better focus on the substantive policy' of the legislation.[103] While these benefits would flow mainly to the experienced reader of legislation, they may also help the drafter.

*8.103* Other evidence given to the Committee suggested that computers could assist in drafting, without really explaining how.[104] The Centre for Plain Legal Language suggested that computers might 'facilitate different drafting styles and easy re-organisation of

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101 Centre for Plain Legal Language, *Submission*, p. S311; Bar Association of Queensland, *Submission*, pp. S473–474.

102 M.J. Redfern, *Submission*, p. S16; Centre for Plain Legal Language, *Submission*, p. S311.

103 Attorney-General's Department, *Submission*, p. S510.

104 See, for example: Mallesons Stephen Jaques, *Transcript*, pp. 26–27.

ideas'.[105]

*8.104* Parliamentary Counsel for New South Wales commented:

> *[For] a particular sort of Bill we can go back to ... a standard precedent ... We can produce the raw bones of a Bill in a matter of minutes. It is extremely useful with all the technological aids ... We can search through, not only the Bill itself, but all legislation, to look for words, phrases or expressions that will have a bearing on the subject matter. We find that the use of computers is a very efficient tool for legislative drafting–at the mechanical level and at the more abstract level.*[106]

*8.105* The evidence therefore suggests that, apart from computers running programs to check style,[107] there are three major uses for computers in drafting:

- to re-organise material in draft legislation;
- to provide for easy storage, recall and use of precedents; and
- for research.

*8.106* To some extent computers are already available to help drafters in OPC and OLD in each of these tasks.

*8.107* Material can be re-organised using ordinary word processing equipment. Legislation in both OPC and OLD, as well as many other areas of government, is already prepared using word processors.

*8.108* Some of the directions issued to drafters in OLD and OPC contain precedents for particular types of provisions. For the most part, these precedents are not electronic form.

*8.109* However, the 'smart template' used by OLD drafters on their computers contains precedents for the operative words, citation, amendment and commencement provisions for regulations. These precedents are automatically made available when the drafter chooses to start a new set of regulations.

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105 Centre for Plain Legal Language, *Submission*, p. S311.

106 D. Murphy Q.C., Parliamentary Counsel for New South Wales, *Transcript*, p. 19. The Committee understands that the Queensland Office of Parliamentary Counsel makes extensive use of computer technology to produce legislation precedents and templates.

107 These are discussed in Chapter 6.

*8.110* Mr Turnbull expressed some concern about use of precedents, and doubted the value of computers in providing precedents.

> *A drafter should re-examine and criticise every provision of the existing law before copying it or modifying it. ...*
>
> *This applies even when using a recent precedent. Our techniques in simplifying the laws are improving all the time, so I do not like any precedents to become fixed.*
>
> *I think there is only limited use for "smart templates" and similar software (at least at the present state of their development). Mr Van Wierst and I looked into this recently and we came to the view that they were designed for standard documents with fairly limited variables, like wills, leases, contracts &c. They do not seem to be suited to legislation, which ranges far more widely and has far more variables.*[108]

*8.111* Through their computers, all the drafters in OLD have access to the SCALE database operated by the Attorney-General's Department. This database, which is discussed in more detail in Chapter 11, contains electronic versions of Acts and Statutory Rules that can be searched for particular words and phrases, as well as many legal opinions prepared by officers of the Department.

*8.112* Officers in OPC currently have more limited facilities for access to the SCALE database, but Mr Turnbull advised the Committee:

> *We [i.e. OPC] plan to have a computer on every drafter's desk by the end of 1992-93. The main purpose is to improve the quality of our laws by giving drafters greater research facilities. We also think that there may be a slight increase in output, both because of the easier access to research materials and the ability of drafters to edit their drafts themselves, particularly outside normal business hours.*
>
> *We think the increase may be small, because our present work methods are very efficient.*[109]

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108 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Supplementary Submission - Responses to Questions, and Additional Material*, pp. S612-613.

109 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Supplementary Submission - Responses to Questions, and Additional Material*, p. S613. The Committee understands that OPC's equipment program has been completed. Every drafter now has a computer on his or her desk.

*8.113* It appears to the Committee that computer technology is already available, or becoming available, to Commonwealth drafting offices for flexible preparation of material and research. However it appears that OLD and some of the State drafting offices have been more ready to embrace computer technology than OPC appears to have been.

*8.114* The Committee accepts that the variability of legislation and desirability of continued improvements in legislative expression limit the value of precedents in legislative drafting.

*8.115* Accordingly, there does not appear to be a case for major upgrading of the computer equipment of the Commonwealth drafting offices beyond current plans. The Committee believes, however, drafters will benefit from its recommendations in Chapter 11 to improve accessibility to legislation in electronic form, and should ensure that they have the equipment necessary to exploit those benefits fully.

# 9 PRESENTATION OF LEGISLATION

## Introduction

*9.1* The Committee received evidence from many people who claimed that legislation would be easier to use and understand if it was better presented. Many of the measures for better presentation of legislation would not directly affect the style of drafting.

*9.2* The following sections of this chapter discuss a number of the measures proposed for better presentation of legislation:

- presenting amendments in the context of the provision being amended;
- use of graphic material in legislation;
- layout of legislation;
- marking defined terms;
- running headings;
- tables of provisions;
- indexes.

## Presentation of Amendments

### *Present Format of Amendments*

*9.3* At present, unless a provision of an Act or regulations is being heavily amended, only the words being altered are set out in an amendment. This means that the reader must often read together the existing provision and the amendment to find out the effect of the amended provision.[1]

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1 The difficulty this can present for the reader is referred to by AQIS, *Submission*, p. S448.

*9.4* Mr Turnbull indicated one solution to this problem:

> *OPC is already using ... [a] method of making amendments more meaningful. This is to group together amendments that have the same purpose and use descriptive headings. ...*
>
> *These give the reader a useful guide to the purpose of amendments that would otherwise be meaningless without reading them against the Principal Act.*[2]

*9.5* OLD does not use the system described by Mr Turnbull, but sets out the heading of the regulation being amended as part of the heading of the amending regulation. While the heading thus gives a broad indication of the subject of the amendment, it does not indicate the effect of the amendment.

### *Proposals to Present More of the Context of Amendments*

*9.6* The Senate Standing Committee on Regulations and Ordinances stated:

> *the looseleaf system of producing and amending different principal instruments ... assists users more than more conventional amendments and should be more generally adopted.*[3]

This system provides more context for amendments of provisions that are near the middle of a page.[4] The drawback is that it is impossible to tell what the amendment is without careful comparison of the page to be omitted and the page to be substituted.

*9.7* In its report *Access to the Law: the structure and format of legislation*, the VLRC proposed that an amending provision should set out the whole of the provision being amended, with words to be omitted shown in one typeface and words to be inserted shown in another.[5] This would enable a reader to see the context of the amendment by looking at a single document. The VLRC proposed that, by using the

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2 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Supplementary Submission - Responses to Questions, and Additional Resources*, p. S607.

3 Senate Standing Committee on Regulations and Ordinances, *Submission*, p. S228.

4 This is not the main advantage of the looseleaf system of amendments. The main advantage is in terms of easy consolidation of legislation, an issue that is discussed in Chapter 11.

5 VLRC, *Report No. 33: Access to the Law: the structure and format of legislation*, pp. 13–14 & 36–43.

enacting words 'Amend section X to read: ...':

> *only the changes–addition or deletion of the words highlighted–would be enacted. This would not involve the re-enactment of the whole section and would not have the effect of unduly extending the material for debate.*[6]

*9.8* Mr Turnbull was nevertheless concerned by the proposal:

> *A serious difficulty with this proposal is that it would involve a great deal of rewriting of the Acts being amended. Each time a section was amended, and the whole section was reproduced in the proposed format so as to show the change of a few words, that section in that form would then become "reaffirmed" by the amending Act. This would not be a problem if the section being amended were already part of a new plain English Act. But in most cases, amendments are made to older Acts, and therefore the provisions being amended would need to be rewritten in plain English.*
>
> *This would be very time-consuming, because in effect it would convert each amending Bill into a significant rewrite of the Principal Act. I have no objection against this in principle, but it would take so much extra time that it would be impossible to carry out without considerable increase in resources.*[7]

He also pointed out that adoption of the proposed format would make amending legislation about ten times longer than it is in its present format, so that considerably more time and resources would be needed to format, check and print each piece of legislation. Other drafters echoed his concerns about the increased demand for time and resources the proposed format would create.[8]

*9.9* Mr Turnbull stated:

> *I would be happy to adopt the [VLRC] proposals if OPC were given the necessary resources, and more importantly, if the Government*

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6 VLRC, *Report No. 33: Access to the Law: the structure and format of legislation*, p. 14.

7 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Supplementary Submission - Responses to Questions, and Additional Resources*, p. S606.

8 Tasmania, Office of Parliamentary Counsel, *Submission*, p. S171; R. Armstrong Q.C., Chief Parliamentary Counsel for Victoria, *Transcript*, pp. 228–229.

*accepted the cost in time. I think the latter is the greater problem.*[9]

*Effect of Presentation of Amendments on Consolidation of Legislation*

*9.10* Some people have suggested that the presentation of amendments affects not only understanding of the effect of amendments, but also the ease with which consolidations of principal and amending legislation can be prepared. While the question of consolidations is discussed at greater length in Chapter 11, the effect of presentation of amendments on ease of consolidations is discussed here to provide a basis for drawing conclusions on the most desirable format for presentation of amendments.

*9.11* SoftLaw Corporation commented:

*A drafting style which provided consolidated amended provisions, rather than simply technical and pedantic statements of amendment, would greatly alleviate the problems caused by AGPS's failure to publish consolidated legislation. Even if these provisions were not available in electronic format (which they should be), it is simpler to commission a typist to key in the amended provisions, and then to replace the whole provisions in an Act, than it is to commission anyone to correctly interpret the amending legislation and make appropriate alterations in the Act. This style of consolidation would therefore allow more people to do their own consolidations, rather than having to cut and paste.*[10]

*9.12* The difficulty identified by SoftLaw Corporation in preparing consolidations has been disputed. Mr Maurice Kelly wrote:

*The many keepers of legislation in the community warmly endorse this [i.e. the present] method [of presenting amendments]. It reduces the chance of error and it certainly keeps down costs. Clerical staff in user organisations can keep paste-up legislation with the least possible fuss. Law publishers such as CCH who quickly print off amended legislation find their task reduced to the minimum. An elaborate style of amendment would hamper them greatly.*

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9 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Supplementary Submission - Responses to Questions, and Additional Resources*, p. S607.

10 SoftLaw Corporation, *Submission*, p. S413.

*Their costs and prices would be higher, and delays would be longer.*[11]

*9.13* The law publishers CCH Australia Limited, Butterworths and The Law Book Company Limited advised the Committee that the present system causes them no difficulties and that they would be happy to operate under either the present system or one like the VLRC proposed. Info-One International Pty Ltd, which provides on-line access to legislation in electronic form, commented that it would prefer amendments in the format proposed by the VLRC. DiskROM, which consolidates some legislation in electronic form, indicated that it has a computer program that assists consolidation by carrying out, on the affected words entered by a key-board operator, various actions described by the amending formulas.

*Conclusion*

*9.14* The Committee considers that of the alternatives to the current format of amendments proposed by the Senate Standing Committee on Regulations and Ordinances, the VLRC and SoftLaw Corporation, the VLRC's proposal is best because it provides both the context of the amendment and a clear indication of what is being changed.

*9.15* However, the Committee accepts that the resources required to adopt the amendment format proposed by the VLRC, and the considerable additional volume of legislation that it would produce, limit the utility of the proposal. In the circumstances, the OPC practice of grouping related amendments is perhaps the most realistic option.

*9.16* Many pieces of subordinate legislation deal with several disparate topics without such a unifying theme as may be found in an Act, so it may not be feasible to adopt in subordinate legislation the OPC system of grouping related amendments under a common heading. Nevertheless, the Committee believes that application of the OPC system to amendments of subordinate legislation should be investigated.

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11 M. Kelly, 'The drafter and the critics', (1988) 62 *Law Institute Journal* 963, 967.

*9.17* **Recommendation 31**

***The proposed law revision unit of the Office of Legislative Drafting should investigate changing the presentation of amendments of subordinate legislation to group amendments of an instrument with similar effects under a heading outlining the purpose of the amendments.***

## Use of Graphic Material in Legislation

*9.18* For several years, diagrams have been included in Commonwealth legislation.[12]

*9.19* From the evidence given to the Committee, it appears that drafters are well aware of the value of graphics in legislation,[13] and that use of graphics in legislation is widely supported by users of legislation.[14]

## Layout of Legislation

*9.20* Mr Turnbull noted that:

> *legislation must be in a format that makes it easy to refer to particular provisions. Subordinate instruments, Government directives, rulings, legal advice, arguments in court and judgments all need to refer with convenience and precision to particular provisions of a law. The result is that the formatting of legislation cannot look as "user-friendly" as a newspaper article or a textbook. Of course, every effort should be made to make it easy to read, but these functions have to be borne in mind.*[15]

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12 Perhaps the best-known examples are the flowcharts in section 4 of the *Patents Act 1990*. Diagrams are also found in many other Acts and Statutory Rules.

13 Tasmania, Office of Parliamentary Counsel, *Submission*, p. S171; I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Supplementary Submission - Responses to Questions, and Additional Material*, p. S601; Attorney-General's Department, *Supplementary Submission*, p. S659.

