

# COMMUNICATION STRATEGIES: UNDERSTANDING THE *RACIAL AND RELIGIOUS TOLERANCE ACT 2001 (VIC)*

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*[The former Law Reform Commission of Victoria provided plain English guidelines for enhancing comprehensibility in legislation. The Racial and Religious Tolerance Act 2001 (Vic) is analysed using those guidelines. The results of the analysis reveal that comprehension difficulties generally arise from rigid adherence to the single provision/single sentence structure. Future improvements will depend on this structure being abandoned.]*

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## I INTRODUCTION

‘Criticism is a study by which men grow important and formidable at very small expense’, wrote Dr Johnson.<sup>1</sup> Critics of legislative drafting rarely come from the ranks of those who draft legislation.<sup>2</sup> For the drafters, difficulties

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1 Samuel Johnson, *The Idler* (1761) vol 2, 39.

2 An exception can be found in the writing of former Commonwealth Chief Parliamentary Counsel, Ian Turnbull: see Ian Turnbull, ‘Clear Legislative Drafting: New Approaches in Australia’ (1990) 11 *Statute Law Review* 161.

include time constraints and instructions based on unsettled policy.<sup>3</sup> They may seldom have the ‘luxury of a period of calm [reflection] in which to consider how the drafting could be improved’.<sup>4</sup> However, this should not preclude criticism. As Edmund Burke observed, ‘[h]e that wrestles with us strengthens our nerves, and sharpens our skill. Our antagonist is our helper.’<sup>5</sup> In this article, the criticism of the drafting of the *Racial and Religious Tolerance Act 2001* (Vic) (*RRT Act*) is designed to help ‘sharpen the skill’, while acknowledging the difficulties facing legislative drafters.

Until the beginning of the consumer movement in the mid-1970s, statutes were drafted in conventional legal English. This style has been described as verbose, overtechnical and full of archaic language.<sup>6</sup> Sentences in conventional legal English are excessively long and exhibit complicated syntax and illogical word order.<sup>7</sup> These sentences often result from the practice of incorporating into a single sentence all the information considered necessary for a section or a subsection. This practice arises from the belief that the semantic links within a sentence are clearer than those between sentences. The contrary has been shown to be the case.<sup>8</sup>

Coinciding with the consumer movement were developments in psycholinguistics and sociolinguistics. With respect to the former, extensive studies were undertaken of the way that people interpret difficult sentence structures, while the latter focused on the way demographics affect language. As a consequence of this favourable intellectual climate, guidelines for plain English drafting were developed. For example, in the 1980s, the Law Reform Commission of Victoria (*‘LRCV’*)<sup>9</sup> produced a set of guidelines for that purpose.<sup>10</sup>

This article seeks to determine to what extent the LRCV Guidelines have been used in the drafting of the *RRT Act*. It confirms that the LRCV Guidelines are incompatible with the legal drafting convention of formulating each provision as a single sentence in an Act, and that this practice has led to comprehension problems in the *RRT Act*. The article also offers a means by which drafters can recognise and eliminate clausal complexity.

<sup>3</sup> George Engle, ‘“Bills Are Made to Pass as Razors Are Made to Sell”: Practical Constraints in the Preparation of Legislation’ (1983) 4 *Statute Law Review* 7, 14.

<sup>4</sup> *Ibid.*

<sup>5</sup> Edmund Burke, *Reflections on the Revolution in France* (12<sup>th</sup> ed, 1793) 247.

<sup>6</sup> Peter Butt, ‘Plain Language in Property Law: Uses and Abuses’ (1999) 73 *Australian Law Journal* 807, 808.

<sup>7</sup> *Ibid.*

<sup>8</sup> Edwin Tanner, ‘The Sanctity of the Single Legal Rule/Single Sentence Structure?’ (2000) 26 *Monash University Law Review* 203.

<sup>9</sup> The LRCV — a statutory corporation — was abolished by the *Law Reform Commission (Repeal) Act 1992* (Vic).

<sup>10</sup> LRCV, *Plain English and the Law*, Report No 9 (1987) app 1. While the Office of the Chief Parliamentary Counsel has a plain English drafting policy, the LRCV Guidelines have not been officially adopted: see Office of the Chief Parliamentary Counsel, Department of Premier and Cabinet (Victoria) *Plain English Policy* (2003) <[http://www.ocpc.vic.gov.au/domino/web\\_notes/ocpcweb.nsf/pages/AboutFrameSet](http://www.ocpc.vic.gov.au/domino/web_notes/ocpcweb.nsf/pages/AboutFrameSet)>. See also Australian Office of Parliamentary Counsel (Commonwealth) *Plain Language* <<http://www.opc.gov.au/plain/index.htm>>.

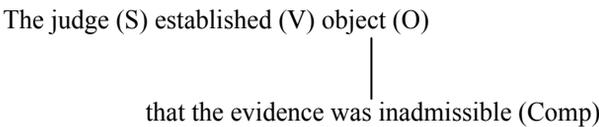
II RESEARCH METHOD

Sentences crafted in conventional legal English are often of extended length. To understand them, it is necessary to trace out their referencing systems. This has been done by unravelling the clausal structure of the sentences and identifying the function of the clauses. Take, for example, the sentence ‘the judge established that the evidence was inadmissible’. It has two finite verbs ‘established’ and ‘was’ and therefore consists of two clauses, at least one of which is a main clause.<sup>11</sup> To find the subject of the first verb, ask ‘*who* established?’ Answer — ‘the judge’. To find an object or complement (if there is one), ask ‘established *what?*’ In other words ask ‘what was the *something* that the judge established?’ The *something* is ‘that the evidence was inadmissible’. So, the clause ‘that the evidence was inadmissible’ is an object. Since both the subject and the object slots in a sentence are filled by nouns or noun equivalents, the clause ‘that the evidence was inadmissible’ is a noun or complement clause. If the original sentence were recast as ‘that the evidence was inadmissible was established by the judge’, the clause ‘that the evidence was inadmissible’ functions as the subject of the verb ‘was established’ and, as such, is a complement clause.

Relative clauses function as qualifiers of nouns. They are in essence adjective equivalents. For example, in the sentence ‘Fuller, who was the original constructionist, opposed Hart’s views’, the clause ‘who was the original constructionist’ qualifies the noun ‘Fuller’, and therefore functions as an adjective. It is, consequently, adjectival — that is, a relative clause.

