



LEGISLATION DESIGN AND ADVISORY COMMITTEE

31 March 2022

Ian McKelvie MP
Governance and Administration Committee
Parliament Buildings
PO Box 18 041
Wellington 6160

Dear Mr McKelvie,

Plain Language Bill

1. The Legislation Design and Advisory Committee (**LDAC**) is mandated by Cabinet to scrutinise Bills against the *Legislation Guidelines* (2021 Edition) (**Guidelines**). The Guidelines have been created to promote legislation that is well designed and accords with fundamental legal and constitutional principles.
2. The Plain Language Bill (the **Bill**) seeks to promote the use of plain English in official documents and websites by requiring all public service agencies and Crown agents (**reporting agencies**) to use “plain language”.¹
3. For the reasons set out below, LDAC recommends that the Bill does not proceed. We consider its policy objective is best achieved more effectively through non-legislative means. We note that Legislation Guideline 2.3 states that “*Legislation should only be made when it is necessary and is the most appropriate means of achieving the policy objective.*” The Cabinet manual also states that Ministers and departments must ensure that unnecessary new legislation is avoided.²
4. LDAC wishes to be clear that it strongly supports the promotion of plain language. Plain language enhances public access to the law and to government services.³ This in turn promotes public engagement in the democratic process and the holding of the Executive to account.⁴
5. We recognise that Parliament may have a role in holding the Executive to account for promoting and progressing the use of plain language, particularly to improve access to law. Increasing accessibility of government information through plain language is a long-term initiative, the success of which will require uptake from successive governments. It may be appropriate that a commitment be made by Parliament to these aims, and not just the government of the day.

¹ Although it is noted that while the General Policy Statement refers to “plain English”, the Bill itself refers to a subtly different concept: “plain language”.

² Cabinet Manual 2017 at 7.23.

³ Chapter 1 of the Legislation Guidelines (2021 edition) identifies accessibility as one of three fundamental objectives of high quality legislation.

⁴ As recognised in the purpose clause (section 4) of the Official Information Act 1982.

6. While in the past Parliament has imposed analogous commitments on the Executive through legislation⁵, such examples are rare. There will often will be more appropriate non-legislative alternatives to achieving both the policy objective and Parliamentary oversight, for example select committee scrutiny of Ministers and agencies. We think that is the case here.

Legislation does not provide adequate flexibility

7. First, we consider that the Bill lacks the required flexibility to achieve the policy objective. In this respect, we note that plain language is context dependent and it requires flexible application to be effective. A legislative requirement that is not nuanced will reduce flexibility.
8. The Bill would impose a uniform plain-language standard across the entire public service. Accordingly, the standard will be applied to a vast range of different types of documents, all of which serve their own specific purposes and have their own target audiences. Given the diversity of the contexts to which the standard is to be applied, we consider a uniform standard is unlikely to be effective. Either the standard will not be flexible enough to work in all the contexts in which it is intended to apply, or it will be set at such a high level, or be so vague or aspirational, as to be effectively unenforceable.
9. The problem is evident in how “plain language” is defined in the Bill. Clause 4 defines ‘plain language’ as language that can be understood after one reading and is clear, concise, well organised, and follows recognised guidelines for plain language.
10. The first limb, “*language that can be understood after one reading*”, does not take into account the highly technical and complex regulatory systems that some reporting agencies necessarily operate. Given the degree of expertise required and the complexity of the decision-making process, it is simply not feasible for all types of documents to be understood after one reading. For example, the Commerce Commission’s Mergers and Acquisition’s guidelines summarise the Commission’s approach to assessing whether an acquisition of a firm’s assets or shares would be likely to lessen competition in a marketplace. The current version of these guidelines contains technical and complex information that runs to 72 pages.
11. In contrast, the second limb of the definition, contains broad and subjective terms: “*clear, concise, and well organised*”. These concepts are highly subjective and do not provide sufficient certainty to have any realistic application across this range of contexts and audiences.

Unnecessary legislation increases legal risk and uncertainty

12. Generally, the point of legislation is to impose clear legal obligations that give rise to rights and obligations that can be enforced by the courts if necessary. In other words, it is intended to have legal effect.
13. Here it is not immediately clear whether the Bill is intended to have legal effect. The Bill imposes legal obligations but has no enforcement mechanism. There is no forum for deciding whether there has been compliance and no prescribed consequence for non-compliance. In saying this we are not advocating for enforcement provisions. Indeed, as we say, they would be highly problematic under this Bill due to the inherently subjective nature of the obligations imposed and the issues with enforcement mentioned at paragraph 8 above. Our point is that

⁵ For example, Parliament’s scrutiny of government expenditure and financial management under the Public Finance Act 1989 and the Government’s climate change reporting obligations under Part 1C of the Climate Change Response Act 2002.

the absence of enforcement mechanisms underscores the point that the Bill is intended, if enacted, not to have any legal effect.

