

Chapter 3—Principles of clear drafting

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Introduction

Commitment to clear drafting

- 3.1 The Parliamentary Counsel Office (PCO) vision statement declares that the PCO is committed to improving access to legislation by ensuring that legislation is drafted as clearly and simply as possible.

What this chapter contains

- 3.2 This chapter deals with 3 main topics.
- 3.3 The first topic (Legislative sentences) deals with the structure of legislative sentences.
- 3.4 The second topic (Composition) is about drafting legislation—how we express legislative ideas in writing. The basis for this topic is the Guidelines for Clear Drafting (*see* 3.12). The Guidelines provide a summary of good drafting practices that were formulated by the PCO in 1999. Drafts are peer reviewed against the standards set by the Guidelines.
- 3.5 The third topic (Other drafting tools) deals with non-standard aids to communication that are used in legislation. These include formulas, tables, flow-charts, and boxed examples.
- 3.6 The chapter has a Further reading section that provides a list of books about writing and style. References in this chapter are to the books listed in that bibliography.
- 3.7 The Appendix contains detailed material about “problematic words”. These are words and phrases that need to be used with caution, and whose background you should be familiar with. They are listed in 3.57.

Legislative sentences

- 3.8 “The unit of communication by means of language is the sentence and not the parts of which it is composed. The significance of individual words is affected by other words and the syntax of the whole ...” (Lord Hoffman in *R v Brown* [1996] 1 All ER 545, 560).
- 3.9 The structure of a sentence—the order in which words are used, whether individually or in clusters, and the positioning (or proximity) of the parts of the sentence—largely determines the meaning of the sentence.
- 3.10 Some basic principles advocated by the PCO and other legislative drafting offices include—
- make sentences simple and logical:
 - use the positive rather than the negative:
 - avoid double and triple negatives:
 - use the active voice rather than the passive:
 - use verbs instead of noun phrases:
 - use paragraphs to separate lists of alternative or cumulative items from the main structure of the sentence:

- keep related words close together (eg, modifiers should be kept close to the words they modify):
- do not mix conditions and exceptions in the same sentence:
- avoid noun strings (eg, “special education delivery programme outputs”):
- avoid demonstrative adjectives (eg, “that entity”):
- put the main clause before the conditional clause if the main clause is simple:
- make sure the words “other than” are placed near to the words they are qualifying.

Composition

Guidelines for clear drafting—Plan: to organise material clearly

3.11 Here are 3 key areas to consider when planning a draft: the objectives, the framework, and the order in which material is to be arranged.

Objective What does it have to do? In legal terms, what must the thing you are drafting (ie, Bill, Part, section) achieve?

Framework Work out the overall conceptual structure: group material into Parts, subparts, and sections, etc.

Order Organisation of material is key to a well-structured Bill or regulation. Material should be arranged in a logical order. For example,—

- substantive matters should come before procedural matters:
- the general should come before the particular:
- provisions that have universal or wide application should come before provisions that have limited application:
- administrative and procedural provisions should be located after substantive provisions so as to give prominence to what is important to readers. Readers should not have to read through a lot of provisions that set up bodies and define their functions and powers before they get to what really matters to them.

Material can also be arranged chronologically or by reference to probability (most likely to least likely).

The arrangement of material should always be consistent. If a particular order has been used in one place, it should, if the underlying reasons are the same, be followed elsewhere.

Guidelines for clear drafting—Write: to communicate with your reader

3.12 As a general guide, put yourself in the readers’ shoes. Ask yourself what readers need to know to help them understand.

Headings	Summarise if possible, otherwise indicate specific topic: Keep brief: Draft with an eye to use in contents: Use liberally.
Sections	One coherent group of ideas per section: Use the narrative style—avoid excessive cross-references: Preferably no more than 5 subsections: Avoid going down to subsubparagraphs.
Sentences	Get to the main point (from the reader’s point of view) early: Keep sentences short and simple— <ul style="list-style-type: none"> • focus on verbs: • avoid nominalisations: • avoid passive constructions unless they are necessary to convey the desired meaning: • keep the subject and predicate close: • punctuate effectively.
Words	Use the simplest word that conveys the meaning: Eliminate unnecessary words: Do not use archaic language: Always use gender-neutral language: Define terms in a way that is truthful and helpful to the reader.
General	Be consistent: Use a positive statement unless a negative one is better.

Headings***Summarise if possible, otherwise indicate specific topic***

3.13 In Part headings, subpart headings, cross-headings, and section headings, you should use words that indicate the main topic of the Part, subpart, etc, as specifically as possible. A heading like “Minister’s powers” does not tell the reader much. A heading “Minister’s powers concerning licences” is much more specific and useful.

3.14 Do not try to summarise a provision in its heading.

3.15 Some headings follow established conventions (eg, “Interpretation” and “Regulations”). You should continue to use these headings as they are part of established PCO style.

Keep headings brief

- 3.16 Headings should be brief. Ideally, they should not go over 1 line of type. If a heading is going over 2 lines, recast it if possible.
- 3.17 It is standard PCO practice to omit all articles (eg, “a” and “the”) from headings, except in headings that refer to the Crown. In this case, keep the article, as in “Act binds the Crown”.

Draft with eye to use in contents page

- 3.18 The contents page of legislation lists all the headings used for Parts, subparts, cross-headings, sections, and schedules. Ideally, the contents page should act like a summary or map of the whole work. You should design your headings with this purpose in mind. This means that headings have a relationship to each other, and not just to the material that they precede.

Use headings liberally

- 3.19 Subpart headings, cross-headings, and section headings all help the reader see the structure of the legislation. They should also help readers quickly find what they are looking for. Use headings (other than Part headings) liberally.
- 3.20 If you use cross-headings within a Part, be aware that every section in the Part must live under an appropriate cross-heading. The cross-heading will apply until another cross-heading displaces it.

Sections (narrative paragraphs)

One coherent group of ideas per section

- 3.21 Sections are like paragraphs in narrative writing. Each sentence (subsection) in a section should relate to the main theme of the section. The main theme should come first, in subsection (1). The heading should indicate the theme or subject matter of the section.

Use narrative style—Avoid excessive cross-references

- 3.22 In ordinary narrative writing, if a person or thing is mentioned in a paragraph, readers will assume that a later reference to the same thing is a reference to the one mentioned before. This rule is sometimes known as the narrative style rule. The rule can be relied on in legislation (sections and clauses) too, unless to do so would cause ambiguity. This means that you do not have to use a cross-reference when referring to something identified earlier in the section, unless using a cross-reference would avoid ambiguity.
- 3.23 In the following example, the provision is dealing with only 1 type of licence. It is therefore safe to assume (and safe for the reader to assume) that a reference to an application is a reference to the application referred to in subsection (1).

