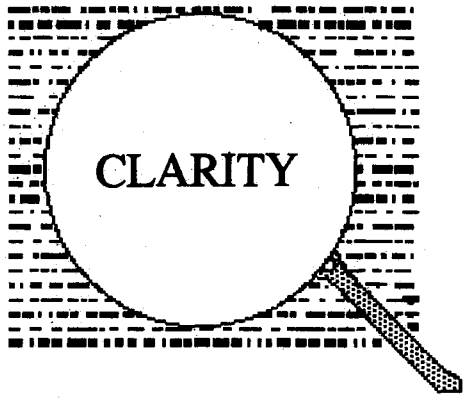

A movement to simplify legal English

Patron: Lord Justice Staughton

No 25: September 1992

INDEX

CHANGE OF ADDRESS

Clarity is now published from

28 Claremont Road, Surbiton, Surrey.

Full details appear on the back page.

Annual supper

Friday, 30th October 1992

The supper and annual meeting is to be held at Chez Gérard, 119 Chancery Lane, London WC2. The main room has been reserved. The restaurant is on the same side as The Law Society's Hall, and slightly nearer to the Strand. At that time on a Friday evening there is no difficulty parking within a 2-minute walk, in Carey Street and the roads betwen it and Lincolns Inn Fields. Meters need not be paid beyond 6.30pm.

We will begin to gather at 6pm and eat at 6.30. There will be a two course meal, with a choice between the carnivorous and the vegetarian. Half a carafe of wine is included in the price. The cost will be about £20 a head inclusive. Those eating will be asked to pay an equal share of the total bill, with CLARITY paying for our guest speaker.

The guest this year is David Lewis, who heads a document design company and is immediate past secretary of the Information Design Association. As a legal group CLARITY has naturally concentrated on words whilst paying little attention to the appearance of documents; the invitation to Mr Lewis is an attempt to redress the balance, and his 10-minute (or so) talk will probably begin at about 8 o'clock, but the timing remains flexible.

Unfortunately, Judge Cook has had to cancel, and he sends his apologies. The Lord Chancellor has posted him temporarily to Leeds.

David Lewis's presentation will be followed by the annual meeting, which will follow its traditional informal format. The agenda appears on page 23.

We expect to finish about 9.30, but can run on if we wish.

The advantages of the new arrangement are:

- A flexible finishing time; and
- The saving of the room and security charges levied by The Law Society.

News

Australia
Robert Eagleson writes ...

Martin Committee recommends Plain English banking to Federal Parliament

In November 1991 the Martin Committee of the Commonwealth Parliament released its report *A Pocket Full of Change.* It recommended that:

> a requirement for plain English documents be incorporated in the code of banking practice. Plain English documents should be produced urgently .... Priority should be given to producing important consumer documents such as the mortgage and guarantee documents.

Parliamentary Inquiry into Commonwealth legislation and legal drafting

The Inquiry is now receiving submissions on the drafting practices of Australian Government agencies, including the Office of Parliamentary Counsel. Among the terms of reference are:

- the need for the Commonwealth Government to ensure that its policies are clear and capable of being simply expressed in writing.
- the need for Commonwealth drafting agencies and drafters within policy development agencies to be aware of the importance of and trained in simple and straightforward drafting.
- the administrative, legal and commercial consequences of inadequately drafted legislation or legal documents.

Plain tax legislation?

The Joint Committee of Public Accounts is holding public hearings as part of its inquiry into the Australian Taxation Office. The Committee has extended its invitations to take up the issue of a plain English rewrite of the Income Tax Assessment Act. It has already taken evidence from a number of private practitioners and the Victorian Law Reform Commission.

Meanwhile New South Wales has instructed its Parliamentary Counsel to review state tax legislation with a view to expressing it in plain English. This will help strengthen the hand of Parliamentary Counsel, who have already endorsed plain English as their preferred style of drafting.

Clearer tax rulings

The Australian Taxation Office has completely recast the form of its rulings.

Where previously the basic structure was

Preamble - Facts - Ruling

it now is

What this ruling is about
The ruling
Date of effect
Explanations
Examples

with the last two sections optional.

The rulings have also been redesigned to improve access to the information.

The initial reaction from both private tax advisors and tax officers has been very favourable.

Clarity of insurance advice under review

The Trades Practices Commission is conducting a program of surveys into consumers' experiences with life insurance and superannuation agents. Part of the survey is "a qualitative program to assess the accuracy, objectivity and comprehensibility of documentation and written and oral advice and information that is provided to consumers".

The Commission plans to report to the Commonwealth Minister for Consumer Affairs by 30th November.

Plain gaming regulations

New South Wales has announced that the regulations covering raffles, bingo, and similar forms of community gaming are to be "remade and updated using plain language".

Plain loan documents

One major building society has

released a plain language mortgage for home buyers. And a major bank has prepared a plain guarantee and indemnity.

Plain tax legislation?

A major industrial concern is in the final stages of rewriting its central industrial award. It expects to achieve significant gains in industrial relations and cost savings in its employee relations divisions once they remove the current version's obscurities and ambiguities, which give rise to conflicts and disputes.

Medicine labelling

The Proprietary Medicine Manufacturers Association has completed a major consumer survey on labelling as a first step in improving the wording and design of labels on medicines. The survey has revealed considerable misunderstanding in the community about the use of medicines as well as difficulty in reading current labels.

The Association has already released a useful leaflet to foster a better understanding of the different blocks of information on labels. The findings are also helping it in negotiations with regulators and certain consumer groups whose requirements in the past have hindered reading.

Publicity

The fairly regular references to plain English, especially by committees with strong public exposure, and the frequent release of plain language documents, are both proving useful allies for those trying to promote clearer and better designed documents in their own organisations, and they are helping to change professional attitudes towards plain English.

Britain

More CLARITY research launched

Following the success of the "client questionnaire" last year, CLARITY has undertaken a second project.

A typical example of legalese - the assignment of a lease - has been translated into three levels of plain language, and all four versions are offered, with a detailed questionnaire, for comment and comparison.

Five hundred copies have been printed. The first batch has been sent to a wide variety of both barristers and solicitors, and we have approached the Lord Chancellors Department for permission to circulate judges. A different version of the questionnaire will be sent to a selection of lay people to compare their perceptions with those attributed to them by the lawyers.

The response rate will affect the number of questionnaires eventually distributed, but it has so far been quite encouraging. As we go to press it is 11 days since we sent the first batch by second-class post, and about 250 have now gone. The first replies arrived by return, and we have had 25 altogether. An interesting pattern is emerging in the replies.

We are very grateful for the help and advice of Lord Griffiths, a Lord of Appeal and chairman of the Lord Chancellor's Advisory Committee on Legal Education and Conduct. He helped test the draft questionnaire and suggested some improvements to it; he has also written a letter which is being circulated as part of the package, endorsing the project and inviting recipients to respond.

Our preliminary findings will be presented to the Plain Language Institute's October conference in Vancouver, at which CLARITY is giving a presentation on this and its earlier research. The final results should be published in *Clarity* 26, due in December, and in the wider press.

Government promotes writing skills in schools

The government has announced plans to improve school standards of spelling and grammar.

A few extra marks are already awarded in GCSE (16-year-old) exams. This is to be extended to the coursework assignments, whose marks count towards the GCSE result.

Over the last 20 or 30 years it has been fashionable to concentrate on the content of children's writing and to treat spelling and grammatical errors as having little or even no significance. This trend is to be reversed.

Statute Law Trust

The Statute Law Trust has been set up as a registered charity whose object is to improve the form and accessibility of legislation. It plans to study and improve statute law, and in particular to found a chair of statute law at Oxford.

The founders believe that this is an undervalued and neglected area of

study, despite its obvious importance and the clear need for reform. In no university in Britain or the Commonwealth does there yet exist a professorship in statute law.

The Trust's Patron is Camridge University Vice-Chancellor Professor Sir David Williams, who opened the Centre for Plain Legal Language in Sydney two years ago. Other trustees include a former first parliamentary counsel, Sir Henry de Waal QC, and two CLARITY members, Francis Bennion and David Elliott. Mr Bennion, who founded the trust, is its secretary and treasurer.

Ireland

Law Reform Commission considers plain language improvements

Cliona Kimber, a research assistant at the Irish Law Reform Commission, is investigating on its behalf the possibility of clarifying statutory and private legal drafting in the Republic.

Ms Kimber recently lunched with several members of CLARITY's committee and she hopes to contact members interested in parliamentary drafting. We have passed her a copy of our submission to the Hansard Society.

She would welcome suggestions, and can be reached at

The Law Reform Commission
Ardilaun Centre
111 St Stephen's Green
Dublin 2
Tel: Ireland (353) Dublin (1) 715699
Fax: 715 316

United States

Legal Writing Institute endorses plain language

At its 1992 conference, the Legal Writing Institute passed Professor Joseph Kimble's resolution in support of plain language. The resolution is set out in full below, and a note about the Institute appears on page 20.

The resolution was originally submitted to the 1990 conference. The Board of Directors then decided that it should be presented to the members through the Institute's newsletter, *The Second Draft*. The October 1991 issue of *The Second Draft* then had six articles on plain English - all generally favourable.

At the 1992 conference, there was a discussion by a panel comprising Professor Kimble of Thomas Cooley Law School in Michigan, Professor George Gopen of Duke University, and Judge Lynn Hughes of the US District Court for the Southern District of Texas. Amongst the audience were Robert Eagleson and Peter Butt, the founding co-directors of the Centre for Plain Legal Language in Sydney; Barbara Child, the director of legal drafting at the University of Florida; Peg James of the Plain Language Project in Vancouver; and Philip Knight of the Plain Language Institute, also in Vancouver.

The vote in favour of the resolution was almost unanimous.

RESOLUTION

At the 1992 Conference of the Legal Writing Institute, which has 900 members worldwide, the participants adopt the following resolution:

1. The way lawyers write has been a source of complaint about lawyers for more than four centuries.
2. The language used by lawyers should agree with the common speech, unless there are reasons for a difference.
3. Legalese is unnecessary and no more precise than plain language.
4. Plain language is an important part of good legal writing.
5. Plain language means language that is clear and readily understandable to the intended readers.
6. To encourage the use of plain language, the Legal Writing Institute should try to identify members who would be willing to work with their bar associations to establish plain language committees like those in Michigan and Texas.

The language of pleadings:
Further and/or in the alternative

We commonly see in pleadings:

1. Allegation A.

2. Further and/or in the alternative, allegation B.

What does this mean?

Further means *and*: that A and B are both true.

In the alternative means *or*, which has two meanings. The first meaning is that either A or B is true, but not both; the second (and more common) is that one or both is true.

