

Clarity

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This issue

This issue of *Clarity* comes to you from Australia. However, its contributors come to you from a number of countries.

The issue is grouped around the theme of "plain language and the legal profession—the past, present and future".

The past

As to the *past*, we publish several "retrospects". One is from Lord David Renton, the chairman of the UK Government committee appointed in 1973 to enquire into the language of legislation. The committee has come to be known as the "Renton Committee". That committee produced a report in 1975, "The Preparation of Legislation", which has come to be known as the Renton Report. Lord Renton's retrospect tells of his life in the law, in politics, and in law reform.

The second retrospect is from Alec Samuels, a long-time member of *Clarity* and well known in the UK for his publications on many areas of law. He writes from his experience of the legal profession, the courts and the judges, with incisive observations about the state of plain language in the UK.

The present

Then we move to the *present*. A short article by Andie Beatty, the Deputy Scottish Parliamentary Counsel, documents movements towards plain language in Scottish legislation. Mr Beatty was instrumental in producing a booklet, released earlier this year by the Office of Scottish Parliamentary Counsel, entitled *Plain Language and Legislation*.

Then, *Clarity* committee member, Simon Adamyk, gives his impressions of plain language in the English Courts. Mr Adamyk writes from the perspective of a practising barrister at the English bar. To complement this view from the bar, another *Clarity* member, Alison Plouviez, writes of the "Better Law-making Charter", released earlier this year by the Law Society of England and Wales. That Society represents English and Welsh solicitors. A slightly sceptical note is then introduced by James Kessler QC, a leading UK barrister, who writes of the Coroners Reform Bill 2006. The UK press has touted this Bill as "the first Bill to be published in plain English"—a claim Mr Kessler clearly doubts.

Moving away from the UK, we then publish a piece by Phil Knight, another long time Clarity member and office holder, on the South African *National Credit Act 2005*. That Act requires certain documents to be “in the prescribed form” or, if no form is prescribed, “in plain language”. The Act then sets out detailed criteria for determining whether a document is in plain language. Phil Knight explains the thinking behind this prescriptive approach to plain language.

Next, we travel to Australia. Mallesons Stephen Jaques is one of Australia’s largest law firms and is well known for its leadership in plain legal language. (Incidentally, it has also been a financial sponsor of Clarity over the years.) Two members of the firm, Belinda Gibson and Marco Stella, trace the development of plain language in their workplace. This will interest readers who are keen to implement change in their own organisation.

Finally, we turn to the United States of America. We publish three pieces dealing with developments in that country. The first relates the philosophy and methodology behind a project to develop a plain language “privacy notice” for use in the financial industry. The article traces the development of the notice through aims, testing, research, design, and prototype evolution. The second piece reproduces part of the testimony of the head of the US Securities & Exchange Commission to a Senate Committee. It shows the SEC’s zeal in promoting plain language and

the enthusiasm and wisdom of its chair, Christopher Cox. The third piece is a legislative update, summarising two recent US initiatives in plain language.

The future

We end with two articles on research developments in plain language. One is by Christoph Hafner, a linguist who specialises in lawyers’ language. Mr Hafner teaches writing skills to law students and is undertaking a PhD on the subject of the language of barristers. This may well be the first doctoral thesis ever written on the language of barristers. His views may come as something of a surprise—particularly to barristers.

The other article is by Kathryn O’Brien, a Sydney University law student. Kathryn and several of her fellow students undertook a substantial survey of law students, legal academics and practising lawyers. The survey tested impressions about the use of plain language in the academy and in practice. Kathryn concludes that Australian law schools, like their US counterparts, should provide proper instruction in plain language as an integral part of law courses.

I hope that you enjoy this plain language smorgasbord.

Happy reading!

Peter Butt
Sydney, Australia

***Clarity:* electronic or paper?**

Every May and November, we publish *Clarity* in two forms: electronic (.pdf) and in print. The electronic version reaches you faster than the print version, which has to come through post from the U.S. Please tell our representative in your country how you want *Clarity* delivered to you.

A retrospect for *Clarity*

The Rt Hon Lord Renton, PC, KBE, TD, QC

Lord Renton is known, by name at least, to many Clarity readers. He was chairman of a committee appointed in 1973 to enquire into the language of legislation. Its terms of reference began: "With a view to achieving greater simplicity and clarity in statute law ...". The committee, now generally known as "The Renton Committee", handed down its report in 1975 (The Preparation of Legislation, Cmnd 6053; London: HMSO, 1975). The Report highlighted the complexities in the traditional style of legislative drafting and recommended many changes.

In this retrospect, written for Clarity, Lord Renton reflects on his life and the Report that bears his name. Ed.

I am now 97. Until I reached that age I led a very active life as a lawyer, a parliamentarian, a soldier (throughout the six years of World War II) and doing work for charities. As a family man, I had a very happy life which was, however, spoiled by my dear wife's death nearly 20 years ago. In that long and varied life I could not have achieved all that I did without clarity to guide me in all decisions I had to make in the very varied life I had to lead in peace and war.

At an early age at school I was taught to avoid ambiguity, for it always caused confusion and obscured one's intentions.

During my professional life as a barrister, in which I became a Queen's Counsel at the age of 45, it was vital that decisions and the ways they were expressed were manifestly clear and unambiguous. It was for this reason that I was called upon to assume responsibility as chairman or a member of various official advisory committees, including Royal Commissions.

I was National Liberal MP for Huntingdonshire from 1945 to 1979. During that time I was in the Conservative and National Liberal Government from 1955 until 1965, first for

two years as Parliamentary Secretary to the Ministry of Fuel and Power, and then in the Home Office for six and a half years with Rab Butler as Home Secretary. As he was also deputy Prime Minister and Chairman of the Party, he had to delegate a large part of his responsibilities to me. That was why I became Minister of State in 1963, and why after leaving the Home Office in 1964 I was made a KBE.

When then I returned to practice as a QC, it took nearly a year before my life as a leader became really busy—but then it did so, and I had some very interesting and prosperous long cases. Although I never wanted to be a full-time judge, I was very glad when I was made Recorder of Rochester from 1963–68 and of Guildford 1968–71. Also before that I was made a Deputy-Chairman of Quarter Sessions in Kent and in Essex.

During my years doing part-time judicial work, there was only one appeal against my decisions, and although it was upheld and resulted in a retrial, the appeal failed!

So much for my judicial work. Now I must mention my ten and a half years in Government. The first two of them were spent as Parliamentary Secretary to the Ministry of Fuel and Power, where I became responsible for health and safety in mines and quarries, as well as for production of coal, oil and other products. Then came my years as a Home Office Minister, which I have already described.

I was a member of the House of Commons from 1945 until 1979. In those days being a Member of Parliament was only a part-time occupation, for we were not paid well enough for it to be a full-time job. Therefore, except for my years in the Government, I carried on my legal practice: for nine years as a busy junior barrister, and then as a Queen's Counsel. In 1966, however, I gave up practice, and I was put on several Royal Commissions and did other parliamentary work.

Having reached the age of 70, I ceased to stand for parliament and was made a peer—a member of the House of Lords—where I also led a very active life until well into my nineties. Then my health declined. I became ill and spent some time in hospital. Although my health recovered, my faculties declined. However, I was able to attend the House of Lords, where I asked the occasional question

but ceased to make speeches or serve on committees.

Looking back on my active years in both Houses, I must confess that leading Parliamentary Delegations to Morocco, Uganda, Australia and Guyana gave me great interest and satisfaction. Each of these delegations contained members of all political parties, but it was unusual for a member of any party to put forward a party prejudice when taking part in our activities in any country we were visiting.

In 1971 Selwyn Lloyd was made Speaker of the House of Commons, and so he had to resign as a member of the Royal Commission on the Constitution. I was appointed to fill his place. I was asked to advise whether there should be devolution for Scotland, Wales and Northern Ireland. I was totally opposed to that for Scotland and Wales—indeed, I was the only member of the Commission who was against it—although I agreed that Northern Ireland should have self-government, and it did so.

In 1973 the first official enquiry since 1870 to consider how Acts of Parliament should be drafted was appointed, and I was made Chairman of it. It was called the Committee on the Preparation of Legislation. We had on it a number of experienced lawyers and parliamentarians. Its report became known as “the Renton Report”. All political parties were represented on the Committee. Our conclusions were broadly unanimous, and the Report was welcomed by both Houses of Parliament. However, the Parliamentary draftsmen and the Civil Servants did not welcome our recommendations, for it meant that, instead of drafting legislation in varied ways that they preferred, it would have to be drafted in accordance with broad principles which we had defined. Therefore, although those principles had been welcomed by the Lords and the Commons, the Civil Servants and Draftsmen carried on in their own way. The Lord Chancellor and the rest of we Parliamentarians were simply ignored, except occasionally; and so our statutes have not for the most part improved their drafting—and clarity has not been achieved to a great enough extent.