- | |
|---|
| <p>× (1) A person who may apply to the Registrar for a licence to ...
(2) An application under <i>subsection (1)</i> must be in triplicate.
(3) A person <i>who applies for a licence under subclause (1)</i> and who is under 16 years must lodge a fourth copy of the application ...</p> |
|---|

- ✓ (1) A person who may apply to the Registrar for a licence to ...
- (2) The application must be in triplicate.
- (3) An applicant who is under 16 years must lodge a fourth copy of the application ...

Preferably no more than 5 subsections

- 3.24 Try to structure ideas into small groups. In legislation, that translates into saying “keep the number of subsections in a section low”. If there are more than about 5 subsections in a section, see if you can split the section.

Avoid subsubparagraph level

- 3.25 A sentence structure that requires you to use subsubparagraphs is probably too complex.

53 Main topic

- (1) Statement of, or first idea about, the topic.
- (2) Second idea about the topic—
 - (a) first element within the second idea:
 - (b) second element within the second idea—
 - (i) first element within second element of second idea:
 - (ii) second element within second element of second idea:
 - (A) first element within second element of second element of second idea; and
 - (B) second element within second element of second element of second idea.

- 3.26 Try turning the subsection into a section. If the paragraphs or subparagraphs are very short, keep them as narrative instead of “shredding” them.

Subsections (sentences)

Avoid suspense—Get to main point early

- 3.27 Indicate the topic of the sentence at the start. Let the reader know early on what the subject matter of the sentence is.
- 3.28 The approach in 3.27 is not as straightforward as it sounds. The order in which you place the elements is a matter for your judgment, but you should be trying to put what the reader needs to know (whatever you think that is) as early as possible.
- 3.29 The structure known as the “sandwich” usually offends against the guideline of getting to the main point early. A common form of sandwich is—

- × Where—
 - (a) the Council has served notice ...
 - (b) the time specified in the notice has passed ...
 - (c) the Council considers that the licence-holder ...

the Council may suspend the licence.

- 3.30 The legal idea in the example above is relatively straightforward and the sandwich form is unnecessary. A simple alternative is “A Council may suspend a licence if ...”.

Keep sentences short and simple

- 3.31 Long sentences tax readers and keep them in suspense. To help readers, the general rule is to keep sentences short. Keep the number of ideas in the sentence to a minimum. Having more and shorter subsections is generally preferable to fewer longer ones. However, a mere count of the number of words is not really the point. The general rule in ordinary writing is to keep sentences to 30 words or less. In legislation, with the possibility of shredding to help the reader follow what is being said, the number of words in the whole sentence is not so relevant.
- 3.32 From the readers’ perspective, the structure of a sentence is more important than its length. A well-structured long sentence may be easier to follow than a poorly structured short one. But it turns out that many of the techniques for good structuring also produce the most concise result.
- 3.33 The rest of the paragraphs in this section (3.34 to 3.52) suggest ways to achieve short, well-structured sentences (ie, subsections).

Focus on verbs

- 3.34 In legislation, the verbs of most sentences will—
- prohibit something (must not/may not):
 - require something (must do):
 - enable something (may do):
 - declare something (this is).
- 3.35 Combining “must” and “may” with strong verbs (as opposed to nominalisations—*see* 3.40) will produce direct legislative writing.
- 3.36 The declaratory sentence is used quite widely in legislation. These are sentences like: “All charges incurred by the Public Trust are a first charge on the property of the deceased person” or “This section is subject to section 9”. By their mere existence, these sentences have the effect they say they have, or do the thing they say they do.
- 3.37 Beware of mistaking a declaratory sentence (which is fine) with a sentence that uses an impersonal construction. Impersonal constructions use an impersonal pronoun (such as “it” or “there”). These constructions should generally be avoided because they fail to clearly identify the legal actor, and are wordy. For example,—

- ✘ It is the purpose of this Act to ...
- ✓ The purpose of this Act is to ...
- ✘ There is no need to include in the application ...

- ✓ The application need not include ...

3.38 Verbs should be in the present tense where possible. For example,—

- ✗ A person who, on the close of the day before the commencement date, held a licence issued under the old Act, will be deemed on the commencement date to hold a licence issued under this Act.
- ✓ A person who, on the close of the day before the commencement date, holds a licence issued under the old Act is deemed, on the commencement date, to hold a licence issued under this Act.

3.39 Here is an example of a provision that must use a past tense—

- ✓ **surviving de facto partner**, in relation to a deceased person, means a person who *was living* in a de facto relationship with the deceased person *at the time of his or her death*.

Avoid nominalisations—Making verbs into nouns

3.40 A nominalisation is a noun derived from a verb. In formal writing, strong verbs (eg, “consider”) are often replaced by a nominalisation plus a weak verb (eg, “give consideration to”). The result is more wordy, less direct writing. Removing nominalisations will make your writing shorter and crisper.

3.41 Here are some common nominalisations—

Strong verb	Nominalisation plus weak verb
to apply	to make an application
to comply	to ensure compliance
to deliver	to effect/make delivery
to hear	to conduct a hearing
to discover	to make a discovery
to investigate	to conduct an investigation
to consult	to undertake consultation

- ✗ ... shall give consideration to multicultural character of New Zealand society ...
- ✓ must consider the multicultural character of New Zealand society.

3.42 *See also—*

- Asprey p 132:
- Williams pp 30–36, 56 (particularly good on this subject).

Avoid passive constructions

3.43 Writing in the active voice rather than the passive voice usually produces shorter, clearer writing. The active voice identifies in a direct way who is doing what.

- | |
|---|
| <ul style="list-style-type: none">✘ Up to 9 persons may be appointed by the Minister to be members of the Advisory Committee.✓ The Minister may appoint up to 9 persons to be members of the Advisory Committee. |
|---|

3.44 However, there are times when the passive voice is perfectly acceptable. Here are 2 of them—

- when it is more appropriate to leave the actor unidentified:

- | |
|--|
| <ul style="list-style-type: none">✓ Applications must be in writing. |
|--|

- when you have just referred to the actor and you do not want or need to refer to it again:

- | |
|--|
| <ul style="list-style-type: none">✓ (3) Despite subsection (1), new co-op may accept a supply of milk that is the subject of an application ...(4) Offers to accept supply of milk under subsection (3) must be made in the same order that applications to supply the milk were received by new co-op. |
|--|

3.45 See Williams pp 36–40 and 47–49 (particularly on the usefulness of passive constructions) and Venolia pp 161 and 162.

