



Australian Government

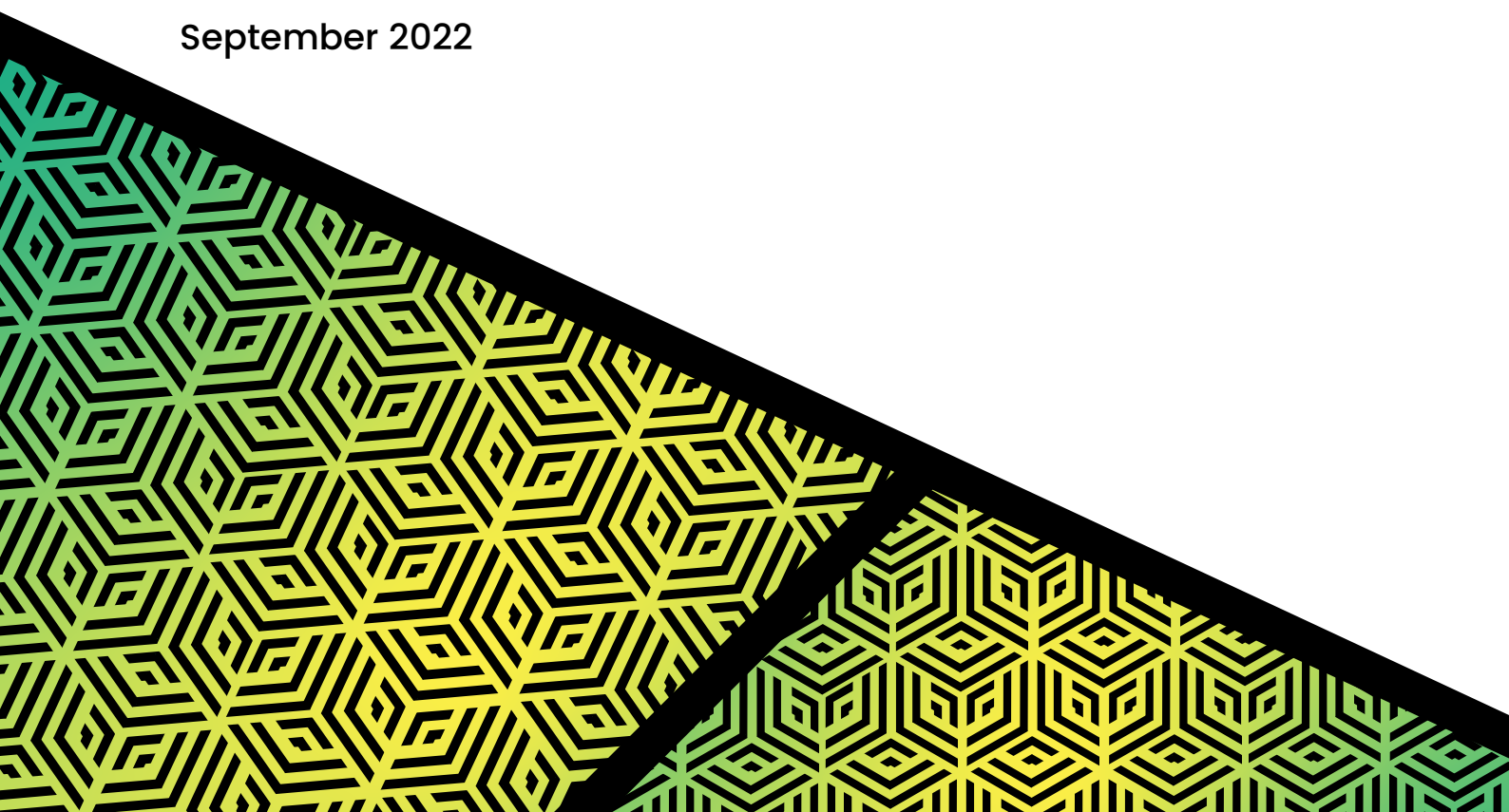
Australian Law Reform Commission

INTERIM REPORT B – ADDITIONAL RESOURCES

LEGISLATIVE FRAMEWORK FOR CORPORATIONS AND FINANCIAL SERVICES REGULATION

Comparative Frameworks for Promoting Good Legislative Design

September 2022



Interim Report B is the second of three Interim Reports to be published as part of the Australian Law Reform Commission's Review of the Legislative Framework for Corporations and Financial Services Regulation. This document is one of several additional resources, published on the ALRC's website, which provide further detail relevant to particular aspects of Interim Report B.

