

# Clarity

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# Clarity

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## This issue

As usual, this issue of *Clarity* contains contributions from many countries, but it focuses on the progress of plain language in New Zealand. It includes articles from judges, lawyers, law professors and plain language consultants on topics ranging from the training of judges and graduates to the use of plain language in the drafting of statutes and legal documents to a government agency's correspondence with clients.

Some contributors continue the debate about the use of numbers that started a couple of issues ago. One legislative drafter provides some striking examples of current policy in New Zealand by using numerals instead of words for all numbers except where the number starts a sentence or paragraph (see Margaret Nixon's article on page 22). *Clarity* policy is not to alter an author's style, except where the editors think the usage is inconsistent within the article itself. So readers will find different styles within a particular issue of *Clarity*.

As novice guest editors, we are grateful to all our contributors for their cooperation and patience as we bumbled into holes and out again. Our editor in chief, Michèle Asprey, has been an inspiration and a model—but please don't ask us to do this again until we have had time for a cup of tea and a lie down!

And, from this outpost of plain language enthusiasm in Middle Earth, your guest editors hope you enjoy reading *Clarity* No 52.

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# Plain English and New Zealand statutes

## John Burrows

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*In this article, John Burrows highlights some of the major changes that have occurred in statutory drafting in New Zealand during the last century. He comments on the role of plain language in legal drafting and questions whether legislation is leading linguistic change in some instances. He also notes that not too much should be expected of plain English drafting.*

New Zealand inherited all the negative features of British statutory drafting. Many older statutes exhibiting those deficiencies are still in force. Some are used every day. They contain unnaturally long sentences, archaic language and excessive cross-references, and some are poorly ordered.

However, in more recent times there has been a sea-change in legal drafting in this country. It began gradually, but has gathered momentum in the last decade. The Law Commission, one of whose statutory missions is to advise on ways in which the law "can be made as understandable and accessible as practicable", contributed to the change. But most of it is due to the determination of Parliamentary Counsel Office to communicate the law effectively, rather than just to get it down on paper.

The results are striking, and can be seen at a glance. A page of the 2004 statute book *looks* different from a page of a statute book ten years ago. It is now rare to find an unbroken block of text more than five lines long and most are much shorter than that. Here are some of the things that have happened.

### The new style

First, there are no superfluous words. Compare the old and new versions of New Zealand's cardinal rule of statutory interpretation.

Section 5(j) of the Acts Interpretation Act 1924 provided:

Every Act, and every provision or enactment thereof, shall be deemed remedial, whether its immediate purport is to direct the doing of anything Parliament deems to be for the public good, or to prevent or punish the doing of anything it deems contrary to the public good, and shall accordingly receive such fair, large, and

liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment according to its true intent, meaning, and spirit.

Section 5(1) of the Interpretation Act 1999 provides:

The meaning of an enactment must be ascertained from its text and in the light of its purpose.

Secondly, separate ideas which might once have been contained in a single passage of text are teased out either into separate paragraphs within a subsection, or into separate subsections. Take this example of the latter (from the Sale of Liquor Amendment Act 2004, s 8):

- 219J (1) A community trust must have a name.
- (2) A community trust may, from time to time, change its name, subject to subsection (3) and its trust deed.
- (3) The name of a community trust must include the words 'Community Trust'.

It could hardly be simpler.

Thirdly, the archaic language has gone. Most significantly, the old stalwart "shall" is no longer used. It used to appear in the majority of sections in nearly all statutes. No word ever so clearly marked off a document as "legal". Even non-lawyers drafting constitutions or rules for their clubs and organisations used it, almost as if any document lacking it would fail in its purpose. Since 1997 it has entirely gone from our statutes. Statutes are drafted in the present tense, and, if an imperative is required, "must" is used.

Fourthly, many devices are resorted to to aid understanding. The Personal Property Securities Act 1999 gives examples to illustrate some of its provisions. It is not the only statute to do this, but the stratagem has not yet achieved wide currency. Tables are being used more extensively. Thus, the rules for the distribution of intestate estates appear in tabular form in the 2001 amendment to the Administration Act (s 77 of the Administration Act 1969):

Person or people intestate leaves	How estate to be distributed
4 Issue but no husband or wife or surviving de facto partner.	All of the estate is held on the statutory trusts for the issue of the intestate.
5 No husband or wife or surviving de facto partner, and no issue, but 1 or both parents.	All of the estate is held in trust in equal shares for the parents, but if the intestate leaves only 1 parent, for that parent.

Flow charts are becoming common: a good example is at the start of Part 3 of the Trade Marks Act 2002. Section headings (or marginal notes as they used to be called) sometimes ask questions as if to excite the reader's interest: for example, in the Education Act 1989, amended in 2002, the heading to s 159W asks: "What is a profile?" About half the sections in the Income Tax Act 2004 have a heading for each subsection. Most substantial new statutes have at their beginning purpose, principle and (sometimes) "outline" sections which serve not just as aids to interpretation but as an introduction to the reader as to what the act is about. Indeed some statutes in the period 1999-2001 had a section of which the heading read "What this act is about": for example, s 4 of the Personal Property Securities Act 1999.

### Some notes of caution

Things are so much better than they were. Much of this modern legislation is (almost) a pleasure to read. However, there are a few notes of caution.

### Colloquialisms

First, some of the expression in modern statutes is so unstuffy as to be almost colloquial. Thus:

If the social worker has only provisional or temporary registration, the certificate *must say so*. (Social Workers Registration Act 2003, s 20(3).)

A member is not interested in a transaction to which the Board is a party *just because* he or she is a registered social worker. (Social Workers Registration Act 2003, s 24(2).)

Language like this almost entirely closes the gap between legal documents and other types of communication. It must influence the lay reader's impression of the law. Some may believe that it lacks a degree of formality, or dignity, appropriate to the law, but that is to take tradition too far. Non-lawyers do read statutes, and anything which brings the law closer to them is to be welcomed, provided that the language is clear and unambiguous.

More controversial, however, is language which is ahead of the play, in that a significant group of readers might think it breaks current conventions and rules. Should legislation be *leading* linguistic change?

Section 78CA(1) of the Education Act 1989, added in 2001, provides:

- (1) The Board of every state school, and the management of every school registered under section 35A, must apply to the New Zealand Teachers Council for a police vet of every contractor who regularly works at the school during school hours—

The word "vet" in this sense does not yet appear as a noun in the current editions of leading dictionaries.

There is also the occasional example of a preposition at the end of a sentence:

The permission may state conditions that the member or the Commission must comply with. (Families Commission Act 2003, Schedule 1, cl 16(3).)

To object to that may be regarded as pedantic, but the Income Tax Act 2004 consistently uses "they" as a singular. Thus:

This section applies when a person sells patent rights that they acquired before 1 April 1993. (Income Tax Act 2004, s DB 30(1).)

Such usage will probably eventually become widespread, but has it yet advanced quite to the point where it is generally acceptable? A significant number of readers probably still think of it as a breach of the rules, and one may question whether an act of parliament should sanction that—yet. However, it is a very difficult call for a drafter to know just when the time is right.

Incidentally, some also have a few questions about the regular use in statutes of "that", rather than "which", in defined relative clauses. Sometimes it just does not sound right. It also makes the terminal preposition more likely, because "that" has no equivalent to "with which" or "to which".

### Do not expect too much from plain English

The second comment is that we should not expect too much from plain English. Legal language, plain or otherwise, has a unique function: it is not just to be *understood*, it is also to be *applied* to find answers to real-life problems. Facts are always arising that no-one anticipated. Sometimes statutory language which seemed as plain as day when read in the abstract dissolves into uncertainty when it is applied to an unusual set of facts. Regulations made under the Fair Trading Act 1986 provide that toys must comply with prescribed safety standards. Is a sweet container shaped to resemble a baby's bottle a "toy"? That question was considered in *Commerce Commission v Myriad Marketing Ltd* (2001) 7 NZBLC 103404. The Traffic Regulations provide that a person who has been disqualified from driving must not drive a motor vehicle. Is a person "driving" if he is in the passenger seat but with a hand on the steering wheel helping to steer the car? That was the question in *R v Clayton* [1973] 2 NZLR 211.

The inherent imprecision of language and the unpredictability of human conduct are a potent combination. As Professor Sim wrote in his 1968 Guest Memorial Lecture, 2 Otago LR 1 at 13, "... the subject matter of legal discourse, human behaviour,

## Plain English and New Zealand statutes

(continued)

cannot be pinned entirely within a framework of verbal description or regulation." Much litigation arises from this truism. Plain language does much to assist understanding but it cannot be expected to solve all, or even many, problems of interpretation and application.

Thirdly, there will always be an ambiguity about audience. Drafters are now obviously drafting statutes (or some statutes at least) with a non-legal audience in mind. Parliamentary Counsel Office in New Zealand maintains a "best-seller" list which shows that some statutes are in high public demand. High on the list are employment-related statutes. Plain drafting makes statutes much more accessible to those people.

### The way lawyers read statutes

However, statutes will always be directed to lawyers as well. When difficulties arise lawyers get involved and take charge of what the language of the statute means, and how it applies to the case in question. However, lawyers read statutes differently from non-lawyers. They read them in the context of the law as a whole, both past and present. When called on to interpret a new plain English statute, a lawyer will usually be tempted to compare it with its "non-plain" predecessor in earlier, now repealed, legislation. There is likely to be argument as to whether the changes in language reflect changes in substance or whether they are purely cosmetic. The latter answer is the more likely: lawyers like continuity, and in Sir Rupert Cross's words, there is a presumption against "unclear change" (see Bell & Engle (eds) *Cross on Statutory Interpretation* 3<sup>rd</sup> ed 1995, 167). The argument has already taken place with regard to the relationship between section 5(j) of the Acts Interpretation Act 1924 and section 5(1) of the Interpretation Act 1999, and has been resolved in favour of continuity (see for example *Jack v Manukau City Council* HC Auckland M1698/99, 14 Dec 1999).

Lawyers also view statutes as parts of the contemporary legal landscape. Well-established definitions of words, particularly those contained in the Interpretation Act, are important. Thus "person" includes a body corporate, and "land" usually includes the air-space above the surface. The Bill of Rights Act 1990 may require, in the case of ambiguity, an interpretation favouring individual rights and freedoms. Moreover, in New Zealand more than some other jurisdictions, lawyers interpreting a statute feel obliged to consult a wide range of preparatory materials such as reports of reform committees, explanatory notes to bills, reports of parliamentary debates, and commentaries of parliamentary select committees.

The point is that non-lawyers may know little, if anything, about these extraneous materials. They are more likely to read a statute as a stand-alone entity, and to rely solely on the resources of language to solve the problem. The non-lawyer may thus sometimes be a little surprised at the "legal" interpretation accorded to a statutory provision, "plain" though its drafting may be. All we can reasonably hope is that lawyers, and courts, do not depart from a meaning which any intelligent lay reader would regard as clear beyond a doubt. Otherwise that reader's reliance will be disappointed, and his or her confidence in the law damaged.

### The value of plain English drafting

None of this is in any way to doubt the value of plain English drafting. Not only does it bring the law closer to the ordinary citizen, it makes life easier for the lawyer as well. It can save much time, and even expense. It is self-evidently undesirable, and indeed harmful, to obscure one's message, and to render an already difficult legal subject more difficult, through bad expression. To assert that plain drafting will not solve all our problems, and that it will not always lead to uniform interpretations, is not to deny that it is a very welcome development.

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### Correction

In *Clarity* No 51, page 23, there was an error in the description of Sue Stableford. Sue is the Director of the Health Literacy Center at the University of New England and also a founding member of the Clear Language Group. The Center and the Group are two different entities.

# Imperatives in drafting legislation: a brief New Zealand perspective

**George Tanner QC**

*Chief Parliamentary Counsel, Wellington, New Zealand*

*This article provides an insider's view of the environment for legislative drafters in New Zealand. It describes some of the complex matters they have to address, and approaches to maintaining consistency. It outlines the drafter's role as a Bill progresses through the parliamentary processes, and discusses some of the moves towards more accessible legislation in recent years. It concludes with positive statements about the need for international cooperation between those who are responsible for drafting legislation, and consultation with plain language researchers who are not necessarily lawyers.*

## Factors affecting the drafting of legislation

Drafting good quality legislation presents many challenges. Clarity of expression is one of a range of components essential for good quality legislation. It is not, however, an end in itself. At its heart, the task of the legislative drafter is to translate policy decisions into effective, principled, and clear law. Drafting legislation is not, as some people perceive it, a simple process where a particular unit of input is matched by a corresponding unit of output. Legislation has to be consistent with the rest of the statute book and the common law. As Lord Steyn has observed, “[u]ltimately, common law and statute coalesce in one legal system” (*Pierson v Secretary of State* [1997] 3 All ER 577, 605). The courts interpret legislation consistently with international obligations. In New Zealand, the courts also interpret legislation consistently with the Treaty of Waitangi. [See box below.]

Legislative history is also relevant to interpretation.

In modern democracies, there is the further imperative that legislation complies with fundamental legal principles. Some jurisdictions have enshrined fundamental rights and freedoms in their constitutions or other legislation. Different jurisdictions have different approaches to incompatibility. The judicial power to strike down is at one end of the spectrum. At the other, the New Zealand approach, is a requirement to prefer an interpretation of legislation that is consistent with protected rights and freedoms. In between the two is the power to make declarations of incompatibility.

In the development of legislative policy and in the drafting of legislation, other mechanisms operate to ensure consistency with legal principle. They differ from jurisdiction to jurisdiction, but the objective is the same. For example, in Queensland, Australia, the Legislative Standards Act 1992 imposes a statutory obligation on the Office of the Queensland Parliamentary Counsel to advise Ministers, government entities, and members of the Queensland Legislative Assembly on the application of fundamental legislative principles, which the Act defines. In New Zealand, it is a Cabinet requirement that in addition to consistency with the rights and freedoms protected by the New Zealand Bill of Rights Act 1990, all legislation must comply with the Legislation Advisory Committee's Guidelines on Process and Content of Legislation <[www.justice.govt.nz/lac/index.html](http://www.justice.govt.nz/lac/index.html)>. Specially constituted committees of many legislatures scrutinise Bills for consistency with basic legal principles.

**The Treaty of Waitangi** was signed initially at Waitangi in the Bay of Islands in February 1840 by Lieutenant-Governor Hobson and about 50 Maori Chiefs and later that year by other Chiefs so that by October over 500 Chiefs had signed. Under the Treaty, the Maori Chiefs ceded sovereignty to the British Crown and yielded to the Crown exclusive right of pre-emption of their lands in return for the Crown's guarantee of the “full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries”. The Treaty accorded the Maori people the rights and privileges of British subjects. In interpreting legislation, New Zealand courts presume that Parliament intends to legislate in accordance with the principles of the Treaty. The principles of the Treaty derive from the concept of partnership and the underlying obligation of good faith between the Crown and Maori. The principle of consultation is important in ensuring that Maori values and interests are identified and adequately considered in the development and drafting of legislation. Policy makers and drafters need to consider whether proposed legislation will affect identifiable Maori rights and interests and whether the legislation should recognise these generally or specifically. Consideration must also be given to the impact of legislation on rights and interests recognised under the common law, such as customary rights.

## Imperatives in drafting legislation

(continued)

Under section 7 of the New Zealand Bill of Rights Act 1990, the Attorney-General must draw to the attention of the House any provision of a Bill that is inconsistent with the rights and freedoms protected by the Act. Advice to the Attorney-General about Bill of Rights compliance is published and so is available to Parliament and its select committees in the consideration of proposed legislation. The duty to report inconsistency to the legislature combined with the ability to scrutinise Bill of Rights advice and the requirement for a judicial interpretation that prefers consistency are powerful sanctions on New Zealand governments to ensure legislation brought to Parliament is consistent with core civil and political rights.

In addition, some jurisdictions have legislation that establishes processes for, and principles applying to, the scrutiny of delegated legislation. In others, scrutiny may take place under the standing orders or other rules of the legislature. Invariably, there will be criteria against which delegated legislation is evaluated. The courts can also strike down delegated legislation. Legislative drafters engaged in drafting delegated legislation have to ensure that the instruments they draft will not come unstuck in the process of parliamentary or judicial scrutiny.

There is a host of other complex issues legislative drafters deal with all the time. They include assessing whether legislation is necessary at all, the design of legislative schemes and the relationship between primary and delegated legislation, the appropriateness of enforcement mechanisms, administrative processes, procedures for appeal and review, cross-border issues, transitional arrangements, and changes to other relevant legislation. There is also the added challenge of accommodating sudden and sometimes major changes of policy within a Bill or instrument that has already been carefully structured. Writing in the May 2004 edition of *Clarity* the Chief Justice of the Supreme Court of Canada said—

Yet too often the complexity of the subject matter and the law, coupled with the pressures of time, overwhelm the judge's good intentions to write clearly, simply, and concisely.

—Rt Hon Beverley McLachlin P.C.,  
“Legal writing: some tools”.

That applies equally to the legislative drafter.

In federations, legislative drafters who work in national, provincial, state, or territory drafting offices have the added challenges of dealing with domestic conflict of laws issues, implementing uniform national legislative schemes, and sometimes

bi-lingual or bi-jural drafting. Then there are the considerations that arise in legislation having to pass through 2 legislative bodies.

In New Zealand, with very few exceptions, Bills introduced into Parliament are referred for consideration to subject specific select committees. Public submissions are called for and considered. Witnesses appear to give evidence and make submissions. Bills remain in select committees for months, sometimes years. New Zealand legislators are “hands on” and Bills usually emerge with extensive amendments. Sometimes they are unrecognisable from how they started out. New Zealand drafters attend most of the select committee meetings, advise on and draft the required amendments. This is not a tranquil environment. The legislative drafter does not have the luxury of relaxing and taking his or her time quietly reflecting on how best to achieve the desired changes. I suspect the dynamics may be similar elsewhere.

Legislation reflects the different influences involved in political decision making, including negotiation and compromise. Legislative drafters need to understand political, government, and legislative processes, including procedural rules and conventions. They must be able to identify the flaws in legislative proposals, suggest alternatives, and sometimes mediate between competing points of view. In New Zealand and in many other comparable jurisdictions, a legislative drafter is really counsel to Parliament and the executive in their law-making roles.

### Accessible legislation

Ensuring legislation is clear and accessible is also a critical component of their work. It is no use to readers that a piece of legislation is both effective and consistent with legal principle if it is not also clear. Neither is it satisfactory if it is clear, but falls short in some other important component. As Lord Oliver of Aylmerton has observed—

For every legislative enactment constitutes a *diktat* by the state to the citizen which he is not only expected but obliged to observe in the regulation of his daily life and it is the judge and the judge alone who stands between the citizen and the state's own interpretation of its own rules. That is why it is so vitally important that legislation should be expressed in language that can be clearly understood and why it should be in a form that makes it readily accessible. Edmund Burke observed that bad laws are the worst form of tyranny. But equally, well-intentioned laws that are badly drafted or not readily accessible are also a form of tyranny.

—Rt Hon Lord Oliver of Aylmerton,  
“A Judicial View of Modern Legislation”  
(1993) 10 Stat LR 2.

Significant progress has been made in many jurisdictions over recent years to improve the way in which legislation is drafted. That progress owes much to the plain language movement, to the work of law reform agencies, and to an appreciation by drafting offices themselves that making legislation as understandable as possible really does matter.

### Recent developments in New Zealand

Significant change in the language and format of New Zealand legislation began with the work of the New Zealand Law Commission. The Commission published 3 reports in the 1990s dealing with inter-related aspects of legislation: *A New Interpretation Act: To Avoid Prolixity and Tautology*, *The Format of Legislation*, and *Legislation Manual Structure and Style*. These were a tripod of measures directed at making legislation more accessible. They reflect the work of the President of the Commission, Rt Hon Sir Kenneth Keith, now a Judge of the New Zealand Supreme Court, and his successor Hon Justice David Baragwanath.

### New Interpretation Act

In 1999 the New Zealand Parliament enacted a new Interpretation Act incorporating many of the Commission's recommendations. The drafting and passage of the Act was the result of close co-operation between the Commission, the New Zealand Ministry of Justice, and the Parliamentary Counsel Office. The Interpretation Act 1999 replaced with a clean and up-to-date statute an earlier 1924 statute that was complex, inconsistent in terminology, and which committed one of the cardinal sins of legislative drafting: obscuring important provisions in long sections dealing with multiple topics. Because interpretation legislation contains the legislature's own directions to readers of legislation and to the courts as to how legislation is to be interpreted, it ought to be one of the most accessible of all the statutes.