Adverbs modify verbs, adjectives or other adverbs. For example, in the sentence ‘if bail is breached the surety is forfeited’, the clause ‘if bail is breached’, is an adverbial clause, modifying the verb ‘is forfeited’. This type of adverbial clause is identified as a conditional clause. Other types of adverbials include ‘manner’, ‘time’, ‘place’ and ‘reason’.

There are a number of ways of representing clausal analysis. In traditional grammar, a sentence is laid out so that the relationships between the clauses are made clear. For example, ‘the judge established that the evidence was inadmissible’, can be represented as:



The same sentence can also be represented in bracketed form as:

[M{Comp}]

where:

S = subject

V = verb

<sup>11</sup> If both clauses were subordinate, their meaning would be incomplete and the result would not constitute a sentence.

O = object

M = main clause

Comp = complement clause

The sentence 'Fuller, who was the original constructionist, opposed Hart's views' can be represented as:

Fuller (S) opposed (V) Hart (O)

    |  
 who was the original constructionist (Rel)

This sentence can also be represented in bracketed form as:

[M {Rel}]

where:

S = subject

V = verb

O = object

M = main clause

Rel = relative clause

The sentence 'if bail is breached the surety is forfeited' can be represented as:

The surety (S) is forfeited (V)

    |  
 if bail is breached (A) (Cond)

This sentence can also be represented in bracketed form as:

[M {Cond}]

where:

S = subject

V = verb

A = adverbial clause

M = main clause

Cond = conditional clause

In the process of traditional analysis, reduced relatives, passives, prepositional phrases, the subject/verb/object adjacency rule, case and conditional clauses, centre embedding, and left and right branching are revealed. Incidental to the analysis process, other features become apparent. These include nominalisations, multiple negatives, misplaced phrases, doublets and word lists, archaic and technical terms, cross-varietal words such as 'trust' and 'consideration', and deontic modals such as 'shall', 'may' and 'must' dealing with obligation and permission.<sup>12</sup>

<sup>12</sup> See generally Otto Jespersen, *Essentials of English Grammar* (1933); Kate Burridge and Jean Mulder, *English in Australia and New Zealand: An Introduction to Its History, Structure and Use* (1998).

The process of traditional analysis enables the scrutiny of the function of every word, phrase and clause in a statute. From this process, it is possible to determine the guidelines which drafters probably followed in drafting legislation. It is also possible to establish whether those guidelines have been followed systematically.

### III THE WORK OF THE LAW REFORM COMMISSION OF VICTORIA

In 1986, the LRCV issued a discussion paper about the benefits of plain English in legislative drafting.<sup>13</sup> It followed this with a report in 1987.<sup>14</sup> In both publications, it made suggestions about the purpose of drafting and the requirements of the intended audience. It argued that it 'is the right of the audience ... to understand any document that confers a benefit or imposes an obligation.'<sup>15</sup> It also argued that, in order to be equitable, a document must be comprehensible to all parties affected by it.<sup>16</sup>

In a multicultural and multiracial society, the *RRT Act* must be comprehensible to a diverse range of people. Research has revealed that those whose first language is not English benefit most from legal documents drafted in plain English.<sup>17</sup> It follows that plain English should be used in drafting this Act.

The LRCV Guidelines cover layout, print size, length of line and the amount of white space. Observance of these Guidelines enhances readability by making the material more reader friendly. This article is concerned with the LRCV Guidelines which enhance comprehensibility by minimising syntactic complexity.<sup>18</sup>

### IV THE LAW REFORM COMMISSION OF VICTORIA GUIDELINES

The relevant LRCV Guidelines include:

- avoid long and complicated sentences even if they are accurate and grammatical. As a guide, sentences should not exceed an average of 25 words, and should be well constructed and as brief as possible;
- keep essential sentence components together;
- use the active voice where possible;
- avoid nominalisations;
- prefer the positive to the negative. In particular, avoid multiple negatives, but use negatives for prohibitions;
- use parallel construction where suitable;
- eliminate superfluous words and phrases.

These Guidelines are explained below. Where necessary, some discussion has been included to amplify the explanations given by the LRCV. However, it

<sup>13</sup> LRCV, *Legislation, Legal Rights and Plain English*, Discussion Paper No 1 (1986).

<sup>14</sup> LRCV, *Plain English and the Law*, above n 10.

<sup>15</sup> LRCV, *Legislation, Legal Rights and Plain English*, above n 13, [24].

<sup>16</sup> *Ibid.*

<sup>17</sup> Edwin Tanner, 'The Comprehensibility of Legal Language: Is Plain English the Solution?' (2000) 9 *Griffith Law Review* 52, 72.

<sup>18</sup> See LRCV, *Plain English and the Law*, above n 10, ch 5.

should be noted that plain English guidelines are not prescriptive. They are not rules; they are guidelines.

### A *Avoid Long and Complicated Sentences*

The LRCV stated that '[t]he excessively long sentence is not suitable for any audience'<sup>19</sup> and '[t]here is never any justification for a long sentence in a functional document.'<sup>20</sup> It identified '[c]onvolved and awkward grammatical structure' as a major hindrance to comprehensibility.<sup>21</sup>

When there is rigid adherence to the single provision/single sentence structure, convoluted and awkward syntax often occurs. The LRCV argued that there are no rules which mandate the expression of provisions in single sentence structures.<sup>22</sup> Not only are there no rules, but it is difficult to mount a sound argument based on linguistics in favour of the single provision/single sentence structure.<sup>23</sup> Protagonists for this type of structure admit that its use sacrifices clarity to the demands of construction.<sup>24</sup> In other words, there is a trade-off between comprehensibility and precision.

The single sentence structure usually requires the use of conflating devices. These include nominalisations, reduced clauses (especially relatives), excessive use of embedding and the repetition of nominals in the place of pronominals. The resulting structure will usually be tightly woven, exceedingly dense and clausally complex. Extensive research in such fields as psycholinguistics, cognitive psychology and instructional theory has demonstrated that the overuse of conflating devices impedes comprehension and consequently reduces clarity.<sup>25</sup> Keith Allan and Kate Burridge confirmed this in their analysis of the *Companies (Acquisition of Shares) Code (Vic) s 27(12)* and the *Sales Act 1958 (Vic) s 95(1)*.<sup>26</sup> In addition, they argued that the extremely long sentence is often characterised by multiple embedding of clauses and phrases which disrupt the nexus between essential sentence components.<sup>27</sup>

An example of a relatively long and complicated sentence is provided by s 19(4) of the *RRT Act* which states:

19. Who may complain?

...