14 AMPICTA, *Submission*, p. S33; Department of the Senate, *Submission*, p. S125; Senate Standing Committee on Regulations and Ordinances, p. S230; Centre for Plain Legal Language, *Submission*, p. S311; DHHCS, *Submission*, p. S363; Law Institute of Victoria, *Submission*, p. S459; Law Society of the Australian Capital Territory, *Submission*, p. S470; Australian Bankers Association, *Transcript*, p. 187.

15 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Submission*, p. S269.

*9.21* A number of people mentioned layout of legislation in their evidence to the Committee.[16] However, most of the evidence went no further than recognising that layout, especially a consistent layout,[17] is important in making legislation easy to use.[18]

*9.22* Nevertheless, two issues raised by Professor Kelly's 'Ten Commandments for Better Legislative Drafting' in relation to layout received some attention:

- positioning of provision numbers; and
- use of running heads on pages.

*Positioning of Provision Numbers*

*9.23* The seventh of Professor Kelly's 'Ten Commandments for Better Legislative Drafting' is to:

> *Place numbers in the margin so that they don't interfere with the reader's view of the text.*[19]

OLD indicated that it had no objection in principle to setting numbers in the margin.[20] Mr Turnbull said that he was planning to have Dr Robyn Penman of the Communications Research Institute of Australia test a number of layout features,[21] including the positioning of numbers.[22] He pointed out:

> *the numbers of subsections, paragraphs etc cannot be moved far from the text otherwise the effect of the indentations on the structure of sentences will be lost.*[23]

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16 See, for example: M.J. Redfern, *Submission*, p. S17; Tasmania, Office of Parliamentary Counsel, *Submission*, p. S170; J. Green, *Transcript*, p. 142.

17 Clerk of the House of Representatives, *Submission*, p. S44; NRMA Insurance Limited, *Submission*, p. S374.

18 Two exceptions to this pattern were the Centre for Plain Legal Language, which tendered an example of some work it had done on re-designing the layout of an Act of New South Wales (*Exhibit 11*) and the VLRC, which submitted its report *Access to the Law: structure and format of legislation* (*Exhibit 15(ii)*).

19 D. St L. Kelly, Chairman of the VLRC, *Second Supplementary Submission - Ten Commandments for Better Legislative Drafting*, p. S589.

20 Attorney-General's Department, *Supplementary Submission*, p. S658.

21 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Submission*, p. S287.

22 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Supplementary Submission - Responses to Questions, and Additional Material*, p. S600.

23 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Supplementary Submission - Responses to Questions, and Additional Material*, p. S600.

*Running Heads on Pages*

*9.24* Professor Kelly's ninth commandment for better legislative drafting pointed out the value of using running heads.[24]

*9.25* OLD noted:

> *The use of running heads can be of great assistance to the reader, especially of long documents, in helping the reader find his or her way around the document more easily. OLD therefore supports their use. The ability to use informative running heads on pages is, to some extent, dictated by the system that is being used to produce the legislation. If the software being used can accommodate informative running heads, OLD would use them. However, if the software cannot accommodate informative running heads, they would have to be inserted manually. This would add to the time taken to prepare legislation and could not be supported by OLD.*
>
> *Running heads may not always be appropriate for inclusion in amending legislation, especially in subordinate amending legislation, where the amendments are often quite small with more than 1 amending reference on each page. OLD, however, uses informative regulation headings in amending legislation, and this goes some way towards ensuring that the reader can find his or her way around the legislation easily.*[25]

*9.26* Mr Turnbull supported the idea of using running heads on pages new Bills, pointing out that reprints included running heads, but explained that it was very difficult for the Government Printer's current equipment to include running heads.[26]

*Conclusions*

*9.27* The Committee encourages OPC to arrange for its consultant to carry out testing of different layout features as soon as possible. There would appear to be no need to delay testing of some layout

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24 D. St L. Kelly, Chairman of the VLRC, *Second Supplementary Submission - Ten Commandments for Better Legislative Drafting*, p. S589.

25 Attorney-General's Department, *Supplementary Submission*, p. S659.

26 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Supplementary Submission - Responses to Questions, and Additional Material*, p. S601.

designs until the main legislation testing program described in Chapter 6 is under way.

*9.28* The Committee believes that running headings are a useful means of helping readers find their way around a document.

*9.29* Recommendation 32

***The Office of Parliamentary Counsel, the Office of Legislative Drafting and the Australian Government Publishing Service should acquire software that will enable the automatic insertion of informative running heads on each page of original legislation, and, as far as possible, on each page of amending legislation.***

## Marking Defined Terms

*9.30* Some submissions,[27] and one of Professor Kelly's 'Ten Commandments for Better Legislative Drafting',[28] emphasised the need to mark defined terms so that a reader would be warned that they had special meanings. Professor Kelly merely suggested 'highlighting' defined terms, while the authors of the other submissions favoured printing defined terms in bold typeface.

*9.31* The Commonwealth drafting offices accepted that, in principle, it would be desirable to mark defined terms but were concerned that marking defined terms could distract the reader and make legislation hard to read.[29] They were particularly concerned that highlighting or printing defined terms in bold would be distracting.

*9.32* Mr Turnbull identified other difficulties in marking defined terms:

> *Another suggestion is to place a cross or asterisk after defined terms wherever they appear. ... Under the Acts Interpretation Act (section 18A), grammatical variations and different parts of speech*

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27 A. Viney, *Submission*, p. S10; M.J. Redfern, *Submission*, p. S17; AQIS, *Submission*, p. S448.

28 D. St L. Kelly, Chairman of the VLRC, *Second Supplementary Submission - Ten Commandments for Better Legislative Drafting*, p. S589.

29 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Supplementary Submission - Responses to Questions, and Additional Material*, p.S600; Attorney-General's Department, *Supplementary Submission*, p. S658. Mr Geoffrey Kolts also argued that highlighting defined terms made the text of legislation very difficult to read: *Transcript*, pp. 422–423.

*have meanings corresponding to the defined term. Putting a cross after one of these variations can be confusing if the phrase does not appear in that form in the definitions section.*

*Further, many expressions are defined in the Acts Interpretation Act. If all defined terms are to be identified, these should be identified too. If marks for these terms were added to the marks for the terms defined in the Act in question, the result would be a text bristling with crosses. There are many of these, not only words like "Australia" and "person", but also provisions conferring powers, as in section 33 of the Acts Interpretation Act. It is not obvious how such nuances given to an Act by the Acts Interpretation Act should be identified.*

*Because of these difficulties, I intend to ask Dr Penman to do some testing on this question as well. In the meantime we use footnotes to direct the reader to important definitions.*[30]

*9.33* The Committee supports the concept of marking defined terms in the text of legislation, but recognises that a number of issues associated with marking defined terms need to be resolved. The Committee considers that the testing proposed by Mr Turnbull should be carried out as soon as possible, and need not wait until the testing program mentioned in Chapter 6 gets under way.

## Tables of Provisions

*9.34* Currently, tables of provisions are provided only in Acts and Regulations at least 25 sections or regulations long, and Acts or regulations divided into parts.

*9.35* Submissions from M.J. Redfern, the New South Wales Bar Association and AQIS noted the value in setting out in one place a list of provisions.[31]

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30 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Supplementary Submission - Responses to Questions, and Additional Material*, p. S600.

31 M.J. Redfern, *Submission*, p. S17; New South Wales Bar Association, *Submission*, p. S203; AQIS, *Submission*, p. S448.

*9.36* Given the assistance that a table of provisions provides to the reader of a piece of legislation, and the ease with which a table of provisions can be prepared using modern word-processing technology, the Committee believes that there is no justification for restricting tables of provisions to longer pieces of legislation.

*9.37* Recommendation 33

***The Office of Parliamentary Counsel, the Office of Legislative Drafting and the Office of Legal Information and Publishing should ensure that tables of provisions are prepared for all new legislation and reprints of Acts and Statutory Rules.***

## Indexing Legislation

*9.38* Currently, only a few reprints of Commonwealth legislation are indexed. New legislation is not indexed.

*9.39* However, several submissions indicated that indexing could make legislation much easier to use, and recommended that legislation be indexed.[32]

*9.40* The Commonwealth *Style Manual* notes:

> *Although the preparation of an index is often regarded as–in some sense–the responsibility of the author, most authors are unwilling to undertake the task and few can match the skills of a professional indexer. ... it is essential for author, editor and indexer to reach a common understanding of what is desirable and practicable before the index is prepared.*[33]

*9.41* The Committee considers that there could be considerable value in indexing long pieces of principal legislation and reprints. It recognises, however, that drafters are unlikely to have the skills or time to prepare indexes to a professional standard. Further, in the case of drafters in OPC, there seems little point in preparing an index for a Bill that could be amended.

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32 M.J. Redfern, *Submission*, p. S17; AMPICTA, *Submission*, p. S33; AQIS, *Submission*, p. S448; Law Institute of Victoria, *Submission*, p. S459; Law Society of the Australian Capital Territory, *Submission*, p. S470. The Attorney-General's Department also recognised the value of indexes, but expressed concern about the cost and possible delay of indexing: *Submission*, p. S509.

33 *Style Manual for Authors, Editors and Printers*, AGPS, Canberra, 1988 (4th edn), p. 290.

*9.42* The Committee therefore considers that indexing would be best done by professional indexers at AGPS. The drafter and instructing officer should help by giving the indexer a suggested list of terms for indexing.

*9.43* Indexing of Acts and regulations by AGPS would not create delays before legislation was made. If copies of legislation were needed urgently soon after it was made, a separate index for distribution with copies of the legislation could be printed later. For less urgently needed legislation, the legislation and index could be printed together.

*9.44* **Recommendation 34**

***The Australian Government Publishing Service should prepare, in consultation with the drafter and instructing officer, an index for each long piece of principal legislation or reprint.***

## Conclusion

*9.45* With the exception of presentation of amendments, choice of graphic material for inclusion in legislation, preparation of tables of provisions and possibly marking defined terms, many of the matters discussed in this chapter need have little direct impact on drafters. Even some of the measures for presentation that do involve drafters could be implemented by extra clerical staff in drafting offices under working under the supervision of drafters.

*9.46* For a comparatively small investment, there appear to be quite significant measures that could be taken to make legislation easier to use.

# 10 MAKING LEGISLATION

## Introduction

*10.1* This chapter considers the effect of the process of making legislation on the quality of the legislation.

*10.2* Current processes of making legislation can have an impact on the quality of legislation in two ways. First, the legislative process often imposes strict time limits on drafting. Secondly, the process of Parliamentary scrutiny of legislation can act as a quality control.

*10.3* The chapter discusses each of these issues in turn.

## Constraints on Time For Drafting

### *Why Are Time Constraints on Drafting Important?*

*10.4* Time constraints can affect the quality of drafting in three important ways.

*10.5* First, if little time is available for preparing legislation, policy may not be adequately considered and developed. This issue is largely addressed in Chapter 2. Limited time for drafting may not reflect hasty policy consideration–indeed, time for drafting may be limited because policy development has taken a long time. However, if time for drafting is limited, it also means that there is little time to consider any policy issues that are raised by the drafting.

*10.6* Secondly, it is widely acknowledged that preparing a clear, simple draft takes longer than preparing a draft with less emphasis on communication.[1]

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[1] See, for example: Tasmania, Office of Parliamentary Counsel, *Submission*, p. S168; Hon. R. Willis MP, Minister for Finance, *Submission*, p. S220; Centre for Plain Legal Language, *Submission*, p. S310; Attorney-General's Department, *Submission*, p. S508; DEET, *Submission*, p. S582; D. Murphy Q.C.,

*10.7* Mr Turnbull commented:

> *It takes more time to draft simply, if you also draft precisely. Of course, if you have the habit of writing simply, provisions will tend to be simple from the start. But provisions seldom end up the way they begin. Problems arise during drafting, and they have to be dealt with as quickly as possible. The quickest way to deal with these is usually to alter the draft, rather than start afresh.*
>
> *One of the most important elements of simple drafting is clear logical structure. However, if you are working at top speed, it is often impossible to revise the structure of the law or of sentences in the provisions, in order to make them as simple as possible. When a law is completely drafted and the drafter is satisfied that it has the correct legal effect, the drafter should then review the whole law in order to simplify it as much as possible. This step is usually denied through lack of time.*[2]

Principal Legislative Counsel in OLD echoed these comments.[3]

*10.8* Thirdly, as a number of submissions pointed out, the more rapidly legislation is drafted, the greater the chance of mistakes being made.[4]

### *How Serious Are the Problems of Lack of Time for Drafting?*

*10.9* Some evidence suggests that there is hardly ever enough time allowed for drafting a piece of legislation. AQIS commented that 'the making of legislation ... is a fairly complex process and is always done under great time pressure'.[5]

*10.10* The Committee also received evidence that the time shortages for drafting some pieces of legislation are very severe. Mr Turnbull gave in his submission some examples of the time constraints under

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Parliamentary Counsel for New South Wales, *Transcript*, p. 10; Taxation Institute of Australia, *Transcript*, p. 102.

2 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Submission*, p. S280.

3 Attorney-General's Department, *Transcript*, pp. 277–278.

4 DSS, *Submission*, p. S150; Tasmania, Office of Parliamentary Counsel, *Submission*, p. S168; DVA, *Submission*, p. S481.