### New format of New Zealand legislation

On 1 January 2000, all statutes and regulations were printed and published in a new format again reflecting many of the recommendations in the second of the Commission's reports. The principal changes included—

- a new and larger typeface (Times New Roman 12pt in place of Baskerville)
- section headings appearing above the text instead of embedded
- a running head at the top of each page with the number of the Part and either the first or last section appearing on the page
- simplified punctuation

- simplified layout of provisions with different levels indented progressively
- Long Titles and Short Titles replaced with a single Title
- a legislative history
- more white space.

Implementing the new format involved consulting with lawyers, judges, community groups, and other users, and engaging specialist document designers. It also necessitated statutory changes and changes to Parliament's standing orders. A Bill to authorise changes in reprints of statutes to ensure consistency with the new format and current drafting practice was, on its introduction, described by one member of Parliament as the most underwhelming Bill ever to come before the New Zealand Parliament. And it is amusing now to recall that a proposal to dispense with the *em* rule could have caused one of the key people involved in the project to contemplate resignation. (*Em* rules look like this—and are used in text to precede paragraphs or subparagraphs. If a paragraph or subparagraph breaks back to the text, *em* rules are also used after the final paragraph or subparagraph.)

### Changes in drafting style

In early 1997, the New Zealand Parliamentary Counsel Office also made a number of modest changes in its drafting style. They included—

- avoiding archaic language (“hereby”, “notwithstanding”)
- omitting referential words when the meaning is perfectly plain (“of this Act”, “of this section”)
- arabic in place of roman numerals
- use of the active voice
- use of “must” instead of “shall” (“An application must contain...” not “An application shall contain...”)
- omitting qualifying words when the meaning of an Act or provision read as a whole is perfectly plain (“subject to”, “except as provided in”).

Surprisingly, these changes were debated in Parliament and endorsed without reservation ((1997) 559 NZPD 869-879). Otherwise, they have never been the subject of comment.

The New Zealand Parliamentary Counsel Office also incorporated into a chapter of its drafting manual many of the suggestions contained in the third of the Law Commission's reports about structure and style. The chapter contains comprehensive guidelines for plain language drafting. It stresses the importance of drafting legislation in plain language and the structure and organisation of material. These guidelines can easily be lost sight of

## Imperatives in drafting legislation

(continued)

by drafters of legislation struggling to meet the challenges of integrating complex policies and massive amounts of material into an understandable and effective statute within tight time frames. The guidelines are built around 3 core concepts: good organisation of material, simple sentence structure, and careful word choice.

Various other techniques have been tried in recent New Zealand legislation to make it more accessible. They include—

- outline sections or Parts that give an overview of what an Act or Part is about
- flow-charts and tables
- examples both in the text or in separate “example boxes” to illustrate the operation of a provision or explain a complex, technical, or abstract provision. In the Personal Property Securities Act 1999, the term “accessions” is defined in the following way—

**accessions** means goods that are installed in, or affixed to, other goods:

### Example

A replacement motor installed in a car.

## Does plain language matter?

The approaches to legislative drafting described above are a deliberate attempt to make legislation more accessible to as wide a range of readers as possible. To some extent, however, accessible legislation will always be illusory. A reader can seldom go to a statute and safely assume that having read and understood the words he or she will know what the law is on the subject the statute deals with. The meaning of a statute is affected by interpretation legislation and common law principles of interpretation, like the canons of construction.

The legislation of some jurisdictions expressly authorises recourse to extrinsic aids in the reading of statutes. In others, like New Zealand, reference to material outside the statute is permissible within limits determined by the courts. All the different components of context are relevant. For example, statutes that regulate trade practices embody economic principles readers need to be familiar with to understand them fully. For these reasons, the bare words of a statute tell only part of the story.

Does it matter then how the statute is drafted? As long as the lawyers and judges can make sense of it, does it matter whether anyone else can? One encounters all kinds of criticism about the legislative drafting techniques I have described. For example—

- the use of outline Parts, overviews, purpose sections, flow-charts, diagrams, and examples is unnecessary if the statute is clearly drafted: “if you were doing your job properly, you wouldn’t need all this”
- additional material only clutters up the legislation and makes understanding more, rather than less, difficult
- it gives readers a false understanding: “they think they know more than they do”
- provisions of long standing have well-established meanings; they should not be restated in plain language if there is a risk they will be interpreted to mean something different
- the purpose of a statute is to change the law, nothing else. Provisions and other material that do not change the law belong somewhere else
- drafting legislation in plain language only makes it longer and scarce parliamentary time will be taken up in passing it.

There is not much force in these kinds of arguments. Legislation has a far wider readership than the plain language sceptics realise. Statutes and regulations that regularly show up on the list of “best sellers” deal with topics like early childcare centres, local government, holidays, employment law, health and safety in employment, privacy, fencing, and sale of liquor. None of this is necessarily “lawyers’ law”.

Up-to-date legislation can be accessed in most jurisdictions free on the Internet. The number of visitors to the New Zealand Government website of legislation points to a substantial readership of legislation. Legislators and legislative drafters are nowadays in closer contact with users than previously. Legislators want to understand the legislation they are asked to enact or make. Clearly drafted legislation can also expose poorly thought out policy, especially in the development phase. If unpleasant messages have to be communicated, and not all legislative messages are welcome ones, they ought not to be hidden in a mass of words. Eliminating traditional legal writing habits does not have the effect of making the law less certain. Traditional legislative drafting methods frequently create uncertainty. Few legal expressions do not survive plain language scrutiny. These are all powerful reasons for trying to make legislation as accessible as possible.

## Final thoughts

New Zealand’s efforts in recent years to make its legislation more accessible have drawn on similar work in Australia and the willingness of colleagues in the Australian drafting offices to share their experience. Progress tends to be incremental and requires a degree of experimentation to find out what works. It also requires a shift in mind set, a willingness to

break from the familiar and reassuring practices of the past, and a commitment to continuous improvement. Drafting legislation is a complex discipline involving many different imperatives. In his celebrated address to the New York Bar Association over half a century ago and half a world away, Justice Frankfurter said—

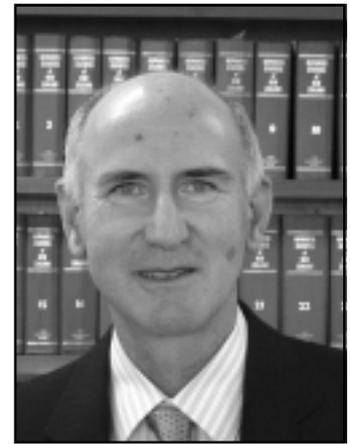
Perfection of draftsmanship is as unattainable as demonstrable correctness of judicial reading of legislation. Fit legislation and fair adjudication are attainable. The ultimate reliance of society for the fulfilment of these august functions is to entrust them only to those who are equal to their demands.

—“Some Reflections On The Reading Of Statutes”,  
Columbia University Law Review,  
Vol 47, No 4, p 527.

Ensuring legislation is communicated in the clearest and most effective way is critically important. Legislative drafters in different jurisdictions have much to learn from each other. They also have much to learn from plain language experts who have researched and thought and written about the issues.

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# Plain language in New Zealand: the drafting of legislation

**The Right Honourable Sir Kenneth Keith**

*Supreme Court of New Zealand*

*In this article, Sir Kenneth Keith, a judge of New Zealand's highest court, highlights some key changes in legislative drafting styles that have occurred as a result of the concern for increasing accessibility by the Law Commission and the Parliamentary Counsel Office in New Zealand.*

*Law Commission* 1985, No. 151

ANALYSIS

...

1985, No 151

**An Act to establish a Law Commission as a central advisory body for the review, reform, and development of the law of New Zealand** [9 December 1985]

BE IT ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:

1. **Short Title and commencement**—(1) This Act may be cited as the Law Commission Act 1985.
- (2) This Act shall come into force on the 1st day of February 1986.

## **Children's Commissioner Act 2003**

Public Act 2003 No 121  
Date of Assent 25 November 2003  
Commencement see section 2

### **Contents**

...

**The Parliament of New Zealand enacts as follows:**

- 1 **Title**  
This Act is the Children's Commissioner Act 2003.

#### **Part 1 Preliminary provisions**

- 2 **Commencement**  
This Act comes into force on the day after the date on which it receives the Royal assent.

The changes in the standard introductory provisions of Acts of Parliament, passed fifteen years apart [see boxes on page 12], illustrate five changes introduced over that period to make the law more accessible:

- better design, with more white space, the separation of headings, the removal of unnecessary punctuation, and an improved type face
- the removal of the (long) title (the passage in bold at the top of the 1985 Act) and the substitution of a single title, often accompanied by a purpose section (section 3 in each of the two Acts); two statements are in general adequate to indicate what the law is about and its purpose
- the use of active indicative language in the present tense instead of subjunctive, permissive, passive and future wording: Parliament ... enacts ... The Act comes into force ...; ("shall" as an imperative is replaced by "must")
- removal of unnecessary words; other examples are "of this Act", "of this section"
- clearer statements at the outset about the name of the Act, the date of assent and the date of commencement.

Those changes in style and drafting result:

- first, from the direction Parliament gave in the Law Commission Act itself that the Commission advise Ministers on ways in which the law of New Zealand can be made as understandable and accessible as is practicable and that it have regard to the desirability of simplifying the expression and content of the law, as far as that is practicable;
- second, from the work the Commission did on the format of legislation and its structure and style; and
- third and notably, from the efforts of the Parliamentary Counsel Office to introduce those changes.

The late Bill Sewell, editor, poet and lawyer, had a major hand in the Commission's work and the leadership of George Tanner QC, Chief Parliamentary Counsel, was and continues to be essential in carrying those changes through and in meeting the 1985 direction. The work of the Legislation Advisory Committee has also given important emphasis to the role of principle in the preparation of legislation. Legislation now also allows the Parliamentary Counsel Office, when arranging the reprint of earlier statutes, to make the changes in their format and style.

George Tanner has often used the simile of the three legged stool: in addition to the changes in format and in structure and style a new Interpretation Act was needed. The 1924 Act was essentially that

enacted in 1888. In 1999 the new Act, again based firmly on work of the Law Commission which had reported in 1990, was finally passed with these purposes:

**2 Purposes of this Act**—The purposes of this Act are—

- (a) To state principles and rules for the interpretation of legislation; and
- (b) To shorten legislation; and
- (c) To promote consistency in the language and form of legislation.

(The careful reader will notice that the format changes were yet to be introduced.)

The 1999 Act is itself an example of the carrying out of the second purpose it states and of the wider purposes stated in 1985. It is only about half the length of the legislation it replaced, although its coverage is about the same, and basic provisions are stated much more directly. Sections 5, 6 and 7 state these principles of interpretation:

## Part 2

### PRINCIPLES OF INTERPRETATION

#### 5. Ascertaining meaning of legislation—

(1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.

(2) The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment.

(3) Examples of those indications are preambles, the analysis, a table of contents, headings to Parts and sections, marginal notes, diagrams, graphics, examples and explanatory material, and the organisation and format of the enactment.

**6. Enactments apply to circumstances as they arise**—An enactment applies to circumstances as they arise.

**7. Enactments do not have retrospective effect**—An enactment does not have retrospective effect.

Those principles appear right at the outset of the Act. By contrast it was only on the ninth and tenth pages of the last reprint of the 1924 Act that these two propositions appeared:

#### *Construction of Acts, etc.*

**5. General rules of construction**—The following provisions shall have effect in relation to every Act of the General Assembly [or of the Parliament of New Zealand], except in cases where it is otherwise specially provided:

...

## Plain Language in New Zealand

(continued)

(d) The law shall be considered as always speaking, and whenever any matter or thing is expressed in the present tense, the same shall be applied to the circumstances as they arise, so that effect may be given to each Act and every part thereof according to its spirit, true intent, and meaning:

...

(j) Every Act, and every provision or enactment thereof, shall be deemed remedial, whether its immediate purport is to direct the doing of anything Parliament deems to be for the public good, or to prevent or punish the doing of anything it deems contrary to the public good, and shall accordingly receive such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment according to its true intent, meaning, and spirit:

That Act did not contain the principle stated in s7 of the new Act. Its related detailed provisions regulating the effect of repeals covered three pages while the parallel new provisions cover about two pages. As well and again by contrast to the 1924 Act, many of the sentences in the new Act are brief, being under twenty words, and, if they go beyond that length (as with s2), paragraphing is often added to aid understanding.

Among other changes introduced in the last decade to promote intelligibility are:

- structural changes which place the important matters at the beginning of the Act and administrative matters at the end, often in schedules
- including examples of the operation of a provision
- the use of charts rather than text and flowcharts, for instance to indicate the procedure to be followed
- the use of formulae, for instance in tax statutes
- the use of overview or outline provisions early in the Act.

The questions must of course be asked: Have the changes helped make the law more accessible? Or have they introduced confusion and doubt? My sense is that many users of the statute book have barely noticed the change, if at all. That is one measure of success. Another is that some parliamentarians dealing with complex employment legislation in 2000, as the new format was being introduced, immediately remarked on how much easier it was to

get an understanding of it and accordingly to criticise it if that was their political position. And another is that within the Courts, according to the law reports, the new Interpretation Act appears to have worked smoothly and effectively in the great run of cases, with only two reported exceptions, both relating to the meaning and application of transitional provisions, an area which regularly throws up difficulties, however the legislature deals with them. The positive impact of the new Act was seen very early in a decision of the Court of Appeal which considered it appropriate to make use of it after it had been passed but before it came into effect.

On the broader move to plain English, Professor John Burrows, the great academic expert on New Zealand legislation, states this conclusion:

The move to plain drafting is very welcome. In the past too much time, and too many words, were spent on making the law comprehensive, pure and accurate. Not enough effort was expended on making it comprehensible. Law that is difficult to understand wastes time and even money; it also results in decreased respect for the law.<sup>1</sup>

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<sup>1</sup> J. F. Burrows, *Statute Law in New Zealand*, 3<sup>rd</sup> ed. (LexisNexis Wellington 2003) 82.

*The Rt Hon Sir Kenneth Keith is a Judge of the newly established Supreme Court of New Zealand. He was a Judge of the Court of Appeal of New Zealand from 1996 to 2003. Before 1996 he was a member and President of the New Zealand Law Commission (1986-96); member of the Law Faculty of the Victoria University of Wellington (1962-64, 1966-91); Director of the New Zealand Institute of International Affairs (1972-74); member of the United Nations Secretariat (1968-70); and member of the New Zealand Department of External Affairs (1960-62). He studied law at the University of Auckland, Victoria University of Wellington and Harvard Law School.*



# Writing decisions in the New Zealand Disputes Tribunal

## Peter Spiller

*Professor of Law, University of Waikato;  
Referee, Disputes Tribunals of New Zealand.*

*In this article Peter Spiller, a judicial officer in the New Zealand Disputes Tribunal, reflects upon the challenges of writing legally binding decisions for a lay audience. He describes how he maintains an awareness of his audience and exercises care in his choice of words, so as to meet the demands of clarity, humanity and legal precision.*

During the past 13 years, I have been a Referee in the Disputes Tribunals in Hamilton and neighbouring centres. The Disputes Tribunals of New Zealand are based on the Small Claims Tribunals of Australia, and provide a forum for lay people with small civil claims. The current financial limit for claims is \$7500 (unless the consent of the other party is obtained) and claims are normally based on contract or negligent damage to property. Referees do not have to be legally trained and lawyers are excluded from the Tribunal as representatives. Referees are required to see if it is appropriate to assist parties to negotiate settlement of claims, but failing this Referees are required to decide the disputes. The resultant settlements and decisions of the Referees become binding court orders, which can be appealed against only for procedural irregularities. Decisions have to be recorded in writing, and may be given either in the presence of the parties or sent out after the hearing. The objective of the Tribunal is to provide an informal, quick, inexpensive and effective means of access to justice.

In this context, there is a strong imperative for Referees to reflect their decisions in plain legal language. The following are some of the lessons that I have learnt about this challenging process.

### Awareness of audience

The primary audience that I write for comprises the disputants who have presented their arguments and evidence. These range across a wide field, from university-educated people, to insurance company representatives well-versed in Tribunal procedure, to farmers, artisans and others for whom a Tribunal appearance is a first-time and difficult experience, to immigrants who have no grasp of English and who require an interpreter, through to semi-illiterate

people who are entirely uncomfortable with court-type proceedings. The exact nature of my writing has to be tailored to the particular people who have presented their case.

My main consideration when writing out decisions is to place myself in the shoes of the parties to the dispute and imagine them having to read and make sense of the order. Both sides need to be clear as to what the result is and how it is to be achieved, for example, the payment of money within a set period of time. Particularly the loser in the contest will want to know why the decision is given against him or her, and so extra efforts have to be made to see the order through that party's eyes.

The secondary audience for whom I write comprises the court officials who might be called upon to enforce the order and the District Court judge who might be required to decide an appeal against the proceedings. The enforcement official needs to be clear about the order rather than the reasons behind it, whereas the judge needs to understand both. Of particular relevance to appeals is the statutory responsibility of Referees to have regard to the law, and in particular legislation, brought to their attention.

It is for this last-named reason that the Referee might need to indicate that he or she has followed proper legal process by including in the order appropriate legal terminology. Thus, it is common for orders to refer to the burden of proof on the applicant, to prove his or her case on a balance of probabilities, and for orders to refer to legal concepts such as negligence and to statutory provisions raised at the hearing. These references may raise problems of understanding for lay disputants who see these terms in an order without any prior explanation of their meaning.

To meet this problem, I make it my practice, when it is clear that the hearing is going to require a decision from me, to have the outline of my decision and its reasons in my mind before the end of the hearing, and to share these with the parties. I believe that no decision or supporting reasons should be a surprise to the parties after the hearing. It is also natural justice that parties have the opportunity of responding to views that the Referee has provisionally formed, and correcting erroneous assumptions. Therefore, if I can foresee that my order could contain terms such

## Writing decisions in the New Zealand Disputes Tribunal

(continued)

as “burden of proof”, “balance of probabilities”, “negligence”, and statutory provisions, I make efforts to ensure that parties understand these terms before the hearing has concluded.

### Care in choice of words

Particularly in view of the lay nature of my primary audience, I unashamedly come down on the side of clarity rather than rounded elegant prose. Thus, I choose short sentences each containing only one essential idea. For example, I might follow the sentence “The applicant made an agreement with the respondent” with “The applicant accepts that he did not complete this agreement”. I try to ensure that my sentences do not begin with a pronoun, in case there is any confusion about who or what “he, she or it” might refer to in the previous sentence.

In choosing my words, I also bear in mind that my decision becomes a court order, and that there needs to be a measure of formality about it. I therefore avoid the use of first names and colloquialisms. I prefer to write that “The applicant, Mr Smith, had the right of way” rather than “Charlie should’ve let Pete drive past”.

While maintaining clarity, directness and dignity of language, I consider it important that my orders should be as humane as possible. One reason for this is that for many disputants their Tribunal experience is their first and only experience of a court system, and this experience needs to be as constructive as possible. Another reason is that justice is not a precise science and certainly in some disputes I have not had absolute confidence that my decision was the correct answer to the issue. Decisions sometimes have to be made in the light of the apparent credibility of the parties and conflicting evidence, and especially in a lay forum there is the possibility that not all relevant evidence is presented. Further, people sometimes reconstruct events in order to make better sense of their present reality, and it is not helpful or accurate to characterise their testimony as lying or false. I therefore try to express my orders in terms of “preferring the evidence of” one side, rather than as a condemnation of the other. I also try to express my reasons in terms of levels of responsibility for an incident, rather than labelling one side or other as blameworthy. Thus, I may note that “Primary responsibility for the collision rests with the applicant because ...” and that “Secondary responsibility rests with the respondent because ...” rather than labelling either party as a transgressor.

## Conclusion

The challenge of writing decisions in the Disputes Tribunal is to balance out the need for decisions which are readily accessible for the lay litigants, and the need to produce decisions that reflect the character of binding court orders. This requires the Referee to meld the demands of clarity and humanity with legal precision. The ultimate hope is that the Tribunal process will have an educative and cohesive effect on the members of our community. This can occur only if the decisions that emanate from the Tribunal are meaningful for all concerned.

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**Peter Spiller** (BA LLB PhD (Natal), LL.M MPhil (Cambridge), PhD (Canterbury), PGCTT (Waikato)) has taught law for 28 years, mainly to undergraduate students. Since 1994 he has been a Professor of Law at the University of Waikato in New Zealand. He has produced a number of legal texts, including the New Zealand Law Dictionary and books on the New Zealand courts. For the past 15 years he has been involved with the New Zealand Disputes Tribunals (formerly Small Claims Tribunals), as a trainer of Referees and since 1991 as a Referee himself.



