A movement to simplify legal language

Patron: Lord Justice Staughton

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Index

Guest Editor's Note

This is an Australian edition of *Clarity*.

It contains a wide spread of articles on the progress of plain legal language in this country. Some deal with current moves towards plain legislation; others discuss the problems of teaching plain language in law schools; and yet others tell of experiences in implementing plain language policies in law firms.

Here—"down under"—we like to think that we are making some progress in changing professional and community attitudes towards legal drafting. Some of our legislation is as clear and plain as any in the English-speaking world. Some of our law firms now draft in a clear, direct style that is the envy of law firms world-wide. Some of our law schools offer courses in plain language drafting. But, of course, much remains to be done. The following articles tell not only of the successes to date, but of the challenges ahead.

Cynics might wonder how it is that Australians should presume to know anything about the Queen's English, let alone how to write it clearly. Isn't Australia the home of Dame Edna Everidge, of Crocodile Dundee, of strine? Well, you be the judge in the ensuing pages.

I would like to record my thanks to those at Sydney University Law School who helped to put this issue together—Fran Smithard, Catherine Hurley and Pauline Moore. And, of course, to the many contributors who put their experiences into writing.

— Peter Butt
University of Sydney, Australia.

Welcome to new members

Australia

Audrey Blunden — solicitor, Mallesons, Stephen Jaques, Sydney

NRMA Insurance Co — (contact, Joy Burger), Sydney

Optus Communications — (contact, Trina Blair) Sydney

Canada

Christine Mowatt — consultant, Wordsmith Associates, Edmonton

Simplified Communications Group Inc — (contact, John Watkinson) Toronto

England

Anne Coles — solicitor, The Law Society, London

Jean Collingsworth — teacher, London Guildhall University

Janet Cooper — solicitor, Linklaters & Paines

Jeremy Gillham — solicitor, Debenham & Co.

John Griffiths — solicitor, Griffiths Jones

Jane Maxwell — civil servant, Charity Commission

Keith Minear — solicitor, Corporate Legal Unit, London Borough Council

United States of America

John Bell — attorney, League for Literate Laws, Columbia, MD

William Roden — attorney, Milwaukee Area Technical College

Prof N.O. Stockmeyer — Thomas M. Cooley Law School, Lansing, Michigan

John St Peter — Edgarton, St Peter, Petak, Massey & Boulton, Fond du Lac, WI

Carol Wilson — Plain Vanilla Enterprises

Prof Georgann Wing — Thomas M. Cooley Law School, Lansing, Michigan

We now have 542 members!

Honorary President: John Walton

Committee

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Please send copy for the next issue to me, as my sabbatical is now over. However, I hope to move to Dorking, Surrey in August or September, but neither the address nor the date of change are certain yet. Mail should be forwarded, but if you cannot reach me on the telephone any other committee member will be able to give you my new address and other details. - MA.

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Plain Language in a Legislative Drafting Office

Dennis Murphy QC,
Parliamentary Counsel, NSW[1]

Introduction

This is the story of how Plain Language has developed in the Parliamentary Counsel's Office of New South Wales.

The Office traces its history back to 1856, with the appointment of Parliamentary Draftsmen on the establishment of fully responsible government in NSW. It was reconstituted in 1878, with the appointment of Alexander Oliver as Parliamentary Draftsman from 1 July of that year.

Throughout the entire history of the Office, its drafters have sought to be at the forefront of the art of legislative drafting. So it was that up to the 1980s we prepared legislation in the then state-of-the-art "high" style of drafting. It was a matter of pride that NSW legislation was the equal of any elsewhere, and was expressed in the intricately elaborate style then favoured by the "best" practitioners.

There were however some of us who from the early 1970s began to wonder whether this "high" style of drafting was really doing the job. It was becoming increasingly difficult to prepare legislation and to understand it. This became apparent in the Commonwealth and State drafting project to prepare new laws to deal with company takeovers. These laws were exceedingly complex. Some of us wondered whether legislation could continue to be prepared on this basis — perhaps we were not cut out for this life of drafting after all!

We knew that a simpler style of legislative drafting was possible. The Office was aware of literature on the subject, and it noted in particular an article by Professor Conard called "New Ways to Write Laws".[2] This article discussed simpler ways of drafting, and covered such matters as cutting out jargon, using shorter sentences, giving examples, providing statements of purpose, improving readability, improving the internal arrangement of legislation, and generally giving more attention to the needs of the reader. Not much was done about these principles at that time.

The eventual adoption of plain language principles in the Office can now be seen in some perspective, and can be seen as a process of development covering perhaps five stages.

Stage 1 — abandoning old style practices

The first steps were taken in 1973 when a formal direction was given within the Office to abandon certain old style expressions and practices. The use of the proviso

1 The views expressed in this article are those of the author alone.
2 56 Yale L.J. 458, 469 (1947). An excerpt was printed in Newman & Surrey, *Legislation*, Prentice-Hall 1955.

ended, as did the use of "such" (when used instead of "that"), "the same", "as aforesaid", "mutatis mutandis", "whatsoever", and similar expressions.

Stage 2 — recognising the need for clarity

By the early 1980s, the need for clarity in legislation was recognised as a principle to be aimed for. The 1983 edition of the Office Manual contained the following statements:

1. Simplicity and clarity of language should be aimed for.

2. Lengthy sections, subsections, clauses, etc., should be avoided by creating new sections, etc. This does not restrict lengthy sections divided into paragraphs, eg regulation-making sections.

3. Unnecessary cross-references, as well as cross-references that are unnecessarily complicated, should be avoided in the interests of easier reading.

4. But precision and accuracy should not be sacrificed in an attempt to be succinct and readable.

These statements remain generally valid, and the principles contained in them have since been elaborated and developed.

Stage 3 — formally adopting Plain Language

In 1986, the Office formally adopted Plain Language as a policy. This followed a considerable amount of public and private discussion. The Victorian Law Reform Commission had come out strongly in favour of Plain English drafting, various newspaper articles and editorials appeared which were also in favour of this approach, and questions were being asked in Parliaments about it. Despite pockets of resistance among Australian drafters, the NSW Office decided to go ahead with the formal adoption of the principles, as they were consistent with its own views.

At the time of this formal adoption of Plain Language, the Office made it clear that the main general principle was that an Act should be able to be understood with a minimum of effort by its readers. Attention was to be paid to the arrangement of Acts, the careful use of headings, and the avoidance of complex provisions in favour of simpler language. The first subsection in a section should be the principal provision of the section, certain words and phrases were to be avoided, and a series of similar suggestions was made.

It is clear, though, in retrospect that the main focus of attention was limited to basic simplifications. A series of simple tests or rules of thumb tended to be applied in practice. These included the following:

* A sentence or paragraph of more than 5 lines was to be avoided as far as possible.

* Shredding of text (by excessive paragraphing and especially subparagraphing) was to be avoided.

* Cross-references within a section were to be kept to a minimum, as were cross-references to other sections.

* The word "notwithstanding" was to be replaced by "despite". However, the use of "despite" and "subject to"

was to be avoided unless essential to the legislative scheme.

* The word "if" was to be preferred to "where". It was preferable, if possible, to place an "if" clause at the end of a sentence rather than at the beginning. The use of an "if" clause was frowned on if the sentence could be reconstructed to avoid it.

* Simple words and phrases were to be preferred to longer or complex words and phrases. Thus "end" is preferred to "conclusion", and "before" is preferred to "prior to", and "in respect of" is generally avoided.

More importantly, the practice developed of requiring a provision to be rewritten if it did not yield its meaning at first reading. If the purpose of a section was not readily apparent, encouragement was given to considering, as a last resort, the use of a purposive statement ("the purpose of this section is to ...").

Attention to these matters achieved a remarkable improvement in the content and readability of legislation (simplistic though they may have been), and they continue to be observed at the present time, in a wider context as indicated below.

Stage 4 — recognising the needs of the user

There still needed to be further development. This came about by a fuller realisation that the needs of the readers and users of legislation had to be catered for.

The identification of the audience was discussed at a Conference on Legislative Drafting held in Canberra in July 1992. It has of course long been recognised that there are differing members of the audience, each with differing needs, including Parliament, the legal profession, the courts, the administrators, professional groups, special groups, and the public. It was then suggested[3] that legislation should be prepared "with the principle at the back of our minds that the public, though not the exclusive audience, is a primary audience".

The idea was put forward that legislation "should be written so that it is feasible for the ordinary person of ordinary intelligence and ordinary education to have a reasonable expectation of understanding and comprehending legislation and of getting the answers to the questions he or she has. This is of critical importance".

The view that legislation should be understandable by the general public reflects the practice in France and other European countries.[4]

The needs of the respective users of legislation are now to be taken into full consideration. This of course has a significant impact on the structure of legislation.

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3 Murphy, *Plain English—Principles and Practice*, a paper presented at the Conference on Legislative Drafting, Canberra 15 July 1992.

4 See for example Sir William Dale, *Legislating in Europe: the Great Divide*, a paper presented at the Conference on Legal Drafting: International Perspectives, Ottawa 1991.

Stage 5 — the legislative structure

This recognition of the needs of the user is now seen by the Office to be part of the deeper issue of the overall structure and policy objectives of legislation. The ideal Act will have a structure that is so eminently logical and clear, that the needs of the different users will be readily accommodated. The text of the Act will have been developed so as to be lucid and compelling and will display the appropriate balance between general provisions and detailed provisions. This may involve a deeper analysis of policy than previously was customary, and may also involve discussions with the sponsor of the legislation with a view to simplifying or adjusting the policy so that the legislative outcome will be of a superior nature.

The appearance of legislation

Closely allied to these principles is the question of the appearance and typography of legislation. The Office has looked very closely at this question in its Redesign Project,[5] and a new format is being adopted for 1995 legislation. The changes in format will result in a clearer and more helpful layout, and will make it easier for users to navigate their way through legislation. It also seems that a change of appearance will bring home to many the fact that the language, content and general approach of legislation have changed.

Office acceptance

The staff of the Office have readily accepted and fully supported the principles of Plain Language and the development of these principles, and many have made constructive suggestions for improving the form and content of legislation.

External acceptance

The work of the Office in applying Plain Language principles to legislation has received wide acceptance at all levels. This has been achieved by the careful introduction of change to legislation in a way that has not caused alarm to users, and that has avoided problems in interpretation and administration.

The next steps?

Clearly the process of applying Plain Language principles to legislation will continue to develop over the coming years. The Office is ready to continue the process of change, always keeping in mind the need to ensure that legislation remains effective and that there is no loss of precision.

The increased use of user testing is one aspect of likely developments. Testing was a feature of the Redesign Project mentioned above, and contributed substantially to the project's outcome.

Conclusion

The task of drafting legislation has, through the application of Plain Language principles, become both harder and

5 See *Review and redesign of NSW legislation, a discussion paper*, Parliamentary Counsel's Office, Sydney 1994. This discussion paper was prepared in association with the Centre for Plain Legal Language, and in consultation with the Office of Queensland Parliamentary Counsel.

easier. Harder — because a different form of rigorous analysis has to be brought to bear in a drafting project, involving the exhaustive use of the drafter's experience and expertise. Easier — because the legislative output in the end is clearly expressed, intrinsically logical, and demonstrably effective because of its clarity.

CLARITY mark

The CLARITY committee has decided that it is not practical to award the CLARITY mark for lawyers' standard documents. Even where based on a precedent, these documents change according to the transaction, and it is not possible to monitor the standard of the amendments each time they are made.

However, the committee also agreed that a CLARITY mark could be awarded for documents that do not vary from transaction to transaction — documents that might be called "genuinely" standard.

The committee has commissioned a logo for the purpose. It will be available on bromide and on disc.

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Plain Language takes off in South Africa

Joe Kimble (United States)
and Chris Balmford (Australia)

An international team — including three members of CLARITY — visited South Africa during March to help the new government begin a plain-language initiative.

The catalyst for the trip was the Plain English Campaign's Third International Conference, which was held last October in Washington D.C. One of the speakers at that conference was Susan de Villiers, from the Ministry of Justice in South Africa. She explained that, among many other things, the South African Government needed to

* write a new constitution to replace the interim constitution adopted in 1993;
* provide a range of new legislation;
* establish effective ministries of education, health, and welfare;
* demystify government activities; and
* meet the expectations of the South African people for improved delivery of government services.

After the conference, the Plain English Campaign and the Ministry of Justice put together the team:

* Christopher Balmford, from the Phillips Fox law firm in Australia;
* Philip Knight, a writing consultant and the former director of the Plain Language Institute of British Columbia;
* Professor Joseph Kimble, from the Thomas Cooley Law School in the U.S.;
* Professor Shadrack Gutto, from the University of Witwatersrand in South Africa;
* George Maher and Janet Biggin, from the Plain English Campaign in the U.K.

The members of this team later participated in a seminar, *Plain Language, The Law and the Right to Information.* The opening address was given by the Minister of Justice, Mr Dullah Omar. (The text of the address appears elsewhere in this issue of *Clarity*.)