Keep subject and predicate (verb plus object) close

3.46 Avoid inserting clauses or phrases between the subject of a sentence and its (main) verb—

- | |
|---|
| <ul style="list-style-type: none">✘ The Minister may, if satisfied that the applicant has sufficient funds, issue a licence to the applicant.✓ The Minister may issue a licence to the applicant if the Minister is satisfied that the applicant has sufficient funds. |
|---|

- 3.47 Take care placing modifying elements. The general rule is to place a modifier as near as possible to the sentence element it modifies. Misplaced modifiers create ambiguity. For example,—

✘ Every owner of gold bullion in *New Zealand* must ...

This should be reworded, depending on the sense, to one of the following:

- ✓ Every person *in New Zealand* who owns gold bullion must ...
or
 ✓ Every person who owns gold bullion held *in New Zealand* ...

- 3.48 Provisos (statements beginning “provided that”) act as modifiers in a sentence. They usually contain what Coode referred to as the case and the conditions. Coode hated provisos, which may explain why he was so keen on getting the case and conditions put at the beginning of sentences. Despite Coode, provisos were once common in legislation, but now they are not used at all. They are both grammatically dubious and not part of ordinary communication. The placement of the case and conditions is a difficult matter, but putting them in a proviso is no longer an option—

- ✘ Any act or omission ... shall constitute an offence ... Provided that this subsection shall not apply to any act or omission which is expressly authorised by ...
- ✓ Any act or omission ... constitutes an offence, but not if the act or omission is expressly authorised by ...
- ✓ (1) Any act or omission ... constitutes an offence.
 (2) Subsection (1) does not apply if the act or omission ...

- 3.49 *See also*—

- Asprey pp 130–132 (on interrupting sentences with clauses and phrases):
- Dick pp 72–77:
- Thornton pp 22–28.

Punctuate effectively

- 3.50 Punctuation provides a signpost to sentence structure. A great deal has been written about it, but for the purposes of this manual it is probably sufficient to repeat the 4 rules set out in Thornton (1996, p 35)—

- punctuate sparingly and with purpose:
- punctuate for structure and not for sound:
- use conventional punctuation:

- punctuate consistently.

3.51 One way in which New Zealand legislation is punctuated differently from most other New Zealand published writing is that we follow the rule “in a series of 3 or more terms with a single conjunction, use a comma after each term except the last” (Strunk and White, p 2). This is sometimes called the “serial comma”. It is used by the Oxford University Press, and is common in US writing.

✓ The director may cancel or suspend any licence, authority, or permit issued under this Part.

3.52 We rarely use bullet points in legislation as they create difficulties for cross-referencing and subsequent amending. However, we do use them in the explanatory notes to Bills and regulations, where the problems of cross-referencing and subsequent amendments do not arise. A rare example of bullet points having been used in legislation is in the Personal Property Securities Act 1999.

3.53 *See also—*

- Venolia pp 45–89:
- Thornton pp 34–45.

Words

Use simplest word that conveys meaning

3.54 “The golden rule is to pick those words that convey to the reader the meaning of the writer and to use them and only them.” (Gowers 1986, p 3)

3.55 Wherever possible, use simple and familiar words unless they do not accurately express the intended meaning. The following is a list of words that can often be replaced by the plainer equivalents shown:

Fancy	Plain	Fancy	Plain
appoint	decide/fix	assist	help
attempt	try	balance	rest
confer	give	data	information
deceased	dead	effected	made/done
endeavour	try	expiration	end
facilitate	help	furnish	give/state/show
grant	give	initiate	begin/start
location	place	mitigate	lessen
obtain	get	permit	let/allow
prior	earlier	prior to	before
purchase	buy	quantum	amount
request	ask	retain	keep
subsequent	later	subsequent to	after
substitute(d)	replace(ment)	sufficient	enough
tender	offer	utilise	use
vendor	seller		

- 3.56 For more lists of plain alternatives, *see*—
- Asprey pp 198–203 (a “plain language vocabulary”):
 - Dick pp 154–158.
- 3.57 Some of the most common and apparently innocuous words that we use in legislation are in fact fraught with difficulties. Many have been the subject of judicial comment. You need to be aware of the history and background of these words. The appendix contains a discussion of the following words and how to avoid the pitfalls associated with them:

Problematic words

<p>all/each/every and/or any appropriation before/after/from being/not being</p> <p>comprise/compose country/state deem except/unless existing</p>	<p>have regard to/take account of less than/more than may/must/shall notwithstanding/subject to of which, whose present/lay (as in before the House of Representatives) sitting days such where/if which/that</p>
--	---

- 3.58 For more problematic words, or more about the above, *see*—
- Asprey pp 170–184:
 - Driedger pp 129–141:
 - Judd pp 141–146:
 - Meehan pp 94–102:
 - Piesse pp 72–85:
 - Thornton pp 95–111:
 - Venolia pp 124–151.
- 3.59 The guideline that says to use the simplest word that conveys the meaning does not mean that we may use informal or jargon words in legislation. Our vocabulary is firmly at the formal and conservative end of the continuum. For example, gaming machines are still called gaming machines, not pokies.
- 3.60 You may use acronyms in legislation, either for the sake of brevity or because the acronym is the commonly used term for the subject. You will need to clearly explain any acronym, preferably in the interpretation section.

✓ **NZSE** means the New Zealand Stock Exchange established by section 3 of the Sharebrokers Amendment Act 1981.

- 3.61 If the acronym is used in explanatory text or in a limited number of sections that will be read together, explain the acronym by putting it in bold in parenthesis immediately after the first time the full name or title is used.

✓ The Environmental Risk Management Agency (**ERMA**) is established for the purpose set out in ...

Eliminate unnecessary words

- 3.62 An obvious way to shorten sentences is by eliminating redundant words. Some phrases that have traditionally been used in legislation can be replaced by single words or shorter phrases.

Traditional	Suggested equivalents
as to whether	whether
by reason of	because
if there are any conditions that do not comply	if any conditions do not comply
in lieu of	instead of
in like manner as	as/in the same way
in relation to/in respect of	for/to/about/concerning
in the event that	if
is allowed to/is permitted to	may
is void and of no effect/does not have any force or effect	has no effect
meets the requirements of	complies with
otherwise than	except
pursuant to	under/in accordance with
take such steps as are appropriate	take appropriate steps
with the permission of the Minister	with the Minister's permission

- 3.63 For more lists, *see*—

- Venolia pp 159:
- Thornton p 73.

- 3.64 The PCO has been using a shortened form of reference to provisions since 1997—

Long form	Shortened form
section 2 of this Act	section 2
subsection (1) of this section	subsection (1)
paragraph (a) of this subsection	paragraph (a)

The shortened form should be used even if it results in inconsistency within a provision. The following example of a compiled provision is fine:

✓ (1) (unamended provision) Subject to section 157 *of this Act* and to subsection (2) *of this section*, the Minister may establish a new school ...