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COMPARATIVE FRAMEWORKS FOR PROMOTING GOOD LEGISLATIVE DESIGN

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Introduction

1. This note briefly outlines the ways in which international jurisdictions highlight the importance of legislative design. This discussion provides further background for the purposes of Chapter 4 of Interim Report B.¹ Among comparable jurisdictions to Australia, New Zealand has been selected for closer analysis and comparison because it most clearly emphasises the importance of good legislative design.

New Zealand

2. Guidance and key legislation related to legislative drafting in New Zealand demonstrate an aspiration for good legislative design which is not reflected to the same extent in Australian equivalents.

3. The *Legislation Act 2019* (NZ) provides that:

- The Act's purpose ‘is to promote high-quality legislation for New Zealand that is easy to find, use, and understand’.²
- The objective of the New Zealand Parliamentary Counsel Office (‘PCO’) is to further that same goal and ‘to exercise stewardship of New Zealand’s legislation as a whole’.³
- The functions of PCO include advising ‘departments and agencies on the drafting and publication of secondary legislation that is not drafted by PCO’ and providing ‘guidance and other support for, and keep[ing] under review, practices relating to the design, drafting, and publication of legislation’.⁴ PCO states that its vision is to achieve ‘great law’ that is accessible and ‘fit for purpose’.⁵

1 See Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [4.74]–[4.79].

2 *Legislation Act 2019* (NZ) s 3(1). For discussion of different perspectives on what makes ‘high-quality’ legislation, see Ross Carter, “‘High-Quality’ Legislation — (How) Can Legislative Counsel Facilitate It?” [2011] (4) *The Loophole* 41.

3 *Legislation Act 2019* (NZ) s 129. See also s 12(e) of the *Public Service Act 2020* (NZ), which provides that one of the principles of the New Zealand public service is to promote ‘stewardship’ of the legislation administered by government agencies.

4 *Legislation Act 2019* (NZ) ss 130(d)–(e).

5 Parliamentary Counsel Office (NZ), ‘PCO’s Vision’ <www.pco.govt.nz/strategic-goal/>.

4. Equivalent provisions in Commonwealth legislation are less aspirational. Section 3(c) of the *Legislation Act 2003* (Cth) (*'Legislation Act'*) provides that one of its objects is to encourage

high standards in the drafting of legislative instruments and notifiable instruments to promote their legal effectiveness, their clarity and their intelligibility to anticipated users.

5. Section 16 of the *Legislation Act* requires First Parliamentary Counsel to 'cause steps to be taken' to promote the object in s 3(c), including by providing training and advice.⁶

6. Both ss 3(c) and 16 of the *Legislation Act* apply only to legislative instruments and notifiable instruments, not Acts.⁷ In its submission to the 2021–2022 Review of the *Legislation Act 2003*, the ALRC suggested that the Review Committee consider extending s 3(c) to include Acts.⁸

7. Section 3 of the *Parliamentary Counsel Act 1970* (Cth) describes the functions of the Office of Parliamentary Counsel (Cth) ('OPC'). That section focuses on OPC's role as drafter and publisher of Commonwealth legislation, and does not include express aspirations relating to the design, quality, or stewardship of legislation.

8. Despite the lack of statutory emphasis on good legislative design, a range of Australian sources touch upon relevant issues. These resources are discussed in further detail in Interim Report B, and include:

- the *Legislation Handbook* prepared by the Department of the Prime Minister and Cabinet — although this handbook focuses on 'the procedures involved in making a law', it also addresses some questions of legislative design, such as the allocation of matters between primary and delegated legislation;⁹
- drafting manuals published by OPC, such as the *Drafting Manual* and the *Plain English Manual*;¹⁰
- the *Instruments Handbook* published by OPC, which provides 'information to help Commonwealth rule-makers and agencies make and manage legislative and notifiable instruments efficiently, effectively and in accordance with the relevant law';¹¹
- drafting directions maintained by OPC — these are 'an authoritative series of pronouncements on a range of drafting issues', which are largely directed towards legislative drafters;¹²
- guides to reducing complexity in legislation issued by, respectively, the Attorney-General's Department (Cth) and OPC;¹³ and
- guidelines on parliamentary scrutiny issued by the Senate Standing Committee for the Scrutiny of Bills and the Senate Standing Committee for the Scrutiny of Delegated Legislation.¹⁴