5 AQIS, *Transcript*, p. 252. See also ATO, *Transcript*, pp. 450 & 453.

which Bills have been drafted,[6] and elaborated:

> *I mention one that I felt very strongly about myself. It is not particularly unique. I drafted a new kind of statutory lien over aircraft just in a weekend. Mr Geoff Kolts drafted the Companies (Foreign Takeovers) Act 1972 in one week. That was an extremely complicated Bill. The corporations legislation was drafted in five months, even though it ran to something like 1,200 pages. The Close Corporations Act was drafted in two weeks. These conditions make it extraordinarily difficult for us to make our laws clear.*[7]

*10.11* Drafters appear to regard lack of time as one of the most serious problems they face in producing clear legislation. Mr Turnbull commented:

> *there are many very powerful reasons why our laws are still more complex than we would like them to be. ... The first and obvious reason is that complex policy is by far the greatest cause of complex laws. ... Another reason is that precision is necessary. ...*
>
> ...
>
> *... But perhaps the one that gets to us most is lack of time.*[8]

## Overcoming the Problems of Lack of Time

*10.12* There appear to be three broad strategies that may help increase the amount of time drafters can spend on legislation to increase its clarity:

- better timetabling of the legislative program;
- giving provisional instructions;
- employing more drafters.

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6 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Submission*, p. S280.

7 OPC, *Transcript*, p. 321.

8 OPC, *Transcript*, pp. 320–321.

*Legislative Timetable*

*10.13* Mr Turnbull noted some of the problems that the parliamentary timetable can cause:

> *There is a deadline each sittings ... for Bills to be introduced if they are to be passed. That is near the end of the sittings and ... this is when you get this enormous surge of work. There are two aspects. One is the timing in parliament, and I know that is a very serious problem for parliamentarians. But that is not really what I am talking about. The thing is that we [OPC] have enormous deadlines placed on us just to meet that particular deadline ... If you have a very long and complex Bill and you get your instructions fairly late, you have to work at enormous pace just to meet that particular deadline, not even an earlier one. Sometimes we have earlier deadlines. ...*
>
> *... we can spend 18 months to two years drafting a Bill and it can be passed in Parliament in a few hours. So the ratio of our work to the parliamentarians' work is very peculiar in that situation. But I think our problem is that we do have deadlines that are far too tight and they are made worse by the fact that policy changes are made at a late stage.*[9]

*10.14* The Parliamentary timetable can also cause problems for OLD. Regulations are often wanted to make a scheme operational at the beginning of a financial year or calendar year. This can impose particularly tight time constraints on OLD if the Act giving power to make regulations is not made until shortly before the whole legislative scheme is to commence.

*10.15* AQIS made two suggestions for improving legislative timetables.

*10.16* First it pointed out that the broad priorities set by the Parliamentary Business Committee gave little guidance to agencies on the likelihood of proposed legislation proceeding. AQIS suggested that

9 OPC, *Transcript*, pp. 328–329.

the Parliamentary Business Committee should set individual priorities for legislative proposals.[10] Mr Turnbull commented:

> *The priorities given to Bills by the Parliamentary Business Committee are based on the Government's assessment of the importance of the policy and other political factors. These often change during the course of a Sittings period, usually because new proposals "jump the queue".*
>
> *When you add the separate items that are included in portfolio Bills, the total number of matters in the Essential [for passage] group is in the region of 300.*
>
> *For these reasons I do not think that it would be feasible to fix a list of priorities within the Essential group.*[11]

*10.17* AQIS's second suggestion was that OLD set turn-around times for drafting jobs and standards for throughput of drafters.[12] OLD considered this idea impractical, explaining:

> *It is not feasible to set standards about turnaround times. It is very difficult to tell from examining instructions (in advance of drafting) what is involved and how long it will take. It is often the case that a seemingly simple drafting task contains hidden pitfalls that do not become obvious until the drafter is well into the draft. Because of the likelihood of this occurring, OLD takes the view that it is unrealistic to set deadlines in advance of full consideration of the instructions. If deadlines are set and problems do occur, the result of meeting the deadlines may well be a legally ineffective draft or a poorly drafted document.*[13]

*10.18* The Committee believes that it is valuable to assign priorities to broad classes of legislation. However, it is not desirable to rank each piece of legislation within a priority class. The Committee considers that turn-around times should not be set for drafters to produce legislation.

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10 AQIS, *Submission*, p. S446.

11 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Supplementary Submission - Responses to Questions, and Additional Material*, pp. S602-602.

12 AQIS, *Submission*, p. S447.

13 Attorney-General's Department, *Supplementary Submission*, p. S648.

*10.19* Some other matters relating to the parliamentary timetable are discussed below in relation to Parliamentary scrutiny of legislation. Although the matters discussed relate primarily to Parliamentary procedures, they may have some incidental effect on deadlines that are set for drafters.

*Provisional Drafting Instructions*

*10.20* The *Legislation Handbook* sets deadlines for giving instructions to OPC, based on the date of Cabinet approval for proposed legislation.[14]

*10.21* DSS indicated that there can be difficulties in meeting the deadlines when policy areas delay clearing instructions prepared by an agency's legal area.

*10.22* OPC has advised DSS that the task of meeting deadlines in the legislative program is eased by:

> *getting instructions to us as early as possible (even if in a provisional form) so that we can begin analysing the legislative proposals.*[15]

*10.23* Although policy changes during drafting are generally bad for the quality of the draft unless there is time to re-write the draft fully,[16] the Committee believes that there is a case for giving provisional instructions when waiting for final instructions is likely to reduce substantially the time available for drafting.

*10.24* **Recommendation 35**

***The Department of the Prime Minister and Cabinet should re-write the* Legislation Handbook *to indicate that compliance with deadlines for giving instructions is important but that provisional instructions should be given to a drafting office if there is likely to be a substantial delay in finalising instructions.***

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14 Department of the Prime Minister and Cabinet, *Legislation Handbook*, paragraph 5.3.

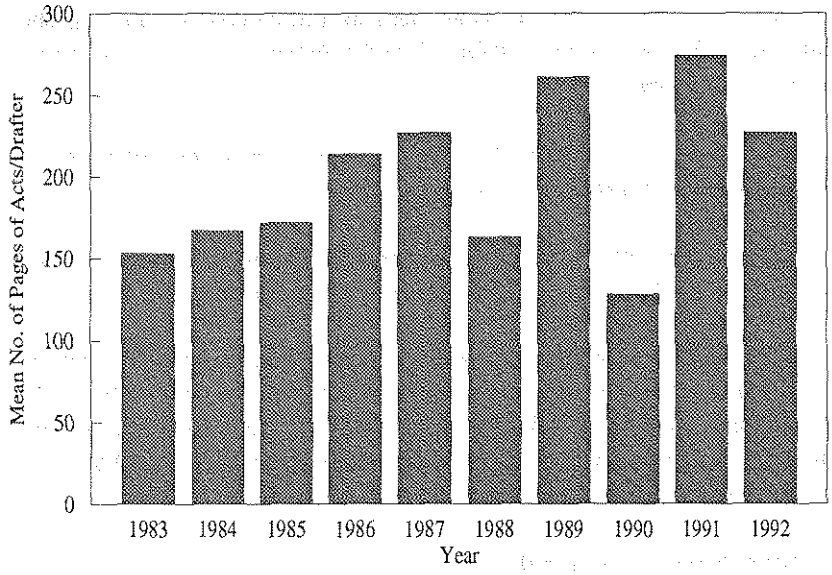
15 V. Robinson, Letter dated 10 November 1992 from OPC to DSS, supplied to the Committee as an attachment to DSS, *Second Supplementary Submission*, p. S661.

16 See, for example: I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Submission*, p. S280; Attorney-General's Department, *Submission*, p. S508.

*More Drafters*

*10.25* Figure 3 shows how the mean workload of each drafter in OPC has generally increased over the last decade, indicating that, on average, each drafter has had less time to spend on each page of legislation. Obviously, if more drafters are employed to do the same amount of work, more of a drafter's time can be spent on a piece of legislation to make it clearer.

**Figure 3. Mean Annual Output of Primary Legislation per Drafter in the Office of Parliamentary Counsel**




Notes:
This graph does not give a completely accurate picture of the mean annual output of legislation per drafter in the Office of Parliamentary Counsel, because:
(a) some of the legislation in each annual volume of Acts would probably not have been drafted in the year to which the volume relates;
(b) drafters may have drafted other legislation that was not passed (e.g. amendments, or Bills withdrawn);
(c) the number of drafters used for the calculation for each was the number of effective full-time drafters at 30 June in the year - this figure may have varied during the year; and
(d) the contribution of consultant drafters is ignored.

Sources:
Australia, Attorney-General's Department, *Acts of the Parliament of the Commonwealth of Australia*, AGPS, Canberra, 1983-1991; Australia, Attorney-General's Department and Office of the Parliamentary Counsel, *Annual Reports of the Attorney-General's Department and Office of Parliamentary Counsel*, AGPS, Canberra, 1982-83 - 1988-89; Australia, Office of Parliamentary Counsel, *Annual Report and Financial Statements 1988-90 - 1991-92*.

*10.26* It will be impossible to eliminate urgent requirements for some legislation that limit the amount of time that can be spent on drafting that legislation, regardless of the number of drafters in a drafting agency. However, the Committee believes that generally, an increase in the staff of drafting offices is likely to allow drafters to spend more time on most pieces of legislation to simplify them.

## Constraints on Time for Parliamentary Scrutiny of Legislation

*10.27* Many people who made submissions to the Committee expressed the view that Parliamentarians are ultimately responsible for the quality of legislation.[17]

*10.28* All Parliamentarians can play a role in controlling the quality of legislation through the processes of scrutiny of legislation. (Parliamentarians who are Ministers can obviously also help control the quality of legislation in their capacity as members of the Executive, but this section considers only Parliamentary scrutiny processes.)

*10.29* Six factors can affect the quality of Parliamentary scrutiny of primary legislation:

- the volume of legislation to be scrutinised;
- the readability of legislation to be scrutinised;
- the mixture of subjects in legislation to be scrutinised;
- the time between introduction of legislation and its passage;
- Parliamentary time allocated to scrutiny of legislation; and
- use of Parliamentary committees to scrutinise legislation.

Except for the fourth factor, these factors also apply to Parliamentary scrutiny of subordinate legislation.

*10.30* The remainder of this section considers five of the six factors affecting Parliamentary scrutiny of legislation. The readability of legislation has already been considered in previous chapters.

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17 See, for example: A. Walsh, *Submission*, p. S4; J. Russell, *Submission*, p. S50; M. Schofield, *Submission*, p. S61; D. Murphy Q.C., Parliamentary Counsel for New South Wales, *Submission*, p. S180; Australian Customs Service, *Submission*, p. S433; New South Wales Bar Association, *Transcript*, p. 116; J. Green, *Transcript*, p. 139.

*Volume of Legislation*

*10.31* Many of the people who gave evidence to the Committee, including drafters, expressed concern about the volume of legislation made each year.[18] As Figures 2 and 4 show, the volume of primary and subordinate legislation considered by Parliament or its committees has generally increased each year over the past decade. It is beyond the scope of this discussion to identify the causes and any solutions to the problem of the large volume of legislation made each year.

*10.32* It is clear, however, that the increasing volume of legislation means that pieces of legislation are generally receiving less Parliamentary scrutiny. Figure 4 illustrates that the increase in Parliamentary sitting time devoted to scrutiny of Government legislation is not proportional to the increase in volume of that legislation.[19] To put it another way, each page enacted has generally been receiving less scrutiny over the last decade, as Figure 5 shows.

*10.33* It is not clear whether this situation can be improved by use of better styles of drafting. General principles drafting will certainly shorten legislation,[20] and the VLRC claimed that Commonwealth legislation could be expressed in many fewer words than it is now without loss of precision.[21] On the other hand, several submissions indicated that use of plain English will not necessarily shorten legislation, as it may be clearer to use more words to explain the message of legislation.[22]

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18 See, for example: Hon. L. Brereton MP, Parliamentary Secretary to the Prime Minister, *Submission*, p. S45; Australian Bankers Association, *Submission*, p. S379; OPC, *Transcript*, pp. 338–339; Law Society of the Australian Capital Territory, *Submission*, p. S469.

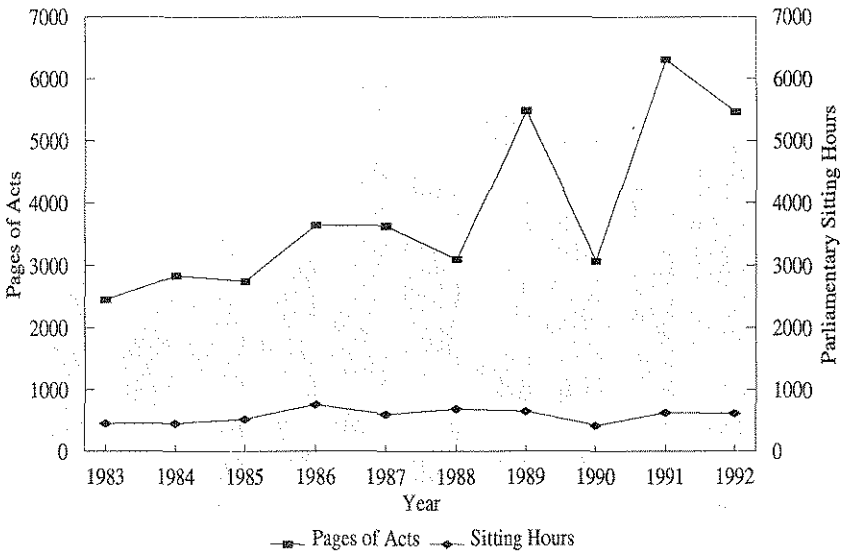
19 See also Department of the Senate, *Submission*, p. S127.

20 See, for example: I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Submission*, p. S288.

21 VLRC, *Transcript*, p. 153.

22 D. Murphy Q.C., Parliamentary Counsel for New South Wales, *Submission*, p. S184; Attorney-General's Department, *Submission*, pp. S507–508, S530 & S536; DILGEA, *Submission*, p. S568.

