A movement to simplify legal language

Patron: Lord Justice Staughton

No 29: December 1993

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Late item

The Plain Language Institute of British Columbia has published posthumously (since its demise in March) a three-volume report recommending legislation to promote the use of plain language in legal documents. Author Philip Knight, formerly executive director of the Institute, is still working in the plain language field for the BC government.

We hope to cover the report extensively in the next issue.

Press dates

The next issue of *Clarity* should be distributed in late March.

To ease production, please send copy to our Surbiton address (given on the back page) as early as possible. The journal is composed gradually throughout the period between issues.

If possible, please send copy on Macintosh-readable discs in *Ready-Set-Go*, Microsoft*Word*, *MacWrite*, or *Teachtext*.

Subscriptions

The subscription to CLARITY is £15, payable on 1st September each year.

Full-time, unsalaried students pay a reduced rate of £5. If you qualify for this, but have paid the full subscription, please ask Justin Nelson for a refund.

The first subscription of a member who joined after December 31st 1992 is good until August 31st 1994.

Late payment

A reminder is enclosed for members whose 1993-1994 subscription is overdue.

Annual supper

For the second successive year CLARITY's supper was held at Chéz Gerard, in Chancery Lane. It was, as usual, a lively and informal social evening.

This year both speakers were CLARITY members. Judge Michael Cooke spoke entertaingly on *How likely is "likely"?* in which he demonstrated in a telling experiment the dangerous ambiguity of words like "probable", "wide", and "often". Martin Cutts, on his way home from a presentation at The Law Society's annual conference, reported the progress of his *Clearer Timeshare Act*, revised in the light of criticisms of the first version (featured in *Clarity* 26 [December 1992, p.3]) and now being tested.

The chairman gave a brief review of developments since the last issue of *Clarity* and invited discussion about CLARITY's organisation.

Those who expressed an opinion felt that we should remain as we had always been until there was some good reason for change. John Walton said that CLARITY was running well and making good progress towards it goal, so there was no point in tinkering with the machinery.

The chairman expressed concern that the committee was invariably composed of volunteers and co-optees who had never been opposed in an election. No-one seemed to mind, and the meeting accepted the committee's two suggestions for more open administration:

- **Future committee meetings would be open to any member interested**. Those attending could take full part in the discussion and decisions.

  Meetings are held about two-monthly between 10.30 or 11am and about 1pm on Saturdays. The place and starting time vary to share the burden of travelling. The next meeting will be at 28 Claremont Road, Surbiton, Surrey at 11am on 8th January. Anyone interested, then (if this is distributed in time) or in the future, should contact a committee member for details (and to make sure that any published arrangements have not been changed).

- **Members who took an interest without wanting to be on the committee could take responsibility for individual projects.**

  This was already in effect to some extent. Patricia Hassett remained as a corresponding member of the comittee to promote CLARITY in America, and Chris Smith had agreed to breathe life into our moribund precedent library.

The reduced subscription for students (see p.1) was also approved.

CLARITY SEMINARS

on writing plain legal English

Mark Adler has now given some 35 seminars on behalf of CLARITY to a selection of firms of solicitors, to law societies, and to the legal departments of government departments, local authorities, and other statutory bodies. Participants have ranged from students to senior partners.

The seminar has slowly evolved since we began early in 1991, but it remains a blend of lecture, drafting practice, and discussion. The handout includes an outline of the lecture, the examples used in the lecture, a self-tuition exercise, and a few of the host organisation's documents selected for redrafting.

You can include as many delegates as you wish, and non-paying guests from outside.

The seminar lasts 3hrs 10mins (excluding a 20-minute break). There is a 25% uplift under the CPD scheme.

The fee is £500, to which expenses and VAT are added. An extra charge is negotiated for long-distance travelling.

Contact Mark Adler at the address on the back page.

Developments

At the 8th January committee meeting we will consider offering an alternative whole-day version of the seminar, and other possible developments.

News

Australia

Corporations law simplification program

Commonwealth Attorney-General Michael Lavarch announced in October the formation of a "Task Force for the Corporations Law Simplification Program".

The task force comprises:

- CLARITY's Robert Eagleson;
- Claire Grose, a partner in Freehill Hollingdale & Page, who has extensive experience in corporation and securities law;
- Vince Robinson, a senior drafter in the Office of Parliamentary Counsel;
- Ian Govey, a senior legislative policy adviser (specialising in business law) in the A-G's department.

A consultative group from the private sector is being formed to represent corporation law users, and the two groups will work closely together.

Mr Lavarch said:

> The corporate law reform agenda will be an active but measured one. I regard the simplification program as the centrepiece of our agenda....
>
> The Task Force will have day-to-day responsibility for preparing recommendations to me on the manner in which the Corporations Law should be simplified to achieve a more comprehensible, user-friendly law. The end result will be to reduce costs and increase international competitiveness — fundamentally important aims for Australian business....
>
> I am especially pleased that the contribution from an experienced and respected corporate lawyer and language expert will be brought to bear from the outset.

The task force's first job will be to recommend a program and timetable for its work, including the drafting principles and priority areas to be adopted.

Mr Lavarch expressed the hope that drawing on private sector experts to work closely with the government would provide a model for simplifying other areas of the law.

But the program would not be rushed:

> Setting arbitrary timeframes is not conducive to careful drafting and the use of plain legal language. Indeed, a lack of time to improve the drafting is often part of the reason that legislation is not expressed more clearly.

Law Institute of Victoria adopts plainer lease

Phillip Hamilton, of the two-partner law firm Tuszynski Klein Hamilton Sacks, has rewritten in plainer language the Law Institute's standard commercial lease.

Some compromises were imposed on the new document, but the Institute's Legal Documentation Committee is now committed to plain language.

Britain

Law Commission calls for plain language "Offences against the person"

On 16th November the Law Commission published a report[1], annexing a plain language Criminal Law Bill to replace the Offences Against the Person Act 1861.

The Commission considered submissions from judges, police, and practising and academic lawyers. It found overwhelming dissatisfaction with the state of the criminal law relating to assaults and related offences. It took the view that the concepts and language had been outdated even when the 1861 Act had been passed, and found that in recent years there had been constant confusion and argument over its interpretation.

According to the Commission's press release, the draft bill:

- Offers a new law, expressed in modern and simple language, dealing with all offences of assault and violence.
- Codifies the current common law defences, with two reforms to the law of duress (extending its availability to murder cases and imposing the burden of proof on the accused).

Mr Justice Brooke, the chairman

[1] *Criminal Law - Legislating the Criminal Code: Offences against the Person and General Principles;* Cm 2370, Law Com No. 218. HMSO, £15.30.

of the Commission, said:

> It appears to us intolerable that a part of the law as important as the law covering criminal assaults, batteries and woundings, that form the subject of over one hundred thousand prosecutions a year ..., should still be based on the antique and obscure language of an Act passed 130 years ago. Fairness and effectiveness in dealing with the problems of violence demand fair, effective and modern laws. If the Commission's proposals were adopted, they would enable everyone to know where they stand, and would bring to an end the confusion and waste of time and resources caused by the present state of the law.
>
> It is just as important that general principles of the criminal law and defences ... that are frequently relied on in the courts should be put on a clear statutory basis. We give figures in our Report which show that even a comparatively short Crown Court case and appeal can cost at least £40,000 in public money, quite apart from the human misery caused by wrongful convictions. This money is wasted if mistakes are made about the law; and mistakes can easily be made when the law can only be found in cases and commentaries and not in a clear statute.

Master of the Rolls joins CLARITY

We are delighted to welcome Sir Thomas Bingham MR as the most senior judicial member of CLARITY.

Bar Council discourages verbosity

Robert Seabrook QC, the bar's incoming chairman, has announced the formation of a body to examine ways of improving professional standards. Under attack will be verbosity, rudeness, and general incompetence. In particular, Mr Seabrook wants to discourage traditional pomposity.

Plain language calls at Law Society conference ...

Sir Donald Nicholls, the Vice-Chacellor, was asked at The Law Society's annual conference in October what single change he would most like to see in the justice system. He replied:

> If I could make one change, I'd take the White Book, all three volumes of it, and burn it. I'd have the rules rewritten in English, in a form that anyone can understand. I'd have orders drafted in a form that people can understand and recognise as being in English. That would make an improvement in the administration of justice but also in the impression that the consumer gets. Instead of thinking he's going into some strange world where people use language in documents and sometimes orally that people never use, he would actually be able to understand what was going on.

Sir Donald's comments provoked spontaneous applause from the audience.

Martin Cutts, in another session, also attacked legalese. He was speaking with Helena Twist at a session on "beauty parades" - in which solicitors give presentations to attract potential clients.

.. and at next year's conference

CLARITY is to give a two-hour presentation at The Law Society's 1994 conference. The emphasis will be on the contribution plain language makes to solicitors' efficiency and profits.

Canada

Plain Language Consultants Network

The Plain Language Consultants Network was formed in September by Cheryl Stephens and Kate Harrison, both of Rapport Communications, Vancouver. Its purpose is to facilitate joint projects, the exchange of ideas, and the referral of work.

Membership is for individuals and is by invitation only.

Updates

Law Society adopts Oerton draft

In *Clarity* 26 [Dec 1992, page 25], we reported Richard Oerton's radical improvement to The Law Society's suggested form of receipt from the beneficiary of an estate.

The Society has adopted his draft, with one small amendment. It will appear in the next edition of the *Probate Practioner's Handbook*, due for publication in the spring.