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Plain language in the UK

Alec Samuels

Alec Samuels was a founding member of Clarity. He is a UK Barrister and Justice of the Peace, and was formerly Reader in Law at the University of Southampton (UK). He has contributed many articles to legal journals on statute law, civil procedure, property law, planning law, and medical law. In this retrospect, written especially for Clarity, he writes of the progress of plain language in the UK. Ed.

The instructions from the Guest Editor of *Clarity* were to write about: “the progress (as you see it) of the plain language movement in the UK: how the solicitor’s arm of the profession has (or has not) accepted plain language; the achievements as you see them to date; and the problems ahead”.

Fairly clear instructions. As an invited author for *Clarity*, one is particularly conscious of style of expression—of plain language. Looking at the Editor’s instructions, one long sentence might seem inelegant. Lord Denning would have expressed himself in four or five short sentences. However, these instructions are in the form of an abstract, so perhaps one sentence is appropriate. But the use of phrases in brackets ought surely to be avoided where possible. One wondered whether the colon was correct: did it introduce the rest of the sentence, or did it merely represent a pause, less than a full stop but more than a semicolon? Then as to the “arm of the profession”, is it singular or plural? Is one thinking of lots of solicitors collectively, plural; or the solicitor as opposed to the barrister, collectively, singular? Is or are the jury a collective singular or a collective plural? Perhaps it may depend upon whether one is seeking to describe the jury as an institution in the criminal justice system or a collection of people in the jury box in the courtroom. Style and substance must go together. Style is particularly important for *Clarity* readers. This *Clarity* author is composing this piece in longhand; there are

many manuscript corrections, and there will be several drafts.

Progress

The progress of the plain language movement in the UK? Good in some respects, disappointing in others. Good in a much greater awareness of the need for plain language than in the past. Parliamentarians, judges, legal practitioners and legal lecturers and authors are constantly complaining about obscurities and ambiguities and complications in the language of the law.

Government recognises the problem. All Bills are accompanied by explanatory notes. Most new statutes are accompanied by departmental advice saying what they are all about. Statutory instruments are accompanied by simple summaries. The building regulations are accompanied by a plain English version.

Good law teaching is constantly insisting upon plain language. The national education system places a heavy emphasis upon literacy. Employers demand a good measure of literacy from their employees, especially new recruits. Reports are expected to carry an executive summary.

Organisations such as Clarity, the Statute Law Society and the Society of Legal Scholars are constantly promoting good examples of plain language. Increasingly, institutions in both the public and private sector instruct specialists in plain language to draft or redraft codes and rules and regulations.

Further, the multiplicity of courts, tribunals, panels and committees in contemporary UK, many composed wholly or largely of non-lawyers, create the need and the demand for advocates to put their case simply and clearly and persuasively in plain language. One of the strengths of the jury system is undoubtedly that it compels lawyers and experts to express themselves in a way intelligible to the non-lawyer—at least, the reasonably intelligent non-lawyer. In civil cases involving technical matters, retired judges are hired to conduct “dummy runs” to test and improve coherence and intelligibility.

Unfortunately there has also been some lack of progress—indeed, some retrograde movement. Government is obsessed with control and regulation, often in excessive detail. Legislation and statutory instruments pour

out, seeking to cover every conceivable situation, encouraging complication and unintelligibility to set in. A better system would leave the interpretation and implementation of a plainly expressed principle to the discretion of the judge or other decision maker, allowing for common sense, pragmatism, flexibility, and justice. In contemporary bureaucratic society, life has become so complicated—the form-filling syndrome—that there is no time to stop and to think and to take a calm, reasoned decision. As we all know, if only we stop to think about it, the key to plain language is simply to think before speaking or writing. Sloppy thinking leads to sloppy expression.

Information technology has brought enormous benefits, but it has also hindered the progress of plain language. The ease and rapidity of means of communication have led to non-reflective expression. Composition on the keyboard can lead to verbosity. When writing a letter by hand, one carefully ponders what to say; but winging off an e-mail seems to require little thought, just the essence of the instant message, however expressed. The computer has created its own language, a sort of bastard technical language of its own, malevolently infiltrating and corrupting the Queen’s English—Shakespeare’s English—one of the greatest gifts contributed to civilisation. Similarly, the mobile phone and its text message has led to abbreviations and short cuts, an unworthy substitute for plain language.

In the television age people lose the reading habit. Intelligently reading good quality prose improves the reader’s quality of expression. Constant exposure to the journalism and superficial language of the media erodes the power of expressing oneself in plain language.

The solicitor

The contemporary UK solicitor is an educated person for whom language is a principal tool for work. As general practitioners dealing with lay clients, solicitors need to express themselves simply and clearly. In the nature of things, solicitors have to be careful and accurate. They must negotiate and settle disputes, often involving large sums of money. They must draft contracts and wills, important documents to provide for the future. To do this, they often prefer traditional precedents,

tried and tested, called onto the screen from the data base at the click of the mouse, but not always expressed in the plain language that some of us might wish.

However, the solicitor is subject to many pressures. Acting for parties in disputes in the context of our bureaucratic society can be very demanding. Mastering the multiplicity of unintelligible laws and regulations is no easy task; and negotiating some sort of compromise or settlement is difficult enough in itself, without having to worry about the niceties of plain language. If the going gets really difficult, then the matter has to go to counsel—the consultant specialist barrister—expert in drafting and advocating, able to give the necessary time, experience and learning to the problem.

Judges

Judges should be masters of the exposition of the law in near perfect language. The remarkable contribution of Lord Denning, the most outstanding UK judge of the twentieth century, lay principally in his extraordinary power of simple yet compelling language—significant not only for the message of justice but for the beauty and convincing quality of the language. In his book *The Discipline of Law* (Butterworths 1979), Lord Denning has a chapter “Command of Language” (pp 1–8). He says that language is the vehicle of thought. Obscurity in thought inexorably leads to obscurity in language. Read the great authors, he says: Shakespeare, Macaulay, Carlyle, Milton. Lord Denning extensively cites and discusses his favourite authors, in *Leaves from my Library* (Butterworths, 1986). He gives advice drawn from his own experience: think of the context in which words are to be used; write positively and definitely; draft and redraft. In yet another book, *The Closing Chapter* (Butterworths, 1983), Lord Denning includes a chapter on “Plain English” (pp 57–65). He says that command of language is the key to success in life. His advice: Think of the hearer or reader, not of oneself; split the text into paragraphs; use short sentences; avoid terms of art and long words (“multi-syllabic jargon and verbal distortion”); read and re-read the draft; and for examples, study Winston Churchill’s wartime speeches.

The biographer Edmund Heward, in his book *Lord Denning: A Biography* (2nd ed, Barry Rose 1997), wrote of Lord Denning’s prose style (pp 189–192). He described the style as staccato, taut, concrete, vigorous and clear, vivid and brief; with the apt word and incisive phrase; telling a story. But some would say that Lord Denning’s style was better suited to the spoken word, the spoken judgment, than the written word, because the staccato style can lack rhythm and grace.

Reading the judgments of the leading contemporary judges, one is struck by the intellectual command but disappointed at the prolixity and complication, in part perhaps required by the legislative subject-matter which judges must interpret and apply. I have written about this in “Those multiple long judgments”, Alec Samuels (2005) 24 CJK 279–287.

Oratory

There was once a debate about who was the greatest orator. The choice came down to Cicero and Demosthenes. The issue was resolved. When Cicero spoke, everyone said what a wonderful speaker he was; but when Demosthenes spoke, everyone said “let’s march!”

House of Lords and plain English

It is interesting to look at recent cases in the House of Lords, the highest court in the United Kingdom, to see how far the judges have had to grapple with problems of “plain English”, problems usually arising from legislation, including today the *European Convention on Human Rights*. Here is a selection of recent cases:

- In the course of a robbery, A concealed his hand under his jacket and used his fingers to give the impression that he was in possession of a gun. Was A guilty of possessing an imitation firearm? Held, no—in fact, A was not in possession of anything. *R v Bentham* [2005] UKHL 18; [2005] 1 WLR 1057.
- A statute proscribed membership of the “Irish Republican Army”. B belonged to the “Real Irish Republican Army”. Held, in the light of history and the whole of the legislation, D was plainly covered. *R v Z (Attorney-General for Northern Ireland’s Reference)* [2005] UKHL 35; [2005] 2 AC 645.

