

THE LOOPHOLE



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Submissions should be no more than 8,000 words (including footnotes) and be accompanied by an abstract of no more than 200 words. They should be formatted in MSWord or similar compatible word processing software.

Submissions and other correspondence about *The Loophole* should be addressed to —

John Mark Keyes, Editor in Chief, *The Loophole*,

E-mail: calc.loophole@gmail.com

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Editor's Notes

As we get closer to the next CALC Conference in Zambia at the beginning of April, it is fitting to look back to the opening of the previous conference in Melbourne in 2017. It began with a keynote address by the Honourable Hilary Penfold who, before becoming a judge of the Australian Capital Territory Supreme Court, had enjoyed a distinguished career as legislative counsel with the Australian Commonwealth Government, including 10 years as First Parliamentary Counsel, the first woman to be appointed to this position. She subsequently served as Secretary to the newly created Department of Parliamentary Services and in 2007 she was appointed to the bench. Justice Penfold thus brought a wealth of varied experience to the conference providing a unique perspective on legislation: that of someone well-acquainted with both the world of legislative drafting and the courts. She presents the challenges legislation faces in the hands of practitioners who are sometimes not well-equipped to understand legislation and concludes with some advice to boost the morale of legislative counsel and suggest a few things they might do to “explain themselves”.

The second article by James Dalmau goes to the linguistic heart of legislative drafting, recognizing that although natural languages like English operate within relatively firm conventions, they also evolve. This evolution can produce “contested usages”, which Mr. Dalmau considers in terms of three categories: style, pragmatics and correctness. He discusses ways of approaching the resolution of whether these usages should be accepted within a legislative drafting office, including resources and linguistic research and concludes “in favour of permissiveness”.

Finally, one of the most experienced legislative counsel in the United States, Jack Stark, discusses some of the effective techniques he has found for drafting legislation in terms of accomplishing its purposes, resolving sticking points and avoiding legal trouble. His suggestions are both pragmatic and pertinent and legislative counsel of varying degrees of experience will find his take on these matters most engaging.

John Mark Keyes
Ottawa, January, 2019

Legislation in the Courts

The Honourable Hilary Penfold¹



Abstract

This article provides a unique perspective on legislation: that of a legislative counsel subsequently appointed to the bench. Although she considers that legislation in her jurisdiction (the Australian Capital Territory) works remarkably well, she discusses why some lawyers nevertheless have problems dealing with legislation. These problems range from failing to properly read legislation to complaining that legislation is either too long or too short. She concludes with some suggestions for continuing to draft legislation that works well, including adherence to rules of structure and grammar and paying attention to their readers.

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¹ The Honourable Hilary Penfold joined the Australian Commonwealth Office of Parliamentary Counsel in 1977 and was appointed as First Parliamentary Counsel in 1993. She was awarded a Public Service Medal in 2001 and was appointed a Commonwealth Queen's Counsel in 2001. In 2004 she was appointed Secretary of the Commonwealth Department of Parliamentary Services. In 2008 she was appointed as a judge of the Australian Capital Territory Supreme Court and retired from that position in 2018. This article is an edited version of her presentation at the CALC Conference in Melbourne, Australia on 29 March 2017.

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Introduction

It's 40 years since I began my career as a legislative counsel, 15 years since I decided it was time to do something a bit different, and went to work in the federal Parliament House in Canberra, and 11 years since I was appointed to the Supreme Court of the Australian Capital Territory (**ACT**). My main reason for mentioning those dates is to explain why, if I use words like “we” and “us”, I'm almost certainly talking about legislative counsel ... Once a drafter, always a drafter.

When I left the Australian Office of Parliamentary Counsel it was to go to a job running a new parliamentary department, consisting of 900 staff who'd been thrown together, kicking and screaming, from three abolished departments. We all worked in a building (the Australian Parliament House) that also housed 226 politicians, including nearly 200 backbenchers who were always ready to grab a story and make a noise in an adjournment debate, and 300 members of the press gallery who were even keener to get their hands on stories, and it was a fairly tumultuous time in many respects.

Among those 900 people in the Department of Parliamentary Services I did have a few lawyers working for me (in fact there were very few occupational groups not represented), but mainly my encounters with the law, and with how legislation was used, were at several removes – for instance, I had some staff who were very keen on the *Privacy Act 1988* (Cth) because they believed (wrongly in my view) that it provided them with a justification for refusing to give out information that might have been politically sensitive about the many organisations who used our facilities for more or less legitimate purposes, and there was another group who saw the moral rights legislation as a reason to **pay** a firm of architects linked to the original architect to protect the original architect's moral right “not to have the work subject to derogatory treatment” by commenting on the impact of any proposed modification to any part of the building.²

The only really legal thing I had to do in that department was to instruct OPC on the drafting of a bill to amend the legislation that had set up the new department. Of course, the person

² Section 195AT of the *Copyright Act 1968* (Cth) gives the “author” (that is, architect) of an artistic work that is a building a right to be consulted about changes to the building before they are made, but does not give the architect (let alone any professional associates) any entitlement to be paid to respond to such consultation.

doing the drafting was one of my former staff at OPC, and I hope she didn't find the process too traumatic. I found it quite cathartic, including because I got the chance to write an explanatory memorandum the way I thought they ought to be written – that is, to explain rather than simply paraphrase what was going on in the legislation and why it was needed.³ Certainly I didn't need to paraphrase my former colleague's elegant draft.⁴

So you will understand that when I was invited to put up my hand for an appointment to the ACT Supreme Court, it was attractive in many ways, not least for the two reasons that it would get me back to real legal work, and that instead of 900 staff I would have two staff.

Again, of course, I was putting up my hand for a very steep learning curve, having previously been in a courtroom as a lawyer exactly twice in my life, both on ceremonial occasions, and having virtually no experience in the areas of law that mainly occupy the ACT Supreme Court (crime, planning disputes, personal injuries litigation). But I did have one thing in my favour – I knew how to read a piece of legislation. These days, of course, that is an increasingly important skill and one that many legal practitioners, especially the ones who work in courts, have never really developed.

So while I had absolutely no idea what was in the three-volume *Court Procedures Rules 2006* (ACT), I was pretty confident of my ability to find things by looking at the table of contents and relying on a basic understanding of legislative structure. I was also pretty confident, knowing when the Rules had been drafted and where, that even though the rules went up to number 6900-odd (plus some transitional rules), there weren't really "over 6000 rules" but a much more manageable number of rules and a lot of "spare" numbers!

Over that last 9 years, I've taught myself a lot of things, and quite quickly I got to the point where my strengths in dealing with legislation more than compensated for my relative lack of court experience – although in a small court with a very wide jurisdiction, I still, not infrequently, find myself dealing with something I've never come across before.

Apart from all the court-related matters, I've learned a bit about how lawyers deal with legislation in litigation, and about how legislation stands up to the pressures of litigation.

In summary, most legislation that I come across these days is pretty good, and generally fit for purpose. That, however, doesn't mean that all lawyers appreciate it, or enjoy dealing with it. In some respects, obviously, that's just tough – it's just part of the job – but in other respects there may still be more that legislative counsel could do to make life easier for users.

My list of the reasons why lawyers sometimes have problems dealing with legislation looks something like this:

³ Parliamentary Service Amendment Bill 2005 (Cth), Explanatory Memorandum.

⁴ *Parliamentary Service Amendment Act 2005* (Cth)

- They don't bother to read it.
- They don't understand, or at least apply, the basics of legislative grammar and structure.
- They don't pay attention to context.
- They resist the constraints sought to be imposed by the legislature.
- They don't like the policy and believe that it ought to be different.
- They start from the assumption that if it's legislation, they won't be able to understand it.

I have also come across complaints that I classify as “just plain silly complaints (whinges)”, and the occasional case of wilful blindness (the lawyer knows what the legislation means, he or she just doesn't want to admit it).

Failure to read the legislation properly or in full, or even subsection (2)

There are few things that annoy me more in court than counsel handing up a copy of just the section he or she is relying on. While I genuinely believe that [Austlii](#) and its counterparts in other jurisdictions are one of the truly great developments in the legal environment in my lifetime, there is no doubt that the software that encourages the reader to look at (and print) each section by itself has a lot to answer for.

Section 37J(1) of the *Supreme Court Act 1933* (ACT) is as follows:

- (1) The Court of Appeal may be constituted by a single judge for hearing and deciding any of the following matters (*incidental matters*) in relation to an appeal:
- (a) leave or special leave to appeal;
 - (b) extension of time to institute an appeal;
 - (c) leave to amend the grounds of an appeal;
 -
 - (i) dismissal of an appeal or other proceeding ...;
 - (j) directions about the conduct of the appeal ...;
 - (k) any other question of practice and procedure in the Court of Appeal;
 - (l) costs and other matters incidental to a matter mentioned in paragraphs (a) to (k).