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# The **power** of language— the lawyer's dilemma

**Gerard Kilpatrick**

*Solicitor, Auckland, New Zealand*

*The article below is taken from a report that a New Zealand solicitor prepared for a client, an incorporated society. The report accompanied a draft new constitution for the society, to replace a previous one prepared in 1979. It entered the public domain when the client published it on its website, where it was discovered by one of Clarity's guest editors. This edited version is published with the consent of both the author and the author's client. The report was in-house in nature and was never intended for publication in an academic journal. It was written partly to be provocative, to raise awareness and to promote discussion. In a few instances, sources may not be acknowledged. Materials particular to the society concerned have been deleted.*

*The edits in this version are for the most part embellishments the author wishes he had thought of first time round.*

When I use a word, Humpty Dumpty said in a rather scornful tone, it means just what I choose it to mean, neither more nor less.

—Lewis Carroll, *Through the Looking Glass*

## **The 1979 re-write**

It is generally accepted that the life of a document in the nature of a constitution is about fifteen years. In that time, drafting styles change, the law changes, and the institution itself changes. It is now some twenty-three years since the society adopted its 1979 constitution, and although it is time for review, that review is not urgent.

The revision this time is far less dramatic than the 1979 revision in terms of content. There are a few changes that might be contentious, but otherwise it is primarily a re-ordering and updating of the drafting. I have made an attempt to bring together related topics. As an example, the officers of the society are dealt with under one heading, whereas previously these provisions were scattered through the document.

In what follows, references to the *Law Commission Report* are to the *Law Commission Report on Parliamentary Drafting*, which may be found at <[www.lawcom.govt.nz](http://www.lawcom.govt.nz)>.

## **Drafting styles**

There is considerable debate, both public and professional, about drafting styles. There is also much failure to progress—arising in part from the pressure under which lawyers work. The legal profession acknowledges drafting issues as important, and in fairness many lawyers involved in drafting do the very best they can. Two of the factors which impede progress are the need to produce a document quickly, and the need to protect the user of the document against possible unforeseen consequences from drafting experimentation. The lawyer tends to stick with what has worked before, especially when under pressure. After all, if a lawyer experiments, it is the client who takes the risk. For the lawyer, it is the substantive result that is important, not the package in which it is presented. That is all right, but it tends to perpetuate poor drafting. There is also considerable baggage from the past. For example, many legal precedents today continue to use two or more words with the same meaning where one word will do.

Examples are:

- will and testament
- assign and transfer
- named and described
- estate and interest
- each and every
- rest, residue and remainder
- devise and bequeath (*instead of give*).

There are countless other examples.

This practice goes back centuries to the time when Latin was the universal language of Europe and the English language as we know it was just developing. The practice developed of using both the Latin *testament* and English or Norman French *will* form of the legal word, probably to ease the transition into the use of English—yet centuries after this practice ceased to have any relevance, we are stuck with this practice today. The original Latin/English/Norman French combination is no longer the influence, but rather an unconscious imperative from centuries of habit for drafters to do it this way.

Other drafting considerations include:

### **Use of the future tense**

The 1979 constitution is riddled with the use of the word *shall* to express an obligation. The difficulty with this is that when *shall* is used in ordinary English, the primary use is to express something that is intended to take place in the future. Students of English will tell you that when *shall* is used to express an obligation, it expresses that obligation only weakly. (There is a big difference between telling a

## The power of language— the lawyer's dilemma (continued)

child: "You shall tidy your room!" and "You must tidy your room!" Of course, there is also the imperative, "Tidy your room, right now!") *Must* not *shall* is now the normal modal auxiliary to express an obligation. Parliamentary drafting now uses this model, and I have mostly followed this in the redraft. The *Law Commission Report* gives the following example:

The text should be:

A person who allows a dog to soil a footpath commits an offence.

**not**

A person who shall allow a dog to soil a footpath shall commit an offence.

In the re-write of the constitution, *shall* is replaced by *must* and, more generally, the drafting is brought into the present tense.

As an example, in the redraft,

the General Secretary shall . . .

**becomes**

the General Secretary must . . .

When first encountered, the series of *musts* may sound a bit harsh and graceless, but that is partly because we are not used to it. It has become the standard.

### Use of provisos to express a new concept

Another common drafting fault is the misuse of provisos. The proviso is not used as a proviso at all, but is rather clumsily used as a link between two different concepts, which should be in separate paragraphs or subparagraphs.

### Use of the word *such*

The word *such* is very convenient to drafters, either as a linking word or to relate back to a subject already expressed. Regrettably, it is not used in this way in ordinary English. Many drafters have a bad case of *such* disease. This superabundance produces an ugly and awkward result. Quite often in my office, we have to Bowdlerise a precedent by using a word processing instruction to emphasise the word *such* on every occasion it is used in a document, and then spend time eliminating each one. Sometimes, this is easy; the word can simply be left out. Other times, several sentences may have to be recast before the *such* can be consigned to the delete button.

The 1979 constitution was not too bad in this regard, but the word *such* has mostly been eliminated from the redraft.

### Use of the active and passive voice

Some drafters use the passive voice when the active voice is appropriate or intended, resulting in clumsy overall language. English is uncomfortable with the passive, and it is usually preferable to write in the active.

The *Law Commission Report on Structure and Style* gives the following example:

The Member may appoint up to 9 persons to be members of the Advisory Committee.

**not**

Up to 9 persons may be appointed by the Member to be members of the Advisory Committee.

The first example is clear and accurate; the second example is clumsy.

(As a matter of interest, this is not picked up at the universities. Graduates come through to us using:

Here is a transfer for signing by you.

and are mystified when their supervisors ask for a more direct sentence structure. It should be *Here is a transfer for you to sign*, or *Enclosed is a transfer. Please arrange signature*. In general, we have to spend quite a bit of time teaching graduates to write clear, concise English based on a subject/verb/object format. One way my firm has dealt with this is to deprive graduates of a dictaphone for twelve months or so, and force them to hand draft everything. That teaches economy of expression, and enables graduates to review as they go. Of course, in recent years almost universal computer literacy helps, as graduates can check and edit their work on screen. This has led to a vast improvement in the quality of completed work.)

### Coode's rules

Another influence on legal drafting comes from Coode's rules, which first appeared in the appendix to the *Report of the Poor Law Commissioners on Local Government* in 1843. Coode's rule requires that the circumstances in which a rule is to operate be stated before its substance. Generations of lawyers followed Coode's rules—for information on Coode's rules, I am indebted to a publication by Law 2000 Pty Ltd, attributed to Jude Wallace—and the effects are still with us today.

Modern drafting rejects Coode's rules. For example:

<i>Case</i>	Where there is any question between any branches touching the boundaries of such branches;
<i>Condition</i>	if a majority of not less than two-thirds in number of the members of such branches make application in writing;
<i>Legal subject</i>	the Executive Council;
<i>Legal action</i>	may deal with any dispute or question concerning such boundaries.

The normal sentence structure, which should be used, is as follows:

<i>Person who must act: legal subject</i>	The Executive Council;
<i>Legal action</i>	may deal;
<i>Legal object</i>	with any dispute or question between branches concerning boundaries;
<i>Conditions</i>	if a majority of not less than two-thirds in number of the members of the branches make an application in writing.

The second construction takes us through a logical sentence structure and makes the sentence much easier to read.

### Gender neutral drafting

The modern convention requires the use of gender neutral drafting; the convention it replaces and which is no longer acceptable was that the masculine included the feminine. This latter convention is centuries old, and was previously widely used in all official documents including parliamentary drafting. It was undoubtedly a sound convention, and facilitated easy drafting.

Reliance on this convention is no longer acceptable—many now regard the masculine as *excluding* the feminine, which of course it does not. The correct use of gender neutral language is still developing, and there are many drafting conventions as to how this may be achieved. Some are simply irritating, such as the practice of using *he* the first time a personal pronoun is required in a document, and *she*

the next time a personal pronoun is required, and so on. In the new constitution, I have mostly avoided using *he or she*, and I have not used at all the more modern affectation of using *their* preceded by a singular noun. The first is annoying; the second is grammatically offensive, although many would say that the latter is simply an example of the evolution of language. These extremes of practice appear to be being driven from the secondary schools and the universities and the obsessively politically correct brigade, and we often see them in graduates' written work.

Other options are to repeat the noun:

A member of the Council may resign the office of member . . .

#### instead of

A member of the Council may resign his office . . .

or connect the noun to the verb

The Commissioner may consent . . .

#### instead of

The Commissioner may give his consent to . . .

The more extreme styles of gender neutral drafting, such as the repetitive use of *he or she* and the use alternately of *he or she* are examples of what might be called *in your face* gender neutral drafting. As noted, it appears to be encouraged by the educational institutions. Documents drafted in this way sometimes appear to be more a statement of political correctness and calculated to annoy rather than examples of good drafting, and this extreme style is best avoided.

In the re-write, I have avoided this more *in your face* style of gender neutral drafting, sometimes having to present the concept in a different way to achieve this.

The last issue I had to grapple with was the *chairman / chairperson / chair* issue. The *Law Commission Report* recommends *chairperson*, but *chairman* is still widely used with few today taking issue. At the very end of the review, I changed it to *chairperson* throughout the document. As a matter of interest, a legislation search revealed 927 uses of *chairperson*, 1,459 uses of *chairman* and 26 uses of *chair*—although I did not check the latter and some may have referred to something to be sat upon.

### Arabic numbers

The parliamentary drafting team has decided to use Arabic numbers instead of writing out the number in full in plain text. I have not adopted this convention—it may be a purely personal thing, but I have had difficulty getting used to this format. If the society feels strongly that we should conform with parliamentary practice and use Arabic numbers, I am quite happy to change it.

## The power of language— the lawyer's dilemma (continued)

### The kindergarten style

Some drafting schools advocate the use of simple, ordinary words, preferably of no more than five letters—words that even an uneducated person would understand. William Wordsworth, the English poet, decided at one stage of his career that he would write his poetry that way, and for that period wrote only in extremely simple language. An example of this is *Lucy Grey*. Here are two verses—regrettably, there are many more.

Of I had heard of Lucy Grey:  
And, when I cross the wild,  
I chanced to see at break of day  
The solitary child.

No mate, no comrade Lucy knew;  
She dwelt on a wide moor;  
The sweetest thing that ever grew  
Beside a human door.

The kindergarten style overlooks the fact that most writing is not done with kindergarten readers in mind, but usually for a well informed audience who are well able to cope with a reasonable range of English vocabulary. Further, confining the drafter to simplistic language denies the drafter the ability to convey nuance by selecting the words used from the wide range of synonyms or near synonyms found in English. There are usually a number of words available to express a single concept, each with a subtly different meaning. Not only the ability to convey meaning is affected, but style as well. As an example of kindergarten drafting, review the contract you have received from your telephone, water or power company. It may be clear enough, but it quickly becomes a yawn because it lacks any elegance or literary merit.

I would not like to have conveyed the ideas in the foregoing using the kindergarten style.

Adopting the kindergarten style tends to rob a document of any elegance and cohesion. The written expression becomes bland, often not achieving what its drafters intended it to achieve. To be fair, it is only the extreme of this style that is objectionable. Kindergarten language can be a good starting point, but not too many of those attending kindergartens have an interest in reading the various documents that are produced in this style.

Ironically, the English word *kindergarten* etymologically comes from two German words *kinder garten* or *children's garden*.

Think what our literary heritage would be like if our great writers had employed the kindergarten style in their work. We would not have the Wordsworth classic:

Dull would he be of soul who could pass by  
A sight so touching in its majesty.

**Instead**, we might have,

What a nice view it is from the bridge, Dave.

The immortal Hopkins line:

I caught this morning morning's minion  
kingdom of daylight's dauphin, dapple-dawn-  
drawn Falcon

**becomes**

There's that damn bird again.

Obviously, I could continue on the subject of drafting issues. I could tell you that they are not easy. Within most legal offices, effective reform is an impossibility across a wide front. This arises because of time constraints, the pressure that lawyers come under to produce a document, the wide range of intellectual ability and the differing levels of commitment. I can tell you from grim experience that drafting reform is not easy.

### Hallowed usage

Having said all that, there are a limited number of instances where it is inappropriate to update language. Nobody appreciates Shakespeare's plays being re-written in plain English. (*Out out, damned spot* would become *Beat it, dog.*) Regrettably, we have to edit Chaucer to make the *Canterbury Tales* make sense to the modern reader. An example of the original text is as follows:

Anon go gete us faste in-to this in  
A kneeling trogh, or elles a kimelin,  
For each of us, but loke that may be large,  
In which we mowe swimme as in a barge,  
An han ther-inne vitaille sufficant  
But for aday; fy on the remenant!

—*The Miller's Tale*

On the other hand, there may even be some merit in having the society's constitution in a non-understandable form.

In some quarters the *King James Bible* is regarded as a literary treasure, and many regret the passing of what is seen as its elegant use of language. Some prefer, for example:

Charity suffereth long, and is kind; charity  
envieth not; charity vaunteth not itself, is not  
puffed up.

There are some who say that this hallowed style has a dignity of expression that suits the formal occasions in which it is used, and regret its passing in favour of the more modern translations. A modern translation I have at hand is the Westminster version, which recites the foregoing verse as follows:

Love is always patient and kind; it is never jealous; love is never boastful or conceited, it does not take offence, and it is not resentful.

With respect, preference for the old style appears to be no more than nostalgia. Clearly, the second translation is better. To prove this, try the two translations out on a young person who is familiar with neither, and see which they prefer.

Of course, it is the very antiquity and vocabulary of the King James version that gives rise to this preference in some quarters.

The society may like to consider the option of retaining our existing constitution for four hundred years in the hope that in that time it will likewise become hallowed and acquire an integral dignity along the lines of the King James version. The down side is that if we then retain it for several hundred more years, it may then become Chaucer-like, needing first to be modernised to be understood.

Regrettably, the language in our constitution probably lacks the underlying cohesiveness necessary to put it to this test. Further, the author of the present constitution makes no claim to divine inspiration, so it is a forlorn expectation anyway and not an option for the society. (The report to the society ends at this point.)

### **Credit where due—author's final note**

Finally, and despite some of my comments above, I pay tribute to the graduates I have worked with over the years. Nearly always graduates are exciting, responsive, eager to learn, prepared to take correction. If given a stimulating, challenging and non-patronising environment, the uninhibited freshness they bring to a legal office, or any office, is something I find exciting. I pay tribute to those tertiary teachers, too, who really care about their charges. If I have a criticism, it is that teachers could be more demanding about the quality of the written work they accept from students, and encourage students to demand good standards of written expression from themselves. If students are having difficulty, they need to start with the first principle that once they have clarified in their own mind what they want to say, they simply write it down. It is so obvious. In so doing they must not eschew vocabulary or flair, but as they develop their draft, make full use of what our wonderful language has to offer.

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### **Non-linear language**

The expert witness was giving evidence for the defence in a car crash appeal in an Auckland court.

Expert: Now that certainly does indicate that the vehicle was running in what's known as the non-linear region of its cornering characteristics, and approaching the point at which incipient control loss would be expected.

Lawyer: Can you clarify what you mean in layman's terms?

Expert: Er . . . yes. The car was fishtailing and completely out of control.

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# Rewriting the Income Tax Act

## Margaret Nixon

*Former Legislative Counsel, Policy Advice Division,  
Inland Revenue Department, New Zealand*

*Ten years ago the Inland Revenue Department in New Zealand embarked on a tax rewriting project. Margaret Nixon was a member of the rewrite team from 1999 to 2004. In this article she outlines the background to the project and some of the changes that the team made.*

New Zealand has been making steady progress on rewriting its income tax legislation in plain language. A milestone was reached this year when the Governor-General gave assent to the Income Tax Act 2004 (ITA 2004), which rewrites about a third of the Income Tax Act 1994 (ITA 1994).

This article explains why the rewrite is being done, how it has progressed, and what distinguishes the rewritten text assented to on 7 May 2004 from traditionally drafted tax law.

### Why is the rewrite being done?

New Zealand's income tax legislation, like that of many other countries, was for a long time an unwieldy structure held together by an impenetrable thicket of words. During the 1990s, various countries considered rewriting their tax legislation in plain language. In New Zealand, this step was recommended by several official reports, including the 1994 report of the Organisational Review of the Inland Revenue Department. The organisational review report also recommended that the drafting of tax bills should be moved from the Parliamentary Counsel Office to a drafting section to be established within the Inland Revenue Department.

The Government accepted both recommendations. It acknowledged that it was time for income tax legislation to be made more comprehensible and it accepted that the responsibility for doing that job, and for drafting all tax bills, should lie with specialist law drafters in the Inland Revenue Department. In 1995, it established a drafting unit within Inland Revenue Department and gave it the tasks of maintaining existing tax legislation and rewriting the ITA 1994.

The Government was clear that the ITA 1994 was just to be rewritten. The effect of the Act was to

remain the same. The only policy changes allowed were those that had been the subject of consultation and a decision by the Government to make a change.

### How has the rewrite progressed?

The first stage of the project, which was done by the Parliamentary Counsel Office, involved reordering and renumbering the existing income tax legislation, i.e., the Income Tax Act 1976 (ITA 1976). It was completed with the enactment of the ITA 1994. Re-ordering meant putting provisions that were similar to one another into the same group—for example, the provisions that stated core income tax rules, which were scattered throughout the ITA 1976, were gathered together and put into Part B (Core Provisions). Renumbering meant using a single letter identifier for Parts, a double letter identifier for subparts, and a double letter and number identifier for sections—for example, section BC 1 is the first section ("1") in the third subpart ("C") in the second Part ("B").

The second stage involved rewriting Part B (Core Provisions). It was completed with the enactment of the Taxation (Core Provisions) Act 1996.

The third stage involved rewriting Parts A to E and Y and re-enacting Parts F to O and the schedules. It was completed with the enactment of the ITA 2004. Parts A to E and Y are discussed below. Parts F to O and the schedules have been updated in minor consequential ways, but are otherwise the same as they are in the ITA 1994. The numbering sequence is also the same—for example, section OB 3A is followed by section OB 6 because the ITA 1994 no longer has a section OB 4 or a section OB 5.

The final stage involves rewriting Parts F to O and the schedules. It will be completed in either 1 or 2 amendments to the ITA 2004 that take out and replace Parts F to O and the schedules. The ITA 2004 will also be the subject of "business as usual" amendments to implement policy changes. For resource reasons, the style of the rewritten Parts A to E and Y will not be maintained in all these amendments.

### What distinguishes the rewritten text assented to on 7 May 2004 from traditionally drafted tax law?

Consistency, orderliness, and precision inform the drafting of the rewritten Parts. These qualities are achieved by drafting features described below.

#### Clear structure

Parts A to E of the ITA 2004 do essentially the same jobs as they do in the ITA 1994—Part A states the purpose of the Act; Part B contains the core provisions on income, deductions, and timing; and Parts C, D, and E provide the detail on income, deduc-

tions, and timing respectively. The ITA 2004 differs from the ITA 1994, however, in making explicit the relationships between the Parts and, in Part D, within the Part.

Section BD 1 and subpart CA state the connection between Parts B and C. Section BD 2 and subpart DA do the same for Parts B and D. Sections BD 3 and BD 4 relate Part B to Part E.

Subpart DA states the connection between Parts B and D by setting out the rules on when deductions are allowed or denied. The relationships within Part D are explained in the sections that allow or deny deductions; they end with a subsection, headed *Link with subpart DA*, that shows how the section relates to the rules.

### Orderly groupings

The ITA 2004 continues the task, begun in the ITA 1994, of organising material in a considered fashion, using subparts to group provisions addressing similar or related rules.

The process of putting provisions into a more logical sequence revealed misplaced provisions. These have been shifted to a suitable location—for example, apportionment rules have been moved to Part F, which deals with apportionment and recharacterised transactions.

The subparts are arranged in 2 distinct groups. In Part C, the subparts run from CA to CH and then from CQ to CX; in Part D, from DA to DF and then from DN to DX; and in Part E, from EA to EJ and then from EW to EY. In all 3 Parts, the first group of subparts applies broadly to all taxpayers and the second group applies to specific instances of activity. The purpose of the gap in the numbering is to facilitate the addition of subparts. A subpart of broad application can be added at the end of the first group and a subpart of specific application can be added at the start of the second group.