- If C is convicted of a crime, but the conviction is later quashed, has there been a “miscarriage of justice” and is C eligible to claim compensation? Although everyone is presumed innocent until proved guilty, C has not suffered a miscarriage of justice if the proper process for trial was followed and he was successful on appeal, or if despite an error of process and delay in rectifying the situation, the court has not acknowledged C to be clearly innocent. *R (Mullen) v Secretary of State for Home Department* [2004] UKHL 18; [2005] 1 AC 1.
- Under legislation, the Secretary of State could detain an illegal immigrant pending removal. For how long, since no period was prescribed? Held, not indefinitely. *R (Khadir) v Secretary of State for Home Affairs* [2005] UKHL 39; [2006] 1 AC 207.
- Legislation said that the Secretary of State could withdraw support from an illegal immigrant. Did this mean that the illegal immigrant could be left destitute? No, he or she must be entitled to support “to keep body and soul together”. *R (Limbuella) v Secretary of State for the Home Department* [2005] UKHL 66; [2006] 1 AC 396. But an illegal immigrant may be deported even if unwell and facing inferior medical treatment in his or her own country. *N v Secretary of State for the Home Department* [2005] UKHL 31; [2005] 2 AC 296.
- A person still in his own country, a foreign country, claimed to be a “refugee” but was refused entry into the UK under a pre-clearance system operated in the foreign country. Can a person be a “refugee” whilst still in their own country, before they have ever set foot in the UK? Held, yes, they may suffer the requisite degree of persecution, and the relevant refugee laws apply to them. *Regina (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2004] UKHL; [2005] 2 AC 1.
- The phrase “habitual residence” appears frequently in legislation, especially in family law. Can an illegal immigrant, who may have been in the relevant country for quite some time, claim habitual residence? Yes, if the facts so justify, for the purpose of the phrase in the law is to establish which country and which court have jurisdiction. *Mark v Mark* [2005] UKHL 42; [2006] 1 AC 98.

- Air carriers are liable for an “accident”. A passenger suffered deep vein thrombosis DVT, caused by cramped conditions, shortage of oxygen, low air pressure, and high temperature; no warning was given. Held, not an “accident”—the situation was normal. *Deep Vein Thrombosis and Air Travel Group Litigation* [2005] UKHL 72.

Achievements

The greatest achievement of the plain English movement is probably the very fact of the movement’s existence, and the general awareness of the problem and possible solutions which it has so successfully engendered. English has more and more become the international language—in politics and diplomacy and commerce and literature. This requires people whose first language is not English to use English. The need for simplicity and clarity has become ever more necessary and obvious.

Problems

Problems of inter-communication will always be with us. Paradoxically, as English increasingly becomes the international language, so the increasing diversity of English itself may create problems for the future. The English spoken in England, the USA, Canada, Australia and New Zealand, South Africa, and in many other parts of the world, is often markedly different, and not only in accent. This could become a disintegrating element. Bureaucracy and authoritarianism are often inimical to the use of plain language. And, as I have already mentioned, modern technology, for all its benefits, is undermining plain English by encouraging the use of jargon of all kinds. But despite all of this: may the plain English movement continue to flourish.

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Plain language in Scottish legislation

Andie Beatty

Elsewhere in this issue, we note developments in plain legal language in England. North of the border, in Scotland, changes are also afoot.

Earlier this year, the Office of the Scottish Parliamentary Counsel (OSPC), which drafts legislation for the newly devolved Scottish Parliament, released a booklet entitled Plain Language and Legislation. The booklet argues the case for plain language in Scottish legislation. It also contains a useful overview of the main plain-language techniques, as well as a convenient bibliography of recently published material on plain language generally.

The booklet can be downloaded free of charge, at <http://www.scotland.gov.uk/ospc>

The booklet was largely the work of Clarity member Andy Beattie, Deputy Scottish Parliamentary Counsel. Mr Beattie has produced the following short comment on the booklet for Clarity readers. Ed.

The Plain Language and Legislation Booklet—some background

Clarity members will be interested to note the new booklet on *Plain Language and Legislation* written by the Office of the Scottish Parliamentary Counsel (OSPC).

OSPC drafts Scottish Parliamentary Bills for the Scottish Executive, the devolved government for Scotland, which was established in 1999 following the first elections to the Scottish Parliament. OSPC is also responsible for the drafting of Scottish aspects of UK Government Bills at Westminster.

OSPC was also established at the time of devolution and was staffed initially by parliamentary counsel from the Lord Advocate's Department (which, before devolution, was located in London and drafted Scottish legislation for the UK Government). Since then the office has doubled in size in order to deal

with the increased demand for Scottish-specific legislation.

The coalition government returned at the first elections continued after the second Scottish Parliamentary elections in 2003 under the auspices of a partnership agreement. This agreement included a commitment to ask the Scottish Law Commission to "investigate methods by which legislation can be published in plain English".

OSPC also drafts legislation for the Scottish Law Commission, so the carrying out of the investigation needed to fulfil the partnership commitment naturally fell to it. The investigation culminated with the booklet's publication in March 2006.

The booklet explores some of the historical connections linking plain language with legislation, investigates strides taken across the globe to modernise legislative style and gives examples of plain language drafting techniques. Although pitched at a general audience, the booklet does contain some interesting reading for those with a more specialised interest in modern legislative drafting.

The booklet is available on OSPC's website, at <http://www.scotland.gov.uk/ospc>

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Plain legal language in the English courts

Simon Adamyk

Introduction

The use of language in civil proceedings has changed considerably since I was first called to the Bar in England some 15 years ago. The changes which have taken place have, in my view, been for the better. There are of course other improvements which could usefully be made, but campaigners for change in the legal profession usually have to content themselves with a geological timescale for any change (if the change comes at all) and I for one have welcomed the changes within the last few years.

I have noticed changes at all stages of the progress of a case, right from the initial contact with clients through to judgments in Court, whether at trial or an appeal. I take a closer look at some of these changes below.

Client care letters

The initial contact between a client and his or her solicitor is usually accompanied by a client care letter which the solicitor is professionally obliged to send to the client. As a barrister, I do not have any hand in writing those letters, but the ones I have seen have been clearly and attractively written, whether they have been sent to an individual (who may be dealing with a solicitor for the first time) or to the legal department of a large company. In each case, the tone is friendly and approachable, and often has a good selection of sub-headings (one of my favourite techniques for trying to present information clearly). I don't get to read the client care letters in all of my cases but I always read them when they happen to be included in my papers, and I haven't yet come across one which I thought was badly drafted. If I were a lay client, I can't help but think that I would find such a letter reassuring and encouraging to me (whether rightly or wrongly!) that I wasn't going to be barraged with gobbledegook later on.

Party-party correspondence

The next stage of the case is usually the correspondence—sometimes protracted—between each party's solicitors. Interestingly, despite the great decrease in the use of Latin in the legal process (at least in England and Wales), in my experience this correspondence is still usually referred to as "*inter partes*" correspondence, although the English equivalents ("*party-party correspondence*" or perhaps even "*correspondence between the parties*") are also regularly used in Court. It is probably in the area of party-party correspondence that I have seen the greatest changes in the use of language. In the 'old days', correspondence between the parties was occasionally seen by some practitioners as an opportunity to adopt as forceful a tone as possible, reminding the other side at every turn what a rubbish case they had and how they were bound to lose at trial, and on occasions adopting a strident tone which sought to intimidate rather than elucidate.

That type of correspondence is on the wane. The fundamental alterations in civil procedure which have come into force in the last few years in England and Wales in the shape of the Civil Procedure Rules ("CPR")¹ have encouraged, and even required, a much more frank and detailed exchange of information between the parties. This includes the stage even before a claim has been issued, and is perhaps especially visible at this stage. The "*pre-action protocols*" embodied in the CPR include detailed requirements for the type of information which needs to be exchanged between the parties, and when. There are specific protocols which are tailor-made for specific types of dispute². In cases not covered by any specific protocol, the Court expects the parties to act reasonably in exchanging information and documents relevant to the claim and generally in trying to avoid the necessity for the start of proceedings³. The parties to a potential dispute are required to follow a reasonable procedure, suitable to their particular circumstances, which is intended to avoid litigation, and to exchange details of the claim⁴. Failing to comply with these types of requirements can lead to adverse costs consequences, among other things, and practitioners and parties have to take these things seriously. If the Court does not consider that the relevant facts and arguments have been clearly and effectively conveyed in the

correspondence, that can place the party whose correspondence it is at a disadvantage. Happily, these considerations tend to lead to a virtuous circle, because as soon as one party chooses to express itself in a clear, measured tone, the other party can come across badly in Court if its own correspondence is phrased in a less 'user-friendly' manner. Whatever the reasons for it—whether the theory I have suggested above or some other factors—there has in my experience been a notable improvement in the clarity with which the party-party correspondence is expressed.

