
Plain Language Bill

29/03/2022

Plain Language Bill 2021

1 Introduction

- 1.1 The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Plain Language Bill (**Bill**), which is a member's bill that seeks to promote the use of plain English in official documents and websites.
- 1.2 This submission has been prepared with input from the Law Society's Public and Administrative Law Committee and Law Reform Committee.¹
- 1.3 The Law Society does not wish to be heard.

2 General observations

- 2.1 The rule of law requires the law to be accessible and able to be understood. To that end, we commend the aim of the Bill to "improve the effectiveness and accountability of the public service by requiring their communications to be clear and accessible to the public".²
- 2.2 However, we query whether legislation is the most appropriate way to achieve this policy objective. The Legislation Guidelines state that legislation should only be made when it is necessary and is the most appropriate means of achieving stated policy objectives.³ The Guidelines further state that unnecessary legislation should be avoided as it involves significant costs.⁴
- 2.3 This Bill is not supported by any departmental disclosure statement, regulatory impact analysis or any other cost-benefit-analyses which support the need to legislate to ensure government communications are clear and accessible.
- 2.4 The select committee should therefore consider whether the policy intent of the Bill could be achieved by other means. A requirement for Government communications to use 'plain language' could, for example, come within the ambit of the 'stewardship' public service principle in the Public Service Act 2020.⁵ If so, the Public Service Commissioner (**Commissioner**) could implement this requirement when setting minimum standards of integrity and conduct under section 17 of that Act, without any need for legislation. We invite the select committee to seek the Commissioner's advice on this option.
- 2.5 If, however, the Bill is to proceed, we recommend making some amendments to improve the Bill and to ensure the purpose and the policy objectives of the Bill are met. These amendments are discussed below.

3 Commencement (clause 2)

- 3.1 As currently drafted, the Act would come into force on the day after the date on which it receives Royal assent. We suggest providing for a longer commencement period to allow

¹ More information regarding these committees is available on the Law Society's website: <https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/>.

² Plain Language Bill, clause 3.

³ Legislation Design and Advisory Committee *Legislation Guidelines* (September 2021), at [2.3].

⁴ Above n 3. Costs could take various forms, and could include costs of enacting the legislation itself, costs of complying with the legislation, and costs in administering, implementing and enforcing it.

⁵ Public Service Act 2020, section 12(1).

reporting agencies to review and redraft any existing documents which come within the scope of this legislation and require updating to ensure they comply with any legislative requirements.

- 3.2 Alternatively, there could be a requirement for updated versions of ‘relevant documents’ to be published within a certain timeframe to ensure they comply with legislative requirements. This approach would also enable reporting agencies to continue using any physical copies of ‘relevant documents’ which cannot be updated and would otherwise need to be disposed of.

4 Interpretation provisions (clause 4)

Definition of ‘plain language’

- 4.1 The Bill defines ‘plain language’ as “language that the intended reader can easily understand after 1 reading; and is clear, concise, and well-organised, and follows recognised guidelines of plain language writing”.⁶ This is a very broad definition which would be difficult, if not impossible, to enforce.
- 4.2 The concept of plain language is inherently difficult to define as the ability to understand language also depends on the age, cultural background, literacy, intelligence quotient and any intellectual disabilities or mental impairments of the reader. The current definition, does not, in our view, account for these characteristics and the diversity of the recipients of public communications.
- 4.3 For this reason, we do not consider it is appropriate to include a statutory definition of ‘plain language’. However, the clarity of the Bill and the scope of what is considered to be ‘plain language’ could be improved by including some information as to the content of the “recognised guidelines of plain language writing” (as discussed further at paragraphs 4.6 and 4.7 below).
- 4.4 We also note the work that is being undertaken by the International Organization for Standardization (**ISO**) and the International Plain Language Federation (**IPLF**) to develop an international standard for plain language.⁷ This standard will feature high-level principles, guidelines, and techniques to help authors communicate effectively with their audiences.⁸
- 4.5 Any New Zealand legislation should, in our view, be consistent with relevant international best practice (including this new ISO standard for plain language). We suggest amending the Bill to include a reference to the ISO standard if the standard is developed before this Bill passes. We also encourage the select committee to seek further advice on the development of this ISO standard to ensure the other provisions of this Bill are also consistent with this standard.