The question that arose before me was whether this provision enabled a single judge (rather than a three-member Court of Appeal) to make an order requiring an appellant to provide security for the costs of the appeal.

The lawyers appearing before me were sure it did – because they'd only read the first four words of paragraph (l), “costs and other matters”. But when I pointed out the rest of the paragraph, which made it clear that the costs reference they were relying on was to costs

“**incidental to a matter mentioned in paragraphs (a) to (k)**” (which a security for costs application clearly wasn’t) they were at something of a loss.

In that case, there wasn’t too big a problem, because I decided (after looking at “equivalent” legislation from several other Australian jurisdictions) that security for costs could be seen as a “question of practice and procedure in the Court of Appeal” (para (k)), and could therefore be ordered by a single judge.⁵

However, I have recently dealt with a matter in the Court of Appeal in which, having achieved variations in the first-instance liability and damages decisions on appeal, the lawyers persuaded themselves that para (l) allowed their complaint about the first instance costs order to be dealt with by a single judge. Despite the Court of Appeal raising concerns, the lawyers persisted in that view until judgment in the appeal from the first instance liability and damages decision had been entered and the Court of Appeal had no further jurisdiction – which I suspect was an expensive mistake for the insurance company involved.⁶

Failure to recognise a standard drafting technique

A common legislative structure involves the following:

If a person [satisfies a pre-condition], the person [may or must act in a specified way].

I’ve come across lawyers who don’t realise (or perhaps don’t want to admit) that those are the same person.

Section 69 of the *Personal Violence Act 2016* (ACT) is as follows:

69 Summary stay or dismissal

(1) This section applies if, in a proceeding, it appears to the Magistrates Court, in relation to the proceeding generally or in relation to a particular application or part of the proceeding, that—

(a) no reasonable cause of action is disclosed; or

(b) the proceeding is—

(i) frivolous or vexatious; or

(ii) an abuse of the process of the court.

(2) The Magistrates Court may, on the application of the respondent or on its own initiative, order that the proceeding be stayed or dismissed either generally or in relation to the claim for relief.

I dealt with a very unusual case in which a Magistrate had dismissed an application for a personal protection order on the ground that no reasonable cause of action was disclosed: the

⁵ *Hughes v Janrule Pty Ltd* [2011] ACTCA 15.

⁶ *Steen v Senton* [2017] ACTCA 5.

applicant (who, in fairness, was not a lawyer) wanted a protection order against a government solicitor based in another jurisdiction because she had written him letters on behalf of the agency for which she worked requesting him to pay costs awarded, in earlier litigation, against him and in favour of the agency.

Before me the appellant asserted that subsections (1) and (2) were quite separate provisions, and the grounds specified in subsection (1) weren't available grounds on which to make an order under subsection (2).⁷

Failure to step back far enough to see the whole context

ACT legislation dealing with personal injuries claims is found in one general Act – the *Civil Law (Wrongs) Act 2002* (ACT) (the **CLW Act**) – and one dealing specifically with motor vehicle accidents – the *Road Transport (Third Party Insurance) Act 2008* (ACT) (the **TPI Act**). Each Act includes a requirement on each party to a claim (in this case, the claimant in relation to a motor vehicle accident and the relevant insurance company) to give the other party copies of documents obtained at relevant times. There are significant consequences of a failure to do so.

Under the *CLW Act*, the provision applied only to documents obtained before legal proceedings were instituted. A question arose about whether the *TPI Act* provisions carried the same limitation.

The judge at first instance wasn't convinced. He said:

While the matter appears to me to be relatively finely balanced, ultimately, the text of ss 102, 104 and 105 is sufficient to impose an obligation that extends beyond the commencement of proceedings **and there are not sufficient matters in the context in which those provisions appear, the structure of the Act generally, or its relationship with the [CLW Act],** to warrant an implication confining their operation to the period before court proceedings are commenced.

Although the judge had looked at the context, in my view he hadn't looked at it the right way – especially since there was also a very powerful policy argument in favour of the opposite conclusion.

In order to look properly at the context, I had to construct the following table:

<i>Road Transport (Third-Party Insurance) Act 2008</i>	<i>Civil Law (Wrongs) Act 2002</i>
<i>Chapter 4 Motor accident claims</i>	<i>Chapter 5 Personal injuries claims—pre-court procedures</i>

⁷ *Quach v RU (No 2)* [2017] ACTSC 234.

Part 4.1 Preliminary—ch 4	Part 5.1 Preliminary—ch 5
Part 4.2 Motor accident claims procedures	Part 5.2 Claims procedures
Part 4.3 Obligations to give documents and information	Part 5.3 Obligations of parties to give documents and information
Part 4.4 Enforcement of pt 4.2 and pt 4.3	Part 5.4 Other provisions—pre-court procedures
Part 4.5 Expert reports	
Part 4.6 Respondent to pay for medical expenses and rehabilitation services	
Part 4.7 Compulsory conferences before court proceedings	
Part 4.8 Mandatory final offers	
Part 4.9 Court proceedings	
Part 4.9A Damages for non-economic loss	Chapter 7 Damages

The heading to Chapter 5 of the *CLW Act* establishes that the provisions included in it apply to what happens before court proceedings are begun. The failure to mention “pre-court procedures” in the *TPI Act* allowed the primary judge to conclude that the two Acts were intended to operate in different time-frames.

However, this overlooked the fact that in the *TPI Act*, the point at which the pre-court provisions stopped being applicable was also signified by a heading, it was just that the heading appeared at the end of the pre-court provisions rather than at the beginning. The heading to Part 4.9, “Court proceedings”, was in my view as clear as the heading to Chapter 5 of the *CLW Act*, “Personal injuries claims—pre-court procedures” in delineating the group of provisions which applied before court proceedings were begun but not after that point.

All members of the Court of Appeal found that the provision of the *TPI Act* only applied at the pre-court stage. The other two members relied on more traditional approaches to statutory interpretation to get there, but I was so convinced by the table of contents – part of what I think of as legislative structure – that I felt obliged to make the specific point. So the comparison of the table of contents above actually came from my judgment, and I also included some commentary about how to “read” the table of contents, as follows:

4. A higher-level examination of the structure of that Act and the *Civil Law (Wrongs) Act 2002* (ACT) (the *CLW Act*), most readily achieved by comparing the respective tables of contents, reveals:

- (a) the differences in the structures of the two Acts, and a reason for those differences (in particular, that the *TPI Act* deals with one kind of negligence claim, whereas the *CLW Act* deals with all negligence claims and many other kinds of civil wrongs that require different kinds of specific provisions); and
- (b) the underlying similarity in the structures of the relevant parts of the two Acts, despite differences in the way different units of the Acts are titled.

5. ...

6. In each Act, pre-court procedures are clearly separated from procedures after action is commenced.

7. Chapter 5 of the *CLW Act* is specified to apply to pre-court procedures in personal injuries claims.

8. The *TPI Act* has no heading referring to “pre-court procedures”, but instead it has pt 4.2 (which requires claims to be made before action may be brought), and pts 4.3 to 4.8, which deal with essentially the same matters as are provided for in ch 5 of the *CLW Act*. The application of those parts to pre-court procedures is not identified by any mention of pre-court procedures as such, but it is in my view almost as explicitly indicated by the heading to pt 4.9, “Court proceedings”. That is, only in pt 4.9 does the legislation move from providing for pre-court procedures into making provisions about actions brought in the court.

9. Accordingly, in saying that the *TPI Act* “has been drafted without any express confinement to the ‘pre-court’ period”, his Honour has overlooked the express indication in the heading to pt 4.9 that the following provisions are about court proceedings, and the clear implication that the previous provisions related to the pre-court period.

10. It is also apparent from a comparison of the tables of contents that the drafter of the *TPI Act* decided to deal with motor vehicle claims in a single chapter (perhaps because that Act also deals with several other related but very different aspects of motor vehicle accident regulation, such as the requirement for vehicles to carry third party insurance and the regulation of third party insurers). That excluded the possibility of using “Pre-court procedures” as a chapter heading (as was done in the *CLW Act*), although it would not have prevented the drafter combining pts 4.2 to 4.8 into a single part headed “Pre-court procedures” followed by the current pt 4.9 (re-numbered appropriately). On the other hand, the use of the heading “Court proceedings” for pt 4.9 could fairly have

been seen as adequate to clarify that the preceding six parts were equivalent to the *CLW Act* provisions contained in ch 5.