Judgments

The language used in judgments has also become more approachable in recent years. This has been achieved in a number of ways.

For one thing, Judges are now discouraged from using Latin in their judgments⁵. This finds its roots in Lord Woolf's Final Report to the Lord Chancellor on the civil justice system in England and Wales (July 1996)⁶, which set out as one of the guiding principles that "*The system should ... (e) be understandable to those who use it*". There are widespread references in the decided cases to Lord Woolf's disapproval of the use of Latin in legal proceedings⁷ and on the whole Judges seem to be taking note of it⁸. This change seems to have permeated throughout civil proceedings. The CPR contain very few Latin tags, the drafters having chosen to replace them with English equivalents or in some cases with entirely new English terminology⁹. Her Majesty's Courts Service website contains an interesting glossary of Latin terms and their English equivalents¹⁰. Anecdotal evidence suggests that different practitioners are encountering different levels of enthusiasm among the Judges for the move away from Latin terminology, but there is no doubt in my mind that the ethos of moving away from the use of Latin in legal proceedings has a firm foothold in this country¹¹.

A further development which I find particularly helpful is the significant reduction in the number of decisions of the Court of Appeal which involve a reasoned judgment being handed by more than one Judge. For obvious reasons, this does not occur at trial level (where there is only one Judge in any case), but in the past I have had to face the time-consuming task of reading two or in some cases three different judgments from the two

or three members of the Court of Appeal panel, who may be saying the same thing, or slightly different things, or completely different things—there was no way to tell without reading each of the judgments in detail. It is now a breath of fresh air to be able to read at the beginning of the judgment that this is "the judgment of the Court" (that is to say, the united view of all members of the panel) or to reach the end of the judgment to find that the other members of the panel simply add "I agree" or words to that effect¹². Naturally, there are still times when one member of the panel wishes to add comments of his or her own in order to make a particular point or place the emphasis in a different way, and there are also occasions where one Judge dissents. But these now seem to be the exception rather than the rule.

Finally, many judgments at all levels of the hierarchy now seem to incorporate sub-headings. This sounds like a simple touch, but I myself find it to be tremendously helpful. The vast majority of legal research exercises that I encounter involve reading a number of different judgments. Some of those judgments can be quite long and usually there are only one or two issues in a judgment which are relevant to the task in hand. To be able to skip straight to the relevant sections is a great time-saver. It also lends a pleasing—and instantly visible—degree of structure to the judgment.

Conclusions

I have touched on only a few aspects of the development of plain legal language in the English courts in recent years. No doubt other practitioners have had different experiences, but for my own part I have welcomed the changes that I have seen. An important part of my job involves assisting lay clients to understand exactly what is going on in their litigation, and the developments which I have outlined above all help to make that part of my job a little easier.

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Endnotes

¹ The CPR can be found on the web at www.dca.gov.uk/civil/procrules_fin/menus/rules.htm.

² There are currently eight such specific pre-action protocols: construction and engineering disputes, defamation, personal injury claims, clinical

disputes, professional negligence, judicial review, disease and illness claims, and housing disrepair cases (see para. 5.1 of the Practice Direction—Protocols, at www.dca.gov.uk/civil/procrules_fin/contents/practice_directions/pd_protocol.htm). Additional pre-action protocols are added from time to time.

³ Para. 4.1 of the Practice Direction—Protocols.

⁴ Paras. 4.2 to 4.6 of the Practice Direction—Protocols.

⁵ Even though this discouragement is well known among lawyers in England, actually identifying the precise location of this edict is quite difficult. There is reference to it in Lord Woolf's speech "Current Challenges in Judging" delivered on 10th April 2003 to the 5th Worldwide Common Law Judiciary Conference in Sydney, Australia, where Lord Woolf said, "As a symbol of what was required I urged, as part of our reforms, the abolition of Latin and the adoption of simple English when rewriting our Rules of Procedure and, indeed, in our courts." See www.judiciary.gov.uk/publications_media/speeches/pre_2004/lcj100403.htm.

⁶ "Access to Justice", Final Report, para. 1(e), Section I (www.dca.gov.uk/civil/final/index.htm).

⁷ See, for example, the cases cited by Roderick Munday in his articles "Does Latin Impede Legal Understanding?" (2000) 164 JP 995, 16 December 2000, and "Lawyers and Latin" (2004) 168 JP 775, 2 October 2004.

⁸ There are exceptions, of course. One notable exception is Lord Woolf's own use of the expression "inter alia" in *Ashworth Hospital Authority v MGN Ltd.* [2002] UKHL 29, [2002] 1 WLR 2033, at para. 48.

⁹ For example, the replacement of "writ" with "claim form", "subpoena" with "witness summons", "ex parte" with "without notice", "garnishee order" with "third party debt order", "mandamus" with "mandatory order", "prohibition" with "prohibiting order", "certiorari" with "quashing order", to name but a few.

¹⁰ www.hmcourts-service.gov.uk/infoabout/glossary/latin.htm.

¹¹ See too the Report of the First Phase of the Enforcement Review, July 2000, para. 227, www.dca.gov.uk/enforcement/firstphasefr.htm: "The form should be based on the current county court request and written in plain English so as to remove Latin phrases presently used in the High Court request for Writ of Fieri Facias."

¹² Sometimes this approach can go amusingly wrong. See, for example, the end of the Court of Appeal judgment in *Windeatt v Windeatt* (No. 2) [1962] 2 WLR 1056 at p. 1066: "Danckwerts LJ: 'I agree with the comprehensive judgment that has been delivered, and I have nothing useful to add.' Ormerod LJ: 'I agree.'"

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Simon was called to the Bar of England and Wales in 1991 and to the Bar of the Eastern Caribbean Supreme Court in the territory of the British Virgin Islands in 2006. He specialises in Chancery/commercial litigation and advisory work, and many of his cases involve international issues. He holds an M.A. in law from Downing College, Cambridge, as well as an LL.M. from Harvard Law School. He is Treasurer of and serves on the committee of the Chancery Bar Association in England, and he also serves on the Chancery Division Court Users' Committee.

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Plain language, the “Better Law-Making Charter” and some UK developments

Alison Plouviez

“Too often legislation is hard to use, understand and apply”. *Clarity* readers may have some sympathy with this remark. It comes from the document introducing the *Better Law-making Charter* published in 2005 by the Law Society of England and Wales.

The Charter sets out ten straightforward proposals which could significantly improve the way legislation is made at Westminster, without a huge investment of money or time. It highlights the need to make new law easier to understand and use, and to take advantage of IT and the internet. For example, Point 8 says, “Legislative texts should be produced using plain language and modern, accessible structure, layout and design, whether on the internet or paper.” (See page 16).

How the Charter came about

The Charter is part of the Society’s Better Law-making Programme. Through this, the Society is calling for improvements in the way legislation is made, written, implemented and reviewed. Accessibility also matters—from preliminary and consultation stages to publication, tracing and implementation of the new measure.

As a representative body, the Law Society frequently comments on individual Bills and Statutory Instruments (SIs), often on practical points rather than the underlying policy. Over the years, across many legislative topics, the same problems tended to reappear—such as new measures not dovetailing well with existing ones, or too much essential detail being left to SIs. So the Better Law-making Programme was set up, to address problems in the way the legislation comes into existence and is implemented, whatever its subject-matter. All political parties are being encouraged to make a commitment to examine and improve the law-making process, so that new legislation is:

- democratic—based on comprehensive public consultation and thorough parliamentary scrutiny;
- usable and accessible—clear in language and layout, easy to find and use;
- well thought-out—carefully implemented, workable in practice, and later reviewed for effectiveness.

Background to the Charter

The document accompanying the Charter argues that improving the legislative process could save time, money, effort and sometimes distress. It broadly groups the difficulties posed by legislation into three problem areas: (a) content; (b) structure and form; and (c) access to the law once made.

Content problems arise from obstacles such as ambiguity. These, and problems of form and structure—such as unnecessarily complicated organisational approaches—are all too familiar. Legislation on paper also lacks everyday aids to document navigation, such as an index.