Progress with High Court forms

In *Clarity* 28 [Aug 1993, page 7], we reported a major project to modernise the form and language of High Court orders, and we passed

on an invitation to CLARITY members to comment on a draft Anton Piller order.

Mr Bill Heeler, the Chancery Division's head of drafting, thanks members for their response, and has incorporated at least some of the suggested improvements into an updated draft. He hopes the new form of order will be launched early in 1994.

He has also confirmed that prescribed forms will be tackled in the course of the project.

EC resolution on parliamentary drafting

Lord Renton has written to the prime minister calling on him to instruct parliamentary counsel to implement the EC's June resolution on the quality of drafting.

The full text of the EC resolution appears on page 5 of *Clarity* 28, but its gist is that legislation should be "clear, simple, concise and unambiguous".

Books

Kelly's *Draftsman* 16th edition

Roderick Ramage

Roderick Ramage's new edition of this classic was published in November and will be reviewed in our next issue. Because of radical rewriting it took 3 years to prepare - twice the length of time needed for earlier editions.

As well as the customary precedent documents, individual clauses are provided, designed for computerisation, and the book will be available on disc.

So that documents can be constructed from individual clauses, Mr Ramage has tried to iron out inconsistencies of language and style. He broke each precedent down into its constituent clauses, redrafted and indexed them, disposed of the surplus versions, and reconstructed the documents from the central store. The individual clauses are supplied, cross-referenced, so that users can build their own documents if the book does not provide in full the one they need.

A generous tribute to CLARITY heads the acknowledgements.

Mabo - What the High Court said

Peter Butt and Robert Eagelson

Robert Eagleson and Peter Butt have written what they describe as a plain language version of a very important decision of Australia's highest court. Like *Kelly's*, this was published in November, and it arrived whilst we were in proof.

Mabo recognises for the first time native land rights to large parts of the continent. It has created turmoil, and work for lawyers for years to come. Some have decribed it as the most significant Australian decision ever.

The text of the decision is extremely complicated and repetitive. There are five separate judgments totalling some 200 pages. Dr Eagleson and Professor Butt thought it a pity that the style in which such an important "public interest" case was written made it inaccessible to the public. They also wanted to show that judicial decisions could be clear and concise if the writers took the trouble to make them so.

Supplement to the 2nd edition of *Statutory Interpretation*

Francis Bennion (Butterworths)

Mr Bennion incorporates the decision in *Pepper v. Hart* (in which the House of Lords overturned its own rule and now allows courts to use parliamentary explanations of the purpose of legislation as an aid to interpretation.

Articles

Writing laws: making them easier to understand

by Susan Krongold

***The Ottawa Law Review* (Vol 24, No.2, 1992)**

This is not just an academic article, but a how-to guide - 85 pages of sensible, practical guidance on writing clearer statutes. More than that, Ms Krongold shows that the existence of plainly written and accessible law is a democratic question, as well as a legal one. "Laws should not be drafted on the assumption that a trained lawyer will be available to interpret them," she says. "Fairness demands that people be informed of benefits or obligations in language which they can understand.... [N]ot to understand the law means not to understand one's obligations and rights as a citizen .... Parliamentarians, as well, should understand

the laws they are passing."

As lawyers we still have a tendency to consider that we have exclusive rights to explain and interpret to everyone else (and so control) constitutional freedoms, rights and obligations, and parliament's intentions. Plain language is a way of giving ordinary people back the key to some of these mysteries. "Readability is a legal issue," she says, explaining that one of her purposes in writing was "to empower non-drafters who actually read legislation as part of their work to insist on texts that they can understand." Governments must offer support by making clear laws a priority. Ms Krongold's thorough, clear and generous explanation of her thinking and research shows how statutes can be imporoved with this aim in mind.

For whom are we writing?

To whom is a statute addressed? This is not a new issue for CLARITY. Francis Bennion assumes it is a professional (that is, a legal) audience (*Clarity* 27 [April 1993] p.18). Susan Krongold suggests "[p]eople of reasonable intelligence who are able to read a good novel or a newspaper with no difficulty" (Jeffrey Archer or Henry James? *The Sun* or *The Independent*?). "[T]he plain language approach ... aims for a wider audience, not everybody".

This is a question of vital importance. In this article, Ms Krongold is setting out to grapple with it, but it is one which has to be answered before a jurisdiction reconsiders how its statutes are written. My own view is that, ideally, statutes should be designed and worded so that they can be understood by everybody who must comply with them. In practice, while I accept that I would have to settle for slightly - but not much - less, I see no reason in principle why people should consent to subject themselves to laws which might as well be written in a foreign language or debated in secret and kept in a cupboard in the Palace of Westminster. And if this means using the *Daily Mirror* stylebook, so be it. As Ms Krongold quotes Wittgenstein, "Everything that can be thought at all can be thought clearly." Perhaps that is the main part of the problem. As Francis Bennion said in the article mentioned above, "obscurity in legislation is very often caused by ... complication ... of thought." According to Ms Krongold, drafters' problems in Canada are much the same as they are in England.

Leaving aside the primary audience, the last people statutes should be written for, she suggests, are judges. Few statutory sections are judicially interpreted, although most are written with this in mind. "The judges are breakdown experts. One should design it to do its essential work."

Ideas and examples

Telling examples illustrate the arguments for plain language and for clear thinking about the task in hand. "Hocus pocus vocabulary", she says, "[makes] the ordinary reader feel as if they have just entered a private club without the proper attire. The first impulse is to leave."

Her sub-headings are admirable: *There are costs to unreadable law*; *People should be able to read statutes*; *Complex ideas can be written as clear law*; *Are Canada's laws that bad?*; *A subject-verb-object sentence is best*; *Clarity must be supported.*

In fact, this is the style she recommends for use in statutes. Why not have headings like these:

Part 1: Why do we have this Act?

Part 2: What do I need to know before reading this Act?

She recommends using full tables of contents and indices, practical improvements which could easily be adopted here immediately without worsening parliamentary counsel's present lot.

She also covers plain language standards such as sentence length and structure, not using Latin words, and avoiding twins and triplets ("save and except", "purchase, lease or otherwise acquire").

The value of short, clear sentences is reduced, she shows, if the organisation of the Act or regulation as a whole is confusing. "A document which scores well on one of the readability formulas such as FOG may still have enumerable problems the formulas do not count." She stresses the importance of avoiding cross-references as far as possible, and of briefly indicating what is referred to if cross-referencing is necessary. "Subject to", "notwithstanding", and "despite" she describes as obstacles to understanding, whose frequent use suggests that the document should be reorganised.

How will the statute be used?

Most people, Ms Krongold points out, will not want to read a statute from start to finish. They will approach it with a question to which they want an answer. The Act should be designed to help, not hinder, that process; and devices which do so, such as flow charts, could be included. An appendix shows an example from Alberta's Labour Act.

Many statutes include forms. No matter how well designed and well thought out the statute, "a small piece of paper could defeat the whole purpose", she says. If a law is passed to speed up the prosecution of minor offences by giving offenders the option of filling in a

form instead of coming to court, this purpose will be foiled if defendants cannot understand the form and have to go to court after all.

Agreed principles

The Drafting Conventions of the Uniform Law Conference of Canada are helpfully included as an appendix. This useful document sets out the principles drafters are to use, as its title does not unambiguously indicate. The conventions cover every aspect of drafting and say, in part:

> Sex specific references should be avoided.
>
> In the English version of an Act, pronouns such as *he, his* and *him* should not be used if the message is intended to refer to persons of either sex. Instead, the drafter can use *he or she,* repeat the noun referred to, or use a combination of these methods .... It is usualy possible to restructure sentences so as to avoid the problem altogether...

Perhaps surprisingly, given the importance of this point, and how often writers have to deal with it, they do not suggest the options of using either the second person or the plural.

Testing the wording

Drafters get no feedback, she says, and only a few statutes are considered by the courts, yet no-one counts the waste of public (or private) money spent in explaining what difficult statutory provisions mean. She outlines four methods of testing statutory wording, the most powerful of which is Usability Testing. Testers develop case studies of realisitic situations for which readers would need the documents being tested. Readers are asked to think aloud as they go, so that the testers get an idea of how the material is being approached. Sessions are recorded for the benefit of testers and "others who may need to be convinced about the problems in the documents". Marks and Spencer test-market new items very carefully; why shouldn't we do this with statutes?

Design

The section headed "Document Design" covers the meeting point of practicality and aesthetics. I think of a good design as something which ingeniously, effectively, and aesthetically solves a problem or does two or more things at once, whether in furniture, gardens, clothes, texts, or fridges. So a "well designed document" might be one which is written in plain language, well organised, *and* attractive to look at. Ms Krongold explains that design and layout factors, perhaps not usually considered by writers, are important plain language issues. For example:

- Plenty of white space makes for easier use;
- Ragged right-hand margins are easier to read and avoid the ugly "rivers of white" between words that some word-processors create (and typesetters avoided) when these margins are justified.
- Serif typefaces (like this one) are easier to read, because the extenders on the letters draw the eye across the page, but you need to think about the quality of the reproduction your page is likely to get; sans serif type (like this one) may be better if the print is small and to be faxed. Not so relevant for statutes, but like so much of this article, food for thought for everyday writing.

Printers' niceties such as the ability to adjust the spacing between letters, to incorporate different fonts, and to paste in graphics are now widely available on desktop computers. This may be a double-edged sword, encouraging too many unsuitable typefaces badly used in the wrong types of document.