Before the seminar, George Maher and Janet Biggin spent about ten days touring the country and speaking to government officials, consumer-group representatives, and insurance-company executives. And George was involved in a two-hour live radio interview in Johannesburg.

The formal program was hosted by the Ministry of Justice and sponsored by the British High Commission, the British Council, Metropolitan Life, and the law firm Mallinick, Ress, Richman & Closenburg. The program consisted of a two-day seminar called "Plain Language — The Law and the Right to Information". The seminar was attended by members of Parliament, the state-law advisers (legislative drafters), drafters from the Constitutional Assembly that is working on the new constitution, civil servants, academics, and local attorneys.

During most of the first day, the team critiqued the new Human Rights Commission Bill and offered suggestions on how to improve it without changing the meaning or losing any of the supposed precision. Among the recommendations:

* Use more familiar language
* Use *must* instead of *shall*
* Avoid doublets and triplets like *interfere with*, *hinder*, or *obstruct*
* Avoid provisos
* Set the information out in a logical order
* Cluster related information
* Allow more than one sentence per subsection
* Avoid unnecessary detail
* Avoid unnecessary repetition
* Use a number of improved design features
* Test major legislation on typical users

As models of legislative drafting, the team especially recommended the work of the Law Reform Commission of Victoria and the discussion paper *Review and Redesign of New South Wales Legislation* by the NSW Parliamentary Counsel's Office and the Centre for Plain Legal Language. (See *Clarity* 32, page 17.)

The second day of the seminar involved a panel of speakers that included the Minister of Justice, Mr. Dullah Omar. The Minister described clear, simple, understandable communication as "an absolute and critical necessity for democracy". He said that people had "a right to understand the laws that govern them, to understand court proceedings in matters that affect them, to understand what government is doing in their name". He emphasized the special problem that South Africa faces, because it has 11 official languages:

> Simply translating what is obscurely written in English or Afrikaans into equally obscure Xhosa or Zulu is not the answer. We do not need 11 versions of gobbledygook: Any translator into an African language will tell you how he or she struggles with English that is written in a complicated and jargonistic way. So, whichever of our 11 languages we use, the principle remains the same. Communication should be clear, simple, and understandable.

Joe Kimble dealt with the misconceptions that some lawyers have about plain language. He outlined the strong evidence that judges, lawyers, and other readers prefer plain language over traditional legal style and that plain language improves comprehension. And he gave some examples of how plain language can save a great deal of time and money.

Christopher Balmford explained how the plain-language movement in Australia has grown and how the Phillips Fox law firm has benefited from its plain-language policy. (See *Clarity* 32, page 15.) He also discussed the landmark work done by the Law Reform Commission of Victoria.

At the end of the second day, the reporters for the seminar gave summaries, and there seemed to be consensus on three concrete proposals:

* The Department of Justice will form a broad-based working group. It will include civil servants, academics, lawyers, linguists, translators, and any others who have an interest.

* The state-law advisers will develop a drafting manual that includes plain-language guidelines.

* The team will do a demonstration project using the Human Rights Commission Bill.

Away from the seminar itself, Christopher Balmford gave a presentation at Metropolitan Life, which was attended by 40 people from nearly 20 insurance companies. He gave a second presentation to nearly 60 local attorneys. That session was sponsored by the National Association of Democratic Lawyers (NADEL) and the Cape Town Attorneys' Association. At both presentations, Christopher focused on the economic benefits that plain language can bring. Finally, he ran a short training program at the law firm Mallinick, Ress, Richman & Closenburg.

After the seminar, Phil Knight was asked to rewrite a second bill and present the revision to the Select Committee on Correctional Services. Phil said, "I only had a couple of days to work with the bill, so I focused on the main problems as I saw them — passivity, excessive wordiness, legalese, and the overuse of cross-referencing. My goal was to reduce all four and have the law place the duty of compliance on the person who could actually perform the duty. By the end of our trip, I believe we had achieved something really positive for the people of South Africa and the international plain-language movement".

After returning from South Africa, Phil, Joe, and Chris produced a redraft of the Human Rights Commission Bill. They presented it to the Ministry of Justice in May.

They would like to test their redrafted version in as many as four countries — South Africa, the U.S., Canada, and Australia.

The Plain English Campaign hopes to set up a review for the South African Government like the review they carried out during the 1980s for the Cabinet Office in the U.K. During that time, over 171,000 forms were reviewed. Of those forms, 36,000 were scrapped, and another 58,000 were rewritten and redesigned. The Campaign's director, Chrissie Maher, said, "If the plain-language initiative in South Africa is as successful as our campaign in the U.K., then the South African Government would save themselves a vast amount of money. That is money which is desperately needed to build houses and schools".

Indeed. It seems that South Africa is the newest venue for plain language. And we can expect that the applications for CLARITY membership will soon be rolling in.

Plain Language, the Law and the Right to Information

Opening address by the South African Minister of Justice, Mr Dullah Omar, at a seminar hosted by the Ministry of Justice and sponsored by the British High Commission and British Council, 10 March 1995

[Elsewhere in this edition of* Clarity, *we have reported the visit of three CLARITY members to South Africa, to participate in a seminar on plain language and law. The opening address at the seminar was given by the South African Minister of Justice, Mr Dullah Omar. Here is the text of his address.]

Ladies and gentlemen, friends and comrades.

It is with great pleasure that I welcome you all to this seminar on *Plain Language, the Law and the Right to Information*. I believe this to be an important milestone in our vision for a transformed justice system. I hope, too, that the discussions we have here today will mark a beginning of many efforts in government to address, in a practical way, the right to information enshrined in our Constitution.

We are very grateful to the five plain language experts who have come from England, Australia, Canada and the United States to share their knowledge and their experiences with us. It has been deeply encouraging to learn that the campaign for plain language is one that has taken root and brought so much benefit to their countries. It has given us faith that, here too, we may achieve great things in making our communications understandable to ordinary people.

We are also very grateful to The British High Commission and the British Council who have helped make this seminar possible. Their country has been one of the pioneers in this area.

I have also been heartened by the enthusiasm with which both members of my own department and others have participated in this important new venture. During yesterday's all day seminar which dealt with topics such as legislative drafting, guidelines for drafting in plain language,and university course material, it became clear that people are strongly committed to the idea of making our legislation and other documentation simpler and more intelligible. Many participants welcomed the initiative as something long overdue. In the legal training and education session, bodies involved in legal education have also demonstrated their commitment to reexamining the question of plain language in the law schools, and we are grateful to those who came from other parts of the country to take part in our seminar. The rapporteurs from yesterday's seminar will do a short report back later this morning, but I have already been told that the seminar was stimulating, that it provoked a lot of discussion and that, in short, it made a good start to a number of projects we would like to see taking place both in and beyond the department in the very near future.

One of the cornerstones of our programme for the transformation of justice

is the principle of people's access to justice. When tackling this question, it is hardly necessary to emphasise that many of the people in this country have had extremely negative experiences of the justice system. Many, many of our citizens have come before our courts after the trauma of a brutalising arrest and found themselves in front of a magistrate or judge who does not share their language or their culture, and who takes decisions in terms of laws which they do not understand. This is not to say that there have not been good judges or magistrates, but they too have been confined by a system which, too often, has been perceived to be in confiict with the interests of ordinary people. Because of the restricted composition of the courts, with incumbents drawn from the ranks of the privileged, the victims of that system have been alienated from the very places they should be able to look to for justice.

In addition, a legal system that defends the privileges of only one section of society can hardly lay claim to the privilege of calling itself a system of justice. This is the historical legacy with which we have to grapple.

The other key to transformation is the principle of participation. We have, at last, held proper democratic elections in this country. But we should not think that the securing of democracy is something that occurs automatically after a democratic election; something that comes about just because people vote for the government of their choice, however great that first step is.

Democracy is a goal. An ideal towards whose realisation we must direct all our efforts. Exercising one's rights in a democracy presupposes: (i) a *knowledge* and *understanding* of those rights; (ii) a knowledge and understanding of how those rights can be exercised; and (iii) a capacity to exercise them. An absence of such knowledge and understanding disempowers individuals and groups. And unless the people as a whole are empowered, democracy becomes a tool in the hands of the rich and powerful. Such a situation results in alienation. People lose faith in democracy and society tends to develop greater tensions and polarisation.

That is why I call democracy an ideal. No society achieves perfect democracy; but it is and must be our obligation to achieve the very best we can in an imperfect world.

So what is it that we should be doing to ensure that we work towards this goal?

The best defenders of the rights of the people are the people themselves. I believe therefore that, if our system of justice is to serve the people of this country, we must give our citizens the means to use rights for the benefit of themselves and their communities. We must create a culture of human rights that gives South Africans both the confidence and an internalised understanding of their rights and role in society. This is part of empowerment.

It is in the pursuit of this goal that the nature and style of public information becomes so critical. If we write laws in complicated and difficult language, how can we possibly expect the citizens of this country to understand or obey those laws? How can we expect them to use those laws for the protection of them-

selves and their communities? If we produce documents that are complex and inaccessible, how can we expect people to understand their rights and put them to good use?

This issue does not only apply to legislation. It goes right across the gamut of government documentation. If pamphlets and information documents and white papers are written in language that is not understood, people cannot reasonably be expected to exercise their rights or obligations. If people cannot understand the forms they need to fill in, they may be deprived of benefits to which they are entitled. According to the Black Sash, 21% of the people applying to their offices are looking for help in the filling out of government forms. And the results are clear. I will give you just one example. In respect of maintenance grants, only 24% of so-called 'illegitimate' coloured children receive benefits. And, according to latest available figures, only a shocking 0.3% of African children receive the grants they are entitled to.

Clear, simple, understandable communication is a whole lot more than just something we should be dreaming about. It is an absolute and critical necessity for democracy. People have a right to understand the laws that govern them, to understand court proceedings in matters that affect them, to understand what government is doing in their name.

What I am saying is that the right to information which forms part of our *Bill of Rights* means that people have a right to information that empowers them and their communities. They have a right to information that they can use in practical ways to make a difference to their lives.

Simplicity of language reflects a commitment to democracy. The use of language above the heads of the average citizen may swell the heads of its users, but it does little else.

Having said this, we need to look at practical ways in which we can make sure that this right to information begins to work. In this regard, there are two important issues I wish to raise.

The first relates to the fact that the people of this country speak not one or two but eleven and more languages. Some of these languages have highly developed written forms and some do not. Some are spoken widely and some only in certain areas by a relatively small number of people. All of these different language speakers have an equal right to information. And I would like to say in this regard that simply translating what is obscurely written in English or Afrikaans into equally obscure Xhosa or Zulu is not the answer. We do not need eleven versions of gobbledegook. Any translator into an African language will tell you how she or he struggles with English that is written in a complicated and jargonistic way. So, whichever of our eleven languages we use, the principle remains the same. Communication should be clear, simple and understandable.

The second point relates to the level of literacy. As we all know, one of the terrible legacies of the past is the inability of many of our citizens to read or write. This is a matter for great shame, as well as being a source of grave disempowerment.

I want to make this point strongly, because often it is neglected or forgotten. People who cannot read or write have an equal right to information and it is up to us, both in government and in civil society, acting in partnership, to make sure that they get it. And this applies equally to people who are blind, deaf or face other difficulties in accessing information. Every one of our citizens has an equal right to information and we share a responsibility to make sure they get the information they need.

We should not, therefore, fool ourselves into thinking that if we produce a booklet or a pamphlet that is plainly written our job is done. We should be looking at additional and different ways of presenting clear and understandable information to people; ways that ensure that, at the end of the day, people have in their possession information that they can use to improve and control their lives. If information is indeed power, that is the kind of power we should be giving to people.

So you see that plain, simple and understandable language must not be confined to written language. It must inform everything we do. Our radio and television broadcasts! The way we speak to people! We need to understand that this is our obligation as a service provider both as a responsible government and as organs of civil society. We must, in short, democratise language.

This does not mean, as some fear, that such an approach will interfere with literature or poetry, or that it will intervene where people of the same profession speak to each other in whatever shorthand they have developed for the purpose. It simply means that, where we communicate with the public, we must do so in a way that the public understands and can use.

Developing a human rights culture will depend on many things. It will depend on the full transformation of the justice system to a system that is accessible, participatory and representative of all the people of our country. It will mean that the courts should not be places of terror and alienation, but places where people can go, and believe they can go, to see and experience justice. It will mean that people and communities in fear or danger know who to approach and how to use their rights to protect themselves. It will mean that, when ordinary people are victimised for whatever reason, they know where to go for help.

But, in order to make these things happen, people must know and understand their rights. They must receive information which tells them what to do and how to do it. And they must have an internalised sense of themselves as citizens living in a democracy with rights that they can exercise and obligations they must meet. And they must know, ultimately, that justice will be done.

Only when people feel that democracy is theirs and for real, will they be prepared to defend it.

This is why I have laid such a heavy emphasis on the right to information in the department of justice and why we hope, in the near future, to be engaged in many communication projects designed to inform the citizens of our country about human rights, the justice system, as

well as people's rights and obligations as citizens.

But whatever we do, and whatever medium or language we use, the challenge before us is to make sure that all our communications are written and spoken in a way that people can understand. A way that empowers them by giving them the information they need to take charge of their lives and exercise their rights as citizens of this country.