6 First Parliamentary Counsel is the head of the Office of Parliamentary Counsel (Cth).

7 Cf *Legislative Standards Act 1992* (Qld) s 3: the purpose of the Act includes ensuring that 'Queensland legislation is of the highest standard'.

8 Australian Law Reform Commission, Submission to Legislation Act Review Committee, Attorney-General's Department, *2021–2022 Review of the Legislation Act 2003* (8 December 2021). For discussion of the ALRC's submission in this regard, see Legislation Act Review Committee, Attorney-General's Department (Cth), *2021–2022 Review of the Legislation Act 2003* (2022) 21–22.

9 Department of the Prime Minister and Cabinet (Cth), *Legislation Handbook* (2017) [1.1], [1.10]–[1.12].

10 Office of Parliamentary Counsel (Cth), *Drafting Manual* (Edition 3.2, July 2019); Office of Parliamentary Counsel (Cth), *Plain English Manual* (December 2013).

11 Office of Parliamentary Counsel (Cth), *Instruments Handbook* (Document release 3.7, September 2022) ii.

12 Office of Parliamentary Counsel (Cth), *Drafting Manual* (Edition 3.2, July 2019) [3]. See, eg, Office of Parliamentary Counsel (Cth), Drafting Direction 3.8, 'Subordinate legislation' (Document release 5.6, December 2021); Office of Parliamentary Counsel (Cth), Drafting Direction 4.1, 'Dealing with instructors' (Document release 4.1, July 2020) 1.

13 Attorney-General's Department (Cth), *Causes of Complex Legislation and Strategies to Address These* (2014); Office of Parliamentary Counsel (Cth), *Reducing complexity in legislation* (Document release 2.1, June 2016).

14 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Guidelines* (2nd ed, 2022); Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Guidelines* (2nd ed, 2022).

9. Compared to equivalent guidance in New Zealand, discussed below, existing guidance at the Commonwealth level in Australia does not express a clear aspiration for good legislative design. Furthermore, the dispersal of guidance across different sources and by different authors means that to the extent Australian guidance implicitly encourages good legislative design, the message may be lost among the detail.

The Legislation Design and Advisory Committee

10. The New Zealand Legislation Design and Advisory Committee ('LDAC') describes its mandate as being 'to promote quality legislation'.¹⁵ The LDAC was established in 2015 by merging the Legislation Advisory Committee ('LAC') and Legislation Design Committee ('LDC').¹⁶ The LAC was first established in 1986,¹⁷ and complemented by the LDC in 2006.¹⁸ The LDC was created in response to findings by the LAC that involving an expert legislative design committee early in the legislative process would benefit government agencies.¹⁹ The LDAC's membership comprises senior public service officials (including legislative drafters), legal practitioners, academics, and other experts with backgrounds in economics and policy.²⁰

11. The LDAC's stated aim is to fulfil its mandate in three ways:

By providing advice to departments early in the development of policy and legislation to resolve problems in the design of legislation and to identify potential public and constitutional law issues.

By setting standards through the publication of Guidelines (endorsed by Cabinet), and supplementary material to support the Guidelines.

By scrutinising Government Bills that come before Parliament.²¹

12. The LDAC publishes the *Legislation Guidelines*²² as part of its standard-setting role, describing them as 'a guide to making good legislation'.²³ The *Legislation Guidelines* have been endorsed by the New Zealand Cabinet as 'the government's key point of reference for assessing whether draft legislation conforms to acceptable legal and constitutional principles'.²⁴ The current edition of the *Legislation Guidelines* comprises 29 chapters, grouped under six themes that address a range of topics relevant to developing legislation.²⁵ The *Legislation Guidelines* are presented as a series of questions, principles, and explanatory text relevant to each topic.²⁶ The draft guidance prepared by the ALRC and contained in Appendix E to Interim Report B adopts the same format.