⁶ Plain Language Bill, clause 4.

⁷ ISO 24495.

⁸ More information regarding this work is available on the ISO website (www.iso.org/news/ref2566.html) and the IPLF website (<https://www.iplfederation.org/our-work/>).

Recognised guidelines of plain language writing

- 4.6 As discussed above, the definition of ‘plain language’ includes language that follows “recognised guidelines” of plain language writing.⁹ If the definition of ‘plain language’ is to be retained, we suggest amending this clause to include a cross-reference to clause 7 of the Bill, which refers to the guidance that may be issued by the Commissioner.
- 4.7 If these “recognised guidelines” are not intended to refer to guidelines which may be issued by the Commissioner, and simply refer to generally recognised guidance on plain language, the definition of ‘plain language’ would be so broad as to be meaningless. In the absence of a more specific definition, it would not be clear what would constitute a ‘recognised guideline’, and as a result, ‘plain language’.

Definition of ‘reporting agency’

- 4.8 The Bill states that a ‘reporting agency’ means a Crown agent or a public service agency. This would effectively bring Crown agents within the Commissioner’s jurisdiction on matters relating to the use of plain language.
- 4.9 We note that the Commissioner generally has a very limited jurisdiction over Crown agents.¹⁰ Crown agents are very diverse group of organisations which have been defined in the Crown Entities Act 2004 by reference to their financial powers and exemptions, which are unrelated to the purposes of this Bill.
- 4.10 We query whether it is appropriate to expand the Commissioner’s jurisdiction over Crown agents, and consequently, give the Commissioner the power to report on Crown agents to Parliament, in the absence of a more general jurisdiction to undertake such reporting. We therefore invite the select committee to consider these issues further if the Bill is to proceed.
- 4.11 If the select committee believes an expansion of the Commissioner’s jurisdiction is appropriate, it should also consider whether the Commissioner’s jurisdiction should similarly be extended to autonomous Crown entities and independent Crown entities which also produce public-facing documents. It would be desirable for the select committee to consult the Commissioner on this issue before any such provisions are drafted.

Definition of ‘relevant document’

- 4.12 Clause 4(c) provides that ‘relevant documents’ include documents which explain to the public how to comply with a requirement that is administered or enforced by the “public service”. This definition excludes Crown agents which also administer and enforce requirements on the public, and are defined as ‘reporting agencies’ in clause 4 of the Bill.
- 4.13 If the select committee deems it is appropriate to expand the Commissioner’s jurisdiction over Crown agents (as discussed at paragraphs 4.8 to 4.11 above), sub-clause (c) should be

⁹ Sub-clause 4(b).

¹⁰ Public Service Act 2020, section 10(b).

amended to include Crown agents (and possibly, autonomous Crown entities and independent Crown entities) within the definition of ‘reporting agency’.

- 4.14 We also note that this definition specifically refers to documents which are necessary to file tax returns. We recognise that this provision may have been carried over from the United States Plain Writing Act of 2010 (upon which this Bill is based).¹¹ However, we query whether such a provision is required in New Zealand legislation, as only a small number of New Zealanders are required to file tax returns. Documents and forms used by ACC, the Ministry of Social Development, Oranga Tamariki and the Department of Corrections, to name a few, are more likely to benefit from plain-language drafting. We therefore invite the select committee to consider whether it is necessary to retain the specific reference to documents which are needed to file a tax return.