So *Further or in the alternative* means *And or or*, which means

Either:

1. A and B are both true

or

2. Only one is true

or

3. One or both of them is true.

But 3 adds nothing to 1 and 2.

This composite statement is correct if at least one of A and B is true.

Would we be saying anything different with *Further and in the alternative*?

This means *And and or*, which means

1. A and B are both true

and

either

2. Only one is true

or

3. One or both of them is true.

1 and 2 are mutually inconsistent, so the composite statement can only be correct if A and B are both true. The disjunctive element is therefore necessarily wrong, and *and in the alternative* adds nothing to *further*.

But do we even need *further*? Suppose we wrote:

1. The defendant was negligent.

2. The defendant broke his contract.

What would the outcome be if we proved only the negligence? Judgment would be entered for our plaintiff client, with damages for negligence, but there would be no damages for breach of contract.

If it makes no difference whether we plead *and* or *or* or neither of them, why make life so convoluted with the illogical *And or or*, or its polysyllabic equivalent *Further or in the alternative*? The only reason is to show that we are moving from one part of the claim to another, but that is best done by headings, as in the example below.

I hope to look at the cases on* and/or *in the next issue. - Ed

Example

Breach of contract

1A [Quote contract]
1B [Quote breach]

2A [Quote another part of contract]
2B [Quote breach of that part]

Negligence

3A [Quote duty]
3B [Quote breach]

From the committee

Journal

About 6 years ago a professional publisher expressed interest in taking over *Clarity* as a quarterly journal, but it came to nothing.

Richard Castle has suggested that we approach another publisher and try again.

We are putting out feelers, but suggestions would be welcome.

Banner

CLARITY's exhibition stands have lacked any means of identifying us in the past.

We now have a 6' canvas banner with our logo, *A movement to simplify legal English,* and the name of our patron, much as they appear at the top of page 1.

Poster

A draft poster appears for discussion on pages 12 and 13.

Subject to any amendments members suggest, we plan to print it and make it available free of charge to members. It will also be available for non-members at either a nominal or no charge.

Workbook

We are preparing a drafting workbook which we hope will be of interest to the College of Law.

CLARITY's description

We have been trying unsuccessfully to think of an improvement for *a movement to simplify legal English.* One possibility appears at the top of the poster on p.6, but we are not enthusiastic about it. Any suggestions?

CLARITY's 10th anniversary

Our 10th anniversary falls in 1993 and we plan a social event to mark it, with an article in the legal press and as much publicity as we can muster.

Drafting Tips

1: Use paragraphs as a guide to meaning

The first of a regular series

1. *Add headings.*
2. *Delete words which add nothing to the sense, and trim wordy phrases.*
3. *Rearrange what is left into a more natural order.*
4. *Change any unnecessary passives to active verbs.*
5. *Add punctuation.*

Version A below is taken from the 1971 edition of Brighouse's Short Forms of Wills.

Version B appeared in* Clarity *24, with the original broken down into paragraphs. It is not reprinted here.

Version C opposite shows version B with the avoidable words crossed out and with words which might be needed (according to the testator's circumstances) in outline.

VERSION A

I give to my eldest son Arthur the goodwill of my trade or business of mechanical engineer and the stock-in-trade machinery plant and effects employed therein or belonging thereto together with the lease of the messuage or tenement shop factory and buildings situate at 146 Bishopsgate London EC2 in which the said business is carried on or used for the purposes thereof and the benefit of all contracts subsisting in respect of the said business and all book debts and moneys due to me in respect thereof or standing to the credit of my business account at my bankers at my death my said son discharging and indemnifying my general estate from all debts and liabilities due or subsisting in respect of the said business at my death and if required by my Trustees entering into a bond or covenant at the expense of my general estate in that behalf AND I APPOINT my said son executor of this my will as to the said business and premises hereinbefore bequeathed to him AND I DIRECT that the estate duty and expenses of taking out the limited probate in respect thereof shall be borne by him.

Notes to version C

[1] *Eldest* would only be necessary if the testator had more than one son called Arthur.

[2] If Arthur is to be referred to several times, he might be defined at the beginning: "*Arthur*" *is my son Arthur Bradpiece of 13 Mill Lane, Bradford.* Then we need not keep referring to him as *my son Arthur* or even *my said son Arthur.*

[3] Similarly, we need only specify the nature of the business if the testator had another with which it might be confused. But I would be inclined to leave it in, in case someone argued about a sideline.

[4] *The word* business *in such a context as this has much the same meaning as when it is said that a man has sold his business.* Simonds J in *re Rhagg: Easten v. Boyd* (1938 Ch 828, at 835). In that case a

VERSION C

Gift of business to Arthur

1. I give ~~to~~ my ~~eldest~~ son Arthur [1,2]:

   (a) ~~the goodwill of~~ my ~~trade or~~ *mechanical engineering* [3] business ~~of mechanical engineer and~~ ;

   ~~(b) the stock-in-trade machinery plant and effects employed therein or belonging thereto together with~~ [4]

   (c) the lease of ~~the messuage or tenement shop factory and buildings situate at~~ 146 Bishopsgate London EC2 in which the ~~said~~ business is carried on [5] ~~or used for the purposes thereof and~~ ;

   (d) the benefit of all contracts ~~subsisting in respect of~~ *relating to* the ~~said~~ business [6] ; and

   (e) all ~~book~~ debts ~~and moneys~~ due to me ~~in respect thereof or standing to the credit of my business account at my bankers at my death~~ *through the business* [6].

2. I APPOINT ~~my said son~~ *Arthur my* executor ~~of this my will as to~~ *for* the ~~said~~ business and *the Bishopsgate* premises ~~hereinbefore bequeathed to him AND~~ .

~~3.~~ ~~My said son~~ *Arthur must* :

   (a) ~~discharge and indemnify my general estate from~~ *satisfy* all ~~debts and~~ liabilities ~~due or subsisting in respect~~ of the ~~said~~ business at my death [6] ~~and~~ ;

   (b) if required by my Trustees enter into a bond or covenant at the expense of my general estate ~~in that behalf~~ *to that end* ~~AND~~ ; *and*

   (c) ~~I DIRECT that~~ *bear* the estate duty and expenses of taking out the limited probate ~~in respect thereof shall be borne by him~~ .

---

solicitor had left *my business as a solicitor,* expressly including office furniture, law books, *and other articles in the office.* The judge decided on the facts not to apply the rule *expressio unius exclusio alterius,* and held that all the business assets, including the premises, goodwill, undrawn profits, and capital passed with the gift. Other beneficiaries might not be so lucky in escaping the *expressio* rule, by which a list of particulars undermines general words to exclude items substantially different from those listed.

[5] A bequest of a business does not include the freehold shop in which it is carried on. - *Re Henton* (30 WR 702). But a bequest *of my business ... at 85 Murray Street, Montrose* included the heritable property at which the business was carried on. The optional wording in this clause of version C would stop the gift of the lease if the testator began to use the premises for other purposes.

[6] This clause is probably not necessary: *business* normally includes its liabilites (*re Rhagg* cited in note 4.)

Using plain English in statutes

by David Elliott

CLARITY's submission to the Hansard Society for Parliamentary Government

This original covers some 55 pages of A4 and will be serialised over the coming issues

CONTENTS

THIS ISSUE

(on the following pages):

Introduction

and

Part 1

INTRODUCTION

A fundamental reappraisal of drafting approach?

A fundamental change?

At the outset of the submission we raise the question of whether there should be a fundamental change in the way in which legislation is drafted in the United Kingdom.

In 1974 Lord Denning spoke of Community law as an incoming tide flowing into our rivers and estuaries. It might now be regarded as a tsunami. But Community law is here to stay. It will have an increasingly pervasive effect on UK domestic law. We raise this question: instead of continuing to write law in a typical Anglo-saxon style should we not give careful thought to revolutionizing our style of writing to mould it along the best of continental lines? Can we afford not to do so?

Lord Diplock has pointed out that English judges, up to the last 20 years or so, may have been largely to blame for

> **the traditional and widely ciriticised style of legislative drafting ... familiar to English judges during the present century and for which their own narrow semantic approach to statutory interpretation ... may have been largely to blame.**
>
> *Fothergill v. Monarch Airlines (1981 AC at 220)*

Purposive approach to drafting and interpreting legislation

Although the shift in statutory interpretation to a purposive approach is clear, there seems to be a reluctance by Parliament (or is it Parliamentary Counsel?) to enact or write law which facilitates that method of interpretation. The purposive approach to statutory interpretation is inhibited without legislation drafted in a way that takes account of and encourages that approach.

There is a considerable weight of authority in support of a purposive approach to drafting legislation. The Renton Committee encouraged the use of purpose sections in statutes, and Sir William Dale has been a leading proponent of that approach. Yet while the UK has moved towards increasingly closer ties with Europe it has seemingly not given considered attention to the interaction of domestic and Community law at the drafting level. That responsibility has remained with the Parliamentary Counsel Office; and that Office has traditionally opposed the continental drafting style.

There are good arguments for and against the continental style of drafting [1]. But the factor becoming more and more important, and the one that may in the end overwhelm the discussion, is that the UK is a member of the European Community governed by languages and drafted in a style that is not solely English. In the face of that reality we may be forced to rethink our legislative drafting style. In short it means Parliament must trust its judges. It means also that the link between drafting and interpretation - and interpretation and drafting - must be given greater recognition. In a sense it means a new form of partnership between Parliament and the judiciary.

U.K. membership in the European Community

The UK cannot ignore the fact that Community law, drafted in a dramatically different fashion and with quite different rules of interpretation, will play an increasing role in our lives. We face a great danger that our domestic law, and the way we write it, may have less and less of an impact if we do not change. UK domestic law may well become relegated to the status of local government bylaws treated as a curious quirk of the Anglo-Saxon. The judiciary have sent out some clear messages in the past decade - if drafters do not respond (or if the Government does not direct them to do so) the judiciary may hasten the relegation of UK domestic law to antiquity. The fact that the judiciary must apply continental methods of interpretation in cases involving international and community law may well cement judicial thinking.

CLARITY's suggestion

Are these over-stated concerns? Perhaps. But it is worth considering a comprehensive re-examination of UK drafting style in light of our membership in the European Community [2]. The UK is undoubtedly able to contribute to the expression of the law in the Community - but if we maintain our present drafting style we may never be able to do so fully.

From time to time we return to elements of the theme of continental drafting but the remainder of our comments are focused on present drafting style and practice and what might be done to improve it without making fundamental changes.

PART 1

Attitude and education and how to get them

The Renton Comittee[3] said that little could be done to improve the quality of legislation

> **unless those concerned in**

the process are willing to modify some of their most cherished habits.