13. In addition to maintaining the *Legislation Guidelines*, the LDAC provides advice to government departments in the course of developing legislation. The LDAC's Terms of Reference expressly recognise that it may 'assist departments with the allocation of provisions between primary and

15 Legislation Design and Advisory Committee (NZ), 'The Role of the LDAC' <www.ldac.org.nz/about/role/>.

16 Christopher Finlayson MP, 'Establishment of Legislation Design and Advisory Committee' (Media Release, 30 June 2015) <www.beehive.govt.nz/release/establishment-legislation-design-and-advisory-committee>.

17 Walter Iles CMG QC, 'The Responsibilities of the New Zealand Legislation Advisory Committee' (1992) 13 *Statute Law Review* 11, 11.

18 The Rt Hon Geoffrey Palmer, 'Improving the Quality of Legislation — The Legislation Advisory Committee, the Legislation Design Committee and What Lies Beyond?' (2007) 15 *Waikato Law Review* 12, 19.

19 Ibid.

20 Legislation Design and Advisory Committee (NZ), *Annual Report 1 January 2020 to 31 December 2020* (2021) 9.

21 Legislation Design and Advisory Committee (NZ), *The Role of the LDAC* (n 15).

22 Legislation Design and Advisory Committee (NZ), *Legislation Guidelines* (2021).

23 Legislation Design and Advisory Committee (NZ), 'Guidelines' <www.ldac.org.nz/guidelines/>.

24 Department of the Prime Minister and Cabinet (NZ), *Cabinet Manual* (2017) [7.38].

25 The six themes are: 'Early Design Issues', 'Constitutional Issues and Recognising Rights', 'International Issues', 'Issues Relevant to All Legislation', 'Compliance and Enforcement', and 'Appeal and Review'. At the chapter level, many of the same or similar topics are the subject of guidance in Australia. For example, Chapter 11 of the *Legislation Guidelines* is titled 'Applying an Act to the Crown', and OPC Drafting Direction 3.10 (Legislation that refers to or affects Australian governments or jurisdictions) discusses the same issue.

26 Legislation Design and Advisory Committee (NZ), *Legislation Guidelines* (n 22) 7.

secondary legislation' and 'provide advice on delegated legislative powers'.²⁷ In its 2020 Annual Report, the LDAC noted that among the issues it most frequently discussed with government departments was 'the appropriateness of subject matter for an Act or secondary legislation'.²⁸

14. In an ALRC webinar in May 2022, New Zealand Parliamentary Counsel Ross Carter emphasised that a key question in legislative design is the allocation of material across the legislative hierarchy. For example, primary legislation might contain more detail in relation to core obligations and sanctions, and might contain less detail in relation to supplementary, emergency, technical, or administrative matters, in order to facilitate greater flexibility.²⁹

15. The *Legislation Guidelines* are given further significance in the legislative process by Cabinet guidance, which:

- encourages ministers and departments to seek advice from the LDAC;
- requires ministers to note, when requesting a place on the legislative programme, whether a Bill will be referred to the LDAC; and
- requires Ministers to specify whether legislation submitted to Cabinet complies with the *Legislation Guidelines*.³⁰

16. The LDAC performs its scrutiny function by making submissions to parliamentary committees in relation to legislative design issues and reporting 'serious or contentious' departures from the *Legislation Guidelines* to the Attorney-General.³¹ Through its Annual Reports, the LDAC also reports on trends that it observes in the legislative design process. For example, in its 2020 Annual Report, the LDAC expressed concern over what appeared to be 'an ever increasing expectation that all legislation can be expedited all at once'.³² It commented that this put 'considerable pressure on the system, under which mistakes are and will continue to be made, and the quality of legislation will suffer'.³³ The LDAC recommended:

Appropriate planning and realistic timelines for the development of policy and legislation need to be put in place to reduce this risk. Planning this way also manages expectations and reinforces what good process looks like across the system.³⁴

17. The LDAC also fulfils an educative purpose by publishing a series of webinars on YouTube.³⁵

27 Legislation Design and Advisory Committee (NZ), 'Terms of Reference' <<http://www.ldac.org.nz/about/terms-of-reference/>>.