### Redundancies removed

Some provisions of the ITA 1994 were redundant because their content was already covered elsewhere—for example, 6 different provisions expressed the idea that, if a person is allowed a deduction for a loss and then recovers the amount of the loss, the amount recovered is income up to the amount of the deduction. The ITA 2004 says it in a single provision, section CG 4 (Recovered expenditure or loss).

Other provisions were redundant because they no longer had effect. Provisions of this kind were omitted and their omission noted in schedule 23, which contains comparative tables of the provisions of the ITA 1994 and the ITA 2004.

### Numerous signposts

The rewritten Parts contain many signposts.

**Tables of contents.** A table of contents appears at the start of the Act and at the start of each subpart.

**Outline provisions.** Various kinds of outline provisions are used. The definition of a key term provides an outline in the subpart on dividends—section CD 2 (Meaning of dividend) says “Sections CD 3 to CD 13 define what is a dividend.” The subpart on life insurance has a section EY 2 headed **Matters to which this subpart relates**. In some subparts, the first section is headed **What this subpart does**—for example, in subpart EE (Depreciation).

**Two levels of cross-heading.** A centred, italic, bold heading introduces a group of sections with a common theme and a centred, italic, roman heading introduces a collection of sections within the group—for example, within subpart CX (Excluded income), the heading *Fringe benefits* is followed by the heading *Introductory provisions*.

**Subsection headings.** Subsections whose subject matter is the same have the same heading throughout the rewritten sections—for example, each subsection on the timing of income is headed *Timing of income* and each subsection containing an exclusion is headed *Exclusion*.

**Directions to related sections.** Sections identify other sections that affect them in a subsection headed *Relationship with section...*

**Descriptions of sections.** A cross-reference to a section in another subpart is followed by the section’s heading in brackets—for example, section CD 8(2) says “The amount of the dividend is calculated under section ME 33 (Notional distribution deemed to be dividend).” To avoid cumbersome cross-referencing, a series of cross-references to sections in other subparts is followed by “(which relate to ...)”.

### Slimmed-down sections

The messages of the sections of the ITA 1994 have been carved out of its dense blocks of text. The ITA 2004 conveys the messages in sections that have been kept as short as their subject matter allows, while using as many subsections as needed to cover different aspects of the message.

Sections are written in the active voice; they have clear structures made plain through subsections, paragraphs, and subparagraphs; and they use internal cross-referencing only to prevent confusion. Great care has been taken to ensure that words are used consistently throughout all the sections in the rewritten Parts.

## Rewriting the Income Tax Act

(continued)

Sections covering the same types of situations are arranged in parallel patterns. For example, many sections in Parts C and D start with a subsection headed *When this section applies*. In Part C, a subsection saying that an amount is income is headed *Income*. In Part D, a subsection allowing or denying a deduction is headed, as appropriate, *Deduction*, *No deduction*, or *No deduction (with exception)*.

### Ordinary language

The rewritten Parts take a modern approach to language. Examples are—

- “acquire” and “dispose” replace expressions such as “acquires or becomes possessed of”, “acquired or created”, “purchase or creation”, “sale or other disposition”, “sale or other transfer”, and “alienation or transfer”
- “expand on”, “modify”, “override”, and “qualify” replace “subject to”
- “mainly” replaces “primarily”, “principally”, “primarily and principally”, and “principally and primarily”
- “treat” replaces “deem” when it is essential to make the point that a thing is legally something other than it is factually
- “any”, “every”, “that”, and “those” are used with care to avoid over-emphasis
- “This section is about”, “The fact that”, “gets a negative result”, and other colloquial expressions, are used.

### Newly formatted formulas

The rewritten Parts improve the format of formulas by discontinuing the approach of writing formulas in 1 long sentence.

Formulas appear in a subsection of their own, usually headed *Formula*, with their items expressed in words, not letters. The formula is followed by a subsection headed *Definition of items in formula*. The subsection contains paragraphs defining the items, if the definitions are short, or a statement that the items are defined in subsequent subsections, if the definitions are long.

### Familiar cross-referencing

There are 2 helpful changes in cross-referencing. The first is that cross-references are written colloquially—for example, “subpart CA” instead of “Part CA” and “column 1” instead of “First Column”. The second is that cross-references are simpler because the numbering in Parts F to O has been standardised. In the ITA 1994, the first inserted subpart, section, paragraph, or subparagraph is labelled “A” in some cases and “B” in others. The

ITA 2004 uses “A” consistently as the identifier for the first insertion—for example, the subpart after subpart NB is now numbered subpart NBA instead of subpart NBB and the section after section ME 1 is now numbered section ME 1A instead of section ME 1B.

### Easy-to-find definitions

While Part O (Definitions and related matters) is not rewritten, the ITA 2004 updates section OB 1 (Definitions). The section is now a comprehensive collection of defined terms, containing either the content of the definition or a reference to the section or subsection in which the content can be found. The section has been reformatted to give each definition a regular legislative shape.

In the rewritten Parts, the definition of a term in a section or subsection is identified by the heading “Meaning of [term]”. Subsections that define terms are placed at the end of their sections whenever possible.

Each section in a rewritten Part is followed by a list with the lead-in words “Defined in this Act”. The list contains the terms used in the section that have an entry in section OB 1.

### Fewer initial capitals

Compared with other New Zealand statutes, the ITA 2004 gives fewer words initial capital letters. This is because of the alphanumeric numbering system. Section numbers and cross-references must appear clearly on the page, without the distraction of unnecessary capital letters. The ITA 2004 does not capitalise most of its technical drafting terms, i.e., “paragraph”, “schedule”, “schedule 1, part A”, “section”, “subpart”, and “subsection” have initial lower case letters but “Act” and “Part” are always capitalised because a lower case letter could change their meanings. For other words, a lower case initial is preferred whenever possible—for example, “department or ministry”, “government”, and “institute” (referring to a Crown Research Institute).

### Repeal revisited

The ITA 1994 is unclear in its approach to its predecessor. Section A 1 (Short title, commencement, etc.) says that the ITA 1994 applies to tax on income derived in the 1995-96 year, which indicates that the ITA 1976 continues to exist. However, section YB 3 repeals it. Sections YB 4 and YB 5 then provide savings and transitional rules that deem it not to be repealed for the purpose of dealing with tax on income derived before the 1995-96 year.

The ITA 2004 is clear in its approach. Section YA 1(1) (Repeals) repeals the ITA 1994, but section YA 1(2) specifically states that the repeal applies only to the tax on income derived in the 2005-06 year and later years. The ITA 1994 continues to exist and can be amended in the same way as any other existing statute.

## Practical drafting matters raised in *Clarity*

The 2003 and 2004 issues of *Clarity* discuss a number of practical drafting matters. This is what the rewritten Parts do about them:

- as specifically requested by users, they use “; and” or “; or” at the end of paragraphs and subparagraphs and reserve colons for use at the end of paragraphs or subparagraphs defining items in formulas
- as required by standard New Zealand legislative punctuation, they use a comma after the second-to-last item in a list of words or cross-references and after a modifying phrase introducing a series of paragraphs or subparagraphs
- they use paragraphs and subparagraphs carefully so as not to make sandwiches of them or shred the text
- they use numerals instead of words (except to start a sentence, paragraph, or subparagraph)

- they use “that” as the introductory word to relative clauses
- they use “they” and “their” as singular pronouns
- they do not use “provided”.

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## Face the front, please

A reader named Ray wants one more go at the duplicitous English language—or is it just the Land Transport Safety Authority? He writes: ‘Poor Maurice, but consider and ponder the little item from the illustrious LTSA in its new Road User Rule. “Left side, in relation to a vehicle, means its side to the left of the vehicle when the vehicle is facing forward”. Right side is similarly defined. I have just about ruptured myself trying to get my vehicle to face some other way.’

*Reprinted with permission from the New Zealand Herald's "Sideswipe" column 29 January 2003*

## English as she isn't spoke

The Immigration Service could do with an English-language test itself, judging by the many cringe-worthy errors on its site spotted by reader Richard England: For example: “If you require application forms and guides, please refer to our website to which you can download these files online.”

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# Decisions that convince

## The Honourable Justice Patrick Keane

*High Court of New Zealand*

*Justice Patrick Keane has been involved in teaching judgment writing for many years. In this article, he describes a specialist writing course for New Zealand judges that was based on a Canadian model and emphasises judgment writing as a craft.*

For the past five years the New Zealand Institute of Judicial Studies has offered judges a three and a half day course on judgment writing as a skill. By the end of this year, 110 judges will have attended, amongst them a number from Australia, from Fiji and Hong Kong.

For the past two years the Family Court of Australia has offered a course. Shorter sessions for specialist groups have featured both in New Zealand and Australia. The Judicial College of Victoria begins in a full way this year.

The idea is far from new. The technique is carefully refined. The model is Canadian. That course has been running since 1980. Up to 55 federally appointed judges attend each year. Alumni include the present Chief Justice of Canada and three other members of the Supreme Court of Canada.

Members of the Canadian faculty taught at the first New Zealand course. Members of the New Zealand faculty have taught in Australia. So the momentum in this part of the world has begun to gather.

These courses have proved popular. Most who attend rate them highly. Many say that they are the most useful and enjoyable they have attended. Three reasons are immediate.

### Attractions

The intent, to begin with, is to assist the judges attending, recognising and respecting their independence; not to subject them to any rigid orthodoxy. They are encouraged to consider for themselves, perhaps for the first time consciously and systematically, these essentials: 'Why do I give decisions? For whom? How should I set them out? How should I sound?'

The intent, secondly, is to be practical. The emphasis is on writing as a craft. Judges bring one or two

decisions they have given in actual cases. After the first lecture, when the ideals the course promotes are explained, they review with the leaders of their syndicates, one to one, one decision, just as they gave it. After that, they re-write the decision and face peer review within their syndicates.

The syndicate leaders are not judges, though judges often share the teaching task. They are experienced and well respected writers—academics whose discipline is literature, novelists, short story writers, poets, journalists, and editors. In their syndicate leaders, judges face, perhaps for the first time, an actively questioning reader, whose knowledge and understanding of law, and of the case, cannot be assumed.

The workshops do not stand alone. General sessions return constantly to the essentials, if more theoretically and coloured by examples from literature and journalism, as well as by examples of judgments good or bad. But the work in syndicate is decisive.

Finally, though these courses are intensive, they are quite simply enjoyable. Judges are invited to look at their daily work in new ways that they find stimulating. They are intrigued by their teachers, and stimulated by their often strongly contrasting frames of reference. They share with their peers, as may not often happen, the difficulty and the interest of their cases.

### Need

The need for this form of course has long been accepted in Canada, and is now well accepted in New Zealand. It springs from the role judges exercise in society. Writing clearly and persuasively is important to us all. For judges it is indispensable.

Society entrusts judges with great power. Judges stand between the individual and the State. Judges supervise the administration of the criminal law. They have the power to safeguard the liberty of the individual and the power to take it away. Judges decide disputes between individuals who cannot agree. To the individuals concerned the issues could not be more important. The decisions judges make must enjoy public confidence.

There are of course safeguards. Judges take an oath to do right under the law 'without fear or favour, affection or ill will.' Mostly, judges hear cases and give their decisions publicly. There are rights of appeal to higher courts. But, ultimately, public confidence can only rest securely on understanding—not just as to what the judge has decided, but why.

What a judge decides must be supported by reasons. There must not merely be reasons, they need to be expressed completely and clearly. Ideally, they need to make sense to anyone who has an interest. Otherwise, however fair and sensible the decision may

actually be, there can be misgivings. The judge may seem to have been arbitrary.

On these courses, therefore, judges are invited to make their own three simple but demanding insights: 'Be aware that you have an audience and how wide and diverse it can be. Engage your audience from the first sentence. Speak accurately and neutrally, yes, but as actively, simply and clearly as you can.'

## Audience

Those interested in a decision can range as widely as one can imagine. How a judge decides is of vital interest, obviously, to the parties to the case and their lawyers. They know the case intimately. Why a judge decides as he or she has, will be of interest to any court hearing an appeal, which will also have the court record. But others, by contrast, perhaps no less interested, the public, the media, other lawyers, academics, the legislature, will know nothing about the case except what the judge says about it.

To a hard-pressed judge the notion of an audience can seem remote. A case comes to a judge as a problem to be resolved. There is an issue on which the contestants cannot agree. The contestants define the issue. They advance by evidence and submissions the disputed facts or law on which it turns. The contradictions can be significant. A swift decision may be needed.

The first thing the judge needs to do, the indispensable thing, is to resolve their problem. He or she may, not unnaturally, especially when time is short, focus more on what decision to make, than on setting out for the widest audience the reasons why.

But judges do need to think carefully about their audience. A judge who thinks only about what the answer is to be, or only of the parties and their lawyers, may speak in shorthand. Others, who do not know the case, even an appeal court with the record, may not find what he or she says understandable. The reasons the judge gives ought desirably to go that further distance.

Conversely, sometimes, judges can stray in the opposite direction. A judge, conscious of the right of appeal, and anxious to give a convincing decision, may record everything that happened in the case, relevant or irrelevant. A judge, intrigued by a point of law of interest to lawyers and the commentators, or the legislature, may write what is really an article for a law review.

As in everything, what counts eventually is balance; and the balance essential begins with good architecture.

## Architecture

In one sense, that ought not to be a problem. In essence, a judgment is very simple. It can be thought

of as an extended syllogism. The judge decides what facts are relevant and reliable, and what law applies, and synthesises the two. That is the essential task, and it never changes.

But cases vary enormously. In simple cases judgments can be simple, in complex and subtle cases both complex and subtle; and decisions involve more than logic. Judges have often to choose between competing values. There can be ethical issues, and issues of good practice.

Judges are very familiar with the basic architecture, if only intuitively. Judgments, like statutes, are the lawyer's tools of trade. But lawyers look to judgments for what they decide, and whether they help or hinder. Few spend time thinking about how they are organised and expressed. They may know that they find some judgments clear and even enjoyable. They may find others hard work. They are unlikely to have analysed why.

The most convincing and enjoyable judgments are those that make sense, from the first sentence to the last. Those that state right at the outset what the issues in the case are and, perhaps, something too of their interest and significance. A good beginning is critical to all that follows.

But that is not how many judgments begin. They start instead by stating first how, as a matter of procedure, the case came into the hands of the judge. That is the easiest way to begin a decision, especially when time is short, and it has enjoyed the force of convention. But the result can be that what is distinctive about the case remains buried. The issues the decision resolves, and what is of interest, may not emerge until pages later. The reader can be left adrift. Interest can rapidly flag.

The first thing that judges are invited to try to do, therefore, is to crystallise in the first paragraph or two what is in issue and is of interest. They are encouraged, then, to order their decisions to the logic of the issues they identify; and to conclude symmetrically: to resolve at the end the issues they identify at the beginning.

The result should be rather like a row of books on a bookshelf. The beginning and the end of the decision are like bookends. In between, like books, lie the issues of fact and law the case is about, identified and sorted out, divided by clear headings.

## Style

Architecture is the first thing; it is not, of course, the last. A judgment for all audiences calls for writing that is active and clear. Better yet, writing that speaks naturally in the voice of the judge.

Most judges do not begin to imagine that they have their own distinctive voice. They think that they write plain prose, just like everybody else. They do

## Decisions that convince

(continued)

not recognise that what they write is influenced by their personalities, their experience and tastes; and by the choices they have made, mostly unconsciously, as to how to write, why and for whom. They can be inhibited. But when they cut loose, the difference can be dramatic.

Judges sometimes, too, equate editing with polishing, a luxury for which they do not have the time, an indulgence of the ego. But that is a fundamental misunderstanding, of course, as the judges soon discover.

Writing is a discipline. Hard work is called for. The apparently simple piece is often the result of careful honing. At a first attempt the judge speaks primarily to himself or herself. Thoughts can be cluttered, sentences unordered, meanings obscure. But, as he or she reworks the decision, conscious of audience, order appears and clarity.

### Ideal

The model that these courses promote is attainable. It is not high literature. It is the writing found in the best magazines. The gift of the best feature writers is to say simply things that are often complex; and to do so lucidly, often elegantly, without striving obviously for effect.

The best judges are known for that gift too. So that is the ideal, which these courses hope to offer. Many who attend find to their surprise, and pleasure, that this is an ideal not wholly beyond their grasp. All that they have to do is work at it.

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*The Hon Justice Patrick Keane was a District Court Judge from 1987 to 2003 and a member of the New Zealand Law Commission for several years during this period.*

*Last year, he was appointed to the High Court. He has lectured in judgment writing at the annual Judges Orientation Course since 1991. After attending a judgment writing course in Montreal, Canada, he and another judge, Justice Randerson, worked with the staff of the Institute of Judicial Studies to make a similar course for New Zealand judges a reality and has been teaching in this course each year since. He has until recently been a member of the Board of the New Zealand Book Council.*



## Weird things serious people write

Microsoft—the ever so earnest folk who brought the world Encarta, and who cause your computer to red underline every word they imagine to be misspelt—has placed the following notice on a loose slip of paper inside the plastic packaging of Office 2004:

This label indicates that the package contains genuine Microsoft product. If the label is missing, please email Microsoft at piracy.com, or call your local Microsoft sales office.

Some questions occur to me:

1. Can't people who counterfeit software also counterfeit fiddly bits of paper stuck in the packaging?
2. If the fiddly bit of paper is, as they say, "missing", how would I know?
3. Even if I suspected that the fiddly bit of paper was missing, how would I read the (missing) message asking me to alert them?
4. What theory of communications gives rise to Microsoft's practice?

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# Plain language and law graduates in New Zealand

**Janet Wainscott**

*WorkWrite, Wellington, New Zealand*

*For some years, Janet Wainscott instructed New Zealand legal graduates in plain writing techniques. In this article she describes what was involved in this work.*

The transition from writing for academic purposes to writing in the workplace is difficult for most graduates, and law graduates are no exception. They face the often-painful transition from writing to impress an academic audience to communicating information to non-academic audiences. Law graduates in New Zealand have some help in making this transition in the form of the professional legal studies course, which law graduates who wish to practise in New Zealand must complete before admission. The Council of Legal Education, a statutory body, prescribes the skills to be taught and requires providers of the course to teach the skills within the context of transactions met in the early years of practice. Until this year, only the Institute of Professional Legal Studies offered the course. From the beginning of 2004, the College of Law New Zealand has been accredited as a provider of the course.

For several years during the 1990s, I worked for the Institute of Professional Legal Studies as an instructor on the professional legal studies course. The following observations are based on this experience and on work that I have done for the Institute more recently.

## **A bridge between university and work**

Most trainees on the course have completed a legal writing course at university with a focus on research and academic writing. Some trainees will have worked for a law firm for a few months, but many have no workplace experience. Trainees show a refreshing acceptance of the need for plain language, but some are not convinced that this means they may need to adapt their own writing style, especially if they believe they already have good writing skills.

The course includes seminars on writing and drafting, which have the goal of enabling trainees to write and draft in clear and precise language. Plain

language underpins the seminars and is addressed specifically in the context of letters and documents encountered in general practice.

Trainees are introduced to plain language techniques—prefer the active voice, keep sentences short, use strong verbs, use everyday words, use headings and lists to organise material. These techniques are explained in assigned reading and reinforced by short exercises. Some of these exercises help trainees to build a vocabulary of plain language expressions by finding plain language substitutes for common wordy expressions. The more difficult exercises require trainees to look at writing samples and identify the faults and suggest improvements. This prepares them for editing their own work later.

Teaching these techniques and nothing more would be just a token nod towards plain language, giving trainees a few handy tips on what to do. The course goes further than this and incorporates the techniques into a writing process that follows the sequence of planning, drafting, revising.

## **Planning**

The first step is planning. This involves analysing the audience and understanding the purpose of the letter or document. In my experience, trainees enjoy this. For example, they are quick to recognise that the purpose of a letter of advice is to inform the client of his or her legal position and options, and that the purpose of a will is to make sure the client's wishes are carried out after the client's death. They are also quick to make an assessment of the nature and needs of their audience, based on information in the fact scenario for an exercise.

Planning includes identifying the content. In a classroom setting, the factual content has to be provided in the form of a scenario for an exercise, but trainees still need to identify the content needed in specific documents. For example, they may need to identify the legal issues and options for a letter of advice, or they may need to work out the timing and procedural details of, say, terminating an arrangement or exercising an option.

For many trainees, the most difficult part of planning is thinking through the structure of a document. Some documents necessarily follow a well-established pattern for that type of document. Within the usual patterns, however, there are always decisions to be made about the order of material and about mechanical details such as numbering, and the sensible and consistent use of definitions.