(3) (provision inserted 2001) A notice under subsection (1) establishing a new school ...

3.65 However, in some situations you will need to specify which Act (or other enactment) you are referring to—

✓ An application for an order under section 105 of the Criminal Justice Act 1985 must, after the commencement date, be dealt with as if it were an application made under section 107 *of this Act*.

Never use archaic language

3.66 A number of words and phrases traditionally associated with legal writing are archaic and should not be used in legislative drafting. They include—

Archaic words and phrases

abovementioned	hitherto
aforementioned	said
aforesaid	save that
beforementioned	thereafter
foregoing	thereby
hereafter	therefrom
herein	whatever
hereinafter	whatsoever
hereinbefore	wheresoever
hereto	whomsoever

3.67 The word couplets and triplets often associated with older legal writing (such as “each and every”, “null and void”, “force and effect”) should not be used. Find a single word replacement.

3.68 *See also*—

- Dick pp 127–129:
- Thornton pp 91–95.

Always use gender-neutral language

3.69 Drafting in gender-neutral language has been PCO practice since the mid-1980s. The Interpretation Act 1999 does not continue the provision formerly contained in section 4 of the Acts Interpretation Act 1924 that the masculine gender includes the female gender. The result of this change is that gender-specific terms are given their ordinary meaning and do not include other genders (except in enactments made or passed before the Interpretation Act 1999 came into force on 1 November 1999). It is therefore essential to use gender-neutral language unless a specific gender is intended. For example, certain offences may be committed only against women.

3.70 Some techniques for converting gender-specific language into gender-neutral language include—

Technique	Gender-specific version	Gender-neutral version
Omit the pronoun	A member of the Tribunal may resign his office	A member of the Tribunal may resign office
Repeat the noun	A member of the Tribunal may resign his office	A member of the Tribunal may resign the member's office
Use masculine and feminine pronouns	A member of the Tribunal may resign his office	A member of the Tribunal may resign his or her office
Recast the sentence into the plural	A member of the Tribunal may resign his office	Members of the Tribunal may resign their office
Convert the noun to a verb form (<i>see</i> 3.40 on why you should anyway)	The Commissioner may give his consent ...	The Commissioner may consent ...
Use a relative clause	Where a mortgagee exercises a power of sale, he must not ...	A mortgagee who exercises a power to sell mortgaged property must not ...
Use a passive construction (but <i>see</i> 3.43)	The Registrar must advise the applicant of his decision	The applicant must be advised of the Registrar's decision

- 3.71 Avoid terms for occupations or activities that are gender-specific. In particular, “chairman” should not be used. “Chairperson” is an acceptable alternative, but “chair” is not. Alternatives are: president, presiding person, presiding officer, presiding member, convenor, co-ordinator, and moderator.
- 3.72 If you are amending legislation that contains gender-specific language,—
- draft amendments using gender-neutral language in the same way as if you were starting from scratch:
 - do not amend the existing gender-specific language unless it can be done within the confines of the amendment that you are instructed to do or it can be done easily (eg, by amending 1 or 2 additional provisions), or unless you are expressly instructed to do so.
- 3.73 The possibility of amending an existing Act to make it gender-neutral may be raised from time to time (possibly during the select committee stage) while you are in the process of making substantive amendments to it. It can be very time consuming, particularly if the Act is large. If the Act uses a term like “salesman” all through

it and time is not a critical factor, the changes should be made. Also, if you are instructed to change a term to be gender-neutral, check that the new term is indeed desirable and has the same meaning as the original term. For example, it has been proposed during select committee stages that “landlord” be changed to “lessor” or “owner”, neither of which was ideal in the context. An example of how “salesman” was changed to “salesperson” is in the Real Estate Agents Amendment Act 1992 (1992 No 12).

3.74 See *also*—

- Asprey pp 111–114:
- Thornton pp 75–77.

Use defined terms that are truthful and convey some meaning

3.75 If possible, a defined term should be—

- intuitive (it should of itself convey some indication of its meaning):
- accurate (the meaning that it conveys of itself should not be misleading):
- obvious (its form and use should suggest that it is a defined term).

3.76 If a common word is given a special meaning, you may want to alert the reader to that fact (eg, by saying “the person’s income (as defined in section 2 ...)”).

- × *Non-intuitive*
Mode B means an appropriation for the costs to be incurred by a department or Office of Parliament in the supply of a specified class of outputs
- × *Inaccurate (euphemism)*
special education means education for children who, because of physical or mental handicap or of some educational difficulty, require educational treatment beyond that normally obtained in an ordinary class in a school providing primary, secondary, or continuing education
- × *Inaccurate (misleading as to extent of category)*
Horse means any horse, mare, gelding, colt, filly, or foal; *and includes an ass, hinney, or mule, or the carcass of any of them*

3.77 See *also* Dick pp 77–87.

General Advice

Be consistent

3.78 Use words and forms consistently within a piece of legislation. For example, if a licence is “granted”, do not later refer to it as being “issued”. If you create a number of offences, use the same formulation for all of them, if possible.

Use positive statements unless negative ones are better

3.79 Affirmative statements are usually more direct and straightforward than negative statements. Multiple negatives should only be used if there is no other way of expressing the provision.

- | |
|---|
| <ul style="list-style-type: none">✘ The returning officer must not count the vote of a member whose dues are not up to date.✓ The returning officer must count only the votes of members whose dues are up to date.✘ a person who is not under the age of 17✓ person aged 17 or over |
|---|

Other drafting tools

Tables

- 3.80 Tables present data in a more accessible form.
- 3.81 Tables are effective when the data to be presented is made up of similar kinds of components, and those components are linked in the same way (eg, amendments, where the components might be the provision amended, the words omitted, or the words substituted).
- 3.82 You may need to introduce a table with a narrative statement explaining how the components set out in the table are linked together.
- 3.83 If provisions are becoming overloaded or repetitive because they have too many essentially similar statements, consider replacing the provisions with a table. In that kind of situation, a table may—
- avoid needless repetition of words that explain how similar components are linked together; and
 - allow the explanation of the link between similar components to be given in one place (eg, the body of a Bill), and the table setting out those components to be given elsewhere (eg, a schedule).
- 3.84 Tables are often placed in schedules, where they may be in landscape rather than in portrait. They may also be useful within a clause, section, or regulation, or as part of a form or a note to a form, in which case they must be in portrait.
- 3.85 When designing a table, consider the need to amend it and the form those amendments may need to take.
- 3.86 For examples of tables (or of amendments to them), *see*—
- Administration Act 1969 (1969 No 52) section 77 (as substituted on 1 February 2002 by the Administration Amendment Act 2001 (2001 No 6));