Conversely, easier access to and greater interest in matters like type design and page layout could have very positive consequences. The first step may have been taken: according to Krongold, the government of New South Wales is working with designers to create new specifications for page layout and typography for statutes. What an opportunity to produce statutes that read well, are easy to use, *and* look splendid, with special typefaces, attractive layout, elegant design. Come to that, why shouldn't published Acts be eligible for design awards? All we'd have to worry about then would be what the politicians actually want the statute to say - but that's another problem.

Alison Plouviez

Also published

Plain language and conveyancing by Peter Butt, published in *The Conveyancer and Property Lawyer* (July-August 1993).

> Professor Butt criticises the traditional language of conveyancers, recommends plain language, reviews the plain language movement worldwide, and gives some before-and-after examples.

Speaking in tongues by Daniel Hayes, published in *Law Student* (October 1993).

> Mr Hayes looks at CLARITY's work.

Learning to write with clarity by Fiona Bawdon, published in *The Independent* (26th November 1993).

> Fiona Bawdon reviews a CLARITY seminar.

Alphabet soup by Mark Adler, published in the Law Societies' *Gazettes* in England, Scotland, Hong Kong, and Singapore.

> Adler accuses traditional legal drafters of abdicating their professional responsibility. He points out serious defects in a typical definition clause and offers a few simple rules for avoiding gobbledegook. The English version was slightly bowdlerised by a sub-editor who thought the original too abrasive.

Forms

The new inheritance tax forms

This review is written by a general practitioner who is not an expert on inheritance tax and who does not specialise in probate, but who has acted over long years in obtaining grants of probate and administering estates.

I have little but praise for the new forms. Following the commendable fashionable trend, they are much more user-friendly than the old forms. The colouring and layout are attractive, if not enticing; the use of white boxes for the insertion of information relieves the form-filling tedium; and the marginal notes (marginal on the old forms!) are useful, concise, and clear. It is also helpful that these notes refer to the appropriate notes in the *Guidance Notes* issued by the Capital Taxes Office (booklet IHT 210).

The pages dealing with calculation of the tax mean less to me than if they were blank. This is a criticism of me, and not of the forms, for the partner nicknamed "The Maths", to whom we always leave the completion of these pages, has no difficulty with them. Whether this is a tribute to her or to the forms, we do not know: perhaps to both.

It is not possible to say that the forms are simple. It is not a simple tax, and it is doubtful whether the forms could be simplified any more.

I have left my criticisms to the last, because they are so minor:

> In the preamble on the first page I would like to see the address of the Capital Taxes Office and their enquiry telephone number. As it is I have to look them up.
>
> Are people misled by "Title and forenames" on the front page, so they omit "Mr", "Mrs", or whatever they are?
>
> Is it necessary to ask for the deceased's "National Insurance Number if available"? (Is it ever available?)
>
> I do not like the repeated phrase "as statement attached". "See schedule attached" would be better.
>
> It would be helpful on top of the margin on page 2 to put a heading: "Notes refer to notes in booklet IHT 210".
>
> Are the words "and from what source" (opposite note 9 on page 3) meaningful? Not to me.
>
> The wording about businesses near the top of page 6 could be improved, to make it clearer that one box refers to the deceased being a sole trader and the other to the deceased being a partner.

But enough. My other criticisms, if not those above, are minimal. I would, however, willingly give them to the CTO on application in prescribed form.

Geoffrey Bull

Seminar

Statutory Interpretation
Butterworths, 22.9.93

In a seminar given at Butterworths' Holborn offices on 22nd September to launch the supplement to the second edition of *Statutory Interpretation* (see p. 5), Francis Bennion gave a brief overview of the book as a whole.

His thesis is that the three classical rules of statutory interpretation - the golden rule, the mischief rule, and the literal rule - do not exist. Rather, there are 1001 interpretative criteria, which advocates generally neglect - to their clients' disadvantage - when preparing argument. A checklist appears in an appendix to the book. Mr Bennion conceded that a practitioner could not be expected to work through every criterion for every point to be interpreted, but argued that someone steeped in them would see automatically how they could be applied.

Conferences

Brandreth at The Law Society

On 25th November Gyles Brandreth MP went to Chancery Lane to introduce his Plain Language Bill (reproduced in *Clarity* 26 [Dec 1992, p.10]) to the annual conference of the Parliamentary Liaison Officers of the local law societies. Various other groups, including CLARITY, were represented. Sue Stapely was

in the chair and drew attention to the work of CLARITY.

Mr Brandreth explained that as the bill was presented under the Ten Minute Rule it had no prospect of advancement. The purpose of the rule was to allow back-benchers to air issues which might then be taken up, not necessarily by government legislation (though this was possible) but often less formally, perhaps by ministerial guidelines.

The bill arose against the background of Mr Brandreth's interest in language, and was triggered by the suggestion that he should sign a mass of unreadable gobbledegook when taking delivery of a purchase. The bill was drafted with the help of the National Consumer Council and the Plain English Campaign, and since it had been published other suggestions had been received. The traditional preamble, "Be it enacted by the Queen's most Excellent Majesty ..." was added at the insistence of the Parliamentary Clerk, who would not otherwise allow it to be laid before parliament.

The bill had stimulated a considerable amount of interest, for example from the photocopier industry, which claimed to have put its house in order. The Board of Trade is also interested, and is assessing the merits of statutory regulation.

The reception was generally favourable. In particular, Joanne Crawford of the Young Solicitors Group said the YSG was in favour of plain language as a necessary safeguard for people's rights.

Legal writing Institute

Chicago: 28th-31st July 1994

Details of this biennial conference will appear in the next issue.

Pepper v. Hart

Oxford: 15th-16th April 1994

The Administrative Law Bar Association (ALBA) and the Statute Law Trust (recently formed by Francis Bennion) are jointly organising a conference on *Pepper v. Hart* (1992 3 WLR 1032) at Balliol College, Oxford.

The conference will start with drinks at 7pm on 15th April. These will be followed by dinner, and overnight accommodation will be provided in college.

Formal proceedings will run from 9am to 4pm on the Saturday, interrupted by lunch. The speakers will include Alan Moses QC (counsel for the crown in the case), Professor T. St. John Bates (editor of the *Statute Law Review*), James Goudie QC, and Francis Bennion. Each speaker's paper will be circulated before the end of the conference.

The aim of the conference is to inform practitioners and others interested of the scope and implications of the decision, the effect of the duties imposed by it, and the techniques needed to carry them out, and to provide an overview of court developments since the case was decided.

There will be no more than 90 places. Preliminary indications are that there is likely to be a good deal of interest in the conference. The all-inclusive charge is £150 for practising solicitors and barristers admitted or called before 15.4.87, and £100 for everyone else.

Application forms
are available from:

George Laurence QC
12 New Square, Lincolns Inn,
London WC2A 3SW
DX 366 London
Tel: 071 405 3808
Fax: 071 831 7376

International conference on legal language

Aarhus, Denmark

23rd-27th August 1994

More details are now available of this conference organised by the Aarhus School of Business (reported in *Clarity* 28 [Aug 1993, p.28]).

Dr Mark Vale's preconference seminar *Clear Business Writing: Effective, Efficient & Productive Communication*, will cover the following topics:

23rd Aug

Techniques for effective client-centred communications

- Assessing and understanding the needs of readers.
- Writing and designing effective messages.
- Assessing risk in the use of language.
- Testing forms and documents for readability and usability.

24th Aug

Information, communication and productivity

- The new communication environment for organisations.
- Assessing the cost of information.
- Linking communications to core business processes.
- Forms and information management.
- Identifying communication and productivity gaps.
- Managing communications for productivity.
- Emerging models of communications renewal in organisations.
- Measuring effectiveness and efficiency.

David Elliott, Bryan Garner, and Joseph Kimble will be offering the other pre-conference

seminar**,** running at the same time. They will examine the flaws in current legal writing and methods of curing them, giving practical hints, examples, and other materials, covering the following topics:

- The elements of good drafting.
- Ways to eliminate clutter.
- Legalistic words and phrases that don't belong in legal documents.
- Reducing average sentence length.
- Structuring complex provisions.
- Words of authority: *shall, must* and *may.*
- Organization.
- The parts of a contract.
- Handling definitions.
- The parts of a rule or statute.
- Document design.
- Canons of construction.
- Ambiguity and vagueness.
- Taking instructions.
- An editorial method.

The main conference, *Linguists and lawyers - issues we confront,* starts with a reception on the evening of the 24th. A list of speakers was given in the last issue. Provisional topics include:

Sections

- Comprehensibility of legal language.
- Discourse analysis and law.
- Legal linguisitics.
- Translation of legal texts.

Workshops

- Legal lexicography.
- Methods of analysing legal language.
- Legal usage.
- Practical translation.
- Plain legal language.
- Porblems for lawyers in going plain.
- The devil's advocate: Can linguistics and law be of mutual help?
- CLARITY's work.

Social events

24th Evening receiption, with food and drinks.

25th Evening reception.

26th Evening banquet in an old restaurant with a view of the woods and beach, with three-course dinner and dancing.

27th Excursion to the central Jutland lake district, including lunch in beautiful surroundings, a walk in the beechwoods, a boat trip, and visis to two museums.

Registration before 1st March

A pre-conference seminar	DK 600
Conference	DK 600
Conference + seminar	DK 1,000
Banquet	DK 250
Excursion	DK 250
Hotel (single, per night)	DK 400
Hotel (double, per night)	DK 600

(There are DK 9.77 to the pound sterling as this is written.)