A habit comes from attitude. The single most important element in using plain language in statutes is the attitude of the drafter.

The drafter's attitude

If drafters have an attitude to drafting that puts the ultimate readers' interests ahead of all others, an immense problem is overcome. The issue then becomes not whether to use plain English, but what steps can be taken to make difficult concepts, or complex sections, easier to understand. Energies are concentrated in that direction rather than endless and wasteful discussions about whether "plain English" should or should not be used.

How to get or encourage the right attitude

Creating and maintaining the right attitude to drafting needs attention at three levels:

- ***the institutional level***

  A Government-wide commitment is needed to use plain English in all forms of legislation[4]. This not only gives an overall policy direction to drafters, but also

  - encourages drafters to use innovative drafting ideas when instructing departments may oppose them. Drafters can rely on the Government-wide policy to justify innovations that otherwise might be rejected
  - a Government-wide policy guides and directs drafters to that goal
  - a Government-wide policy is also something that can be used as an audit or check by others to see whether the product, the legislation, is in fact written clearly. The policy gives a measuring stick for commentators.

- ***Reinforcement at the Ministerial level***

  There are many government policies which, if not reinforced by an active Minister, have only lip service paid to them. Ministers of the Crown should actively encourage, support, and audit plain English efforts within their respective Departments. This would be seen as a further refinement and support for a Government-wide initiative.

  It should also go without saying that controversial provisions should not be concealed by obscure drafting to ease their passage.

- ***Parliamentary Counsel Office***

  As a unique office within Government and with unique responsibilities, the Parliamentary Counsel Office should have its own plain English drafting policies.

  The plain English policy for the Parliamentary Counsel Office could include a drafting manual to give specific guidance and encouragement to drafters when considering different drafting approaches to problems. There are many drafting manuals around - one that is particularly directed to clear communication was described by Ian Turnbull, the Chief Parliamentary Counsel for the Australian Federal Government, in a recent article in the Statute Law Review.

We see a drafting manual as both a guide and incentive to Parliamentary Counsel, with its prime focus - clear communication. Improvement in drafting is a continuing process and we see some advantage to a permanent committee of both Houses of Parliament having some role in both raising issues about and commenting on drafting style, and in learning from Parliamentary Counsel some of their difficulties. The independence of the Office might then be better tailored to meet the needs of the user.

Education

Most Parliamentary Counsel, both in the United Kingdom and overseas, learn on the job. There are very few drafting courses for Parliamentary Counsel and those that do exist have no particular focus on clear communication. At present, knowledge of drafting techniques and approaches tends to be handed down from one senior Parliamentary Counsel to a more junior one. The training, such as it is, is incestuous. Unless a drafter is particularly innovative, it is difficult for new ideas to emerge and to develop.

Any kind of drafting course which encourages clear communication, and shows techniques to achieve it, is worthwhile for Parliamentary Counsel. But courses should be designed to help Parliamentary Counsel with specific legislative drafting problems. Developing a drafting course is a project that should be a co-operative one, combining the skills of Parliamentary Counsel with communicators and writers. Once focused on a non-threatening project, like developing a drafting course, significant progress would be made in creating useful course material and content for a drafting manual for all law writers.[5]

But much more needs to be done. Parliamentary Counsel should be aware of research that has been conducted about what helps people understand written text and what hinders comprehension. With that knowledge new ideas and techniques can be developed both internally and with the aid of outside experts. Links between the Parliamentary Counsel Office and universities having an

interest in the area could provide a valuable exchange of information resulting in an improvement in the quality and drafting of legislation.[6]

Parliamentary Counsel should become more aware of the difficulties people have in understanding legislation. Not just an awareness of general complaints, but the particular reasons - *why* legislation is often difficult to understand. Once the difficulties are understood, drafters may take more active steps to improve the product of their work. There are often many ways to achieve a particular result - if the drafter gives priority to the way which will be best understood by the ultimate reader, a significant improvement in drafting would result.

Some awareness of difficulties can be shown by testing readers' comprehension of legislation and the difficulties they encounter. Video-taping lawyers and lay readers as they struggle through a particular section of legislation would be a fascinating peak into how much time is wasted by legalese, and how much time can be saved by clear writing.

Concepts of good organization of texts that help the reader from one point to another will put a new perspective on organizing legislation (both the overall organization of an Act and the internal organization of sections).

There has been considerable debate in legislative drafting circles in the last few years over what is commonly called the "common-law style" and the "civil-law style" of drafting. Unfortunately, the debate comes down to which is "best". Instead of asking that question, for which there can never be a complete answer, it would be more helpful if the debate focused on when it is more appropriate to use one style rather than the other; then to learn the techniques appropriate for each style and the difficulties and advantages associated with each.

All this should be built into drafting courses and seminars for those involved in drafting legislation

Other thoughts on stimulating ideas about writing legislation

(1) Improving legal writing generally

The key to improving legal writing is:

- to turn ideas about communication into suggestions lawyers can use when they write; and
- to teach lawyers and those entering the profession how to write (especially that legal writing does not have to be turgid, complex, and dull).

(2) Specific suggestions

With the aim of improving legal writing in mind, we should:

(1) encourage more drafting courses and support initiatives to create them;

(2) use other professions and disciplines in the design and teaching of drafting courses;

(3) encourage and support research into how readers try to understand legislation and adopt practices which help readers;

(4) distribute information about writing - whether by a newsletter, regular seminars, or a network of contacts - *Clarity* is now internationally welcomed as providing a useful forum for doing this;

(5) establish exchanges of people and information about writing (for example, between Commonwealth legislative counsel offices, law reform commissions, universities, and the practising bar);

(6) give opportunities to lawyers on sabbaticals to undertake writing or writing research projects, including legislation;

(7) establish joint projects between university faculties, and with universities and others relating to teaching writing or writing research, and engaging in comparative studies of drafting techniques and related matters;

(8) encourage the establishment of bursaries and scholarships related to drafting;

(9) encourage a multidisciplinary approach to improving the expression of the law;

(10) write to a lay audience, not the judiciary, without losing legal certainty.

Quality control

How can quality control be maintained over legislative drafting? Here are some suggestions:

(a) a style guide

Particularly in an office of more than 2 or 3 people it is helpful to have a consistent style. It helps if drafters can agree on certain conventions and develop a style guide which they follow in day-to-day writing. Many legislative counsel offices have drafting style guides but not, as we understand it, the Parliamentary Counsel Office.

(b) editors

Several legislative counsel offices overseas use editors to check on grammar and consistency of drafting. An increasing use is being made of them and English and linguistic experts. Is there room for such expertise in the Parliamentary Counsel Office?

Continued on page 13 »»

CLARITY poster: Outline guide to good writing

This is a reproduction of the draft approved by the committee.
Comments are invited before 13th October.

The original is on a single sheet of paper approximately 70 x 46 cm

The CLARITY logo and the title appear at the top, and publication details are boxed in the bottom right-hand corner.

It is set in Times, using 24pt for the headings, 18 pt for the text, and18 pt bold for the sub-headings.
(The heading of this page is 18pt Times.)

Layout

Use short lines

Use plenty of white space around the margins and between paragraphs and sub-paragraphs.

Use headings and sub-headings to show how your document is organised.

Typography

Use typography as a guide to meaning, and to make your document easy on the eye.

If you can, use:

- different styles and sizes of type.
- plain, bold, and italic typefaces.

Use capitals only for the first letter of a sentence or a proper name:

- Don't capitalise common nouns.
- Avoid the "telex" style, which uses only capitals. Research shows that lower-case print is easier to read, because the reader uses the shape of the words as an aid.

Indent sub-paragraphs.

Be consistent. If you are, the typography will work with the headings to show how your document is organised. If you are not consistent, you will confuse your readers.

Organisation

Consider your reader.

Make your points in a sensible order. Don't jump from one subject to another and back again.

Repetition

Avoid repetition by:

- Organising your document efficiently.
- Defining terms.
- Using lead-in lines (as has been done here to avoid repeating *Avoid repetition by* before each point).
- Using pronouns (if they are unambiguous).
- Using synonyms (in informal documents only).

Definitions

Put definitions where they can be found, preferably at the beginning.

Use words in their normal sense unless there is good reason not to.

Don't define words used in their normal sense, unless they are ambiguous.

Use short, convenient names, not wordy ones.

If "the context does not permit" the definition, don't use the defined term.

Cross-reference

Avoid cross-reference by keeping related points together.

How much to say

Make your text as short as you can without losing meaning and without making your message sound brusque. But remember that clarity is more important than brevity.

Make your document as long as it need be, but keep each paragraph and sentence digestibly short.

Paragraph length

Don't ramble: each paragraph should deal with only one main point. Different sentences within the paragraph can expand on that point. If this sentence had been about punctuation it should have been in the next column.

Sub-paragraphs

If you want to make a series of points arising out of the main point of a paragraph, use sub-paragraphs.

Sentence length

Sentence length should vary, averaging about 15 or 20 words. No sentence should be longer than 40 words.

Sentence structure

Keep the subject, verb, and object together, and near the beginning of the sentence. Until readers know what you are talking about, they cannot begin to follow your argument.

Use active verbs unless there is good reason for a passive.

Write positively unless there is good reason for a negative. (Don't use a negative formulation [like this] if it is not better than the positive version.)

Use the present tense in formal documents.

Avoid:

- *shall*, which can mean *must* or *will*.
- inappropriate conditionals (*I would argue*).
- complex auxiliary verbs (*shall have been appointed*).
- phony reflexives (*I will write to yourselves*).

Do not embed clauses within clauses. This pointless habit is the greatest single source of difficulty in reading lawyers' prose. Put all the detail you want into your document, but not all in one breath.

Use the same grammatical form for each item in a list.

Word choice

Don't use a complex, foreign, or unusual word when a simple, English, or familiar one will do. (Most unfamiliar words in legal documents have no technical meaning, and can easily be avoided.)

If you do need to use a technical expression when writing for a lay audience, explain it.

Cut out unnecessary words and phrases ("I enclose *herewith*"; "Give, *devise and bequeath*"; "*Insofar as* __ *is concerned*").

Use concrete expressions rather than vague ones (*at least 3* instead of *some*).

Avoid clichés.

Punctuation

Always punctuate.

Do it with the same care and precision as you use words.

> **Punctuation is a rational part of English composition, and is sometimes quite significantly employed. I see no reason for depriving legal documents of such significance as attaches to punctuation in other writings.**
>
> Lord Shaw in
> *Houston v. Burns* (1918 AC 337)

»» Continued from page 11

Computer software will give drafts a "score" which gives some indication of how easy, or difficult, they are to read.