(4) A representative body has sufficient interest in a complaint if the conduct that constitutes the alleged contravention is a matter of genuine

<sup>19</sup> LRCV, *Legislation, Legal Rights and Plain English*, above n 13, [52].

<sup>20</sup> *Ibid* [53].

<sup>21</sup> LRCV, *Plain English and the Law*, above n 10, [69]. See generally LRCV, *Access to the Law: The Structure and Format of Legislation*, Report No 33 (1990) [2.1.1]–[2.1.4].

<sup>22</sup> LRCV, *Plain English and the Law*, above n 10, [46]. See also Michele Asprey, *Plain Language for Lawyers* (1991) 165.

<sup>23</sup> Tanner, 'The Sanctity of the Single Legal Rule', above n 8, 204.

<sup>24</sup> Reed Dickerson, *The Fundamentals of Legal Drafting* (1965) 5.

<sup>25</sup> See generally Edwin Tanner, *The Comprehensibility of Legal Language: Is Plain English the Solution?* (PhD Law Thesis, University of Melbourne, 1998) ch 5.

<sup>26</sup> Keith Allan and Kate Burridge, *Euphemism and Dysphemism: Language Used as Shield and Weapon* (1991) 199–200.

<sup>27</sup> *Ibid*.

concern to the body because of the way conduct of that nature adversely affects or has the potential adversely to affect the interests of the body or the interests or welfare of the persons it represents.

The clausal structure of this subsection can be represented as:

[M{C(R)(A)(A<R>)}]

where:

M = main clause

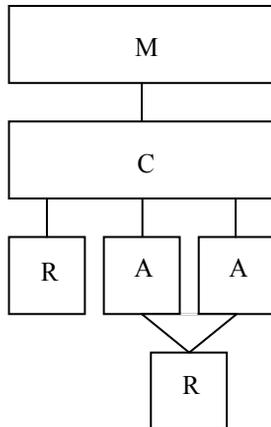
C = conditional clause

R = relative clause

A = adverbial clause

This 58 word subsection is expressed as a single sentence and contains six clauses. Sentences like this are still common in legal writing and bureaucratese, but are rarely used in common parlance.<sup>28</sup> There is a main clause — ‘A representative body has sufficient interest in a complaint’ — and five subordinate clauses, which include the conditional clause ‘if the conduct is a matter of genuine concern to the body’, with three subordinate clauses dependent on it. These dependent clauses are the relative clause ‘that constitutes the alleged contravention’, the adverbial clause ‘because of the way conduct of that nature adversely affects ... the interests of the body or the interests or welfare of the persons’, and another adverbial clause ‘[because of the way conduct of that nature] ... has the potential adversely to affect the interests of the body or the interests or welfare of the persons’. The relative clause ‘[that] it represents’ is, in turn, subordinate to both adverbial clauses since it qualifies both ‘body’ and ‘persons’ in those adverbial clauses.

The complexity of s 19(4) is perhaps better represented in diagrammatical form as:



<sup>28</sup> Ibid 198–9.

where:

M = main clause

C = conditional clause

R = relative clause

A = adverbial clause

The LRCV noted that this type of sentence structure forces readers to engage in ‘intricate syntactic analysis’ to extract meaning.<sup>29</sup> Such structures violate H P Grice’s maxim of manner which states that meaning should be presented in a clear concise manner that avoids ambiguity and avoids misleading and confusing the reader.<sup>30</sup> Long and complicated sentences may frustrate readers because they feel an unreasonable expenditure of effort is required in order to understand the implications of what has been written.<sup>31</sup>

To simplify the syntax of s 19(4) and make it more comprehensible it could be redrafted as:

19. Who may complain?

...

- (4) A sufficient interest in a complaint is established if a representative body has genuine concern about the conduct that constitutes the alleged contravention. Conduct of that nature affects adversely or may affect adversely:

(a) the interests of the body; or

(b) the interests or the welfare of those persons the body represents.

The clausal structure of this redrafted provision can be represented as:

First sentence: [M{C(R)}]

Second sentence: [M or M{R}]

where:

M = main clause

C = conditional clause

R = relative clause

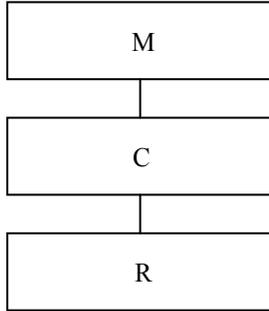
<sup>29</sup> LRCV, *Legislation, Legal Rights and Plain English*, above n 13, [51].

<sup>30</sup> See H P Grice ‘Logic and Conversation’ in Peter Cole and Jenny Morgan (eds), *Speech Acts* (1975) 41, 41–58. See also Allan and Burridge, above n 26, 202.

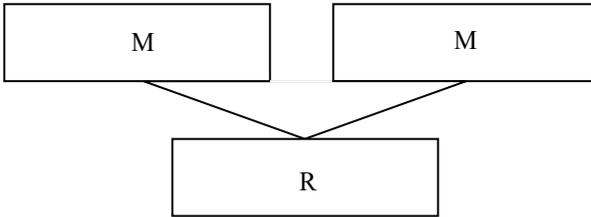
<sup>31</sup> Allan and Burridge, above n 26, 202.

The clausal structure of the redrafted s 19(4) could also be represented in diagrammatic form as:

First sentence:



Second sentence:



In this redraft, the semantic links between the two sentences are preserved and comprehensibility is improved. This can be demonstrated: in the *RRT Act*, ‘sufficient interest’ occurs as ‘new’ information in s 19(3)(b)<sup>32</sup> and as ‘old’ information in s 19(4). In the redraft of s 19(4), ‘sufficient interest’ has been placed in the initial position to make the semantic link between s 19(3)(b) and s 19(4) clear. In the redrafted s 19(4), ‘conduct’ occurs as ‘new’ information in the first sentence. It has been placed as ‘old’ information in the subject position of the second sentence. This accentuates and preserves the semantic linkage between the two sentences. The formulaic and diagrammatical representations of the redrafted s 19(4) shows that the grammatical structure has been simplified.

*B Keep Essential Sentence Components Together*

The structural components of a sentence in the form of a statement are subject (S), verb (V), either object (O) or complement (C), and adverbial (A).<sup>33</sup> The essential components are the subject and the verb and, if present, either the object or the complement. The adverbial is not an essential sentence component. Essential components have fixed positions in a sentence. The function of a component is determined by its position, and the typical word order of the

<sup>32</sup> Section 19(3)(b) provides that (emphasis added): ‘A representative body may complain to the Commission on behalf of a named person or persons if the Commission is satisfied that ... the representative body has a *sufficient interest* in the complaint’.

