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Crystal-clear: comprehensibility as the goal of legislative drafters and how they attempt to achieve it

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Contents

1 Introduction

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Common law drafters working in countries that have adopted the Westminster Parliament model are part of a drafting tradition that evolved in England in the 1800s (STEFANOU 2016: 124). Since the 1970s, there has been pressure to ensure that legislative output is comprehensible. This led drafters progressively to abandon the traditional Victorian phraseology of statutes in favour of plain English (HUNT 2002: 26).

This paper argues that isolated efforts of a legislative drafter are not sufficient to achieve comprehensibility of the statute book, instead, individual efforts must be supported and co-ordinated within the wider legislative-drafting environment. Comprehensibility here is taken to mean that legislation is clear to the reader and easily understood by the legislation's intended audience (SULLIVAN 2001: 102). In order to make this argument, I draw on my experience as a legislative drafter with the Office of the Queensland Parliamentary Counsel (OQPC), the organisation entrusted with drafting legislation for the State of Queensland, Australia.

2 The legislative drafter in the Westminster parliamentary tradition

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Legislation is a journey that begins with the shaping, moulding and refining of policies and ends with the passing of legislation by the legislature (HASHIM 2012: 143). This journey is specific to each jurisdiction. However, OQPC's approach to drafting shares features with the approach of drafters in places as far away as Canada and Kenya as heirs to the British tradition. In taking their Westminster parliamentary system to their former colonies, the British also took a certain know-how in respect of legislative drafting where specialised lawyers were used to draft legislation to be introduced in Parliament. As part of this arrangement, a distinct feature was the division between policymaking and drafting. Policy is for Government to fix. Policy is a broader notion than decision: it covers a bundle of decisions that reflects an intention to decide in a particular way in the future (HAGUE/HARROP 2004: 309). Policy is the responsibility of Government (departments); the drafter's role is to formulate it in legislative language. The drafting is done by a specific body of lawyers trained in the language, conventions and craft of legislative drafting (the Parliamentary Counsel's Office in larger jurisdictions and the Attorney-General's Chambers in smaller jurisdictions) to give effect to those policy instructions and "translate" them into legal provisions in the shape of a bill, draft regulation or any other statutory instrument (CRABBE 1993: 20).

3 The Office of the Queensland Parliamentary Counsel

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By reason of Australia being a federation, the federal Parliament coexists with the individual Parliaments of six States (New South Wales, Victoria, Queensland, South Australia, Tasmania and Western Australia). In addition, the federal Parliament has granted self-government and delegated some legislative power to its two federal Territories (the Australian Capital Territory and the Northern Territory). Therefore, there are in Australia nine offices of legislative drafters serving each of the federal and state / territory parliaments.

OQPC drafts primary and subordinate legislation for the State of Queensland. This involves supplying bills for the unicameral State Parliament, called the Legislative Assembly, as well as drafting regulations, rules, notices and other statutory instruments. Queensland Government Departments are headed by Ministers who have been democratically elected to the State Parliament and are responsible to Parliament for their portfolios. Drafting instructions come from civil servants (in many cases trained lawyers themselves) working in the various Government departments. These instructors usually have expertise in the specific area of the drafting project. If necessary, they will seek additional information from others within the Department. However, there tends to be one instructor per project and the drafter is kept away from any internal liaising with other parts of the Department (that being the task of the instructor). This guarantees the policy / drafting divide.

In order for OQPC to start working on giving effect to drafting instructions, ministerial approval is required. For instance, if a policy officer working in the Department of Agriculture and Fisheries thinks it would be a good idea to make changes to the regulation dealing with fire ants (a pest in some parts of Queensland), then in order for OQPC to accept and act upon the drafting instructions, the policy officer must first provide evidence of ministerial approval for changes to the regulation. In the case of government bills for introduction to the Legislative Assembly, Cabinet approval is required.