First annual CLARITY awards

The first annual CLARITY awards were presented at a gala occasion at the Law Society's hall on 23 May 1995. The awards were sponsored by D.J. Freeman & Co.

The guests of honour were Lord Justice Staughton and Charles Elly (President of the Law Society). Both spoke briefly, and Mr Elly presented the awards.

The judges, all members of CLARITY, were Paul Clark (a partner in D.J. Freeman), Eirlys Roberts (European Research into Consumer Affairs), Lord Justice Staughton, and Mark Adler.

The level of interest was encouraging, and some of the entries were excellent. Needless to say, the winners were delighted. The evening was a success. Both CLARITY and D.J.Freeman & Co. have resolved to make this an annual event.

These were the winning entries:

Class	*Applicant*	*Document*	*Award*
Agreements	Lovel White Durrant	Barclays Bank limited guarantee	Hon mention
	Ireland Abrahams	Client agreement	Winner
Client leaflets	Bircham & Co	Enduring powers of attorney	Hon mention
	T.G. Baynes & Sons	Guides to buying and selling your home	Winner
Client newsletters			No award
Litigation			No award
Wills	Minshall Pugh & Co	Will	Winner
Landlord and tenant	Bolton Metro (local authority)	Tenancy agreement	Overall winner

Plain Language in Sweden

Barbro Ehrenberg-Sundin

The main source of initiative for the plain language movement in Sweden has been the Cabinet Office (the Prime Minister's Office). In 1965 a government minister began to vet prospective legislation, and in 1976 the first linguist was appointed within the Cabinet Office. He was given the task of organizing a more systematic modernization of the legal language in laws and ordinances. Since 1980 we have been a team of three language experts revising most of the material destined for the Riksdag (the parliament), writing guidelines, and organizing training sessions for government officials to help them to prepare drafts, bills, commission reports, governmental decisions etc. in a style and language that can be quickly read and understood.

The Ordinance for the Ministries 1982 prescribed that the Under-Secretaries for Legal Affairs in the Cabinet Office and in the Minstry of Justice must ensure that "all statutes and decisions are written in a clear and simple language". So, with their approval we have been carrying out noticeable text reforms during the last fifteen years.

We also initiate plain language activities outside the Ministries. The Government has recently appointed a Plain Language Committee (Klarspraksgruppen) to encourage state agencies all over Sweden to start plain language projects. This committee, of which I am a member, has been asking the agencies about their plain language activities and has been organizing conferences to spread the benefits of clear communication to them. We also edit a Plain Language Bulletin.

This is a brief summary of what is going on in Sweden. Very little has been published in English (or in any language other than Swedish) about our work. So, as a new member of CLARITY, I am taking the opportunity to tell you a little about it. If you are interested, please contact us for further information: The Language Experts, Ministry of Justice, 103 33 Stockholm, Sweden. Or you can pay us a visit!

Even a long time ago

The Swedish king Charles XII, while commanding his troops in Timurtash in Eastern Europe in 1713, dictated the following ordinance for the Royal Chancellery in Stockholm:

> His Majesty the King requires that the Royal Chancellery in all written documents endeavour to write in clear, plain Swedish and not to use, as far is possible, foreign words.

Charles XII wanted the Swedes to be proud of the Swedish language, and was concerned about the French influence on our language at that time. So was his father, Charles XI, who had ordered the Chancellery to use Swedish in all official correspondence with foreign kings and emperors, with one exception though — for the French king.

Almost all Swedish kings from the 16th century onwards have been concerned about the oral and written language used

by the civil servants. They all had their special reasons for this concern. One was to communicate effectively in order to get what they wanted - taxes, for instance; another was to show their power internationally. In recent times the main reasons for plain language activities are *democratisation, better legal rights* and *efficiency.*

Sweden is now a member of the European Union, and as such has the right to use Swedish in all documents and decision-making processes in the Union. Charles XII would have been pleased!

But the style and organization that we confront in EU documents, translated into Swedish, are not at all encouraging. It takes us back, more or less, to where we started twenty years ago.

How we started and methods we use

Modernization and simplification of the legal language used in legislation was our main task during the first years. Gradually we also started to analyze the traditional content, organization, style and design of other governmental texts, and found that they needed a more reader-oriented and rational approach. Therefore, during the last fifteen years we have been developing new "models" for several official documents, depending on how the readers use them.

Together with five legal advisors we now form the Division for Legal and Linguistic Draft Revision in the Ministry of Justice. Our methods are as follows:

Revision. All draft statutes and government bills submitted to the Riksdag, as well as committee terms of reference, are sent to us from the ministries shortly before the government considers them. They are revised by the linguists and lawyers, who check their legal (constitutional and formal) quality and ensure that they are as easy as possible to read and understand. At that late stage the linguists can only make alterations concerning sentence structure, allusions, appropriate words, forms and phraseology.

Seminars. We organize seminars for the civil servants who draft Acts and decrees, government bills (which include explanatory statements omitted from the Acts), administrative decisions and government committee reports. We also offer general courses on how to write effectively.

Handbooks and guidelines. We assist the Cabinet Office's Under-Secretary for Legal Affairs to write and edit handbooks and guidelines to coordinate and ease the work of the ministries. There are special guidelines for almost all types of documents produced in the ministries.

Membership of Committees. The language experts take part in the work of some government committees that are redrafting legislation. At present I am a member of the Taxation Law Committee, and my colleague is a member of the Tax Collection Law Committee. At this stage we have more influence on the texts, dealing for instance with organization, headings, references and wording.

Advice and information. An integral part of our work is to give advice to and help and encourage the drafters. This also means persuading quite a number of people to appreciate the benefits of plain Swedish.

Some of the results

Lucid statutes
A statute in the modern style is divided into chapters, with chapter headings and informative subheadings (e.g. "How to pay the rent"). Each article has no more than three paragraphs.

If it is necessary to cross-refer to a provision, the reference is formulated in a way that gives the reader a fair picture of what the provision is about.

The language is as simple as possible. The sentences are built in such a way that the reader understands the message easily. Exceptions, conditions, and so on may be dealt with by list. Archaic and formal words and phrases are replaced, as are many technical expressions.

Now it has become even more important for us to maintain a high quality in Swedish statutes. The EC Directives are often complicated and verbose and must not serve as a model. So a new task for us is to convince all those people who are to implement EC directives not to copy them, but to transform them into lucid legislation.

Straightforward government administrative decisions
Our latest text reform makes government decisions more straightforward. Readers get answers to their questions at the beginning of the reply. The letter starts: "The Government has decided to give you permission to ....". The account of the case and the motives then follow under different headings.

The ministers now address people by using the familiar word *Du* or *Ni*, instead of talking *about* them, as they did before.

These two changes make it easier for the drafter to picture the reader, and so to explain the motives for the decision comprehensibly.

To set a good example

In the Cabinet Office and the ministries, as well as in other organizations, writing is ruled by tradition. Consequently, we have focused our work on altering inefficient writing habits and text structures. The development of new text models (for bills, commission reports, administrative decisions, etc.) has had an effect internally and their use is gradually spreading.

The Plain Swedish Committee, which I have already mentioned, was appointed by the government in 1993 to convey experiences from the plain language work that has been carried out in the Cabinet Office. Moreover, the committee has shown the results from another plain Swedish project, carried out a couple of years ago in a few Swedish authorities. The report from that project, *The official language may certainly be altered*, has been a great success among Swedish officials.

We are also trying to promote language consultants, seeking to convince the authorities that it might be worth their while asking for help. Since 1978 the University of Stockholm has offered a 2.5 year course in Swedish for those who want to become language consultants. More than 100 consultants are now awaiting more and more commissions from the authorities.

After 15 years of target-oriented work on plain Swedish in the Cabinet Office, I am convinced that the seed we have sown will yield a good harvest.

Reforming the Legal Profession from Within:

a Report on the first year of the Plain Language Committee of the Law Society of New South Wales

Michèle M Asprey

[In **Clarity** *32, Michèle Asprey reported the results of a survey on New South Wales lawyers' responses to plain legal language. The survey was conducted by the newly-formed Plain Language Committee of the Law Society of New South Wales. Here, Michele reports on the founding of the Committee and tells of its other work.]*

1994 was the first year of the Plain Language Committee of the Law Society of New South Wales. I was its founding Chair.

Forming the Committee

For some time I had been thinking about trying to form a plain language committee for the Law Society. I thought it was important that the representative body of solicitors in New South Wales was not only in favour of plain language in legal writing, but actually endorsed it, by supporting the work of a committee.

I had spoken to various people about my idea over the years. At the end of 1993 I spoke to Professor Joseph Kimble, the guest editor of the March issue of CLARITY. Joe is one of the driving forces behind the Plain English Committee of the State Bar of Michigan, which has a proven track record of successful work over 10 years now.

I was inspired by Joe, but was still vacillating, when something happened that finally spurred me into action. The new Presidentelect of the Law Society of New South Wales for 1994 was announced. It was David Fairlie, a partner at my old firm of Mallesons Stephen Jaques. Mallesons had been active in the plain language movement since around 1987. Suddenly the clouds parted. The time was right. So I wrote to David Fairlie while he was still President-elect, and floated the idea.

David was enthusiastic. So was the Law Society Council (the Law Society's governing body), when David put my idea to them. The Council gave the new Committee its blessing a few weeks later. The Committee was formed in January 1995, and I was appointed Chair.

Members

The first committee members were 10 solicitors, most of whom who had no particular plain language expertise or qualifications, other than that they were committed to helping other solicitors in New South Wales to adopt plain language in legal drafting. We wanted to make the Committee as representative as we could of the solicitors practising in New South Wales. We felt if we had too many "experts", the Committee could lose touch with the reality of the daily problems of the legal practitioner. In hindsight, I be-

lieve the makeup of the Committee is one of its strengths.

Aims

One of the first things the Committee did was to draft a statement of aims. We thought it would be useful to help us keep us on track in the future. It is very easy for committees to be sidetracked, and I think this can be a particular problem for lawyers working in the plain language area.

This is the statement we came up with:

We aim to have lawyers write and speak in plain language.

To achieve this we will —

1. Promote clear, precise and effective communication between lawyers and the people who use the documents they draft.

2. Promote a better understanding of plain language.

3. Help lawyers understand the principles of plain language so they can apply the techniques to their drafting.

4. Help other Law Society committees target and rewrite standard documents and forms in plain language.

5. Be a contact and referral point for lawyers on plain language.

6. Be a contact and referral point for other organisations wishing to simplify legal documents, eg, the courts, industry bodies, other professional associations, govemment departments.

7. Encourage language reform initiatives from both within and outside the profession.

8. Publicise plain language developments to lawyers and others.

Drafting those aims proved to be a very useful process. It helped us clarify our thoughts about what the Committee could — and should — do. It gave us a framework to discuss plain language and the law generally, and at the same time we got to know what issues were important to each member of the Committee.

Rewriting Documents

The Committee decided to try working on a couple of commonlyused legal documents, to see if we could produce simplified versions which could be adopted as standards by the New South Wales Law Society. We began working on a plain language version of a simple enduring power of attorney.

The legislation dealing with powers of attorney is different in every State of Australia. Early in 1994, the AttomeysGeneral of each State were looking at standardising the legislation. Our Committee produced two forms of powers of attorney — one which could be used in New South Wales as the legislation stands now, and another which could be used if legislation were uniform throughout all States of Australia.

Both forms are about to be submitted to the Law Society's Council. If the Council agrees, the New South Wales form will be adopted as a standard Law Society form. The Committee also wants the Council to recommend our uniform legislation version to the AttomeysGeneral who are considering the new legislation, in the hope that they will adopt it as a new standard form throughout Australia.

We also looked at a form of Costs Agreement which was prepared by another committee of the Law Society. It was part of a new Costs Guidebook that had just been published by the Law Society. We wanted to see if we could simplify and redesign it, so that it could be reduced to a single or doublesided A4 sheet. Then we planned to get the revised draft approved as a Law Society standard. As I write, work on simplifying the Costs Agreement is about to start in earnest.

Working with other Committees of the Law Society

It took quite a while for other committees to realise that we were there to help. We particularly wanted to look at any documents which Committees were drafting for publication under the banner of the Law Society. Slowly, as we became better known, documents began to filter through to us for our input from a plain language point of view. That particularly pleased me, because one of the reasons I wanted to form a Plain Language Committee within the Law Society was so that the Law Society itself would not only endorse plain language, but also practise it.

One of our longrunning debates involved the name of one of the other Law Society committees. It was the "Pro Bono" Committee — the committee which oversees the Law Society's scheme for solicitors to give voluntary legal services to those in need. Our Committee applauded the work of the Pro Bono Committee, but detested its name. Did we really need to use a Latin name — especially an import from America? Surely we could think of a plain English altemative.

We came up with plenty of suggestions, but we have not yet settled on the perfect alternative. Personally, I favoured "Public Benefit". This has the same initials as Pro Bono, so we could use the initials in a motif which incorporates both expressions, to make a smooth transmission from one to the other. As I write, the Committee is still debating the issue. (Isn't it funny how the littlest things in this game are often the hardest to resolve?) I'm sure they would welcome suggestions from members of CLARITY. Why not drop the editor a line if you have any thoughts?