Other problems of access involve simply finding the law and assessing its current status. All UK statutes appear, even on the official government publications website, in their form “as originally passed by the UK Parliament” (see <http://www.opsi.gov.uk/acts.htm>). So whether a section is in force or not, or has been repealed or amended, is not clear on the Act’s face.

Another kind of access problem is the need at times to be able to trace the history of legislation and the course of court decisions on its meaning. Lord Nicholls of Birkenhead commented in a 2004 case:

“Unhappily the law in this country on [compulsory purchase] is fraught with complexity and obscurity. To understand the present state of the law it is necessary to go back 150 years to the Lands Clauses

Consolidation Act 1845. From there a path must be traced, not always easily, through piecemeal development of the law by judicial exposition and statutory provision. Some of the more recent statutory provisions defy ready comprehension.”

(*Waters v. Welsh Development Agency* [2004] UKHL 19, paras 1 and 2. The judgment is available at <http://www.parliament.the-stationery-office.co.uk/pa/ld199697/ldjudgmt/ldjudgmt.htm?>).

Other calls for change

In the last few years, several organisations have looked critically at the way Parliament works and at its output. Commentaries have been published by such bodies as the House of Commons Modernisation Committee and the House of Lords Constitution Committee, the Hansard Society and the cross-party Parliament First Group. The Modernisation Committee is currently looking at the legislative process (see http://www.parliament.uk/parliamentary_committees/select_committee_on_modernisation_of_the_house_of_commons.cfm). The Law Commission for England and Wales has now published a consultation paper on post-legislative scrutiny (see Charter Point 4, on page 16) and how it might work. A report is in preparation (see http://www.lawcom.gov.uk/post_leg_scrutiny.htm). And a lot of work is going into feedback and impact assessment (Charter Points 1 and 3). Both are improving. For example, the effect of proposals (such as for a new offence) on the legal aid budget and on the courts is now specifically assessed.

Hence, the Charter came into being against a background of existing dissatisfaction with certain aspects of the legislative process, and a climate of gradual change. It reflects and supports the views of many of those who are keen to see improvement in the current system.

Recent UK plain language developments

In the context of the climate for change, readers may be interested to hear of two recent developments in the United Kingdom: the Coroners’ Bill, and developments in Scottish legislative drafting concerns.

(a) Coroners Bill

Harriet Harman MP, Minister of State at the Department for Constitutional Affairs, recently published the Coroners Bill (see <http://www.dca.gov.uk/legist/coronersreform.htm>).

This breaks some significant new Parliamentary ground. It was published in draft, to allow the House of Commons to undertake pre-legislative scrutiny. The increasing use of pre-legislative scrutiny has been welcomed, but while draft Bills are not unusual they are not yet the norm. Scrutiny of this Bill will go further, however. The Minister announced that “a separate strand of pre-legislative scrutiny [will] take place which will be by families who have recent experience of the coroners’ service”.

But the Bill’s main novelty arises from its format, as it includes a plain language “translation” of, and alongside, the statutory language version. Important questions arise from this interesting development, such as how much information the non-specialist reader needs. For instance, clause 46 of the Bill deals with adults giving evidence by live link. The plain language version renders 32 lines of text into three. But it does not mention the circumstances which the coroner may take into account in agreeing to this happening (such as the importance of the witness’s evidence).

(b) Scotland

Earlier this year, Parliamentary Counsel in Scotland, where the devolved Parliament can make its own law on some topics, announced a commitment to plain language. They published a useful booklet setting out a history of plain statutory drafting, the constraints on drafters, information on techniques and a bibliography—which includes names likely to be familiar to readers of *Clarity*—at <http://www.scotland.gov.uk/Publications/2006/02/17093804/0>.

Both the Coroners Bill and the Scottish development are also noted elsewhere in this edition. For the Coroners Bill, see the article by James Kessler at page 17; for the Scottish plain language development, see the article by Andy Beattie at page 10. Ed.

For the text of the Charter, see <http://www.lawsociety.org.uk/documents/downloads/dynamic/betterlawmakingcharter2005.pdf>

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Alison Plouviez is a Policy Adviser in the Law Reform Team at the Law Society of England and Wales, working in particular on the Better Law-making Programme. She has been interested in plain language since Clarity’s early days and is a former Committee member of Clarity.

The Better Law-making Charter

1 FEEDBACK ON CONSULTATIONS

Departments should give detailed feedback on responses to consultations, explaining how thinking has changed as a result and, if major arguments have not been accepted, why not.

2 PRE-LEGISLATIVE REVIEW

Before re-legislating on a topic, the scope and effectiveness of existing legislation should be reviewed. If new provisions are needed, these should be carefully dovetailed with the old, and sections which have been overtaken or never implemented should be repealed. Consolidation should be considered.

3 IMPACT ASSESSMENT

'Justice delayed is justice denied'. Adequate resources—such as funding for legal aid and court facilities—need to be provided to ensure that new rights and obligations can be promptly and effectively enforced or challenged. This means that the cost and other impacts of the measure must be systematically assessed at an early stage and proper provision made well in advance of implementation.

4 POST-LEGISLATIVE REVIEW

Significant legislation should be reviewed after an appropriate period. Is it working well? If not, why not? What lessons can be learnt?

5 BALANCING PRIMARY AND SECONDARY LEGISLATION

Statutory instruments (SIs) often contain vital details about the working of a measure, but receive a lower level of scrutiny than primary legislation. Bills should therefore either contain more detail or new procedures should allow draft SIs to be debated and amended. In the meantime, significant secondary legislation should be subject to consultation before being formally laid.

6 SOFT LAW

Soft law, such as government circulars and guidance, should be published online and on paper by those who make it showing dates of

implementation and clearly distinguishing legislative requirements from interpretation. Superseded material should be archived but remain available.

7 HELP USERS FOLLOW THE PROGRESS OF LEGISLATION

The Parliamentary website should be designed to help users understand and follow the progress of current and forthcoming legislation. Hansard, long Bills and SIs should be printed with an index; after each Parliamentary stage, Bills should be reprinted on paper of a different colour, and made available online, showing the deletions and additions made to the text in debate. A shorter version of Hansard should be published, to show the effect of votes on the Bill.

8 USE PLAIN LANGUAGE AND GOOD DESIGN

Legislative texts should be produced using plain language and modern, accessible structure, layout and design, whether on the internet or paper.

9 TAKE ADVANTAGE OF THE INTERNET

Each main measure should have a site or page of its own, with Acts and SIs in both "as passed" and "as amended" forms. This should include essential information such as dates of implementation and links to relevant regulations, amendments, departmental guidance and case law, other relevant primary legislation and the lead department. Departmental websites should alert regular users to news and include all current guidance and circulars, archiving outdated material but keeping it available free of charge.

10 IMPLEMENTATION

Implementation of legislation should be carefully planned to ensure that the measure will be workable and effective in practice, in part by doing thorough research at an early stage. Guidance and information should be comprehensive and available in good time before a measure comes into force.

The Law Society Better Law-making Charter
www.lawsociety.org.uk

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Plain English revolution officially announced

James Kessler

The Department of Constitutional Affairs has announced a Plain English Revolution with a small fanfare. The press release (12 June 2006) was headed:

First Bill to be Written in Plain English

It stated:

The Coroners Reform Bill will ... be the first Bill that will be published in plain English—so that anyone can read it and know what changes it is making.

This received a thoroughly positive response from the non-legal public. According to *The Times* (18 June 2006):

Centuries of parliamentary tradition will be swept away next week with a new-style Bill offering a “plain English” translation of the usual impenetrable legal language.”

The *Guardian* reported the same story in similar words.

Legal readers may be puzzled. Are we on the brink of a constitutional revolution in the UK? To see what actually happened, turn to the Coroners Bill.¹ This is in fact a draft Bill, published for consultation. Draft Bills have become quite a common procedure. You will find the Bill drafted in the current preferred style of the Parliamentary drafter, no different from many other Bills. On the right hand side pages you will find explanatory notes. Explanatory notes are as old as legislation itself, and explanatory notes have been published along with Parliamentary Bills since 1999.² To give the reader an idea of the *soi disant* “constitutional revolution”, here is the first part of section 1 of the Draft Bill and its corresponding “plain English” translation:

Draft Bill

Explanatory Note

1 Duty to investigate certain deaths

- (1) A senior coroner must conduct an investigation into the death of a person as soon as practical if—
 - (a) he is aware that the body of the deceased is situated within his area and
 - (b) subsection (2), (3) or (4) applies.