(d) peer review

The comments of colleagues are invaluable. One suggestion made in a Working Group Study to the Law Reform Commission of Canada called *Drafting Laws in French* (1979) could establish a consistent review process and direct the writer and reviewer to important issues in reviewing drafts. The Study suggested a "review control sheet" containing a checklist of issues of substance and drafting designed to maintain drafting quality.

The Law Society's *Make A Will Week*

The publicity for the 1992 promotion pays less attention to plain English than I seem to remember from last year, and the following misleading information appears on an otherwise informative handout:

Why is legal language needed?

People have been leaving property by will - and arguing over wills - for hundreds of years. Some words and phrases have come to have widely accepted legal meanings which can be slightly different from their everyday sense. For example, "personal property" can mean more than just one's own possessions. So frequently solicitors have to use the accepted legal wording, even though this may seem obscure or unattractive. There is a movement to simplify legal language, however, and more firms are using plain English where possible. Be sure to ask for an explanation if anything is not clear to you, whatever the cause.

This is a disappointing apology for the linguistic murder routinely perpetrated by illiterate solicitors on their bamboozled clients. It is always possible to use plain language if the writer has the patience to make the meaning clear; and it is always practicable to use much plainer language than most lawyers believe. Doubters should send a short piece of "impossible" text to CLARITY for translation.

Book reviews

Making Sense of
English in the Law

by Martin Cutts
Chambers: £5.99
Edinburgh and New York 1992
Paperback:247 + viii pp

This is a law dictionnary for the consumer.

It is written by a member of CLARITY who, though not a lawyer himself, has been campaigning effectively for clear legal expression since before CLARITY was formed. He founded the Plain English Campaign with Chrissie Maher in 1979, but has since branched out on his own. He has shared the credit for substantial improvements in the language of government and big business.

Against this background, I was disappointed by his book.

It claims to reflect the law of England and Wales as it stood in October 1991, but in the following paragraph acknowledges only two sources of help: one checking Scots law and one checking EC law. It would be rash for anyone to write a textbook without having his draft checked by a specialist, and it is extremely odd that a layman should do so. Nor has the manuscript been properly edited.

It is not surprising that mistakes abound, and I am sorry to say that I very quickly lost confidence in the work.

Some statements are just plain wrong. For example, in the explanation of joint tenancy and tenancy in common, Mr Cutts gives misleading legal advice:

> **A couple planning to buy a property together, whether they are married or not, should consider carefully which kind of agreement they want. If there is no agreement, joint tenancy will be assumed.**

Some "definitions" are not definitions at all, but inappropriate flippant remarks. For instance:

> **Miscarriage of justice**
>
> A judicial cock-up.
>
> See **sorry.**
>
> **Sorry**
>
> An expression of regret rarely employed by the judiciary even after the most ghastly miscarriages of justice.

The book is altogether too casual. So we have:

> **Title deeds**
>
> See **land certificate.**

This suggests, with staggering inaccuracy, that all title deeds are land certificates. And then there is no entry for **land certificate**, although a description is buried (badly punctuated) in the definition of **Land Registry**:

> The certificate is in three parts:
>
> 1 the property register which gives a plan of the land, describes the land and states any **rights of way** over adjoining land;
>
> 2 the proprietorship register which names the owners and says what kind of title they hold in it;
>
> 3 the charges register which states any **land charges**.

Statements 1 and 3 are wrong, and the entry elsewhere for **land charge** is garbled.

There is a market for this book, and there is no reason why Mr Cutts should not have written it. But the publishers should have removed these errors before it went to press. I hope there is a second edition, and that it is properly checked.

M.A.

Martin Cutts replies:

All books make mistakes, so I suppose what matters is how many there are and how important they are. You, for example, imagine in *Clarity for Lawyers* that there exists a passive tense, which is bunkum, but I wouldn't expect a linguist to condemn the book for such reasons.

As to the review itself:

1. The book is not a textbook.
2. What is your evidence for saying the book is not properly edited?
3. The book does not purport to contain merely or only definitions, so I don't understand your point about "Miscarriage of Justice". Since the book went to press, several judges have apologised, which is heartening.
4. The entry for title deeds does not suggest that they are the same as land certificates. It was meant to get people to the Land Registry entry where I say something about title deeds. The cross-reference is wrong, but in a book of 750 entries and 4,000 cross-references, a few referencing blunders are likely, especially in a first edition.
5. You say the land certificate punctuation is bad, but give no evidence.
6. You say I have misdescribed the land certificate, and I'll have to check that. But the Oxford Concise Dictionary of Law (1990) says something very similar. As it does for the Land Charge entry which you claim is garbled (evidence?).

I stand by my criticism, but readers can buy the book and make up their own minds. - Ed.

Mightier than the Sword

by C. Edward Good
Blue Jeans Press 1992
LEL Enterprises, PO Box 5628,
Charlottesville, Virginia 22905
Paperback
Legal ed 239 + ix pp, $12.95 + $3 p/p
Reguar ed 152 + xx pp, $7.95 + $2

There are two versions of this book: one is for lawyers, the other for everyone else. They are identical except for the examples and for additional chapters dealing with legal drafting in the first version.

Mr Good has taught legal writing for most of the 21 years since he took his law degree. Since 1980, shortly after a year researching for the US Supreme Court, he has been presenting seminars and programs in persuasive writing. This book distills his experience.

Mightier than the Sword is more technical than its rivals, with detailed grammatical exposition which I found too difficult for comfortable reading. I do not suppose I am the only reader to have skimmed these sections, and the book as a whole supports the busy lawyer's objection that plain language writing is too difficult. For instance:

> **In the chapter on nouniness, you learned that nouns must be glued to sentences by verbs or prepositions. If glued by verbs, nouns serve as subjects or objects of main verbs or verbals. The other major way to glue nouns onto sentences is by the preposition. Looked at in this way - as one of the primary noun-attachers - the preposition readily finds its own definition:**
>
> A preposition is a word used to link a noun or noun form to a sentence and to show the relationship the noun bears to another noun or to a verb.
>
> **From the definition of a preposition, we can glean the definition of a prepositional phrase:**
>
> A prepositional phrase consists of a preposition and a noun or noun form acting as the object of a preposition.

My reaction, before my brain glazed over, was that nouns were *part* of sentences, not "glued" to them. Be that as it may, is it necessary to get to grips with all this to write well? And should not a book promoting plain language (although I do not think that expression is used) be plain itself?

The heaviness is erratically and ineffectively camouflaged by folksy banter, which I found mildly irritating.

There are plenty of good-writing tips, but they are more accessible in other books, notably Richard Wydick's classic *Plain English for Lawyers.* Edward Good's work seems to be aimed at more serious students, and I leave it to them to judge its success at that level.

M.A.

Edward Good replies:

Thank you for giving me the opportunity to comment on your review. I can only say that yours is the first unfavourable review of either edition. A sampling (there are more) of the other reviews appears below:

The Hon David Nelson, US Circuit Judge:

> You can open *Sword,* like Dr Johnson's dictionary, to almost any page and read with both pleasure and profit what is found there. What you will find, among other things, is a good explanation of how grammar can help you straighten out writing that isn't ungramm-atical, exactly, but that lacks grace, clarity, and style.

Journal of the Delaware Bar Association:

> Good provides a series of clear analytic tools for determining why prose intended to be eloquent and persuasive so often turns out flabby and downright disagreeable to read.

Prof Charles Whitbread, USC Law Center:

> *Mightier than the Sword* is a first rate work. It teaches you exactly how to improve your writing in law school and beyond.

Washington State Bar News:

> Good packages his rules in an engaging narrative style, with examples easy to remember. It's the sort of book you can remember without having to think about it much.

Again, I leave it to readers to make up their own minds.

Drafting Legal Documents

Principles and Practices

(2nd ed) by Barbara Child
West Publishing Co, 1992
Paperback: 432 + xviii pp

This is a substantial book, which I have not yet finished reading. A review will appear in the next issue.

A Practitioner's Guide to Wills

by Merryl Thomas

Our review in Clarity 24 strongly criticised the language of the precedents but was otherwise favourable.

Richard Oerton has reviewed this book more critically for a forthcoming issue of the New Law Journal..

The 1992 Legaldegook Awards

Plain-Language Committee, State Bar of Texas

Received from Bryan A. Garner, who chairs the committee and the legaldegook subcommittee

The She-Sells-Seashells Award

For Lilting Legislative Alliteration

Shucking of Shellfish — Shellfish shall not be subjected to contamination while being held or processed. Shellstock to be shucked shall be stored ... in such locations that contamination from standing water or splash from foot traffic does not occur .... Only safe and wholesome shellfish shall be shucked.

25 Tex. Admin. Code § 241.69 (a)(1), (a)(3) (1992 Supp.)

In bestowing this award, the Legaldegook Subcommittee noted that a predecessor regulation, now repealed, showered even more esses in defining classes of reshippers:

Reshippers — Persons who transship shucked shellfish in original containers, or shellstock, from certified shellfish shippers ....

25 Tex. Admin. Code § 241.21 (repealed)

The Uninviting Invitations Award

For the Invitation Least Likely to Be Accepted Gleefully

Pursuant to the aforesaid, I would now sincerely request that you consider the within correspondence as a formal invitation to make an appearance so as to advise of your expertise and the various day to day procedures involving same. In addition to the aforesaid, we might have numerous other attendees. Accordingly, I would now respectfully request your consideration with respect to an appearance and ask that your assistant establish contact with my office so that arrangements can be made at a time convenient with your schedule. I now thank you for your sincere attention to the above and shall await your response as relevant to the same.

The Typographic Award

For the Accidental Pun Gone Most Awry

The winner is a pleading filed in federal district court by a Texas lawyer. It begins, "To the Horable U.S. District Judge."

The Foggy Footnote Award

For the Footnote That Must Have Shed the Least Light in a Brief

Non-contingent, conceptual, semantic connectedness is an absolutely necessary condition for sameness of meaning. If two terms mean the same thing, then normal language users find themselves inclined to perceive a necessary, conceptual, unbreakable connection between the two things. *Frequent correlations* are insufficient to prove connections of *meaning*. (It might be worth noting, that conceptual connectedness is not a sufficient condition for sameness of meaning. Abstruse connections and mathematics may be necessary and conceptual, but they need not involve connections in *meaning*.)