On a different front, the Ethics Committee of the Law Society asked for our input on their draft Statement of Ethics for solicitors in New South Wales. They adopted our suggestion for a statement about communicating with clients. The relevant part of the statement now reads:

> ... lawyers should ... communicate clearly with their clients.

Our suggestion was adopted without question.

Another committee, the Young Lawyers Committee, asked me to give a lunchtime lecture, called "Drafting Legal Documents in Plain Language". We dealt with some quite complicated drafting problems, including things like the "continuing guarantee" clause — a clause that has always intrigued me. We had a lively discussion about some of the hard issues that come up in security documents.

Survey of attitudes to Plain Language

As I reported in the March 1995 issue of CLARITY, in August 1994 our Plain Lan-

guage Committee surveyed the attitudes of New South Wales solicitors to plain language in legal drafting. The survey took the form of a onepage questionnaire inserted in the August issue of the *New South Wales Law Society Journal*, the monthly journal sent to all solicitors in New South Wales.

The results showed that solicitors in New South Wales were in favour of plain language in legal drafting, and by an overwhelming majority. 93% of respondents answered "yes" to question 1: "Are you in favour of plain language in legal drafting?". 4% answered "no", and 3% were undecided.

Almost 95% thought that it was *possible* to draft legal documents in plain language, and almost the same percentage thought it was *appropriate*. A lesser percentage 85.5% said that they understood what is involved in plain language drafting. And an extraordinary (and encouraging) figure of — 80.5% — of respondents said that they wanted to learn more about plain language drafting.

Even though it was a fairly informal survey, and we must read the results cautiously, the Committee was very excited about the results, and the extremely good response rate: the survey had one of the best responses to any survey ever conducted by the New South Wales Law Society.

We are particularly encouraged by the fact that solicitors in New South Wales seem to be keen to learn more about plain language and the law. That's something the Committee wants to build on. In fact, we had already planned a forum for the Law Society's annual legal exposition, "LEXPO '94", to be held later in 1994.

LEXPO '94 Forum

The forum, called "Plain language in Practice", was held in October 1994. We decided on quite an unusual format. 6 members of the Committee each agreed to speak for 5–10 minutes each on one small but practical issue. This kept the forum moving along, gave participants a good exposure to a wide variety of practical problems and personal views and approaches, and it provoked a lively discussion afterwards. People particularly mentioned how well they thought the format of the forum worked.

The Plain Language forum had the highest attendance of all the seminars and forums of LEXPO '94. The Committee wants to hold more forums with a similar format.

Standardising Court Rules

The Committee was able to assist the President of the Law Society in his discussions with the Chief Justice of New South Wales about whether it was possible to standardise the rules of the Supreme Court, the District Court and the Local Courts. The Chief Justice had expressed some reservations about revising the rules in plain language. His view was that much of the language had been settled by authoritative decision, and it may be unwise to change the language to make it plain.

The Committee was able to arm the President with an appropriate response to that argument. Mark Adler was a great help to the Committee in this. He put us

in touch with Mr W R Heeler, Head of Drafting for the Royal Courts of Justice in London. Mr Heeler updated us on similar reviews of the civil courts procedures of England and Wales, and High Court orders such as the Anton Piller orders and Mareva injunctions (regularly mentioned in CLARITY). He gave us some very helpful information which the President was able to pass on to the Chief Justice.

The Committee has not been involved further in this task so far, but I know that the new AttorneyGeneral of New South Wales, Geoff Shaw, is firmly committed to standardising and simplifying our court forms, so there may yet be more work for the Committee.

Articles in the NSW Law Society Journal

In 1994 we aimed to write a series of articles for the *NSW Law Society Journal*, dealing with different drafting issues. But because we had so much of a "newsy" nature to report — our formation, our aims, the survey, the survey results, the Lexpo forum, and so on — we did not end up writing any "educational" items. But we kept on bringing plain language, and the work of the Committee, to the readers' attention.

In fact, there is already a monthly plain language column in the *NSW Law Society* Journal. It is contributed by the Centre for Plain Legal Language. The Editor tells me it is the most popular column in the Journal!

New Projects for 1995

The Committee is keen to monitor the progress of the two major packages of legislation being simplified in Australia at the moment—the *Corporations Law* and the income tax law.

The Committee has been appointed to the editorial committee of the *New South Wales Solicitors Manual* (the "blue book"). This is a commentary on the law and practice of solicitors in New South Wales.

And the Committee is planning another forum to allow discussion of practical problems facing solicitors who want to write in plain language. That will no doubt lead to more workshops and seminars. We know the need is there, and we are pretty sure the demand is there too.

Postscript: Other commitments recently forced Michele to retire (reluctantly) as Chair of the Committee in 1995. The new Chair is Philip Chown, a solicitor with the Commonwealth Bank of Australia. The Committee has been inundated with requests from people wanting to join it. So it is well placed to continue its work in 1995 and beyond.

[The Editor comments: Several years ago, Sydney University's Centre for Plain Legal Language conducted a survey on public understanding of common "legal" terms. A number of those surveyed thought that *pro bono* was form of dog food.]

LAW COMMISSIONER GUEST SPEAKER AT CLARITY ANNUAL SUPPER

[Charles Harpum, Law Commissioner for England and Wales, and a member of CLARITY, was guest speaker at the CLARITY Annual Supper on 28 October 1994. Here are extracts from his speech.]

I am greatly honoured to have been asked to address the Annual Supper of CLARITY, of which I am proud to be a member. I would like to tell you tonight about the very strange job that I do as a law reformer. I was appointed to be a Law Commissioner with effect from 1 January 1994. I succeeded another member of CLARITY, Trevor Aldridge QC, and have assumed his mantle as the Commissioner with responsibility for property and trusts law. Before I became a Commissioner I had been an academic at Cambridge for some sixteen and a half years, where I specialised in land law, conveyancing, trusts and legal history.

I am often asked, what *is* the Law Commission and what exactly does it do? The Commission is a creature of statute. It was created, together with the Scottish Law Commission, by the Law Commissions Act 1965 "for the purpose of promoting law reform": s 1(1). [Mr Harpum then explained the Commission's function, the division of work within it, the consultations it undertakes before making final recommendations, and the implementation of its Reports. He continued:]

This conveniently brings me to how my work fits in with the aims of CLARITY. The Law Commission's task is to make the law clearer, simpler and more accessible to all. *No* law should be "lawyer's law." The only good law is clear law. If legal principles cannot be expressed in plain English there is something wrong with them. By forcing ourselves to express and explain our laws in plain English we will necessarily both clarify them and confront the principles on which they rest.

I will finish with an anecdote which illustrates both what we should be trying to do as law reformers and the attitudes of mind that we have to overcome. The Law of Property (Miscellaneous Provisions) Bill 1994 [now an Act] is concerned largely with something called "the covenants for title." Put in plain English, these are provisions, implied into transfers of land, by which the seller promises that the land is not subject to defects in title other than those which he disclosed to the buyer before contracts were exchanged. If you have bought a piece of land, and some time later the title turns out to be defective, you should have a remedy. The present law is in the highest degree arcane. The implied covenants for title found in the Law of Property Act 1925 were drafted originally in the 1660s by Sir Orlando Bridgeman. His were not the resonant phrases of the King James Bible or of Milton. Let me quote a very small part of the covenants which are themselves implied by words in a different place in the Act:

> And that, freed and discharged from, or otherwise by the person who so conveys sufficiently indemnified against, all such estates, incumbrances, claims, and demands, other than those subject to which the conveyance is expressly made, as, either before or after the date of the conveyance, have been or shall be made, occasioned, or suffered by that person or by any person conveying by his direction, or by any person rightfully claiming by, through, under, or in trust for the person who so conveys, or by, through, or under any person conveying by his direction, by, through, or under any one through whom the person who so conveys derives title, otherwise than by purchase for value.

One suspects that dinner with Sir Orlando Bridgeman must have been rather heavy going. I wonder what he would have said to CLARITY? In the Law of Property (Miscellaneous Provisions) Bill, the law is much clarified. The obligations of a seller of land are the same after conveyance as they were between contract and completion. The Bill, in clause 3(1) says:

> If the disposition is expressed to be made with full title guarantee there shall be implied a covenant that the person making the disposition is disposing of the property free —
> (a) from all charges and incumbrances (whether monetary or not), and
> (b) from all other rights exercisable by third parties,
> other than any charges, incumbrances or rights which that person does not and could not reasonably be expected to know about.

We can all just about understand that. Surely, this clarification would be welcomed by all. Not a bit of it. Let me quote from the published evidence to the Special Standing Committee from an eminent Chancery silk. He described the Bill as "senseless ("stupid" might be a better, if less polite description)." For him the prolixity, impenetrability and indeed inadequacy of the existing covenants are irrelevant. He says:

> Any change in the law is disruptive and therefore needs substantial gains to justify it; and this is particularly so where the existing law is clear and generally regarded as fair.

He sums up his ethos with the phrase "if it ain't broke, don't fix it". Reading this diatribe from such an eminent lawyer I was deeply puzzled. I know a little about conveyancing. It is notorious that the existing covenants for title are virtually useless. They do not work at all when they are most needed. They are certainly not "fair" by any standard that I can understand. And only a skilled chancery lawyer can work out precisely what Sir Orlando Bridgeman's thicket of verbiage is all about. Law does not exist for the benefit of highly skilled specialists. It should be comprehensible to all. If the law is complex that is itself a justification for its reform and its simplification. It *is* "broke" and it *does* need fixing. With that I think that we can make common cause.

A Content Analysis of Legal Jargon in Australian Statutes

Duncan Berry

[Duncan Berry is a senior Parliamentary drafter in New South Wales. He is preparing a Doctoral thesis on statutory drafting. Here is a report on part of his research.]

There continues to be a perception in the community that legal documents are incomprehensible because the lawyers who drafted them have written them in legal jargon, often referred to as "legalese". As long ago as the 16th century Sir Thomas More criticised statutes on these grounds (More, 1516). Jonathan Swift (1726) made similar criticisms. In the l9th century, the famous jurist, Jeremy Bentham (1823) accused lawyers of "poisoning language in order to fleece their clients" and denounced legalese as "excrementious matter, literary garbage". In more recent times, two law professors, Rodell (1939) and Mellinkoff (1982) have attacked legal language as "nonsense" and "solemn hocus pocus" that reads as if it had been translated from German by someone with a rather meagre knowledge of English, serving only to "conceal the confusion and vagueness and emptiness of legal thinking ..." (Rodell, 1939). More recently still, the Renton Report has provided a number of examples of criticisms of convoluted drafting in English statutes (Renton, 1975). Other writers have pointed out that legal language uses archaic, foreign and uncommon words in long complex sentences with intricate clause subordination patterns, expressed in the passive voice and totally lacking in humanity and colour (Danet, 1980; Malley, 1987).

There have also been numerous criticisms of legal writing in Australia. These include: the Senate Standing Committee on Education (1984); the Australian Law Reform Commission (1982); the lay press, such as the Sydney Morning Herald; and legal journals, such as the Australian Law Journal (1985: 189). However, the criticism that seems to have had the most far reaching effect came from the former Attorney General of Victoria, the Hon. Jim Kennan (1985). In a speech to the Legislative Council of Victoria in 1985, he announced a new approach to the preparation of Victorian Parliamentary Bills a process that he referred to as "Kennanisation"! In future all legislation for the State of Victoria was to be drafted in "plain English". Shortly afterwards, the Victorian Law Reform Commission (1987) held an inquiry into the techniques and methods used in writing legislation and other legal documents. In identifying the nature of the problem, the Commission had this to say:

> Many legal documents are unnecessarily lengthy, overwritten, self-conscious and repetitious. They consist of lengthy sentences and involved sentence construction. They are poorly structured and poorly designed. ... They use confusing tautologies such as "ordered, adjudged and decided" and "let, allow and permit". They retain archaic phrases such as "know all men by these presents" and "this indenture witnesseth". They use supposedly technical terms and foreign words and

phrases, such as "inter alia" and "res ipsa loquitur", even when English equivalents are readily available. They are quite unintelligible to the ordinary reader, and barely intelligible to many lawyers. Language which suffers from some or all of these defects is called "legalese".

Critics have identified four main areas of concern. These relate to vocabulary, syntax, organisation and style. Mellinkoff (1982) and Benson (1985) have criticised lawyers' vocabulary on the grounds that legal documents contain, or at least contain too many:

(1) long words, such as "commencement" rather than "start";

(2) archaic English words, such as "aforesaid", "hereinbefore" and "witnesseth";

(3) Latin phrases, such as "mutatis mutandis";

(4) common words with unusual meanings, such as "prayer" and "consideration";

(5) law French, such as "estoppel" and "voir dire";

(6) terms of art, such as "eminent domain", "fee simple", "messuage" and "hereditament";

(7) jargon (argot);

(8) formulistic formulae, such as "know ye all men by these presents";

(9) vague expressions, such as "reasonable care";

(10) doublets, such as "null and void", "full force and effect", "each and every", fair and reasonable", "just and equitable" and "fit and proper";

(11) unusual prepositional phrases, such as "as to" and "in the event of"; and

(12) the use of "the said" and "such" as articles, e.g. "until the said agreement is signed" and "until such person complies with the foregoing requirements".