I don't imagine anyone will take any notice, however.⁸

On the other hand, it has to be said that the legislative counsel could also have made things easier for everyone by considering the legislative context into which the *TPI Act* was being enacted and either making the application of the relevant provisions explicit or identifying the *TPI Act*'s relationship with the existing *CLW Act*. In fairness, this would have been more difficult (but not impossible, given the capacity to include notes in ACT and other Australian legislation) if the *TPI Act* was drafted by reference to model legislation negotiated among some or all Australian States and Territories.

Rejection of legislative constraints

Judicial officers don't like being constrained by legislation – it's much harder work to comply with processes laid down in detailed legislation, and it can obstruct a judge or magistrate in doing what he or she thinks **ought** to happen, precedent or not.

The *Crimes (Sentencing) Act 2005* (ACT) (the ***Sentencing Act***) provides a good example of this.

Since 1977 (at least), judicial officers have been using the so-called “*Griffiths* remand”. Essentially, a *Griffiths* remand involves the court telling an offender to go away and straighten himself (occasionally herself) out for the next however many months, after which the offender is required to come back to court to be sentenced in the light of whatever straightening out has been achieved.

The *Sentencing Act* provides among other things for making “deferred sentence orders”. The Explanatory Statement for the Crimes (Sentencing) Bill said:

Deferred sentence orders are a codification of an existing power available to the Court known as *Griffiths* remands following the High Court's decision in *Griffiths v The Queen* (1977) 137 CLR 293

Deferred sentence orders will enable the Court to adjourn proceedings to provide an offender with an opportunity to address their criminal behaviour before sentencing. In this way the Court can assess whether the offender demonstrates prospects for rehabilitation, or the offender's ability to address their criminal behaviour.

Given the references to the *Griffiths* remand and to codification, I'm pretty sure that these new provisions were intended to replace *Griffiths* remands.

However, the new legislation was fairly long. Part 8.1 of the provisions relating to deferred sentence orders contained the following sections:

⁸ Although in the course of editing this paper, I did notice that the decision had been quite widely reported by the standards of the ACT Court of Appeal: *Jefferson-Taite v Lewis* [2016] ACTCA 19; 11 ACTLR 242; 310 FLR 136; 76 MVR 147.

Part 8.1 Deferred sentence orders—making

- 114 Application—pt 8.1
- 115 Meaning of *deferred sentence obligations*
- 116 Deferred sentence orders—eligibility
- 117 Deferred sentence orders—suitability
- 118 Deferred sentence orders—indication of penalties
- 119 Deferred sentence orders—review requirements in orders
- 120 Deferred sentence orders—obligations
- 121 Deferred sentence orders—explanation and official notice
- 122 Deferred sentence orders—period of effect

There is a lot of material in those new provisions (and part 8.1 is followed by parts 8.2, 8.3, and 8.4, which have plenty more material).

Since 2005, some members of the ACT judiciary – the ones who read legislation – make deferred sentence orders. However, I know of one magistrate who complained that he tried to make a deferred sentence order, but it took him 4 pages of notes, and so some of the judiciary still make orders that they call *Griffiths* remands, and without going through the 4-page rigmarole).

There may be, in this particular case, a real question of how much it matters if there's a bit of a free-for-all. However, the obvious answer in general is that it does undermine the rule of law in at least a minor respect, by detracting from consistency in the application of the law (especially within a small jurisdiction). There is also the specific detail that a judicial officer who uses a *Griffiths* remand saves himself or herself having to do something that might be quite important in how effective these things are: to make a compliant deferred sentence, a judicial officer must tell the offender what the sentence will be at the end if he or she achieves the necessary progress in rehabilitation (and tell them what that rehabilitation will involve), and what the sentence will be if the offender doesn't manage that, but for a *Griffiths* remand it is adequate (as a matter of law) simply to tell the offender to come back in 6 months to be sentenced. As well, the *Sentencing Act*, unlike the High Court, also deals with such things as the offender's bail obligations, and the circumstances in which he or she can be arrested without a warrant.

Disagreement with policy

On occasions, lawyers (and especially judges) take exception to legislation on policy grounds, taking an attitude that if articulated (which it rarely is) would be along the following lines:

- “I understand the policy (or at least I think I do), but I have an ideological objection to it.”

- “I don’t have a problem with the broader policy, but I don’t like this particular bit of it.”
- “I have no idea what the broader policy is, but I don’t like this particular bit of it.”

I suspect that, by and large, judges who take these kinds of attitudes wouldn’t be particularly sympathetic if offenders used these explanations to excuse their criminal behaviour.

In fairness, I should say that although I’ve heard quite a number of judges express these kinds of views from time to time, mostly what they actually do is fairly much compliant with the relevant legislation. In fact it is probably more common for judges to hold a genuine (albeit misguided) belief about the content of the relevant legislative policy, which may be misguided either because they do not necessarily understand the policy-making processes and the factors accounted for in the end result, or because they consider legislative policy only at a very abstract level, which does not necessarily answer every question about the operation of particular matters of detail.

Learned helplessness

Sometimes lawyers seem to start from the assumption that they won’t be able to understand the legislation, so they won’t even bother trying. And sometimes, in fairness, I’ve seen cases in which all the lawyers (including the judicial officer) only give up after having gone around in too many circles trying to make sense of the legislation involved – almost always in cases where the attempt is to make two different provisions (often in different pieces of legislation) work sensibly together.

This is another case in which, often, the legislative counsel could have solved the problem if they had been more focussed on the issues that might arise in interpreting a particular provision because of the broader legislative context into which it was going.

I have a considerable amount of sympathy for the lawyers who give up after going around in too many circles, but I have very little sympathy for counsel who won’t make any sensible effort to discuss the provisions concerned but insist on sticking with completely ridiculous (but self-serving) assertions about what the provisions mean.

Legislative counsel and practitioners and the great divide between them – when the common law and statute collide

Many legislative counsel have some experience in other kinds of legal practice, but not many of them have any serious experience in the courts or other forms of legal practice, and at least in my experience, policy makers often don’t have much more experience as practitioners than the legislative counsel they are instructing. Criminal law in particular, but other areas too, have such a huge common law content that trying to legislate in those areas is fraught with danger.

The criminal law concept of “conviction” provides a useful example of this problem.

Under common law, a person might be “convicted” for a particular purpose:

- on acceptance of a plea of guilty;
- when a judge or magistrate makes a finding of guilt, or a jury returns a verdict of guilty;
- on the formal articulation of a conviction by a judge in the course of sentencing;
- on the formal recording of a conviction in the court registry.

That is, it is possible to find case law that identifies each of these cases as the point at which a person is convicted.

Clearly, “conviction” is not a safe concept for a legislative counsel to rely on to identify a point in a criminal process.

Furthermore, a guilty person won’t always be “convicted” because, at least in the ACT and in most other Australian jurisdictions, a court dealing with a person who has either pleaded guilty, or been found guilty, of an offence has the option of finding the offence proved but declining to record a conviction (referred to in the ACT legislation as making a “non-conviction order”).⁹

The relevant part of section 17 of the ACT *Sentencing Act* is as follows:

Non-conviction order

- (1) This section applies if an offender is found guilty of an offence.
- (2) Without convicting the offender of the offence, the court may make either of the following orders (each of which is a **non-conviction order**):
 - (a) an order directing that the charge be dismissed, if the court is satisfied that it is not appropriate to impose any punishment (other than nominal punishment) on the offender;
 - (b) a good behaviour order under section 13.
- (3) In deciding whether to make a non-conviction order for the offender, the court must consider the following:
 - (a) the offender’s character, antecedents, age, health and mental condition;
 - (b) the seriousness of the offence;
 - (c) any extenuating circumstances in which the offence was committed.
- (4) The court may also consider anything else the court considers relevant.

Non-conviction orders aren’t handed out lightly, and in particular they aren’t often made when there is a victim, but it’s not unknown (indeed I’ve done it myself). So, a provision about victim impact statements that doesn’t recognise the possibility of non-conviction orders can cause a problem. Section 52 of the *Sentencing Act* says:

⁹ *Crimes (Sentencing) Act 2005* (ACT), s 17.

52 Victim impact statements—use in court

- (1) A victim impact statement may be—
- (a) tendered to the court; or
 - (b) made orally in court; or
 - (c) read out in court
- (2) The statement may be given when the court considers appropriate—
- (a) **after** the offender has been convicted; and
 - (b) **before** the offender is sentenced.