This clause sets out the circumstances when the coroner will investigate a death. It mirrors the requirements of section 8(1) of the Coroners Act 1988 (“the 1988 Act”), except that the requirement to investigate where the death has occurred “in prison” (section 8(1)(c)) has been altered so that it applies to deaths where the deceased was “in prison or otherwise lawfully detained in custody”.

The location of the body of the deceased (or cremated remains) will determine the coroner who will have a duty to investigate the death, as is currently the case under section 5(1) of the 1988 Act. This is to ensure that more than one coroner does not begin an investigation. In the new system, just as in the 1988 Act, coroners will continue to be allocated to a geographical area, although later clauses in the Bill set out the circumstances when these boundary restrictions can be relaxed.

Subsections (2), (3) and (4) set out the types of death that the coroner must investigate....

The innovation, if there is one, is possibly that the Explanatory Note is on the right hand side of the page as opposed to being published (as more usual) in a separate volume.

Conclusion

The press release was, alas, out of connection with reality. In plain English—of which the Government apparently approves—it might be called spin, though some might use harsher words, such as misleading rubbish. The PR Department of the DCA knows full well that the public wants plain English. The press release worked in the sense that it provided good PR. It made fools of a number of journalists who took it at face value without, presumably, discussing the matter with any legal colleagues. The Spectator, for instance, fell flat for the scam in Rod Liddle’s column (17th June 2006) headed “All laws to be written in plain English? Harriet Harman’s campaign against lawyer-speak”.

How the staff at the Department of Constitutional Affairs must have laughed!

The moral

Does it matter? It is encouraging that the Government recognises the benefits of plain English—if only for the purposes of self-serving press releases. It may be, however, that they are happier to talk the talk than to walk the walk. Much of the Finance Act 2006, for instance, is totally incomprehensible. No fanfare here about plain English. The moral one might draw from this story is not to take on trust anything one reads in a UK Government press release.

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Endnotes

- ¹ www.dca.gov.uk/legist/coronersreform.htm.
- ² www.opsi.gov.uk/legislation/uk-expa.htm.

James Kessler is a leading UK barrister. He delivered a paper at the 2005 Clarity conference. His books are renowned for their clarity of expression, and the precedents they contain are models of plain language in a field of law that is complex and tortuous. His books include: *Drafting Trusts and Will Trusts*; *Taxation of Charities*; *Taxation of Foreign Domiciliaries*; *Drafting Trusts and Will Trusts in Canada*; *Drafting Trusts and Will Trusts in Northern Ireland*.

Clarity for South Africa's credit consumers

Phil Knight

In November last year, the Parliament of South Africa enacted the *National Credit Act, 2005*¹, which is scheduled to be fully operational within the next year. This new legislation, which applies to every agreement between people dealing at arms-length if interest is charged for money loaned, credit extended or a deferred payment, includes a broad new obligation on creditors to use "plain language" in every document that the Act requires the lender to provide to a borrower.

It is essential that attorneys advising South African lenders understand the specific requirements of that obligation. To do that, they will first need to consider the scope of application of the Act, both as to the transactions to which it applies, the borrowers who are protected by it, and the documents that are required to meet the "plain language" standard. All of those questions are beyond the scope of this article.

However, in preparing to give advice on what the law requires of lenders, it is equally important to examine the specifics of the language requirements, which are illustrative of only one of the many options available when pursuing the goal of clarity in legal texts.

The plain language rule

The new requirement governing documents written by lenders and delivered to borrowers in South Africa is set out in section 64 of the Act, which reads:

(1) *The producer of a document that is required to be delivered to a consumer in terms of this Act must provide that document—*

(a) *in the prescribed form, if any, for that document; or*

(b) *in plain language, if no form has been prescribed for that document.*

(2) *For the purposes of this Act, a document is in plain language if it is reasonable to*

conclude that an ordinary consumer of the class of persons for whom the document is intended, with average literacy skills and minimal credit experience, could be expected to understand the content, significance and import of the document without undue effort, having regard to—

(a) *the content, comprehensiveness and consistency of the document;*

(b) *the organization, form and style of the document;*

(c) *the vocabulary, usage and sentence structure of the text; and*

(d) *the use of any illustrations, examples, headings, or other aids to reading and understanding.*

The first significant observation about section 64 is its placement within the Act, and the title assigned to the section. It falls within *Chapter 4—Consumer Credit Policy, Part A—Consumer Rights*. The section itself is titled *Right to information in plain and understandable language*. As a declared right, section 64 enjoys a protected status within the Act. Any attempt to contract out of it would be illegal, and consumers who act to enforce this right are protected from retribution by the lender.

The details of those legal mechanisms are again beyond the scope of this article, but the provision that they protect is profound: clarity has been declared to be a right, alongside the right to participate in the economy, the right not to be discriminated against when participating in the economy, the right to receive information, and the right to have legal rights protected.

Subsection (1) deserves a brief explanation. The new Act specifically allows a court to consider appropriate foreign law when interpreting and applying the Act. Statutory requirements of the sort set out in section 64 are relatively uncommon in South Africa, so it would be reasonable to expect a court to look at relevant decisions from foreign courts. The drafters were well aware of the 2002 decision of the Supreme Court of Canada in *Smith v. Co-operators General Insurance Co.*², in which the Court held (among other things) that a general obligation to provide information in "straightforward and clear language" could not be satisfied merely by using a form of document approved or prescribed by the regulator. The Canadian

decision suggests that the author ought to have added to the approved or prescribed form to the extent necessary to satisfy the more general clear language standard. The South African drafters recognized that an approved or prescribed form to which more has been added is no longer the form as prescribed or approved. The Supreme Court of Canada's doctrine would create an impossible conflict for attorneys and others drafting regulated documents using prescribed forms, as they would have to choose which law to violate: the one requiring the use of a prescribed form, or the one requiring the use of 'plain language'. To avoid that trap in the application of their new plain language requirements, section 64(1) was framed to apply only to documents whose form or content had not been prescribed by regulation.

Nature of the plain language requirement

Language standards for legal documents take many forms, but fall broadly into two or three species. Some impose an objective test, such as a readability measurement, font size, or use or avoidance of specific words³. Requirements of that sort are simple to administer and adjudicate, and provide a high degree of certainty for the regulated industry and its advisors. On the other hand, they make it equally simple to evade the goal of clarity for the consumer, since anyone with a modest degree of creativity can assemble simple words in short, direct sentences that nevertheless obscure meaning.

Recognizing that evasion would at times be in the interests of some lenders, that an objective test allows for technical compliance, but substantive evasion, and that plain, simple text is not necessarily the same thing as clarity or certainty in meaning, South Africa rejected the path of easily measurable standards.

Other legislation imposes a subjective test, in which compliance is assessed either against the actual ability of a specific consumer to read and understand the text, or on the probability that consumers of a particular class or characteristic will generally be supposed to be able to do so.

Although the 'specific consumer' test would create great legal certainty for consumers, Parliament recognized that the test was fraught with peril. In a dynamic consumer marketplace, it would be impossible to predict

what style, organization and vocabulary would successfully communicate with each and every potential consumer. Industry would never have any degree of certainty that it was complying with the law, and would always be exposed to an unacceptable degree of risk.

In the *Smith* case, discussed above, all of the Canadian courts interpreted the Ontario insurance law that was in issue as imposing a subjective 'class of consumer' test, holding that the documents had to be in "clear language, directed towards an unsophisticated person"⁴. The South African test, as amplified in section 64(2), uses a similar approach, but attempts to be more nuanced (and frankly, less elitist) than was the Supreme Court of Canada in its characterization of all consumers as presumptively unsophisticated.

Instead, section 64 directs the court to imagine an ordinary consumer of the class of persons for whom the subject document was intended. That person is not to be imagined as the worst case—wholly unable to read. Rather, it is a person of average literacy—a test that can, and should, be applied in a flexible manner, having regard to the various patterns of literacy in various localities and across various economic classes. On the other hand, the imagined consumer is not to be the best case—a highly experienced borrower. Rather, the assumption is to be made that the consumer is a first time borrower. This description of the imagined consumer is rooted in the recognition that ability to read and understand a document varies with two kinds of life experience—that of a reader, and (in the context of credit) that of a borrower. Section 64 says that, when preparing their documents, lenders may assume the borrowers to be somewhat experienced readers, but must assume that they are all novice debtors.