4 No drafter is an island

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Like in other jurisdictions within this drafting tradition, OQPC's drafters are qualified lawyers recruited from private practice, other government departments, academia and law graduates. Would-be drafters are selected for their demonstrated ability to analyse and synthesise legal, policy and other associated drafting problems, devise alternative ways to achieve policy objectives, solve drafting problems in innovative, practical and legally effective ways, and produce high quality, clear, concise and readily understandable and accurate text. These are considered basic aptitudes on which to build up the expertise necessary to become a fully-fledged drafter. It is acknowledged in the jurisdictions that belong to this tradition that it takes about five to seven years to develop a lawyer into a legislative drafter (SALAMBIER 2009: 533).

John Donne's famous poem starts with these lines: "No man is an island entire of itself; every man is a piece of the continent, a part of the main […]". These words aptly describe the *modus operandi* of contemporary Parliamentary Counsel (PC) in jurisdictions of the Westminster parliamentary tradition where a drafting project is usually entrusted to one legislative drafter who is assisted or 'peer-reviewed' by another, usually more senior, drafter. They form a small team and are jointly responsible for finalising the drafting project. This system of pairing-up is part of the on-the-job training arrangements, where the reviewer serves as the guide and mentor to the drafter in that particular drafting project (STEFANOU 2016: 129).

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A drafting project starts with the drafter receiving drafting instructions. The instructions fall outside the scope of drafting *strictu sensu*, but they are a crucial part of the legislation drafting process (XANTHAKI 2014: 21). They contain the background information, the reason for the proposed amendment or for enactment if it is a new piece of legislation, and they can be very brief or very extensive depending on the particular project.

The drafter seeks to give effect to the instructions. A draft goes through many versions throughout its lifecycle up to the point of becoming law. So, the drafter sends the first version to the Department and an iterative process then occurs via emails and meetings between the drafter and the Department up to the point where the draft is settled. At this stage, the drafter may send the project to the reviewer for revision. The reviewer's main concern is to ensure that the drafting project is legally effective for its purpose. This may generate a number of suggestions to improve the draft that the drafter will either incorporate into a new version or discuss with the Department. These suggestions may be in relation to the drafting style. A main concern of the reviewer is improving the draft's accessibility, as this is an important part of the rule of law. Depending on the project, this process may take a week, a month or longer. It is only when the Department, the drafter and the reviewer are happy with the version of the project that a final version is prepared for introduction to Parliament in the case of bills, presentation to the Governor in Council[1] in the case of most statutory instruments, or for ministerial approval in the case of lesser statutory instruments.

5 Promoting consistency

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The effect of the pairing of a junior drafter with a senior reviewer allows for transfer of know-how within OQPC. This arrangement develops the drafter's drafting strategies and helps equip them to tackle new and more complex drafting projects subsequently assigned to that particular drafter. The work of the drafter and reviewer contribute to the overall

1 The Governor is the representative of the Queen for the State of Queensland. "Governor in council" means the "Governor acting with the advice of the Executive Council". The Governor and the Executive Councillors acting as Governor in Council is the body that gives legal authority to actions to be taken or actions or decisions made under Acts of Parliament or the Constitution of Queensland itself.

objective of OQPC, which is ensuring that the Queensland statute book is of the highest quality; in other words, that the collection of the laws of Queensland are clear and consistent with the rest of the statute book.

The efforts of the drafter and reviewer in drafting comprehensible provisions are supported by the wider structure of OQPC. This is done through a number of resources. Firstly, the house style manual, kept in electronic format in the intranet, lists alphabetically the different topics of interest to drafters. For instance, under "amendment of provisions" there are subtopics dealing with the structure and style of amending provisions, action commands and location commands, and renumbering policy. This resource ensures consistency of approach as drafters will use the same procedure for similar situations. In a way, the manual is the repository of collective wisdom of OQPC as the strategies and examples it contains serve as precedents that drafters can consult in order to inform their drafting strategies. The advantage of the digital support of the manual is that new rules and examples are integrated into it quickly, which prevents fossilisation and ensures that novel situations are tackled in a consistent way by all the drafters in OQPC. This was evident in relation to new *sui generis* COVID-19 emergency legislation which was required at the start of the pandemic to cover very diverse areas of the law. The guidance in the electronic manual permitted drafters to draft consistently.