(emphasis added)

The problem emerges here, or is at least compounded in this case, by the fact that many other parts of the *Sentencing Act* use “conviction” quite specifically to refer to the formal and explicit imposing of a conviction in the course of the sentencing process. Obviously, where the Act, elsewhere (and at earlier points), uses the same word to define various sentencing options which emerge only **after** guilt is determined, a reference to the stage at which guilt is determined as a “conviction” in one part of the Act (in order to postpone access to a victim impact statement until after that point) has the potential to create a real problem.

Subsection 52(2), in using the point of conviction as the start of the period during which the victim impact statement can be put before the court, means two things –

- there would be a good argument that a victim impact statement **can’t** be put before the judicial officer until he or she has decided whether to make a non-conviction order; and
- if the judicial officer does decide to make a non-conviction order, then the victim impact statement can’t **ever** be put before the court.

It is almost certain that neither of these outcomes was intended. If victims are to feel that their statements are to have any significance, and if the victim impact process is to be taken seriously, then the victim impact statement should always be available to the sentencing officer in deciding the appropriate sentence, and it certainly shouldn’t be permanently excluded from being aired in court.

On the other hand, it is equally clear that victim impact statements shouldn’t go anywhere near the person (judicial officer or jury) who is **deciding** guilt until after the decision about guilt has been made.

This is a good example of the kinds of provisions that founder on the legislative counsel’s distance from the people who deal with these kinds of matters day to day. For a legislative counsel, it is entirely natural to think that a legal word like “conviction” has a single, clear meaning that is universally understood by lawyers, but because of its common law history, it

emerges that conviction has at least several different meanings, and if it's going to be used in the same piece of legislation to cover two different meanings, it must be defined, either explicitly or by implication in one way or another.¹⁰

Just plain silly complaints (whinges)

When I first joined the Supreme Court, I used to try to educate people when they produced these complaints, but after a few years I gave it up as usually a waste of breath.

Judges and other lawyers like to complain about numbering in legislation (“How can we be expected to deal with a section numbered 47ZZG?”). As every legislative counsel knows, any system of numbering works fine at the beginning, and all systems of numbering turn messy as soon as people (not generally legislative counsel) want to amend them.

Complaints to the effect that legislation is too long generally mean that the legislative counsel have tried to deal with every different case separately, while complaints that legislation is “too dense” generally mean that too many different cases are dealt with in each provision. You can't win.

Complaints about legislation constraining the judicial discretion are counterbalanced by complaints that the legislation doesn't give any guidance about how a discretion is to be exercised (as I said, you can't win).

Then there is the occasional nonsense that I have earlier described as wilful blindness, but may be more accurately described as a complete refusal to engage with the legislation in question.

I dealt with an appellant a while ago – disturbingly, in the circumstances, he was a lawyer representing himself in a fight with the ACT Law Society, which had refused to renew his practising certificate (possibly for good reason). He began his appeal by claiming that the actions he objected to were in breach of s 117 of the Australian *Constitution*. The provision is not one of those that Australians learn about in law school, so I had to open up my pocket constitution, and found the following:

¹⁰ Having noticed this problem, I adopted the practice where there was a victim impact statement, of recording the conviction during the sentencing hearing and before the statement went into evidence. Fortunately, I was never faced with a victim impact statement in a case in which a non-conviction order could reasonably have been sought. After some time, s 52(2) of the *Sentencing Act* was amended, to read as follows:

- (2) The statement may be given when the court considers appropriate—
 - (a) after any of the following:
 - (i) the offender has pleaded guilty to the offence;
 - (ii) the court has found the offence proved;
 - (iii) the offender has been found guilty or convicted of the offence; and
 - (b) before the offender is sentenced.

117. A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.

The first question, of course, was whether this provision (or an implied equivalent) applied at all in the ACT, which of course is a Territory rather than a State for the purposes of the Constitution, but I had a feeling that I wasn't going to get far in that kind of serious discussion of Australian constitutional law. Instead I said: "Please tell me first, which jurisdiction are you a resident of, and which other jurisdiction is subjecting you to a disability or discrimination?"

His immediate response was "Well, if your Honour's going to read it **that** way"

I made it clear that I **was** going to read it that way, and it didn't take me long to dispose of the rest of the appeal.

What should legislative counsel be doing differently?

My first answer to this question is "not a lot, really". Mostly, legislation works remarkably well, and the majority of cases involving legislation that get to court are not about what the legislation means but about how it applies to a particular set of facts.

Within the courts, there is increasing acceptance of the role of legislation in the law – it's often grudging, but so what, and it has been much less grudging among a number of our most senior and well-respected judges, such as recent High Court Chief Justices Gleeson and French.

Generational change will eventually deal with the lawyers who have been used to (and prefer) making it up as they go along.

Legislative counsel can't afford, and shouldn't allow themselves to be persuaded, to give up on a strict and careful adherence to the rules of grammar and structure.

However, legislative counsel shouldn't be too proud to explain themselves, by using such things as:

- simplified outlines;
- helpful structures, reflected in helpful tables of contents;
- cross-references, notes and examples;
- free-standing explanatory material (at least where legislative counsel write such material, or can influence those who do), which includes liberal use of words like "because", "therefore", "otherwise", and so on.

And, as I've already noted a couple of times, legislative counsel as well as interpreters of legislation must take proper account of the context in which their legislation is being drafted, and the context in which each provision will fall to be interpreted, and do their best not to

send their readers on complicated scavenger hunts for meaning that could have been avoided if the legislative counsel had thought a bit harder about the big picture.

I leave you with a good news story, which is the uniform evidence law that is, in Australia, currently implemented in the following legislation:

- *Evidence Act 1995* (Cth)
- *Evidence Act 1995* (NSW)
- *Evidence Act 2008* (Victoria)
- *Evidence Act 2011* (ACT) (where the Commonwealth Act applied 1995-2011)
- *Evidence (National Uniform Legislation) Act* (NT).

This uniform law originated in a joint project by the Australian Law Reform Commission (**ALRC**) and the Commonwealth and New South Wales governments. The ALRC report was submitted to government accompanied by a draft bill prepared by a freelance (but trained) drafter. The draft was then revised by New South Wales and Commonwealth legislative counsel. It originally contained 197 sections (several more have been added, but not so as to detract from uniformity). The law effectively codifies (and in some areas reforms) most parts of the law of evidence. It took much of the first 20 years of the uniform law's life for the High Court to deal with all the rearguard actions from judges and other lawyers who wanted to keep applying the common law (as well as or instead of the Act), but these days it works so well¹¹ – and shows just what can be achieved when skilled legislative counsel work with people who are experts in the relevant law or policy areas!

¹¹ And not just for those of us who hadn't gone near the law of evidence in 30 years before becoming a judge – and not just me, either, but including at least a few judges appointed from academia who have also found it a lifesaver.

Better ways of deciding whether a contested usage is permissible in legislation



James Dalmau¹

Abstract

In this paper I address issues related to "contested usages" - linguistic devices whose acceptability, appropriateness, or correctness legislative counsel disagree on (e.g. singular "they"). Specifically, I explore how drafting offices ultimately decide whether or not to permit their drafters to use a particular contested usage in legislation. First, I provide a taxonomy of the kinds of concerns that arise in relation to these usages, dividing them into issues of style, pragmatics, and correctness. I then set out matters that can be usefully brought to bear in considering those concerns. In particular, I highlight the limitations of relying on dictionaries and usage guides, and encourage deference to relevant linguistic research. I identify opportunities for collaboration with linguists. I conclude by arguing that a decision about whether to permit a contested usage should be made in a considered way, and that a permissive attitude is warranted.

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¹ Senior Parliamentary Counsel at the Office of the Chief Parliamentary Counsel (Victoria). This paper was given at Australasian PCC and CALC (Pacific) Conference, Canberra, April 2018. Thanks to Dr Haidee Kruger, Dr Deanna Wong, Prof Pam Peters and Dr Adam Smith of Macquarie University for their assistance with this paper. The views expressed here are my own. I can be reached at jamesdalmau@gmail.com...

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1 Introduction

The purpose of this paper is to make suggestions about how drafting offices decide what kinds of language we will and will not permit in our legislation. Specifically, this paper addresses discussions about whether to permit a “contested usage.” I define this to mean “a linguistic device whose acceptability, appropriateness, or correctness legislative counsel disagree on.” Below I give some examples.

1. The use of the word “which” in a restrictive sense. For example: “Subsection (1) applies to a person who holds an authority **which** is similar to that of a registered medical practitioner.” Some take the view that this must, or should, be replaced with the word “that”.
2. The use of the word “whose” with an inanimate object. For example: “High-speed fan means a fan **whose** maximum speed is no less than 100 revolutions per minute.” Some take the view that “whose” can only be used in relation to persons and animals.
3. The use of “they”, “them” and “their” as singular pronouns (commonly called singular “they”). For example: “On request, the officer must provide **their** details.” Some take the view that these pronouns can only ever be used to refer to plural subjects, like officers.