One more characteristic applies to the imagined consumer—they have to try to read the document. The court is to consider whether it is reasonably probable that a somewhat experienced reader, even though a novice debtor, who makes a reasonable effort to do so, will comprehend the document. With this short clause in section 64(2), South Africa rejected any notion of a text-based conception of communication and recognized that meaning is not simply lying on the page, waiting to be absorbed, but rather is created in the minds of readers applying

themselves to a document and the symbols encoded upon it.

However, the court is not to limit its enquiry to the nature of the ordinary consumer for whom a document is intended. Just as section 64 recognises that communication and the creation of meaning is 'reader centred', it also recognizes that consumers have a purpose in reading their credit contracts and other documents. So, the test continues by directing the court to consider those purposes, asking whether it is probable that the consumer could understand the content, significance and import of the document. The three nouns in that string suggest these three questions:

- Can the consumer understand what the document says?
- Can the consumer understand what the document has to do with the credit arrangements?
- Can the consumer understand the effect of the message on the credit arrangements, and on other aspects of the consumer's affairs?

Finally, section 64 provides some assistance for anyone assessing whether a document meets the plain language test, by directing a review of four qualities of the text itself.

First, consider the thought reflected in the document, as a whole text. Is it complete, comprehensive and consistent?

Second, consider the organization and presentation of the text. Is there a logic to it, and is it a logical pattern that the reader will recognize and find helpful?

Third, consider the language, words, usage and sentence structure. In many laws of this type, this consideration comes first, and in yet many more, no other considerations are even mentioned. Yet research has shown that, despite all the attention given to vocabulary and sentence structure and length, when assessing comprehensibility, these aspects are the least significant features of a text. So it seems fitting that this consideration should fall lower in the list than the more significant matters that address the readers' comprehension, rather than cognition and decoding.

Fourthly, consider any aids to understanding that have been inserted to illustrate any

aspect of the text. Does it have a table of contents, headings, glossary? Did the author use tables, examples or graphs?

Final thoughts

Significantly, none of document characteristics included in section 64 are required. They are merely aspects of the text to be considered when assessing whether the plain language test has been met. In fact, section 64 does not require of any document that it meets any textual quality at all, nor is its purpose to measure any document against any particular objective quality criteria. Rather, it requires that the intended readers will probably be able to understand the document, and directs the court and others as to how to assess whether that test has been met.

There is a rhetorical paradox in section 64. On the one hand, it starts by requiring certain documents to "be in plain language", an expression that suggests a text based test for such a document. On the other hand, it describes a document as "being in plain language" if it satisfies a test that is reader based and related to purposive communication. Section 64 has appropriated a widely used, though ultimately nonsensical, expression often employed in relation to documents as static artifacts, and re-directed it to focus on the interpersonal dynamic of written human communication.

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Endnotes

¹ Act No. 34 of 2005. Published in Government Gazette 28619 on 15 March 2006. To access the full text of the Act in Acrobat (.pdf) format, go to www.dti.gov.za/ccrdlawreview/creditact2006/htm

² (2002) SCC 30. Reviewed by Janet Erasmus in (2002) *Clarity* 48 at page 32.

³ See, for example, certain aspects of the regulations reviewed by Margaret van Naerssen in (2005) *Clarity* 53 at page 57, or the regulations I reviewed in (1995) *Clarity* 32 at page 22.

⁴ Italics added for emphasis.

Phil Knight is a Canadian lawyer, university lecturer and drafter. He is a former Editor of *Clarity* and for many years was *Clarity's* Canadian representative. He has drafted some of South Africa's most important post-apartheid Acts, including its human rights legislation.

Implementing plain language at Mallesons

Belinda Gibson and Marco Stella

Mallesons Stephen Jaques

Introduction

Mallesons is a leading commercial law firm in the Asia-Pacific region. In 1986, we took the unprecedented step of introducing a plain language policy. At the time, we did not realise how pervasive plain language would become, not just at Mallesons, but in the legal market generally. We now regard plain language as “the voice of our brand” and an integral part of the firm’s culture.

Plain language is a simple concept. It does not have a special legal meaning. It just means communication that is clear and easy to understand. Plain language is often compared to traditional legal language (also called “legalese”). The comparison is stark. Legalese is difficult to read and understand, even for lawyers. Documents written in legalese are poorly organised, use outdated or overly complex grammatical structures (or both), and contain unfamiliar, confusing and unnecessary words. Plain language is a way to avoid the problems of legalese.

One feature that plain language shares with many other simple ideas (for example, “eat less and exercise more”) is that it is surprisingly difficult to put into practice. This article is about our experiences in implementing plain language at Mallesons. In particular, we discuss:

- why we decided to adopt plain language;
- how we did it;
- the challenges we faced; and
- our achievements and some future directions.

Why use plain language?

The benefits of plain language are now well documented.¹ In summary, plain language is

efficient and effective. These benefits flow through to our clients, ourselves and the legal profession as a whole.

Back in 1986, we were mainly focussed on the efficiency benefits for the firm. For example, by using plain language we were able to reduce the number of words in our precedent documents, sometimes by more than half.² For a 20-page document, even a 25% reduction means around 2,000 fewer words. As a result, our lawyers can prepare and review our documents faster. And let’s face it, no one likes reading or writing unnecessary words. That is a chore usually reserved for school children on detention, not professionals working to tight deadlines to achieve the best result for their clients.

Another efficiency benefit is that plain language reduces errors and promotes accuracy. Documents written in plain language are easier to read and understand than those written in legalese. Therefore it is much harder for a mistake to go undetected in a plain language document. Mistakes are usually discovered and corrected before the document is finalised. In one matter we were asked to rewrite a client’s standard form loan agreement in plain language. After reviewing the document, the client asked why we had inserted a particular clause. In fact we had not inserted it. The clause had been in the document all along, but the client did not realise this until they read the plain language version. Unfortunately, plain language cannot guarantee mistake-free documents, only clear thinking can do that—but it is still an important aspect of risk management at Mallesons.³

It did not take long for our clients to realise that plain language benefits them too. It enables them to actively participate in solving their legal problems and, ultimately, to make informed decisions about what they should do next. Today, the majority of our clients not only expect plain language, they demand it. They will not tolerate advices or documents that they do not understand.

We can also vouch for the legal effectiveness of plain language. Over the years we have prepared all types of documents in plain language: advices, agreements, insurance policies, compliance manuals, prospectuses. Some of them have been tested in court. We are pleased to say that they fared well.⁴ In

fact, judges have commented favourably on plain language documents (not just ours).⁵

Finally, plain language benefits the legal profession as a whole. Poor communication is a major cause of friction between lawyers and their clients. It often leads to formal complaints being made against lawyers.⁶ No doubt the way many lawyers write contributes to these problems. So, instead of adding to the problem by using legalese to mystify their work, lawyers could improve their client relationships by using plain language to clarify what they do.

How did we do it?

Even though plain language is not a new language, there are some parallels between learning a new language and learning plain language. At Malleasons we introduced plain language by immersion. We wanted to surround our lawyers with plain language so as to give them every possible opportunity to use it in their day-to-day work.⁷ We did (and still do) this by providing them with plain language precedents, training them in plain language techniques, and offering support when they need it.

Precedents

Our precedents are templates for creating documents. They range from basic frameworks requiring the writer to fill in most of the detail (for example, a letter template), to sophisticated agreements and letters of advice containing not only standard text but also choices and “help notes” representing years of accumulated know-how.

Precedents are the starting point for many of the written communications we produce. If our precedents are in plain language, then the majority of our finished documents will be too. And by using the precedents over and over again, our lawyers are constantly exposed to good plain language writing.

Three of our precedents comprise the firm’s style guide. They set out our format rules and writing guidelines for all written communications. These rules and guidelines are based on plain language principles.

We have strict quality controls for precedents. Each precedent is carefully prepared by one of our precedent lawyers, usually in conjunction with one or more lawyers from the relevant practice team. They are signed off by

at least one partner. This process ensures that no detail, even seemingly minor ones, escapes plain language scrutiny.

There is no point having plain language precedents unless they are easily accessible. In 1994 we ensured that our lawyers could instantly access the entire suite of precedents from their desk.⁸ Our technology has moved on, and it is now possible for our lawyers to access the precedents from any place where there is a computer with an internet connection.

Training and support

Having a comprehensive suite of plain language precedents is at best a good start. During the course of any matter, the precedent is modified to create the final document for the client. It is therefore important for our lawyers to be able to write independently in plain language. If they do not, it is usually very obvious where the precedent stops and the original writing starts.