Syntactic features (such as extremely long complex sentences with embedded subordinate clauses) can also pose problems for readers of legislation and other legal documents. One form of syntax that is peculiar to legal documents is the proviso. Provisos[1] are almost unknown to the English language outside the law and, because non lawyers are totally unfamiliar with this kind of syntactic feature, they will undoubtedly find the presence of provisos in any legislation which they are called on to read both intimidating and an obstacle to comprehension. The existence of provisos is in itself bad enough, but the position becomes intolerable when a proviso appears to be subject to another proviso.[2] Other difficulties for the statute user can arise from poor style (for example, overloading sentences with too many ideas and legislation by reference[3]) and bad organisation (for example, the uncoor-

1 A proviso is a formula, placed at the end of a legal proposition, which begins "Provided that .." It is usually an exception to a general proposition, but sometimes it may be used to express a condition to which a proposition is to be subject. Coode (1848) described the proviso as "the bane of all correct composition". Even in the 19th century, he questioned whether there was any real need for provisos.

2 The phrase "appears to be" is used advisedly, because in many instances it is difficult to be sure whether a second proviso is qualifying the first proviso or the original proposition!

3 The following is an example of this technique:
"Subject to the regulations, the provisions of the Justices Act 1902 apply (with any necessary modifications) to and in relation to a warrant or summons issued or to be issued under this Act in the same way as they apply to and in relation to a warrant or summons of a corresponding kind issued or to be issued under that Act."

dinated distribution throughout the text of related material).

Having determined, what in broad terms is characterised by the term "legalese", I carried out an analysis of the vocabulary of a number of older statutes (pre 1950) of the Commonwealth, New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia. I then surveyed a number of more recent statutes from those jurisdictions that were enacted after 1990.

With one exception, I did not take into account unusual syntactic features, bad organisation or poor style. To identify these phenomena would be a much more time consuming exercise and will have to wait for another day. The exception was provisos, which I included because they were relatively easy to identify.

My objectives were twofold. Firstly, I wanted to find out to what extent statutes contained language that could fairly be characterised as legalese. My second objective was to compare the older statutes with the modern ones to determine how far criticisms which might have been justified in relation to Australian statutes of 40 or 50 years ago are valid for modern Australian statutes and to ascertain what, if any, changes have taken place during the intervening period.

The criteria for determining whether or not any particular word or phrase amounts to "legalese" are largely those identified above by Mellinkoff (1963, 1982) and Benson (1985). In sum, I took to be legalese any word or phrase if it was of a kind found in legal documents (including statutes) but not generally found in any other form of English writing. However, I excluded certain legal terms of art from the analysis if no other common English word or phrase was available to adequately replace the term. (The term "fee simple" is an example of this.)

I also excluded "long words" and "vague expressions" (items (1) and (9) above). This is because whether a word is long is very much a matter for subjective determination. A word that one person regards as "long" might not be so regarded by another person. Moreover, with some words, the shorter word may be less familiar to the audience than its longer equivalent[4] and no other suitable synonym may be available.

As regards vague words, "reasonable" or "sufficient" for example, these may be acceptable in statutes as long as an appropriate mechanism for processing the word is prescribed in the document concerned. Furthermore, these kinds of words are readily found in other forms of English writing.

In the course of my survey of older statutes I found copious examples of the following words that Mellinkoff (1963) and others have characterised as "legalese":

deemed	thereafter	hereby
bona fide	thereat	hereinbefore
aforesaid	therefrom	hereinafter
the said	thereunder	hereafter
the same[5]	thereto	howsoever
such[6]	therein	hereof
thereof	herein	in lieu of
therewith	whereof	moneys

4 E.g. "otiose" as opposed to "superfluous".
5 When used as a pronoun.
6 When used as a substitute for "the" or "that".

thereout	wherein	primafacie
therefor	whosoever	foregoing
thereafter	whomsoever	the like[7]
thereby	whatsoever	hereunto
whereupon	namely	thereupon
thereunto	utilised	pursuant to
per centum	in pursuance of	by reason of
abode	messuage	notwithstanding
aforementioned	save as[8]	mutatis mutandis
that is to say	furnish[9]	instrument[10]

I also found instances of the following "doublets" and other tautologous expressions:

read and construed
final and conclusive
force and effect
null and void
prejudice or affect
ratify and approve
preference or priority
rights, title, powers and remedies
between or among
apply and extend
and/or
had and obtained
obtain and have effect
peaceable possession
penalty or pecuniary liability
application, statement, requisition, assessment, notice or any other document
account, books, records and documents
books, documents or paper
absolutely void

Other legalistic phrases I found included:

shall be in addition to and not in substitution for...
are in addition to and are in no way in derogation of...
shall be construed as if ...

The results of my survey are set out in Appendices 1 and 2 below. Appendix 1 deals with Australian Acts passed before 1950 and Appendix 2 relates to Acts passed since 1990. Each Appendix specifies in respect of each of the Acts surveyed the number of pages, the number of sections and Schedules, the number of items of legalese found (according to the criteria set out above), the approximate number of words[11] and the number of items of legalese per 1,000 words. Because tables of provisions are constructed from headings to sections and schedules, I excluded legalese found in the tables. Otherwise legalese in headings would have been counted twice.

The data show a wide disparity between the older Acts (Appendix 1) and the more modern ones appearing in Appendix 2. There is also a significant disparity between the various jurisdictions. Even in the 1940s, Commonwealth Acts contained far fewer items of legalese than most State legislation.

Appendix 1 shows that for Commonwealth Acts the average number of items of legalese per 1000 words was 9.14 compared with the average for all Australian jurisdictions of 15.34. At the other end of the spectrum, the average for the Queensland Acts surveyed was over 2.5 times higher at 24.3 items per 1000 words. Provisos, Latin expressions and words like

7 When used as a substitute for "the same" or "similar".
8 When used as a substitute for "except" or "unless".
9 Meaning "supply" or "provide".
10 Meaning "document".
11 The number of words was counted on a number of pages in each Act and averaged. The average was multiplied by the number of full pages in the Act. The number of words was counted (to the nearest fifty) on pages that were only partly filled with text. The words in tables of provisions or contents have not been counted because, in most cases, they are a compilation of (and thus merely repeat) the headings to Parts, Divisions and Schedules, and the shoulder headings or marginal notes to sections, occurring in the Act concerned.

"aforesaid", "hereinafter", "hereinbefore", "therein", "thereof", "hereof" and "thereafter" were relatively uncommon even in older Commonwealth legislation. On the other hand, the older Queensland Acts were particularly bad in this regard, being infested with provisos, Latin expressions and the kind of vocabulary that is so characteristic of legalese. Although the older New South Wales and Victorian Acts contained significantly fewer items of legalese than their Queensland counterparts, they still rated poorly. Appendix 1 shows that, after Queensland, the next worst States were Victoria with an average of 17.43 items of legalese per 1000 words and New South Wales with 15.82 items per 1000 words. The remaining States ranged between 15.55 items per 1000 (Tasmania) and 12.64 items per 1000 words (South Australia).

Appendix 2 demonstrates an enormous reduction of legalese in the statutes of the 1990s. New South Wales Acts showed the most dramatic improvement with a rate of only 0.94 items per 1000 words as compared with 15.82 items per 1000 for New South Wales Acts of 50 years ago. Commonwealth statutes closely followed with 1.06 items per 1000 words. South Australian statutes (1.11 items per 1000 words) and Tasmania (1.24 items per 1000 words) were not far behind. Modern Queensland Acts also showed a very considerable reduction in the use of legalese. The rate for recent Queensland Acts would probably have been even better had it not been for the fact that one of those Acts contained 125 items of legalese, a rate of 6.87 per 1000 words! The rate for modern Western Australian statutes was 4.8 items of legalese per 1000 words. Once again the result would have been very much better had one of the three Acts examined not contained 40 items of legalese (a rate of 8.42 items for each 1000 words).

One of the most remarkable findings was that none of the 1990s statutes contained a proviso.[12] None of the modern New South Wales, South Australian or Tasmanian Acts contained Latin words generally regarded as characteristic of legalese and it was extremely rare to find such words in recent Acts of the Commonwealth and the other States. Some modern statutes, however, contained doublets, such as "full force and effect" and "affect or prejudice", and phrases like "in pursuance of" and "by reason only that". Words like "notwithstanding", "deemed", "furnished", "instrument", "moneys", "the same"[13] and "whatsoever" also continued to be quite common. One or two of the statutes contained "thereupon", "thereunder", "thereof", "thereto", "therefrom", "therein" and "hereby".

Despite containing very little "legalese" in the limited sense defined for the purposes of the analysis, some of the statutes surveyed still seemed to be quite complex. For example, most people affected by the Superannuation Guarantee (Administration) Act 1992 (Commonwealth) would have difficulty in under-

12 In an earlier survey of 1980s Acts, only one proviso was found and that was in the Tobacco Products Act 1988 (Queensland).

13 Used as a pronoun.

standing the complexities of Parts 2 and 3 of that Act.

Although the analysis of 1990s statutes does demonstrate a move away from legalese in the narrow sense defined above, this does not of itself suggest that parliamentary counsel have adopted a simpler style. Nevertheless, I did observe a trend towards sentences that were shorter and better constructed than in the older statutes. There also seems to be a trend towards expressing propositions positively rather than negatively and to using the active voice instead of the passive voice, although the use of passives is still very common. It was common to find proportions and calculations expressed by means of mathematical formulae (with appropriate definitions) rather than by the use of words only. In some of the modern statutes I noted a reduction in clauses and phrases designed to connect one legislative provision to another.[14] Such tautological phrases as "the provisions of" also seem to be used less frequently. In the case of a sentence having a singular subject and a plural subject most Commonwealth and New South Wales Acts now seem to follow Fowler (1968) by making the verb agree with the nearer of its subjects, rather than the cumbrous repetition of the verb.[15] The unnecessary repetition of nouns also seems to be now eschewed in many Acts.[16] Some recent Commonwealth and New South Wales Acts (not including any of those surveyed) have included aids designed to assist users' understanding. Among these aids are introductory notes to assist readers in finding their way around the Act in question or to tell them how the Act works. Another aid is the use of a flow chart or algorithm to illustrate the procedural steps required to be followed under the Act. Yet another aid has been the introduction of examples which are designed to illustrate how the related legislative provisions are meant to function. Some legislative provisions are now followed by notes that explain how those provisions work.

So what may be inferred from the analysis? While in the past one may have been justified in criticising Australian legislation for containing legalistic words, phrases and forms of the kind catalogued above, this criticism seems to be no longer valid, certainly not at least as far as most Australian statutes are concerned. However, the analysis is not conclusive. It would be necessary to carry out further research to determine whether the syntax, organisation and style of modern legislative drafting was sufficiently free from the characteristics associated with legalistic writing, such as the excessive use of the passive mood and too many ideas in one sentence. Nevertheless, the fact that provisos no longer appear in modern Australian statutes and a general impression gained from reading some of those statutes suggests that other improvements involving the syntax, organisation and style of Australian legislation might have been made.

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14 E.g., instead of saying "An application made by a person under subsection (1)..." one is now quite likely to see "An application ...". Also, phrases like "of this Act", "of this Part" and "of this section" have for the most part been omitted as redundant, although such phrases continue to appear in New Zealand Acts.

15 E.g., "A person or persons have ..." rather than "A person has, or persons have ...".

16 E.g., "A person to whom section 10 applies ..." rather than "A person who is a person to whom section 10 applies ...".

On the other hand, it should not be assumed that the dramatic improvement apparent in recent Australian statutes has necessarily flowed through to the preparation of other kinds of legal documents. Despite attempts by Eagleson (1990), Kerr (1991) and others to educate lawyers as to the benefits of plain language in legal documents, a cursory glance at a few of the legal documents prepared by lawyers in the private sector would reveal that there is a long way to go before legalese is eradicated from the law. But even in the private sector there are some encouraging signs that the drive for plainer language is having some effect, with a number of commercial organisations adopting plain English documents that directly affect the general public.

Having established that the survey of recent Australian statutes demonstrates a clear trend away from vocabulary characterised as "legalese", one might reasonably ask what has brought about the change. Although not conclusive, I think there is little doubt that one contributory factor influencing the change was the Kennan speech mentioned earlier and the subsequent report of the Victorian Law Reform Commission (1987). The report argued that legal documents, and legislation in particular, should be written in the style known as "plain English" and claimed that this style was compatible with precision and was capable of expressing complex policy. This style was also claimed to be less time consuming than the traditional style. But an earlier survey I did of statutes enacted between 1982 and 1987 showed that in many Australian jurisdictions the socalled traditional style of drafting had already been abandoned. For example, a survey of five Acts of one Australian State passed in the early 1980s[17] revealed a rate of only 0.70 items of legalese per 1,000 words. A similar survey of Commonwealth legislation passed during the same period revealed no provisos and very little of the vocabulary normally characterised as legalese. It would seem therefore that, even before the 1985 Kennan speech and the Victorian Law Reform Commission's Report, at least some Australian parliamentary counsel were already moving towards a style that avoided legal jargon.