The disagreements around singular “they” were a significant motivation in writing this paper. I will use that device as an example throughout.

2 A taxonomy—three kinds of concerns

In discussions about whether to permit a contested usage in legislation, different sorts of concerns are raised. These can generally be categorised as concerns of the following kinds:

1. Concerns about **style**
2. Concerns about **pragmatics**
3. Concerns about **correctness**

2.1 Concerns about style

Generally, **consistency** of language is a stylistic matter - putting to one side instances where inconsistent language creates problems of interpretation. Legislative counsel will be mindful of maintaining consistency with the style used both within the piece of legislation concerned, and more broadly across the jurisdiction's statute book.

Plain language also encourages us to achieve consistency with the language of the audience. This is reflected in the deprecation of jargon and in directives to use words that the audience can easily understand. However, this kind of consistency can prove difficult to navigate or accommodate in this context. This is for two reasons. The first is the well-established truth that legislation has multiple audiences (for example, judges, parliamentarians, and those whose conduct it regulates). The second arises because we are dealing with usages that are contested; such a contest arises precisely because there is a lack of unanimity about a usage. If an audience itself contains conflicting views about an issue, consistency with one view creates inconsistency with another.

The **formality** of proposed or contested language is also a stylistic matter. The tone of legislation must be appropriate to its status as an authoritative prescription of legal rules made by a democratically elected legislature. Writing in *The Loophole*, Daniel Greenberg recounts feedback from non-lawyers regarding draft legislation that replaced “considers” with “thinks” and “substance” with “thing”. This feedback articulated that “[t]he law is not conversation, and it appears that attempts to present it as if it were do not find favour with those whom they are designed to please.”² Clearly, an imperative to sound formal and authoritative can conflict with a plain language approach.

Aesthetic concerns are also stylistic in nature. These include concerns about whether language is sufficiently elegant. A provision may be inelegant because it is too long, or too repetitive, or because it contains clusters of words or syllables that are awkward to read (whether aloud or silently). For example, counsel may object to a double “that” in a provision that begins “If the court considers *that that* evidence is probative”. The currency of a provision's language (that is, whether it appears too old fashioned or too modern) may also be considered aesthetic. However, that characterisation may change if the language is so old-fashioned that it is difficult to understand.

2.2 Concerns about pragmatics

Pragmatic concerns deal with the way the legislative text will be used. The **readability** of the text is in this way a pragmatic issue. This is separate from aesthetic concerns; readability has less to do with how pleasing, concise, or modern a provision is, and more to do with whether its meaning is communicated on a single reading, or whether multiple readings are

² Greenberg, Daniel, “The three myths of plain English drafting” (February 2011) *The Loophole* 103, 105.

required. For example, readers may have difficulty with a provision that includes a lengthy conditional clause in its middle. By the time the reader is past that clause, they may have forgotten how it started, and so return to the start of the provision for a second pass. This is not a purely aesthetic concern.

Interpretive problems are also a pragmatic issue. The use of a particular device in a particular way may introduce an ambiguity in the meaning of a provision. Obviously these concerns are fundamental and significant; as the counsel's role is to ensure that a policy is implemented in a legally effective way, resolution of these ambiguities is of critical importance.

Interpretive problems arise in specific instances. For example, Eagleson considers a provision that reads “Where an applicant notifies the other residents, [they] must lodge a section 12 notice within 14 days.”³ Obviously the use of singular “they” here creates an ambiguity - it is not clear whether the pronoun refers to the applicants or the other residents.

But a specific instance in which a particular device causes an interpretive problem does not tell us much about whether that device should be permissible generally. There are many perfectly acceptable (and accepted) devices that come with similar risks: a comma in the wrong place can introduce ambiguity in some circumstances; using an abbreviated version of a noun phrase (for example, “Commissioner” for “Commissioner of Police”) can introduce ambiguity in some circumstances. Yet no one suggests that commas or abbreviated noun phrases are impermissible. Rather, we train legislative counsel to be aware of these risks and to use these devices with care. The same approach should apply to contested usages.

2.3 Concerns about correctness

At the heart of many disputes about linguistic devices is the question of whether the device breaches a rule of the language. These are expressed as complaints that the writing is ungrammatical. Petersson has observed that this “remains the basis for rejecting singular ‘they’”.⁴ It is important to note, however, that judgments about the aesthetics of a particular linguistic device are sometimes presented as judgments about its correctness: “If it's unpleasant for him, it's an error for you.”⁵

3 Dealing with these concerns

There are a number of different things that counsel can invoke in explaining their concerns or addressing the concerns raised by others.

³ Eagleson, Robert D, 'A Singular Use of They' (1994) 5 *Scribes J. Leg. Writing* 87, 93.

⁴ Petersson, Sandra, “Locating Inequality—The Evolving Discourse on Sexist Language” (1998), 32 *U. Brit. Colum. L. Rev.* 55, 76.

⁵ Pullum, Geoffrey K, [“The Land of the Free and The Elements of Style” \(2010\), 26\(2\) *English Today* 34, 39.](#)

3.1 Searching the existing legislation

If there is a question about whether a particular usage is consistent with the language of either a particular Act or the statute book more broadly, an electronic search may assist. This will be of more use if the linguistic device involves a specific word (for example, “they” or “whose”), but it will be of less use if the linguistic device does not (for example, splitting the infinitive). Searching will yield empirical evidence of how, and how often, the usage has been deployed before.

3.2 Feedback from instructors and other users

Officials instructing on legislation are an important source of feedback on its readability, use and elegance. While they do not possess drafting expertise, it is unlikely that their reactions to legislative text will be entirely unrepresentative of the likely reactions of the text's eventual and ultimate audiences. If an instructor finds a provision difficult to read, open to a competing interpretation, or inappropriately informal, others may do the same. This is worth reflecting on. (This is not to say that legislative counsel need always defer to these views, but simply that they deserve serious consideration.)

Instructors' feedback is valuable both when a contested usage is being proposed, and also when an alternative technique has been implemented to avoid the contested usage. An example of this is repeating the noun phrase rather than using a pronoun (for example, repeating “police officer” rather than adopting the form “the police officer must provide *their* details”). A suspicion that the contested usage would have a readability cost must be weighed against any readability concerns reported in response to the alternative wording.

3.3 The intuitions and experiences of legislative counsel

It is obvious that those whose working lives chiefly consist of reading and writing legislative text will have useful and well-informed intuitions about what language might be too informal or insufficiently clear. Our experience is also valuable when considering whether a provision that presents a readability issue can be transposed into a more readable form (or whether the alternative forms also have their own issues). And any counsel who has received instructions to remedy an interpretive problem in an existing provision will be primed to anticipate and recognise them in the drafts that they write and review.

A difference between the intuitions of various counsel does not mean that there is no point in sharing and discussing them. But when counsel disagree about the grammatical acceptability of a particular linguistic device, their intuitions and experiences are of limited value. Legislative counsel are expert, sophisticated users of the language. Each of us writes in accordance with our understanding of grammar, which is inevitably more developed than those whose work is not so textual. And yet we will have different understandings of

grammatical rules and principles, just as many other sophisticated language users have failed to reach consensus on those points.

Ultimately, differences in intuitions about the grammatical correctness of a particular usage become discussions about the specific grammatical rule or principle that is said to have been infringed (or to have changed). A more than trivial difference of opinion about this should suggest that the provenance and validity of those rules requires something more than invoking distant memories of grammar classes. Nor can a “work it out from first principles” approach to these questions be wholly persuasive when so many grammatical rules, without controversy, turn out to have exceptions. To better understand these rules and their exceptions, we may turn to usage guides and dictionaries.

3.4 Usage guides and dictionaries

These texts are rightly accorded authoritative status in discussions about grammar. They should therefore be given considerable weight. Where they speak with one voice on a particular question, that might fairly be thought to resolve the matter. But what about when they differ?

Singular “they” provides a useful example. The second edition of *Fowler's Modern English Usage* holds that singular “they” “sets the literary man's teeth on edge”.⁶ The third edition, published in 1996, says that singular “they” is acceptable.⁷ And when writing about singular “they” in legislative drafting in 2016, Salembier relied on usage guides in support of the proposition that “[a]mong grammarians... the use of singular “they” is generally acknowledged to be incorrect”,⁸ citing the second edition of *Fowler's*, a superseded edition of *Strunk and White*⁹ and an online version of *The Blue Book of Grammar*.¹⁰

On the other hand, Eagleson cites three dictionaries as recognising and permitting this usage.¹¹ Volokh observes that the *Merriam-Webster's Dictionary of English Usage* also

⁶ Driedger, Elmer A, “[Are Statutes Written for Men Only](#)” (1976), 22 *McGill LJ* 666, 668, citing *A Dictionary of Modern English Usage*, 2d ed. (1965), 404.