<sup>33</sup> LRCV, *Plain English and the Law*, above n 10, [74].

essential components is S, V, O or C. If the order of the items filling the component slots is changed, so is the meaning.<sup>34</sup> There is a strong and essential connection between the components subject and verb. This connection is so strong that one without the other does not make sense.<sup>35</sup> The subject of a sentence consists of a noun or a noun equivalent and the verb may take one or more auxiliaries. Where a verb consists of more than one part, there is a strong connection between the parts, that is between the auxiliaries and the verb.<sup>36</sup> In some sentences, objects/complements are essential components<sup>37</sup> and the nexus between them and the verb is strong.

Although they are not essential sentence components, relative clauses and reduced relative clauses have fixed positions. They must be placed immediately after their antecedents if meaning is to be preserved. Where the relative qualifies the subject, the nexus between the subject and the verb is disrupted.<sup>38</sup>

The adverbial is not an essential component, and the nexus between it and the verb is quite weak. Its position in a sentence is not rigidly fixed. It may be placed at the beginning, at the end, or in any other place in a sentence where it does not disrupt a nexus.<sup>39</sup>

When clauses or phrases disrupt a nexus, comprehension difficulties may arise. The material which disrupts the nexus must be held in the short-term memory until the relationship between the essential components can be established. If the insertion consists of more than seven unrelated items, the short-term memory is likely to fail.<sup>40</sup> Disruption of the nexus may be avoided by recasting the sentence.

### 1 *Subject/Verb Nexus Disruption*

In s 23 of the *RRT Act*, sub-ss (2) and (3) provide illustrations of the disruption of the nexus between a subject and its verb, and between a verb and its object.

#### 23. Application of *Equal Opportunity Act 1995*

...

- (2) For the purposes of sub-section 1, a reference in Divisions 2 to 7 of Part 7 of the *Equal Opportunity Act 1995* to a complainant includes, in rela-

<sup>34</sup> For example, compare the meanings of 'Harry hit George' with 'George hit Harry'. In the former, it is Harry who does the hitting. In the latter, Harry is hit.

<sup>35</sup> In the statement form of a sentence it does not make sense to use the noun 'the dog' by itself. Nor does the use of 'was running' make sense by itself. However, the sentence 'the dog was running' does make sense.

<sup>36</sup> In the verb phrase 'was running', 'was' is the auxiliary and 'running' is the lexical verb. In the verb phrase, 'could have been accepted', 'could have been' forms the auxiliary and 'accepted' is the lexical verb.

<sup>37</sup> Compare 'Lachlan tore' with 'Lachlan tore his shirt'. The sentence does not make sense without an object (ie 'shirt').

<sup>38</sup> In the sentence 'the sprinter who won was disqualified', 'who won' is a relative clause disrupting the subject/verb nexus. In the sentence 'the sprinter, seized by cramp, fell over', 'seized by cramp' is a reduced relative clause disrupting the subject/verb nexus.

<sup>39</sup> In the sentence 'the man snored loudly', the adverbial 'loudly' can be placed at the end, at the beginning or between the subject and the verb, without altering the meaning; 'loudly the man snored', 'the man loudly snored' and 'the man snored loudly'. Conventional usage favours the final example.

<sup>40</sup> See George Miller, 'The Magical Number Seven, Plus or Minus Two: Some Limits on Our Capacity for Processing Information' (1956) 63 *Psychological Review* 81.

tion to a complaint lodged by a representative body, a reference to the representative body.

- (3) In relation to a complaint lodged by —  
 (a) a representative body; or  
 (b) a person referred to in section 19(2) —

all periods of time referred to in Divisions 2 and 4 of Part 7 of the *Equal Opportunity Act 1995* (other than the periods of time referred to in sections 108(1)(c) and 110(1) of that Act) are doubled.

In s 23(2), the subject ‘a reference’ is separated from its verb ‘includes’ by 17 words, all of which qualify the subject ‘reference’. The verb ‘includes’ has been separated from its object ‘a reference’ by 10 words including one reduced relative clause ‘lodged by a representative body’.<sup>41</sup> In each case a nexus has been disrupted.

In s 23(3), the subject of the main clause ‘all periods of time’ is separated from its verb ‘are doubled’ by 35 words,<sup>42</sup> which include two reduced relative clauses.<sup>43</sup> The nexus between the essential sentence components, the subject and the verb, has been disrupted.

To avoid the nexus disruptions, ss 23(2) and (3) could be redrafted as:

23. Application of *Equal Opportunity Act 1995*

...

- (2) For the purposes of sub-section 1, if, in Divisions 2 to 7 of Part 7 of the *Equal Opportunity Act 1995* there is a reference to a complainant in relation to a complaint lodged by a representative body, that reference is a reference to a representative body.
- (3) In relation to a complaint lodged by —  
 (a) a representative body; or  
 (b) a person referred to in section 19(2) —

all periods of time are doubled if they are referred to in Divisions 2 and 4 of Part 7 of the *Equal Opportunity Act 1995*. This does not apply to periods of time referred to in sections 108(1)(c) and 110(1) of that Act.

## 2 Deontic Modal/Verb Nexus Disruption

Section 25(2) of the *RRT Act* provides an example of the disruption of the nexus between the deontic modal ‘must’ and the verb ‘engage’. It reads:

25. Offence of serious religious vilification

- (2) A person must not, on the ground of the religious belief or activity of another person or class of persons, knowingly engage in conduct with the intention of inciting serious contempt for, or revulsion or severe ridicule of, that other person or class of persons.

<sup>41</sup> In this reduced relative clause, the words ‘which have been’ have been omitted from before ‘lodged’.

<sup>42</sup> 1995 is counted as one word, as are the section numbers 108 and 110.

<sup>43</sup> These are ‘referred to in Divisions 2 and 4 of Part 7 of the *Equal Opportunity Act 1995*’ and ‘referred to in sections 108(1)(c) and 110(1) of that Act’. In these reduced relative clauses, the initial relative ‘which’ and the auxiliary ‘are’ have been omitted.