I found trainees reluctant to plan their structure in any detail before drafting. They told me that they are used to writing with a computer. They put down their thoughts quickly and then cut and paste to

## Plain language and law graduates in New Zealand

(continued)

shuffle the order until they get it right. The usual advice to plan the structure before drafting works for people who learnt to write in pre-computer times, but it might not be consistent with the way many people write nowadays and might not reflect that writing is often iterative, rather than a sequential process.

### Drafting

Trainees approach drafting exercises with some knowledge and experience of plain language because they have already completed the exercises on plain language techniques. They can now see how their analysis of audience and purpose feeds into their decisions about content and tone, especially in the letter writing exercises where the scenarios contain clues about the knowledge and attitude of the client as well as the client's instructions. When they finish their first draft of a document, they can see (sometimes with a little help) that if their draft is incomplete or the structure flawed, then they probably hadn't identified the content or planned the structure in enough depth.

### Revising

The final step in the process is revising. Trainees are encouraged to make at least three editing passes through their work—one for content, one for struc-

ture and one for style. During the pass for style, trainees can concentrate on plain language issues and draw on their experience in recognising and solving problems gained in the earlier plain language exercises.

### Challenges ahead

Newly qualified lawyers in New Zealand do at least have an awareness of plain language and some experience of plain language drafting. Further challenges lie ahead for them. They have to adapt to the culture of a law firm, which may or may not encourage plain language. They have to get used to drafting projects that involve many more iterations than were possible in a classroom setting. On the other hand, they will often use precedents where drafting can seem like little more than adding variables, but where danger lurks for the unwary. Newly qualified lawyers must negotiate these challenges and still remember that their purpose always involves communicating with their readers.

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*Janet Wainscott runs a business providing writing, document development services and plain English editing for a range of clients including education providers and public sector organisations.*

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# Definitions and CAPITALS: where are we?

## Richard Castle

*Lawyer; legal drafter*

*In this article, Richard Castle examines definitions and capitals, and advocates less of both. He also urges all drafters to follow the English parliamentary style.*

### The three over-indulgences

There are three over-indulgences in legal drafting: “shall”, capitals and definitions. Of these, “shall” has virtually gone from many private documents to be replaced by “must”, “is to”, “will” or the present tense. A similar trend is seen in a lot of public drafting, both in England and Wales and elsewhere. The battle against over-use of capitals is largely though not entirely won in many areas. The problem of definitions is proving the most intractable of the three.

### Over-capitalising

As for over-capitalising, there is still a distinct split. In public drafting the over-use of capital letters has virtually disappeared: capitalisation is retained only at the beginning of sentences and for proper nouns. Private drafters, in contrast, cling to their capitals for dear life as though to abandon them would be to lose some vital element. Every item perceived to have some importance has to be flagged by a capital, even when the result is disjointed. See for example:

Where in this Schedule a right of the Train Operator is expressed as “the Train Operator may bid”, “the Train Operator is entitled to bid” or any cognate expression, a Bid made in exercise of such right is, for the purposes of Part D of the Network Code, not a Non-Compliant Bid, but does not give rise to any Firm Contractual Right on the part of the Train Operator.

No public drafter in England would nowadays dream of writing in this uneven way. In many cases, private drafters use a capital for a non-defined word where the word has some significance for them. Thus every parliamentary bill is a Bill, every testamentary document a Will and every chief executive a Chief Executive. So the notion that only defined words or items are indicated by a capital flies out

the window. Moreover even the most enthusiastic capitaliser does not capitalise every defined term. In model clauses for railway track access agreements (UK), the definitions of 19 words or expressions in an alphabetical list have “day”, “flex”, “period of 60 minutes” and “xx20” all in lower case, and the rest in upper case. The distinction (if any) between upper case and lower case defined terms is unclear.

Many if not most capitalised items are capitalised unnecessarily anyway. Who could possibly misunderstand “the lease period” (inevitably a variable from lease to lease) and what is gained by calling it “The Lease Period”? If the juxtaposition of (say) “the tenant” with “a tenant” becomes confusing, it can quite easily be sorted out in the text rather than by insisting on “the Tenant”. There is a natural concern that a word or expression used in a special or unusual way in a particular document will be overlooked. But to capitalise, italicise or embold every defined term leads to inconsistency and lack of readability. The drafter has to remember not only to capitalise where he or she is using a defined term, but also not to use a capital for undefined terms. Where a word is used both as a defined term and in a general sense, confusion may result. For example, it is all too easy to have “the Guarantor” as a party but to forget that not every guarantor in the body of the document will have the rights and responsibilities of “the Guarantor”.

If the path of non-capitalisation is taken, the drafter must be careful to choose expressions for definition and to adopt an order and layout which will guide and not mislead the intended reader. That is not easy—in fact it is one of the higher drafting skills which takes effort and practice to acquire.

In short:

- capitalisation of defined terms in private documents is inconsistent and confusing
- it leads to more problems than it solves, and
- it should be abandoned in favour of the English parliamentary style, where definitions are kept to a minimum, there is no capitalisation and the logical flow of the document helps its interpretation.

## Definitions and CAPITALS: where are we? (continued)

### Use of definitions

In a more general sense definitions continue to be a problem in many quarters. Many parliamentary drafters over-define, producing great long alphabetical lists. Private drafters seem to vie with each other over the length, complexity and redundancy of their definitions ("My definitions are bigger than yours, so there!"). As in many (if not all) aspects of drafting, parliamentary counsel in Whitehall are the leaders—as one would hope them to be. They use techniques which private practitioners could copy with advantage. Among these are:

- defining only when necessary
- splitting the defining so that related groups are dealt with together
- putting one-off definitions near the place where they occur
- using one-off definitions with care
- keeping alphabetical lists as short as possible
- adopting indexes of defined expressions
- employing devices other than dictionary-style definitions.

### Define only when necessary

Too many drafters always resort to a definition when they use a term more than once. But a plan attached to a document might first be referred to as "the attached plan" for example, and then referred to in nearby text as "the plan". There is no need to define "the plan" or (even worse) "the Plan" as "the plan attached to the document" or the "plan attached hereto" or anything else.

Most lay people will not read a document right through. They will refer to it only to check some point or see what they must do. Definitions as traditionally used can hinder this process. For instance "the Director" might be defined as "the Director of Maritime Safety". The writer and the experienced reader will appreciate who "the Director" is when looking at blocks of text. But will the inexperienced reader, the new entrant to a regulated activity, the very person at whom the regulations are aimed? Better to refer in the text to "the Director of Maritime Safety" and then refer nearby to "the Director". Likewise basic concepts like "property" and "equity" neither need definitions nor should they be defined. Some flexibility and generality (as opposed to ambiguity) is necessary for all legal instruments. Similarly lawyers love coining abbreviations ("a disc operating system ('DOS') ...") and then using them come what may. This habit is catching. Non-lawyers now use the device in official writing and

often justify it by reference to legal use. Like many potentially useful short cuts, it is often overdone.

Consider also this notorious passage:

For the purpose of this Part of this Schedule a person over pensionable age, not being an insured person, shall be treated as an employed person if he would be an insured person were he under pensionable age and would be an employed person were he an insured person.

This passage contains a number of defined terms, and its compression and incomprehensibility come about because the drafter felt compelled to use those defined terms. Depending upon what the drafter really meant to say, and the contents of the rest of the instrument, a better shot at it might be along the following lines.

- (1) A person who is over pensionable age is to be treated as employed if the following two conditions are fulfilled.
- (2) The first condition is that he is not insured.
- (3) The second condition is that he would be both insured and employed if he was under pensionable age.

Naturally, it might still be necessary to define or describe "pensionable age" and "insured" and "employed". But that would be preferable to getting stuck in the tramlines with "insured person" and "employed person".

### Deal with related definitions together

Instead of creating one alphabetical list, think about creating a separate clause for important inter-related items. Consider a document dealing with the business of jet boats. It proves necessary to state (or define) what is meant by "boat", "jet boat", "adventure jet boat" and "non-adventure jet boat". If these are dealt with alphabetically, the reader does not know what is meant by a "boat" when he or she reads the interpretation of "adventure jet boat". The problem is compounded if all definitions in the documents are lumped together in one alphabetical list. The solution is to separate related definitions into a subgroup and then move from the general to the particular or the more particular. So in our example, the heading might be "Meaning of 'boat' and related expressions" and the order in which the items are dealt with would be (1) boat (2) jet boat (3) adventure jet-boat (4) non-adventure jet boat. Similar examples are legion, for instance "substance", "noxious substance" and "non-noxious substance".

### Put one-off or localised definitions where they arise

Many definitions are used only once, or only within a particular part of a document. These are best placed

near where they occur rather than included in a list of general definitions. Otherwise, there may be no easy way of pointing the reader to the place of definition or even of reminding the reader that the word or phrase is used in a special sense.

### Use one-off definitions with care

One-off definitions (sometimes disparagingly referred to as “one-shot” definitions) have their place, though they should be used only where they help the reader. Take this simple rule, for example:

- (1) Adventure jet boats that operate on braided rivers must be fitted with a structure which allows emergency exit for all persons when the boat is inverted on solid level ground.
- (2) A **braided river** is a river flowing in a number of channels separated by stable or unstable bars or shoals.

Conventional wisdom would have the one-off use of “braided river” combined with the main rule, producing something like:

Adventure jet boats that operate on rivers flowing in a number of channels separated by stable or unstable bars or shoals must be fitted with a structure which allows emergency exit for all persons when the boat is inverted on solid level ground.

That is just about acceptable, unless “braided river” has a particular resonance for a large proportion of the intended audience. The technique would not be acceptable if the necessary definition of the chosen term was much longer.

### Avoid alphabetical lists

Long alphabetical lists are to be avoided, for the reasons indicated earlier. The longer they are, the more muddling they can become. Do not force your reader to go to a long dictionary of your own devising whenever a term might be defined. If you choose to use an alphabetical list, do your best to show (subtly and so as not to disturb the sense of the sentence) that a word or phrase is used specially.

### Use an index of defined expressions

One technique for collecting together definitions or terms explained or used in a special way is to collect them all into an index of defined expressions. This index will usually come at or towards the end of the main body of a document, but before the schedules. It can prove a neat way of gathering together one-off or localised definitions with general definitions. In fact, why not go further in long instruments and incorporate a general index for the whole document? The index might be made a clause or left independent. If it is a good index, that should not matter either way.

### Give explanations or descriptions rather than definitions

The private drafter almost always resorts to dictionary-type definitions. The public drafter is often more astute, relying where appropriate more on explanations or descriptions than on pure defining—even if that defining is sometimes preceded by “includes” rather than “means” (the standard lead-in word) or “is” (a non-standard but often useful variant). A good example of the explanation is found in the admirably well drafted UK Arbitration Act 1996 s 5(2):

There is an agreement in writing—

- (a) if the agreement is made in writing (whether or not it is signed by the parties),
- (b) if the agreement is made by exchange of communications in writing, or
- (c) if the agreement is evidenced in writing.

### “If the context so admits”

This qualification and similar phrases have been condemned in no uncertain terms by David Mellinkoff and others. A good drafter will always try to ensure clarity and avoid ambiguity. If this is not achieved, context comes into play. Though a drafter is always free to disapply a definition, he or she should try to do so knowingly and expressly rather than by leaving it to implication. It follows that “if the context so admits” and related expressions are best left out.

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### Clarity: electronic or paper?

We publish *Clarity* in both electronic (.pdf) and paper forms, in May and November. The electronic version reaches you sooner, because the paper version has to be posted from the US all around the world. You can ask for *Clarity* to be delivered to you either or both ways.

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## O ate 2 of Jill'r pairs

**Richard Lauchman**

*Lauchman Group Consulting, Maryland*

*For 21 years, Dr Lauchman has fought the battle in the trenches. He presents writing workshops, remodels documents, and provides plain-language consulting for nearly 100 organizations, half of them in the US Government. In this article, he continues the Clarity debate on the use of numbers.*

If I know anything about readers, the title of this essay is more mystifying than edifying. As a structure of language directed toward speakers of English, it fails to convey anything in particular because it violates several conventions. When I recast it to read "I ate 2 of Jill's pears," I clarify meaning, but something still isn't quite right. The use of the numeral is unconventional here. At first glance, that doesn't seem like a big deal; after all, the reader is capable of grasping the writer's intent. Isn't he? And that's what we want, isn't it?

The answer to the first question is Yes. The reader understands the meaning of "2". The answer to the second question is a resounding No. What we should want is an outcome profoundly different from the reader's managing, through various athletic maneuvers, to snatch our meaning. What we should want is an outcome where the meaning is easily plucked. That's what I'm writing about here: the degree of labor we impose on readers. Regardless of our motives, we increase that burden when we are guided by principles that have little to do with how writing communicates.

What provoked me to think about the matter is *Clarity's* recent editorial decision (in *Clarity* No 49) to use numerals in all cases where a cardinal number is expressed. Dr Eagleson's article in *Clarity* No 50, "Numbers: figures or words" argues eloquently for expanding the use of the numeral, and I agree with much of what he says. Where I cannot agree, I find that my objections have to do with my sense of exactly how immutable, in the opinion of readers, the various conventions of number use currently are. I suppose I'd better say that my purpose in writing this is not to rebut Dr Eagleson. Nor is it to address the conventions of number use. My purpose in writing this is to make a broader point about the danger in tinkering with what works.

## The importance of "invisible" style

*First, do no harm.* This is the Hippocratic Oath and the guiding principle of the medical profession. Writers and editors should also be guided by this principle, along with another one, usually expressed in crackerbarrel vernacular as *If it ain't broke, don't fix it.* We do more harm than good when we abruptly change language conventions that are causing no great inefficiency.

When we start from the premise that language is a medium for conveying ideas, it follows that the medium itself should not attract the reader's scrutiny; style should be invisible, a non-issue, so that the reader has unobstructed access to ideas. When style calls attention to itself, readers abruptly stop seeing the ideas and focus instead on the medium. And here it may be more accurate to say that intruding style actually prevents readers from concentrating on the ideas and forces them to focus on the medium.

When the medium distracts, readers begin asking questions that have nothing to do with what the writer is trying to convey. Suppose I decide that "nud" would be an excellent addition to English. After all, we have "nod" to capture the affirmative shake, but we have nothing simple to convey the negative shake. And sooner or later someone has to introduce the word. And so I write, "When Greenspan asked whether he had made himself clear, the reporters nudded." What I've done is ambushed the reader, and my reward goes something like this: *Nudded? Is "nudded" a word? Am I supposed to be familiar with it? What does it mean? Does it mean shaking your head in disagreement? If that's what it means, why didn't the writer say it that way? Did he invent the word? If so, then who does he think he is?* These are a few of the questions that will occur, and there are plenty of others. Some readers, for example, might wonder whether the writer has a shadowy agenda.

It seems to me that we don't want this outcome. What we do want is invisible style, and in order to achieve it, we need to honor convention when it comes to the innocent things. Without doubt, many conventions of the English language appear nonsensical in the harsh light of logical scrutiny. Spelling springs to mind. In English, the spelling of many words might justifiably be called arbitrary and capricious. And certainly it would be more logical to behave as the Germans do, and spell every word the way it sounds. But insisting on a purely mathematical logic (the logic of consistency) is impractical in instances where a different kind of logic holds sway. In the enterprise of communicating, there is a different logic at work—the logic of expectation—and it is only by employing this logic that a writer succeeds. The logic of consistency yearns for "nud"; the logic of expectation is baffled by it.

## Evolution works; mutation doesn't

We would do well to remember the chilly reception given those who have advocated a phonetically uniform spelling of English words. The same reception has greeted those who, wishing to stamp out the gender bias they find inherent in the promiscuous use of "he," "him," and "his," have suggested gender-neutral pronouns. *Tey* (he or she), *tem* (him or her), *ter* (his or her), and *ters* (hers) flashed across the lexicon in the 1950s. And since then, people have seriously put forth a number of variations on the theme. (These variations include *ve*, *ver*, *vis* and *co*, *co*, *cos* and even—with politics peeking out—*she*, *herim*, and *heris*.) The motive may be laudable from the standpoint of achieving precision, but we do not see these structures in the language. The reason we do not see them is that there is a conspiracy against their use—against their being anointed as "words"—the irrefutable and utterly democratic conspiracy we might call the will of the users of language. Experienced writers know a number of ways to avoid writing *If the applicant passes his physical exam, he will be scheduled for a polygraph*. For less experienced writers, faced with the possibility of sounding sexist, being indicted as sexist seems the lesser of two evils when compared to *If the applicant passes ter physical exam, tey will be scheduled for a polygraph*.

Language users are an intractable lot. We balk at changing our conventions, and our reluctance is practical even if it isn't entirely logical. Why is it practical? Because it enables us to get on with communicating. So far I haven't heard anyone arguing that our conventional way of forming possessives is biased. We write "Jack's hat" and we write "Jill's hat," and in both cases we are contracting "his." Buried under centuries of subtle etymological metamorphosis are the bald phrases "Jack his hat" and "Jill his hat." Certainly such phrasing isn't logical if Jill is female. More than illogical, it could be yet another example of gender bias. So, if we shrug off the mandate of what readers expect, we might claim that it is logical to leave "Jack's hat" alone but to substitute *Jill'r hat* ("Jill her hat") when we are talking about Jill, and to do the same for all female referents. But to arrive at such a conclusion, we would have to be looking at speech acts in a way our readers never do.

This is an important point. In the ordinary course of events, the reader does not ponder every least aspect of a writer's style. What the reader wants to do, what he tries to do, is simply get the point. If the writer is of sound mind, he understands this, and he clears a path for the reader to get the point. What he should not do is plant little land mines in that path. Regardless of how aesthetically pleasing "enuff" may seem to the logic of consistency, spelling "enough" that way is planting a little land mine. The outraged cry of users of language might be, "Enough is *enough!* Enough is not *enuff!*"

In time, "enough" may become "enuff." How language conventions change—I did not say deteriorate, but change—is not the issue here. The point is that conventions change gradually. They evolve; they do not mutate. Mutations of all sorts, not just in language, are abrupt and unexpected, and because they are unexpected, they deserve and receive a stare. I could suddenly decide, for example, to use "O" as the first-person pronoun. My reasons might range from the metaphysical to the symbolic, and they might even make sense. But O would have to have a screw loose if O believed that the result wouldn't halt the reader in his tracks.

## Distinguishing convention from idiom

What should matter to us is the practical result of our choices. To me it's reasonable, and highly commendable from the perspective of pragmatism, to argue for simplifying words and phrases that are unnecessarily complex. It is undeniably an act of good faith to eliminate *Further affiant sayeth not* and its shaggy, inbred cousins, especially when writing to non-attorneys. But there is an important distinction between the idiom of a profession and the conventions of a language. And I think it's unreasonable to argue for tinkering with conventions that cause no harm.

For precisely the same reasons that the practical writer uses "I" as his first-person pronoun, he spells the number when it starts the sentence.

Three of the speakers were excellent, but the other two were mediocre. One actually seemed half-asleep at the podium.

3 of the speakers were excellent, but the other 2 were mediocre. 1 actually seemed half-asleep at the podium.

The first example conforms to convention. In this analysis, what's far more important is that it expresses its meaning in a way linguists call "prereflective"—in plain language, neither writer nor reader has to think about it. It's conventional. It's expected. What all of this means is that the style succeeds in becoming transparent. The transfer of ideas from page to reader is immediate and effortless.

The second example expresses the same meaning, but the transfer is not immediate. Looming between words and meaning is the necessity of performing an analytical effort not required by the first example: puzzling over the presence of numerals. And of course, what ensues is the series of questions unrelated to the writer's intent, as the reader wonders, *Why did he use "3" instead of "Three"? Have the rules changed? Is the writer an iconoclast?* And so on. And that's quite a bit of distraction packed into a single keystroke—distraction that would not have occurred had the writer left well enough alone and simply used the convention.

## O ate 2 of Jill'r pairs

(continued)

Now in discussing matters of this sort, each of us is at the mercy of experience: I've developed my sense of language convention from what I've read, you've developed yours from what you've read, and Ichabod, over there in the corner, has developed his from what he's read. As an American, I put my period inside quotation marks. If you were a Canadian, you would put yours outside quotation marks. Ichabod will use whichever placement conforms to his experience. But one thing is certain: as readers, when we see a number at the beginning of a sentence, all three of us expect that number to be spelled.