Payment (except for the hotel, which is payable on arrival) should be made on registration, in Danish Kroners without charges to the receipient, by:

- bank transfer to account 3634 089977 at Den Danske Bank or Giro 4108710; or
- money order marked 711.05.33.

(No personal cheques, please)

Full refunds are available on cancellation before 1st July, but no refunds for later cancellations.

Registration forms and further details from:

Jan Engberg
Aarhus School of Business
Fuglesangs Alle 4
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Judicial decisions: acts of communication

by

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In giving a decision we are communicating the law. We are drawing on our training and knowledge to make the law available to others to enable them to recognise that they have been treated justly and fairly in terms of the law. While one side may not like the decision purely for reasons of self-interest, nonetheless both sides should be able to appreciate that the decision is sound and all that could be done under current law.

Because handing down a decision is not just an application of the law to a particular situation but also an act of communication to win acceptance from others, then we need to recognise that we are engaged first in a thinking activity. We cannot communicate successfully and clearly unless we have thought clearly and rigorously about the information that has been presented on the case. Communicating and thinking go hand in hand.

Secondly, communication is a purposeful activity: we have a message - in this instance, a ruling - we want to convey. We are talking or writing because we have something of substance to pass on.

To succeed we have to be clear about the message. We have to determine rigorously what is the real issue in the case and how the law applies to it. Because we are dealing with the law and with the interests of human beings, we must be accurate. There is no reason for error or imprecision. And we must be strictly relevant. The message must shine through clearly and unencumbered. Whatever is not pertinent must be excluded, no matter how interesting or correct it may be in itself. Anything that does not contribute directly to the thrust of the message must be excised. The audience must be left free to concentrate on the message: it should not be distracted by peripheral information.

But more, we are also engaged in a social activity. We not only have a message we want to convey but also people to whom we want to convey it. Accuracy or correctness of content is not sufficient. There also has to be comprehension. If parties to the proceedings are going to appreciate the reasonableness of the ruling - or at least grant it some credence - then they must be able to understand it. If it is obscure, unintelligible, outside their ken, then they can feel cheated, deceived even. Think of your own reactions in disputes with organisations when they have fallen back on convoluted provisions in small print to snatch a victory over you. Have you not felt antagonised? So also in court: if one side cannot make sense of what the decision-maker is saying, that side is going to leave court disgruntled, with the belief that the law has been mysteriously used against him or her and not administered fairly.

Presenting the ruling

This social context of our communication requires us to consider the traditional approach to arranging our material. We have been taught to set out the problem, to produce and discuss the evidence, and then to present the findings. It is the classical *beginning - middle - end* approach to organisation. Certainly this is the way we should go about reaching our decision. But it is not the best way of presenting it. The courtroom is not the same as the university or research setting. The communication environment is entirely different. In the courtroom we have people who are anxious for a ruling. They are emotionally involved, strained and agitated. We must satisfy their most pressing need before they can take in the reasons. Until they know the outcome, they will be only half listening - if listening at all - to our words. So it is best in most cases to organise the decision along the lines:

Issues - ruling - reasons

This is far from a novel suggestion. There is a lot of support for it even within legal circles. The common practice of executive summaries and abstracts at the front of papers and reports highlights the desire of readers for overviews. The tendency nowadays to list recommendations at the beginning of proposals points in the same direction.

Along with organisation goes the obligation to take account of general matters of language. Our sentences should be short and straightforward. There should be a greater number with main clauses first and subjects first. When we are requiring someone to do something, we should use the active rather than the passive.

> You must return the goods by 30 November

is preferable to

> The goods must be returned by 30 November

in which the actor is not expressed.

Inflated and archaic words are to be avoided. If technical terms are necessary, they should be accompanied by some explanation. We do not know the technical terms of other activities and feel no obligation to acquire them. We should not expect others to know ours; nor should we look down on them if they don't.

The greater demands of speech

Many decisions are given orally. The audience has to absorb the ruling on the first hearing or lose the thread. Unlike a written decision, where readers have the opportunity to backtrack, no such option is available to listeners. So there is even greater pressure to be clear and to provide listeners with all the aids we can to help them manage the task.

It is useful, then, to provide them with oral flagposts to show where you are - spoken headings, as it were. It is considerate and wise, for example, to announce each segment of the decision with introductory words such as:

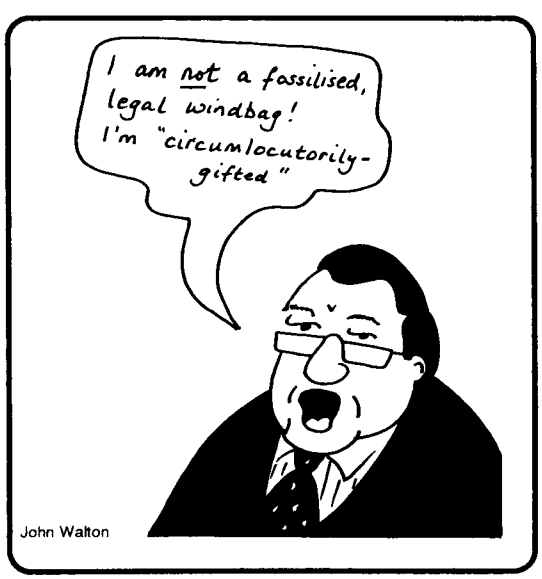
> The issues in this case are ...
>
> My ruling is ...
>
> My reasons are:
>
> first, ...
>
> secondly, ...

The real test

We must always return to the purpose of a decision: it is to communicate the law. Its success is judged by the correctness of the ruling and the reception of the message, not by the fancifulness of the language. Too many speakers and writers - and sadly judges among them - feel that they have to display erudition and exhibit a breadth of language. They let their attention shift from the audience to their image. Despite their intentions, however, they do not impress their hearers. It is the judges and registrars who make themselves clear who impress because the hearers go away satisfied. They have understood the law - and that is what they came to court for.

Peter Butt has sent in this clipping from the *Sydney Morning Herald* of 15th November:

Perhaps, writes Tony Morgan, of Woolloomooloo, you should challenge your readers to find a longer section name in an Act of Parliament in the Western world than section 159GZZZZA(2)(b)(iii)(A) of the Australian *Income Tax Assessment Act*. Our friendly accountant tells us this deals with something called "tax-exempt infrastructure borrowings".



Reader Friendly Communications Awards, Sydney, 30th November

Winner

If things are getting violent at home, you're really worried and there's no-one else to turn to, you can go to your local police station and ask to talk to an officer. You can telephone the police on 11444 or 000 at any time, or ring the Child Protection crisis line. You don't need any money.

Loser

This Lease is entered into upon the express condition that the Lessor shall not in any way be liable for any injury which may be caused to the Premises or to the Lessee or to any employee agent invitee or licencee or to the Lessee's property or to the property of any employee agent invitee or licensee

Drafting snippets

What is needed to "declare"?

Formal documents often contain - at the beginning of often randomly selected paragraphs - the expression "It is hereby agreed and declared between the parties". Is this necessary?

The obvious answer is that it is not. The parties' signatures at the foot of the document imply their agreement to its contents. (And if that were not so, the signatures would not ratify the expression "It is hereby agreed ...".) And what does it add to statement X to assert that you are declaring X?

The *Law Society's Gazette*, in its report of *Huntingford v. Hobbes* (22.9.93, p.42), suggested that the formal wording was necessary. But that is misleading.

The printed transfer (Land Registry form 19(JP)) used in both *Huntingford* and the indistinguishable *Harwood v. Harwood* (1991 2 FLR 274), read:

> The transferees declare that the survivor can give a valid receipt for capital money arising on a disposition of the land.

The wording in the similar case of *re Gorman* was:

> It is hereby agreed and declared that the transferees are entitled to the land for their own benefit.

The point in each case was not that formal words were missing but that the terms of the trust were not unambiguously spelled out. In *Harwood* Sir Christopher Slade said that the provision was consistent with the transferees' holding as nominees for a single third party. If that were so the Law of Property Act 1925 would not impose a trust for sale, and section 14 of the Trustee Act 1925 would enable the survivor to give a valid receipt).

Parliamentary obfuscation

To what extent are members of parliament innocent — often lay — victims of the drafting style of parliamentary counsel? Their own attachment to verbose archaic formulae seems worse than that of the lawyers, as can be heard daily on the broadcast reports of their proceedings.

In Lord Wilson's *Memoirs: The Making of a Prime Minister* (Weidenfeld 1986, p.154) he reproduces an extract of *Hansard*'s report of a speech of his:

> **Mr H. Wilson:** on a point of order: Sir Charles Erskine-May lays down that, where a difficulty has been reached about a Motion to report progress, there is an alternative way in which the debate in a committee of the whole House can be brought to a conclusion if that is the wish of the committee.... (He) provides that an alternative Motion can be moved and is quite often accepted, to the effect that the Chairman do leave the chair.
>
> I should like to ask whether you would accept as an alternative the Motion "that the Chairman do leave the Chair forthwith". It being understood that it would be moved in the spirit of Erskine-May's suggestion that this is an alternative way of bringing a debate in committee to a conclusion when there has been a refusal of the Motion to report progress. If it is in order I should like to move that, so that we may get out of this very serious impasse.

A less pompous gathering would have avoided the "very serious impasse", and the need to waste time on procedural discussion, by the suggestion "that we end the debate".