The Cascading Sentence Award

For the Sentence That Most Resembles Niagara Falls

The Defendant specially excepts to said allegations for the reason that there is no allegation as to what deceptions and false representations in Defendant's report that the Plaintiff is complaining about and for the reason that allegations seem to be saying that the Defendant "induced" the Bank to deny Plaintiff's request for a loan of $100,000.00 and in that connection it is difficult to understand how this Defendant could in fact "induce" the Bank to deny the Plaintiff's loan for the reason that the Defendant obviously had nothing to do with the Bank's denial of the loan of $100,000.00 as such decision would have been based upon whatever information the Bank had in its file in denying such loan or renewal of such loan and that this Defendant as a matter of law could not be liable for the Bank's denial of Plaintiff's request for a loan of $100,000.00 or for the damages actually sustained in the sum of $100,000.00 which the Plaintiff claims he sustained of which special exception the Defendant prays judgment of this Court.

The Save-the Period Award

For a Page of Legal Drafting in Which Only One Period Appears

NOW, IN CONSIDERATION OF THE PREMISES, and the mutual covenants heretofore recited to be kept and performed by the respective parties hereto, and for value received, and for other good and valuable consideration, the undersigned, as Assignor, assigns and transfers unto CH, and CH, Professional Corporation, with its principal offices located in the City of Tuscaloosa, as Assignee, its legal representatives, his use and benefit, any and all cause or causes of action of whatsoever kind or nature, claims, right, title or interest, rights to pursue any claims against and to recover any and all sums of money, products in kind, or other properties, now due and owing to me, together with any and all claims, demands, including the seeking of judicial declaratory judgment rulings that existing leases are of no force and effect and clearing any clouds on my mineral title and title to my executive rights that I now have, or may have against AB and/or PQ, and any other person or person, whether jointly or severally, arising out of, or for, any loss, injury or damage sustained by me in connection with those wells that are presently located on that certain 160 acre tract which is described in Exhibit "A", said Exhibit "A" being attached hereto and incorporated herein by reference for all purposes herein, on which there is presently located, the Apple Unit Number One and the Orange Unit Number Two, said lease being made the subject of an assignment from AB to PQ on January 15, 1990, which was effective according to the assignment and Bill of Sale, on January 15, 1990, now believed to be operated by PQ because of the breach of duties by the said PQ, and AB and others due to fraud, misrepresentation, cloud on my title and any and all other wrongful acts in any fashion which serves to interfere with any mineral ownership or executive rights or limit my right to enter into new oil, gas, and mineral leases with respect to the property made the subject and described on Exhibit "A", and in consideration of the premises, FC, as Assignor, assigns and sets over unto CH, and CH, Professional Corporation, as Assignee as follows:

> An undivided FOUR-FIFTHS (4/5) out of FIVE-FIFTHS (5/5) of TWENTY-FIVE (25%) percent interest in and to the minerals, royalty, bonuses, or other cash consideration paid in settlement or collected through Judgment of all monies, bonuses, cash considerations, or royalties recovered from, or incident to the ownership by Assignor of the minerals attributable to the executive rights which he owns with respect to that certain 160 acres of land, more or less, as described on Exhibit "A", said Exhibit "A" being attached hereto and incorporated by reference for all purposes herein.

The Herculean Headnote Award

For the Case-Note That Takes on 12 Labors (at Least)

Even if attorney's initial representation of both vendors and purchaser was not a conflict of interest, attorney had absolute duty at meeting with vendors when extension of subdivision contingency was discussed to advise vendors of existence of agreement under which purchaser was assigning the purchase agreement, in that the purchaser needed more time to obtain subdivision approval in order to keep assignment agreement alive and obtain approximately $1.6 million profit if that agreement was consummated, thus it was in purchaser's best interest that attorney not disclose agreement to vendors since the disclosure would have induced vendors not to grant extension, but it was in vendors' best interest that attorney disclose existence of the agreement, since disclosure would have confirmed their belief that value of property had escalated and they were better off refusing extension and seeking another buyer in open market.

The Groaning Tree Award

For a Whopping Waste of Paper

This award went to one entirely unnecessary (because it paraphrased what was said on a neighbouring page) 488-word sentence from the preamble to Title 31, Natural Resources and Conservation [!] Regulations, Texas Water Commission, published November 1, 1991. It is too long to reproduce here, as it covered the rest of this page and half the next one.

Late news

Plain Language Institute seeks extension

Phil Knight writes:

The last two years have been an exciting time of realizing the many activities planned in our first year. We have learned more and more about how to bring the language people use closer to the meaning they want to communicate. We have worked with a widening circle of people involved in different aspects

Continued on page 18 »»

Kimble's research into American judicial attitudes

We have referred in the past to research into US judicial attitudes to plain English [Clarity 20 (4/1991) p.3 and 24 (6/1992) p.11].

The results have been consistent in states as diverse as Michigan, Florida, Louisiana, Texas, and California. In each state, some 85% of judges preferred the plain language version, and considered it more professional.

Our thanks to Professor Joseph Kimble of Thomas Cooley Law School, Michigan, who pioneered the research, for sending the texts which the judges were asked to compare.

In the original, the plain language version did not always come second, and it was not differentiated by the typography.

Now comes the above named John Smith, plaintiff herein, by and through Darrow & Holmes, his attorneys of record, and shows unto this Honourable Court as follows:

For his complaint, the plaintiff says:

Maker(s) hereby acknowledge receipt of a completely filled in copy of this note and disclosure statement prior to execution hereof this ___ day of ____ , 19 __.

I received a completed copy of this note and disclosure statement before I signed the note.

_____ Date _____

Petitioner's argument that exclusion of the press from the trial and subsequent suppression of the trial transcripts is, in effect, a prior restraint is contrary to the facts.

Petitioner argued that it is a prior restraint to exclude the press from the trial and later suppress the trial transcripts. This argument is contrary to the facts.

One test that is helpful in determining whether or not a person is negligent is to ask and answer whether or not, if a person of ordinary prudence had been in the same situation and possessed of the same knowledge, he would have foreseen or anticipated that someone might have been injured by or as a result of his action or inaction. If such a result from certain conduct would be foreseeable by a person of ordinary prudence with like knowledge and in like situation, and if the conduct reasonably could be avoidable, then not to avoid it would be negligence.

To decide whether the defendant was negligent, there is a test you can use. Consider how a reasonably careful person would have acted in the same situation. To find the defendant negligent, you would have to answer *yes* to the following two questions:

1) Would a reasonably careful person have realized in advance that someone might be injured by the defendant's conduct?

2) Could a reasonably careful person have avoided behaving as defendant did?

If your answers to both these questions is "yes", then the defendant was negligent. You can use the same test in deciding whether the plaintiff was negligent.

Payment of benefits will not be made by the company if the insured fails to provide notification of the loss.

The company will pay benefits only if the insured notifies the company of the loss.

Interested attorneys may, on or before Feb. 20, 1987, submit to the Clerk, 233 Main St., Gotham City, written comments regarding the proposed change in court procedures.

If attorneys want to comment on the proposed change in court procedures, they may send comments in writing to the Clerk, 233 Main St., Gotham City, before Feb. 21, 1987.

Plain Language Institute
»» Continued from page 17

of communication, with whom we share a common concern for access to justice and a fairer society.

The Institute's Board of Directors have concluded that the need for our work extends beyond the term of our first mandate, which expires in March, 1993. We will seek a renewal of that mandate and the funding that makes our work possible. In the meantime, we will be very busy fulfilling agendas in research, education, and promotion. We will continue to provide resources to all of those people - readers and writers - who are interested in clearer language and easier access to justice.

Our work is an exciting and creative process, with the reward of meeting many people who share the Institute's vision. An extensive network of people in British Columbia and beyond have worked with us and been interested in promoting the cause of plain language.

A detailed report of the PLI's projects will appear in the next issue.

Letters

Certificates for value

From Francis Bennion
62 Thames St, Oxford OX1 1SU

In the June 1992 *Clarity*, noté 28 to the Gruff Award (p.21) rightly says that when commas are used as parentheses it is a remarkably common mistake to omit the second comma. Yet accepting my point that your redraft of the Stamp Office formula for value certificates is ambiguous you offer as a correction (p.8) the insertion of just such a pair of dangerous commas.

In *Statute Law* (3rd edition, p.52) I remarked:

> Drafters are taught that it is bad workmanship to make your meaning depend on a comma or a bracket - or any other punctuation mark. Punctuation is to facilitate comprehension not alter meaning.

Elsewhere the book says (p. 313) in connection with *Ruther v. Harris* (1876 1 Ex D 97), a case on s.21 of the Salmon Fishery Act 1861, that in s.21:

> ... syntactical ambiguity is avoided only by the comma after "kill", a breach of the rule that punctuation should not affect meaning.... The head-note to the report makes the mistake of failing to include this vital comma, thereby demonstrating the validity of the rule.

All of which shows that it is better for the drafter to cure syntactical ambiguity by rephrasing the draft rather than by sticking in a pair of commas. They are liable to come unstuck.

I disagree strongly:

1. Mr Bennion bases his argument on what "drafters are taught". But this only means that existing customs should never be changed - a policy which implies that all the flaws of legalese should remain undisturbed.

2. Lawyers, who now rarely charge less than £100 an hour for their drafting skills, should be able to punctuate if they are to give value for money. A lawyer who composes an elaborate 200-word sentence without punctuation rather than risk a mistake is like a builder who constructs a skyscraper by balancing bricks because he cannot trust himself with cement.

3. Complex unpunctuated sentences are more prone to mistakes of construction or meaning (or "just" misunderstanding) than a simple punctuated sentence. Of course, occasional errors are inevitable in any activity, whatever the policy, and the example at the end of Mr Bennion's letter proves nothing but that the proof-reader was (a) careless or (b) illiterate or (c) a product of his time, since in 1876 the modern strict rules of punctuation had not fully evolved.

4. In **Houston v. Burns** *(1918 AC 337) Lord Shaw of Dunfermline said:*

> **Punctuation is a rational part of English composition, and is sometimes quite significantly employed. I see no reason for depriving legal documents of such significance as attaches to punctuation in other writings.-**
>
> **Ed.**

From Richard Oerton
84 Burghley Rd, London NW5

May I join in the great Certificates of Value competition?

This one takes account of all the points made in the June issue:

> **It is certified that this transaction is not part of a larger one (or one of a series) for which the total consideration exceeds £____ in amount or value.**

Points worth mentioning:

1. The brackets around "or one of a series" are needed to meet Francis Bennion's point about ambiguous modification: since they are in brackets, these words alone cannot be the ones modified. Perhaps the same result could be achieved (as you suggest) by commas, but brackets seem better if only because they are less easy to omit by accident.

2. Your preference for "I certify" is ok where the instrument is made by one individual and cast in the first person singular, but surely this would be unusual?