- Agricultural Workers Accommodation Regulations 1963, Amendment No 1 (SR 1975/246):
- Dairy Industry Restructuring Act 2001 (2001 No 51) Schedule 5:
- Employment Relations Act 2000 (2000 No 24) section 74:
- Estate and Gift Duties Amendment Act 1972 (1972 No 25) section 7:
- Fisheries Act 1996 (1996 No 88) section 319:
- Food Amendment Regulations 1998 (SR 1998/191) regulations 4 and 6:
- High Court Rules, form 64Q, note 4 (as inserted by the High Court Amendment Rules 2000 (SR 2000/109)):
- Human Rights Review Tribunal Regulations 2002 (SR 2002/19) regulations 6 and 14:
- Maori Reserved Land Amendment Act 1997 (1997 No 101) Schedule 2 clauses 2(1) and 3(1):
- Medicines Regulations 1984 (SR 1984/143) regulation 6(3):
- Mutual Assistance in Criminal Matters Act 1992 (1992 No 86) section 24A and Schedule (as substituted by Mutual Assistance in Criminal Matters Amendment Act 2002 (2002 No 23), and *see* also sections 15 to 17 of that Act):
- Police Act 1958 (1958 No 109) section 27(3):
- Shearers Regulations 1963, Amendment No 1 (SR 1975/220):
- Superannuation Amendment Act 1970 (1970 No 116) section 12(2):
- Tariff (Zero Duty) Amendment Act 1998 (1998 No 100) section 2:
- Weights and Measures Amendment Regulations 1998 (SR 1998/30) Schedules.

Examples

3.87 Examples are used in legislation in the same way that they are used in other writing—to clarify and illustrate the point being made. Examples such as the following are common:

- ✓ **activity**, for the purposes of Part 6,—
 - (b) includes ancillary or subservient functions relating to the activity, *such as* administration, management ...
- ✓ Changes authorised by this section include ...
 - (f) changes to the case of letters or words (*for example*, the replacement of small capitals with ordinary capitals ...)

3.88 Examples are part of the enactment in which they occur. This is made plain by section 5(2) and (3) of the Interpretation Act 1999, which is itself an example of an example—

- ✓ (2) The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment.

- (3) Examples of those indications are preambles, the analysis, a table of contents, headings to Parts and sections, marginal notes, diagrams, graphics, examples and explanatory material, and the organisation and format of the enactment.

3.89 Occasionally legislation includes an example that illustrates how a series of provisions works. Examples of this sort are sometimes included in forms. For example, section 16 of the Insurance Law Reform Act 1985 inserted a provision into a form that illustrated how the rules prescribed could be worked through. This kind of example is also used in explanatory material (eg, the explanatory note to the Banking and Insolvency (Netting and Payments Finality) Bill 1998).

3.90 The Personal Property Securities Act 1999 included a number of examples of this sort. As this was a new type of provision to include in an Act, an example format was developed—

✓ **accession** means goods that are installed in, or affixed to, other goods

Example

A replacement motor installed in a car.

3.91 The Personal Property Securities Act 1999 was drafted well before the Interpretation Act 1999 was enacted. In light of uncertainty about the status of these types of examples in legislation, it was considered desirable to include a provision in the Personal Property Securities Act 1999 to make the position clear.

21 Status of examples

- (1) Every example used in this Act is part of this Act.
- (2) An example used in this Act is only illustrative of the provision to which it relates. It does not limit the provision.
- (3) If an example and the provision to which it relates are inconsistent, the provision prevails.

3.92 Subsection (1) in the example in 3.91 is not now necessary. Subsection (2) may be unnecessary, but the Injury Prevention, Rehabilitation, and Compensation Act 2001 contains a provision of that sort, even though it does not contain boxed examples. Subsection (3) could be considered to be a safety net, but there is no equivalent to it in the Property (Relationships) Amendment Act 2001, which (at this time) is the only other Act containing a boxed example.

3.93 If you are thinking of using boxed examples, consider the following:

- what is the attitude of the instructing department to including examples?
- which provisions should have examples? If some, why not others? In the Personal Property Securities Act 1999, the types of provisions that were selected were ones that dealt with—
 - new terminology:
 - a special point that might not be obvious:
 - consumer transactions involving collateral:
 - competing interests in certain types of collateral.
- what, if anything, do you need to say about the status of the examples used? Do you need to include provisions along the lines of those in subsections (2) and (3) of section 21 of the Personal Property Securities Act 1999?
- how should the examples be drafted? Examples are illustrative, and do not attempt to cover all scenarios. Adopt scenarios that are typical of the problem being illustrated, or that readers can easily relate to:
- how do you check that the examples are legally correct and achieve their purpose of helping the reader understand what is being said? You will need to build in time for every example to be carefully checked:
- examples will need to keep up with changes made to a Bill as it goes through the House. This will mean extra work.

3.94 *See also—*

- Barnes pp 8–24:
- Elliott pp 1–17.

Formulas

3.95 Algebraic formulas assist in calculating amounts if explaining the calculation in words becomes lengthy and involved. If possible, express the variables of the formula in words rather than symbols. For example,—

$$1 - \frac{(\text{residual value} \times 1)}{(\text{cost estimated useful life})}$$

(Provide definitions of the variables immediately below the formula if they are required.)

3.96 If it is not possible to express the formula in words, then express it using symbols represented by the initial letters of the variables. This makes the formula easier to remember and apply. For example, the following formula, which is used for calculating net specified income, is adapted from section OB 1 of the Income Tax Act 1994:

$$\frac{(a \times 52) - t}{n}$$

- 3.97 In this example, “a” represents assessable income, “n” the number of weeks during which the taxpayer was a full-time earner, and “t” the amount of tax payable.

Further reading

The following list contains books and articles on clear drafting.

Author	Name	Publication details
Aitken, J K	<i>Piesse: The Elements of Drafting</i>	9th ed, The Law Book Company, Australia, 1995
Asprey, Michele M	<i>Plain Language for Lawyers</i>	3rd ed, Federation Press, Sydney, 2003
Bailey, Edward P	<i>Plain English at Work: A Guide to Business Writing and Speaking</i>	Oxford University Press, USA, 1996
Barnes, Jeffrey	<i>Shining Examples</i>	Commonwealth Association of Legislative Counsel, The Loophole www.opc.gov.au/calc/docs/LOOPHOLE2004.pdf (accessed 17/8/07)
Costanzo, Margot	<i>Advances in Plain Language: How to be Plain without being Ordinary</i>	NZ Law Society Workshop, September 1997
Dick, Robert C	<i>Legal Drafting in Plain Language</i>	3rd ed, Carswell, Canada, 1995
Driedger, Elmer A	<i>The Composition of Legislation; Legislative Forms and Precedents</i>	2nd ed, Department of Justice, Ottawa, 1976
Elliott, David C	<i>Using Examples in Legislation</i>	David Elliott www.davidelliott.ca/ (under “Legislative Drafting”) (accessed 3/8/09)
Gowers, E	<i>The Complete Plain Words</i>	3rd ed, HMSO, London, 1986
Meehan, Michael and Tullock, Graham	<i>Grammar for Lawyers</i>	Butterworths Guides, Australia, 2001
Melville, L W	<i>The Draftsman’s Handbook</i>	2nd ed, Longman Group UK Ltd, UK, 1991
Miers, David R, and Page, Alan C	<i>Legislation</i>	2nd ed, Sweet and Maxwell, Great Britain, 1990