Despite recent improvements, criticisms still remain. The Chairman of the House of Representatives' Legal and Constitutional Affairs Committee, Michael Lavarch [now the Attorney-General] was quoted in the *Australian Law News* (August 1992) as saying:

> Despite some moves towards plain English styles of drafting, it seems that our laws are still unnecessarily complex. We will be assessing whether there are ways of drafting legislation which would produce more simple but no less precise laws.

He also pointed out that Australian taxation law had often been criticised as "impenetrable even for tax specialists". The complexity of Australian legislation was also the subject of criticism in *Taxa-*

17 The Acts concerned were the Long Service Leave (Casual Wharf Employees) Act 1982, the Chiropractors Registration Act 1982, the Apple and Pear Industry (Crop Insurance) Act 1982, the Apple and Pear Industry (Miscellaneous Acts Repeal) Act 1982 and the Prisoners (Interstate Transfer) Act 1982.

tion in Australia (November 1992) which reported on a computer test conducted by the Victorian Law Reform Commission on the Income Tax Assessment Act 1936 (Commonwealth).[18] The test suggested that to understand some of the sections of the Act would require 12 years' schooling and 15 years' tertiary education! There is clearly still some way to go before we can claim to have really usable statutes!

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18 Although enacted in 1936, this Act has been so heavily amended, particularly in recent years, that few of the original words remain.

APPENDIX 1 - OLDER ACTS (PRE 1950)

(Note: "Pvo" represents "proviso"; "tp" represents tautological phrase or expression; and "Lp" represents Latin phrase or expression.)

Name of Act	No. of pages (excluding tables of provisions)	No. of sections and Schedules	No. of words (to nearest 50)	Items of legalese	Items of legalese per 1000 words
Commonwealth Acts					
Wood Distribution of Profits Act 1948	11	33; 0	3,400	43	12.65
Parliamentary Retiring Allowances Act 1948	10	28; 0	3,800	22	5.79
Nationality and Citizenship Act 1948	19	53; 2	6,650	38	5.72
River Murray Waters Act 1948	6	6; 1 1 preamble	4,100	61 (8 pvos; 1 Lp)	14.88
Total	**46**	**120; 3 1 preamble**	**17,950**	**164 (8 pvos; 1 Lp)**	**9.14**
New South Wales Acts					
Charitable Collections Act 1934	16	21; 0	4,950	135 (1 pvo; 2 tps; 1 Lp)	27.27
Technical Education Act 1940	56	86; 0	18,500	228 (8 pvos; 17 tps; 2 Lps)	12.32
Stock Foods and Medicines Act 1940	20	35; 0	6,600	128 (2 pvos; 17 tps; 2 Lps)	19.40
Horse Breeding Act 1940	12	17; 0	3,950	47 (6 pvos)	11.90
Total	**104**	**159; 0**	**34,000**	**538 (17 pvos; 36 tps; 5 Lps)**	**15.82**

Name of Act	No. of pages (excluding tables of provisions)	No. of sections and Schedules	No. of words (to nearest 50)	Items of legalese	Items of legalese per 1000 words
Queensland Acts					
Liens on Crops of Sugar Cane Act of 1931	11	23; 0	3,700	190 (10 pvos; 6 tps; 1 Lp)	51.35
Roofing Tiles Act of 1948	29	26; 0	9,500	204 (11 pvos; 14 tps)	21.47
Hide and Leather Industries Act of 1948	10	22; 0	3,000	19 (3 pvos; 1 tps)	6.33
Wheat Industry Stabilization Act 1948	10	19; 0	3,100	56 (3 pvos; 3 Lps)	18.06
Total	**60**	**90; 0**	**19,300**	**469 (27 pvos; 21 tps; 3 Lps)**	**24.30**
South Australian Acts					
Barley Marketing Act 1947	10	22; 0	3,000	17 (5 pvos)	5.67
Venereal Diseases Act 1947	5	7; 0	1,500	30	20.00
Building Materials Act 1945	9	17; 0	2,700	44	16.30
Total	**24**	**46; 2**	**7,200**	**91 (5 pvos)**	**12.64**
Tasmanian Acts					
Ringarooma and Cascade Water System (Agreement) Act 1947	9	11; 2	3,800	76 (3 pvos; 3 Lps)	20.00
Milk Act 1947	21	29; 0	7,200	67 (2 pvos; 3 Lps)	9.31
Exton Water Act 1947	13	30; 1	3,600	84 (1 pvo; 2 Lps)	23.33
Total	**43**	**70; 3**	**14,600**	**227 (6 pvos; 8 Lps)**	**15.55**

Name of Act	No. of pages (excluding tables of provisions)	No. of sections and Schedules	No. of words (to nearest 50)	Items of legalese	Items of legalese per 1000 words
Victorian Acts					
Local Government (Streets) Act 1948	15	30; 0	4,500	107 (1 pvo; 11 tps; 1 Lp)	23.78
Statute Law Revision Committee Act 1948	5	11; 0	1,450	27 (1 pvo; 2 tps)	18.62
Barley Marketing Act 1948	11	26; 1	3,150	26 (2 pvos; 2 tps; 1 Lp)	8.25
Cancer Institute Act 1948	13	27; 1	3,350	57 (2 pvos; 5 tps; 1 Lp)	17.01
Total	**44**	**94; 2**	**12,450**	**217** **(6 pvos; 20 tps; 3 Lps)**	**17.43**
Western Australian Acts					
Coal Mine Workers Pensions Act 1943	35	49; 0	12,250	142 (11 pvos)	11.59
Censorship of Films Act 1947	16	31; 1	5,050	56	11.09
Country Towns Sewerage Act 1948	49	54; 4	17,550	249 (18 pvos)	14.19
Total	**100**	**134; 5**	**34,850**	**447** **(29 pvos)**	**12.83**
Total - Commonwealth and all States	**424**	**718; 15** **1 preamble**	**140,350**	**2,153** **(98 pvos; 77 tps; 21 Lps)**	**15.34**

APPENDIX 2 - NEWER ACTS (POST 1990)

(Note: "Pvo" represents "proviso"; "tp" represents tautological phrase or expression; and "Lp" represents Latin phrase or expression.)

Name of Act	No. of pages (excluding tables of provisions)	No. of sections and Schedules	No. of words (to nearest 50)	Items of legalese	Items of legalese per 1000 words
Commonwealth Acts					
Broadcasting Services Act 1992	96	218; 3	34,200	15 (2 tps)	0.44
Superannuation Guarantee (Administration) Act 1992	47	80; 0	16,800	11 (3 Lps)	0.65
Disability Discrimination Act 1992	58	132; 0	21,500	51 (6 tps)	2.37
Total	**201**	**430; 3**	**72,500**	**77 (8 tps; 3 Lps)**	**1.06**
New South Wales Acts					
Government Pricing Tribunal Act 1992	19	30; 4	5,300	2 (1 tp)	0.38
Parking Space Levy Act 1992	15	32; 1	3,050	9 (2 tps)	2.95
Swimming Pools Act 1992	29	41; 3	6,600	3 (3 tps)	0.45
Total	**63**	**103; 8**	**14,950**	**14 (6 tps)**	**0.94**

Name of Act	No. of pages (excluding tables of provisions)	No. of sections and Schedules	No. of words (to nearest 50)	Items of legalese	Items of legalese per 1000 words
Queensland Acts					
Contaminated Land Act 1991	40	57; 1	14,600	33 (7 tps; 2 Lps)	2.26
Grain Industry (Restructuring) Act 1991	54	92; 4	16,200	5	0.31
Transport Infrastructure (Roads) Act 1991	55	93; 3	18,200	125 (42 tps; 6 Lps)	6.87
Total	**149**	**242; 8**	**49,000**	**163 (49 tps; 8 Lps)**	**3.33**
South Australian Acts					
Wilderness Protection Act 1992	26	41; 1	8,700	5 (1 tp)	0.57
Survey Act 1992	26	63; 1 (Appendix)	8,100	13 (5 tps)	1.60
State Government Insurance Commission Act 1992	12	30; 1	3,850	5 (1 tp)	1.04
Total	**64**	**134; 3 (1 Appendix)**	**20,650**	**23 (7 tps)**	**1.11**
Tasmanian Acts					
Perpetuities and Accumulations Act 1992	24	28; 1	6,600	5 (1 tp)	0.76
Access to Neighbouring Land Act 1992	8	16; 0	2,000	5 (2 tps)	0.25
Subordinate Legislation Act 1992	12	18; 3	2,900	0	0
Education Providers Registration (Overseas Students) Act 1991	22	38; 0	6,300	12 (3 tps)	1.90
Total	**66**	**100; 4**	**17,800**	**22 (6 tps)**	**1.24**

Name of Act	No. of pages (excluding tables of provisions)	No. of sections and Schedules	No. of words (to nearest 50)	Items of legalese	Items of legalese per 1000 words
Victorian Acts					
Victoria Park Land Act 1992	17	19; 2	3,600	14 (8 tps)	3.89
Superannuation (Public Sector) Act 1992	15	21; 0	3,500	3	0.86
Swinburne University of Technology Act 1992	48	70; 1	11,250	21 (11 tps; 1 Lp)	1.87
Total	**80**	**110; 3**	**18,350**	**38 (19 tps; 1 Lp)**	**2.07**
Western Australian Acts					
Western Australia Financial Institution Authority Act 1992	24	57; 0	3,950	2	0.51
SGIO Privatisation Act 1992	26	30; 2	3,800	18 (3 tps)	4.74
Coal Industry Tribunal Act 1992	30	39; 0	4,750	40 (7 tps)	8.42
Total	**80**	**126; 2**	**12,500**	**60 (10 tps)**	**4.80**
Total - Commonwealth and all States	**687**	**1245; 31**	**205,750**	**367 (105 tps; 12 Lps)**	**1.78**

Teaching Legal Writing Skills

Penny Pether

[Lawyers' drafting skills are unlikely to improve unless legal writing is taught systematically in law schools. Here Penny Pether, lecturer in law at the University of Sydney and an experienced teacher of legal writing, gives her views on teaching law students how to improve their writing.]

With a few notable exceptions, legal writing skills teaching in Australian Law Schools has been a practice more honoured in the breach than in the observance. Commonly, where legal writing is included in the curriculum at all, it forms a composite subject with legal research. Legal research is generally handed over to already overburdened law library staff; legal writing is supposed to occur by osmosis and be assessed through the marking of essays in substantive law subjects by busy lecturers. Not surprisingly, then, law teachers across the country complain often with good cause of their students' poor writing skills. So do increasing numbers of their potential employers. As for their future clients? Robyn Kina, who recently had her murder conviction overturned by the Queensland Court of Appeal in effect because her lawyers' inadequate communication skills deprived her of the opportunity to raise a provocation defence seems to speak for many of them:

> With the lawyers, I guess I couldn't open up to them, and for some reason they just wouldn't listen... lawyers talk in big words. You think, "I wish they would use ordinary words." And then you think, "Maybe they don't know them!" ....There are a lot of people in jail who don't understand lawyers.

An obvious way to approach legal writing skills teaching is to equip law students with the techniques developed by the "plain legal language" movement. More sophisticated "plain language" practitioners typically describe their approach as "readercentred". This fits neatly with current trends in legal education which promote "studentcentred" learning, and with the movements to make legal services delivery "clientcentred". The risk with this rhetoric, democratic and praiseworthy as most of us see it to be, is that an uncritical acceptance of it tends to blind us to the power of law's (and education's) institutions and discourses, and the extent to which at present that power tends to benefit certain groups, and exclude and discriminate against others.

What to do, then, to enable lawyers to write and read law in ways that will make it more responsive to the needs of a diverse population? To fit them to make a difference in a country in which only the very rich and some of the very poor can afford legal services? To save legal academics the timeconsuming drudgery of marking essays which at their worst can be heartbreaking evidence of the functional illiteracy of their authors, many of whom might prompt the despairing description of a character from David Lodge's *Nice Work* who described the painful irony of teaching poststructuralist

theory to " young people who have read almost nothing except their GCE set texts and Adrian Mole, who know almost nothing about the Bible or classical mythology, who cannot recognize an illformed sentence, or recite poetry with any sense of rhythm." To equip the feepaying consumers of legal education with a market edge which may help them secure and hold on to work?

If anything is plain it is that they will need such an edge in a legal employment market made uncertain and extremely tight by the collapse of the legal fees market in the early 90's, by pressures to change the ways legal services are delivered, and by the bumper crop of law students currently being trained. This last is largely due to the recent dramatic increase in the number of Australian law schools, many of which have yet to produce graduates. I have taught remedial legal writing skills to lawyers who asked for help in much better times for legal employment than now. These lawyers were at risk of losing their jobs or their careers were stalled because they had emerged from their university training with very low levels of written language competence.