   "We certify" is better in the other cases. Who does the certifying when "it is certified that"? The parties to the deed (often only the seller), the drafter (usually the buyer's solicitors), or the milkman? - Ed.

3. I have used "total" instead of "aggregate" and I don't see why not.

Tactless editor

From Martin Cutts
69 Bings Road, Whaley Bridge, Stockport, Cheshire SK12 7ND

I was dismayed by your description of a CLARITY member in the last issue as a *kind and amiable man* and *an appalling pedant.* This was patronising and disparaging and merits an apology.

It would merit one even if his grammatical point was totally wrong and yours was totally right. As it is, his view on the use of *nor* is legitimate enough and sanctioned by Gowers in *Complete Plain Words* (1986) who *(? - Ed.)* says, "But *nor* is so often used in such a construction

that it would be pedantic to condemn it."

I did not intend to patronise Mr Bowcock but only to take the edge off my criticism with a warm personal comment. If it gave the wrong impression I apologise.

But I take issue with Mr Cutts on the grammatical point. Gowers (at pp 148/9) says that although (my version) is logically right, (Brian Bowcock's) is so often used ... that it would be pedantic to condemn it. This does not mean that it is right. Nor should I be charged with pedantry when I was only responding to Mr Bowcock's proposition that he was right and I wrong. - Ed.

Nodding the donkey

From Nicholas O'Brian, 4 Brick Court, Temple, London EC4

Here is an example from *The Lawyer* of the problems involved in using metaphors:

The partners are the proprietors of the firm and their professional livelihoods are on the line: no wonder that they wish to keep their heads near (even if not constantly on) the reins of power.

Legal Writing Institute

The Legal Writing Institute is a non-profit corporation founded in 1984 by the University of Puget Sound School of Law.

Its purpose is to promote the exchange of information and ideas about legal writing and to provide a forum for research and scholarship about legal writing and legal analysis.

The institute promotes these activities through a conference held every other summer, a newsletter distributed three times a year, and a scholarly journal published annually.

The Institute also maintains a library of sample writing assignments available for use in legal writing courses. They are mostly designed for office memoranda, with a few aimed at drafting appellate briefs. The collection is an informal compilation of items contributed by members of the Institute. A nominal fee is charged for each assignment ordered.

The Institute has over 900 members. They represent:

- All ABA-accredited law schools in the USA;
- Australian, Canadian, and English law departments;
- Independent research and consulting organisations;
- The practising bar.

Anyone interested in the practice or teaching of legal writing may join. Contact:

Legal Writing Institute

950 Broadway Plaza, Tacoma, Washington 98402

Chris Rideout: 206 591 2239 Laurel Oates: 206 591 2233

Referrals register

This list is open to any member willing to accept referrals of clients from other members.
All are solicitors (or lawyers, if based outside Britain) unless indicated.
Please write to *Clarity* if you would like to be included.

New entry

Richard Castle: land transactions.
Cambridge: 0223 321855; and Hurstpierpoint, Sussex: 0273 833171

Change

Nicholas Grazebrook of Shakespeares, Birmingham, adds *inland navigation* to the fields in which he accepts referrals.

Plain Language Notes

The Plain Language Institute has started publishing *Plain Language Notes,* a monthly series of articles.

It is available on request from
1500-555 West Hastings Street, Vancouver, BC V6B 4N6
1 (Canada) 604 687 8895 (fax 0018)

Letter

The Law Society
an extract from a letter not otherwise intended for publication

From Sue Stapeley
50 Chancery Lane, London WC2

Nit picking: I personally believe that The Law Society is singular, and that your paragraph in the 3rd column on page 2 of Clarity 24 should read "The Law Society has made its own submission."

Yes, but there seem(s) to be so many of them! - Ed.

Licence to assign

Perhaps the plain language movement has made more progress in England and Wales than we had realised. The pre-word-processor licence to assign reproduced below - more wordy than the current "traditional" versions - surfaced during the CLARITY office move.

A plain version, incorporating a deed of variation, appears opposite.

This D EED is made the Twenty-second day of April One thousand nine hundred and seventy five BETWEEN THE MASTER AND FOUR WARDENS OF THE FRATERNITY OF THE ART OF MYSTERY OF HABERDASHERS IN THE CITY OF LONDON Governors of the Possessions and Revenues of the Hospital at Hoxton in the Foundation of Robert Aske (hereinafter called "the Haberdashers' Company") of the first part Andrew Barry Clover of 15 Pitfield Street in the London Borough of Hackney (hereinafter called "the Lessee") of the second part and David Eric Fauntleroy of 29 Abbey Road Marble Arch W.2 (hereinafter called "the Assignee") of the third part

WHEREAS :-

(1) By a Lease (hereinafter called "the said Lease") dated the Thirtieth day of June One thousand nine hundred and fifty eight and made between the Haberdashers' Company of the one part and Graham Henry Ian Johnson of the other part All that shop and premises known as 15 Pitfield Street Hoxton in the London Borough of Hackney was demised to the said Graham Henry Ian Johnson for the term of Eighteen years from the Twenty fourth day of June One thousand nine hundred and fifty eight at the yearly rent of Two hundred and fifty pounds subject to the Lessee's covenants and conditions therein contained

(2) Under and by virtue of divers mesne assignments acts in the law and events the benefit of the said Lease is now vested in the Lessee for the said term of years subject to the payment of the said rents and to the performance and observance of the said covenants and conditions

(3) The Lessee is desirous of assigning all its estate and interest in the said Lease to the Assignee and the Haberdashers' Company has agreed to grant their licence for such assignment in consideration of the Assignee entering into the covenant on his part hereinafter appearing which the Assignee has agreed to do

NOW THIS DEED WITNESSETH as follows :-

1. IN consideration of the covenant on the part of the Assignee hereinafter contained the Haberdashers' Company HEREBY GRANTS unto the Lessee their Licence to Assign ALL THAT the Lessee's estate title and interest in the said Lease UNTO the Assignee PROVIDED ALWAYS that this Licence shall not extend or be construed to authorise any further or other dealings with the said Lease without the express licence in writing in that behalf first had and obtained from the Haberdashers' Company.
2. IN consideration of the Licence hereinbefore contained the Assignee HEREBY COVENANTS with the Haberdashers' Company that he will during the remainder of the term of the said Lease pay the said yearly rent at the respective times and in the manner appointed by the said Lease and will also duly perform and observe the several convenants on the part of the Lessee contained in the said Lease
3. THE Haberdashers' Company's Surveyor's fees and Solicitors' costs and expenses of and incidental to the preparation and execution and completion of this Licence together with the appropriate amount of V.A.T. thereon and including the Stamp Duty payable on the duplicate hereof shall be paid by the Lessee

IN WITNESS whereof the Haberdashers' Company has hereunto affixed its Seal and the Lessee and the Assignee have hereunto set their respective hands and seals the day and year first above written

Specimen

LICENCE TO ASSIGN and DEED OF VARIATION

Details

Date of this document	____ September 1992.
Premises	Deux Meyes, Brassey Avenue, Eastbourne, East Sussex.
Lease	That dated 19th October 1990 between the landlord and the tenant.
Landlord	Andrew Black.
Tenant	Catharine Day.
Assignees	Edward Frank Green and Hilary Ious, both of 101 Preston Road, Bexhill-on-Sea, East Sussex.

Licence to assign

1. The landlord permits the assignment of the lease to the assignees.
2. The assignees accept responsibility, individually and jointly, for the tenant's obligations in the lease for the rest of the term.

Variation of lease

3. The use of the premises permitted by the lease will change on the assignment to *the retail sale of linguistic memorabilia.*

Signed as a deed) ..... EFG
by the assignees)
in the presence of:) ..... HI

..... witness's signature
..... printed name
..... and
..... address

Drafting snippets

The cluttered Land Register and/or muddled conjunctions

It is a pity that the land register must be cluttered with long-winded, badly-drafted, repetitive covenants, often obsolete. The builders of housing estates are serious offenders, and the titles compare unfavourably to those of estates built earlier in the century.

Acting recently for the purchasers of a simple, detached, freehold house, I have had to wade through 10 pages of covenants affecting the seller's title. Many of these do not apply to my clients' plot. Many repeat the wording of others.

One paragraph (of "exceptions and reservations" from the property), drafted in 1991, read:

> Full and free right and liberty for the Developers and their successors in title to all or part of the Remaining Land and their respective tenants servants and licencees to construct connect to and use at all times and for all purposes with or without vehicles and/or animals the roads and paths now or later to be constructed on the property which are necessary for the purpose of access to and egress from the Remaining Land until such time as such roads and footpaths shall be adopted by the Local Highway Authority as roads and paths maintainable at the public expense.

This is riddled with redundancies and clumsy formations, and it is not even precise. For instance:

- There was no definition anywhere in the title of "the Remaining Land", so it was impossible to tell:
  (a) which land had the benefit of the reservation; or
  (b) which roads were necessary for access.
- Few people have "servants" now; "employees" is a more accurate expression.
- What is meant by the power to use "for all purposes" the roads necessary for access and egress? Could residents hold a street party, for instance, so long as they took care only to block essential accessways?
- Do the developers envisage horse-drawn deliveries, or just residents walking (or driving) their dogs? but what is meant by "with or without vehicles and/or animals"?

  Among other options, it presumably entitles an accessor to come without a vehicle but with an animal, or without an animal but with a vehicle, or without either. But does someone coming with a horse but without an elephant come "without an animal"? Old-fashioned milkmen beware.

The next page of the register contained the following definition of "roads and paths":

> (which latter expression shall throughout this Deed include footpaths and footpath/cycleways).

Does this include a cycleway which is not also a footpath, or only cycleways which double as footpaths, to the considerable danger of pedestrians?

Incorporation by reference

The winner of the *Save-the-Period* Award on page 7 includes the wording:

> ...which is described in Exhibit "A", said Exhibit "A" being attached hereto and incorporated herein by reference...

Similar constructions are quoted as normal by Barbara Child in her workbook *Drafting Legal Documents* (to be reviewed in *Clarity* 26).

If referring to another document is enough to incorporate it, then the trick is achieved by "which is described in exhibit *A*".

A sum equal to ...

The fashion has grown up for tenants to pay the landlord "a sum equal to" the amount spent on services. So if the landlord spends £1,000 on maintenance, it is no longer sufficient for the tenant to find £1,000; he now has to contribute a sum equal to £1,000.

This modest contribution to prolixity could be improved. We might provide:

DO YOU OFFER A PLAIN ENGLISH SERVICE?

If so, and you would like to be included, free of charge, in a list, please send details.