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In addition to the manual, there are two pieces of legislation that assist drafters in achieving comprehensibility of legal provisions: the *Legislative Standards Act 1992*[2] and the *Acts Interpretation Act 1954*[3]. The former introduced the "fundamental legislative principles" (FLPs) which are defined as the principles relating to legislation that underlie a parliamentary democracy based on the rule of law. These principles are spelled out in section 4 of the Act and have been decisive in ensuring the overall quality of the statute book. The principles are used by Parliamentary Committees of the Queensland Legislative Assembly to scrutinise draft legislation tabled or introduced in Parliament. Therefore, the FLPs provide a standard to ensure quality of legislation.

On the other hand, the *Acts Interpretation Act 1954* (AIA) is the Act of Parliament that contains the instructions on how to read other Acts of Parliament.[4] For instance, it tells us that "In an Act, words indicating a gender include each other gender"[5] and that in an Act, in relation to a power, the use of "may" indicates that the power may be exercised or not exercised, at discretion, whereas if the word "must" is used, in relation to a power, it indicates that the power is required to be exercised.[6] The AIA simplifies drafting of other legislation as it is not necessary to define again terms that are in common use and that

2 Found here: https://www.legislation.qld.gov.au/view/html/inforce/current/act-1992-026#pt.2

3 Found here: https://www.legislation.qld.gov.au/view/html/inforce/current/act-1954-003

4 *The Statutory Instruments Act 1992* fulfills the same role as the AIA in relation to statutory instruments.

5 AIA section 32B.

6 AIA section 32CA.

already appear in the AIA's list of commonly used words and expressions.[7] This saves time and effort as individual statutory instruments only need to define terms that are not already defined in the AIA or that are given a different meaning in the relevant instrument from the meaning in the AIA.

6 Illustration

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I have selected one provision, namely section 14 of the *Bail Act 1980,* in order to illustrate how it all comes together to provide comprehensible legal provisions. This provision appears as it was originally enacted (cf. example [1]), and then as it is currently in force (cf. example [2]).

Firstly, it is worth noting that in example [1], subsection (1) is made up of one single sentence with several clauses. Reading and taking in the content of this provision was likely to require a lot of concentration by the reader and going back and forth within the text. The current version (cf. [2]) has been recast. In other words, the provision has been reformulated but its meaning has not been altered. We can see that the original provision has been split into two: subsections (1) and (1A). Recasting the provision has made it easier to read. Subsection (1) now deals with the types of persons to whom the provision applies, and subsection (1A) with the discretion to grant bail by the police officer. It is no longer necessary for the reader to go back and forth within the text to make sense of it. The distribution of the subsection's information in paragraphs greatly assists the reader in understanding to whom the section applies.

[1] **14. Release of persons apprehended on making deposit of money as security for appearance**.

(1) Where a person who has been apprehended for an offence other than an indictable offence or an offence specified in the second schedule is delivered into the custody of a member of the police force at a place that is a police station, watch-house or lock-up, without having first appeared before a justice in relation to that offence, the member of the police force who is in charge of or the watch-house keeper at that place, if he is satisfied that the person cannot be taken forthwith before a justice and if he thinks it prudent to do so, may grant bail to the person and **release him** from custody **on his making a deposit** of money as security **for his appearance** before a court or justice on such day and at such time and place as are notified to him in accordance with this section.