Building schemes again

In *Clarity* 25 (September 1992, p.25) I queried the common practice of developers who purport to impose a building scheme on buyers while reserving the right to vary the covenants when selling other plots. In the following issue (December 1992, p.25) Richard Oerton referred to authority which permitted this contradiction.

I had recently to advise on the 1975 title to a house on an estate in which the original purchaser

> ... for himself and the persons deriving title under him hereby covenants with the Company and the persons deriving title under it for the benefit of the remainder of the land now or formerly comprised in the Title above mentioned and every part of it so as to bind the property hereby transferred into whosesoever hands the same may come that he will at all times hereafter observe and perform the stipulations and conditions set out in the Third Schedule hereto PROVIDED ALWAYS that the Company and its successors and assigns owners for the time being of the part of the land comprised in the Title above mentioned or for the time being remaining unsold or otherwiseundisposed of or may [sic] at the request of the transferee or the persons deriving title under him release or vary any of the said stipulations and so that nothing herein contained shall create or impose any restrictions on the manner in which the Company or the persons deriving title under it may deal with the whole or any part of the said land comprised in the above mentioned Title for the time being remaining unsold *or be otherwise deemed to create a building scheme for the said land or any part thereof* [my italics].

Richard Oerton's view is that an explicit denial of a building scheme is effective, and that there is none. What then is the effect of this confusing clause?

At law

Sellers can enforce both positive and negative covenants against the original buyer (the covenantor).

Sellers' assignees can do the same if (1) the covenant "touches and concerns" their land and (2) the covenant was annexed to the assignees' legal estate in the land. (The position is slightly more complicated if the covenant was made before 1926.)

But neither original sellers nor their assignees can enforce the covenant against a covenantor's assignees. (Although there are ways to pass on responsibility: for example, original covenantors can be sued for the breaches of their successors, and can pass on responsibility if they have taken an indemnity).

In equity

Sellers can only enforce whilst they retain the land for whose benefit the covenant was given.

Their assignees can enforce if the covenant "touches and concerns" their land and they are entitled to the benefit of the covenant. They can be entitled in any one of three ways:

(a) The benefit of the covenant has been assigned with their land; or

(b) It has been attached to their land; or

(c) There is a building scheme.

Assignees from covenantors are bound only by negative covenants given to protect land owned by the original covenantee and attached to that land.

Applying these rules to the covenant in hand, does it make any difference to anyone if there is or is not a building scheme. And what was the drafter trying to achieve with that exceptionally long paragraph?

Writing numbers

Reprinted from

The Elements of Legal Style

by Bryan Garner, Oxford University Press, 1991

by kind permission of the author

Where science and mathematics are not involved, the best practice is to spell out all numbers, cardinal and ordinal, smaller than 101. (Another common practice - the convention followed in science and mathematics - is to spell out only numbers smaller than 11; this less formal practice is perfectly acceptable in legal writing.) Instead of,

> During 1989, 92 trials in the federal courts in this region consumed 20 days or more; the 2 longest trials lasted more than 3 months.

Write

> During 1989, ninety-two trials in the federal courts in this region consumed twenty days or more; the two longest trials lasted more than three months.

There are five exceptions to this general principle:

> 1. If numbers recur throughout the text or are being used for calculations - that is, if the context is quasi-mathematical - then use numerals.
>
> 2. Approximations are usually spelled out (*about three hundred years ago*).
>
> 3. In units of measure, words substitute for rows of zeros where possible (*$3 million, $3 billion*), and digits are used with words of measure (*9 inches, 4 millimeters*).
>
> 4. Numbers that begin sentences must always be spelled out (*Nineteen hundred fifty-eight was an auspicious year ...*).
>
> 5. Percentages may be spelled out (*eight percent*) or written as numbers (*8 percent*), but, unless you are dealing with several percentages, write out *percent* instead of using the sign (%).

When, in the same context, some numbers are above the cut-off and some below, the style for the larger numbers determines the style for the smaller ones. Instead of,

> Of the 160 Criminal Rules, only three are to be amended.

Write

> Of the 160 Criminal Rules, only 3 are to be amended.

Some numbers require punctuation; others do not. Commas separate digits into thousands (10,000), even when the number is 1,000. Square dollar amounts should not include zeros to indicate cents: Write $4,700, not $4,700.00. When referring to decades, the trend nowadays is to omit the apostrophe: hence, 1960s instead of 1960's. Finally, despite the legal writer's habit, you need not, and should not, duplicate written amounts with numerals in parentheses: *six hundred (600) bales of hay; w*rite simply *600 bales of hay*. For other puzzles with numbers, consult *The Chicago Manual of Style* (13th ed. 1982) or *Words into Type* (3d ed. 1974).

Legal aid draft franchising contract

Contents

The Legal Aid Board wants its franchising agreement to be written plainly, and invites suggestions for improvement from CLARITY members

by mid-January if possible, please

Please contact:

Simon Morgans
Legal Aid Board
DX 451
London

071 353 3794

Limitations of space and time have prevented us reproducing more than about half the agreement, but members wanting the rest of the text can obtain it from Mr Morgans or find it in *The Law Society's Gazette* of 24th November 1993

Background

(A) The purpose of the Legal Aid Act 1988 ('the Act') is to establish a framework for the provision under pts II, III, IV, V and VI of the Act of Advice, Assistance and Representation which is publicly funded with a view to helping persons who might otherwise be unable to obtain advice, assistance or representation on account of their means.

(B) The board was established under the Act with the general function of securing that advice, assistance and representation are available in accordance with the Act and of administering the Act.

(C) S.4 of the Act empowers the board to do anything which it considers necessary or desirable to provide or secure the provision of advice, assistance and representation including (if the Lord Chancellor so directs and to the extent specified in the direction) entering into any contract with any person or body to provide such services under pt II of the Act.

(D) The Lord Chancellor has, under s.4(4) of the Act, made a direction dated ... enabling the board to enter ...

(E) Regulations have been made under the Act with regard to the provision of franchised services by the franchisee under a contract.

(F) The franchisee wishes to provide the franchised services in accordance with the Act and the regulations on the standard terms and the board wishes to appoint the franchisee to provide them.

1. Interpretation

1.1 In these standard terms the following expressions shall have the following meanings.

'The Act" means the Legal Aid Act 1988.

'Advice' means 'advice' as defined in s.2 of the Act which is available under (and is not excluded from) the Act and this agreement.

'Agreement' means this agreement between the board and the franchisee on the standard terms.

'Application form' means the form of application (and any annexures to it) made by the franchisee to the board indicating the franchisee's wish to provide the franchised services.

'Approved representative' means any person, firm or company approved by the franchisee to supply services to it in accordance with the specification.

'Assistance' means 'assistance' as defined in s.2 of the Act which is available under (and is not excluded from) this agreement.

'The board' means the Legal Aid Board and, where the context so requires, includes the board's representatives.

'CAB' means citizens' advice bureau.

'Client' means any person receiving any of the franchised services from the franchisee.

'Devolved powers' means those powers and functions of the board (if any) which the franchisee is approved from time to time by the board to exercise in the franchised categories of work as authorised by the relevant franchise certificate and those powers, rights, facilities or arrangements as may be provided to franchisees by green form special arrangements.

'End date' means 24.00 hours on the date on which this agreement ends whether by expiry or by termination.

'The franchise certificate' means the relevant certificate or certificates, including any variations to it or them approved by the board, and any replacement certificates issued by the board to the franchisee authorising the franchisee to provide the franchised services.

'The franchisee' means the organisation which has entered into this agreement with the board.

'Franchise manual' means the manual prepared by the board (which may include the *Legal Aid Handbook*) giving guidance on legal aid aspects of casework and on the exercise of the devolved powers.

'Franchised categories of work' means those categories of legal aid work in which the franchisee is approved by the board to provide the franchised services from the franchised offices, on an office by office basis, as authorised by the relevant franchise certificate.

'Franchised offices' means, as the context so requires, the relevant franchised office or any or all of the franchisee's offices approved by the board for the provision of the franchised services as authorised by the relevant franchise certificate.

'Franchised services' means the provision, as authorised by the relevant franchise certificate, under this agreement of advice and/or assistance and/or representation: (a) from the franchised offices, (b) in the franchised categories of work; and (c) in compliance with the Act, the regulations, the specification and the franchise manual.

'Franchising' means a system of securing the provision of advice, assistance and representation by means of contracts between the board and approved providers of legal services.

'Franchising promotional items' means the board's franchise logo and franchise certificate and all or any of such other logos, signs, display materials, information, literature and other promotional items, supplied or approved by the board, in connection with franchising or the franchised services.

'Green form special arrangements' means such powers, rights, facilities or arrangements as may be provided by regulations for franchising.

'Key personnel' means those personnel (if any) of the franchisee whose employment by the franchisee is material to the provision of the services and/or to ensuring compliance with this agreement, the specification or the manual and who are designated as such on the fran-chise certificate.

'Legal aid fund' means the fund established by the board in accordance with s.6 of the Act.

'Legal aid work' means the provision, under the Act, of advice, assistance or representation, as defined in s.2 of the Act, whether or not provided under this agreement.

'Material breach' means, as the case may be, (i) any breach of this agreement, capable of remedy, which the board has required the franchisee to remedy within 21 days (or such longer period as the board may specify) and which has not been remedied within the required period or (ii) any other material breach of this agreement which is not capable of remedy.