The disruption of the nexus between the deontic modal ‘must’ and the lexical verb ‘engage’ has been caused by the insertion of 16 words.<sup>44</sup> This can be avoided by resiting those words in the initial position as follows:

25. Offence of serious religious vilification

- (2) On the ground of the religious belief or activity of another person or class of persons, a person must not engage knowingly in conduct with the intention of inciting serious contempt for, or revulsion or severe ridicule of, that other person or class of persons.

In the *RRT Act* there are another five provisions with almost identical wording. The same type of disruption occurs in all of them.<sup>45</sup>

### C *Prefer the Active Voice*

Active and passive voice express the relationship between a verb and the noun phrases that are associated with it. When a sentence has an active verb, the agent (or doer of an action) is in the subject position and the receiver of the action is in the object position.<sup>46</sup> When a sentence is in the passive form, the agent no longer holds the subject position. This position is held by the recipient of the action.<sup>47</sup> Attention is focused on the recipient by its position as subject.

The active sentence is shorter and more direct and is consequently easier to process. However, there are situations in which the use of the passive is desirable; ‘for example, where the agent is unimportant or universal and therefore does not have to be specified.’<sup>48</sup> In some cases the use of the passive may permit drafters to arrange the material so that ‘old’ information occurs in the subject position and ‘new’ information occurs in the final position which receives end stress.<sup>49</sup> The alternation of ‘old’ and ‘new’ information enhances semantic linkages.

If it is functionally meaningful to highlight something by using the passive then it should be used. However, the practice of using the passive to hide the identity of an agent may give rise to suspicions of questionable intentions. Where this is the case it should be avoided.

<sup>44</sup> They are ‘on the ground of the religious belief or activity of another person or class of persons’.

<sup>45</sup> See ss 7(1), 8(1), 24(1), 24(2) and 25(1).

<sup>46</sup> For example, in the active sentence ‘Parliament amended the statute’, ‘Parliament’ is the subject and performs the action ‘amended’ and ‘the statute’ is the object.

<sup>47</sup> For example, in the passive sentence ‘the statute was amended by Parliament’, ‘the statute’ is both the subject and the recipient of the action ‘was amended’, while ‘Parliament’ is the agent of the action.

<sup>48</sup> LRCV, *Plain English and the Law*, above n 10, [81].

<sup>49</sup> *Ibid.*

An example of the unnecessary use of the passive occurs in s 27(3) of the *RRT Act* which reads:

27 Liability of body corporate

...

- (3) If, in a proceeding for an offence against this Part, it is necessary to establish the state of mind of a body corporate in relation to particular conduct, it is sufficient to show that —
- (a) the conduct was engaged in by an employee, agent or officer of the body corporate within the scope of his or her actual authority, and
  - (b) the employee, agent or officer had that state of mind.

A redraft of this subsection in the active reads:

27. Liability of body corporate

...

- (3) If, in a proceeding for an offence against this Part, it is necessary to establish the state of mind of a body corporate in relation to particular conduct, it is sufficient to show that —
- (a) an employee agent or officer of the body corporate engaged in conduct within the scope of his or her actual authority, and
  - (b) the employee, agent or officer had that state of mind.

The only change made is to the voice of the verb ‘engaged’. The passive form ‘was engaged’ has been replaced by the active ‘engaged’. This change also enhances the parallel structure of the subsection and focuses interest on the ‘employee, agent or officer’. There are many similar uses of the passive in the *RRT Act* but, as with this example, none cause severe comprehension difficulties.<sup>50</sup>

#### D Avoid Nominalisations

Nominalisation is the creation of nouns from verbs, adjectives and other parts of speech.<sup>51</sup> The use of nominalisations seems to make writing sound more important, but it increases the number of words used to say exactly the same thing. It also tends to rob an event of its immediacy by introducing a degree of abstractness and detachment. It is better to use the verb, which is shorter and more precise.

After making a noun out of a meaningful verb the drafter often has to hunt around for another verb to make the sentence or clause grammatical. These ‘empty’ verbs often have no specific meaning when inserted to facilitate the use of nominalisations.<sup>52</sup> Some examples of empty verbs are ‘make’, ‘give’ and ‘necessitate’. These verbs are usually full of meaning, but when used to facilitate

<sup>50</sup> See, eg, s 7(2)(a) where ‘conduct may be constituted by a single occasion’ could be written as ‘a single act may constitute conduct’. Other examples of agentless passives include s 14(2), ‘this Act ... has been contravened’, and s 25(4), ‘[a] prosecution ... must not be commenced’.

<sup>51</sup> For example, a nominalisation of the verb ‘apply’ is ‘make an application’.

<sup>52</sup> Veda Charrow and Myra Erhardt, *Clear and Effective Legal Writing* (1986) 111.

nominalisations their meaning is lost. For example, if the sentence ‘please apply on this form’ is written with the verb ‘apply’ nominalised, it becomes ‘please make your application on this form’. The empty verb ‘make’ is needed to complete the sense of the nominalisation.<sup>53</sup>

The *RRT Act* contains a number of nominalisations. For example, in s 14(1)(a) ‘has made a complaint’ could be replaced by the verb ‘has complained’, and ‘comes into operation’ could be replaced by either the verb ‘commences’ or the verb ‘operates’.<sup>54</sup>

### E *Prefer the Positive to the Negative*

Since people are more responsive to positive than to negative information it is better to use the positive. A negative statement must be converted to the positive before it can be understood, and so requires more processing to be comprehensible. However, there are times when a negative instruction is more telling than a positive one.

Some actions need to be expressly prohibited and must be stated negatively.<sup>55</sup> If they are rendered positively they may lose their mandatory force and may also undergo a meaning change. In the order ‘cyclists must not ride on the footpath’, it is the ‘footpath’ which cyclists are forbidden to use. They can use a bike path or perhaps even the gutter, as well as the road, as long as they do not ride on the footpath. In the positive rendering ‘cyclists must ride on the road’, the order implicitly forbids the use of the footpath, the gutter and the bike path.

Some prohibitions can be expressed in the positive. Take, for example, s 25(4) of the *RRT Act*, which reads:

25. Offence of serious religious vilification

...

- (4) A prosecution for an offence against sub-section (1) or (2) must not be commenced without the written consent of the Director of Public Prosecutions.

This subsection could be recast as:

25. Offence of serious religious vilification

...

- (4) The written consent of the Director of Public Prosecutions must be obtained before a prosecution for an offence against sub-section (1) or (2) is commenced.

<sup>53</sup> LRCV, *Plain English and the Law*, above n 10, [83].