28 Legislation Design and Advisory Committee (NZ), *Annual Report 1 January 2020 to 31 December 2020* (n 20) 13.

29 Australian Law Reform Commission, 'Recording: What Goes Where? A Comparative Discussion of the Legislative Puzzle' <www.alrc.gov.au/news/recording-what-goes-where/>.

30 Department of the Prime Minister and Cabinet (NZ) (n 24) [7.39]–[7.40], [7.65]. See also Legislation Design and Advisory Committee (NZ), *Legislation Guidelines* (n 22) 7.

31 Legislation Design and Advisory Committee (NZ), *Annual Report 1 January 2020 to 31 December 2020* (n 20) 12.

32 Ibid 6.

33 Ibid.

34 Ibid 7.

35 Legislation Design and Advisory Committee (NZ), 'LDAC Webinar Series on YouTube' <www.ldac.org.nz/about/updates/ldac-webinar-series-on-youtube/>.

‘Better Rules’

18. Emerging ‘Better Rules’ methodologies, such as those utilised in New Zealand, aim to produce more effective legislation. These methodologies adopt the use of multi-disciplinary teams, human-centred design principles, and drafting legislation simultaneously in English and in software coding language at the policy development stage.³⁶ Using these approaches seeks to avoid the ‘disconnect’ between policy intent and the reality of implementation that can arise when a more traditional, segmented, and sequential legislative development process is employed. Namely, in a traditional process, policy ideas are first developed by policy professionals. Those ideas are then interpreted and adapted by lawyers drafting legislation in English. Following that, software versions are developed by technology professionals to assist government agencies and private entities to implement the law. By contrast, a Better Rules process brings together professionals, from each of those fields, from the earliest stages of policy development and seeks initially to create a ‘blueprint’ reflecting the logic of proposed legislation. The blueprint can then be used as the basis for simultaneous drafting of legislation in English and in software code.

19. Simultaneous ‘bilingual’ drafting can arguably enhance rigour in relation to legislative design choices. For example, the code version can be used to ‘test’ the substantive effect of the draft legislation by running example situations through the system to see whether the anticipated outcome is achieved. The code version can also be linked more easily with other relevant legislation to check for any (intended or inadvertent) implications arising from the intersection of different laws. Once legislation is enacted, the code version can efficiently become the basis for implementation and compliance systems. As Better Rules processes develop further they may help to improve legislative design more generally, particularly in areas of law that are highly prescriptive.

20. The ALRC has previously discussed the potential for using Extensible Markup Language (‘XML’) — a coding language — to improve the drafting and publishing of Commonwealth legislation.³⁷ Referring to the ALRC’s work, the 2021–2022 Review of the *Legislation Act 2003* recommended that OPC should

undertake a scoping study into XML-like formats used by similar jurisdictions for legislation registers and develop a plan to enhance the [Federal Register of Legislation] in a format that will enable the additional functionality sought by stakeholders.³⁸

36 See, eg, New Zealand Government, ‘Better Rules — Better Outcomes’ <www.betterrulers.govt.nz>. See also NSW Government, ‘Rules as Code — NSW Joins the Worldwide Movement to Make Better Rules’, *Digital.NSW* <www.digital.nsw.gov.au/article/rules-code-nsw-joins-worldwide-movement-make-better-rules>.

37 See Australian Law Reform Commission, ‘Improving the Navigability of Legislation’ (Background Paper FSL3, October 2021) [139]–[170]; Australian Law Reform Commission, *Interim Report A: Financial Services Legislation* (Report No 137, 2021) rec 11, [6.92]–[6.106].