'NACAB' means National Association of Citizens' Advice Bureaux.

'Official investigation' means any investigation (of which the franchisee knows) by (a) the relevant professional body (b) an organisation (such as in the case of a franchisee which is a firm of solicitors, the Solicitors' Complaints Bureau) which is responsible for regulating or disciplining the franchisee or its personnel (c) the board's special investigation service or (d) the police, into possible wrongdoing by the franchisee or its personnel.

'Regulations' means the regulations made under the Act applicable or relevant for the time being to the provision of any part of the franchised services under this agreement and includes any arrangements made by the board pursuant to and to give effect to such regulations and any direction by the Lord Chancellor.

'Relevant professional body' means the body or organisation responsible for regulating the conduct of the franchisee in connection with the franchisee's provision of the franchised services to its clients and being one of the following: (a) the Law Society, (b) the Federation of Independent Advice Centres, (c) the Law Centres Foundation, or (d) the National Association of Citizens' Advice Bureaux.

'Report' means a report from one or more of (a) the organisations which may carry out an official

investigation (b) the Solicitors' Indemnity Fund, about the franchisee and/or its personnel.

'Representation' means 'representation' as defined in s.2 of the Act which is available under (and is not excluded from) the Act and this agreement.

'The Specification' means the document designated as such and prepared by the board which the board may amend as provided by this agreement.

'The standard terms' means the Legal Aid Board franchise agreement standard terms currently in force.

'Start date' means 00.00 hours on the date notified to the franchisee by the board as the date the franchisee shall begin to provide the franchised services.

'The term' means the period from the start date to 24.00 hours on */*/1999.

'Transaction criteria' means the criteria described in the specification enabling the board to audit the franchisee's case files to determine whether the basic issues necessary to provide a competent service have been addressed.

1.2 Clause headings in this agreement are inserted for convenience only and shall not affect its interpretation.

1.3 Words denoting the masculine gender shall include the feminine gender and words denoting the singular number shall include the plural and vice versa.

1.4 Reference to any legislation or subordinate legislation shall, as the context requires, be a reference to any substitute for, or re-enactment of, such legislation or subordinate legislation arising at any time during the term or any renewal or extension of the term.

1.5 Reference to approving or approval means approving or approval as provided by this agreement or, if no express provision is made by this agreement, to approving or approval in writing.

1.6 Reference to notifying, notification or notice means notifying, notification or notice as provided by this agreement or, if no express provision is made by this agreement, notifying, notification or notice in writing.

1.7 This agreement shall be governed by and in accordance with English law.

2. Licence

2.1 The board grants the franchisee the non exclusive right and licence to provide the franchised services during the term in accordance with the provisions of this agreement.

2.2 For so long and to the extent that this agreement remains in force, legal aid work undertaken by the franchisee in any franchised categories of work from any franchised offices shall be provided solely on the terms of this agreement and not on any other basis.

2.3 For the avoidance of doubt, legal aid work undertaken by the franchisee outside the franchised categories of work or when, or to the extent that, this agreement is not in force, shall not be governed by this agreement.

2.4 In carrying out any legal aid work including exercising the devolved powers, the franchisee acknowledges that it is an independent provider of legal services. It is not an agent or partner of the board and shall not act as such or conduct its activities so as to give the impression that it is the board's agent or partner.

3. Franchise certificate

3.1 The board will issue a franchise certificate for each franchised office. The franchise certificate shall at all time remain the property of the board and shall be dealt with as directed by the board.

3.2 The franchise certificate will state the franchisee's name, the address of the franchised office, the franchised categories of work the devolved powers and such other information as the board may desire and, unless the board otherwise directs, shall be displayed at the franchised office (without alteration) as directed by the board.

3.3 If there is any amendment to the categories of work or the devolved powers the board will issue a replacement franchise certificate.

3.4 If this agreement is terminated or approval of any franchised office, franchised category of work or devolved power is suspended or terminated, the franchisee shall forthwith return the relevant certificate to the board.

4. Start and term

4.1 This agreement shall commence on the start date and, subject to the provisions for termination and extension, shall continue in force for the term.

4.2 Any advice, assistance or representation coming within the franchised categories of work which the franchisee is in the course of providing on the start date (or any later date when such advice, assistance or representation comes within the franchised categories of work) shall, from that date, be governed by this agreement. For the avoidance of doubt, while such work is governed by this agreement, the franchisee shall be entitled to receive payment for it only pursuant to this agreement and not in accordance with any entitlement which might otherwise arise under the Act or any regulations.

4.3 Any advice, assistance or representation coming within the ambit of the franchised categories or work, which the franchisee is in the

course of providing on the end date shall, from that date, not be governed by this agreement. For the avoidance of doubt, from that date payment for such work shall be pursuant to relevant legal aid legislation and the franchisee shall not be entitled to receive payment for it pursuant to this agreement.

5. Extension

5.1 Subject to the board's rights to terminate this agreement, the board shall grant the franchisee an extension provided franchising is to continue.

5.2 If this agreement is extended it shall be extended on the standard terms in force at the start of the extended term.

5.3 The standard terms in force at 00.00 hours on **/**/1999 shall provide for an extended term of three years.

5.4 The board shall consult the Law Society on any new standard terms which it wishes to apply during any extended term.

5.5 The board shall notify the franchisee at least six months before **/**/1999 of the new standard terms which shall apply if an extension is granted.

6. Franchisee's principal obligations

6.1 The franchisee shall comply with this agreement and shall provide the franchised services in accordance with this agreement with all reasonable skill, care, diligence and accuracy.

6.2 In providing the franchised services, the franchisee shall, and shall ensure that its personnel and approved representatives shall, at all times:

6.2.1 comply with the mandatory requirements in, and follow the guidance in, the franchise manual;

6.2.2 so far as they relate to the conduct of its activities pursuant to this agreement or the provisions of the franchise manual, comply with, observe and perform the obligations set out in the specification; and

6.2.3 not do anything in conflict with the specification or the franchise manual.

6.3 For the avoidance of doubt, the obligations set out in the specification include the requirement to continue to meet such performance as is required in the monitoring arrangements section of the specification (which the franchisee was obliged to meet in order to become a franchisee under this agreement) and any obligation to have systems, procedures or controls includes the obligation to operate them.

6.4 The franchisee shall, when it is being audited by the board and at such other times as the board may reasonably require, demonstrate to the board that it is complying, observing and performing (and not acting in conflict) and has at all times complied, observed and performed (and not acted in conflict) as required by this cl 6.

7. The franchisee's duties

7.1 The franchisee shall comply at all times with all relevant legislation from time to time in force including the Act and the regulations. If there is any conflict between this clause and the provisions of clause 6, the provisions of this clause shall prevail.

7.2 The franchisee shall allow the board and its authorised representatives at any time, during normal business hours upon reasonable notice (being not less than five working days), to have access to any of its premises for any of the purposes set out in the specification and/or to verify by regular auditing and/or other verification process whether it is complying with this agreement. The franchisee shall supply the board with such facilities as the board may reasonably request for such purposes.

7.3 The franchisee shall make available to the board, when it is being audited by the board or at such other times as the board may reasonably require, within 14 days of the board's request, or such further period as the board may specify, with such information and assistance and such documents or parts of documents, including the case files and file records of legally assisted persons (and former legally assisted persons) as the board may require or are specified in the specification for such reasonable purposes as the board may specify including verifying whether the franchisee is complying with this agreement and the conduct of research into franchising. For the avoidance of doubt, the board will not require the removal of live or active case files from a franchised office unless there are special circumstances requiring their removal, such as lack of space which means that the board cannot audit on the premises.

7.4 Without prejudice to cl 10, the franchisee shall notify the board of any material alteration to any information it has provided to the board (including information which it provided in seeking to become a franchisee) and to the manner in which it provides the franchised services (including alterations to the franchisee's management or management systems). For the purposes of this clause, material alterations include any decision to stop providing representation in any franchised category of work or any fundamental change in the management of the franchise.

7.5 The franchisee shall not publicise its status as a franchisee except in accordance with the specification, or as approved by the board, and shall not say or do anything

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Statute Law Reform - is anybody listening?

by

Francis Bennion

An updated version of an article that first appeared in 133 *Solicitors Journal* 1989, p. 886.

The purpose of legislation is to express the legislator's will in a form suitable (with or without subsequent processing by courts and others) for conveying the message to those who have to conform to it. In modern western societies the will of the legislator is exerted in many directions and over many topics. The system cannot work justly and efficiently unless the people governed by it are easily able to find out what it requires of them.

Ideally the citizen should be able to find this out directly, perhaps by consulting a book or video screen. In reality it is for the foreseeable future likely to remain necessary that the citizen should consult an adviser possessing legal expertise. Anyone else who presumes to offer advice on legislation invites reversal of the maxim that the lawyer who acts for himself has a fool for a client. His client has a fool for a lawyer.

Even if it is unrealistic at present to contemplate that legislation can be directly accessible to the citizen, it should be directly accessible to the legal adviser. Yet I have met no lawyer who denies that under the current system grave difficulties lie in the way of such accessibility (though I doubt that many lawyers seriously want anything done about this).

One problem people have experienced in putting forward sensible and workable reforms is that the subject is a difficult one, with many technicalities. Solutions that appear feasible to a person unfamiliar with these are dismissed by the expert (who rarely seems willing to respond positively with suggestions that might get round the technical objections).