Author	Name	Publication details
Strunk, W and White, E B	<i>The Elements of Style</i>	4th ed, Longman Publishers, USA, 2000
Sullivan, Ruth	<i>Driedger on the Construction of Statutes</i>	3rd ed, Butterworths, Toronto, 1994
Thornton, Garth	<i>Legislative Drafting</i>	4th ed, Butterworths, UK, 1996
Venolia, Jan	<i>Write Right!: A Desktop Digest of Punctuation, Grammar and Style</i>	4th ed, Top Speed Press, Berkeley, USA, 2001
Williams, Joseph M	<i>Style: Towards Clarity and Grace</i>	University of Chicago Press, 1990

Appendix—Problematic words

All, each, or every

- A3.1 These words are often used where they would be better omitted or replaced by “a”, “an”, or “the”. For example,—

- ✓ An elected member holds office for 3 years.
not
- ✗ All elected members hold office for 3 years.

- A3.2 The use of “all”, “each”, and “every” should be restricted to contexts in which their core meaning is needed. “All” may be appropriate if the emphasis is on the collective, and “each” or “every” if the emphasis is more on the individual (but avoid “each and every”).

And, or

- A3.3 Thornton’s (1996) basic advice is to use “and” to connote togetherness (conjunction), and “or” to mean that you can take your pick (disjunction). This reflects our ordinary usage of “and” and “or”.

- A3.4 “And” has been judicially construed in a disjunctive sense, and “or” in a conjunctive sense, so drafters should take care when choosing. Consider the context carefully, and if the chance of ambiguity exists, eliminate it. If necessary, restructure the sentence.

- A3.5 Thornton asserts (1996, p 130) that in definitions you may generally use either “and” or “or”. Either of the following formulations is acceptable, and they mean the same thing:

- ✓ **animal** means dogs, cows, and sheep
- ✓ **animal** means dogs, cows, or sheep

- A3.6 Another reason why “and” and “or” are not in fact as discreet as they first appear is because “and” in a positive statement turns to “or” in a negative one. For example, “The committee may accept oral submissions and submissions recorded on video” turns into “The committee may not accept oral submissions or submissions recorded on video”. In this case, the “or” is really doing the job of an “and”.

- A3.7 Asprey (p 172) lists some extra words you could use to clarify the meaning of an “and” or an “or”. They are—

Either A or B or both.
 Either A or B but not both.
 Any one of the following: A: B: C.

Any one or more of the following: A: B: C.
Each of the following, together or separately: A: B: C.
All of the following together but not individually: A: B: C.

A3.8 The last 4 options in A3.7 work well in a paragraphed subsection. Both the lead-in words and the individual paragraphs will end with a colon. You have avoided using “and” or “or”, but the meaning is completely clear. The most common forms of this technique in the PCO are the expressions “all or any of the following” or “1 or more of the following”. They have the same effect.

A3.9 The first 2 options in A3.7 are available only if you do not paragraph. For example, you cannot write the following:

✘ Either—
A; or
B; or
both A and B

“Either” is used only when there are 2 options. Paragraphing this phrase makes it look as though there are 3 options. In an unparagraphed provision, the “either” applies to the A and the B, but is not read as extending to the “or both”.

A3.10 Finally, the expression “and/or” should never be used. Although it may appear to be a shorthand way of saying “any or all of the following”, its meaning is frequently ambiguous. You should work out exactly what you mean, and say it using as few (but no fewer) words as you need.

A3.11 *See also—*

- Asprey pp 169–175:
- Dick pp 104–111:
- Thornton pp 130–131:
- Piesse pp 72–85.

Any

A3.12 “A” or “an” is usually just as effective as “any” and free from ambiguity. “Any” may be ambiguous because it is capable in some contexts of carrying the same meaning as “every”. In the following example, it is not clear whether the Minister must consult 1 organisation or every organisation:

✘ The Minister must consult any organisation that appears to the Minister to represent a substantial number of citrus growers.

Before, after, or from

- A3.13 Great care must always be exercised in using these terms, and the drafter must always have a proper appreciation of their effect in particular situations.
- A3.14 Section 35 of the Interpretation Act 1999 sets out rules for interpreting the word “from” in relation to periods of time. A period of time described as beginning “from” a specified day, act, or event does not include that day or the day of the event or act unless a contrary intention appears.
- A3.15 Section 10 of the Interpretation Act 1999 provides that if an enactment is expressed to take effect from a particular day, the enactment takes effect at the beginning of the next day.
- A3.16 A period of time prescribed as ending “before” a specified day, act, or event does not include that day or the day of the act or event (*see* section 35(4) of the Interpretation Act 1999).
- A3.17 In many cases, it is better to define exactly the period concerned. For example, a period may be expressed to begin on a specified day and to end with the close of another day. In other cases, it may be better to use the word “after” instead of the word “from”.

Being, not being

- A3.18 Do not use “being” and “not being” to join relative clauses. For example,—

✘ A person who is 70 years or over, being a person who has a driver licence.

Join the 2 clauses with “and” instead. For example,—

✔ A person who is 70 years or over and has a driver licence.

- A3.19 Sometimes a “being” provision helps to make sense of a complex provision by enabling qualifying phrases to be put in parentheses. For example, in regulation 17(2)(n) of the Electricity Regulations 1997,—

✔ (n) work done on low voltage fittings, where—
 (i) the work consists of—
 (A) the replacement of a fuse link with a fuse link or plug-in miniature circuit breaker of an appropriate rating; or
 (B) affixing a fitting (*being a plug, an adaptor, a cord extension socket, or an appliance connector*) of an appropriate rating to a flexible cord that is designed to have such a fitting affixed to it; and

Comprise, compose

A3.20 A whole comprises the parts of which it is constituted, but the parts do not comprise a whole. Thus New Zealand comprises 2 large islands and a number of smaller ones. It is not correct to say that 2 large islands and a number of smaller ones comprise New Zealand.

A3.21 Do not confuse “comprise” with “compose”. While compose does mean “make up, constitute”, you must use a preposition if you use “compose”. For example,—

- ✓ A body corporate both *comprises* x members and is *composed* of x members.

