

SPOTLIGHT ON LANGUAGE

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Although LEAP's work on legal entities taking transfer of land on behalf of groups under the South African land reform programme is holistic, there are various areas that can be spotlighted. A practical focus that lends itself to immediate improvement is the nature, style and content of the founding documents of legal entities established to take transfer of land. Whether these are trust deeds or association agreements they are, for convenience, referred to here as "constitutions".

LEAP's field and research experience

LEAP works with members of legal entities needing to know what is in their constitutions. Sometimes they have questions on how to make management decisions; sometimes their project is in trouble and they need the guidance the constitution should provide; sometimes they need an overview of the content of their constitution as a first step towards amending it in an informed way.

In some projects members don't hold their constitution documents. Where they do, the sad fact is that the majority of these documents are difficult for them to read and understand. Constitutions tend to be over-long, poorly arranged, contradictory and written in the old-fashioned English known as Legalese. In general, they are incapacitating as shown by these typical reactions:

Members of legal entity: We don't understand this document because we are stupid.

LEAP: You don't understand this document because it is badly written and doesn't reflect what you agreed to.

Member of legal entity: We don't understand this document because it is written in English – all we need to do is to translate it – please help us to do this.

LEAP: We have managed to translate this document directly from Legalese, but we can see you are more confused than before OR

We can't translate this document because it is saying three contradictory things about membership, which makes nonsense of the clauses on rights-holders and decision-making.

Many fruitful lines of enquiry, practical and theoretical, have arisen from LEAP's original work with documents in Legalese. Our struggle to get to the meaning of some awful examples has given useful pointers to where things go wrong! On the other hand it is laborious to mine meaning from a poorly framed constitution. From such labours we offer tools for unravelling difficult documents in the hope that those

drafting constitutions for legal entities in land reform will be able to recognize and avoid some of the obvious problems in language.

LEAP has techniques to check whether the constitution is appropriate for a particular group in a particular situation and whether it meets the requirements of law, and has published some recommendations on drafting (*Some tips for drafting legal entities in simple language*. LEAP August 2000. 8pp.). LEAP regularly translates document content into Zulu in explaining documents verbally, and written translation is an obvious technique for rendering the constitution more understandable to its primary users.

Simplifying language

If the document is written in old-fashioned Legalese then everything we have mentioned about understanding a constitution in order to access, assess, translate or write it in a readable way begins with a first step of simplifying the language.

Stewart Cant, a lawyer, gives some examples of standard expressions of which lawyers are fond, followed in each instance by a simpler word or phrase that may be used instead:

shall be entitled but not obliged to: **may**
shall be prohibited from: **may not**
shall be obliged to / shall be responsible for / hereby undertakes to /
promises to / agrees to: **shall / must**
nominate, constitute and appoint: **appoint**
are desirous of: **want to**
for the purpose of enabling: **to enable**
in a position to: **able to**
re / in regard to / regarding / as regards / with reference to / respecting /
concerning: **about**
in the capacity of: **as**
in the event of: **if**
save and except: **except**
consequent upon: **as a result of**
supra / hereinbefore / abovementioned / aforementioned: **above**
infra / hereinafter / hereunder: **below**
herein: **in this document**
whereas: **as**
amount of all charges levied in respect of: **cost of**
consensual: **agreed**
Thus done and signed / Thus done and executed: signed
In witness whereof the undersigned parties have hereunto set their hands:
witnessed by

From Stewart Cant (1992): Legalese – II. More tips on how to avoid it. Businessman’s Law 21, 107-110

Simplifying constitution documents – digging out meaning and putting it in order

As we use it in LEAP, simplification is a process in which all the essential provisions of an existing Legalese constitution are captured in plain language. Simplifying a constitution is more complex than simplifying the language within it. It involves digging out and putting in order the meaning of a document, as well as writing it in plain language.

LEAP has simplified constitutions for different purposes: to test whether a document in Legalese meets the real needs of the group for which it was drafted, to give people more control over their own process and reduce their dependence on outsiders for explanations, and to make it possible to translate a Legalese document into Zulu, often in order that a group can make an informed decision about whether they want to amend it or not. Simplification of a constitution is necessary for translation into another language, any other language, because of the idiomatic nature of language. Only concepts can be translated and even this is chancy.