Let's remember exactly what it is about a usage that makes it a "convention." First of all, it is an agreement, among users of language, to behave in a particular way: to capitalize the first letter of a sentence, generally use "s" to form plurals, and so on. As an agreement, it can be honored or it can be breached. When the convention is honored, it contributes to invisible style; when it is breached, readers notice, and style is yanked into the klieg lights. If we want to minimize the burden on the reader, we must honor the innocent conventions.

Reform has to start somewhere, surely, but we had better be judicious in what we choose to reform. Everyone benefits when we simplify the complex idiom of a profession, but everyone suffers when we violate the conventions of language itself. The rough road needs repair. Smooth pavement does not.

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## Freudian slip

While editing this issue, the editor in chief came across the expression "pain legislative dafting" in one of the items (we won't say which).

Yes, indeed. Some days it feels just like that, doesn't it?

# The *doleful* grip of convention

## Dr Robert Eagleson

Plain English consultant; formerly Associate Professor of English Language, University of Sydney

*In recent issues of Clarity there have been 4 letters and 1 article reacting negatively to the use of figures in all contexts. But have the critics touched on substantive issues and real weaknesses or have their responses been sparked by sentimental attachment to a convention familiar to them? Do we need instead more generous consideration of the practices and needs of all readers, not just our own, and more rigorous thinking on the development of language and on the standing of conventions?*

Webster's Third New International Dictionary of the English Language Unabridged was published in 1961. A magnificent contribution to the development of English lexicography, it recorded that *infer* and *imply* now overlapped in meaning, that *transpire* had acquired as 1 of its senses 'come to pass, happen', and that *due* to now operated as a preposition with the sense of 'because of', objectively without condemnation because the practice of the community had developed along these lines. Prescriptivists condemned this approach as "accelerating the deterioration of the language" and "renouncing the duty to defend the niceties of the language against the erosion of vulgar usage".

I was reminded of this episode when 4 letters on the use of figures for numbers were published in *Clarity* 50 and 51. For Christine Mowat 'starting a sentence with a number is like going to a party bare-chested'. Ken Bulgin holds that using figures for numbers under 100 is 'slipping into the stunted vulgarity of textspak'. And Nick Lear dismisses the universal use of figures as 'silly'.

### Protestation without proof

For all their emotive force these protests come strangely without proof. Ken makes no attempt to explain why *by 5 August* preserves the fineness of the language but *within 5 days* hurtles us into tastelessness. Nick does not explain how *The company has 5 directors* is 'silly' but somehow *The company has 5 directors and 612 shareholders* (as required by the convention on numbers set out in *Clarity* 29) returns us to soundness. Nor do we learn why a sentence beginning with a single digit figure can cause

Christine to feel in dishabille but a sentence beginning with a single letter word (even *I*) leaves her demurely clad!

All we have from the objectors are assertions and denigrations. Mysteriously, they are reticent to substantiate why they consider words better than figures. It would be especially good to have evidence from them that less-able readers find words more comprehensible and more effective in some contexts in helping them reach the right message. It is their needs that should be our uppermost concern.

But then, they cannot even agree about the scope of the convention: Ken wants words for numbers 'under 100'; Christine, for numbers 'under 10'; and Nick for 'low numbers' (*sic*).

### Some substance to explore

To his credit, Don Revell offers a concrete reason. He finds the typographical similarity between *I* and *1* together with the lack of context creates difficulty for him when *1* occurs at the beginning of a sentence. It may be that the figure and the letter are not differentiated clearly enough in the typeface we used and that we need to select faces that are stronger in this regard. Don's factual observation opens the way for us to test this.

On the other hand it may be more a question of familiarity, as we discovered once when we were converting the text of a contract into plain English and introducing a new layout, including shorter lines, as part of the process. At the first drafting session 1 lawyer announced that he much preferred the more traditional line length (about 170mm). At the next session 2 weeks later he declared that he had come to find the shorter line was much better. He needed a little time to adjust.

It is at this stage that some hesitation creeps in over the thrust of Don's objection. There is a revealing comment in his letter: 'Virtually all your audience has been taught since grade school that where a number appears at the beginning of a sentence it should appear in words'. Could his then be an instantaneous, knee-jerk reaction? Certainly, there is no reflection on change in language in his observations. Yet in recent decades we have seen punctuation in addresses abandoned and rules on

## The *doleful* grip of convention

(continued)

the indentation of paragraphs in letters modified. The old conventions on these matters were also taught tediously at school and admittedly some had trouble converting to the new procedures, but change we all did over time. Those who are currently having difficulty with sentences beginning with a figure—and many do not—may find with more exposure to the practice that their difficulty disappears.

We should still investigate Don's objection because it is a genuine one. But our testing procedures must encompass all angles.

### Fact or theory

Failure to take account of the processes of change in language also undermines Richard Lauchman's arguments on pages 34-36 in this issue. We cannot invent examples in the privacy of our studies and extrapolate from them: instead we must see what actually happens in the real world. Then we discover that people cope with both new and hitherto-unknown existing words without feeling "ambushed" as Richard portrays. It is not reasonable to expect readers to know every word they come across and not valid to always confine the compass of a writer's vocabulary. This is why we have dictionaries and insert explanations in plain language documents.

In other areas of language, variations arrive unsystematically and piecemeal, not changing a whole domain at once. The history of numbers testifies to this gradual process. The territory for the use of words has been progressively whittled away. Today there are newspapers in the UK, Canada, USA, New Zealand, Singapore and Australia that restrict words to 1-9, and have handed over 10-99 to figures, no doubt to the chagrin of Ken Bulgin but unremarked by the general population. Using a figure for every number within a sentence is only a small extension of this development. On this point it is illuminating that Don Revell does not report figures as a stumbling block when they are within a sentence. Placing a figure at the beginning of a sentence is only the next small step, not requiring the community to adopt a new sign but simply to use a much-used sign in yet another position. Some have already taken this step, logically standardising the system. Whether others follow them is their choice. We have managed to live with linguistic variations among English speaking communities for centuries.

Again, our grammatical structure has witnessed change. *Thou* has vanished from general use; meanwhile *they* is expanding into the singular. *Than* is classified as a preposition nowadays and *taller than me* is winning out. Some of these changes come about as a result of the innocent actions of members of the community who are oblivious to existing

"rules" or have forgotten them. We may regret the loss of useful distinctions, but we have also learnt to work our way around any problems without a nervous breakdown. Otherwise how did we manage to move from Old English to Middle English, let alone to Modern English?

### Insular speculations

At the beginning of his letter of protest, Nick Lear opined that the use of figures in *Clarity 49* was an experiment and went on to quote Joe Kimble's dictum 'wherever possible, test consumer documents on a small group of typical users'.

The use of figures for all numbers in *Clarity 49* was no experiment but only the continuation of a well established practice. For example, the Singapore Land Authority, which has extensive contacts with all sections of the community, has been using figures in correspondence, circulars, reports and forms since at least 2001, and possibly earlier. The Authority has never received any protests from members of the community. The reasons are obvious. Most readers are concerned with the message. Few have endured the scourges of doctrinaire editors to make them conscious of alternatives. Moreover, figures are likely to be their natural response. Say a number aloud, and most people will conjure up a figure in their mind's eye, not a word.

To cite 1 other example from another country. Parliamentary counsel in Australia have used figures for words for some 30 years. Section 52 of the Companies (Acquisition of Shares) (Victoria) Code 1986 contains 'not exceeding 5 years' and 'within 2 months', to quote 2 of a continuous stream of occurrences.

From 1993 to 1997 the Australian Government appointed a task force to supervise the rewriting of the Corporations Law in plain English. During that period 2 Acts containing rewritten portions of the Law were prepared and passed by parliament. Draft texts of each Act were tested in every capital city, with over 40 test groups and some 500 participants. As well, we met every Law Society and Bar Council in the country. Although other points of language, such as the use of *they* as a singular pronoun, were queried, at none of the tests or meetings was the use of figures challenged. Nor is it the case that their use could have been overlooked. In section 169 there are 3 figures in 13 consecutive lines of text; and the number 1 occurs in the headings of consecutive sections 248A and B, and a further 2 more times in the 3 lines immediately following the second heading. It can be fairly claimed that in the extent of our testing we had out-Kimbled Kimble!

Insularity also bedevils the speculations in Richard Lauchman's article. At 1 point he writes:

As an American, I put my period inside quotation marks. If you were a Canadian, you would put yours outside quotation marks. Ichabod will use whichever placement conforms to his experience. But one thing is certain: as readers, when we see a number at the beginning of a sentence, all three of us expect that number to be spelled.

In addition to the information just discussed, contrary facts were to hand in *Clarity* 49 and 50 to indicate a more complex linguistic setting. Moreover, why does Richard tolerate a Canadian placing periods in a different position but not Singaporeans placing figures in new positions? Why does he assume that everyone will react negatively rather than see the advantages in another option and adopt it? There is the evidence from practitioners of plain legal language and members of the public that many welcome enthusiastically change from legalese. And an American should not doubt the adaptability of a community given the readiness of so many in his own to adopt Noah Webster's innovations.

We need to step outside our own group if we are to make reliable and realistic observations on the community's usage and conduct.

### Blind spots

We are all likely to have blind spots on language. We usually acquire them as students or young writers. A teacher requires *different from*, a law lecturer insists on the spelling *judgment*, a publisher holds that a sentence cannot end with a preposition or that some numbers must be presented as words in a certain context. We conform out of respect, or to avoid penalties, or to have our articles published. Over time we lose sight of the fact that as language these items are only arbitrary, and therefore mutable, signs. They take on the status of unbreakable laws and unthinkingly we come to accept them as marks of the literate person. We then feel the need to resist any proposed change as a lowering of standards and as a threat to what we have (wrongly) come to hold as cultured.

A classic example is *program*. This was the accepted spelling from the time the word was introduced into the language until the early 19<sup>th</sup> century when the British adopted *programme* from the French. In recent decades there has been a trend to return to the historic spelling, which has been resisted by some "educated" people ironically in the belief that they are preserving the pure spelling.

Another example is the presentation of dates. Beginning with words, *the fourth of May*, we abbreviated to half-and-half ordinals, *4<sup>th</sup> May*, and then reduced further to the stark *4 May*. That we can also have *May 4* further reflects the mutability of the convention.

None of this implies that we must rush to embrace any change that appears on the scene but it does mean that in the environment of change we must exercise rigorous thinking and suppress false notions of what is correct and what it means to be literate. It is always well to remember that many of the forms that we use today without qualms, such as *it's me* and *ice cream*, were heavily criticised by the "purists" of yesteryear.

### Convention or principle

We reach its true objective when we have used language to enlighten others. There is always a danger in seeking to maintain a convention that we lose sight of our audience and ignore the more critical principle that language was made for man, not man for language, to adapt a saying of Jesus Christ. It is this principle that moved us in plain language to bring the audience back into the centre of the stage, insisting that its rights to understand were paramount and that clarity was as important as precision. This principle constrained us to reject the time-honoured convention of lawyers that exceptions had to be expressed with the main proposition, thus producing inordinately long sentences. It impelled us to challenge the notion of settled terms. It is this principle that guides us in striving to produce documents that readers can comprehend—and with the greatest ease to them.

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# Citizen's Language

## *Plain Language in Mexico*



### Salome Flores Sierra

*Plain Language project leader*

*Since President Vicente Fox took office in December 2000, the Mexican Government has actively encouraged reinvention and implemented innovative practices in each of its institutions. These efforts have demanded not only a radical transformation of traditional schemes of public management but the establishment of a new culture where public servants face their government work with a renewed positive attitude.*

*As part of the Better Regulated Government mandate, one of the six strategies of Mexico's Good Government Agenda, the Government of Mexico launched the Lenguaje Ciudadano initiative (Citizen's Language) on October 4<sup>th</sup>, 2004.*

This interview with the Deputy Secretary of Public Administration, Jesús Mesta (JM), and General Director for Better Regulation, Carlos Valdovinos (CV)—leaders of the Plain Language initiative in Mexico—will explain this project as part of the government-wide strategy to transform it into a citizen-driven institution which will help Mexicans get a government that operates the way they want it to work.

### **Mr. Mesta, could you explain the overall strategy in which Plain Language inserts itself?**

**JM:** With President Vicente Fox's election in 2000, Mexico joined more than 40 countries world-wide who are focusing on public sector reform based on the following principles:

- improve competitiveness,
- enhance accountability,
- restore citizen trust in government, and
- reduce deficits.

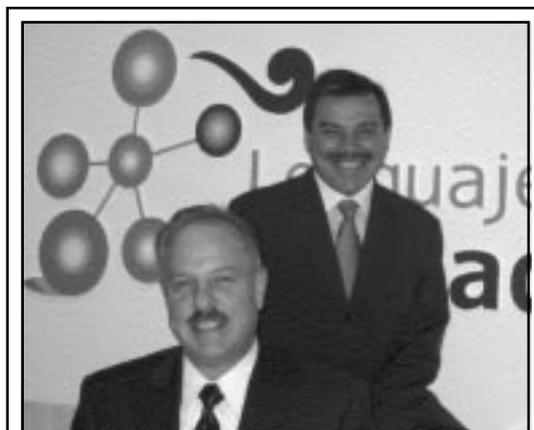
This reform is being institutionalized by the Ministry of Public Administration and is orchestrated around the Good Government Agenda. The Agenda is based on successful performance management strategies and international best practices.

The President's Agenda for Good Government is this administration's commitment to create a government that is responsive to citizens and focused on results. Its six strategies are:

- **Government that costs less:** Direct spending to programs that benefit citizens like health and education while reducing program overhead expenditures.
- **Quality government:** Satisfy or exceed citizen expectations of the services delivered to them.
- **Professional government:** Attract, develop and retain the best women and men in civil service; we passed the first ever Civil Service Law.
- **Digital government:** Enable citizens to access government information and services from the comfort of their homes or offices.
- **Better regulated government:** Guarantee that citizens and public servants can complete their business easily, securely and quickly.
- **Honest and transparent government:** Restore society's trust in government; we have now a Freedom of information Law which ensures that society and media access government records.

The Agenda for Good Government is being implemented by teams in every federal agency through a series of management networks led by the Assistant Secretaries for Management and Budget in each Cabinet Department. The Office of Innovation in the Presidency is responsible for coordinating and tracking the networks' results. In addition, each Cabinet Secretary has incorporated performance targets for the Agenda in their Performance Agreements with the President.

Since Government Innovation refers to a cultural



*Jesús Mesta (front) and Carlos Valdovinos (rear), leaders of the Plain Language initiative in Mexico*

and structural movement that aims to improve the orientation, the capacity, and the strategic response of public administration, restructuring everything from multiple perspectives, Plain Language is an ideal tool to help public servants embrace the cultural shift that is needed to change government services into citizen-oriented services.

### **What kind of steps has the Government of Mexico taken to improve communication with the citizens?**

**CV:** Our final objective is to improve productivity and competitiveness by ensuring that citizens and civil servants carry out transactions easily, securely and quickly. Plain Language as part of the Better Regulated Government strategy is one of the most important initiatives we have to accomplish this. Other tools the Government of Mexico has developed:

- Developed <[www.normateca.gob.mx](http://www.normateca.gob.mx)> the one-stop portal for government regulations. So far, 25% of regulations have been eliminated and the portal receives 20,000 visits monthly.
- Established a moratorium on regulations until 2005.
- Created the Rapid Business Opening System (SARE); with it small businesses can start operations within 72 hours.
- Eliminated conflicting requirements between agencies by standardizing regulations.

The next step is to rewrite all instructions and regulations affecting citizens in Citizen Language. Its prime directive is to redesign all communications to meet the reader's needs. This does not mean to make technical language simple, but to adapt the language to the reader and so, elevate the level of competitiveness.

### **How do you plan to get the Plain Language initiative implemented?**

**CV:** We have discovered that bringing international experts, who have been involved in developing successful Plain Language strategies in their own countries before, to explain their model to Mexicans is the first step towards awareness and change. That's the reason for the October 4<sup>th</sup> international conference that will launch this initiative. A Spanish language expert, Daniel Cassany, will come and explain the cost of written language in public organizations. Barbro Ehrenberg-Sundin from Sweden; Maggie St. John from Plain Language Commission, UK; Annetta Cheek from the US; and Robert Eagleson from Australia will participate in a panel to present the model they have used in each of their countries and discuss their successes and challenges. We expect that by the end of that week Mexican public servants will know what Citizen Language is and the important cultural change needed to improve government's written communication will begin.

This is the most recent step in a three-year strategy to reform internal regulations and the first one in changing government—citizen communication.

### **What are the next steps in the Citizen Language strategy?**

**CV:** As we mentioned before, the first step is to get public servants to grasp the importance of language in government communication to citizens. We understand Plain Language as a tool for elevating Mexico's competitiveness, as it has been proven in every country where a Plain Language initiative has been implemented. Better-written communications means that citizens invest less time trying to understand what the government requires from them to provide services; administrative costs go down, efficiency comes up and in the end we have a Government that serves the citizen better.

Our second objective is to train the people in charge of developing communication materials and writing regulations on how to write Plain Spanish documents. For this reason we have come up with a series of materials they will be able to take home on the day of the launch. We are developing a manual, based on international guides and Mexican needs; a one-stop website with international best practices, and a series of workshops.

**JM:** In November, the Presidency holds its annual National Week of Innovation and Quality and as part of it there will be a Citizen Language Workshop for 100 high-level public servants. We will also hold a "train the trainers" workshop to institutionalize the cultural change.

### **Where can we get more information?**

**CV:** By October 4<sup>th</sup>, we will launch the Citizen Language web site <[www.lenguajeciudadano.gob.mx](http://www.lenguajeciudadano.gob.mx)>, which will include all material developed for the strategy and references to international Plain Language web sites. You can also get more information from us at [cvaldovinos@funcionpublica.gob.mx](mailto:cvaldovinos@funcionpublica.gob.mx).

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*Salome Flores Sierra is project leader of the Plain Language Initiative in Mexico. She has a Masters in Public Administration from the University of Canberra and has been involved in different projects for better regulation in her current position at the Ministry of Public Administration.*



## Exploring meanings of plain language

Christine Mowat

*Plain language philosopher, Edmonton, Canada*

*In spring 2004, members of Plain Language Association International (PLAIN) listserv vigorously discussed Douglas Aoki's Harvard Educational Review article<sup>1</sup>. Aoki sharply criticized the idea that the teacher's role is to translate complex materials into plain language. The PLAIN discussion, in its defence of plain language, mocked postmodernist theory in general and Aoki's article in particular.*

*Intrigued by the seemingly outrageous contention that "a love of clear writing turns out to be a hatred of language", I began my intellectual dance with Aoki and Lacan's theory. I wrote the paper below for the listserv, as it describes that dance.*

*Reactions to the paper varied dramatically. One person argued that, no matter how atrocious Aoki's writing, I was determined to find some justification for it. Another wrote that a reasoned attempt to find value in difficult academic discourse was the gentler and more reflective response to it.*

This response to a request that we look at the Aoki article is both late and long. Don't read it if you are not interested in thinking about the philosophy underlying plain language.

Despite its complexity—even density—and often seemingly purposeful obfuscation, Aoki's article raises a number of theoretical questions for those of us who call ourselves plain language specialists. Better the enemy you know than the one you don't know, I say. And, I'm not even sure Aoki is an enemy. Astonishingly, I found parts of his article well written, some engaging because of image-evoking comparisons, and some, dramatic and passionate. I found other parts head-achingly difficult.

I should tell you something about my own background, and the way I read the article, because I am clearly at odds with the responses to Aoki on the listserv so far.

I often work in plain language at the level of white-collar literacy, that is, I am not usually trying to write at a grade 5 or 6 reading level. Years ago, I spent four undergraduate years studying philosophy. Perhaps that's why I have more tolerance for

Aoki's writing. There were 12 of us in honours philosophy, and we devoted a whole year to Kant's *Critique of Pure Reason*. For me, that year invoked a fear of misunderstanding, the hardest and most passionate thinking I've ever done, and intellectual delight.

So when Aoki writes (on page 9):

I am *not* arguing against clear writing, nor championing a ludicrous ejection of plain language from sociology, education or the academy in general. Rather, I am contending that clarity cannot escape difficulty, that the thing never speaks for itself, and that texts [such as] Lacan's, which do not disguise that immanent difficulty . . . but confront the reader directly [as] crucial to thinking . . .

I felt relieved. But let me go back to the beginning.

### Creating context— is it part of the plain language process?

Aoki opens with a story of a family who would play a parlour game reading academic sentences out of context and then bursting into laughter. Aoki calls this *radical decontextualization*. His point, I believe, is that without a broader knowledge of the scholarship (or context) from which the sentence was generated, we may judge too quickly, facilely, and so inappropriately. (And that is why a subject specialist is so important to a plain language rewriting team, for example, one tackling the rewrite of a mortgage or securities legislation.)