5 Plain language guidance issued by the Commissioner (clause 7)

Contents of guidance

- 5.1 The Bill could be improved by including some information regarding the possible content of the guidance that may be issued by the Commissioner under this clause. This could include, for example, the maximum number of words per sentence, the use of headings, key conventional grammar rules, and restricting the use of Latin terms and technical language.

Consultation requirements

- 5.2 Clause 7(2) requires the Commissioner to consult with “all persons or organisations” they consider appropriate when issuing plain language guidance. The lack of clarity about the individuals and organisations that should be consulted could lead to difficulties in enforcing this statutory requirement. We therefore propose amending the Bill to include some additional information regarding the parties that need to be consulted under this provision (which could include, for example, the various Government departments which prepare public-facing documents).

6 Recommendations to the Minister on plain language guidance (clause 10)

- 6.1 Clause 10(1) provides that the Commissioner may make recommendations to the Minister about plain language guidelines and best practice. However, the Bill does not provide for a corresponding power or requirement for the Minister to do anything, or to act on any such recommendations. We invite the select committee to consider the purpose of this clause and the requirement to make such recommendations to the Minister (noting that it is the Commissioner, and not the Minister, who is tasked with issuing plain language guidance under the Bill).

7 Communications in Māori and New Zealand Sign Language (clause 11)

- 7.1 We are pleased to see the Bill contains a carve-out for communications in Māori and New Zealand Sign Language to recognise that documents in those languages are more

¹¹ Plain Writing Act of 2010 (US), section 3(2)(A)(i).

appropriately governed by their own tailored legislative frameworks. We therefore support the retention of this provision if this Bill is to pass.

8 Enforceability mechanisms

- 8.1 The Bill does not provide for any mechanisms to enforce the statutory requirements which will be imposed on reporting agencies. Rather, the Bill appears to solely focus on enhancing change within the public service in relation to writing standards. As a result, members of the public who are dissatisfied with an agency's compliance with the legislation would only be able to challenge a reporting agency's decision-making process via judicial review.
- 8.2 If judicial review is commenced, it would be difficult for a court to identify any distinct 'decisions' that could be subject to review. For that reason, the United States Plain Writing Act of 2010 contains an express ouster clause for judicial review of compliance (or non-compliance) with that Act.¹² This provision makes it clear that the public does not have the right to challenge plain writing decisions made under that Act.
- 8.3 However, it is important to note that judicial review plays a fundamental part in upholding the rule of law, which requires decision-makers to act within the law. For that reason, the Legislation Guidelines recommend that legislation should not restrict the right to apply for judicial review through the use of ouster clauses.¹³
- 8.4 If any ouster clause is to be included in the Bill, the select committee will need to first carefully consider whether it is appropriate to exclude the right to apply for judicial review and whether such an exclusion would be consistent with the New Zealand Bill of Rights Act 1990.¹⁴
- 8.5 As currently drafted, this Bill contains no such ouster clause. However, even if judicial review is available, it is unlikely to be a meaningful and accessible route for the public to enforce the law. In our view, the prospect of judicial review proceedings in relation to writing decisions underscores our concern about whether legislation is the most appropriate way to achieve the policy objective behind the Bill.

¹² Plain Writing Act of 2010 (US), section 6.

¹³ Above n 3, at [28.1]. The Guidelines further state, at [28.1], that courts are likely to give ouster clauses a narrow interpretation to preserve the courts' ability to review decisions in at least some circumstances.

¹⁴ Section 27(2) of the New Zealand Bill of Rights Act 1990 provides that "Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination."

8.6 If the Bill were to proceed, the select committee should consider amending the Bill to provide for some enforcement mechanisms. This could include, for example, specifying (for the avoidance of doubt) that a complaint may be made to an Ombudsman under the Ombudsmen Act 1975. We encourage the select committee to consult the Chief Ombudsman to better understand if this would be an effective enforcement mechanism, or to otherwise consider whether other bodies are well-placed to assume an enforcement role.

A handwritten signature in black ink, appearing to read 'F. Barton'.

Frazer Barton
Vice-President