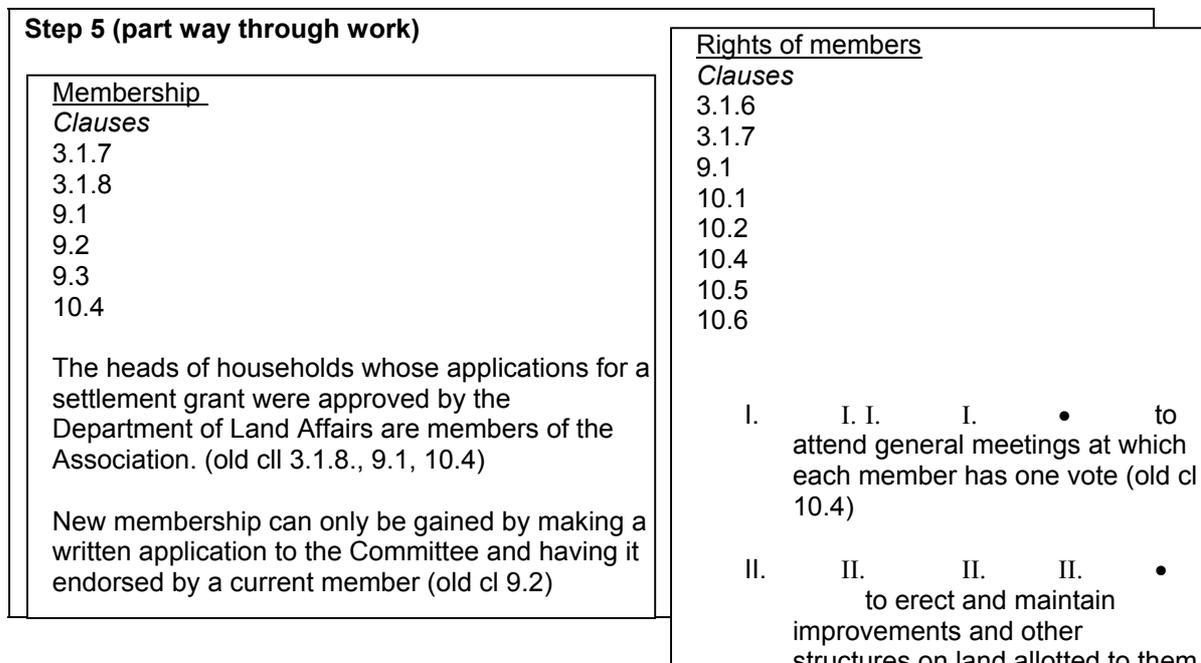
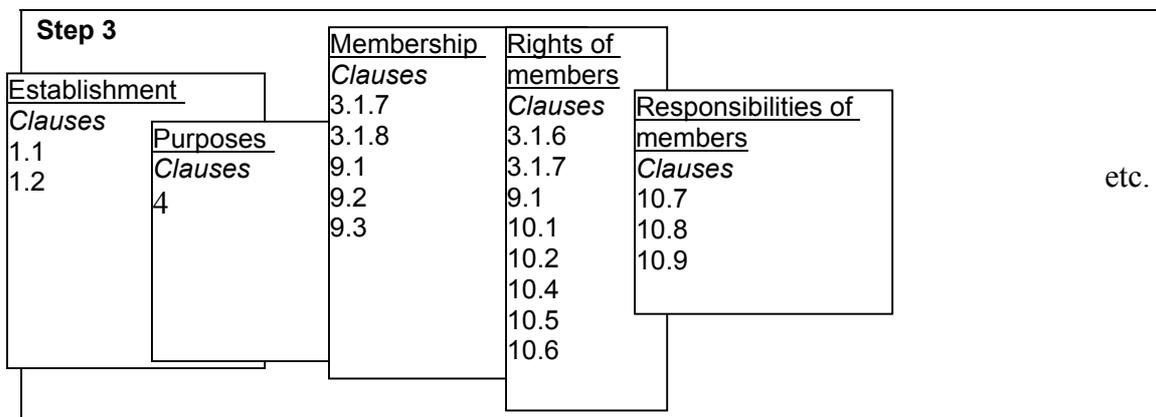
When simplifying an entire constitution LEAP generally does not attempt a clause-by-clause simplification of a long, confusing document because many sentences will be found to be mere decoration and can simply be left out and because clauses are often unintelligible without reference to other clauses. A better approach is to rearrange the clauses to gain clarity and an unimpeded flow of ideas. Certain clauses drop away because they are simple repetitions, or because they contain no information. We take out the definitions clauses and include definitions in the text where they have a context and can be used. This reduces the word-count to one third or one quarter of that in the original document. It is useful to get the document as short as possible because it is less intimidating to readers and also because the receiving language is often more longwinded than English!