### Ways of reading unfamiliar text

Let me add another two of my reading biases. The first is that I do not always consider jargon as pejorative. (Indeed, Aoki uses Lacan's jargon often.) My newest *Oxford English Dictionary* (1998) definition of *jargon* is "(a) special words or expressions used by a particular profession or group that are difficult for others to understand and (b) a strange, outlandish, or barbarous language". The first meaning may be what Aoki suggests though he quotes critics of Lacan as denoting (b).

I understand that Aoki (and Lacan) enjoy respect from within a restricted postmodernist linguistic community. Even a reader outside the deconstructionist camp, however, can appreciate some of Aoki's arguments. The writing, with its insider jargon, is clearly not aimed at the public. To mock it, especially by extracting isolated sentences, does no good for our plain language cause. (Having said that, I think Aoki misrepresents the complexity of plain language and certainly produces more than his share of impenetrable prose.)

The second bias, or perhaps *perspective* is a better word here, comes from a background in teaching reading to professionals—for those in university executive development programs, for example. I try

to read in stages. In the first stage, I am a friend of the writer. I try to understand the content and welcome the challenge of new ideas and language.

With Aoki, that was a real struggle.

I admit I found myself marching through paragraphs, underlining and bolding furiously; scribbling notes, premature rebuttals and retorts; expostulating, posing questions and drawing arrows to indicate what I thought were contradictions. I read and reread. I jumped paragraphs that were nonsensical and turned to read the conclusion before finishing the rest. Then I went back and stroked out what I felt was extraneous to what mattered to me as a plain language specialist. That included the long section on safety and the analysis of fraudulent scholars, fascinating though those were.

I read all the notes in order as I re-read, and though they were not all clear to a non-sociologist outsider, they often gave me a helpful context. Then I went back and critically analysed what interested me.

We know readers choose to read materials with the political and values biases that support what they believe. This article of Aoki's seemed initially to be antithetical to everything I believe.

### Surprises—treasures as well as outcasts among the verbiage

But I was surprised at the results of my reading. Here is what I found:

1. I agree that dense intertextual references demand a familiarity (Aoki calls it *fluency*) with theory and that theorists in a discipline such as sociology live, work, and think in what he calls a "certain social-theoretical sub-culture". Does that mean we cannot use plain language to make this knowledge accessible to others? Aoki thinks not because of his restrictive meaning of *plain language* and its relation to what he calls "the art of teaching" (simplifying and making meaning accessible to all) as opposed to "teaching" (more ethical in his view).

The ethical form of teaching Aoki prescribes forces the reader-learner (and presumably the professor) to face the "thing in itself", the original verbal formulation of complex ideas. I'm not sure that opposing these two ways of teaching is helpful. Aoki never does explain *how* he actually teaches. (Surely he does not just parrot-like quote Lacan? Since he seems to passively box himself into a corner confronting "the thing in itself", plain language seems to offer a commonsense way out, both for learner and lecturer.) And the type of clarity, facilitation, and precision involved in the quality of

plain language translation we plain language specialists espouse rebuts Aoki's narrow view of *translation*.

I discovered that both Aoki's notes, and different ways of saying the same thing with examples, helped give me context for his complex arguments. Though Aoki restricts his definition of putting complexity into plain language to *translating*, I believe that contextualizing is another aspect of the plain language process. I had not thought specifically of that theoretical level to our work.

2. I agree with Aoki that *plain language* is itself ultimately not plain. We know when we have written or rewritten something well in plain language. But, define and explain as we might, we cannot *exactly* describe just what we have done. The whole process is greater than the analysis into steps, and we know it. But we can come pretty darn close. And maybe that ideal is happily beyond us. We *do know*, however, that we need to think more about clarifying, and publicizing, our multi-disciplinary field of plain language.
3. I agree with Aoki that "a child learning a new word is an archetype—perhaps *the* archetype—for education . . . For parents, an infant's first word is nothing short of miraculous". It is marvelous to learn a new term, even now. (While reading Aoki, I learned several new words.) He says Lacan believes the entry into language "is the very accession to being human". (Plain language translation: Language is what makes us human.)  
But his next jump is to suggest that repudiating jargon is the opposite, what he passionately calls "the outraged refusal of the word"! Well, if eliminating jargon means missing the point of the complexity and originality of its author, means that the essential meaning is violated, means that the richness of ideas is watered down, and strained to a skeletal representation of its full-bodied self, then that is not what I or other plain language specialists mean by translating into plain language. And to set up this kind of straw figure and knock it down is unhelpful.
4. I agree that a large part of plain language re-writing is translating. But not if we accept Aoki's meaning of *translation*. If I have it right, he argues that translation implies a loss of meaning, complexity and rhetorical style. His discussion rests on a bipolar view of teaching and language. Below I show the polarities he suggests:

## Exploring meanings of plain language

(continued)

Aoki, Lacan, and others believe in:	Plain language sociologists believe in (from Aoki's perspective):
The rigour of technical vocabulary and the danger of an easy and readable style.	Clear, simple language.
Sheer inaccessibility: Lacan prefers to "be difficult" and the only way in or out of his text "will be anything but plain".	Meeting the consumer demand for language that is accessible. Aoki says the result is a "reconfiguring" of the university as a business with students as clients.
Clarity that is too frequently a name for fantasy. Clarity is not innocent, but violent.	The "art of teaching", a diminished role that only encompasses <i>translating</i> complex ideas into plain language.
Plain language as seductive because of "instantaneous (though implied <i>superficial</i> ) uptake". Yet that very "velocity" is suspect because it minimizes.	Materialistic professional standards (knowledge is objectified).
Plain language as an activity that simplifies, abandons, displaces and extracts from complexity. Language is reduced to instrumental communication.	Refusing jargon for the sake of clarity and accessibility.
Plain language translation as a material reductive activity. (I think he means making abstract instead of maintaining the complexity's concreteness. Or he could mean significant reduction?)	Championing plain language for its populism. But Aoki sees this as a radical change—complexity fades to sketchy and commonplace.
The phrase, "given enough time" making the statement irrefutable and creating an absolutist statement.	Given enough time, translating even the most complex ideas into plain language.
The more one faces difficult terms, the more they slip into "ever-increasing complexity and elusiveness" (p.4).	Teaching difficult terms in "other" language.
Plain language makes everyone think alike because everyone uses reductionist commonplace language. "If everyone is thinking alike, only one person is thinking."	A refusal to teach.

Aoki has given his own "plain language" definition of *plain language*. And it does not match my view of what plain language rewriting entails. But his analysis reminds us of what we don't want!

To plain language specialists, translating into plain language means, among other things:

- Replacing abstraction with examples and concrete language.
- Augmenting material that is too skeletal.
- Removing ambiguity.
- Tightening and making more graceful syntactical structures.
- Producing sentence architecture, lengths, and fonts that are easier and quicker to read.

- Reorganizing so readers can easily find key information, and designing documents to make key content or emphasis obvious.
- Writing for our readers.
- Replacing vocabulary with words that mean the same as the original but "saying it better".
- Eliminating verbosity, tautologies, redundancies, repetitions.
- Mirroring the meaning as much as is necessary given our writing purposes and audiences. This includes recasting complex ideas in similar forms (given the immense flexibility of English and a recognition that we never say *exactly* the same thing with two different sets of words, nor do we claim that any two putative synonyms mean

*exactly* the same thing—or we wouldn't have two words!).

- Choosing analogies and image-evoking words and phrases for interest, for persuasion, and for their mnemonic effects.
- Improving grammar, spelling, punctuation, layout, and design.

Aoki himself uses most of these strategies to articulate his own arguments. He frequently uses examples and selective quotations to help glue his arguments together. (If fellow sociologists are not inveigled into reading Lacanian materials as he notes, he could consider trying translating into plain language in the sense in which we plain language specialists mean it!)

### Some disagreements with Aoki's approach to plain language

*He oversimplifies the concept of teaching and circumscribes it in an unnatural manner.* The assumption that teaching is only translation is absurd. If the "art of teaching" is translating complex ideas into plain language, plain language teachers do far, far more, as illustrated above. Such a view postulates a mug-and-jug theory of teaching with the teacher being the jug full of knowledge and the student the mug to be filled up. That view was upended 35 years ago. (But the view that Aoki purportedly aspires to in his teaching, focusing on developing thinkers, not students who mimic easily digestible content, is one I'm sure most of us agree with.)

The view Aoki ascribes to Lacan, that learning never stops, that the process of learning, retranslating, constant rereading, reinterpreting, and rewriting, is not at odds with using plain language to discuss complex ideas. It is as if Aoki thinks of complex ideas holistically, as if they were so bound-about and integrated and like Platonic ideals, that trying to participate in unfolding them were a childish and hopeless activity.

*He says complex ideas can only be understood in their own form as things in themselves.* This line of reasoning leads us to a *reductio ad absurdum* (I can't help myself!). How can we ever know *the other* then? It lands us in the swamps of solipsism, the theory that we can only know anything subjectively, and that there is no objectivity in the act of knowing.

Forgive me: I'm back to Kant and his architectonic (theoretical model). Kant developed a model for knowledge that posited both an objective and a subjective element for every act of knowing. He set the stage for emphasizing the *learning* as much as the teaching, and the *learner* as much as the lecturer. So does plain language. The "slippage" that Aoki and Lacan refer to from language and learning, from refining and clarifying and, to extrapolate, between

plain language drafts, focus groups, and collaborative writers, is the same for us plain language folks as for Aoki, I believe.

*Yet we differ here, too. We do not demand a correspondence between complex language and complex ideas as he does.* Or if we do, we decide to retain words such as securities in securities commission documents, or *architectonic* as above, or selected terms of art in legal documents, by adding explanations, examples, analogies, or visuals. This is not arrogance or to show we are more intelligent: it is the appropriate use of specialized language.

When Aoki says the teaching of sociology is not about the immaculate transmission of objects of knowledge, I clap loudly. But using plain language to clarify is not to objectify knowledge of disciplines. The teaching of any academic discipline is about the process of thinking within a new linguistic culture. So, too, with plain language. Perhaps Aoki would do well to learn more about what our plain language socio-linguistic culture entails. Perhaps we will one day have our own academy?

Plain language requires an intellectual effort that opens worlds to others. Sometimes plain language is complex or sophisticated. But readers bring their own experience and background to each plain language reading task. Plain language means we *try* not to exclude even the most complex of disciplines or texts for those who want to work at understanding them. It does not mean we squeeze out their essence, complexity, or individuality.

By focusing on one misleading category of plain language, Aoki distorts and mocks what I think he does not understand—ironically the complexity of the plain language process.

### How can summarizing be a part of good plain language writing?

Another part of plain language writing is the ability to summarize a document. There is a difference between an academic abstract and an executive summary. In business writing literature, the latter acts as a bouillon cube, sucking up the essence from the whole document and giving essential specifics.

An abstract, however, as in Aoki's article, remains at the level it suggests—abstract. The editor at the *Harvard Educational Review* who wrote this one for Aoki's article did not step down from that abstract level. The abstract did not explain why in his technical language, Aoki said that clear writing threatens both teaching and the university as an institution. Documents written for business, government, or the public, however, demand informative summaries, not abstracts.

## Exploring meanings of plain language

(continued)

### Some objections and appreciation

I object to the way Aoki makes Lacan into a God whose writing is complexly inaccessible, yet perfect; full of elitist jargon that he either doesn't define or for which he gives contradictory definitions, yet admirably profound; and so desirable as a thing-in-itself that, once mastered, a scholar overcomes her or his insecurities about being an academic impostor.

And I object to, and okay, in a way admire, Aoki's playing with language and so playing with the reader's sense of expectation of how words will be used to make sense. Examples include:

- "the exclusions and treacheries of clear language",
- "terribly ugly, seemingly clear texts, and terribly beautiful, manifestly difficult ones", and
- "the problem with Lacan's texts: they are full of language that refuses to disappear into its own meaning, full of language that refuses to annihilate itself".

Such paradoxes obviously frustrate rather than amuse most outside, or even fellow sociologist, readers. But viewed as ways to imaginatively and interestingly make his points, Aoki's intellectual word puzzles may entertain as well as instruct.

Writers such as Aoki write complex, abstract, analytic arguments. I have read economists' papers or policy tomes that exact the same kind of time-and-energy-consuming effort to read. Sometimes learning is translating—or putting into familiar words or *our own words* (personal plain language) what another has written—to make sense of it. Yes, something may be lost in the translation, but that is better than not getting it at all. I'm guilty of a lot of that in this response.

Aoki's paper is not written for the public, or even for plain language specialists. So his claim that the love of clear writing turns out to be a hatred of language may sound comical and contradictory to us. But when inserted into a certain sociological community's academic stream, a stream whose historical context is fed by years of dialogue and intellectual analysis on related topics, Aoki's thesis is provocative.

### Some conclusions

Even *with* the discipline-specific language that Aoki uses, an outsider like me can be appalled at the thought of "dumbing down" curriculum to meet the factory-like conditions in a university environment that Aoki fears. His deliberations alert me to the need for constant vigilance in defining and describing our plain language practices and in explaining and illustrating excellent plain language documents.

Reading Aoki reminds me of the chameleon-like nature of the term, *plain language*. On this listserv, I believe we sometimes give too much time to readability and grade-level research discussions. *Plain language* is an adventurous traveler with eclectic interests. It draws on research in linguistics and psycholinguistics, the composing process, reading, literacy, design, typology and layout, client testing, grammar, punctuation, rhetoric, words—to name a few. It travels internationally and pokes a head into learning centres from universities to public schools, from hospitals to petroleum companies, from securities to human rights commissions.

Though still banging insistently and unsuccessfully at the doors of some law firms, plain language has, I believe, been more consistently welcomed by government justice departments. It finds both comfortable and uneasy places at various levels of government. Plain language wedges its way into bureaucratic, legal, and institutional contexts and gathers around it social language protesters. Plain language consistently confronts the inequities that result from closed and elitist language. We know that plain language is a human rights issue.

Aoki's paper is academic. Some may argue that his writing is inexcusably badly written from a plain language perspective. The paper makes me wonder if some writing is inappropriate for us to barge in to. But barge I have. And so enjoyed the walk . . .

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cmowat@wordsmithassociates.com

<sup>1</sup> "The Thing Never Speaks for Itself: Lacan and the Pedagogical Politics of Clarity", Vol. 7, No 3. Fall 2000, ISNOO10-8055. Also see <[www.quasar.ualberta.ca/cpin/cpinfolder/papers/Dougpaper.htm](http://www.quasar.ualberta.ca/cpin/cpinfolder/papers/Dougpaper.htm)>.

*A former English teacher in England and Kenya, Christine Mowat, B.A. (Hons.), M.A., has run Wordsmith Associates Communications Consultants Ltd., a plain language consultancy, for 24 years. She has 10 instructors in three Canadian cities, and writes, researches, trains instructors and teaches, and creates plain language curricula. Her passion is to bring the gentle but determined plain language revolution into law.*



*Carswell published her book, A Plain Language Handbook for Legal Writers in 1999. Christine's work encompasses government; executive management programs and universities; securities commissions; law firms; insurance, health, environment, engineering, petroleum, and technical contexts; and auditors and accountants.*

# Legislative drafting in perspective

A report from the CIAJ conference  
in Ottawa, September 9-10, 2004

The Canadian Institute for the Administration of Justice aims to improve and advance the administration of justice by working with the legal drafting community. Its legal drafting conferences are a source of continuing legal education for the legislative drafting community across Canada. Its latest conference on the topic was held in Ottawa (Canada), from September 9-10, 2004. It welcomed over 100 participants.

## Ethics and drafting

As in previous conferences, this Ottawa meeting combined the theoretical aspects of legislative drafting and its related issues with a more hands-on practical approach. This year's event opened with the topical session: "Ethics and drafting". The participants studied the ethical rules and values legislative drafters must now follow as members of a profession, as well as their pitfalls. Case studies allowed the drafters to see the importance of recognizing an ethical problem when it arises, and taking the appropriate steps to solve it.

## How do drafters learn?

Professional development was among the related issues presented to academics and government counsel at the conference. Recent studies have examined how professionals learn within a community of practice, moving from novice to expert. A panel dealt with the current trends in educating professionals and discussed some of the implications for legislative drafting offices.

## The role of the interpreters of law

Apart from the ethical and professional aspects, the CIAJ conference usually highlights the role of the various other participants in the legal process, including the interpreters of the law. One conference session asked: how do those responsible for interpreting the law see the role of the legislative counsel? Perspectives from a judge, a politician and a regulator were presented as to the necessary qualities of a good 'drafter', and the importance of these qualities for the written law and legislative interpretation.

## Is the medium still the message?

As part of the technical training offered for the legislative drafter, the conference featured the importance

of information design and questioned whether "The medium is still the message". Expert panellists illustrated in a very persuasive way how information design matters, and how it could—and should—apply to legislative texts. Through a series of good and not-so-good examples, as well as rewrites and practical tips for better structuring ideas in a legislative text, the experts demonstrated how down-to-earth information design can be, and how relevant Marshall McLuhan's statement is nowadays, after nearly 40 years.

## Master class & comparative exercise

A master class showcased expert drafting in the Canadian legislative context. A comparative exercise then demonstrated the bilingual and bijural nature of the Canadian legal system. What elements are common to all good legislation? How much room is there for individuality in drafting? Four expert drafters answered these and other questions by presenting their revisions to a base text definitely in need of improvement. One English common law drafter and one French civil law drafter drafted independently, while one English and one French drafter worked as a team.

## Best practices workshop

This session ended with a workshop on drafting techniques and the best practices to communicate the law. Participants had been assigned to three groups: two English-speaking and one French-speaking. Based on examples given earlier to participants, each group analysed the drafting techniques used to better communicate the law. The expert drafters who led the groups offered a theoretical context in both languages and legal systems. They dealt with stylistic choices, including general vs. specific, text structure and organization and reference techniques. The audience was invited to react and make suggestions—and justify them. As a complement to the workshops, there was a writing tools exhibitors showcase. As in previous conferences, this provided the opportunity to discover some of the leading edge software and linguistic products that are used in the modern technology-oriented drafting environment.

## The last word

The conference ended quite aptly on the following issue: "Who has the last word on legislative interpretation?" Courts accord varying levels of deference to administrative agencies and government departments that interpret or apply legislation. How should drafters take into account their interpretive roles and the potential for multiple interpretations? This session challenged the assumption that judges are the most important interpreters of legislative texts. Over the past 25 years, Canadian courts have

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*(continued on page 50)*

**International Conference**  
**Clarity and Obscurity in Legal Language**

5 - 9 July, 2005  
Boulogne-sur-Mer (France)  
Université du Littoral Côte d'Opale

**Official languages:**  
**French and English**

Organised under the auspices of CERCLE, équipe VolTer (Vocabulaire, Lexique et Terminologie) and of LARJ (Laboratoire de Recherches Juridiques)—Université du Littoral Côte d'Opale, in collaboration with Clarity.

**Organising committee**

**Co-chairs**

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Université du Littoral Côte d'Opale  
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**Professor Joseph Kimble**  
President and Membership Secretary of Clarity  
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**Co-chairs**

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- **Lionel Levert**  
Department of Justice  
Canada
- **Stefania Dragone-Birocchi**  
European Commission  
Belgium
- **William Lutz**  
Rutgers University  
USA
- **Christopher Balmford**  
Cleardocs  
Australia



## Boulogne 2005 program

This draft program is subject to changes as the arrangements firm up.

### Tuesday, July 5

#### Registration and opening of the conference

Official introduction by French officials and academics, with the participation of Clarity President, Professor Joseph Kimble, and the Honourable Justice Michael Kirby, High Court of Australia.

### Wednesday, July 6

Devoted to plain legislative drafting, in English and French and in the two major legal systems, common law and civil law.

- **Keynote speech**
- **Writing the law**  
(one common session for all cultures and languages)
- **Writing the law in plain French**  
For French-speaking jurisdictions (mostly civil law but also in French common law)

- **Master classes in English and French**
- **Writing the law in plain language**

For the USA, the Commonwealth, and other English-speaking jurisdictions (common law)

This will be an extended hands-on session. A panel of 4 or 5 experts will present some documents and explain their approach to drafting. Some of the documents will be available on the conference website before the conference, so everyone can review and rewrite them.

- **Writing the law in plain French**
- **Bilingual or multilingual law and the search for clarity**

Again, this will be a hands-on workshop. Legislative drafters from France, Canada, Switzerland, Belgium, etc will work on exercises and examples.