**Figure 4. Annual Quantity of Acts Compared with Parliamentary Time Spent Considering Bills**

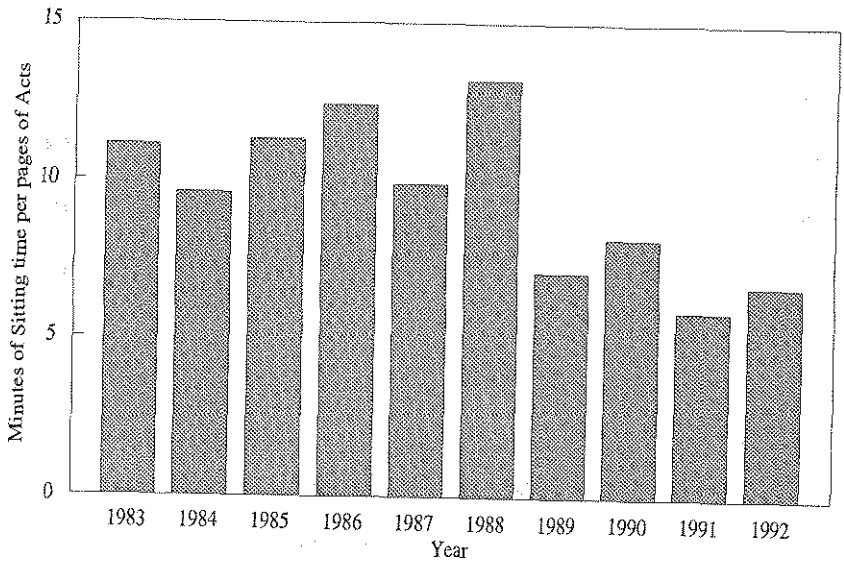



*Notes:*
This graph allows comparison of the volume of legislation passed by Parliament with the time spent considering it.

The comparison may not be completely accurate because:
(a) some of the legislation in each annual volume may not have been considered by either House of Parliament during the year to which the volume relates; and
(b) during the period under consideration, 2 private member's or Senator's Bills were enacted. The 11 pages of Acts resulting have been included in the figures for volume of legislation, but the figures for time indicate only time spent on Government legislation.

Sources:
Australia, Attorney-General's Department, *Acts of the Parliament of the Commonwealth of Australia*, AGPS, Canberra, 1983-1991; Australia, Department of the House of Representatives, Chamber Research Office; Australia, Department of the Senate, Procedure Office, Research Section, *The Legislative Process in the Australian Senate: a brief description of the procedures under which Bills are considered in the Senate*, 1992, Table 3; Australia, Department of the Senate, Table Office, file 92/270; Australia, Parliament, Senate, *Business of the Senate*, Department of the Senate, Canberra, 1983-1992. The number of pages of Acts passed in 1992 is based on information provided by the Senate Table Office.

**Figure 5. Parliamentary Scrutiny of Legislation: Mean Time Spent Considering a Page of Primary Legislation**




Notes:
This graph shows the mean number of minutes spent by both Houses of Parliament considering each page of legislation enacted.

The graph may not give a completely accurate indication because:
(a) some of the legislation in each annual volume may not have been considered by either House of Parliament during the year to which the volume relates; and
(b) during the period under consideration, 2 private member's or Senators' Bills were enacted. The 11 pages of Acts resulting have been included in the calculation, which was made on the basis of time spent on Government legislation.

Sources:
Australia, Attorney-General's Department, *Acts of the Parliament of the Commonwealth of Australia*, AGPS, Canberra, 1983-1991; Australia, Department of the House of Representatives, Chamber Research Office; Australia, Department of the Senate, Procedure Office, Research Section, *The Legislative Process in the Australian Senate: a brief description of the procedures under which Bills are considered in the Senate*, 1992, Table 3; Department of the Senate, Table Office, file 92/270; Australia, Parliament, Senate, *Business of the Senate*, Department of the Senate, Canberra, 1983-1992.

*Mixture of Subjects in Legislation*

*10.34* Some Bills, such as portfolio Bills, deliberately combine amendments of different pieces of legislation. The Clerk of the House of Representatives commented:

> *in relation to the procedures of the House, it is suggested that scrutiny, and coherent relevance in debate, is not enhanced by the wide range of subjects portfolio Bills encompass.*[23]

*10.35* The Committee appreciates that the practice of grouping amendments in portfolio reduces the number of Bills that pass through Parliament. However, it questions the advantage of this reduction if the Bills are harder to consider because of their disparate nature. Given that there is no saving in terms of the number of legislation proposals that must be considered, and that word processing allows rapid development of the formal parts of many Bills, the Committee doubts whether the savings effected by portfolio Bills are particularly significant. It would appear to be more appropriate to group amendments of legislation in a Bill according to the subject of the legislation being amended than the identity of the department administering the legislation. This would offer some of the advantages of portfolio Bills without creating the problem of excessive diversity within a single Bill.

*10.36* **Recommendation 36**

***The Government should discontinue the practice of grouping amendments of legislation administered by one department in a portfolio Bill and instead group amendments of legislation dealing with a single subject into a single Bill.***

*Time Between Introduction and Passage of Legislation*

*10.37* The longer the time between introduction and passage of a piece of legislation, the greater the opportunity Parliamentarians have to consider the legislation privately.

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23 Clerk of the House of Representatives, *Submission*, p. S44.

*10.38* Nearly two thirds of the Bills that originated in the House of Representatives in 1992 and passed both Houses of Parliament in the 1992 Budget sittings, were enacted in no more than 2 months.[24] Fifteen percent of them were enacted in no more than 6 weeks.[25]

*10.39* Some legislation is introduced and passed by a House of Parliament on the same day, giving almost no time for consideration of the legislation outside the chamber.

*10.40* The length of the sitting periods makes it difficult to extend the time that usually elapses between introduction and enactment of a Bill without slowing the whole legislative program. There may, however, be a way of extending that time for some legislation.

*10.41* As most Bills originate in the House of Representatives, the peak legislative workload of the House of Representatives generally occurs before the end of a sitting period. The final sitting days of a sitting period are used mainly to deal with legislation originating in, or returned with amendments from, the Senate. They therefore tend not to be as busy as sitting days a little earlier in the period. There may be an opportunity to introduce more legislation at the end of a sitting period of the House of Representatives. This would allow individual parliamentarians (and members of the public) to scrutinise the legislation during the adjournment between sitting periods. The possibility of introducing at the end of one sitting period legislation to be passed in the next would depend greatly on OPC's ability to draft legislation after its peak workload had subsided (after the deadline for introduction of legislation for passage in the same sittings period) but before the end of the period.

*10.42* Recommendation 37

***To improve the scrutiny of primary legislation, a minimum of ten days should elapse between the introduction and second reading of a Bill.***

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24 Figures derived from: Australia, Parliament, House of Representatives, *Work of the Session: Budget Sittings 1992*, Department of the House of Representatives, Canberra, 1993, pp. 3–8.

25 Figures derived from: Australia, Parliament, House of Representatives, *Work of the Session: Budget Sittings 1992*, pp. 3–8.

*Parliamentary Time for Scrutiny of Legislation*

*10.43* Parliamentarians can collectively scrutinise legislation either in the chamber of a House of Parliament, or in a committee. The quality of this form of scrutiny also depends on the time available for it.

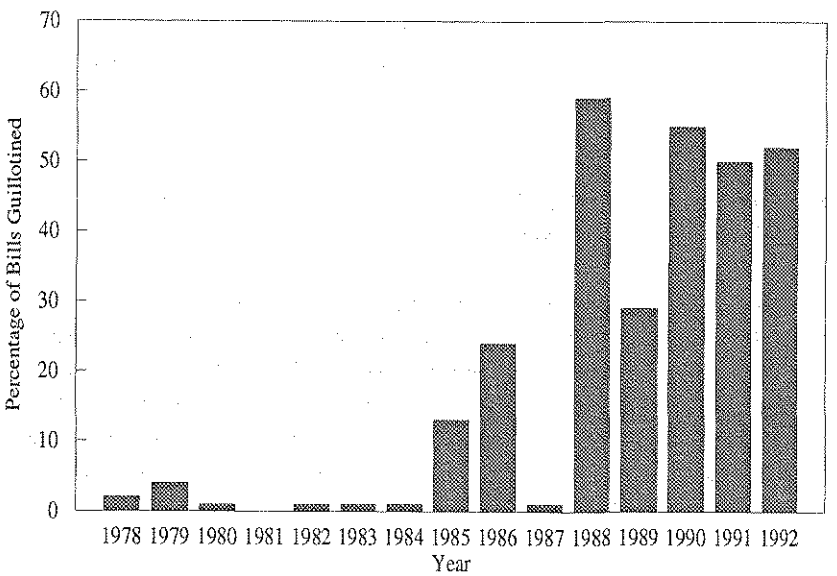
*10.44* As noted above, the amount of parliamentary sitting time devoted to scrutiny of legislation has not increased proportionally with the volume of primary legislation.[26]

*10.45* A further sign of the shortage of time for scrutiny of primary legislation is given by the high proportion of Bills declared urgent ('guillotined') in recent years by comparison with earlier years. This is illustrated in Figure 6. Mrs Margaret Schofield, the Department of the Senate and the Clerk of the House of Representatives expressed concern about the detrimental effect that use of the guillotine has on the quality of legislation.[27]

26 See Figure 4, and Department of the Senate, *Submission*, p. S127.

27 M. Schofield, *Submission*, p. S56; Department of the Senate, *Submission*, pp. S128–129; Clerk of the House of Representatives, *Submission*, p. S44.

**Figure 6. Application of Guillotine to Debate in the House of Representatives on Bills Enacted Later in the Year**




Notes:
This graph illustrates the proportion of Bills (expressed as a percentage of the number of Acts enacted in the year) declared urgent in the House of Representatives each year.

The graph may not present an entirely accurate picture of the proportion of Bills declared urgent in a given year because it does not take into account:
(a) the fact that some legislation debated may never have been enacted; or
(b) legislation debated in the House of Representatives one year but not enacted until the following year.

Sources:
A.R. Browning (ed.), *House of Representatives Practice*, AGPS, Canberra, 1989 (2nd edn), Appendix 17; Australia, Parliament House, House of Representatives, *Work of the Session*, Department of the House of Representatives, Canberra, 1989-1992.

*10.46* One possible explanation for the increased use of the guillotine is the Senate's practice of setting a cut-off date after which Bills received from the House are automatically adjourned to the next sittings (the 'Macklin cut-off'). Bills are often rushed through the House so that they can be introduced in the Senate prior to the cut-off date. This has the effect of reducing the amount of time available to the House to scrutinise legislation.

*10.47* Submissions to the Committee identified two broad means of increasing time for collective scrutiny of legislation by Parliamentarians:

- Parliament sitting for more days each year; and
- devotion of a greater proportion of Parliamentary sitting time to scrutiny of legislation.

*10.48* Submissions from the Department of the Senate, P.J. Boyle, the Clerk of the House of Representatives and the then Parliamentary Secretary to the Prime Minister raised the question of whether Parliament should sit for more days each year.[28]

*10.49* Both the Clerk of the House of Representatives and the then Parliamentary Secretary to the Prime Minister recognised that the desirability of devoting more time to legislative scrutiny needed to be balanced against Parliamentarians' obligations to spend time with their constituents.[29] For this reason they did not indicate whether they favoured an increase in sitting days.

*10.50* Only the Department of the Senate firmly advocated that Parliament should sit for more days each year.[30] The Clerk of the Senate stated, however:

> *In the absence of measures to make better use of available time, an expansion of sitting time would not necessarily improve quality control of legislation, because there would be a tendency to spend much of the additional time in the way it is spent, or, on one view, wasted, under the existing system. An expansion of sitting time should be undertaken only in conjunction with measures to make better use of available time.*
>
> *Having said that, it is believed that an increase of about 20 sitting days, in conjunction with more sensible hours of sitting, would greatly improve the performance of both Houses, in the attention given to legislation as well as other aspects of parliamentary*

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28 Department of the Senate, *Submission*, p. S135; P.J. Boyle, *Submission*, p. S6; Clerk of the House of Representatives, *Submission*, p. S42; Hon. L. Brereton MP, Parliamentary Secretary to the Prime Minister, *Submission*, p. S46.

29 Clerk of the House of Representatives, *Submission*, p. S42; Hon. L. Brereton MP, Parliamentary Secretary to the Prime Minister, *Submission*, p. S46

30 Department of the Senate, *Submission*, p. S135.

*performance.*[31]

*10.51* It is clear that more time would be available for effective parliamentary scrutiny if the Parliament sat more frequently.

*10.52* The Department of the Senate proposed that time would be more efficiently used for legislative scrutiny if each House were to set its own yearly calendar of sittings in standing orders. The calendar would allocate time to Government legislation, private Parliamentarians' legislation and other business, including committee work. The Department suggested that the Government should explain its legislative program in some detail at the beginning of each period of sittings to allow sensible allocation of time to consideration of particular pieces of legislation according to their complexity, with a reserve for urgent and unforeseen legislation. The Department argued:

> *This would be a self-imposed rational alternative to the guillotine, and would avoid the old parliamentary trap of a great deal of legislation accumulating at the end of the period of sittings with no time to consider it properly.*[32]

*10.53* The Clerk of the House of Representatives and the then Parliamentary Secretary to the Prime Minister also agreed that it would be desirable to make more efficient use of parliamentary time to scrutinise legislation.[33] The Clerk suggested that the times when a sitting is currently suspended for meal breaks could be used for consideration of uncontroversial legislation by the House, a committee of the whole or general purpose standing committees.[34] This could significantly increase the time available for legislative scrutiny. At least one-seventh of sitting hours of the House of Representatives were suspended each year from 1985 to 1992 (inclusive).[35]

*10.54* Another means of increasing the efficiency of use of parliamentary time for scrutiny of legislation was identified by DVA and the New South Wales Bar Association. They considered that parliamentary time available for scrutiny of legislation could be used more efficiently

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31 Department of the Senate, *Supplementary Submission*, p. S634.