How LEAP simplifies a constitution – step by step

A pre-simplification is usually necessary to gauge whether the project is possible. Provisions dealing with key concepts such as membership, rights and decision-making should be gathered together and compared. If these are inconsistent or ambiguous the document can be considered fatally flawed or void for vagueness and not worth the labour of simplification.

1. Hold in mind the basic requirements of intelligibility:
 - clarity;
 - grouping of ideas in logical order, the most important first;
 - keep flow: avoid cross-references and mention of outside documents;
 - economy;
 - consistency: don't use different words for the same thing, or the same word meaning different things.
2. Work out provisional headings.

3. Go through the document and allocate the clause numbers to your headings under suitable sub-headings. We use cards for this.
4. Put closely-related concepts together. You may have to split some clauses. More often you will combine them. Some will be found to hold no new information.
5. Find the information within the closely-related clauses and write that down. It is important to ignore the actual wording of the original clause unless it is absolutely clear and simple. Use your own words to capture the idea in sentences in plain language.
6. Write your new clause number in the original text for checking purposes.



Examples from simplifying a Community Property Association constitution

Example 1: Clarity regarding membership

| The original clauses | Simplified version |
|--|--|
| <p><i>In the original document, the sources of information from the original document are scattered. Clues to the real meaning hidden in the clauses like a crossword puzzle have been underlined. Simplification involved finding the clues to meaning and drawing them together.</i></p> <p>Clause 3.1.7 “Membership register” shall mean the register to be established and maintained by the Management Committee, of participating <u>members who shall be the persons eligible to vote at the General Meeting of Members of the Association.</u></p> <p>Clause 3.1.8 “participating members” shall mean the <u>rightful participants in the land acquisition project</u> designated as such in terms of Clause 10.1 and whose names will be reflected in the Membership Register. <i>(Clause 10.1 is about tenure rights rather than membership. The danger of irritating cross-references, and the uneven use of capital letters are best eradicated.</i></p> <p>Clause 9.1 Households eligible to apply for benefit from the assets, resources and projects of the Association shall comprise of the <u>families whose applications for a settlement grant has been approved by the Department of Land Affairs.</u> The said participating members shall be registered in a membership register as such.</p> <p>Clause 10.4 <u>The head of each household, registered in the Membership Register, has voting rights and therefore is the participating member.</u></p> | <p>4. Membership of the Association</p> <p>The heads of households whose applications for a settlement grant were approved by the Department of Land Affairs are members of the Association.</p> <p>The names of members shall be listed on a membership register to be kept up-to-date by the committee.</p> <p><i>Note that as there is no other sort of member, there is no point in calling a member a “participating member”</i></p> |

Example 2: economy of wording

| The original clause | Simplified version |
|--|---|
| <p><i>Clause 8.1.8 of the original text, under POWERS OF THE MANAGEMENT COMMITTEE, consists of 84 words and reads:</i></p> <p>“To employ staff, agents and other people (either casually, temporarily, permanently or on secondment) to carry out the objects of the Association upon such terms and conditions as they may from time to time consider desirable, and to terminate such employment or agency, and to pay their salaries, fees, commissions, remuneration and other charges out of the Association’s Fund and to confer upon any staff or agents so appointed the right to exercise any discretion which may be vested in the</p> | <p><i>All that is necessary can be done in 3 words:</i></p> <p>10.8 To employ staff.</p> <p><i>Rationale: employment involves job description, remuneration, the power of the employer to dismiss etc, so the embroidery is unnecessary. The clause might just as well have gone on to require application of the Basic Conditions of Employment Act and that the dismissal may not be unfair...! One must assume basic common sense in the people applying the constitution.</i></p> |

Who else will find simplification useful ?

People who have already drafted documents in Legalese, and want to make the change to plain language will find simplification techniques useful. It is of course quicker to write it in plain language the first time.

DLA planners responsible for assessing constitutions or outsiders facilitating planning or mediation processes might be puzzled sometimes as to what a constitution document is saying when it is written in Legalese. Sometimes it is possible simply to return it to the person drafting with a request that it be drafted in plain language. If you decide instead to try to get to grips with the content of constitutions in Legalese, it is useful to gather concepts together in the way we suggest in steps 1-4, especially under headings that are critical for the document to be useful, such as membership and rights.