38 Legislation Act Review Committee, Attorney-General’s Department (Cth) (n 8) rec 6.3.

United Kingdom

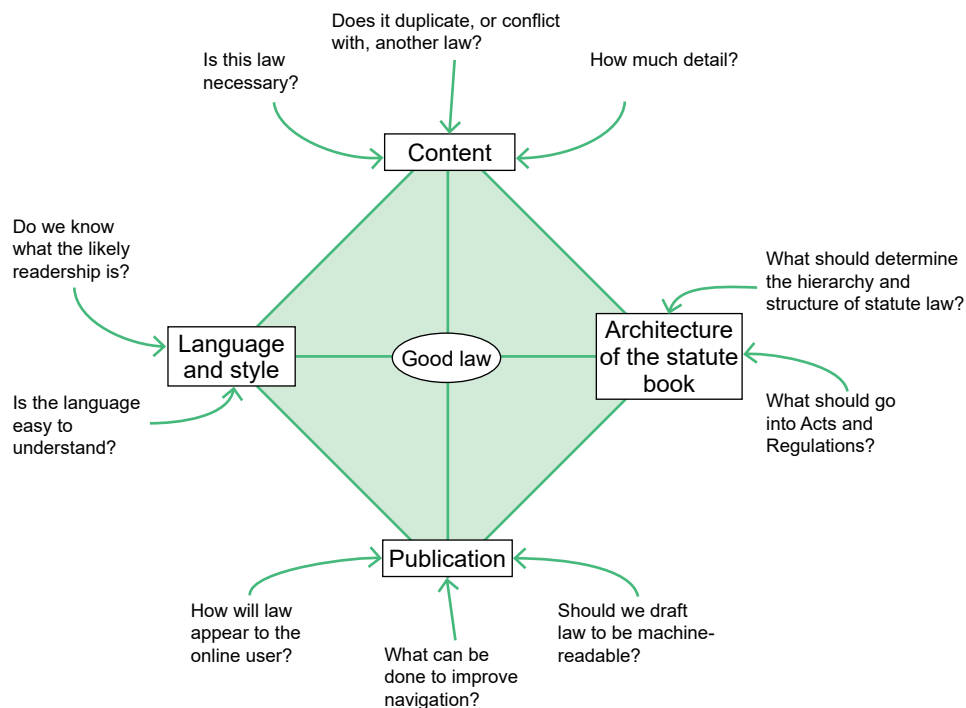
21. An organisational priority of the UK Office of the Parliamentary Counsel ('UKOPC') is to 'work with colleagues within and outside government to promote good law'.³⁹ According to the UKOPC, 'good law' is legislation that is 'necessary, clear, coherent, effective and accessible'.⁴⁰

22. Guidance issued by the UKOPC states:

An understanding of 'good law' should underpin the preparation and promotion of legislation. It should be the default, with good law principles guiding all those involved at different stages and in various capacities in the making of legislation. Like open policy-making and the strategic use of digital technology, good law should be considered part of the new, user-centred approach across government.⁴¹

23. Previous guidance noted that 'good law' straddled four areas that had 'traditionally been regarded as separate domains', namely: content, language, architecture, and publication.⁴² The interaction between those four domains was summarised by the UKOPC in the diagram at Figure 1 below.

Figure 1: 'Good law' diagram



39 Office of the Parliamentary Counsel (UK), 'About Us' <www.gov.uk/government/organisations/office-of-the-parliamentary-counsel/about>.

40 Cabinet Office (UK), *Guide to Making Legislation* (2022) [5.3].

41 Ibid.

42 Office of Parliamentary Counsel (UK), 'Guidance: Good Law' <www.gov.uk/guidance/good-law>.

Canada

24. Similar to Australia, federal Canadian legislative drafting guidance is largely focused on technical aspects of drafting and form, as opposed to overarching principles of design. Canadian legislation is drafted in both official languages: English and French. Drafting guidance is similarly published in both English and French.⁴³

25. One source of guidance which touches upon issues of legislative design is the Guide to Fostering the Readability of Texts. It aims to remind

those involved in the development of legislative texts of some readability principles so that legislative texts are as accessible and easy to understand as possible.⁴⁴

26. The Guide suggests that it is possible to

enhance the readability of a legislative text by

- A. writing for the readers;
- B. giving readers enough overall context to understand the purpose of the text;
- C. organizing the material well;
- D. showing readers the overall organization of the text;
- E. helping readers find the information they are looking for;
- F. giving readers the key structural elements of each legislative sentence as early as possible;
- G. creating a logical flow from sentence to sentence;
- H. using paragraphing when the elements of a legislative sentence lend themselves to a list; and
- I. keeping the language as simple as possible.⁴⁵

27. The Canadian Institute for the Administration of Justice ('CIAJ') is an organisation which conducts a range of educational activities relating to the administration of justice.⁴⁶ Those activities include a biennial conference on legislative drafting, after which papers and presentations are generally made available on the CIAJ website.⁴⁷ Previous conference topics include 'The New Legislative Counsel: At the Intersection of Law, Policy and Politics' (2016) and 'Legislative Architecture — Building with Words' (2012).