32 Department of the Senate, *Submission*, p. S136.

33 Clerk of the House of Representatives, *Submission*, p. S42; Hon. L. Brereton MP, Parliamentary Secretary to the Prime Minister, *Submission*, p. S46

34 Clerk of the House of Representatives, *Submission*, p. S42.

35 Calculated from: Australia, Parliament, House of Representatives, *Work of the Session*, Department of the House of Representatives, Canberra, 1985–1992.

if proper consultation had been completed before introduction of a Bill.[36] DVA observed:

> *The obvious advantage [of consultation on legislative proposals before introduction of a Bill] is that such a process can save considerable Parliamentary time in a busy legislative program in debating contentious clauses in bills or by lengthy consideration of bills referred to Senate Standing Committees for further investigation and report.*[37]

*10.55* The Clerk of the House of Representatives raised the possibility of involvement of parliamentary committees at this stage in considering exposure drafts of legislation or green papers relating to legislation.[38]

*10.56* The Committee recognises that more efficient use of parliamentary time for scrutiny of legislation will be facilitated by consultation on legislation before its introduction into Parliament. Some of the other advantages to be gained from public consultation on draft legislation were discussed in Chapter 2.

*10.57* **Recommendation 38**

***The Government should prepare every six months, and propose for inclusion in Sessional Orders of the House and Senate, an indicative calendar of activities for the Parliament. The calendar could indicate the proposed legislative timetable and allow set times for the consideration of particular Bills.***

*10.58* **Recommendation 39**

***Ministers should refer any exposure drafts of legislation to the parliamentary committees responsible for the matters covered by the legislation.***

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36 DVA, *Submission*, p. S485; New South Wales Bar Association, *Transcript*, pp. 108–109.

37 DVA, *Submission*, p. S485.

38 Clerk of the House of Representatives, *Submission*, p. S42.

*Legislative Scrutiny by Parliamentary Committees*

*10.59* The Clerk of the House of Representatives recognised the possibilities of using committees to consider legislation:

> *The committees could ... perform a useful function once a Bill was introduced to the House. Provision could be made, by specific resolution, for the stage of debate on the second reading and/or consideration in committee to occur in general purpose standing committees.*
>
> *... one beneficial feature claimed for the parliamentary committee system is that it provides the opportunity for the legislature to be taken to the people. The suggestions made in this submission in this regard would enable the people on whom proposed legislation will impact to comment directly to legislators on perceived consequences, and for legislators to explore the options accordingly.*[39]

*10.60* The Department of the Senate suggested that more frequent use of the committee of the whole in the House of Representatives would improve legislation.[40] In its supplementary submission the Department went on to argue that the consideration of legislation in standing committees provides even greater opportunities for effective scrutiny.[41]

*10.61* The practice of referring legislation to Senate committees is already well established and the Clerk of the Senate summarised the benefits as including:

- the opportunity for legislators to question officers responsible for framing legislation;
- speedier consideration of legislation because committees could deal with several pieces of legislation concurrently;
- greater ease of deliberation on legislation in committees than in the chamber; and
- shortening of consideration of legislation in the chamber because it has already been considered in committee.[42]

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39 Clerk of the House of Representatives, *Submission*, pp. S42–43.

40 Department of the Senate, *Submission*, pp. S128–129.

41 Department of the Senate, *Supplementary Submission*, p. S634.

42 Department of the Senate, *Supplementary Submission*, p. S635.

*10.62* The advantages of using committees to consider legislation apply to both primary and subordinate legislation. In the latter context, the work of the Senate Standing Committee on Regulations and Ordinances over a period of more than 60 years has been widely acknowledged.

*10.63* While not detracting from the work of the Senate Standing Committee on Regulations and Ordinances, the Clerk of the House of Representatives suggested that:

> *... the [House of Representatives Legal and Constitutional Affairs] Committee may wish to consider whether disallowance proposals by Members of the House should stand referred to a committee specially appointed or to the appropriate general purpose standing committee. This question is particularly relevant to the provision in some recent legislation enabling the House to amend and approve (rather than to disallow) agreements etc. made under the Act. The floor of the Chamber is a far from perfect venue for consideration of this kind.*[43]

*10.64* The Committee believes that consideration of legislation in standing committees may well help enhance the quality of scrutiny of legislation and thus the standard of legislation. This applies equally to primary and subordinate legislation.

*10.65* The Committee believes that the small number of motions in the House of Representatives relating to subordinate legislation does not warrant formation of a committee especially to deal with subordinate legislation.[44] Matters relating to subordinate legislation should be referred to the appropriate standing committee.

*10.66* **Recommendation 40**

***The Government should consult the Opposition with a view to amending Standing Orders of the House of Representatives to facilitate more effective forms of scrutiny of primary and subordinate legislation.***

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43 Clerk of the House of Representatives, *Submission*, p. S43.

44 Only seven motions were moved (and all were negatived) in the House of Representatives for disallowance of subordinate legislation in the decade 1983–1992. Three motions to approve subordinate legislation were moved (and all were carried) in the House in the same period. See Australia, Parliament, House of Representatives, *Work of the Session*, 1983–1992.

# 11

# ACCESS TO LEGISLATION

## Introduction

*11.1* There is little point in having clearly drafted legislation if it is difficult to gain physical access to it. Many people who gave evidence to the Committee were concerned about the difficulties in obtaining access to legislation, especially subordinate legislation.[1]

*11.2* Others noted that the lack of up-to-date reprints make it harder to understand legislation, because it is often necessary to refer to more than one document at a time.[2]

*11.3* This chapter considers these issues of access to legislation. It looks first at access to legislation generally. The use of word processors and computer type-setting mean that there is potentially a considerable degree of overlap between availability of legislation in electronic form and on paper, but the following sections deal with the two issues separately. The chapter then addresses consolidation of amended legislation, and concludes with a section on access to material ancillary to legislation.

## Access to Legislation in Electronic Form

*11.4* Electronic access was proposed as an efficient, inexpensive way of distributing legislation,[3] particularly to areas remote from capital cities.[4]

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1 See, for example: K. Seppanen, *Submission*, p. S21; Department of the Senate, *Submission*, p. S 122; DSS, *Submission*, p. S158; Centre for Plain Legal Language, *Submission*, pp. S310–311; Business Council of Australia and Institute of Company Directors, *Submission*, p. S429; Law Institute of Victoria, *Submission*, p. S459. The following organisations noted particular concern over the difficulty of access to subordinate legislation: Senate Standing Committee on Regulations and Ordinances, *Submission*, pp. S226–227; Australian Law Librarians' Group, *Submission*, p. S254; Law Society of Western Australia, *Submission*, p. S476; Attorney-General's Department, *Submission*, pp. S485–486.

2 Department of the Senate, *Submission*, p. S131; Centre for Plain Legal Language, *Submission*, p. S311.

3 SoftLaw Corporation, *Submission*, p. S412.

4 K. Seppanen, *Submission*, p. S21.

*11.5* Many Australian jurisdictions have been involved in developing public access to legislation in electronic form. For example, Victorian legislation is fully consolidated in electronic form,[5] Info-One International Pty Ltd provides subscribers with on-line access to legislation of many Australian jurisdictions, and the Australian Capital Territory is planning to make its legislation available on public-access databases.[6]

*11.6* Commonwealth legislation is presented electronically in a number of forms. The two major forms are on-line access to a database and CD-ROM (compact disk read-only memory). Knowledge-base systems also help administrators in some Commonwealth agencies use legislation.[7]

*Existing On-Line Access*

*11.7* The major form of on-line access to legislation is to the SCALE database maintained by the Attorney-General's Department. Some organisations have direct access to the database, while others can gain access through the on-line services offered by the company Info-One. The Attorney-General's Department informed the Committee:

> *There is access, for a fee, by members of the public and Commonwealth Departments and Agencies to electronic consolidations maintained by Attorney-General's Department on SCALE, the Department's legislation database. SCALE contains copies of published reprints and copies of the annual numbered series of Commonwealth Acts and Regulations. It also contains some "paste-ups" of legislation to be reprinted.*[8]

*11.8* In addition, SCALE contains State laws, and reports from all major Commonwealth and State courts, and tribunals.[9]

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5 Business Council of Australia and Australian Institute of Company Directors, *Submission*, p. S429.

6 Hon. R. Follett MLA, Chief Minister of the Australian Capital Territory, *Submission*, p. S463.

7 SoftLaw Corporation, *Submission*, p. S411.

8 Attorney-General's Department, *Supplementary Submission*, p. S636.

9 Hon. M. Lavarch MP, Attorney-General, *Major Initiatives Improve Public Access to Law*, News Release, 22/93, 24 June 1993, p. 1.

*11.9* The Committee was also advised that some Departments provide on-line electronic access for their staff to legislation that they administer.[10]

*Existing CD-ROM Services*

*11.10* Diskrom, a joint venture between Computer Law Services Pty Ltd and AGPS, has for some years been providing a CD-ROM service with Commonwealth legislation. The venture offers three main legislation products:

- Commonwealth Acts and Regulations in a form that reflects the state of the printed (including reprinted) legislation;
- corporations legislation with some Acts in consolidated form and extrinsic material; and
- tax law, including a consolidation of the *Income Tax Assessment Act 1936* and extrinsic materials.

Subscribers to the service receive updated replacement disks and supplementary information either regularly or as amendments make it necessary.

*11.11* Info-One International Pty Ltd also advised the Committee that it would be providing a CD-ROM service with Commonwealth legislation early in 1993.[11] The legislation would not be fully consolidated, but would contain hypertext links to allow easy movement between a provision of the principal legislation and later provisions that amended the principal provision.

*11.12* One submission complained that the current CD-ROM service for general Commonwealth legislation was limited because it 'mirrors the deficiencies of a paper-based system'.[12] The lack of up-to-date consolidations means that, although it is easy to move between different provisions, it is still necessary to read more than one provision to obtain the up-to-date text of a provision that has been amended since the last reprint.

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10 AQIS, *Transcript*, p. 260; AQIS, Letter to the Committee dated 4 December 1992, p. 2; DSS, *Second Supplementary Submission*, pp. S662-663.

11 Info-One International Pty Ltd, Letter to the Committee dated 30 November 1992, p. 1.

12 AQIS, *Submission*, p. S448.

*Other Forms of Electronic Access Currently Available*

*11.13* Some Commonwealth agencies have the legislation they administer available on computer disk. Some legislation is also being provided on disk commercially by private publishers.[13] There were, however, some complaints that AGPS did not sell legislation on disk as an alternative to paper.[14]

*11.14* SoftLaw Corporation indicated to the Committee that it had provided DSS and DVA with knowledge-base systems to make it easier for them to administer the legislation for which they are responsible.[15]

*Proposals for Improved Electronic Access to Legislation*

*11.15* The Committee received some evidence about proposals to upgrade the accessibility of legislation in electronic form.

*11.16* DSS advised the Committee that over the next 5 years it would be creating a network of personal computers that would allow better presentation of its legislation in electronic format and hypertext linkages between related pieces of legislation and between legislation and relevant administrative material.[16]

*11.17* AQIS indicated that it is planning to place consolidations of its legislation in electronic form on its network of computers to which industry operators (e.g. abattoirs and food processing plants) also have access.[17]

*11.18* The proposal with the greatest ramifications flows from the ARC's recommendations for improving access to subordinate legislation. The ARC reviewed the question of access to subordinate legislation and recommended:

*[ARC] Recommendation 25*

*Under the [proposed] Legislative Instruments Act, a Legislative*

13 See, for example, 'Electronic Law Book', (1993) 28(1) *Australian Lawyer* 59.

14 SoftLaw Corporation, *Submission*, p. S413; DSS, *Transcript*, p. 400.

15 SoftLaw Corporation, *Submission*, p. S411.

16 DSS, *Second Supplementary Submission*, p. S661.

17 AQIS, *Transcript*, pp. 263–264; AQIS, Letter to the Committee dated 4 December 1992, p. 2.

*Instruments Register should be established in which all delegated [i.e. subordinate] legislative instruments covered by the Act should be published.*

*[ARC] Recommendation 26*

*(1) Responsibility for the establishment and maintenance of the Legislative Instruments Register, including publication of instruments, should be with the Office of Legislative Drafting.*

*(2) The possibility of computer-based publication and storage of the Register, and access to the Register, should be investigated by the Office of Legislative Drafting.*[18]

*11.19* These recommendations were supported in evidence given to the Committee by the Senate Standing Committee on Regulations and Ordinances, the Business Council of Australian, the Australian Institute of Company Directors and the Attorney-General's Department.[19] Indeed, the Senate Committee and Attorney-General's Department went further than supporting investigation of a computer-based register and said that the register should be in electronic form.

*11.20* Witnesses from the Attorney-General's Department explained to the Committee the form they thought the register should take:

*If the ARC report were implemented, we are looking at not only establishing an image based electronic register of all these legislative instruments, not just Stat[utory] Rules but all the other ones as well, but also having available a parallel text database which could be searched through more than just AGPS bookshops in capital cities.*[20]

*11.21* On 24 June 1993 the Attorney-General, the Hon. Michael Lavarch MP, issued a press release confirming that the Government was considering the introduction of an electronic version of the proposed Legislative Instruments Register. It is planned that the

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18 ARC, *Rule Making By Commonwealth Agencies*, p. 65.