Any experienced legislative drafter, if moved to propound reforms (which few are), is likely to be in a good position to avoid making unrealistic proposals. It was for that reason that I felt an obligation to frame and put forward over the years a number of suggestions of this kind. It may now be helpful to summarise these, and that is the main purpose of this article. They are set out in a number of books, articles, and other sources. The main books are *Statute Law* (Longman, 3rd edition 1990) referred to below as "SL", and *Statutory Interpretation* (Butterworths, 2nd edition 1992, supplement 1993), referred to as "SI". Unless the contrary intention appears (as the Interpretation Act is fond of putting it), publications referred to below are by me.

The proposals fall into four groups: (1) general reforms; (2) reforms in the way Acts are drafted; (3) reforms in the way legislation is interpreted; (4) reforms in the way legislation is presented to the user.

(1) General statute law reforms

Codification

Produce comprehensive codifications of the general law wherever possible. (SL pp 74-77; 1986 Crim LR, p. 295.) The English Law Commission has been singularly unsuccessful in carrying out the duty imposed by the Law Commissions Act 1965 to codify the law (*The Law Commission and Law Reform*, 1988, pp 62-64).

Is codification worthwhile? Lord Thring, founder of the Parliamentary Counsel Office (where all United Kingdom public general Acts have been drafted since 1869) said:

> No man in his senses can doubt that a code, or the reduction to a consistent and harmonious whole of the scattered fragments of the law of a country, is the ideal perfection of legislation. No man can doubt that a code of English law is the goal towards which all English law reform should tend.
>
> (Thring, *Simplification of the Law* [Bush, London, 1875, p.2])

Is codification possible under modern conditions? Sheldon Amos, a Victorian barrister with chambers at 9 Kings Bench Walk, wrote in 1867 that:

> The three main requisites demanded in those who would codify the English law are (1) a masterly faculty of accurately comprehending the true drift of all the materials to be used; (2) a profoundly scientific knowledge of general jurisprudence; and (3) a capacity for definite, terse, unambiguous and comprehensive expression.
>
> (Amos, *Codification in England and the State of New York* [London, W. Ridgeway, 1867, p.15])

This remains true. Where are the geniuses who satisfy the Amos requirements?

Statute Law Commission

Set up an official Statute Law Commission to act as the keeper of

the statute book. (SL, pp 69,337.) Lord Justice Gibson, a former chairman of the Law Commission, said of this proposal at a colloquium held to mark the Commission's 20th anniversary:

> Francis Bennion has referred to statute law. I agree with him about the state of our statute law.... [It] seems to me to be a part of the law which is most likely to be improved directly if responsibility for the whole of it were concentrated in one hand. The Chairman of the Law Commission has the honour of being the Vice-Chairman of the Statute Law Committee. That committee meets once a year at 12.00 in the confident expectation that it will finish its business by 1.00 o'clock. It has promoted much useful work through sub-committees. It does not have control directly, as I respectfully think such a committee should, of all aspects of statute law. The notion of a Statute Law Commission commended itself to me when I heard it discussed.
>
> (*The Law Commission and Law Reform* [Sweet & Maxwell, 1988, ed. Graham Zellick, p.53])

Since that was said the Statute Law Committee has been converted into the Lord Chancellor's Advisory Committee on Statute Law. As its name indicates, this lacks the executive powers suggested by Lord Justice Gibson. Has there been anything more than a change of name?

Statute Law Institute

In default of a Statute Law Commission, set up an unofficial Statute Law Institute, similar to the American Law Institute, with the function of preparing codes etc. (SL, pp. 27-28.)

(2) Reforms in the way Bills and Acts are drafted

One title one Act

Arrange the statute book under titles, with one Act for each title. (SL, pp. 10, 39, 66, 70-73, 227.)

Standardised clauses

Use standardised clauses, drawn up by, say, the Parliamentary Counsel Office or the proposed Statute Law Commission, for constant use in Acts and statutory instruments. These will insure that the same thing is said in the same way, and shorten drafting time. They should be updated by revision whenever necessary. (SL, pp. 26-28.)

Information for MPs

Do not include in a Bill passages designed only for the information of MPs, since wording intended to form part of the law should be framed solely for that purpose. (SL, pp. 37-38.) Instead use a textual memorandum. (SL, pp. 51-52.) For this reason, do not use Keeling schedules. (SL, pp. 51-52.)

Amendments to Bills

Alter procedural rules to enable MPs to put down a simple amendment which merely raises for debate the relevant policy point. At present they have to draft a detailed amendment that fits the structure of the Bill. (SL, p.33.)

Textual amendment

Use this in preference to indirect amendment. (SL, p.32.) I have been pressing for this change since 1968, and it is now largely in operation.

Commencement and transitional provisions

(1) Where different provisions are to be brought into force by order at different times, provide a commencement schedule which is to be amended by each order so as to provide in the Act itself (when reprinted) a comprehensive commencement statement. (SL, pp. 48-50.)

(2) Include in each principal Act (that is, an Act which does not merely amend other Acts) a schedule forming a historical file of commencement dates and transitional provisions. This file would be amended by any subsequent legislation amending the principal Act. (SL, pp. 49-50; 130 NLJ 1980, p. 913; 131 NLJ 1981, pp. 356, 586.)

(3) Reforms in the way legislation is interpreted

Training

Recognise the need to train judges, advocates and advisers in the principles of statute law and interpretation. (SL, pp. 41, 83; *The Law Society's Gazette* 1982, pp. 219, 664.)

Drafting technique

Distinguish, for purposes of interpretation, between precision drafting and disorganised composition. (SL and SI: see indexes.)

Dynamic processing

Accept that dynamic processing of legislative texts is part of the judicial function, producing *sub-rules* which are more detailed than the main rules laid down by the legislator. (SL and SI: see indexes.) To aid this acceptance, pass a codifying Act that declares the powers of courts and other persons or bodies in relation to the interpretation of legislation. (SL, pp. 320-324, 343-345.)

Interstitial articulation

Accept that a judicial sub-rule should be expressly and precisely framed as such, so as to articulate it within the interstices of the legislative text. Such articulated sub-rules can then be used directly by the codifier (see above). This method also reduces judicial error. (SL, pp. 198-310; SI, pp. 373-376.)

Selective comminution

To assist comprehension, break up the relevant portion of a lengthy passage into numbered clauses.

Codification of interpretative technique and criteria

Codify the judge-made and statutory rules, principles, presumptions and canons of interpretation. This would best be done in an enacted code. Failing that it could take the form of an official restatement promulgated by the Law Commission or a similar body. The code would recognise that the *enactment* is the unit of enquiry in statutory interpretation, and distinguish the legal from the grammatical meaning. It would acknowledge interstitial articulation and the formation of sub-rules by judicial and other processing. It would distinguish the factual outline from the legal thrust of an enactment, and show how disputes arise over opposing constructions. It would state the paramount interpretative criterion, namely legislative intention.

The code would go on to specify the authorised guides to legislative intention, which are of four kinds: (1) *rules* laid down by statute or the courts; (2) *principles* derived from the legal policy of the state; (3) general *presumptions*; and (4) linguistic *canons*. The detailed content of these categories is as follows.

(1) Rules of construction laid down by statute or the courts. The basic rule of statutory interpretation is that the legislative intention is taken to be that an enactment is to be construed in accordance with the general guides laid down by law, and that when these produce conflicting answers the problem is to be resolved by weighing and balancing the relevant factors. Other rules comprise: rules at present laid down by the Interpretation Act; the duty to have regard to the juridical nature of an enactment; the informed interpretation rule; the plain meaning rule; the rule applicable where the meaning is not 'plain'; the commonsense construction rule; the rule *ut res magis valeat quam pereat* (strive to make the enactment effective); and the functional construction rule.

(2) Principles of construction derived from legal policy. These comprise the following principles: law should serve the public interest; law should be just; persons should not be penalised under a doubtful enactment; law should be predictable; law should not operate retrospectively in an adverse sense; law should be coherent and self-consistent; law should not be subject to casual change; and municipal law should conform to international law.

(3) General presumptions as to legislative intention. These comprise the following rebuttable presumptions: the legislative text is to be the primary indication of intention; the literal meaning is to be applied; the mischief is to be remedied; a purposive construction is to be given; regard is to be had to the consequences of a construction; an 'absurd' result was not intended; legislative errors are to be rectified; evasion is not to be countenanced; ancillary rules and maxims of the law are intended to be attracted; and an updating construction is to be applied where necessary.

(4) Linguistic canons of construction. These comprise the following canons: deductive reasoning is to be employed; an Act is to be construed as a whole; broad terms are to be correctly treated; static and mobile terms must be distinguished, as must processed and unprocessed terms; there must be correct treatment of technical terms, neologisms, archaisms, abbreviations, homonyms, and other special cases; *noscitur a sociis* (the meaning of a doubtful word may be ascertained from the words associated with it); *ejusdem generis* (the meaning of general words in a list is restricted by the meaning of particular words in the same list); the rank principle; *reddendo singula singulis; expressum facit cessare tacitum* (an express provision negates an implied one); *expressio unius est exclusio alterius* (the mention of one excludes one not mentioned); implication by oblique reference; and implication where a statutory description is only partly met.

(4) Reforms in the way legislation is presented to the user

Computer systems

(1) Carry out further research into methods by which, using a special computer language such as LEGOL, legislative provisions could be *initially* expressed in machine-readable form. (SL, p. 333; *The Law Society's Gazette* 1981, p. 1334.)