I teach legal writing skills at the University of Sydney, where with the help of colleagues like Mark Duckworth of the Centre for Plain Legal Language and the enthusiastic support of the Dean, David Weisbrot, I am developing an integrated legal writing skills training program which is in its first year. Leaving aside for a moment the political issues which I touched on before, this may seem relatively straightforward to readers of *Clarity*: a perfect opportunity to train students in the principles of plain language drafting before they have time to learn bad habits. Indeed, it looks like an enviable task. After all, our undergraduate intake of over 200 is drawn from the State's best and brightest matriculants: you have to be in the top 2% of NSW's equivalent of A Levels to secure a place. And there is fierce competition for entry to our small graduate program: outstanding pass degrees or strong honours degrees are the norm; higher degrees not uncommon. An anecdote may help suggest that the task is trickier than it seems.

A staple "plain language" technique is to use strong, active verbs. In recent weeks a class of graduate law students to whom I was describing the principles of plain language drafting asked me to explain what active and passive voice verbs were. In their 20s and early 30s, these "beneficiaries" of 1960s school curriculum policies lack a knowledge of the way their language works, and have no vocabulary to describe it. This makes training them in effective writing skills more or less impossible; unless we equip them with this basic knowledge about English we cannot go on to do the real work of training them to communicate effectively in writing.

Mark Duckworth has developed a pilot program of selfpaced computer tutorials in legal writing skills which we are this year trialling on our first year undergraduate intake. This program introduces students to plain language drafting, but also helps them acquire skills in basic English grammar, syntax, and punctuation. It is now clear that the graduates would benefit from this program; we are exploring the feasibility of extending it to them in 1996. I should make it clear here that while increasing numbers of our students

come from nonEnglish speaking backgrounds, socio-economic factors and educational history can be as significant as family language background in determining the literacy levels of our students at entrypoint.

There are other implications of legal writing skills training which also bear on curriculum design and implementation. They range from the intensely practical to the political and ethical. One of the most basic is a consequence of the integrated approach to skills training, which many legal education experts currently promote as the "best practice" model. Meeting the needs of colleagues who teach substantive law subjects which are the "homes" of various stages of an integrated skills program raises fundamental issues about the nature of the discipline, about learning, curriculum, and assessment, and about the purpose of legal education.

For reasons of equity and effectiveness we need to devise curricula which will be flexible enough to service a range of students. Some of them are effectively functionally illiterate in the University context in a textbased discipline like law. At the other end of the spectrum are students who are highly skilled, but find it difficult and indeed disturbing to comprehend that not everyone reads things in the way that they do or with the ease that they do.

Resourcing remedial literacy programs is resourceintensive: most University managements put it in the "toohard" basket and underfund it, despite rhetoric aimed at the lucrative market in overseas feepaying students. Language and Learning Centres, overburdened and underresourced, often quite rightly assign low priority to assisting the academic elite enrolled in law schools: there are many students who need their scarce resources more than law students do. And how many legal academics really have the skills to diagnose what I will for now call the literacy "problems" of their students, or to design and deliver remedial literacy programs? After all, the U.S. experience suggests that many law school writing instructors fall into the job because it is one typically assigned to junior, untenured staff members.

There are the ethical issues raised in teaching a multicultural clientele in a way that can suggest and reproduce monocultural values and practices. For example, how does a teacher service Koori students whose first language is Aboriginal English, and whose teachers in substantive law subjects may (often unknowingly) penalise them for using Aboriginal English in assessment tasks? Is legal writing skills training empowering for such students, or is it a species of violence, a colonial practice?

One response is to approach the task as enabling bicultural competence, and this requires legal writing skills programs which discard the traditional division between skills and content, which theorise and contextualise skills teaching in ways which to date are foreign to the Australian experience, and, as far as I can tell, to the experience in the U.S. and the U.K. This in turn requires a commitment by faculties to exploring new ways of teaching law, a big task in a tertiary education sector which has moved rapidly from a meritocratic to a democratic model, without proportionate increases in funding.

These are significant challenges, but the unique combination of staff with interest

and expertise in legal writing skills training and a faculty which is about to embark on skills teaching in ways which make it both "smarter" and resource effective suggests that the Sydney experience may provide some useful models for revamping this Cinderella subject.

Plain language in consumer contracts:

U.K. implements E.U. directive

The British Parliament has now passed legislation implementing the European Union directive requiring plain language in consumer contracts (reported in Clarity 31 [Oct 1994, p. 9]). Unfortunately, CLARITY'S recommendations were not adopted, and our criticism of the draft applies equally to the final version.

Nor did the government meet the 1 January deadline set by Europe. Statutory Instrument 3159 of 1994 does not come into force until 1 January 1995.

Many "plain English" consumer documents have been appearing, though their standard is uneven. Others are in last-minute preparation. However, in the last month before the change comes into force legalese remains the norm.

We hope CLARITY members will rely on the new law to pressure for change.

Law Commission criticises obscure laws

In its latest Report, the English Law Commission has condemned the poor drafting of many of England's laws. In the introduction to the Report, the Commission's chairman, Mr Justice Brooke, says: "Bad law wastes money". The criminal law was a good example. But there were others as well: "large swaths of trust law, and landlord and tenant law ... are antique, obscure or impenetrable, and the bill for bad law goes to those who have to use it.

The Law Commission 29th Annual Report. HSMO. ISBN 010-224-495-2.

The Small Firm Perspective Kabos Elder

John Kabos

[Many large Australian law firms have moved to plain language. Some have invested large amounts of time and money in training staff and developing plain language precedents. This article looks at plain legal language from the perspective of small firms, who lack the resources of the mega-firms. John Kabos is a partner in a two-partner firm in Sydney.]

Purpose of this paper

To highlight our experience in the use of plain legal language over the last four years.

Nature of Kabos Elder

Our firm is a 2 partner, 1 associate firm providing commercial legal advice to middlesized businesses.

Our view of plain legal language

Plain legal language involves satisfying our clients' need to understand our product. We achieve this by:

* concentration on clarity,
* careful analysis and sorting of information,
* simple but precise wording,
* sensible punctuation,
* use of layout and print techniques,
* attractive packaging of the final product.

Implementation in our firm

With the informal management structure of our firm, we have been able to:

* introduce plain legal language without bureaucratic delay,
* react to problems quickly,
* achieve uniformity throughout the firm immediately,
* translate precedent documents to plain legal language when required,
* adopt a radically plain form of legal language.

Benefits for our clients

* Correspondence from us is easy to read and respond to.
* Our clients can understand documents prepared by us.
* We promote our clients' self esteem by consciously avoiding a communication snow job.
* Our clients have greater confidence in our advice.
* Our clients' commercial dealings are more effective.

Benefits for our firm

* Communications with our clients and our colleagues are simpler.
* Our advice is more readily accepted by our clients.

* Our clients recognise that we are making a contribution to their business rather than being a necessary evil.

* The risk of a negligence claim is reduced because our clients understand the documents and the correspondence.

Observations

* Some clients find our radically plain legal language too abrupt. They admit that the relevant information is easy to find and accept it after a while.

* Some solicitors do not believe that plain legal language is sufficiently precise and seek amendments drafted in legalese. We decide on the merits of the substance of the requested amendments and translate the substance to plain legal language.

* Some solicitors consider it important to use only words and phrases that have been tested in court. This is illogical, as the involvement of court has usually been required because the words could not be understood.

* Some intermediaries, such as merchant bankers, consider that if legal documents and transactions are understood by the clients their role will be diminished. If their only contribution is because of legalese, then that may happen.

* Drafting in plain legal language requires an intimate knowledge of the transaction being documented and the applicable law. We have to put greater effort into the task than if we simply use a precedent.

* The cost of producing documents for the first time in plain legal language is frequently greater than simply following an unintelligible precedent and making a few changes. In most cases, because of the perceived benefit of the product, our clients have been prepared to bear the cost.

* When we are not in control of the drafting and an unintelligible document is imposed on our client, we prepare a highlights memorandum setting out the key issues in plain legal language and crossreferencing those to the submitted document. To make the highlights memorandum effective it is important to group the key issues logically and not necessarily follow the order of the submitted document.

Once you start using plain legal language, clients expect you to continue using it. Implementation is a oneway trip.

Clarity "style"

At its meeting on 18 April, the CLARITY committee considered the style of this Journal.

Do you find *Clarity* too heavy? Too light? Just right?

Here's your chance to have your views considered. Comments to Mark Adler, please.

Pollies to Speak in Plain English

Anne Sarzin

[In 1994 the Centre for Plain Legal Language at the University of Sydney, and the New South Wales Parliamentary Counsel's Office, produced a joint report on revamping the design of legislation. The report, entitled "Review and redesign of NSW legislation" was noted in Clarity 31, p. 4. The NSW government has decided to implement the report. The following article appeared in the University of Sydney News, 31 May 1995. It is reproduced with permission.]

All NSW legislation will be set out according to the design guidelines established by Sydney University's Centre for Plain Legal Language, in consultation with the Parliamentary Counsel's Office.

The new design has been accepted by the State Government and will be used for all Bills introduced into Parliament.

This achievement by the Centre for Plain Legal Language coincided with National Law Week (2127 May), which was launched by the Governor of NSW, Rear Admiral Peter Sinclair.

The Governor had commented on the importance of current initiatives to simplify or define the law in plain English. "When comprehension becomes a casualty of technical detail, then confidence in the legal system will also suffer," he said.

> If this causes breaches of the law through ignorance, or greater need for professional involvement, which may be beyond the reach of many, then the adverse consequences will be compounded.

The design of the format was the result of collaboration between the Centre's director, Mr Mark Duckworth, and Mr Dennis Murphy of the Parliamentary Counsel's Office. Their project aimed to improve the readability and the appearance of legislation.

"The new design makes legislation easier to use," Mr Duckworth said.

> It will undoubtedly lead to the best designed legislation in Australia — and our format has already been acclaimed by legislators in Canada, South Africa and the United States. Userfriendly legislation is vital to increased access to the law.

The Centre and the Parliamentary Counsel's new design is the culmination of several years' work, which included a discussion paper, extensive consultation and testing. The new design — fully accepted by parliamentarians and practitioners in publishing and law — will be used for all Bills prepared for introduction or exposure in 1995.

In a letter sent last week to Mr Duckworth, Mr Murphy thanked the Centre "for the invaluable work that has been done in developing and testing the new design".

Some of the features of the new design for NSW legislation are: better numbering

of sections and subsections for scanning; more space between sections and paragraphs; fewer capital letters, especially in headings; easier-toread text; and punctuation reduced to the necessary minimum

Mr Duckworth said

> Plain language is much easier than just words. It's about organising ideas so that they make sense to the reader, and designing documents to make them clear and easy to use.

The Centre's major breakthrough in determining the design of NSW legislation has been accompanied by a comprehensive teaching program at the University to promote the use of plain legal language.

Law lecturer Penny Pether who helped thc Centre implement a teaching program this year, said 600 law undergraduates were currently involved in different parts of the program.

> This is the beginning of a program aimed at integrating legal writing skills training into our curriculum. The range of teaching initiatives includes computerised plain language drafting tutorials available in language laboratories. The tutorials were developed by the Centre in conjunction with the Department of French.

The principles of plain legal writing will also be included in the Law School's firstyear core course on Legal Institutions. The teaching initiative also includes a special program of plain language and legal writing skills training tutorials for seconddyear students on the CamperdownDarlington Campus and for firstyear graduate students at the Law School. "We will extend that program in future years," Ms Pether said.

The Dean of Law, Professor David Weisbrot, said the University's Centre for Plain Legal Language in the Faculty of Law had already been internationally acclaimed for its major initiative devoted to simplifying legal language in Australia.

> By helping to save time and money and by reducing the incidental costs of business, they have achieved a micro-economic reform, and at the same time have made the law more accessible to people in the community.

News from Australia

Queensland

The Queensland Law Society has set up a Plain English Committee. It has also announced a number of initiatives to encourage lawyers to write in plain language. The Law Society's Plain English campaign was launched on 15 May by Mark Duckworth, Director of the Centre for Plain Legal Language, and by Queensland solicitors Joe Tooma and Kevin Copely. At the launch the Law Society announced a new award for the best articles in the Law Society's publications *Proctor* and the *Queensland Law Society Journal*. The Law Society also announced a will drafting competition. Solicitors have been given a set of facts on which they must draft a will in plain English.

Tasmania

On 27 May, the Tasmanian Law Society organised its first intensive workshop on plain legal language. The workshop was run by Mark Duckworth and Veronika Maddock (Deputy Chief Parliamentary Counsel for Tasmania). The workshop was sponsored by the Hobart law firm of Dobson Mitchell & Allport. The workshop, which was part of Law Week, was oversubscribed. The 55 solicitors from around Tasmania who met in Hobart for the workshop showed the increasing commitment of practitioners in both the public and private sector to using plain language in the law.

Australian Language and Literacy Council — Plain English Projects

Lillian Armitage

[CLARITY member, Lillian Armitage, National Precedents Manager, Minter Ellison Solicitors, reports on a plain language project being undertaken by the Australian Language and Literacy Council.]