19 Senate Standing Committee on Regulations and Ordinances, *Submission*, pp. S229–230; Business Council of Australia and Australian Institute of Company Directors, *Submission*, p. S429; Attorney-General's Department, *Submission*, p. S518.

20 Attorney-General's Department, *Transcript*, p. 269.

Register will be operational from July 1994.[21]

*11.22* The press release suggested that more convenient public access to the SCALE database of Acts and Regulations was also being considered.[22]

*11.23* One of the problems in providing on-line electronic access to legislation is the difficulty in preserving formatting of legislation when it is transmitted electronically to different types of computers and printers using different software. The Committee was told by a witness from the Attorney-General's Department that solutions to this problem are being investigated:

> *AGPS are looking at developing the use of SGML, which stands for standardised general mark-up language. ... this is a way of embedding commands about type size, layout, bolding or paragraphing ... in the text of material. If you use this SGML, you can then send electronic text all over the place, and it can be printed on any kind of PC [personal computer] or any kind of system, and it still comes out exactly the same, because the indents [etc.] ... are embedded in the text.*[23]

## Consolidating and Printing Legislation

### *Background*

*11.24* AGPS informed the Committee that it gives highest priority to printing legislation.[24] The Committee received little evidence that the time delay between making and publishing legislation caused difficulty.[25]

*11.25* The issue that concerned most people was the delays in publishing official consolidations of legislation. The last complete official consolidation of Acts reprinted them as at 1973, while the last

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21 Hon. M. Lavarch MP, *Major Initiatives Improve Public Access to Law*, p. 1.

22 It is proposed that public access to the SCALE and the proposed Legislative Instruments Register be gained by 'dialling up via computer or using the Attorney-General's Department offices in each State or the extensive network of Government bookshops.' (Hon. M. Lavarch MP, *Major Initiatives Improve Public Access to Law*, p. 2.)

23 Attorney-General's Department, *Transcript*, pp. 274–275.

24 AGPS, *Submission*, p. S628.

25 Australian Law Librarians' Group, *Submission*, p. S256.

official consolidation of Statutory Rules dates from 1956. In more recent times, there have been pamphlet reprints of individual pieces of legislation, with an emphasis on reprinting Acts.[26]

*11.26* Much Commonwealth legislation is printed by AGPS from camera-ready copy provided by the Attorney-General's Department.[27] The copy is generated using computer-based technology, so it is necessary to have legislation in electronic form before a printed consolidation can be published.

*Electronic Consolidation*

*11.27* As indicated above, Diskrom consolidates some legislation in electronic form. At present, however, most consolidation of legislation in electronic form is done by the Attorney-General's Department and forms the basis for material on the SCALE database and reprints of legislation.

*11.28* Consolidation of Commonwealth legislation in electronic form has been hampered by the fact that not all legislation is available in electronic form.[28]

*11.29* The Attorney-General's Department indicated in January 1993 that:

> *The Commonwealth Statute Books currently consist of some 1300 titles of Acts and 900 titles of Statutory Rules, a total of about 2200 titles. About 1910 titles are already in a form that is up to date and capable of being reprinted as required. Of the remaining 290 titles, about 160 are scheduled for consolidation in 1993 using current resources.*
>
> *There are approximately 130 titles of legislation that have not been scheduled at this stage. A review by a legal officer of the continued need for each of these titles of legislation will determine whether all of these titles need to be back-captured. ...*
>
> *In addition to the program of backcapturing legislation to bring it up-to-date, the Department is endeavouring to maintain in an up-to-*

26 Attorney-General's Department, *Transcript*, pp. 270–271.

27 Attorney-General's Department, *Supplementary Submission*, p. S642.

28 Attorney-General's Department, *Transcript*, pp. 270–271.

*date form all legislation passed since 1989 and subsequently amended.*[29]

*11.30* As more legislation is captured in electronic form, the production of an up-to-date consolidation of Commonwealth legislation becomes more realistic. Both Computer Law Services - the private company in the Diskrom joint venture - and the Attorney-General have recently announced their intention to produce a consolidation in electronic form.

*11.31* Computer Law Services plans to complete, by January 1994, an 'across the board' consolidation of all Commonwealth Acts.[30] The consolidation will be made available to subscribers in a CD-ROM format and will be supplemented monthly by newly consolidated material. Early versions of this product, known as *Commonwealth Consolidation*, are already on the market.[31]

*11.32* Shortly after the release of *Commonwealth Consolidation*, the Attorney-General announced that his Department intended to make available to the public up-to-date versions of all Commonwealth Acts and subordinate legislation. The Department is planning to have its consolidations available, through the SCALE network and the proposed Legislative Instruments Register, by the middle of 1994.[32]

*Reprinting Consolidated Legislation*

*11.33* The Committee was informed that the factor limiting reprinting of legislation was supply of text by the Attorney-General's Department, rather than the printing capacity of AGPS.[33]

*11.34* Decisions on reprinting legislation are made largely by the Attorney-General's Department, although it receives input from other Commonwealth agencies. AGPS advises on the state of its stocks of particular pieces of legislation.[34] OPC advises whether Acts under

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29 Attorney-General's Department, *Supplementary Submission*, pp. S659-660.

30 See: D. Eagle, General Manager, Computer Law Services, Letter sent to the Committee on 6 April; and D. Eagle, Letter sent to the Committee on 23 June 1993.

31 D. Eagle, Letter sent to the Committee on 23 June 1993, p. 1.

32 Hon. M. Lavarch MP, *Major Initiatives Improve Public Access to Law*, pp. 1-2.

33 AGPS, *Submission*, p. S629; Attorney-General's Department, *Supplementary Submission*, p. S642.

34 Attorney-General's Department, *Supplementary Submission*, p. S642.

consideration for reprinting are about to be amended so that a consolidated reprint would have only a short 'life'.[35] Agencies administering legislation may request special arrangements for reprinting.[36]

*11.35* The Attorney-General's Department explained:

> *The priority for the reprinting of legislation ... is decided by the following criteria (in descending order of importance):*
> - *the priority list of legislation determined by the Department's Board of Management;*
> - *what legislation is out of stock at AGPS;*
> - *whether the legislation is to be reprinted on an annual basis as a result of an agreement with a particular agency;*
> - *specific requests from Departments; and*
> - *other legislation that requires reprinting.*[37]

*11.36* The Department identified a number of factors that could slow the preparation of consolidations of legislation, including complex format,[38] old-style drafting,[39] and any minor alterations that might be made to the text under powers to up-date style in legislation by administrative action.[40]

### *Unofficial Consolidations*

*11.37* The lack of up-to-date official consolidations of all legislation leads not only to private publishing houses publishing looseleaf services, but also to people and groups with a particular interest in a piece legislation keeping their own paste-up consolidation. Neither of these arrangements are particularly satisfactory solutions to the problem of access to up-to-date consolidated legislation.

*11.38* While private publishing houses offer looseleaf subscription services that provide for rapid updating of legislation, they cover only

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35 I.M.L. Turnbull Q.C., First Parliamentary Counsel, *Supplementary Submission - Responses to Questions, and Additional Material*, p. S612.

36 See, for example: DHHCS, *Transcript*, p. 416.

37 Attorney-General's Department, *Supplementary Submission*, p. S642.

38 Attorney-General's Department, *Submission*, p. S510.

39 Attorney-General's Department, *Submission*, p. S511.

40 Attorney-General's Department, *Supplementary Submission*, p. S641. Although there are not currently any powers of this nature for Commonwealth legislation, the Committee has recommended them in Recommendation 29 (see paragraph 8.77).

a small proportion of the wide range of Commonwealth legislation.[41]

*11.39* The Committee received evidence that Commonwealth agencies alone devote considerable resources to maintaining unofficial consolidations of legislation. DSS spends about $65,000 to produce each unofficial consolidation of the *Social Security Act 1991* which is distributed widely to staff and welfare groups, and expected to produce three consolidations in the 1992–1993 financial year and at least four the following year.[42] The Attorney-General's Department keeps a set of paste-ups covering almost all amended titles of Commonwealth Acts and Regulations.

*11.40* The Law Society of Western Australia claimed:

> *The difficulty of access to delegated legislation also raised issues of Constitutional importance. Government departments which may have "private" updated versions of delegated legislation may have an unfair advantage over the ordinary citizen when a dispute arises.*[43]

To overcome this problem, the Society proposed that Commonwealth departments should be obliged to keep updated subordinate legislation in paper form, and possibly also computer form, available for public access.[44]

*11.41* AQIS proposed an alternative: that AGPS should take over the Attorney-General's Department's paste-up system and offer copies to the public.[45] Commenting on the question of public access to its paste-ups, the Attorney-General's Department said:

> *As these [paste-ups and electronic consolidations that are not on SCALE database] are largely unofficial, and are produced entirely for the internal workings of the Department, the Department is unable to guarantee their accuracy and therefore restricts their*

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41 Most of the law publishers from whom the Committee received information could not conveniently catalogue the titles of Commonwealth Acts and Regulations that they offered in looseleaf or regularly updated form. The Law Book Company, however, provided (as an attachment to its letter dated 5 January 1993 to the Committee) a list of about 80 titles of Commonwealth legislation for which it provided looseleaf services. The Attorney-General's Department indicated that there are currently about 2,200 titles of Commonwealth Acts or Regulations: Attorney-General's Department, *Supplementary Submission*, p. S636.

42 DSS, *Second Supplementary Submission*, pp. S662-663.

43 Law Society of Western Australia, *Submission*, p. S476.

44 Law Society of Western Australia, *Submission*, p. S476.

45 AQIS, *Submission*, p. S448.

*availability. Officers in the Department are aware of the limitations they may have and it is not infrequent that suggestions for correction of a paste-up or an electronic consolidation are made to those preparing them.*[46]

*Demand Printing*

*11.42* If a database of up-to-date consolidated legislation were available, it could, at least in theory, be used to print legislation on demand. This would ensure that people received legislation that was up to date, and would minimise any incentive not to reprint legislation that might arise from having stocks of old legislation on hand.

*11.43* The Committee was informed, however, that there are a number of obstacles to providing demand printing. Principal Legislative Counsel of OLD told the Committee:

*We are investigating the possibility of demand printing of these legislative instruments [that would be on the register of subordinate legislation proposed by the ARC] so that they would be available. But the current position is not good. It is really a question of resources, I think.*[47]

AGPS indicated:

*AGPS is in the process of investigating the possibility of demand printing/publishing of legislation (including consolidations of legislation) in concert with other interested parties and potential suppliers of equipment and systems incorporating the necessary technology.*

...

*Significant resources (including management resources, funds, technology, and expertise) would be needed to compile and maintain a consolidated database which is authoritative, accurate, up-to-date, and able to be efficiently utilised as part of a demand printing/publishing system. In the case of AGPS (which is only one*

46 Attorney-General's Department, *Supplementary Submission*, pp. S641-642.

47 Attorney-General's Department, *Transcript*, pp. 269–270.

*of the parties involved in the production and dissemination of legislation) questions of demand and commercial constraints are also relevant.*[48]

*Alternatives to Consolidation*

*11.44* The Committee received some evidence from the Senate Standing Committee on Regulations and Ordinances and AQIS supporting the practice of issuing amendments of legislation in looseleaf form.[49]

*11.45* A looseleaf system that is kept up to date is convenient to use. However, as with legislation in conventional form, there is no feature inherent in a looseleaf system that informs the reader whether the legislation has been kept up to date. The looseleaf system may also increase the physical volume of legislation that must be handled, as even a minor amendment will require a whole page of amending legislation.

## Cost of Access to Legislation

*Printed Legislation*

*11.46* There were a few complaints about the cost of legislation.[50]

*11.47* One submission proposed that lawyers be given free legislation.[51] DSS explained that it distributed free copies of its unofficial consolidations of the *Social Security Act 1991* widely.[52]

*11.48* The Australian Law Librarians' Group and the Law Society of Western Australia suggested that it could be cheaper to buy legislation

48 AGPS, *Submission*, pp. S629-630.

49 Senate Standing Committee on Regulations and Ordinances, *Submission*, p. S228; AQIS, *Submission*, p. S445; AQIS, *Transcript*, p. 260.

50 See, for example, Law Society of Western Australia, *Submission*, p. S475.

51 M.J. Redfern, *Submission*, p. S17.

52 DSS, *Transcript*, p. 397.

if it were sold in parts likely to appeal to particular audiences.[53] The Law Society of Western Australia proposed:

> *We suggest that within the context of one omnibus Act, provision be made for the publishing and selling of separate, self-contained chapters each dealing with a specific topic. In the context of Social Security, this may be a particular type of benefit. A further separate chapter may then contain a collection of the generally applicable provisions, relating to such matters as appeals. It may then be necessary to buy only two chapters when dealing with a specific benefit.*[54]

*Electronic Access*

*11.49* Costs of electronic access include:

- the computer hardware to gain access;
- software needed to present information; and
- subscription to a CD-ROM service or payment for time spent on-line to a database.

These costs are likely to make electronic access to legislation too expensive for casual users of legislation unless access is provided through a library. A further cost is the training needed to enable a person to use systems of electronic access to legislation.