<sup>54</sup> See also s 5 where ‘[a] contravention of this Act’ could be expressed as ‘[c]ontravening this Act’; s 4(2) where ‘[i]t is the intention of the Parliament’ could be expressed as ‘Parliament intends’; s 11 where ‘person’s conduct was engaged in’ could be expressed as ‘a person conducted’; s 14(1)(a) where ‘has made a complaint against’ could be expressed as ‘complained about’.

<sup>55</sup> LRCV, *Plain English and the Law*, above n 10, [84].

Some prohibitions are difficult or impossible to express in the positive. Take, for example, s 25(2) of the *RRT Act*, which reads:

25. Offence of serious religious vilification

...

- (2) A person must not, on the ground of the religious belief or activity of another person or class of persons, knowingly engage in conduct with the intention of inciting serious contempt for, or revulsion or severe ridicule of, that other person or class of persons.

It is possible to remove the overt negative signal ‘not’ from s 25(2) which then reads:

25. Offence of serious religious vilification

...

- (2) A person must refrain from knowingly engaging in conduct with the intention of inciting serious contempt for, or revulsion or severe ridicule of, another person or class of persons on the ground of the religious belief or activity of that other person or class of persons

The subsection is still negative since ‘to refrain’ is a negative action. In its recast form the subsection is not as strong a prohibition as it was in its original form.

Multiple negatives should be avoided because they increase processing difficulties. Negatives include not only the obvious ones like ‘not’ and ‘never’ and the prefixes ‘un-’, ‘in-’, and ‘anti-’, but also conjunctions like ‘unless’ and words whose meanings include an aspect of negativity (for example, ‘few’, ‘seldom’, ‘scarcely’, ‘little’). For example, the positive sentence ‘the problem is solvable’ is much easier to process than the negative ‘the problem is not unsolvable’. The latter has two extra steps involved in the processing. When a double negative is recast in positive form, the meaning of the sentence may be altered. For example, ‘I am not unhappy’ does not mean the same as ‘I am happy’.

#### F Use Parallel Structure where Suitable

When several ideas need to be expressed in one sentence it may be possible to use parallel structure. This may make even an excessively long sentence easier to understand. Parallel structure is a type of listing and requires that expressions in parallel basically have the same grammatical structure and a common referent. Section 19(1) of the *RRT Act* provides an example of the inappropriate use of parallel structure. It is expressed in 117 words in eight clauses and reads:

19. Who may complain?

- (1) The following may complain to the Commission —
- (a) a person who claims that another person has contravened a provision of Part 2 in relation to that person;
  - (b) if that person is unable to complain because of impairment —
    - (i) a person authorised by that person to act on his or her behalf; or

- (ii) if that person is unable to authorise another person, any other person on his or her behalf;
- (c) if that person is a child —
  - (i) the child; or
  - (ii) a parent of the child on the child's behalf; or
  - (ii) if the Commission is satisfied that the child or a parent of the child consents, any other person on the child's behalf.

The initial seven words of this provision form a main clause whose subject 'following' can be replaced by six different candidates, all of which are nouns or noun phrases. Section 19(1) appears to be expressed in parallel structure. However, parallel structure has not been used correctly.

In this example, the noun 'following' is the common referent required by parallel structure. The grammatical structure of s 19(1), with the subject italicised, is as follows:

- s 19(1)(a) consists of the noun '*a person*', the relative clause 'who claims', and the complement clause 'that another person has contravened a provision of Part 2 in relation to that person'.
- s 19(1)(b) consists of the conditional clause 'if that person is unable to complain because of impairment', the noun '*a person*', the reduced relative clause 'authorised by that person to act on his or her behalf', the conditional clause 'if that person is unable to authorise another person', and the noun phrase '*any other person on his or her behalf*'.
- s 19(1)(c) consists of the conditional clause 'if that person is a child', the noun '*the child*', the noun phrase '*a parent of a child on the child's behalf*', the conditional clause 'if the Commission is satisfied', the complement clause 'that the child or a parent of the child consents', and the noun phrase '*any other person on the child's behalf*'.

The clausal structure of s 19(1) is almost impossible to represent as a formula and this should indicate that it is not set out correctly in parallel structure. The subsection consists of the main clause '[t]he following may complain to the Commission', whose subject '[t]he following' requires clarification. Six possible alternatives have been offered for the subject position, while the predicate (the verb 'may complain' and the adverbial 'to the Commission') remains constant. The syntax of each main clause that can be constructed with the alternative replacements for '[t]he following' is revealed below:

subject {R(Comp)} verb adverbial phrase  
 (C) subject (rr) verb adverbial phrase  
 (C)(C) subject verb adverbial phrase  
 (C) subject verb adverbial phrase  
 {C} {C(Comp)} {subject verb adverbial phrase}

Where:

R = relative clause

rr = reduced relative clause

C = conditional clause

Comp = complement clause

This analysis also reveals that in the first two main clauses the nexus between the subject and the verb has been disrupted.

It is possible to redraft s 19(1) to make the parallel structure obvious and eliminate the disruptions.

19. Who may complain?

(1) A complaint may be made to the Commission by —

- (a) a person who claims that another person has contravened a provision of Part 2 in relation to that person; or
- (b) a person authorised by that person to act on his or her behalf, if that person is unable to complain because of impairment; or
- (c) any other person, if the person is unable to authorise another person and if that person is unable to complain because of impairment; or
- (d) a child, if that person is a child; or
- (e) a parent of a child on the child's behalf if that person is a child; or
- (f) any other person on the child's behalf if the Commission is satisfied that the child or parent of the child consents.

This redrafted subsection of 130 words in 10 clauses can be represented as:

$[M\{R(Comp)\}\{C\}\{C(C)\}\{C\}\{C(Comp)\}]$

Where:

M = main clause

R = relative clause

C = conditional clause

Comp = complement clause

In the redraft, the main clause '[a] complaint may be made to the Commission' has been rendered in the passive. The six possible agents of a complaint can be readily identified by their initial positions in the six parallel paragraphs. Disruptions to the subject/verb nexus and intrusive conditional clauses have been avoided. The provision is easier to understand.

### G *Eliminate Superfluous Words and Phrases*

Wordiness is the natural enemy of clarity. One of the most common forms of wordiness in legislation is the inclusion of details with no particular legal significance. An example is provided by s 10 of the *RRT Act* which states:

10. Incorrect assumption as to race or religious belief or activity

In determining whether a person has contravened section 7 or 8, it is irrelevant whether or not the person made an assumption about the race or religious belief or activity of another person or class of persons that was incorrect at the time that the contravention is alleged to have taken place.