43 Government of Canada, 'Legistics' <www.justice.gc.ca/eng/rp-pr/csj-sjc/legis-redact/legistics/toc-tdm.html>; Government of Canada, 'Guide Fédéral de Jurilinguistique Législative Française' <www.justice.gc.ca/eng/rp-pr/csj-sjc/legis-redact/juril/toc-tdm.html>. See also Uniform Law Conference of Canada, 'Report of the Committee Appointed to Prepare Bilingual Legislative Drafting Conventions for the Uniform Law Conference of Canada' <www.ulcc-chlc.ca/Civil-Section/Drafting/Drafting-Conventions>.

44 Government of Canada, 'Guide to Fostering the Readability of Legislative Texts', *Introduction* <www.justice.gc.ca/eng/trans/ar-lr/rg-gl/p1.html#>.

45 Ibid.

46 Canadian Institute for the Administration of Justice, 'Our Work' <www.ciaj-icaj.ca/en/about-us/our-work/>.

47 See Canadian Institute for the Administration of Justice, 'Documentation: Legislative Drafting' <www.ciaj-icaj.ca/en/library/papers-and-articles/legislative-drafting/>; Canadian Institute for the Administration of Justice, 'Videos: Legislative Drafting Conferences' <www.ciaj-icaj.ca/en/library/videos/legislative-drafting/>.

Singapore

28. The Legislation Division of the Attorney-General's Chambers is the central legislative drafting office for Singapore. The Legislation Division's 'vision is to create an effective statute book for Singapore' by producing legislation that is 'enduring', 'easily understandable', and 'accessible'.⁴⁸ The Legislation Division also aims to enhance 'the link between good policy and good laws by conducting courses on effective law making and legislative drafting in partnership with the Civil Service College'.⁴⁹

29. The *Revised Edition of the Laws Act* (Singapore) establishes a framework for periodic revision of Singapore's legislation. Under that Act, legislation may be revised to (among other things) correct mistakes and to improve its readability, however such changes may not alter the meaning of any legislation.⁵⁰ The ninth universal revision of Singapore's Acts was completed in 2020 with the publication of the 2020 Revised Edition of Acts.⁵¹

30. A forthcoming Background Paper by the ALRC will discuss Singapore's revision of Acts, and post-legislative scrutiny more generally, in further detail.⁵²

Commonwealth Association of Legislative Counsel

31. The Commonwealth Association of Legislative Counsel ('CALC') aims 'to promote cooperation in matters of professional interest among people in the Commonwealth engaged in legislative drafting or in training people in legislative drafting'.⁵³

32. CALC conducts a biennial conference on legislative drafting and provides other services for members, including an online forum and drafting advice service.⁵⁴ CALC also publishes a journal, *The Loophole*, which contains articles relating to legislative drafting and design.⁵⁵

48 Attorney-General's Chambers (Singapore), 'Our Roles — Drafter of Laws' <www.agc.gov.sg/our-roles/drafter-of-laws/overview>.

49 Ibid. The Singapore Civil Service College provides education services to public sector employees: see Singapore Government, 'Civil Service College (Singapore)' <www.csc.gov.sg/>.

50 *Revised Edition of the Laws Act* (Singapore, 2020 rev ed) s 4. See also Cheryl Seah, 'Singapore's 2020 Revised Edition of Acts' [2022] (1) *The Loophole* 13.

51 Seah (n 50) 14.

52 Australian Law Reform Commission, 'Post-Legislative Scrutiny' (Background Paper FSL8, forthcoming).

53 Commonwealth Association of Legislative Counsel, 'Commonwealth Association of Legislative Counsel' <www.calc.ngo>. 'Commonwealth' in this context refers to the Commonwealth of Nations (formerly the British Commonwealth of Nations), as distinct from the Commonwealth of Australia.

54 Commonwealth Association of Legislative Counsel, 'Services' <www.calc.ngo/services>.

55 Commonwealth Association of Legislative Counsel, 'Publications' <www.calc.ngo/publications>.