(2) Convert existing statutory rules which do not require the exercise of judgment or discretion for their operation into computer programmes enabling them to be directly accessed by use of a computer terminal. (For an instance of this being done see Phillip Capper and R. Susskind, *Latent Damage Law: The Expert System*, Butterworths 1988.)

Algorithms etc

Use algorithms, logical trees, and other graphic systems to enable statute users to find out how legislation affects them without having to understand its language. (SL, pp. 331-332).

Composite restatement

Publish, preferably through some official body such as the Law Commission, authoritative presentations of particular subjects dealt with by statute in the form of composite restatements. A composite restatement of the legislation on a particular topic combines in one rearranged, comprehensive, updated text provisions from all relevant Acts and subordinate legislation. It uses the technique of comminution (see

above), and employs typographical aids. It solves the user's problem of text-collation and, as has been said, "does half the work for him or her". (SL, chap. 23. For an example of its use in annotated form in relation to consumer credit law see *Consumer Credit Control*, Longman 1976 to date.)

Conclusion

The would-be reformer needs to start by understanding the name of the legislation game. The whole idea of drawing up general verbal formulas to regulate future human conduct is far more complex than anyone seems prepared to allow. The situations to be regulated are complex. Getting agreement in parliament is complex, and too many cracks get papered over. Language is complex, and hopelessly imprecise. Interpreting judges or administrators are complex creatures, each one a different individual with his or her own ideas of the meaning of legislative words. Finally, life is complex.

The only foreseeable thing is that the unexpected will happen. Yet the same imperfect words have to regulate us today, tomorrow, and through the uncertain future. There *is* more we could do to assist this process. There really is.

Letters

The split infinitive

from Richard Oerton

I am agog to read (on page 38 of the excellent August issue) that Partridge thinks it right to split the infinitive in the following sentence

> **Our object is to further cement trade relations.**

If it isn't split, the object is clearly that of further cementing trade relations. But if it is split, the object could equally well be that of furthering relations in the cement trade.

[It seems necessary to split an infinitive with the adverb modifying it when the infinitive is the second of three consecutive verbs. Otherwise it is not clear whether the adverb relates to the first or third verb. Edward Good gives an example in Mightier than the Sword (Blue Jeans Press, 1989, page 30): "We have decided to quickly consider hiring you." - Ed.]

Northern Ireland

from Mary McAleese
director, Instititute of Professional Legal Studies, The Queen's University of Belfast

You might like to know that Belfast is already doing its best for Plain English.

The Institute of Professional Legal Studies runs a mandatory one-year vocational training programme for solicitor and Bar students. Drafting plays an important role in the skills we try to develop. We devised a foundation course in drafting (with a lot of help from Professor John Adams). It is designed to get students thinking about and practising good drafting techniques. So far the Bar students outshine their solicitor colleagues.

The Consumer Association of Northern Ireland now award an annual prize to our best exponent of plain English.

Charity Commission

from David Pedley

David Pedley has written — and I apologise to him for mislaying the full text of his letter — paying tribute to the improvements in the Charity Commission's documents but drawing attention to certain clauses in its specimen memorandum of association of a company limited by guarantee. In particular, he criticises:

> (the power) to draw, make, accept, endorse, discount, execute and issue promissory notes, bills, cheques and other instruments, and to operate bank accounts in the name of the Charity;
>
> and the definition
>
> "executed" includes any mode of execution.

Who's who in the plain language community

an occasional series

The Precedent Group and Rapport Communications

The Precedent Group is a business partnership formed in Vancouver in April 1987 by Cheryl Stephens and Allen Soroka. Its services include legal research, legal writing, and legal education and training. Its clients include the British Columbian branch of the Canadian Bar Association.

Rapport Communications is a subsidiary formed in January 1993 to provide services and training in the use of plain language, legal communications, and legal marketing.

Rapport is a newsletter about the plain language community published by Rapport Communications as its "pro bono" work. Its principal circulation is in Canada, but it goes also to England, Scotland, Ireland, the United States, Australia, and New Zealand. It is read by lawyers, many government employees at municipal, provincial, and federal levels, legal academics and educators, plain language consultants, and plain language advocates in the private and public sectors. Most of its contents are also published on the Public Legal Education and Information computer network sponsored by the Canadian Department of Justice.

From January 1994 *Rapport* will be published quarterly. The price will be Cdn$50 plus tax in Canada and US$50 elsewhere.

Meanwhile, Rapport Communications have published:

Insititutional analysis: A design for a plain language audit.

Plain language: make it so (an introduction to plain language process and style), intended as a workshop manual.

Letter perfect: modern legal correspondence

Rapport 92, a digest of *Rapport* 1992.

Plain language legal writing, a manual for use in educational institutions.

Cheryl Stephens began her adult life at journalism school in California, then took her BA degree before moving to British Columbia for her Ll.B. After her call to the British Columbian bar in 1981, she was in sole general practice for two years before moving to the corporate world, where she acquired varied experience in administration, editing, and teaching. She is currently enrolled in the Post-Graduate Diploma Program in Applied Communications at Simon Fraser University.

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The Document Design Centre, Washington

The Document Design Centre (DDC) is part of the American Institutes for Research in the Behavioural Sciences.

AIR grew out of the Aviation Psychology Program in the United States Army Air Force in the Second World War. Dr John Flanagan, who directed the program, founded AIR on his return to civilian life at the University of Pittsburgh.

It is an independent, not-for-profit company carrying out research, development, and evaluation, in the behavioral and social sciences, for private, charitable, and government clients. Three quarters of its funding comes from the US government, the rest from state and municipal governments, foundations, associations, and private companies.

The DDC creates and redesigns consumer contracts, owners' guides, computer documentation, banking and legal documents, letters, personnel manuals, and all types of forms. It also develops software ranging from tutorials for beginners to on-line help systems.

The DDC has recently been working with the Bureau of Labor Statistics to improve the Internal Revenue Service's tax return form used by home sellers.

They began by interviewing 10 professional tax preparers. Most thought they understood the form completely, but they sometimes disagreed among themselves about the meaning of specific items. Then they asked 21 taxpayers to complete the form using dummy information supplied by the IRS. Only one completed it correctly. The results of this research have been used to rewrite the form. (We hope to publish more details of the project in a future issue.)

Membership list

As none has been published for some years it was thought that a complete list might be of interest to promote contact between members.

Please write to the editor if your details are inaccurate or incomplete

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Malaysia

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Malta

Dr David Fabri. International Business Authority

Dr Paul Micallef; Department for Consumer Affairs

New Zealand

Chapman Tripp Sheffield Young (contact: Helen Pearce)
ProfSirKennethKeith;LawCommission
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Jason Pearce; Morgan Bruce
David Spalding; James, James & Hatch
D. Thomas; Clement Jones & Emyr Williams

Legal Aid Board's draft franchising agreement
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which is or is likely to be misleading to clients or potential clients regarding its status as a franchisee.

7.6 The franchisee shall notify the board should it become aware of any event which may entitle the board to terminate this agreement, or to suspend or terminate approval in respect of any of the franchised offices, the franchised categories of work or the devolved powers.

7.7 The franchisee authorises the board to request reports as often as it wishes and whenever it wishes before the end date and shall ensure that such of its personnel as may be required to give consent to enable such reports to be given to the board, shall do so.

Remaining clauses

8. *Use of logo and other promotional materials*
9. *Rights and obligations of the board.*
10. *Constitutional changes.*
11. *Confidentiality.*
12. *The franchisee's warranty.*
13. *Suspension and termination.*
14. *Consequences of termination and suspension.*
15. *Prohibited gifts.*
16. *Amendments to the specification and manual.*
17. *Indemnity.*
18. *General.*

Welcome to new members

Australia

Lillian Armitage; national precedents manager, Minter Ellison Morris Fletcher; Melbourne, Victoria
Jeffrey Barnes; legal writing lecturer, Monash University; Victoria; (former parliamentary drafter)
Phillip Hamilton; attorney, Tuszynski Klein Hamilton Sacks; Caulfield, Victoria

England

Sir Thomas Bingham; Master of the Rolls; London
Connie Carter; law student, University of London
Ian Goddard; legal dept manager, 3i plc; Solihull
George Laurence QC; London WC2
Gerard Ng; post-graduate student, Sheffield University
Margaret Piran; solicitor, BT; London W5
Lord Renton QC; London WC2
Professor Michael Zander; London School of Economics; London WC2

Northern Ireland

Mary McAleese; director, Institute of Professional Legal Studies, The Queen's University of Belfast; associate of the Institute of Linguists

Scotland

Eric Allan; solicitor; Inverness
Valerie Clark; solicitor; Dundee
Ellis Simpson; solicitor; Glasgow

Wales

Jason Pearce; trainee solicitor,Morgan Bruce; Cardiff

News about members

Jeffrey Barnes is visiting England until 17th January.

Francis Bennion semi-retired to Cyprus on Boxing Day. He is giving up the bar to concentrate on writing, and has several books in mind. But he hopes to retain his room at the Bodleian and will be returning frequently to England on speaking engagements. We wish him very well. His address will be

54a Nicodemou Mylona Street, Limassol, Cyprus
Fax: 010 357 5 747086

Peter Butt is stepping down as director of the Law Foundation Centre for Plain Legal Language at the end of this year.

Ruth Lawrence has taken maternity leave from the Law Society's Publications Dept.

Dean Poster has joined the London office of Coudert Brothers, a multi-nationa law firm not previously represented in CLARITY.

Honorary President: John Walton

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