## Access to Extrinsic Aids to the Interpretation of Legislation

*11.50* The Australian Law Librarians' Group submitted:

> *Location of legislative sources of law is made increasingly difficult, as a range of interpretive materials is required.*
>
> ...
>
> *Explanatory memoranda that accompany bills are difficult to acquire, as their access is strictly limited by publishing policies*

53 Australian Law Librarians' Group, *Submission*, p. S257; Law Society of Western Australia, *Submission*, p. S475.

54 Law Society of Western Australia, *Submission*, p. S475.

*which limit their numbers ... Explanatory statements which accompany statutory rules are not offered for sale and generally are inaccessible, although they are public documents.*[55]

A number of other submissions also expressed concern about the accessibility of explanatory materials that can be used as an aid to interpret legislation.[56]

*11.51* Explanatory material relating to tax and corporations legislation is available in electronic form with legislation on the CD-ROM services provided by DiskROM.

*11.52* DSS gave evidence that it distributes to welfare groups the manuals that it prepares for its staff to help them administer legislation, and that it makes the manuals available for inspection at its offices.[57]

*11.53* The ATO told the Committee:

*We have developed a new product called A Guide to New Legislation which brings together the actual Bill, the second reading speeches, the explanatory memo, press releases and the parliamentary debates, and that really has proved to be a very successful publication, so much so that we are now being pressed to offer it for sale.*[58]

*11.54* The Attorney-General's Department raised the possibility:

*that much of the material that is currently available elsewhere (such as Second Reading Speeches for Bills and Explanatory Statements for Regulations) might be made available as an adjunct to the printed copies of legislation—not integrated into its text.*[59]

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55 Australian Law Librarians' Group, *Submission*, p. S256.

56 A. Viney, *Submission*, p. S11; K. Seppanen, *Submission*, p. S21; Senate Standing Committee on Regulations and Ordinances, *Submission*, pp. S230–231; Business Council of Australia and Australian Institute of Company Directors, *Submission*, pp. S429–430.

57 DSS, *Transcript*, pp. 386–387.

58 ATO, *Transcript*, p. 452. See also ATO, *Taxation Laws Handbook: Taxation Laws Amendment (Self Assessment) Act 1992, Exhibit 19(iii).*

59 Attorney-General's Department, *Supplementary Submission*, p. S644.

The Department noted, however, that:

> *Explanatory Memoranda and Second Reading Speeches for Bills and Explanatory Statements for Regulations are currently available separately and the cost in resources to print and distribute them with legislation would be primarily at the printing stage. However, if the extra costs of production were reflected in the selling price of legislation, users might object to the automatic grafting onto the legislation of explanatory material whether in integrated or adjunct form.*[60]

## Conclusions

*Access to Legislation*

*11.55* The Committee recognises that good electronic access to legislation is vital, particularly in areas where it is not easy to obtain printed legislation. The continuing demand for the type of services provided by publishers such as Computer Law Service (through the Diskrom joint venture) and Info-One, attest to the importance of good electronic access to legislation.

*11.56* The Committee believes, however, that electronic access to legislation, however, is no substitute for an adequate system of publishing printed (and reprinted) legislation. The cost of electronic access and the special skills needed to operate systems for electronic access mean that not everyone will be able to gain access to legislation electronically. Printed legislation is likely to be more accessible for many people for many years to come.

*11.57* While the Commonwealth should make the text of its legislation available as widely as possible in electronic and printed form, the Committee does not believe that the Commonwealth should be obliged to present legislation in electronic form with additional features such as hypertext linkages etc. People who simply want to buy legislation in its basic form will not want to pay for extra features of this kind. Private publishing enterprises, or joint ventures involving both the public and private sectors, can provide legislation with additional features if there is a market for them.

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60 Attorney-General's Department, *Supplementary Submission*, p. S644.

*11.58* **Recommendation 41**

***The Office of Legislative Drafting should establish and maintain an electronic register of images and text of all subordinate legislative instruments made after the establishment of the register.***

*11.59* **Recommendation 42**

***The Office of Legislative Drafting should be responsible for publishing in the*** Commonwealth Government Gazette ***the title and date of entry of a subordinate legislative instrument in the proposed electronic register as soon as practicable after the instrument has been entered in the register.***

*11.60* There does not appear to be a need for a comparable register for Acts. Unlike the diverse array of subordinate legislation, Acts come from a single source and have standardised format. Acts are already available in electronic form from the SCALE database operated by the Attorney-General's Department.

*Consolidating Legislation*

*11.61* The Commonwealth has a responsibility to ensure that accurate and up-to-date versions of all Commonwealth legislation are available to the community. Over the last two decades this responsibility has been neglected and a significant amount of legislation is now unavailable in an up-to-date, consolidated form.

*11.62* In the absence of an official consolidation, the initiative taken by Computer Law Services to produce a consolidation of Acts in CD-ROM format is to be commended.

*11.63* There are also signs that the Commonwealth may be moving to resume its responsibility to ensure ready access to consolidated legislation. This too is to be commended.

*11.64* It has been put to the Committee that the production of two versions of consolidated legislation may give rise to an unnecessary and costly duplication of effort.[61] The Committee acknowledges these

[61] D. Eagle, Letter sent to the Committee on 23 June 1993, p. 2.

concerns, but is firmly of the view that the Commonwealth should, after years of neglect, produce and maintain an official consolidation of Commonwealth legislation.

*11.65* In undertaking its work the Attorney-General's Department should make best use of all available resources, both public and private sector, and endeavour to minimise any duplication.

*11.66* **Recommendation 43**

***The Attorney-General's Department, in conjunction with public and private sector partners as appropriate, should by 30 June 1994:***

**(a) consolidate, in electronic form and as the official consolidation, all Commonwealth primary and subordinate legislation;**
**(b) publish, in printed form, a complete consolidation of all Commonwealth primary and subordinate legislation; and**
**(c) put in place means of ensuring ready public and parliamentary access to the complete consolidation in electronic form.**

*11.67* The Committee encourages consolidation of each piece of legislation as soon as possible after it is amended. However, the Committee does not favour publication of legislation in looseleaf form, because:

- there is no greater guarantee that looseleaf legislation is up to date than there is that legislation published in conventional form is up to date;
- publication of legislation in looseleaf form makes tracing changes to a piece of legislation over time harder than it is with the present form of publication; and
- publication of legislation in looseleaf form will require production and handling of a greater volume of legislation.

*Printing Parts of Legislation for Separate Sale*

*11.68* The Committee is not opposed to suggestions that legislation be sold in units of less than a whole Act or set of regulations. Indeed, the Committee supports the development of demand printing.

*11.69* However, the Committee believes that there is little legislation drafted in a way that would allow it to be broken up to be sold in parts. It would be essential to indicate clearly on each part that it was only a part of the legislation and that other parts may be relevant to its interpretation.

*Access to Explanatory Materials*

*11.70* The Committee considers that as explanatory materials are allowed to be used in interpreting legislation, they should be made readily available. It would be desirable that the full range of explanatory materials for a particular piece of legislation be made available in one place, as the Australian Taxation Office has done.[62]

*11.71* **Recommendation 44**

***The Department of the House of Representatives and the Department of the Senate should establish and maintain a public-access database that contains the text of explanatory materials referred to in subsection 15AB (2) of the* Acts Interpretation Act 1901 *(e.g. explanatory memorandums, second reading speeches, Parliamentary debates and relevant parliamentary committee reports) for each Bill passed by both Houses of Parliament.***

*11.72* **Recommendation 45**

***The Office of Legislative Drafting should establish and maintain a public-access database of the text of the explanatory statement tabled in Parliament with each subordinate legislative instrument.***

*Resources*

*11.73* Adoption of the Committee's recommendations will impose extra demands on Commonwealth agencies, particularly the Attorney-General's Department (including OLD) and the Parliamentary Departments.

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62 See, for example, ATO, *Taxation Laws Handbook: Taxation Laws Amendment (Self Assessment) Act 1992, Exhibit 19(iii).*

*11.74* **Recommendation 46**

*Resources should be allocated:*

*(a) to the Office of Legislative Drafting to enable it to establish and maintain an electronic register of subordinate legislation and a database of the explanatory statements accompanying subordinate legislation;*

*(b) to the Attorney-General's Department to complete electronic consolidation of all Commonwealth legislation by 30 June 1994; and*

*(c) to the Department of the House of Representatives and the Department of the Senate to enable them to establish and maintain a database of the text of explanatory material associated with Bills.*

Daryl Melham MP
Committee Chair

21 July 1993

# APPENDIX I - TERMS OF REFERENCE

On 23 June 1992 the then Attorney-General, the Hon. Michael Duffy MP, referred to the Committee terms of reference for an inquiry into Commonwealth legislative drafting. The Committee was asked to inquire into and report on the principles and practice of legislative and legal drafting by the Commonwealth, with particular reference to:

(a) the drafting of primary and subordinate legislation;

(b) the training of legislative drafters;

(c) proposals for the simplification of legislation; and

(d) the role of Commonwealth Departments and agencies in preparing instructions for the drafting of legislation and in approving draft legislation.

On 28 May 1993, following the establishment of the Committee in the 37th Parliament, the Attorney-General, the Hon. Michael Lavarch MP, asked the Committee to continue the work of its predecessor.

The terms of reference referred by the Attorney-General were the same as those referred to the former Committee, with the exception of one change in the wording of the preamble. The second terms of reference referred just to 'legislative drafting' rather than to 'legislative and legal drafting'. The change was made to more accurately reflect the intended focus of the inquiry.

# APPENDIX II - SUBMISSIONS AND EXHIBITS TO THE INQUIRY

## Submissions

| | |
|---|---|
| 1 | J O Clark<br>Canberra ACT |
| 2 | Alan Walsh<br>Walsh and Partners<br>Solicitors |
| 3 | P J Boyle<br>Mosman NSW |
| 4 | G B Scanlan<br>Stafford Heights QLD |
| 5 | Allan Viney<br>Frenchs Forest NSW |
| 6 | M J Redfern<br>Balwyn VIC |
| 7 | Kevin Seppanen<br>Mackay QLD |
| 8 | Adele Byrne<br>Ballarat VIC |
| 9 | Council of Small Business Organisations of Australia |
| 10 | Communications Research Institute of Australia |
| 11 | Administrative Appeals Tribunal |
| 12 | The Australian Manufacturers' Patents, Industrial Design, Copyright and Trade Mark Association |
| 13 | Timothy S Faulkner<br>Melbourne VIC |
| 14 | Department of the House of Representatives |

15 Hon Laurie Brereton MP
Parliamentary Secretary to the Prime Minister

16 Senate Standing Committee for the Scrutiny of Bills

17 John Russell
Eagle Heights QLD

18 Margaret Schofield
Willetton WA

19 Australian Taxation Office

20 Department of the Senate

21 Department of Social Security

22 Office of Parliamentary Counsel (Tasmania)

23 Andrew Cannon
Supervising Magistrate
Adelaide, SA

24 National Foundation for Australian Women

25 Parliamentary Counsel's Office (New South Wales)

26 The New South Wales Bar Association

27 Mallesons Stephen Jacques

28 Law Commission (Wellington, New Zealand)

29 Hon Ralph Willis MP
Minister for Finance

30 Senate Standing Committee on Regulations and Ordinances

31 The Taxation Institute of Australia

32 John D Fitzgerald
Crows Nest NSW

33 Australian Law Librarians' Group

34 Australian National Audit Office

35 Office of Parliamentary Counsel (Commonwealth)

| | |
|---|---|
| 36 | Law Foundation Centre for Plain Legal Language |
| 37 | Hon Brian Howe MP<br>Deputy Prime Minister and<br>Minister for Health, Housing and Community Services |
| 38 | Geoffrey Hackett-Jones QC<br>Adelaide SA |
| 39 | NRMA Insurance Ltd |
| 40 | Australian Bankers' Association |
| 41 | Trade Practices Commission |
| 42 | Law Reform Commission of Victoria |
| 43 | SoftLaw Corporation Pty Ltd |
| 44 | Business Council of Australia |
| 45 | Australian Customs Service |
| 46 | The Law Society of South Australia |
| 47 | Australian Council of Social Service |
| 48 | Australian Quarantine and Inspection Service,<br>Department of Primary Industries and Energy |
| 49 | Law Institute of Victoria |
| 50 | Hon Rosemary Follett MLA<br>Chief Minister of the ACT |
| 51 | Australian Institute of Company Directors (Queensland Division) |
| 52 | Law Reform Commission of Victoria<br>(supplementary submission) |
| 53 | The Law Society of the ACT |
| 54 | Bar Association of Queensland |
| 55 | The Law Society of Western Australia |
| 56 | Hon Ben Humphreys MP<br>Minister for Veterans' Affairs |

57 Attorney-General's Department

58 Department of Defence

59 Hon Gerry Hand MP
Minister for Immigration, Local Government and Ethnic Affairs

60 Law Council of Australia

61 Department of Social Security
(supplementary submission)

62 Department of Employment, Education and Training

63 Law Reform Commission of Victoria
(second supplementary submission)

64 Office of Parliamentary Counsel (Commonwealth)
(supplementary submission)

65 Australian Government Publishing Service

66 Clerk of the Australian Senate
(supplementary submission)

67 Attorney-General's Department
(supplementary submission)

68 Department of Social Security
(second supplementary submission)

69 The Australian Taxation Office
(supplementary submission)

## Exhibits

1 Dr Robyn Penman, 'Legislation, Language and Writing for Action', a paper delivered at the Parliamentary Counsel's Committee Conference on Legislative Drafting in Canberra on 15 July 1992 (presented as an attachment to submission number 10)

2 Department of Prime Minister and Cabinet, *Legislation Handbook*, July 1988 (presented as an attachment to submission number 15)

3 (i) Senate Standing Committee for the Scrutiny of Bills, *Scrutiny of Bills Alert Digest: No. 4 of 1991*, 13 March 1991