The clausal structure of this provision can be represented as:

$C[M\{Comp(R\langle A \rangle)\}]$

Where:

C = conditional clause

M = main clause

Comp = complement clause

R = relative clause

A = adverbial

This 52 word section is expressed in a single sentence. Not only does the sentence have five clauses, but the relative clause ‘that was incorrect’ is separated from its antecedent ‘assumption’ by 15 words.<sup>56</sup> Unnecessary words have also been introduced through excessive caution. There is no need for ‘or not’ after the second use of ‘whether’, and the phrase ‘at the time that’ is better expressed by ‘when’. Further, the words ‘at the time that the contravention is alleged to have taken place’ may be unnecessary. The provision could be rewritten as:

10. Incorrect assumption as to race or religious belief or activity

Contravention of section 7 or 8 occurs even if, at the time of the alleged contravention, a person has made an incorrect assumption about the race or religious belief or activity of another person or class of persons.

The clausal structure of this recast section can be represented as:

$[M\{C\}]$

Where:

M = main clause

C = conditional clause

<sup>56</sup> They are ‘about the race or religious belief or activity of another person or class of persons’.

V APPLICATION OF GUIDELINES TO THE *RACIAL AND RELIGIOUS TOLERANCE ACT 2001* (VIC)

The LRCV Guidelines listed above have been applied to the whole of the *RRT Act* and the results are contained in Table 1. The data is displayed in three columns. The preamble has four numbered paragraphs, each of which contains several sentences.

**Table 1: Grammatical structure of the *Racial and Religious Tolerance Act 2001* (Vic)**

Grammatical Characteristics	Preamble	With Preamble	Without Preamble
Number of words	207	3310	3103
Number of provisions	4	72	68
Number of sentences	9	77	68
Range of sentence length	12–36	7–205	7–205
Average number of words per sentence	23	43	45.6
Median number of words per sentence	20	39	34
Number of sentences with 25 words or less	6 (66.7%)	26 (33.8%)	20 (29.4%)
Number of sentences with more than the average number of words	3	48	42
Range of number of clauses	1–4	1–19	1–19
Average number of clauses per sentence	2	2.97	3.1
Number of sentences with one clause only	4 (44.4%)	33 (42.9%)	29 (42.6%)
Average number of words in the one clause sentences	17	26.1	24.6
Number of sentences with less than three clauses	6 (66.7%)	52 (67.5%)	46 (67.6%)
Average number of words per sentence in sentences with less than three clauses	20	29.8	30.8
Number of sentences with three or more clauses	3 (33.3%)	25 (32.5%)	22 (32.3%)
Average number of words per sentence in sentences with three or more clauses	29	29.8	30.8
Number of sentences with six or more clauses	0 (0%)	6 (7.8%)	6 (8.8%)
Average number of words per sentence in sentences with six or more clauses	0	125.7	125.7
Number of disruptions of nexus between subject and verb	0	5	5
Average number of words in subject/verb disruption	0	19.2	19.2
Number of disruptions of nexus between auxiliary and verb	0	5	5
Average number of words in auxiliary/verb disruption	0	15.4	15.4

Number of disruptions of nexus between verb and complement	0	1	1
Average number of words in verb/complement disruption	0	10	10
Number of times relative separated from antecedent	1	2	1
Number of words in disruption	5	12	15
Number of times parallel construction used	2 (22.2%)	22 (28.5%)	20 (29.4%)
Number of times agent passive used	2	8	6
Number of times agentless passive used	1	23	22
Number of times negative used	0	8	8
Number of reduced relative clauses	2	29	31
Number of nominalisations	0	12	12
Number of occasions on which superfluous words have been used	0	15	15

### A The Preamble

The table shows that the preamble has been drafted in plain English:

- The average length of each sentence is less than 25 words.
- There is an average of two clauses per sentence. Four of the nine sentences (that is 44.4 per cent) have one clause only and there is only one sentence with four clauses.
- There are no disruptions to the nexus between essential sentence components.
- Because of the relatively simple syntax, conflating devices have not been needed. However, there is a reduced relative clause<sup>57</sup> which does not disrupt a subject/verb nexus.
- Parallel structure has been used. In the first sentence of paragraph one there are two parallel complement clauses.<sup>58</sup> In the first sentence of paragraph two there are two parallel main clauses.<sup>59</sup>
- There are three uses of the passive, two agent<sup>60</sup> and one agentless.<sup>61</sup> In no instance can the passive be satisfactorily converted to the active. The agentless passive has not been used for a nefarious purpose.
- There are no instances of the use of the negative.

<sup>57</sup> The reduced relative is 'provided by this cultural diversity' and 'thus reducing the benefit'. The full clause would have read '[which are] provided by this cultural diversity'.

<sup>58</sup> They are 'that freedom of expression is an essential component of a democratic society' and 'that this freedom should be limited only to the extent that can be justified by an open and democratic society'.

<sup>59</sup> They are '[t]he people of Victoria come from diverse ethnic and Indigenous backgrounds' and '[the people of Victoria] observe many different religious beliefs and practices'.

<sup>60</sup> They are 'that can be justified by an open and democratic society' and '[t]he majority of Victorians embrace the benefits provided by this cultural diversity'.

<sup>61</sup> It is 'some Victorians are vilified on the ground of their race or their religious belief or activity'.

There is only one negative comment concerning the drafting of the preamble and that concerns the last sentence, which reads:

Preamble

...

4. It is therefore desirable that the Parliament enact law for the people of Victoria that supports racial and religious tolerance.

In this sentence, the relative pronoun ‘that’ is separated from its antecedent ‘law’ by a phrase ‘for the people of Victoria’. This section would have been better expressed as:

Preamble

4. It is therefore desirable that, for the people of Victoria, the Parliament enact law that supports racial and religious tolerance.

### B *The RRT Act without the Preamble*

The rest of the *RRT Act* adheres rigidly to the single provision/single sentence structure. As previously indicated, it is almost inevitable that rigid adherence to this type of structure will result in at least some convoluted and awkward syntax. In order to knit all the information into a single sentence, conflating devices are usually necessary. Some of these devices cause disruption to the nexus between essential sentence components and hinder comprehension. Had the drafters observed the guideline about sentence length, the *RRT Act* would have been easier to understand.