14. One risk with legislation that is not intended to have legal effect is that legal effect may be read in by the Courts nonetheless. This may result in unforeseen and unintended consequences. Further legislation may be necessary to redress those consequences. This will involve further cost (see paragraphs 17 to 19 below).
15. As currently drafted the Bill imposes an obligation on all reporting agencies to *ensure* that all relevant documents for which they are responsible use plain language. The duty to “*ensure*” sets a high bar for reporting agencies. It is conceivable that a document held to be inconsistent with the plain language standard may also be held to be unlawful. The flow on consequences of this unlawfulness is not immediately clear. It is possible that the point might arise if a Court was assessing an individual’s non-compliance with an underlying legal requirement arising out of a document. An argument might be made to a Court that the requirement is not in plain English and that the litigant ought to be given some sort of full or partial relief from having to fulfil the requirement. It is most unlikely that this is intended by the Bill, but it is an illustration of the uncertainty and unsettling effect generated by a law that imposes unclear drafting obligations and articulates no legal consequences for not meeting them.
16. Even if legislation is intended to have legal effect, unclear or inconsistent provisions in legislation create uncertainty and legal risk. In this respect the current definition of “*relevant document*” includes documents not ordinarily intended to be read by the public.⁶ This exceeds the purpose stated in clause 3 of the Bill. The terms “*service*” and “*benefit*” are also broad terms, the precise intended application of which is difficult to ascertain. Given the large number of different documents filed with the Government, it is also unclear why tax returns are specifically included in the definition of relevant document.

Legislation involves significant cost

17. In addition to the costs of enactment (including financial and House and select committee time), legislation creates compliance costs. These can be direct and indirect, financial and practical.
18. Legislation directs how reporting agencies prioritise their resources in order to solve a problem. Reporting agencies have different needs and approaches to plain language. As noted above, some agencies will be dealing with subject matter experts on highly technical and complex matters, others will be communicating with the public at large. Many will do both. Mandating a uniform approach may lead to wasteful spending that is less effective at communicating to the relevant audience, and so reduce the opportunities to achieve the outcome in a more targeted manner.
19. The needless expenditure of limited public resources on seeking to give effect to an unclear Bill risks bringing the law into disrepute.

Legislation alone will not achieve the policy objective and may create perverse incentives

20. In the current context, we consider that there is a real risk that, even if plain language standards were able to be applied, the Bill would not achieve its policy objective. In this respect, we note again that the Bill does not contain any enforcement provisions. While there is an obligation to

⁶ A “relevant document” is defined as including any document that: (a) is necessary to obtain a service or file a tax return; or (b) provides information about any benefit or service; or (c) explains to the public how to comply with a requirement the public service administers or enforces...

report to the House annually, there is little incentive for reporting agencies to comply with their obligations. In our experience, such reporting obligations, in isolation, do not drive significant change. There is a risk that the requirement for reporting agencies to appoint a plain language officer will likewise be treated as a compliance cost and will not drive the change in behaviour sought. In this respect, we note that the Bill is largely adopted from the provisions in the Plain Language Act 2010 enacted in the United States of America. A report on US government communications following the passing of the US Act found that the Act had had little impact on the language used by the US government.⁷

21. We also note, that the plain language requirement only relates to documents issued or revised after the Bill comes into force. Given the cost of complying with plain language standards, as currently drafted the Bill might have the perverse effect of discouraging reporting agencies to revise their documents, so undermining the objective of the Bill.

There are non-legislative options available

22. Finally, we consider that there are alternatives to legislation that would be considerably more effective and appropriate in achieving the policy objective. In this respect, we note that there are already a number of non-legislative initiatives aimed at improving access to government information.
23. For example, the [New Zealand Government's Web Usability and Web Accessibility Standards](#) set minimum standards for website technology, design, and content to ensure government websites are as accessible as possible. This includes guidance on plain language. Compliance with these standards are mandated by Cabinet⁸. The annual Plain English Awards already celebrate excellence in plain language, including with a section focussed specifically on the public sector.
24. A clear endorsement from Parliament of the importance of plain language in government documents so as to ensure access to the law (and its effectiveness) would be valuable. However, rather than using legislation to effectively give this endorsement, members could speak to this value in their speeches. Select committees could also use the annual review and Estimates processes to seek information on how well agencies set, and meet, plain language standards. This scrutiny could be targeted at the most important agencies and so be more flexible and effective than legislation.
25. Lastly, the Government itself could extend the current expectations set in the Cabinet manual to use letters of expectations and other tools that mandate key agencies to set plain language standards for their public information and report on them.
26. Any of these initiatives, in isolation or combination, would allow for greater flexibility to respond to changing circumstances, reduce the risk of unrealistic public expectations, and allow different agencies to target accessibility requirements to their particular circumstances.

Recommendation

27. LDAC recommends that this Bill does not proceed, on the basis that its policy objective could be achieved as effectively through non-legislative means.

⁷ Rachel Stabler "What We've Got Here is Failure to Communicate: The Plain Writing Act of 2010" (2013) 40 J Legis 280 at 280.

⁸ [CAB Min \(03\)41/2B](#)

28. If the Bill does proceed, LDAC recommends that the Committee pays careful attention to the vague provisions in the Bill and the risk that the Bill's scope goes beyond the intended policy.
29. Thank you for considering our submission. We would like to be heard in person.

Yours sincerely

A handwritten signature in grey ink, appearing to read 'MS', is positioned above the typed name.

Mark Steel

Chair

Legislation Design and Advisory Committee