⁷ Fowler, H.W.; Burchfield, R.W, *The New Fowler's modern English Usage* (Oxford University Press: Oxford, 1996), 779.

⁸ Salembier, P, “Is Bad Grammar Good Policy? Legislative Use of the singular ‘they’” (2015), 36(2) *Statute Law Review* 175, 176. The same points are made (with the same citations) in Salembier, P, *Legal and Legislative Drafting*, 2nd ed. (LexisNexis Canada: Markham, 2018), 185.

⁹ Salembier cites W Strunk and E White *The Elements of Style*, 3rd ed. (MacMillan Publishing: London, 1979); a 4th edition was published in 1999.

¹⁰ Salembier cites Grammarbook.com: <http://www.grammarbook.com/grammar/pronoun.asp> (accessed 4 March 2015).

¹¹ Eagleson, above n. 3, 88, citing *The Oxford English Dictionary* (2d ed. 1989), *Webster's Third New International Dictionary* (1961), and *The Random House Dictionary of the English Language* (1987).

permits it.¹² And while ultimately deprecating the usage, Salembier does cite the *Cambridge Grammar of the English Language* as permitting it.¹³

When there is a conflict between *Fowler's* and *Strunk and White*, which is to be preferred? If *Merriam-Webster* and another dictionary disagree, to which should we defer? Relying on particular usage guides in these situations can be open to the criticism you are really just “looking over a crowd and picking out your friends”.¹⁴ Whatever your position on singular “they”, you will find support for it in these authorities. This should dampen expectations that usage guides and dictionaries can always offer a neat and straightforward way of resolving disagreements about contested usages.

3.5 Linguistic research

When an instructor offers an opinion on a drafting matter, counsel will often be conscious (and may remind the instructor) that they, and not instructors, are the experts on these matters. The expectation is that it is therefore reasonable for instructors to be guided by our expertise.

Similarly, if legislative counsel are seeking to become informed on a linguistic issue, it is reasonable for us to be guided by those who possess linguistic expertise. While we are sophisticated language users, our practice is in using language as an instrument, rather than studying language to better understand it. That, however, is exactly the job of linguists. And that is why it is reasonable for us to be guided by their expertise.

Below I give some examples of linguistic research that can make a contribution to a discussion about whether it is permissible to use a contested usage in legislation. The citation of the example studies below is not intended to be dispositive of any question about whether to permit a particular disputed usage, or to represent the latest and most robust findings in the field. Rather, they are offered to demonstrate the existence, in the linguistic literature, of empirical findings that can better inform discussions of whether to permit a particular contested usage in legislation.

3.5.1 Example — Reading time studies

These are experimental studies that measure the time it takes participants to read various texts. Longer reading times may be taken to indicate what are called processing costs – this is a readability issue, which, under the taxonomy set out in section 2, is a pragmatic concern.

¹² Volokh, Eugene, [“Correcting Students’ Usage Errors Without Making Errors of Our Own” \(2008\), 58\(4\) *Journal of Legal Education* 533](#), 539 fn 24.

¹³ Salembier, above n. 8, 176 fn 8, citing R Huddleston and G Pullum (eds), *The Cambridge Grammar of the English Language* (Cambridge University Press: Cambridge, 2002) 492–93.

¹⁴ The history of this phrase is explored in [K.L. Scheppele, “Looking over the Crowd and Picking Your Friends: The Social World of Legal Cases”, Maryland Law School, February 2012](#).

A 1997 American study used two experiments to examine the effect of pronoun choice on reading times in different types of sentences each of which contained “he”, “she”, or “they”.¹⁵ The first experiment used sentences in which the pronoun attached to a non-referential antecedent with an indefinite pronoun; that is, a noun phrase denoting a hypothetical person (for example, “a sailor”). The second experiment used sentences in which the pronoun attached a referential antecedent with a definite pronoun; that is, a noun phrase denoting an actual person to whom the writer is directly referring (for example, “That truck driver”). Reading times were measured by requiring participants to press a button to indicate that they had completed reading the sentence.

Using singular “they” did not increase reading times in the first experiment, but it did in the second. This led to the following conclusion:

Taken together, the results of these two experiments demonstrate that the increased use of singular they is not problematic for the majority of readers. We propose that in those few cases in which its use is considered surprising, the delays seen in comprehension are due not to the pronoun's ungrammaticality or to uncertainty over the intended referent, but to the suspicious opacity of using a nongendered pronoun for an antecedent whose gender is presumably known.¹⁶

Reading times can also be measured in other ways. In eye-tracking studies, participants are shown a series of sentences. Sophisticated hardware and software are used to track the movement of the participants' gaze across the sentence. This can yield data about how long it takes participants to read certain kinds of sentences, the direction and order of their eye movements throughout the sentence, and the duration for which the eyes rest on certain parts of sentence.

A 2017 UK study¹⁷ used eye-tracking to examine reading times for sentences pairing “him”, “her”, or “them” with three different kinds of antecedents: those whose gender is represented in the noun (for example, “chairwoman”); those to whom a strong gender stereotype attaches (for example, “nurses”, who are stereotypically thought of as women); and those to whom no strong gender stereotype attaches (for example, “cyclists”). The analysis differentiated between three types of sentences: those that used “them”; those using a gendered pronoun that matched the stereotype or gender of the noun; and those using a gendered pronoun that was a mismatch with the noun. The results were summarised as follows:

¹⁵ Foertsch, J., & Gernsbacher, M. A., [“In Search of Gender Neutrality: Is Singular They a Cognitively Efficient Substitute for Generic He?”](#) (1997), 8(2) *Psychological Science* 106–111.

¹⁶ *Ibid*, 111.

¹⁷ Alice Doherty & Kathy Conklin, [“How gender-expectancy affects the processing of ‘them’”](#), (2016) 70 (4), *The Quarterly Journal of Experimental Psychology* 718-735.

It therefore seems that, for both high-expectancy and gender-known antecedents, any cost associated with the use of them is much more transient and less robust than the cost of gender-mismatch. There was no evidence of a cost or advantage associated with them for antecedents with low gender-expectancy at any region or measure, nor was there any evidence of a cost/advantage of them for low-expectancy antecedents compared with gender-known or high-expectancy antecedents.¹⁸

This kind of research is useful in allaying concerns that the use of singular “they” will result in certain kinds of sentences having a reading time cost. This is valuable in discussions about the readability of using singular “they” in legislative sentences. In particular, these studies suggest that “they”, in a statutory provision will often be unlikely to incur a reading time cost by comparison with “he or she”. This is especially so given that, by their nature, statutory provisions are more often general commands issued to a broad class of persons rather than being directed at specific known individuals.

3.5.2 Example — Acceptability studies

These are experimental studies directed at ascertaining the extent to which a particular language device is accepted by a particular audience. This acceptance might consist of judgments about how natural, grammatical, permissible or correct the device is.

In 2002, a study was conducted on the acceptability of 27 contested usages among Australian high school teachers and high school students.¹⁹ These usages included:

4. “Between you and I” (rather than “between you and me”)
5. Using “data” or “criteria” as if they were singular nouns (rather than plurals)
6. “Different than” (rather than “different from”)
7. Singular “they”.

The study consisted of two surveys. In this first survey, participants were given examples of each usage. They were then asked to mark these as “Accept”, “Reject”, or “Doubtful”. In the second survey, participants were given sentences in which a word was missing, and asked to fill it. For example, in the sentence “The data ____ useless”, the choice to use “is” (or “was”) instead of “are” (or “were”) indicate the perceived acceptability of treating “data” as singular.²⁰ The second survey also included a proofreading test, in which participants were invited to review sentences and mark any desired changes.

The following quantitative findings related to singular “they”:

8. 75% of teachers and 68.5% of students deemed “their” with the antecedent “anyone” to be acceptable.

¹⁸ Ibid, 728.

¹⁹ Lee, Jackie. [“Attitudes towards disputable usages among Australian teachers and students” \[online\]. \(2002\), 25\(1\) Australian Review of Applied Linguistics, 109-129.](#)

²⁰ Ibid, 118.

9. 54.8% of teachers and 98.1% of students elected to use “their” with the antecedent “everyone”.
10. 9.6% of teachers and 43.5% of students elected to use “their” with the antecedent “one”.
11. 65.8% of teachers and 96.6% of students elected to use “them” with the antecedent “anyone”.