[2] **14 Release of persons apprehended on making deposit of money as security for appearance**

(1) This section applies if —

(a) a person, who has been arrested in connection with a charge of an offence, other than an indictable offence or an offence mentioned in the schedule, is delivered into the custody of a police officer who is—

(i) the officer-in-charge of a police station or police establishment; or

(ii) a watch-house manager; and

7 AIA schedule 1.

(b) the person has not first appeared before a justice in relation to the offence; and
(c) the police officer is satisfied the person can not be taken promptly before a court.

(1A) If the police officer considers it appropriate, the police officer may grant bail to the person and **release the person** from custody **on the person making a** deposit of money as security for the **person's appearance** before a court on the day and at the time and place notified to the person under this section.

Notes—

1 See also section 13 for when only particular courts may grant a person bail.
2 See also section 16 for when a police officer must refuse to grant bail.

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In the 1980 version of the provision, the drafter used expressions that have been replaced by plain language in the current version – see words with single underlining, such as the replacement of "apprehended" with "arrest". The same trend of replacing higher register expressions for plainer renditions can be seen in the case of "offence specified" being replaced by an "offence mentioned". Similarly, "the person cannot be taken forthwith" becomes "the person cannot be taken promptly". The officer thought it "prudent" in 1980 but nowadays considers it "appropriate". Also, whereas in 1980 bringing the person to court was to be done "on such day and at such time and place as are notified", it is currently rendered in plainer language. Therefore, we can see that the provision has kept the same meaning but the word choice to convey such meaning is more accessible and less demanding for the reader because it prefers words used everyday over words that belong to a higher register.

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Another difference between the two versions relates to the use of the male pronoun. The 1980 provision is male-gendered, as seen in the terms with dot underlining, where the masculine-gender words also refer to women. Different jurisdictions have used different strategies to tackle gendered-language (PATTERSON 1999: 36). Here the drafter has opted for omitting the use of pronouns by repeating the noun "person" and thus making the provision gender-neutral.

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Finally, the current version includes notes to draw the reader's attention to related matters. These improvements in the version currently in force are consistent with plain language drafting. They seek to make legislation easier to understand by using headings and clear structure to help the reader navigate around legislation. They avoiding archaic language, using the active voice rather than the passive and there is a marked preference for using short sentences and breaking information down into discrete pieces by using paragraphs.

7 Conclusion

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This comparison shows the improvements to the provision as enacted in 1980. By modernising the lexicon, organising the information differently, using terms already defined in the AIA and preferring the use of non-sexist language, the provision is arguably easier to read and understand, and thus not only more comprehensible, but also more inclusive.

This is the style of the statute book of Queensland and every ten years, when subordinate legislation expires because of statutory sunset clauses, there is a new opportunity for checking language and rewriting the subordinate legislation accordingly.

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However, keeping legal provisions comprehensible cannot depend on the goodwill or talent of isolated drafters. It requires commitment to comprehensibility at an organisational level. OQPC has demonstrated this by hiring lawyers with an aptitude for drafting, developing and training them. This has allowed for the transformation of the statute book that has gone from looking like the 1980 example to the contemporary enactment of the sample provision.

Comprehensibility of legal provisions as a goal would be meaningless if they were not intended to be accessed by the citizens. That is why the changes in style of drafting have come hand-in-hand with efforts to digitise the statute book. The legislation portal for Queensland (https://www.legislation.qld.gov.au) shows the legislation that is in force (both primary: statutes, and secondary: subordinate legislation), as well as legislation as passed (in the case of statutes) and subordinate legislation as made. It also provides versions of the bills currently in Parliament and repealed legislation. The legislation website: https://www.legislation.qld.gov.au is continuously updated and is free to access.

In conclusion, comprehensibility of legal provisions is a co-ordinated enterprise, carried out by individuals who operate in a supported environment. In the case of Queensland, a main concern informing the work of OQPC is to make accessible the laws of the State to its residents both in content, by using accessible language and drafting techniques, and also by making them available online at no cost and updating them as they are being enacted, amended and repealed.

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