### Thursday, July 7

- **Keynote speech**
- **Fuzziness in legal language**
- **Readability in European institutions**
- **The clarity tool box: technology and access to law**
- **Plain language in the judicial context**
- **Plain language in civil law jurisdictions** (French-speaking and other)
- **Professional development of legal writers & drafters**

### Friday, July 8

- **Keynote speech**
- **From plain English to plain languages: a multilingual effort**
- **Plain language in the multidisciplinary context**
- **The past and future of plain language, or plain languages**  
An extended session in which panelists from around the world will discuss activities in their countries
- **How to make clarity mainstream: overcoming the obstacles to plain language**
- **Wrap-up by English-speaking and French-speaking speakers**

### Gala dinner

To be held on Thursday evening. Cost included in registration.

## Clarity and Obscurity in Legal Language

(continued)

### Saturday tour

A visit of the surroundings of Boulogne is organised with a lunch for all participants. You may see how attractive the region of Côte d'Opale is by visiting the Website and links:

<[www.tourisme-boulognesurmer.com](http://www.tourisme-boulognesurmer.com)>

### Proceedings

Speakers will have submitted their abstracts in English. Papers will be reviewed by a committee for publication in the conference proceedings. The final edition should contain a mix of English and French papers to reflect the bilingual and bijuridical nature of the conference.

In each session, the audience will have a chance to ask questions; all debates will be recorded on audio tapes, and a summary will be made and translated in both languages for the final wrap-up session.

### Registration terms

- **Standard registration fee** **250 Euros**  
Includes luncheons, reception, coffee breaks, gala dinner, Saturday tour and lunch, conference proceedings, and a Clarity membership.
- **Reduced fee (conference speakers)** **180 Euros**  
Includes luncheons, reception, coffee breaks, gala dinner, Saturday tour and lunch, conference proceedings, and a Clarity membership.
- **Single-day registration fee** **150 Euros**  
Includes one luncheon, coffee breaks, gala dinner, conference proceedings, and a Clarity membership.
- **Student fee** **100 Euros**  
Includes conference proceedings and a Clarity membership. Confirmation of student status is required.
- **Student single-day fee** **30 Euros**  
Includes book of abstracts. Confirmation of student status is required.
- **Accompanying person** **100 Euros**  
Includes gala dinner, Saturday tour and lunch.

### Conference contact details

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**Website:**

<[www.univ-littoral.fr/confinter2.htm](http://www.univ-littoral.fr/confinter2.htm)>

### Legislative drafting in perspective

(continued from page 47)

carved out a role for administrative tribunals and government officials to determine what legislation means. They have established standards for reviewing their interpretations. The standards vary depending on the expertise of the interpreter and the subject matter of the legislation. For example, in the fields of labour law and securities law, the courts will generally defer to the interpretations of tribunals and arbitrators, unless they are "patently unreasonable". This trend challenges the notion that courts must always arrive at a single "correct" interpretation. It recognizes that, at least in some circumstances, others may be in a better position to decide what a legislative text means.

For a more complete account of the event, please visit the following site: <[www.ciaj-icaj.ca/english/legaldrafters/LegDraftNational04ENG.pdf](http://www.ciaj-icaj.ca/english/legaldrafters/LegDraftNational04ENG.pdf)>.

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## *Fifth International PLAIN Conference*

November 3-6, 2005  
Loews L'Enfant Plaza  
Washington, DC, USA

Susan Milne, Chair of Plain Language Association International (PLAIN) reports that plans for the November 2005 plain language conference are firming up.

To quote Joanne Locke, a Washington conference organizer, "The location couldn't be better. It's right on the Mall across from the Smithsonian, and right above a Metro stop and a large indoor shipping plaza." A sightseer's delight.

A call for papers will go out in January 2005, and paper acceptance will be finalized by the end of March, 2005.

In fact, this conference involves two organizations that share the acronym PLAIN. Plain Language Association International is the sponsor of the conference, and the Plain Language Action & Information Network, a volunteer group of U.S. government employees, is the host.

The conference theme is "Adding Up the Benefits." Presentations will focus on tangible (cash savings, time saved ... ) and intangible (happy customers, informed patients ... ) benefits of plain language. Both PLAIN organizations are keen to have as many international members attend as possible. We're working on early-bird rates and we may (I repeat, may...) be able to offer small travel subsidies.

The format will be similar to the 2002 Toronto PLAIN conference. Thursday evening is registration and reception. Friday and Saturday are the main conference workshops and presentations. Friday evening is the banquet night with a keynote speaker. Sunday morning is the general meeting of PLAIN (International).

So far no speakers have been confirmed, but we have big ideas! Al Gore is one.

For more conference information, please go to [plainlanguagenetwork.org/conferences/](http://plainlanguagenetwork.org/conferences/), or contact Amy Bunk, Program Chair, at [apbunk10@aol.com](mailto:apbunk10@aol.com)

## *Next guest editor— Clarity No 53*

Our next guest editor is **Catherine Rawson**, an Australian lawyer who has lived and worked on 5 continents, and gets by in as many languages. Her experience in cross-cultural communication has shown her that many users of English as a foreign language can write clear, readable English



free of predictable translation errors with just 1-day's training supported by tailored editing software. And once confident of the benefits of writing in plain English, many opt to write plainly in their native language. They do this because they find writing plainly is efficient and clients prefer this style.

*Clarity* No 53 will review plain language usage around the globe.

## *Call for articles*

### **on the penetration of plain language principles into countries where English is a foreign language**

*Clarity* No 53 will focus on how users of English as a foreign language are faring. Do they aspire to write in plain English or are they constrained to adopt an opaque style by tradition, ignorance, habit or translation conventions?

If you are a legal writing consultant, trainer, lawyer or person involved in producing and revising materials for government departments and agencies, businesses and organisations, we'd like to hear of your experience in a short article.

Please email the guest editor **now** with questions or the topic you plan to write on.

Guest editor:	Catherine Rawson
Email:	<a href="mailto:legal_easy@hotmail.com">legal_easy@hotmail.com</a>
Article deadline:	24 January 2005
Article lengths:	Either 1,500 or 3,000 words.

## From the President

To begin, let me welcome a new member of the Clarity Committee—Nicole Fernbach. Nicole is the founder and owner of Juricom, Inc. a legal-translation agency headquartered in Montreal. She is also an accomplished teacher, speaker, and author who has actively supported and promoted Clarity for many years. She and Anne Wagner have been the main organizers of our conference next July in France (more below).

I'd also like to welcome two new country representatives who are replacing the current representatives in South Africa and Singapore. In South Africa, Annelize Nienaber is taking over for Frans Viljoen. Annelize teaches in the Department of Legal History, Comparative Law, and Jurisprudence on the Faculty of Law at the University of Pretoria. She and Frans were co-editors of *Clarity* No 46 and of the fine book *Plain legal language for a new democracy*. In Singapore, Lei-Theng Lim is taking over for Hwee-Ying Yeo. Lei-Theng is an experienced practitioner, writer, and teacher with a long list of accomplishments and awards. Currently, she is on the Faculty of Law at the National University of Singapore, where she serves as the deputy director of the Legal Writing Programme.

On behalf of Clarity, my sincere thanks to Frans Viljoen and Hwee-Ying Yeo. They are among Clarity's longest serving representatives, and they have helped build our membership in those two countries. We are grateful for their efforts.



And now for the conference in France—the biggest thing that Clarity has ever done. The Statute Law Society is also involved in the planning and promotion, as it was for our first conference. In this issue, you'll find a draft program. I think you can already see how extraordinary the conference will be.

We are trying hard for a mix of old and new, practical and academic, different countries, different disciplines, and different languages. Anne Wagner and Nicole Fernbach have already lined up many leading practitioners, drafters, academics, and government officials from around the world—with many more to come. Clarity's two patrons, the Honourable Justice Michael Kirby and the Right Honourable Sir Christopher Staughton, have kindly agreed to participate. And most members of the Committee, including most of the country representatives, have confirmed that they will attend. You can get all the latest information (including a more detailed draft program) and also register for the conference at the conference website— <[www.univ-littoral.fr/confinter2.htm](http://www.univ-littoral.fr/confinter2.htm)>. You'll not want to miss these three or four days in the beautiful, seaside city of Boulogne.

Joe Kimble  
Lansing, Michigan  
USA

### Members by country

Australia	118	Gran Canaria	1	Netherlands	4
Austria	1	Hong Kong	9	New Zealand	16
Bahamas	2	India	6	Scotland	8
Belgium	4	Ireland	1	Singapore	12
Bermuda	1	Isle of Man	1	South Africa	34
Brazil	1	Israel	2	Spain	2
British Virgin Islands	1	Italy	1	Sweden	12
British West Indies	4	Jamaica	1	Switzerland	2
Canada	52	Japan	4	Thailand	1
Denmark	4	Jersey	3	Trinidad and Tobago	1
England	393	Luxembourg	1	USA	260
France	1	Malaysia	1	Wales	9
Germany	5	Malta	2	West Indies	2
				<b>Total</b>	<b>983</b>

## Letters to the editor

### Elliott on Municipalities

**Peter Butt, Sydney, Australia**

Do drafters draft with judges in mind? For the “plain language” drafter, the answer is “no”: you draft for your immediate audience. And so, if you are drafting an agreement, you draft for the parties to the agreement; if you are drafting a statute, you draft for those most likely to need to read and apply the statute. But in neither case do you draft primarily for the judge before whom (perish the thought) the agreement or statute may come.

Nevertheless, drafters are always relieved to find that, if the document or statute comes before a judge, then even the judge can understand it! And so it proved in the recent Canadian Supreme Court case of *City of Calgary v United Taxi Drivers' Fellowship of Southern Alberta* 2004 SCC 19 (25 March 2004). At issue was whether the Alberta Municipal Government Act 1994 authorised municipalities to limit the number of taxi plate licences. The Supreme Court held unanimously that it did.

Of interest to *Clarity* members is the Court's assessment of the statute. In the words of the Court, the statute “follows the modern method of drafting municipal legislation”; it was “in broad and general terms”, and was to be read with a “broad and purposive approach”. The Court also cited other Canadian municipalities legislation that took the same approach.

In fact, the first draft of the Alberta statute was done by one of *Clarity*'s leading Canadian members, David Elliott. Legend has it that his draft was rather too radical in its “plainness”, and was watered down somewhat before enactment. Whether or not that is correct, the draft formed the basis of local government legislation in New South Wales. The New South Wales Local Government Act adopted many of Mr Elliott's drafting innovations. One of *Clarity*'s two judicial patrons, Justice Michael Kirby, has described the drafting style of the New South Wales statute as a “paragon in our midst”. And the New South Wales style has now been followed in municipality legislation in a number of other Australian jurisdictions.

So let the story be told: the work of a *Clarity* member has helped to radically change the face of key legislation in two countries at opposite ends of the world. David Elliott himself is too self-effacing to publicise the fact—so let me do so in this letter.

### Numbers as figures or words?

**Alan King, Hertfordshire, England**

As an O.A.P. who tends to be a pedantic traditionalist about English, I agree with those *Clarity* readers who dislike the indiscriminate use of figures instead of words when writing numbers. (N42n8ly, s%n it will B txt splg 4 all.)\* The regular use of figures evidences laziness, and an unwillingness to bother to remember the correct spellings of eighth and twelfth, etc. The extra time used by typing numbers as words is infinitesimal in relation to the size of the whole document.

Often large numbers have to be read aloud, for example, in Bible reading—see Nehemiah ch.7—or when announcing election results. Some people are unable to render ‘105,017’ audibly as ‘one hundred and five thousand and seventeen’, and will just call out the digits—‘one o five o one seven’.

The main argument against using figures is the likelihood of error. A mistake of one digit in figures is much more serious than a typing error of one letter of a word expressing a number. The sum of ‘£1000’ typed as ‘£100’ could easily be missed by a person signing a Will, letter or contract, but ‘one thousand’ typed as ‘one hundred’ would be noticed.

Obviously there should be exceptions to every rule, for the sake of clarity, appearance, and common sense, but I find the trend towards figures quite disturbing.

\* *The sentence in the third line is: ‘Unfortunately, soon it will be text spelling for all.’—Eds*

## *Clarity* annual general meeting

**Saturday 5 February 2005**

**At New Square Chambers,  
12 New Square, Lincoln's Inn, London,  
WC2A 3SW**

1030 Coffee  
1100 Meeting  
1300 End  
1330 Lunch in local restaurant  
(optional—at own cost)

Please let Paul Clark know if you are coming, indicating if you would like to reserve a place for lunch

Tel: +44 1892 506059  
Email: pec@crippslaw.com

A map showing how to get there is available at <[www.newsquarechambers.co.uk/maps.htm](http://www.newsquarechambers.co.uk/maps.htm)>

## New members

### New Members

#### Australia

*Australian Securities & Investments Commission*  
[Ms. Isobel Wilks]  
New South Wales

*Victoria Legal Aid (Library)*  
[Ms. Justine Hyde]  
Melbourne

*Plain English Foundation*  
[Ms. Nicola Robinson]  
New South Wales

*Lindsay Reid*  
Mallesons Stephen Jaques  
Sydney

*Helen Thompson*  
Solicitor, MLC  
New South Wales

*Justine Woodford*  
Allens Arthur Robinson  
Melbourne

#### Bahamas

*Patrick MacKey, Attorney*  
Nassau

#### Bermuda

*Lorraine Welch*  
Chief Parliamentary Counsel  
Sandys

#### British Virgin Islands

*Benedicta PT Samuels*  
Samuels Richardson & Co.  
Tortola

#### Canada

*Legislative Counsel Office*  
[Ms. Linda Petit]  
Winnipeg

*Monique Lacroix, Librarian*  
Department of Justice Canada  
Ottawa

*Diane Pettie, Vice President*  
Sempra Energy Trading  
Calgary

*John E.S. Poyser*  
Inkster Christie Hughes  
Winnipeg

*Ruth Sullivan, Professor of Law*  
University of Ottawa  
Ottawa

*Sarah Thomson*  
Information Officer  
Peterborough

#### England

*Derrick Balsom, Partner*  
Onions & Davies  
Shropshire

#### Jamaica

*Marlene Nembhard-Parker*  
Senior Legal Counsel  
Legislation and Treaty Services  
Kingston

#### Japan

*Bill Lafferty, Translator*  
Tokyo

#### Jersey

*David Hull*  
Law Draftsman's Office  
Saint Helier

#### New Zealand

*James Scherer*  
Hoffman Law  
Auckland

#### South Africa

*Annelize Nienaber*  
Faculty of Law  
University of Pretoria  
Pretoria

#### Sweden

*Bengt-Ake Nilsson, Justice*  
Supreme Administrative Court  
Stockholm

#### Trinidad and Tobago

*Justice Rolston Nelson*  
Hall of Justice  
Port-of-Spain

#### United States

*Jan Blue, Director*  
The Florida Senate  
Senate Bill Drafting  
Tallahassee, Florida

*Norman Lambert, Writer*  
St. Louis, Missouri

*Dr. Richard Lauchman*  
Consultant  
Lauchman Group  
Rockville, Maryland

*Rebecca Lee*  
Weather TAC Communications  
Washington, D.C.

*Donna Lerman*  
University of Southern Maine  
Augusta, Maine

*Jennifer Minkowitz, Attorney*  
Legal Services for the Elderly  
Augusta, Maine

*Vickie Rainwater*  
Director of Legal Writing  
Texas Wesleyan University  
School of Law  
Fort Worth, Texas

*Jane Siegel, Professor of Law*  
Thomas M. Cooley Law School  
Lansing, Michigan

*Bill Thimmesch*  
Damascus, Maryland

*Marcia Walters*  
Seattle, Washington

#### West Indies

*Lydia Elliott, Senior Draftsperson*  
Caricom Legislative  
Drafting Facility  
St. Lucia

*Allison Isaac*  
Attorney-General's Chambers  
St. Lucia

*Vasunthera Nadarajah*  
Senior Legal Draftsperson  
Attorney-General's Chambers  
Anguilla

### Country reps wanted

If you are in a country without a Clarity country representative and you would consider taking on the job, please contact Joe Kimble at [kimblej@cooley.edu](mailto:kimblej@cooley.edu).

## Clarity makeover

I hope you've noticed that this issue of *Clarity* looks a little different.

In May 2003, *Clarity* had its first makeover for some time. Afterwards, we listened to what you had to say about it, and we were pleased that most reactions were positive. But we knew there was still room for improvement. So when I took over as editor in chief in July 2003, I did what I tell my clients to do when it comes to information and document design: I took some professional design advice.

The *Clarity* you see now is the result of design advice from Montague Leong Design Pty Limited, a Sydney firm. They helped us to streamline the existing look, but without changing it so much that you wouldn't recognise it. Among the things they suggested were:

- changing the way we use white space: adjusting margins and indents and the like
- slightly adjusting the font size and, more importantly, the leading
- using fewer fonts overall, but making sure our article titles were still distinctive
- using a two-column format for articles, instead of a combination of two and three columns
- spreading over two pages the contact information that used to be crammed onto page 2
- beginning most articles on a new page, preferably a left-hand page
- specifying two new article lengths (1500 and 3000 words) that will allow articles to span either two or four pages
- having more subheadings in articles
- bringing back the photos: we had photos in *Clarity* Nos 42 and 43, but there have not been any since then
- updating the venerable old *Clarity* logo—the magnifying glass—by making it a little more abstract. We erased the handle, and blurred the words and the border. Instead of magnifying as it did before, the glass now actually clarifies. And we changed the word “Clarity” within the glass from all caps, so that it is now the same as it is on the front page.

There are many other subtle changes that you may or may not notice. But I hope you'll agree that we've taken the next step towards a more professional-looking publication.

Now we want to do something else that I recommend to my clients: to test. We are testing the new *Clarity* look on you, the readers. That means we want to hear from you. What do you think? Can we improve anything else? Is there anything about the new design that doesn't work for you? Email and tell us. Email me at [asprey@plainlanguagelaw.com](mailto:asprey@plainlanguagelaw.com) and please send a copy to our next guest editor, Catherine Rawson, at [legal\\_easy@hotmail.com](mailto:legal_easy@hotmail.com).

Finally, I'd like to thank all at Montague Leong Design Pty Limited for their practical approach to good design on a small budget, and Trish Schuelke in Michigan, who works with me on the technical side of the production and layout of *Clarity*. She has enthusiastically embraced the changes, and reacted to all of my requests and deadlines with patience, grace and good spirits.

While I'm thanking people, I also want to thank all the guest editors I have worked with as editor in chief so far: Peter Butt, David Elliott, and now Jacquie Harrison and Nittaya Campbell. There would be no *Clarity* without them. They all do a professional job, in their “spare” time, simply to support the cause of *Clarity*. And thanks in advance to Catherine Rawson for what she is about to do with *Clarity* No 53.

Michèle M Asprey

*Clarity* editor in chief  
Sydney, Australia



*Patricia Schuelke, who handles the technical production and layout of Clarity.*

# Application for membership in Clarity

Individuals complete sections 1 and 3; organisations, 2 and 3

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## 1 Individuals

*Title*                      *Given name*                                      *Family name*

Name .....

Firm ..... Position .....

Qualifications

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## 2 Organisations

Name .....

Contact Name

---

## 3 Individuals and organisations

Address .....

Phone ..... Fax .....

Email .....

Main activities

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### Annual subscription

Australia	A\$35
Brazil	R50
Canada	C\$30
France	€ 25
Hong Kong	HK\$200
India	R1225
Israel	NIS125
Italy	€ 25
Japan	¥3000
Malaysia	RM95
New Zealand	NZ\$50
Singapore	S\$40
South Africa	R100
Sweden	SEK250
Thailand	THB1000
UK	£15
USA	US\$25
Other European countries	€ 25
All other countries	US\$25

### How to join

Complete the application form and send it with your subscription to your country representative listed on page 2. If you are in Europe and there is no representative for your country, send it to the European representative. Otherwise, if there is no representative for your country, send it to the USA representative.

Please make all amounts payable to Clarity. (Exception: our European representative prefers to be paid electronically. Please send her an email for details.) If you are sending your subscription to the USA representative from outside the USA, please send a bank draft payable in US dollars and drawn on a US bank; otherwise we have to pay a conversion charge that is larger than your subscription.

### Privacy policy

Your details are kept on a computer. By completing this form, you consent to your details being given to other members or interested non-members but only for purposes connected with Clarity's aims. If you object to either of these policies, please tell your country representative. We do not give or sell your details to organisations for their mailing lists.