From the table and the previous analysis, the following adverse observations can be made:

- Sentences range up to 205 words in length and average nearly twice the suggested average length.
- In s 19(1), previously analysed, parallel construction has not been correctly used.
- There are a number of disruptions of the nexus between essential sentence components. Of these, five are between subject and verb and average 19.2 words in length,<sup>62</sup> six are between auxiliary and verb and average 15.3 words in length,<sup>63</sup> and one of 10 words is between verb and complement.<sup>64</sup>
- In conflating information into the single provision/single sentence structure more than 30 reduced relative clauses and 12 nominalisations have been used. Of the reduced relatives, five cause, or are involved in causing, a subject/verb nexus disruption.
- There is one provision (s 10) in which the relative ‘that’ is separated from its antecedent ‘assumption’ by 15 words.<sup>65</sup> Identification of the antecedent of the relative pronoun ‘that’ is difficult. The antecedent must be a noun or a noun equivalent and must be of the same number as the verb in the relative

<sup>62</sup> See ss 2(2), 4(1)(c), 22(1), 23(3) and 27(1).

<sup>63</sup> See ss 7(1), 8(1), 24(1), 24(2), 25(1) and 25(2).

<sup>64</sup> See s 23(2).

<sup>65</sup> That is ‘about the race or religious belief or activity of another person or class of persons’.

clause. The clause ‘that was incorrect at the time’ has a singular verb, so the antecedent of ‘that’ must be singular. Since relative pronouns should be placed as close as possible to their antecedents it is expected that the singular noun nearest to ‘that’ will be its antecedent. ‘Person’ is the closest singular noun, but it is not the antecedent, nor are ‘activity’, ‘belief’ or ‘race’. The antecedent is, in fact, ‘assumption’. This same separation occurs in s 26, which is almost identically worded.

- ‘Vicariously liable’ is the only phrase the general public is likely to find difficult to understand. This phrase is not defined nor is its meaning easily ascertainable from the section. Even when s 18 is read with s 17, which is headed ‘Vicarious liability of employers or principals’, the meaning of the concept remains elusive. Supplementary notes have been used in the *RRT Act* to explain the meaning of terms used within sections.<sup>66</sup> This practice should have been extended to ‘vicarious liability’.
- There are a number of provisions in which superfluous words have been used.<sup>67</sup>

From the table the following positive observations can be made:

- Although the agentless passive has been used in the *RRT Act* there are no examples of its use to hide the identity of the agent for questionable purposes. When the agent passive was used, conversion to active voice usually introduced other difficulties. For example, in s 11 changing the clause ‘that the person’s conduct was engaged in reasonably and in good faith’ to the active gives ‘that the person conducted himself/herself reasonably and in good faith’. Another example can be found in s 8(2)(a) which reads:

8. Religious vilification unlawful

...

(2) For the purposes of sub-section (1), conduct —

- (a) may be constituted by a single occasion or by a number of occasions over a period of time.

When the verb ‘may be constituted’ is converted to the active voice the sub-section might be taken to read:

8. Religious vilification unlawful

...

- (2) For the purposes of sub-section (1), a single occasion or a number of occasions over a period of time constitutes conduct.

The apparent agent ‘by a single occasion or by a number of occasions over a period of time’ has become the subject. However, this redraft does not mean the same as the original. The agent that ‘constitutes conduct’ is not ‘a single

<sup>66</sup> Supplementary notes follow ss 7(2), 8(1), 24(1)(b), 24(2) and 25(1)(b). Each note is identical, stating that to “engage in conduct” includes use of the internet or e-mail to publish or transmit statements or other material.’

<sup>67</sup> See, eg, s 14, in which the word ‘person’ is used 17 times to refer to at least three different ‘persons’.

occasion or by a number of occasions over a period of time', but rather an item like 'behaviour'. This would have been apparent if s 8(2) had read:

8. Religious vilification unlawful
  - (2) For the purposes of sub-section (1), conduct —
    - (a) may be constituted by behaviour on a single occasion or on a number of occasions over a period of time.

The redraft would then have read:

8. Religious vilification unlawful
  - (2) For the purposes of sub-section (1), behaviour on a single occasion or a number of occasions over a period of time constitutes conduct.

This latter redraft reveals the function of the phrase 'on a single occasion or a number of occasions over a period of time'. It also illustrates the ambiguous nature of the preposition 'by', the use of which does not always indicate the agent in a passive sentence.<sup>68</sup> The change to active shifts the focus away from 'conduct', which is the link with s 8(1). It is also the link with s 8(2)(b) which reads 'may occur in or outside Victoria'. As a result, the passive form is preferable. Note, however, that the words 'over a period of time' are superfluous as 'a number of occasions' must occur 'over a period of time'.

- Although the number of clauses per sentence ranges from 1 to 19, parallel structure has generally been used to facilitate comprehension.
- The few examples of the negative are suitably used.

## VI CONCLUSION

Most of the identified problems flow from a rigid adherence to the single provision/single sentence structure. If that structure were abandoned, conflating devices such as nominalisations and embedding between essential sentence components would not be needed. The general public is not used to long and syntactically complicated sentence structures, and consequently they should be avoided.

One way of identifying complicated syntax is to analyse the clausal construction of each draft sentence and present it as a formula. If the analysis reveals that a sentence has more than three clauses, it is likely that the general public will find the material difficult to comprehend. This may not be the case where parallel structure is possible. If this is the case, then the length of the sentence is not likely to inhibit comprehension. If it becomes clear that the nexus between essential sentence components has been disrupted, then the sentence should be recast so that the disruption no longer occurs. It may be possible to recast a sentence in the passive so that the disruption of the subject/verb nexus is avoided by transferring the agent and the embedded clause away from the subject position. It may be possible to rephrase a relative clause into a conditional clause

<sup>68</sup> Compare the function of 'by' in the sentences 'the baby was found by the dog' and 'the baby was found by the kennel'. In the first sentence, 'by' indicates the agent. In the second sentence, it indicates where the baby was found.

and so avoid the subject/verb disruption. The auxiliary/verb disruption can often be avoided by resiting the disrupting phrase or clause to a different position.

Even given the problems that have been identified, the drafting of the *RRT Act* shows some progress towards the use of plain English in legislative drafting. The number of occasions on which conflating devices have been used is comparatively small, as are the number of nexus disruptions. Parallel structure has, in general, been used effectively. However, further improvements in comprehension could be achieved if the drafters abandoned rigid adherence to the single provision/single sentence structure.