(ii) Senate Standing Committee for the Scrutiny of Bills, *Fourth Report of 1991*, 10 April 1991

(iii) Senate Standing Committee for the Scrutiny of Bills, *Scrutiny of Bills Alert Digest: No. 5 of 1991*, 10 April 1991

(iv) Senate Standing Committee for the Scrutiny of Bills, *Eighth Report of 1991*, 29 May 1991

(presented as attachments to submission number 16)

4 Margaret Schofield, 'Submission to the Task Force on Management Improvement within the Australian Public Service', June 1992 (presented as an attachment to submission number 18)

5 *Magistrates Court (Civil) Rules 1992* (South Australia) (presented as an attachment to submission number 23)

6 (i) Legislation Advisory Committee, *Legislative Change - Guidelines on Process and Content*, Report No. 6, Revised Edition, December 1991

(ii) Extracts from a report prepared by the Law Commission of New Zealand on a New Interpretation Act (circa 1990)

(iii) K J Keith, 'Plain Language and Legal Drafting, A New Zealand comment', a paper delivered to the Conference of Commonwealth Law Ministers held in Christchurch (New Zealand), April 1990

(presented as attachments to submission number 28)

7 The Taxation Institute of Australia, 'Taxation Simplification Charter (Draft)', 1991 (presented as an attachment to submission number 31)

8 (i) Office of the Parliamentary Counsel (Commonwealth), 'Attachment A - Examples of Aids to Understanding'

(ii) Office of the Parliamentary Counsel (Commonwealth), 'Attachment B - Innovations in Rewriting the Social Security and Sales Tax Laws'

(iii) Office of the Parliamentary Counsel (Commonwealth), 'Attachment C - Random Pages from Recent Acts'

(iv) Office of the Parliamentary Counsel (Commonwealth), 'Attachment D - Letter from Secretary, Department of Social Security'

(v) Office of the Parliamentary Counsel (Commonwealth), 'Attachment E - Commentary on VLRC's Redraft of Division 16E'

(vi) Office of the Parliamentary Counsel (Commonwealth), 'Attachment F - Note on Numbering System Proposed by VLRC'

(presented as attachments to submission number 35)

9 (i) Mallesons Stephen Jaques, 'Supporting Statement'

(ii) Annotated version of an exemption declared under subsection 728(1) of the Corporations Law (Commonwealth)

(presented by witnesses representing Mallesons Stephen Jaques at the public hearing in Sydney on Tuesday 29 September 1992)

10 (i) NRMA Insurance Ltd, *Personal Effects Insurance Plain English Policy*, Edition 4, 1986

(ii) NRMA Insurance Ltd, *Home Buildings Indemnity Insurance Plain English Policy*, Edition 5, 1986

(iii) NRMA Insurance Ltd, *Home Contents Insurance Plain English Policy*, Edition 5, 1986

(iv) NRMA Insurance Ltd, *Home Buildings Replacement Insurance Plain English Policy*, Edition 5, 1986

(v) NRMA Insurance Ltd, *Comprehensive Insurance Policy - Cover for Cars and Motor Cycles*, Editon 1, 1992

(vi) NRMA Insurance Ltd, *Personal Effects Insurance Policy*, Edition 5, 1991

(vii) NRMA Insurance Ltd, *Car Insurance Policy*, Edition 5, 1991

(viii) NRMA Insurance Ltd, *Third Party Property Damage Insurance Policy - Cover for Cars and Motor Cycles*, Edition 1, 1992

(ix) NRMA Insurance Ltd, *Home Contents Insurance Policy*, Edition 6, 1991

(x) NRMA Insurance Ltd, *Home Buildings Insurance Policy*, Edition 6, 1991

(presented by witnesses representing NRMA at the public hearing in Sydney on Tuesday 29 September 1992)

11 Judith Bennett and Harry Dunstall, 'Pleading Guilty Notice', a draft article, June 1992; and examples of improvements to the layout of the *Industrial Relations Act 1991* (New South Wales)

(presented by witnesses representing the Law Foundation Centre for Plain Legal Language at the public hearing in Sydney on Tuesday 29 September 1992)

12 John M Green, 'Don't Kill All the Lawyers', an address given at the graduation ceremonies of the Australian Graduate School of Management and the University of NSW Law School, May 1992 (presented by Mr Green at the public hearing in Sydney on Wednesday 30 September 1992)

13 Australian Quarantine and Inspection Service (Department of Primary Industries and Energy), *Report to Clients, 1990-91* (presented as an attachment to submission number 48)

14 Australian Capital Territory Attorney-General's Department, *Report on Legislation Review*, September 1991 (presented as an attachment to submission number 50)

15 (i) Law Reform Commission of Victoria, *Plain English and the Law*, Report No. 9, 1990

(ii) Law Reform Commission of Victoria, *Access to the Law*, Report No. 33, May 1990

(iii) David StL Kelly, 'The Takeovers Code: A Failure in Communication', (1987) 5 Companies and Securities Law Journal 219

(iv) David StL Kelly, 'User Friendliness in Legislative Drafting - The Credit Bill 1989', (1989) Bond Law Review 143

(presented as attachments to submission number 42)

(v) Law Reform Commission of Victoria, *Redraft of Subdivision A, Division 10 of Part 2.16 of the Social Security Act 1991 - First Draft*, October 1992

(vi) Law Reform Commission of Victoria, *Redraft of Part 4 of the Close Corporations Act 1989*, October 1992

(vii) Law Reform Commission of Victoria, *Redraft of Division 16E of Part III of the Income Tax Assessment Act 1936 - Second Draft*, August 1992

(presented as attachments to submission number 52)

16 (i) A paper prepared by the Department of Veterans' Affairs showing the enactments administered by the Department

(ii) A paper prepared by the Department of Veterans' Affairs showing the disallowable and non-disallowable instruments made under the *Veterans' Entitlements Act 1986*

(iii) Department of Veterans' Affairs, *The Development of Policy and the Legislative Process*, September 1992

(iv) Department of Veterans' Affairs, 'The Repatriation Private Patient Principles'

(v) Department of Veterans' Affairs, *Guide to the Assessment of Rates of Veterans' Pensions*, Third Edition, May 1992

(vi) Department of Veterans' Affairs, *Vehicle Assistance Scheme*, May 1986

(vii) Department of Veterans' Affairs, *Veterans' Children Education Scheme*, January 1987

(viii) Department of Veterans' Affairs, *Treatment Principles*, March 1992

(presented by witnesses representing the Department of Veterans' Affairs at the public hearing in Canberra on Monday 23 November 1992)

17 A paper prepared by Ian Turnbull QC, containing extracts from legislation made in Canada, New Zealand, UK, USA and Australia; and commenting on matters relevant to the inquiry (presented by Mr Turnbull at the public hearing in Canberra on Monday 23 November 1992)

18 Geoffrey Kolts OBE, 'Observations on the Proposed New Approach to Legislative Drafting in Common Law Countries', [1980] Statute Law Review 144 (presented by Mr Kolts at the public hearing in Canberra on Tuesday 15 December 1992)

19 (i) Australian Taxation Office, *Taxation Ruling, Income Tax: whether a non-resident covertible noteholder is a foreign controller for thin capitalisation purposes*, TR 92/6, 10 September 1992

(ii) Australian Taxation Office, *Foreign Income Return Form Guide*, 1991

(iii) Australian Taxation Office, *Taxation Laws Handbook, Taxation Laws Amendment (Self Assessment) Act 1992 (Act 101 of 1992)*, 1992

(presented by witnesses representing the Australian Taxation Office at the public hearing in Canberra on Friday 15 December 1992)

Copies of the submissions are available for inspection at the National Library of Australia, the Commonwealth Parliamentary Library and the House of Representatives Committee Office. A limited number of copies are available on request from the Committee secretariat at the following address:

The Secretary
Legal and Constitutional Affairs Committee
House of Representatives
Parliament House
CANBERRA ACT 2600

Telephone: (06) 277 4622
Facsimile: (06) 277 4773

# APPENDIX III - WITNESSES AT PUBLIC HEARINGS

**Sydney, Tuesday 29 September 1992**

*Parliamentary Counsel's Office (New South Wales)*

Dennis Murphy QC, Parliamentary Counsel

*Mallesons Stephen Jacques*

Edward Kerr, Partner
Robert Eagleson, Consultant in Plain English

*National Roads and Motoring Association (NRMA)*

Helen Conway, Group Secretary and General Counsel
Jenny Burn, Senior Manager, Customer Communication, NRMA Insurance

*Law Foundation Centre for Plain Legal Language*

Malcolm Harrison, Executive Director
Judith Bennet, Principal Researcher
Rosemary Huisman, Senior Lecturer, Department of English, University of Sydney
Penny Pether, Associate Lecturer, Department of English, University of Sydney

*Taxation Institute of Australia*

Geoff Petersson, Technical Director

*NSW Bar Association*

Murray Tobias QC, Senior Vice-President

**Sydney, Wednesday 30 September 1992**

*John M Green, Partner, Freehill Hollingdale and Page*

**Melbourne, Tuesday 20 October 1992**

*Law Reform Commission of Victoria*

Professor David StL Kelly, Chairman
Lucinda Brash, Plain English Drafter and Legal Researcher

*Australian Bankers' Association*

Alan Copsey, Chairman, Legal Committee
Shane Daley, Member of the Legal Committee

*Law Institute of Victoria*

Carol Bartlett, Director of Research and Information
Laurie Dalton, Research Solicitor
John Wilkin, Member of the Institute

*Office of Chief Parliamentary Counsel (Victoria)*

Rowena Armstrong QC, Chief Parliamentary Counsel

**Melbourne, Wednesday 21 October 1992**

*Business Council of Australia*

Bob Gardini, Consultant to the Business Council
Professor John Farrer, Professor of Commercial Law, University of Melbourne and consultant to the Business Council

**Canberra, Monday 23 November 1992**

*Australian Quarantine and Inspection Service, Department of Primary Industries and Energy*

Geoffrey Gosling, Manager, Legal Services Section
John Sainsbury, Senior Assistant Director, Compliance Investigations and Legal Branch

*Attorney-General's Department*

Jean Baker, Principal Legislative Counsel, Office of Legislative Drafting
Lindsay King, Senior Legislative Counsel, Office of Legislative Drafting
Jeremy Wainwright, Senior Legislative Counsel, Office of Legislative Drafting

*Department of Veterans' Affairs*

Peter O'Connor, National Program Director, Corporate Services
Frederick Buckley, Director, Legislation Section, Legal Branch

*Office of Parliamentary Counsel (Commonwealth)*

Ian Turnbull QC, First Parliamentary Counsel
Thomas Reid, First Assistant Parliamentary Counsel
Adrian Van Wierst, First Assistant Parliamentary Counsel

**Canberra, Tuesday 15 December 1992**

*Communication Research Institute of Australia*

Dr Robyn Penman, Research Director

*Department of Social Security*

Michael Sassella, Principal Adviser, Legal Services
Helen Fleming, Assistant Secretary, Legal and Legislation Branch
James Hill, Director, Advisings and Special Projects Section, Legal and Legislation Branch

*Department of Health, Housing and Community Services*

John Carroll, Senior Legal Adviser
Paul Pirani, Assistant Secretary, Legal Services Branch

*Geoffrey Kolts OBE QC, Partner, Freehill Hollingdale and Page*

*Australian Taxation Office*

Peter Simpson, First Assistant Commissioner, Legislative Services Division
Gavin Back, Assistant Commissioner, Sales Tax Simplification Unit
Alison Towler, Project Officer, Law Modernisation Project

Copies of the transcripts of evidence are available for inspection at the National Library of Australia, the Commonwealth Parliamentary Library and the House of Representatives Committee Office. A limited number of copies are available on request from the Committee secretariat at the following address:

The Secretary
Legal and Constitutional Affairs Committee
House of Representatives
Parliament House
CANBERRA ACT 2600

Telephone: (06) 277 4622
Facsimile: (06) 277 4773

IV

# APPENDIX IV - GLOSSARY

| | |
|---|---|
| Black letter law | Legislation which is drafted in great detail so as to indicate its application in every possible circumstance. |
| Consolidate | To combine original and amending legislation to produce a single document that sets out the law in its current form. |
| Defined terms | Words or phrases the meaning of which is defined in the legislation in which they appear. |
| General principles drafting | Drafting to make clear broad principles or concepts rather than detailed rules. Also known as 'fuzzy law'. |
| Plain English drafting | An approach to drafting which aims to simplify the law by removing unnecessary obscurity and complexity. Plain English drafting involves structuring legislation in a clear and logical way; using appropriate simple language; avoiding inappropriate traditional legal expressions; and, using graphics, examples and document design features as aids to understanding. |
| Portfolio Bill | An 'omnibus' Bill containing amendments of all legislation within a portfolio, or of certain related legislation within a portfolio. Statute Law Revision Bills (which contain technical amendments to Acts administered by various |

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|---|---|
| | portfolios) are also known as 'omnibus' Bills. |
| Primary legislation | Legislation made by Parliament. |
| Principal legislation | Legislation to which changes have been made by an amending Act or subordinate instrument. |
| Provision | A Part, Division, section, subsection, paragraph, regulation, subregulation or clause of a Bill, Act or subordinate instrument. |
| Purposive interpretation | An approach to finding the meaning of a legislative provision, preferring an interpretation that promotes the object of the legislation to an interpretation which does not. |
| Running heads | Information at the top of each page of a piece of legislation which allows a reader to see at a glance what material is dealt with on the page. Running heads can contain a brief description of the Part or Division, and an indication of the sections covered on the page. |
| Subordinate legislation | Legislation made under an Act of Parliament (often by the Governor-General or a Minister of State). |