Country

A3.22 Sometimes there is confusion as to whether we should refer to “countries” or “States”. The proper word at international law is usually “State”.

Deem

A3.23 The word “deem” has been frequently used in statutes. The purpose was to create a legal fiction. *See* section 50 of the Privacy Act 1993, which provides that all codes of practice issued under section 46 of that Act are “deemed to be regulations for the purposes of the Regulations (Disallowance) Act 1989 ...”.

A3.24 “Deem” has traditionally been used when something is to be what it is not, or if something was not to be what it is. For example,—

- ✓ A person who has received an offer of compensation is deemed to have accepted the offer unless the person registers an objection within 30 days of receiving the offer.

A3.25 People who are not familiar with legislation find “deem” a confusing word. Words like “regarded”, “taken”, or “treated as” have much the same effect as “deem” and can, in many cases, be used instead of “deem” or “deemed”. Careful consideration should be given in each particular case. As a rule, “deem” should only be used to create a legal fiction, and even then it should be avoided if there is a sensible alternative way of achieving the same result. For example, “deem” is often appropriate in validation provisions because of the need to convey the notion that the illegal action has been made lawful, but that it was initially illegal (otherwise people might take it as a sign that Parliament has condoned the illegal action and that they can do it again!). An example of an alternative way to create a legal fiction without using “deem” is—

- ✓ To avoid doubt, it is declared that every consent to which this section applies is, and always has been, as valid and effectual as if the power to give it had been lawfully delegated to the officer who purported to give it.

- A3.26 Never use “deem” if it bears the meaning of “think” or “consider”. In the following example, the use of “deem” is **not** appropriate:

✘ Nothing in this Act shall be deemed to affect a right to compensation under any other law.

The provision should be expressed as “Nothing in this Act affects ...,” or more directly, “This Act does not affect ...”.

- A3.27 A common and proper use of the word “deem” is in commencement provisions that backdate the commencement of an Act or a provision of an Act. This type of provision could read as follows:

✓ This Act is deemed to have come into force on 1 January 1997.

Except, unless

- A3.28 If a provision is expressed to apply “except” in specified circumstances or “unless” something happens, consider whether there is provision for the consequences if that circumstance does occur or that something else does happen, that is, when the provision no longer applies. A complementary provision may be necessary, as supplied in the following example:

✓ A mortgagee who exercises a power to sell mortgaged property must not become the purchaser of the mortgaged property except,—

- (a) in accordance with section 166, at a sale of land or goods through the Registrar; or
- (b) in accordance with an order of a court made under section 168.

Existing

- A3.29 This word requires an unambiguous reference to a fixed point in time. A definition may be desirable.

Less than, more than

- A3.30 To provide for “less than X” and “more than X” has the effect of excluding X itself and leaving it unprovided for. Use “not exceeding/exceeding” or less than/at least instead. “Above/below” and “over/under” should be similarly avoided.

May, must, or shall

- A3.31 “May” should be used where a power, permission, benefit, or privilege given to some person may, but need not, be exercised, ie, exercise is discretionary. For example,—

✓ The District Court Judge may impose any other conditions on the person’s release that the Judge considers necessary.

A3.32 “Must” should be used where a duty is imposed that must be performed. For example,—

- ✓ Before questioning a person who is entitled to the questioning safeguards, a police officer must enquire whether the person wishes to consult a lawyer.

A3.33 Although “shall” is used to impose a duty or a prohibition, it is also used to indicate the future tense. This can lead to confusion. “Shall” is less and less in common usage, partly because it is difficult to use correctly. “Shall” is now rarely used in New Zealand legislation (for a rare example, *see* the Royal Warrant of the New Zealand Service Medal 1946–1949 2002, SR 2002/225). “Must” should be used in preference to “shall” because it is clear and definite, and commonly understood.

A3.34 “Shall” and “must” are often used unnecessarily in declarative expressions in an attempt to capture a sense of authority and obligation. In this situation, the present tense is often more appropriate. For example,—

- ✓ A parent *is* entitled to appear.
- ✗ A parent *shall be* entitled to appear.
- ✓ It *is* lawful.
- ✗ It *shall be* lawful.
- ✓ Only a person who is a resident *is* eligible.
- or*
- ✓ A person *is* eligible only if resident.
- ✗ A person *must* be a resident to be eligible.
- ✓ No person *may* do x, y, and z.
- ✗ No person *shall* do x, y, and z.

A3.35 Occasionally “will” is an appropriate substitute for “shall”. For example,—

- ✓ A seafarer with monocular vision serving in departments other than the deck department will pass the minimum standard in accordance with the Masters and Mates (Foreign Going and Coastal Qualifications) Regulations 1993 if ...

- ✘ A seafarer with monocular vision serving in departments other than the deck department shall pass the minimum standard in accordance with the Masters and Mates (Foreign Going and Coastal Qualifications) Regulations 1993 if ...

Notwithstanding, subject to

A3.36 Each provision of an Act or part of a provision of an Act must be read in its immediate context and in the context of the Act as a whole. This is based on the decision in *Greenshields v The Queen* [1958] SCR 216 in which Locke J stated as follows (p 225):

The broad general rule of construction of statutes is that a section or enactment must be construed as a whole, each portion throwing light, if need be, on the rest.

A3.37 Another decision along the same lines is *Hampson v Department of Education and Science* [1990] 2 All ER 513, in which Lord Lowry stated as follows (p 518):

... an expression which is prima facie neutral must be looked at in both its immediate and its more remote context.

A3.38 *See also* the statement made in relation to this matter in *Driedger on the Construction of Statutes* (Sullivan 1994, pp 245–246). That statement is as follows:

Each provision or part of a provision must be read both in its immediate context and in the context of the Act as a whole. When words are read in their immediate context, the reader forms an impression of their meaning. This meaning may be vague or precise, clear or ambiguous. Any impressions based on immediate context must be supplemented by considering the rest of the Act, including both other provisions of the Act and its various structural components.

A.3.39 However, if provisions in an Act or in different Acts are or may be inconsistent with each other, the expressions “notwithstanding” and “subject to” have been frequently used to clarify which one prevails—these expressions should be avoided if possible. If a particular provision is to override another, this can be achieved in a direct way by saying: “This section applies despite anything in section 00” or “This section prevails over section 00”. If a provision is to give way to another, this can be achieved by saying: “Section 00 overrides this section”. In some cases, it may be necessary to spell out more precisely the relationship between the provisions by stating the reason one takes precedence over the other. Simply stating that one overrides the other can still leave doubt as to why it does.

A3.40 “Subject to” should never be used when the intended meaning is “in accordance with”. These phrases do not have the same meaning: the first denotes a conditional relationship and the second compliance.