Acceptability studies will be of variable relevance to discussions about permitting contested usages in legislation. They will be more relevant if they are more recent, and if the participants are from a relevant demographic. But the variety of audiences for legislation means that many different demographics will be suitably relevant. For example, in the study above, the author notes a shared grammatical conservatism among teachers.²¹ Significant acceptance of singular “they” among such a demographic indicates that adopting it in our legislation might not place us on the cutting edge.

3.5.3 *Example—Corpus linguistics*

This is a branch of linguistics that consists of studying collections of texts. The kinds of texts that might be collected and studied include newspaper articles, transcripts of unscripted conversations, transcripts of scripted public addresses, etc. Software and manual labour is then used to interrogate the collection. The occurrences of certain linguistic forms are identified, sorted, and coded, and quantitatively analysed to identify, for example, differences in how often certain usages occur, the decade in which they occurred the most or the country of publication in which they occur the least.

In 2012, a UK study looked at two datasets of UK newspaper articles.²² The first dataset comprised articles from the 1960s, while the second comprised articles from 2007 and 2008. The author analysed how many times singular “they” occurred in each dataset. She also analysed occurrences of generic “he” (the use of “he” as a generic pronoun). The quantitative results were that:

12. Within the 1960s dataset, singular “they” accounted for 11% of the occurrences; generic “he” accounted for 89%.
13. Within the 2007/2008 dataset, singular “they” accounted for 80% of the occurrences; generic “he” accounted for 20%.

As with acceptability studies, the relevance of a particular piece of research from the field of corpus linguistics will depend on a number of factors. A particularly important factor is the nature of the text contained within the datasets that are analysed. Evidence about the prevalence of singular “they” in unscripted conversation or informal email correspondence will not merit much consideration in considering whether to permit that usage in legislation.

²¹ Ibid, 122, 128.

²² Laura Louise Paterson, [“Epicene pronouns in UK national newspapers: a diachronic study”, \(2011\), 35 ICAME Journal 171–86.](#)

Greater weight, however, should be accorded to studies of formal texts that are written by sophisticated, authoritative users of the language and produced for general consumption. Evidence that a particular usage appears regularly in texts of that kind should make it more difficult to contend that the usage is properly categorised as incorrect.

4 Accessing and using linguistic expertise

Section 3.5 above demonstrates the existence of relevant expertise that can make a meaningful contribution to discussions about permitting contested usages in legislation. The question then becomes how best to access that expertise. Finding, understanding and reviewing linguistic research is a specialist task. It is not to be expected that legislative counsel will possess these skills or should be required to develop them. Rather, we can access and benefit from contemporary understandings of linguistic research by building constructive relationships with academic institutions. There are opportunities for mutual benefit in this kind of cross-sector multidisciplinary work.

Once the expertise is accessed, and linguistic research is brought to bear in a discussion of whether to permit a particular contested usage in legislation, how should it be treated? How much weight should be given to it? This will of course depend on how robust and unequivocal it is. But unless it is particularly tentative, or emerges from a demographic or corpus that has too little relevance to the legal and legislative contexts, it ought to be considered more dispositive than a legislative counsel's intuition (however deeply held), or a single paragraph from a decades old style guide. To think otherwise would be to unfairly discount the expertise attaching to this body of research.

5 Conclusion—In favour of permissiveness

The high quality of legislation produced by legislative counsel reflects the fact that they have a specialist expertise. And that quality is in part a product of the repertoire of techniques that legislative counsel learn, develop, and refine. Denying recourse to a contested usage reduces this repertoire.

It is of course true that there are many linguistic devices that it will be uncontroversial to prohibit because of the kinds of concerns described in section 2 above. But this paper is concerned with contested usages. Legislative counsel will only make arguments in favour of a contested usage if they think that it has a particular utility, or is somehow superior to the less disputed alternatives.

Accordingly, prohibiting a contested usage (whether generally or in particular circumstances) is a serious thing to do; at least in some counsel's eyes, the result will be that they are prevented from producing their best work. It follows that I favour a considered permissiveness on these matters. Put differently, I think the threshold for prohibiting a contested usage ought to be high. Perhaps prohibiting a particular usage might satisfy the tastes of particular counsel; it might avoid the risks that come with careless adoption of that

usage; and it might forestall criticism from the most conservative readers. But in my view, once the threshold is set at the appropriate level, these considerations do not even approach it.

I do not think it would be reasonable to require that a usage must be almost universally accepted before legislative counsel can be allowed to deploy it. We should not consider that a usage should be prohibited simply because senior counsel dislike it. Nor is a prohibition justified only because a usage has not previously appeared in the relevant jurisdiction's statute book. And a general intuition about grammatical incorrectness, backed up by one usage guide or another, should not take the place of careful consideration of the relevant linguistic research.

None of this is to say that there will never be good enough reasons to prohibit a particular contested usage. Surely there will be. And it is true that determining whether such reasons exist naturally calls for evaluative judgment and involves some subjectivity. But these matters can nonetheless be approached carefully, sensitively, systematically, and with deference to relevant expertise. Legislative counsel could consider exactly what the concerns are - perhaps by using the taxonomy set out in section 2. They could reach out to linguists and obtain the valuable expert advice described in section 3, using it as discussed in section 4.

Approaching the task in this way is more likely to lead to answers that meet with approval, both among counsel and among the various audiences for our work. Such an approach should have many benefits. Distinctions will be drawn between the aesthetic preferences of counsel and empirically backed reservations about readability. A diversity of intuitions about matters such as formality and elegance might be exposed and appreciated. Implicit value judgments will need to be made explicit, which is likely to demonstrate that these are not universal or inevitable.

Discussions like these may even mean that, every once in a while, a legislative counsel might be persuaded to discard their prejudices against a particular usage – or perhaps other counsel might be convinced to stop pushing the envelope. Perhaps more often, these discussions might reveal that the strongest reservations regarding a particular contested usage are largely confined to (or are most pronounced in) specific contexts and circumstances. For example, it might be that objections to using singular “they” are strongest when the pronoun has as its antecedent a noun of a particular kind. Teasing out these nuances allows for compromises that otherwise might not be reached. Such desirable results as these simply will not be reached by a mere insistence that Strunk & White must be followed.

Much of what is said in this conclusion is itself contestable. Certainly, legislative counsel will disagree on where exactly the threshold for prohibiting a contested usage should be set. But I do not think there is much to be said against the suggestion that we should navigate these issues in a way that breaks the problem down, concedes that there is a diversity of

views, builds on relevant evidence, and recognises the consequences of denying counsel access to particular linguistic devices. Adopting such a method may mean foregoing the comfort that one's intuitions on these matters will always be correct. But it is likely to lead to better drafting.

Tools for Legislative Drafters

Jack Stark¹



Abstract

This article is a continuation of an earlier article published in the Loophole in April, 2012. It presents the author’s further thinking on three groups of “tools” that can be used in drafting legislation. The first help in drafting legislation that accomplishes its purposes. The second can be used to move drafting forward when it gets stuck. The third focus on avoiding potential legal problems.

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¹ Former Legislative Attorney, State of Wisconsin (US).

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Introduction

Legislative drafting is a difficult and important endeavor. This article presents some assumptions about drafting. Then it presents a number of tools, that is, methods by which legislative drafting can be done well). There is a series of tools that help drafters accomplish a draft's purpose, a set that helps drafters get unstuck and a set that helps a drafter avoid legal trouble. These tools will help drafters improve the quality of their drafts.

Assumptions

Writing is a craft. That is, it is not mechanical or automatic, and it is not something that can be done well without thinking about the consequences of the drafter's decisions. A drafter needs tools: techniques that work in the legislation language game. Tactics that work for other language games, such as essay writing, might not work for legislative drafting. That is, panaceas such as plain language are of little or no use in legislative drafting. Drafting has some unusual features. It is highly conventional and thus unlike the kinds of writing that are free-wheeling. These conventions need not be inhibiting; they can they can help a drafter to write more easily and more effectively. Accuracy—stating legislative directives as precisely as possible—is paramount. Writing so as to be easily understood is less important. Another unusual attribute of legislative drafting is that it has only a few functions.

Tools for Accomplishing a Draft's Purposes

The functions of statutes

The statutes forbid (usually done with “shall not” or “may not”), authorize (usually done with “may”) and require (usually done with “shall,” which is traditional and seems more imperative than “must.”), conditions under which those three behavioral directives apply and consequences of following or failing to follow the directives. Definitions are conditions. To write a statute a drafter decides to determine which function is to be effected. Then the drafter needs to decide who is to be addressed. Then a drafter needs to determine whether there are conditions or consequences. If there are, he or she must determine how they are to be attached logically, structurally and syntactically to the relevant behavioral directive.