The Australian Language and Literacy Council is currently preparing formal advice to the Australian Federal Minister for Employment, Education and Training on plain English and accessible reading materials.

The Council is required to review current developments and assess needs in plain English and accessible reading materials in the public and private sectors to:

* map current achievements in terms of social, economic and other indicators
* assess the needs of specific groups of adult readers for accessible reading material
* develop and recommend a strategy to assist in implementing Australian language and literacy policy.

For the purposes of the advice, the concept of plain English and accessible reading materials includes the notion of developing reading materials which provide access to information, literature and documents by all Australians, including adults who need easy to read, accessible literature in English. It includes Australians from non-English speaking backgrounds, intellectually disabled people, adult literacy students and Aboriginal and Torres Strait Islander people.

To carry out the ministerial reference, the Australian Language and Literacy Council has appointed consultants to carry out the following four projects:

* Project 1— Identifying the needs of specific groups for accessible reading materials
* Project 2 — Best practice in the public sector (two sites)
* Project 3 — Best practice in the private sector (two sites) excluding the legal profession
* Project 4 — Review of activities in plain English and the law.

Minter Ellison, one of Australia's leading law firms, was engaged to carry out Project 4: Plain English and the Law. Fiona Beith (also a CLARITY member) and I carried out the project.

Project 4 required us to identify and evaluate the effectiveness of activities in the legal profession which have been specifically directed at providing accessible documents in plain language.

To carry out the project we:

1. Identified and evaluated examples of documents available for the general consumer market in the following areas:
   * insurance
   * residential leasing

* retail leasing
* conveyancing
* residential building
* banking.

2. reviewed what activities (apart from legal drafting) have been undertaken generally in the legal profession to make documents more accessible to the consumer, including:
   * public education
   * training members of the legal profession
   * providing advice.
3. carried out a brief overview of the activities of the bodies listed below, directed at providing accessible legal documents:
   * the courts
   * federal and state governments
   * bodies that regulate or influence the implementation of the law (Trade Practices Commission, Life Insurance Federation of Australia, Insurance Council of Australia, Banking Ombudsman).

We did not examine the activities of individual law firms or legal practitioners.

We submitted our report to the Australian Language and Literacy Council at the end of April 1995. Under the terms of our consultancy, we cannot publish our report for a further six months. However, I can say that overall, our investigations showed that there have been many attempts to provide legal documents in accessible language for the consumer market. The most significant advances have been made in the consumer insurance and banking markets. But there is still a long way to go. There are may areas where the development of accessible legal documents in plain language has been slow. Also, the majority of standard form documents produced using plain language principles have been prepared for use by readers from English-speaking backgrounds with reasonable levels of literacy. Largely, it has been left to community legal advice centres to make legal documents more accessible to people from non-English–speaking backgrounds and to people with disabilities.

More news on American Bar Association's Annual Meeting

As we mentioned in the last issue, the 1995 annual meeting of the American Bar Association will include a program on plain language, sponsored by the Committee on Communication Skills (formerly the Legal Writing Committee).

The program is to be called "Clear Writing Pays: the Benefits for Lawyers and Clients". Speakers include the Honorable Judith S. Kaye (Chief Judge, State of New York Court of Appeals), Duncan MacDonald (Citibank, New York), Kenneth Gluckman (Chrysler Corporation, Detroit), Christopher Balmford (Phillips Fox, Melbourne, Australia), and Bryan Garner (LawProse, Dallas, Texas). Balmford and Garner are members of CLARITY.

The program is being organised by Joe Kimble, another member of CLARITY. You can contact him at Fax (USA) (517) 334 5748.

The program will be held on August 6, from 9.00 to 12.00, at the Park Hyatt Hotel, Chicago.

We will report on the program in the next issue of *Clarity*.

Training Lawyers and Making Change

Mark Duckworth

[Mark Duckworth is Director of the Centre for Plain Legal Language, Faculty of Law, University of Sydney. As part of his work at the Centre he runs many training courses for judges, solicitors and public administrators. The Centre is also involved in setting up new programs for teaching law students about plain language and legal writing. In this article Mark explores some of the issues faced when training law students and judges in the plain language process.]

This article is about training law students and judges. It might seem strange to link together the two ends of the legal world: those just beginning to study the law and those who make it. But they are closely linked - the way judges write has an important influence on the what law students learn about the value the profession places on communication skills.

In Australia, most law schools place little emphasis on teaching lawyers communication skills. There is more emphasis than there was, but generally legal writing is given only a couple of weeks in a crowded first year program.

In later years, some subjects go through the forms of common commercial agreements. There are some very fine optional courses on legal drafting. But it is possible for a law student to get all the way through with very little understanding of how to write clearly, let alone the more complex issues of testing effectiveness with the actual audience.

To improve the standing of legal writing two things have to happen:

* the legal profession has to value communications skills

* law students have to know this.

Law students who want to work in the legal profession concentrate on what they think law firms value: company law, tax, contacts, property, advanced company law.

I have heard partners in many law firms comment on the poor quality of the writing produced by recent law graduates. The law firms themselves are partly to blame for this. In this world of Total Quality Management, communication is often the bit that gets left out. Research and analytical skills, knowledge of legal principles are all stressed, but the means by which everything else happens is ignored. It is like building a vast new factory, but still leaving the old rusty water pipes.

Traditionally, law students were presumed to know how to write. They were, and are, taught how to unravel complex judgments, statutes and contracts. In turn they learn to write based on these models. It is a skill for which the apprenticeship model is still seen as appropriate.

Thing are changing. Certainly the profession is taking the issue more seriously. Both the New South Wales and Queensland Law

Societies have plain language committees. More and more law firms are adopting plain language policies. But the greatest change must happen at law school .

What law schools think of plain language

The Centre recently carried out a survey of law schools in Australia. I will report on the results of this more fully in a later edition of *Clarity*. Of the 24 law schools in Australia, 14 have replied to our questionnaire. In brief, some of the results were:

* every respondent said that their faculty taught legal writing in some form. Three universities have courses that were specifically devoted to legal writing
* all said that, as far as they could generalise, their faculties favoured the use of plain language
* all but one said that their faculties considered it a priority to teach students effective communication skills. The one negative wrote "no - unfortunately".

Overall, the results were encouraging, but showed that much remains to be done.

Computer assisted learning

Although law schools are placing more value on teaching legal writing skills, it is still difficult to convince the majority of law students that it is a skill they should concentrate on. For this reason, the Centre has been developing a computer assisted legal writing course at University of Sydney Faculty of Law.

In late 1994 I was asked to develop a legal writing program for first year law students at the Law School. The resources available to do this were limited. We could not go and hire 40 tutors to teach the 240 students, so I started to develop the idea of computer based tutorials. Luckily, shortly after the project began, Ingrid Silver started working at the Centre. She was a law student and had just completed a Master's degree in linguistics. She put the Centre in touch with Dr Marie-Thérèse Barbaux-Couper and Michelle Lenin from the French Studies Department. They had developed a means of teaching part of the first year French course by using the computers in the Language Centre. They had also developed a similar course for first year Japanese. We worked out that the shells they had created for their computer assisted courses could be adapted to suite our needs. What the Centre had to do was develop the content to put in the shells. We also had to work out if our course needed any new shells.

The Centre produced a manual and a set of exercises on the computer. Felicity Kiernan and Chris Norton did much of the actual work in producing the exercises and the computer's responses to correct and incorrect answers. The course uses two basic types of exercise:

* a series of "pop-up menus" that lists possible answers for students to choose from
* blanks in sentences that the student must complete.

With a computer based course, each question must have only one answer or a very limited number of them. This means that the computer cannot assess all possible alternative answers. In these cases, students are not marked as being wrong, but

were invited to compare their answer with our suggested response. In all cases, once a student has answered a question, a correct answer is displayed with a detailed explanation of the issues involved. Students are not assessed on the course, but it is compulsory for them to do it.

The program also has on-line help and a series of buttons that display cartoons and illustrations. These were there to make the tutorials a little "lighter" and to emphasise some of the points through humour.

You cannot change a person's style in 4 sessions on a computer. But our aim was

* to raise the students' awareness of the problems with the way lawyers traditionally write, and
* to teach them about sentence structure and word choice.

The pilot of this new course finished in June 1995. We surveyed the students to find out what they thought of it. The results were very encouraging. Of the 112 students surveyed:

* 71% said that their knowledge of plain language had improved
* 65% said that their knowledge of grammar had improved

To the question "Has the course made you more aware of the problems with the way lawyers traditionally write", 70% wrote "yes". In terms of actually changing the way students write, the course may have achieved less: only 45% wrote that they thought it had improved their style. However, this is still quite a large number. As any teacher of writing skills knows, you need to give students a lot of practical exercises. Because of the nature of the course, the computer can only give limited practical experience. We had to have exercises that tested knowledge of problems rather than ability to write.

It is clear that the course did raise consciousness of the problems with traditional legal writing. This is a very important first step, because you cannot help people improve unless they know the problems they must overcome.

Judges

One of the greatest problems in training law students is that so much of what they read is badly written. Some of the worst writers are judges.

Over the past few years, judges in Australia have been put under intense scrutiny. Part of the problem is with the way they write. Former Australian Chief Justice Sir Anthony Mason recognised this when he wrote:

> Unfortunately, judgments do not speak in a language or style that people readily understand ... The judgment is so encrusted with the doctrine of precedent that it tends to be forbidding. The lesson to be learned is that if we want people to understand what we are doing, then we should write it in a way that may make it possible for them to do so.[1]

1 Opening address to the New South Wales Supreme Court Judges Conference, 30 April 1993.

One of the most difficult tasks is training judges and tribunal members to do this. Recently I have been involved in training workshops for members of some courts and tribunals.

It is many years since Lord Denning created a new format and structure for judgments. In *The Closing Chapter* Lord Denning explained:

> At one time judges used to deliver a long judgment covering many pages without a break. I was, I think, the first to introduce a new system. I divided each judgment into separate parts: first the facts; second the law. I divided each of those parts into separate headings. I gave each heading a separate title. By doing so, the reader was able to go at once to the heading in which he was interested: and then to the passage material to him.[2]

Many judges and tribunal members still write in long passages of undivided text, unaware of the changes Denning suggested over 30 year ago. I always feel that I have achieved something if at the end of one of the workshops, the participants know how to use headings properly.

I know I had at least one success. I was running a session for a tribunal and one tribunal member, made it clear that she was there under protest because she knew how to write. She spent the first part of the session editing one of her own decisions. Gradually she began to take notice of what I was saying. At the end her attitude had changed. She said she had learnt something after all and held up the decision she had been working on - she had added headings throughout.

The plain language process

Training courses make the participants aware of the problems with their writing. They can open peoples' eyes, show them some techniques and give them time to do some practical exercises. Courses alone cannot transform a bad writer into a good one.

I always emphasise that producing plain language documents involves a process. This is something that all lawyers from law students to judges have to understand. Plain language is not simply changing words and design, but a process that includes those who use and administer the existing documents. There is no alchemy that turns base metal into gold.

Changing attitudes to the worth of legal writing means bringing about the cultural change. This change is happening in the profession and it involves many factors. One of these is training lawyers at all stages of their careers how to communicate effectively. We must use all available methods to do this and help increase the rate of change.

2 *The Closing Chapter* London, Butterworths, 1983 p.64.

Illiterate laws dispatched

Some of our readers may know of the publication *Dispatch*. Appearing under the banner of the League for Literate Laws, it takes American legislative drafters to task for the appalling standard of much of their work. It is both witty and intelligent, and pulls no punches in its acerbic condemnations of the very worst examples of the drafters' art.

The editor of *Dispatch* is Mr John Bell, a CLARITY member. Mr Bell writes as follows:

Through *Dispatch* I have waged a solitary (and largely unavailing) campaign to improve the way federal statutes are written in the United States. I try to do this with some humor, using examples of the kinds of statutory prose that I consider a disgrace to any government—and certainly to one claiming to be democratic. I have no problem finding examples. Wordy, pretentious language is the favored style of Washington statute writers, although with many variations reflecting the traditions of different committees and federal agencies.

Dispatch appears under the name of an organisation—the League for Literate Laws - but in fact there is no organisation. The League is just me. I call it a mythical organisation because that seems to fit the spirit of an endeavor that most informed observers over here would consider quixotic.

Dispatch is free. I send it both to those who ask to receive it and to those who don't ask for it but who I think need to see it. My subscribers—those who ask—now include many language buffs but also a significant number of those in this country who are well known for their interest in improving legal writing. Many of those who receive it without asking are members of Congress, Congressional staff and people in the federal executive branch agencies who have responsibilities connected with legislation. Total circulation for an issue averages 600.

I was a legislative attorney for much of my working career. Now retired (so long as nothing interesting comes it), I've been writing *Dispatch* for a little over five years, producing issues when time permits and inclination prods. I have changed the format with the last issue—abandoning the tabloid format for a more conventional newsletter style. I liked the irreverence of the tabloid, but the new design simplifies production, lowers my cost, permits higher quality paper, and makes it easier for readers to reproduce and pass copies or extracts on to others.

Enquiries to

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