The list will be sent to new and prospective members, and will be available to anyone interested.

that the lessee shall pay to the lessor a sum equal to four times half the amount paid and discharged by the lessor under schedule 9 hereof PROVIDED ALWAYS that the lessee shall deduct from that sum before payment to the lessor as aforesaid the number he she or it first thought of

The careless use of "and"

A recent covenant obliged the tenant

from time to time and at all times during the term ...

It was not explained how the tenant could do something both intermittently and continuously.

The clause continued:

... to repair and keep in good and substantial repair ...

Having kept the building in good (and substantial) repair, the tenant still had to repair it. This is taking good husbandry to extremes.

I assume that the drafter intended:

To keep the building at all times during the term in good and substantial repair by [not "and"] repairing it from time to time.

The landlord might have been satisfied with:

To keep the building in good repair.

Tenants would have guessed that they were to do this by repairing it (when necessary) and by looking after it generally. And there would be some difficulty in arguing that the omission of "at all times during the term" meant either that the tenant could let it go hang some of the time, or that the obligation outlived the tenancy.

A whimsical definition

The solicitors for the developers of a housing estate now under construction in Berkshire offer this delightfully batty definition:

The front garden means the part of the Property which is intended to remain unenclosed.

Building schemes

Developers often impose covenants expressed to be enforceable between plot-buyers whilst reserving the right "to release or modify the covenants" on the sale of other plots.

The company with the abstract front gardens replied to my suggestion of inconsistency:

None have been waived. The covenants are part of a building scheme.... We do not believe there is any contradiction....

I pressed the point:

The *Elliston v. Reacher* conditions for the existence of a building scheme require that the estate is set out in plots subject to restrictions which the developer intends to impose on all of them. How, therefore, can a building scheme exist when the transfer explicitly states that the developer may waive or vary the restrictions when selling other plots? And if there is no building scheme, how can the covenants be enforced between purchasers?

The reply was that:

All plots are sold subject to the restrictions. A building scheme is created and is accepted as being created by the land registry.

If the solicitors could assure me that all plots *are* (presumably the continuing present) sold subject to the restrictions, what is the purpose of the reserved right to vary? Meanwhile, the Land Registry said (on the telephone):

It happens all the time. It doesn't alter the fact that it is a building scheme - as long as all the other factors listed in *Elliston v. Reacher* are present then it is still recognised by the Land Registry as a building scheme.

Perhaps, but would it be recognised by the courts? Have I overlooked a change in the *Elliston* rules, or is the Land Registry claiming to alter the law?

At last a good word for developers and their solicitors

But the developers' solicitors criticised above deserve credit on two counts.

Their transfers use less legalese, shorter sentences, and clearer paragraphing than we are used to. They say they have made a conscious effort to be plain. »»

The documents supplied for houses on at least one of their estates (but not all of them) have useful notes, summarising the agreements with the local authority and directing the buyers' solicitors away from material which does not affect their clients.

Ambiguous unpunctuation

This extract comes from the draft underlease of a shop in a large mall, and has been copied verbatim from the standard headlease submitted by a large insurance company:

> **... making good to the Tenant (?) in a reasonable manner all damage thereby occasioned to the Demised Premises and the Tenants fixtures and fittings and stock ...**

The refusal to punctuate allows two interpretations. No doubt the drafter believed he or she was omitting an apostrophe after *Tenants,* but it could as well have been a comma; this alternative would create a far wider liability.

Statutory declarations

In *Clarity* ____ I looked at the formal requirements of affidavits and affirmations, but not those of statutory declarations.

Section 8 of the Statutory Declarations Act 1835 provides:

> **It shall and may be lawful for any justice of the peace, notary public, or other officer now by law authorised to administer an oath, to take and receive the declaration of any person voluntarily making the same before him in the form of the schedule to this Act annexed.**
>
> **Schedule**
>
> **I AB do solemnly and sincerely declare that ...**
>
> **and I make this solemn declaration conscientiously believing the same to be true, and by virtue of the provisions of an Act made and passed in the ___ year of the reign of his present Majesty, intituled "An Act" (here insert the title of this Act).**

By the Short Titles Act 1896:

> **The Short Title may be subscribed.**

Does *it may and shall be lawful,* which despite the *shall* is permissive, mean that no other wording may be used? Time ran out during my research in the library. Does anyone know of any authority?

Humpty Dumpty

The Court of Appeal has held that a flagstone is "equipment" for the purposes of s.1(1) of the Employers' Liability (Defective Equipment) Act 1969.

The decision was based on

> **... the broad approach to the Act bearing in mind its general purpose, rather than the argument based upon a precise, if not legalistic, construction of the terms of the Act itself.**

Knowles v. Liverpool City Council (*The Times* 2.7.92)

The permissive *shall*

Section 238 of the Insolvency Act 1986 provides that

> **... the court shall, on such an application, make such order as it thinks fit.**

In *re Paramount Airways Ltd* (*The Times* 5.3.92) the Court of Appeal said that the discretion imported by this expression was wide enough to allow the judge to make no order. This was reported as an example of the permissive *shall.*

But it could be interpreted to mean that the court must exercise its discretion. Having decided what order (including *no order*) it thinks fit, the judge must make it.

Competition

In Clarity 24 we offered a £10 book token for the best poem composed in legaldegook. The clear winner was Robin Widdowson, for:

In Defence of Legalese

Oh, I love that Legalese
Let me speak it, let me please!
Notwithstanding, inasmuch
Aforementioned, Double Dutch
I'm hereinafter on my knees
If I can spout my Legalese

Legal jargon fills my mind
As many terms as I can find
Hereinunder, theretofore
In excess, but give me more!
Insofar as contracts bind
Let's tie in tongues, both sealed and signed

Oh legal language! Legalese!
Grant me rights and give me ease
To draft, amend, revise and waive
From now henceforth, except and save:
This language fit for chimpanzees
For me can mean quite handsome fees ....

A. Robin Widdowson
Bath, 1992

Discourse and the professions

International conference at Uppsala, Sweden

August 1992

'CLARITY was well represented at this conference of linguists, thanks to the efforts of Robert Eagleson. Professor Eagleson is an Australian whose prominence in the field of plain language law leads people to overlook that he is by training a linguist rather than a lawyer.

He chaired an all-morning discussion on *The reform of official language: its impact on social justice and professional prospective on language*, and invited CLARITY members Martin Cutts, David Elliott, Mike Foers, Joseph Kimble, Chrissie Maher, and Mark Adler to the conference to join the discussion. Ms Maher was not there, but was represented by Frankie and David Bray of the Plain English Campaign.

Robert Eagleson said:

It is now 17 years since the first document appeared in the current movement for plain language in government, law and business. The movement has now taken hold in many countries, and it is time to consider its impact.

One of the reasons behind the drive to reform official language was the recognition that many people were at a disadvantage when they could not understand documents setting out their rights or obligations. One object of the discussion would be to explore the effect of the reform of official language on social justice.

Professionals' misconceptions about language had impeded acceptance of clearer writing. What changes to their linguistic perceptions had those in the plain language movement experienced? Are we seeing shifts in discourse structures as well as attitudes? Are the reforms bringing changes to genres and even the disappearance of some types?

The discussion was lively and useful, and the following points were made:

- The linguists at this conference used gobbledegook incomprehensible to the CLARITY group. (Robert Eagleson was the bridge between the two groups, having a foot in each camp.)
- Certain landlords rewrote a standard tenancy agreement in plain English to avoid compulsion by the government. In rewriting, they discovered some provisions that were so unfair that they dropped them.
- Trade union officials fearful about loss of their role had been the only dissenters when plain language employment documents were approved by management and workers.
- In an Australian experiment a group of lawyers were given legal research problems. Half had plain language sources and half had traditionally written sources. They all reached the right solution, but the plain language group were quicker.
- Important information was often unavailable to medical patients: for instance, those undergoing surgery were not aware of the after-effects so had not made adequate arrangements for post-operative care.
- We are told by packets that food and medicines contain certain percentages of certain substantances with scientific names, but we have no idea of the significance of the information.
- Professional specialists must work with plain writing experts to simplify documents.
- Lawyers have an exaggerated fear of change, and exaggerate the precision of traditional documents.
- Research had found that only 3% of the terms in traditional legal documents had had their meanings defined in litigation.
- The definitions supplied by the courts were often mutually inconsistent. *Tried and tested* often meant "extensively litigated because of ambiguity", and the most recent case would not necessarily be the last.
- Practising lawyers tended not to know the results of that litigation in sufficient detail to justify their claim to precision.
- Senior lawyers often disagree with the view of junior lawyers that the meaning of a particular expression has been precisely defined.

- Prof Eagleson's experience was that senior lawyers were more open to plain language improvement than their younger colleagues.

- Documents are insufficiently tested.

- Saftey instructions required by law in the workplace were pitched not at the workforce but at the lawyers who might have to rule on their adequacy.

- Over-informality in consumer documents misled the public into thinking it was dealing with a friendly document when in fact it was hostile.

One of the linguists said that he would be suspicious of a plain language contract, and would rather trust his lawyers. He was promptly sat upon:

- People shouldn't trust lawyers, whose ruling body (in England) paid out large sums to compensate defrauded clients.

- Plain language should not and need not mean loss of precision.

- Many documents are unnecessarily difficult.

- We should not give in to the argument that legal documents could not be written plainly; resistance is emotional and self-interested.

- Lawyers starting to write plainly have found that clients who previously accepted draft documents without comment offered improvements when they could understand what they were shown.

- A lot of non-lawyers have to interpret legal writing in their work, and have difficulty with traditional language.

- It is vital that clients understand what is written in their names, so they can correct the inevitable mistakes and omissions.

- The research CLARITY did last year showed (a) that clients understood a lot less than lawyers think they do, and (b) that they understood a lot less than the clients themselves realised.

- A danger is that clients tend to think they are wrong and their lawyer right.

- Most legalese has nothing to do with precision.

- Legalese is linguistic fancy dress, which should be discarded with the wigs and gowns whose future is now under discussion in Britain.

- Shorter lines make a document easier to read. A lone lawyer who disputed this admitted two weeks later that he had been wrong.

- Citibank reduced many default provisions in their standard loan document to a mere two, deciding that all the others were unnecessary because they dealt with circumstances which never arose.

- We need lawyers who know what they are doing, and open-minded people. These are not easy to find, but it is worth perservering.

Robert Eagleson said that he had never found a legal document which was entirely free from error.

Barbro Ehrenberg-Sundin, a language expert from Stockholm, said:

She had been involved last year in a project to revise the Swedish Rent Act, under the chairmanship of a Supreme Court Justice.

She had been asked to change the language without changing the meaning, but had eventually won the right to introduce substantive changes. She had done the work in collaboration with a lawyer.