The interlocker

“Interlocker” needs explanation. The statutes consist of statutory units, not paragraphs, like most prose. In fact, a drafter should think in statutory units. They resemble outlines, the parts of which interlock. For example, the bare bones of a statute will look something like the following:

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- (1) ... :
- (a)
- (b) ... :
- 1.
- 2.

In drafting the units, one should put together common material and realize that he or she is constructing a hierarchy which shows elements that are of the same order. One should also look up and down levels of units.

The complex sentence

Complex sentences (sentences with subordinate clauses) are useful tools. In simple sentences there is no subordinate clause, no conjunction that connects two complete thoughts. Examples are “A person who is licensed to practice optometry in another state shall pay a \$25 fee. The clerk shall issue that person a license to practice in this state.” Compound sentences are material that could be two complete sentences joined by a conjunction such as “and” or “but.” An example is “A person who is licensed to practice optometry in another state shall pay a \$25 fee and the clerk shall issue to that person a license.” A complex sentence has a subordinate clause. An example is “If a person who is licensed to practice optometry in another state pays a \$25 fee, the clerk shall issue to him or

her a license to practice in this state.” Complex sentences make the connection of the parts of the statute more exact and more obvious. They also minimize prepositions, vague subjects and weak verbs. Drafters should use them lavishly.

The definition

If we were text-centered or reader-centered, I would write that definitions simply state the meanings of terms. However, in elucidating statutes it is best to be drafter-centered. Thus, one should look at the use of definitions and other elements of statutes. Definitions serve several desirable results. They create economy; that is, they promote directness and conciseness. They fit into systems of definitions. They set standards. They specify the applications of terms. They close loopholes. Most important, they minimize administrative and judicial misinterpretation of the will of legislatures and executives in specifying the law.

The spectroscopy of generality

Imagine an arc with “specific” at one end and “general” at the other. A drafter can write a statute that lies anywhere on the arc. The drafter’s task is to write a statute that lies at a location on the arc that allows for accuracy (remember that that is the main goal of drafting) but that allows sufficient flexibility to deal with unexpected instances to which the statute might apply. The right point varies by the statute’s subject matter and by the draft’s details. A drafter should favor work on the specific end of the draft to further accuracy. He or she should also move toward the specific end if the subject matter is a battleground for the legislature or if there is available relevant technical information. He or she should move toward the general end of the arc if a large range of situations needs to be covered.

The reality check

Remember that you are not merely writing words; you are trying to affect behavior. You are mapping the behavioral directives onto the real world. Because accuracy is paramount, that activity is crucial. Before you begin to write a bill, occasionally during the process of writing and after completion of the draft do a reality check. Check the effects that the bill will have on the behavior of the persons whom the bill will affect if it becomes law. Check the possible interpretations, including deliberate misinterpretations. Look at the draft from various perspectives: citizens, administrators and judges. A visual aid such as a diagram might help. For an honest reader are there enough and accurate enough directions? Are the directions the ones that the requestor wants to convey?

The organizer

Organization should be undertaken at the beginning of the drafting process. Create order; do not wait for it magically to evolve. That approach forces thought, which is always good and avoids trouble. Organize in statutory units if possible.

Remember that form follows function. For example, use a chronological arrangement for a process. The Wisconsin statutes on shared revenue with local units of government were organized haphazardly. Later they were rearranged so that they for the most part follow the order in which the steps necessary to make the payments appear in part in the order in which they are performed. It usually is inadvisable to organize according to the order of importance. Organize in statutory units if possible.

The leash

As you start a draft slow down. Ask yourself whether the draft is as easy as it appears. Among the questions that should be addressed before starting to draft is whether there are constitutional problems. For example, a state legislature's draft to give special consideration to airlines that have hubs in the state should not have been started before the draft's relation to the Commerce Clause of the United States Constitution was checked. Ask yourself a series of questions: what am I assuming? Are my assumptions valid? Do I need more material, such as definitions? Resist the temptation to quickly merely add a word or phrase or to add an item to a list without further thought. See whether the new material necessitates a further change of the statutory unit to which the new material is to be added.

The specter of the result-oriented judge

This check does not need to be made for every draft, but it should be made for difficult or controversial drafts. Imagine that you are in a war between, on one side, the legislature and the governor and, on the other side, a result-oriented judge. The drafter's job is to make it as likely as possible that a judge would interpret a statute the way that the requester of the bill that created or affected the part of the statutes that is being litigated would want it to be interpreted. Imagine a dialogue between you and the judge. Some things that you can do to make it more likely that the view that the requester had will prevail is to add definitions; they narrow the ground on which the result-oriented judge has to stand. Make sure that the behavioral directives are correct. Firmly connect the conditions and consequences to the behavioral directives. Check the degree of generality: very general bills are much easier to read so as to arrive at a particular result that might not be the one that was intended.

The focuser

Drafters will be more effective if they constantly have in mind the main purpose of the draft on which they are working. They should relate that purpose to the draft's secondary material and avoid superfluities. These goals are more likely to be accomplished if the drafter understands and keeps in mind the five functions of statutes. It might be counter-intuitive, but sometimes it is possible to do too much research for a draft. That can obscure a drafter's focus on the process and the draft. Some of the other tools, most notably the complex sentence and carefully using statutory units will help a drafter focus.

Tools for Getting Unstuck

All drafters sometimes get stuck: they cannot figure out what step to take next or cannot solve a problem so that they can move on. There are also tools for this situation.

The sticking point finder

When stuck, the first task is to try to determine in what way you are stuck, not at what point in the draft. The problem might not be at the point where you feel distress. Some possible questions that should be considered when you are stuck are as follows. Is the organization of the draft illogical? Is the draft's main purpose unclear? Is the main behavioral direction incorrect or missing? Are the connections or consequences faulty? Is your background knowledge inadequate? Is the fit with the relevant statutory system faulty? As to the latter problem, some possible solutions are to check your cross-references or create some new ones and to do a word search to find other statutes that might have to be affected.

The reverse gear

Go back one step in your thought process. If you cannot find the right word, the problem might be the sentence's syntax. If a detail is fuzzy, perhaps you need to rethink and reformulate in your mind the draft's purpose. Sometimes the requester has led you astray. You can try to determine what he or she really wants. This step would probably necessitate contacting him or her. The requester might also have made false assumptions that have led you down the wrong path.

The analogy

There might be an analogous bill or statute consulting which would lead you back to the correct path. For example, a problem with a draft on the income tax might be solved by examining a gross receipts tax. For a problem with a detail, a drafter might want to consult a similar statute. It would be helpful to keep a file of examples. When looking for helpful analogies it is somewhat dangerous to look to other jurisdictions. The contexts of details might very well be significantly different.

The colleague

One possible aid is the most skilled or most senior of your colleagues. Another possibility is to recognize which of your colleagues knows the most about certain topics or situations. For instance, which one is the appropriations expert? Who is good at various skills such as phrasing or finding alternative solutions? Do not hesitate to get help; drafting agencies ought

to be cooperative enterprises. Besides, asking for help is flattering to the person requested, usually not an annoyance.

The alternate route

One possibility is to step back and work on something else for a change: another part of the draft or another draft. That eases tension and lets the subconscious work. Also, a bill is an elaborate system. Moving away to another part of the system might illuminate the part where you are having the problem.

The main goal identifier

Finding and keeping in mind a draft's main goal will help you focus, which in turn will help you get unstuck. It might help to articulate and write down that goal. Also think of secondary goals and their relation to the main goal. Often you can clarify the main goal by discovering the reason for the drafting request and the legislator and his or her supporters who want the bill.

Tools for Avoiding Legal Trouble

The nose

Intuition is a powerful ally. For example, a request for a property tax exemption for a single entity's property smells bad. It bears checking.

The trouble spotter

This tool implicates finding the source of the odor that the nose detected. Among the sources are over-reaching, apparent violations of separation of powers, an odd relation between units of government, turf battles, preferential treatment, an exception to a general rule or statute, radical innovation, a right or privilege diminished or eliminated, a statement by the requester that he or she is merely "leveling the playing field."

The constitution checker

A drafter needs exhaustive understanding of the constitution or constitutions that are relevant to his or her work. Studying them when one has time is important, as is checking them whenever one is suspicious about the constitutional status of a draft.

The above material constitutes a very large set of tools for a drafter to acquire, remember and use. However, as you know, drafting is very difficult. It also is fascinating work.