A3.41 “Notwithstanding anything in this Act” (or a variation of this) is a formula quite often used in New Zealand statutes—

- ✓ Notwithstanding anything in any other enactment ...
- ✓ Notwithstanding the provisions of subsections (1) and (2) or section 60(2), but subject to subsection (2A) and section 60(3) ...

Similar formulas are—

- ✓ Except as provided in this Part ...
- ✓ This Part of the Act shall apply notwithstanding anything in any other Part of this Act ...

A3.42 Although these formulas may indicate that the provisions containing them are intended to prevail, they often do not indicate which provisions are to be overridden. The difficulties that such formulas create are—

- the uncertainty or even impossibility of application:
- an incomplete communication of the legal effect of the provisions:
- the probability that users will be misled:
- the possibility of implied or express repeal by a subsequent provision:
- the possibility of a broader application than that intended.

A3.43 A more straightforward way of clarifying the relationship between different elements of an Act must be found. The use of affirmative rather than negative statements, and specific identification of the affected provisions is one possibility. For example,—

- ✓ Payment must be made within 21 days, except in the circumstances described in subsection (1).
- ✓ Part 3 of the Land Transfer Act 1952 prevails over sections 10 to 15 of this Act when ...

A3.44 Do not begin a sentence with the phrases “Subject to” or “Except as provided”. Put the qualifier in a separate section or subclause. For example,—

- ✓ Subsection (1) is subject to subsection (3).
- or*
- ✓ Subsection (1) is subject to section 14 of the Supreme Court Act 2003 (which provides that ...).
- or*
- ✓ However, subsection (1) does not apply if subsection (3) applies.

Present, lay

- A3.45 Use “present to” for a requirement to present a report or paper to the House of Representatives (SO 362). Note that some of the important precedents still use the old term “lay before” the House of Representatives (*see* section 44A of the Public Finance Act 1989). These precedents should not be followed in this respect.

Sitting day, sessions

- A3.46 Old precedents refer to a requirement to *lay* a report or paper before the House of Representatives by the end of a parliamentary session. It is now preferred practice to refer instead to a requirement to *present* a report or paper not later than [x] sitting days after [...].
- A3.47 Check that the number of sitting days chosen corresponds, roughly, to an appropriate period. For example, 12 sitting days would now correspond, at a time when the House was sitting each week, to 1 month. At other times, it might correspond to a very much longer period).
- A3.48 A second method of making reports or papers available is often specified as an additional requirement (eg, publication in the *Gazette* or some other method).

Such

- A3.49 “Such” can be ambiguous in its point of reference. It can also produce a “starchy” effect when overused.
- A3.50 “Such” can often be either omitted or replaced with “the”, “a”, “that”, “all”, or “every”, or a variant. For example,—

- ✓ ... all other organisations the Minister thinks appropriate.
- or*
- ✓ ... every other organisation the Minister thinks appropriate.
- ✗ ... such other organisations as the Minister thinks appropriate.

Where, if

- A3.51 “Where” is commonly used to suggest place (eg, the street where you live). It also refers to situations or sets of circumstances, which may be actual or hypothetical. For example,—

- ✓ The complainant is not required to state his or her address or occupation in court, except where leave is given under paragraph (c).

- A3.52 “Where” has also been traditionally used to introduce a conditional clause, but in that case “if” is preferable—

- ✓ This section applies if the conviction subsisted when the statement in question was made.

A3.53 “Where” and “if” should not be overused at the beginning of sections and subsections. The use of “where” and “if” can frequently be avoided by rearranging the material in a particular provision. For example,—

If a receiver sells property in the exercise of a power of sale, the receiver must account to the owner of the property for any surplus that remains after satisfying the claims of the chargeholder.

A3.54 If “if” were omitted, this would become—

A receiver who sells property in the exercise of a power of sale must account to the owner of the property for any surplus that remains after satisfying the claims of the chargeholder.

Which, that

A3.55 In defining relative clauses, without commas, use “that” (ie, if readers need all of the information in the sentence).

A3.56 In non-defining relative clauses, with commas, use “which”.

- ✓ The recommendations that were put forward have been accepted.
“that were put forward” = defining relative clause
“that” = relative pronoun, “that” functions as a pronoun/subject.
- ✓ The recommendations, which were finished only yesterday, have been accepted.
“which were finished only yesterday” = non-defining relative clause
“which” = relative pronoun

A3.57 The defining relative clause defines the recommendations that we are talking about.

A3.58 The non-defining relative clause does not define the kind of recommendations we are talking about—this is indicated by the commas and the use of “which”.

Whose, of which

A3.59 Although “whose” refers to persons, it may be used to for objects to avoid awkward constructions requiring “of which”. For example,—

- ✓ Blueberry fruit, whose seedlings were supplied by Michigan State University, has grown vigorously in silt loam.

Have regard to, take account of

A3.60 Our practice is to regard the phrase “take into account” as imposing a stricter requirement than “have regard to”. We generally use “take into account” if the intention is to require the decision-maker to address each matter and give it some weight. We generally use “have regard to” if the intention is to require the decision-maker to consider each matter and to allow the decision-maker to disregard any matter that the decision-maker considers irrelevant.

In *R v CD* [1976] 1 NZLR 436, which concerned the phrase “take into account” in section 5 of the Costs in Criminal Cases Act 1967, Somers J said:

The first question (not I think canvassed before Chilwell J), is what is meant by the words “shall have regard to”. I do not think they are synonymous with “shall take into account”. If the appropriate matters had to be taken into account, they must necessarily in my view affect the discretion under s 5(1) and it is clear from s 5(2) that the matters to be regarded are not to limit or affect that discretion. I think the legislative intent is that the court has a complete discretion but that the seven matters, or as many as are appropriate, are to be considered. In any particular case, all or any of the appropriate matters may be rejected or given such weight as the case suggests is suitable. I propose to examine the matter on that footing.

R v CD supports the view that “take into account” imposes a stricter requirement. However, in *Te Runanga O Raukawa Inc v The Treaty of Waitangi Fisheries Commission* CA 178/97 (which concerned the phrase “have regard to”), the Court of Appeal (per Tipping J) commented on the fineness and general unhelpfulness of the distinction drawn in *R v CD*.

For judicial discussion on this topic, *see*—

- *R v CD* [1976] 1 NZLR 436, 437:
- *New Zealand Co-operative Dairy Co Ltd v Commerce Commission* [1992] 1 NZLR 601, 612:
- *Te Runanga O Raukawa Inc v The Treaty of Waitangi Fisheries Commission* CA 178/97:
- *Solicitor-General v Moore* [2000] 1 NZLR 533, 543:
- *Bleakley v Environmental Risk Management Authority* [2001] 3 NZLR 213, 235.