The old Act was in traditional Swedish law language (whose faults were the same as its English equivalent). It suffered from:

- Insufficient headings;
- Long sections each covering many points;
- A great deal of cross-reference;
- Long, complex sentences;
- Archaic language;
- Convoluted word order; and
- Unnecessary passive verbs.

The new version had reduced or cured these faults. It had been reorganised according to the needs of the landlords and tenants who would rely on it. It began each section with a summary, giving the outline first and the details later. But some traditional elements had to be retained for consistency with other laws.

The Commission responsible for the new Act was pleased with the result, and it was widely acclaimed. Tenants' groups in particular were pleased.

But most courts and rent tribunals objected to what they saw as inconsistency with the land law code. They said that it was "impossible" to divide chapters into sub-chapters (although it had been done, and the world had not ended) and argued that questions did not belong in headings. Lawyers complained of unfamiliarity.

Plain language is almost unanimously approved in Sweden, although some lawyers were

concerned about the risk of meaning-change. The project is still alive, and the Department of Justice is to decide on its future.

Comment

- We must sometimes compromise to get things done. Rudolph Flesch had resigned from the Citibank project because they refused to allow contractions, and that was taking purism too far.
- Splitting sections makes the Act longer, so giving rise to objections.
- But plain language techniques allow a considerable overall shortening of documents, despite extra paragraphing.
- It is helpful to point out to the objectors that similar projects have been successful in other jurisdictions.
- Similar drafting improvements were successfully made in the Church of Sweden Act. Lawyers did not object in this case because it was entirely new law, and did not have to tie in with any other Act.
- Language experts want to involve lawyers in reform, but lawyers do not reciprocate.
- The objection to questions in headings was unreasonable, bearing in mind the convention that headings were not part of the document.
- No: there are judgments to the effect that headings *do* count.

Ruth Wodak, of the Linguistics Department of the University of Vienna, spoke about the reformulated Building Regulations Law of 1976:

German legalese suffered from the same defects as its English and Swedish equivalents.

The regulations were changed with the intention that anyone could read them without expert help.

The new version had:

- A table of contents and an index;
- The explicit statement of intentions;
- A variety of typefaces;
- Good paragraphing;
- Sentences shortened to an average between 16 and 18 words;
- Lists instead of unbroken paragraphs;
- Main verbs at the beginning of sentences instead of the end;
- An absence of subsidiary clauses;
- Explicit connectives like *if* and *but*;
- Active verbs instead of passive;
- Second-person pronouns (addressing the reader as *you*).

They tested the new regulations by asking people to paraphrase the old and the new. This produced the classification in the table below right:

Some people thought that the revised version was too informal. This showed a need for re-education.

Comment

- The level of improvement was disappointing in view of the size of the investment.
- The understanding of some jury instructions had only improved from 45% to 60% after revision.
- The effort is justified by the continued saving of effort when dealing with more comprehensible forms; and as writers gain experience the translation becomes quicker. And we must add to the account the saving of time in writing plain forms instead of legalese.
- Many people worldwide are unaware of research in the field. Academics are in touch with each other but do not communicate with civil servants or other practical writers. The Swedish Language Institute did not know about this conference and was not represented at it.
- Too many people were reinventing the wheel.
- The plain language movement was still in its infancy, and results would improve as we gain experience.
- Calling text "plain language" sometimes incites resistance that would not be there without the label.

Martin Cutts said:

When he founded the Plain English Campaign he thought plain language would create a more just society. He had been impressed by the story of a couple who had signed a mortgage deed they did not understand: they did not know how much they had paid or

	Old	new
Close to text	50%	57%
Need for prior knowledge	8%	5%
Criticism/ evaluation	30.5%	15.5%
Refusal or inability to paraphrase	11.5%	22.5%

what they still owed; the lender refused to tell them, but still obtained a court order and they were evicted.

Since then the plain language movement had flourished, with the support of Margaret Thatcher (whose concern for social justice the speaker derided) and some banks and insurance companies. Yet financial hardship was worse than ever, and it was difficult to see how the problems of society had been alleviated. Poll tax forms were fairly plain, but were still unpalatable.

The government seems less interested than it was in saving the public's time spent filling in forms.

An Anton Piller injunction, served on him as an unrepresented lay defendant without previous knowledge of the proceedings, contained a 700-word sentence in archaic language, accompanied by an explanatory note containing a 93-word sentence.

But a panel of judges, chaired by Lord Justice Staughton, CLARITY's patron, was reconsidering the Anton Piller practice.

Comment

- Martin Cutts was expecting too much from plain language. The purpose was to improve communication; improving the message was another problem.

- Legal language is a politcal issue: incomprehensible documents deprive people of the chance to disagree.

- Plainer forms increased claims for state benefits, which some governments do not want.

- A railway had regularly denied liability for accidents on the grounds that its badly drafted rules had been broken. For example:

  The rules called for two men to stand on each side of track repair works to warn of approaching trains. But there were only five men in the team, which left only one to do all the work. In practice, three men worked and one stood watch on each side. The problem did not emerge until the rules were explained.

- It was difficult for readers to see what had been omitted from legalese documents.

- Clients polled by Mallesons Stephens Jacques chose to have decisions or advice placed at the beginning, with the reasons following, rather than the other way round. This way they could read the details or not, as they chose.

- Lawyers are not deliberately obscure. They are not trained to write. They need help.

- CLARITY's work was explained.

Professor Brenda Danet of the Hebrew University Jerusalem

gave a lecture which was of considerable interest to CLARITY members. We have not been allowed a transcript, as it is to be published in the proceedings of the conference, but we took notes

For the last seven years Professor Danet has researched the transfer of performative rituals from oral ceremonies to written ones.

Archeological evidence suggests that cognitive rituals (for example, burying artefacts with bodies) pre-dated language.

Pre-literate societies have binding rules enforced by social pressure, but there are neither lawyers nor formal laws.

Cuneiform legal transactions were incomplete until written.

In Anglo-Saxon England only some clergy were literate; no-one else was, not even kings). The use of documents began with the recording of transactions vesting land in the church.

Legal language - whether oral or written - had a ceremonial role which led to a distinct style. Doubling (*null and void*) helped achieve this. The ceremony was a necessary part of the transaction. (This is performativity.)

Anglo-Saxon land grants date from the 7th century.

Many Anglo-Saxon wills were not dated, but the earliest surviving one dates from 805. It takes the form of a story told in the 3rd person and in the past tense.

Only one will in ten began like a modern will:

I Alfred King of the West Saxons by the grace of God and with this witness declare how I wish to dispose of my inheritance after my death.

References to witnesses were common:

Of this King Alfred and many others are witnesses.

(This is closer to the style of modern lay people than to that of lawyers. The language is not technical, and reminiscent of the expression "You can ask so-and-so" - Ed.)

Another example of Anglo-Saxon legal drafting begins:

I Ealdorman Alfred command

to be written in this document to King Alfred and all his councillors.

Out of a sample of 62, 25 included curses directed against anyone tampering with the document.

More recently, when a member of the Israeli Knesset added *with God's help* at the end of the oath of allegiance, a political opponent petitioned the High Court for a declaration that the oath was ineffective and that he should not take his seat.

Performative rituals are affected by the technology of the day. How will they be affected by computers, fax machines, and video recorders?

Special documents have used fancy lettering, seals, colour, and expensive paper. (The signing of international treaties is customarily marked by an exchange of pens.) But documents are losing these characteristics. Will computerised treaties be agreed by electronic means, with the ceremony abandoned? Professor Danet thinks not.

What is the future of video wills? They are still very rare, and under current law are effective only as supplements to written wills (as in Anglo-Saxon times the written will was supplemental to the oral ceremony). But they are more personal, as in Anglo-Saxon wills addressing the beneficiaries in the second person and showing the gift:

This vase is for you, Tom.

Will we smarten video packaging, as we have until now used special paper and notarised documents?

(For a detailed history of legal English from Celtic times, see David Mellinkoff: **The Language of the Law,** *Little Brown & Co, Boston & Toronto, 1963 but still in print. It is reviewed in* **Clarity** *20 (April 1991) at p.13. - Ed.)*

Susan Blackwell of the School of English Birmingham University

spent many hours recording British Rail announcements on platforms and trains.

British Rail announcers are almost as bad as lawyers for ritual, although the language is mercifully incomparable.

Platform and on-board announcers have separate styles. For instance, a driver will say to his passengers "Good morning, ladies and gentlemen", but station announcers never do.

Platform announcements are of three sorts:

- special announcements (for example, about the delay or cancellation of a train, or a platform change);
- personal calls; and
- staff announcements.

Personal calls and staff announcements are introduced as such (*This is a staff announcement...*) but special announcements never are.

But there is some foolish pomposity:

- Signals are referred to as *lineside equipment.*
- By management edict, passengers must be called *customers.*
- *Service* is used for any thing which supplies (or is supposed to supply) a service, and can be, for example, a train or a buffet. So we have *Please take care when walking through the service.*

Passengers (*customers, my foot!*) are more likely to hear sentences of the form *the train approaches* if they are waiting on the platform and *the train is approaching* if they are on a train. ***(This does not seem a very good example. They are unlikely to be told that another train is approaching theirs unless an accident is in progress. -Ed.)***

Denmark

Legal language conference planned for 1993

The Århus School of Business hopes to mount a two-day conference on legal language in November 1993, "for senior researchers and PhD students".

Canada

***Just language* conference**
Plain Language Institute
Vancouver
21st - 24th October

CLARITY will be well represented at this major conference, and a report will appear in the next issue

Full details appear in the last issue.

Enquiries to the PLI:

1 (Canada) 604 687 8895 (fax 0018)

Welcome to new members

England

Hannen Edward Beith; solicitor; Windsor, Berkshire
F.A. Jones; solicitor; Newcastle-on-Tyne
Clare Price; public speaking speech specialist; nr Salisbury, Wiltshire
David Scillitoe; businessman; Siemens Plessey; Christchurch, Dorset
David Warren Jones; solicitor; Bournville, Birmingham

France

A.D.E. Ford; solicitor; IBM UK Ltd; Paris

United States

C. Edward Good; lawyer, lecturer, author and publisher; Charlottesville, Virginia

News about members

Richard Henchley, general counsel and company secretary at Rolls Royce plc, has been appointed treasurer of The Law Society.

Press date for the next issue:

1st December

PRECEDENTS

We have a volunteer to run the precedents library. More next issue.

CLARITY TIES

are available for sale at

£8.50 each

Navy blue ties with the CLARITY logo (as nearly as it can be reproduced)

Please send your order with a cheque to our Surbiton address

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