So we back up our precedents with training for our new starters when they join the firm. All new starters have a session on Malleasons’ style and the importance of using it for all written communications. New lawyers have an interactive session specifically on plain language, which covers:

- planning and organising material logically for the reader;
- sentence structure, including sentence length, active and passive voice, positive and negative sentences and placement of essential elements; and
- word choice, including using familiar words, avoiding unnecessary words, and using verbs for actions.

Also, seasonal clerks (law students working at Malleasons during their vacation before entering the final year of university) have a special session on how to write a good research memo. This is a more practical session, focussing on the specific skills the clerks will be using during their clerkship. As an added bonus, they can use their newly acquired plain language skills when they return to university to complete their studies.

As well as training, plain language contacts throughout the firm are available to assist with plain language problems. This “just in time” support can be a particularly effective way of spreading plain language skills,

because it is in response to a real problem rather than a hypothetical training situation.

Past challenges

Introducing plain language at Mallesons raised its fair share of challenges. This section sets out a few of the more important ones, some of the mistakes we made, and how we fixed them.

Project management

At the start, we did not realise just how big a project implementing the plain language policy would be. To put it into perspective, between 1988 and 1990 the costs of developing our precedents were over \$5,000,000. We also employed 7 lawyers full-time during that period to get the job done.⁹ Since then we have committed substantial resources to expand and maintain our precedent system. A project of this size will not succeed without proper project management. This includes careful scoping of the project, planning the tasks to be performed, allocating resources, setting milestones and checking and rewarding progress.

Resistance to change

On a personal level, the change from legalese to plain language can be confronting. It is very difficult for anyone to change their writing style, especially if they have been using it for many years. While most lawyers would not dream of basing a legal advice solely on a legal textbook published 20 years ago, often they are quite content to use a writing style and rules of grammar of a similar vintage (if not older) in the very same advice!

There are two steps to successfully managing the change from legalese to plain language:

- convincing people that it is the right thing to do; and
- giving them the tools and the skills to do it.

We discussed the second step in the previous section. The rest of this section deals with the first step.

Convincing our lawyers to change

Today, the case for plain language is widely accepted. In 1986 it was not. A key factor in achieving the first step at Mallesons was having the support of the firm's senior management. In a partnership, this effectively means that a majority of partners must actively

support the initiative. Partners have an enormous influence over the development of junior lawyers. Those partners who do not actively support plain language can sometimes pass on old habits to a new generation of lawyers, who then need to be re-educated. It has taken a long time to minimise these "pockets of resistance".

Another critical factor in convincing our lawyers has been the calibre, dedication and enthusiasm of the people who have led the way. We have been fortunate to have had on our team world-renowned plain language experts like Michèle Asprey, Dr Robert Eagleson, Ted Kerr and Professor Peter Butt (the last two are still with us). Robert, a former professor of English at Sydney University, was particularly helpful in convincing lawyers of the merits of plain language. Even our most opinionated lawyers thought carefully before arguing points of grammar with him!

We have found that even lawyers who accept plain language as the best way to write and who have all our plain language resources at their disposal, sometimes still use legalese. This may be because the client insists that a certain clause or document should be used, or because there is not enough time to compose or check a plain language version. But these situations are becoming less frequent.

Our achievements and future directions

Over the past 20 years, we have:

- dramatically improved our service to clients by clearly and effectively communicating solutions to their complex legal problems;
- changed the firm's culture so that plain language is regarded as the only acceptable form of written communication;
- won 3 Clarity awards;
- set up and maintained an extensive suite of plain language precedents; and
- trained our lawyers to write independently in plain language.

Our challenge now is to maintain our leadership in the field of plain language communication, by continuous improvement and training and by using the latest technology to make better drafting resources more readily available.

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Endnotes

- ¹ M Asprey, *Plain Language for Lawyers*, 3rd ed, The Federation Press, Sydney 2003, pp 33-34; P Butt and R Castle, *Modern Legal Drafting: a guide to using clearer language*, Cambridge University Press, Cambridge 2001, pp 88-95; R Eagleson (E Kerr and C Balmford, eds), "Plainly the Best—Guidelines for expert legal drafting", unpublished Mallesons document, pp 1-2.
- ² Eagleson, p 2.
- ³ Eagleson, p 2.
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- ⁹ Kerr, p 50.

Belinda Gibson is a partner at Mallesons Stephen Jacques, a leading Australian law firm with offices throughout Australia and in a number of other countries. **Marco Stella** is a senior associate at the same firm, with extensive experience in training and precedent development. Mallesons (as the firm is usually called) is known for its plain language drafting style, and many of its partners and staff are members of Clarity. A version of this article was recently published by CCH Australia, at www.cch.com.au, and is reproduced here with the consent of CCH. Ed.

Evolution of an *easy-to-understand financial privacy notice*

Susan D. Kleimann
Kathryn Maloney Simonds
Rasika Krishna

Background

The U.S. government had a public policy problem—and needed a solution.

To protect consumers and make them aware of financial-information-sharing practices, the U.S. government implemented a policy in 1999 known as the Gramm-Leach-Bliley Act (GLBA). The GLBA requires financial institutions to provide their customers with disclosure notices about their policies and practices around financial information sharing. In response to the regulation, financial institutions went to great lengths and expense to comply with the government's policy and disclose their practices. However, consumers weren't reading the financial privacy notices—and if they attempted to read the notices, they couldn't understand them.

The GLBA specifically states that privacy notices must be "clear, conspicuous, and accurate statements of a company's privacy practices." However, researchers reported early on that the privacy notices were too lengthy, dense in content, and contained complex language. The government made many attempts to address the problems—issuing draft language, holding joint agency workshops on writing effective privacy notices, developing guides for complying, and opening up for comments from industry. After six years, the government enlisted communication experts to help them develop alternative financial privacy notices that consumers could easily understand and use.

Our company, Kleimann Communication Group, Inc., conducted formative research and an iterative document design project sponsored by six of the federal financial regulatory agencies¹. The government unveiled

KCG's full report on financial privacy notices on March 31, 2006. The report presents a research-based rationale for a "prototype" privacy notice. It discusses the qualitative research methodology used; presents findings and analysis from eight test sites; describes the evolution of the prototype through an 18-month iterative process; and outlines key themes that contribute to the success of the project and to the clarity and usability of the prototype.

Objective and goals

The project objective was to explore the reasons why consumers don't read and understand privacy notices, and then to use this research to develop paper-based alternative privacy notices—or components of notices—that consumers could understand and use. We used a rigorous, research-based design model to gather data and make revisions after each iteration based on consumer input. This process of designing and revising allowed us to continually modify general and specific features of the prototype, such as content, presentation, and wording. The process also allowed us to understand barriers to consumer comprehension and ultimately arrive at a prototype that met the research goals of comprehension, comparability, and compliance.

- *Comprehension.* The prototype must enable consumers to understand the basic concepts behind the privacy notices and understand what to do with the notices. It must be clear and conspicuous as a whole and readily accessible in its parts.
- *Comparison.* The prototype must allow consumers to compare information-sharing practices across financial institutions and to identify the differences in sharing practices.
- *Compliance.* The prototype must include the elements required by the GLBA and the affiliate marketing provision of the Fair and Accurate Credit Transactions Act.

Design considerations

Within the design, we worked with several considerations and constraints:

- *Neutral and objective.* The prototype needed to inform consumers about privacy laws and financial institutions' sharing practices in a factual and neutral way. The language should provide factual information, not direct a consumer to make any particular decision. Through the course of designing and testing, we resisted using inflammatory or potentially provocative words as a means of attracting attention to the document.
- *Format and design.* The prototype needed to be paper-based rather than Web-based. To focus on the research goals of comprehension, comparability, and compliance, and to minimize testing variables, we tested only in black and white, on 8½" x 11" paper, and with a large, readable font.

Methodology and testing

We used four qualitative methods—focus groups, preference testing, pretest, and diagnostic usability testing—to iteratively develop and refine the prototype according to the research goals of comprehension, comparability, and compliance.

We tested a total of 66 participants over eight test rounds in various locations based on the U.S. census regions and divisions. The testing was conducted over 12 months, as follows:

- Two focus groups with 10 participants each, 20 participants total (Baltimore, MD)
- Preference testing with 7 participants (Washington, DC)
- Pretest with 4 participants (Baltimore, MD)
- Diagnostic usability testing with 35 participants in five sites (San Francisco, CA; Richmond, VA; Austin, TX; Boston, MA; and St. Louis, MO)

Research and design

Each test session was carefully planned and structured to meet the research goals. The following five questions helped guide the development of the prototype content and design. How do we:

1. attract consumers' attention to the notice using only objective and factual language?

2. decide what information to include?
3. ensure that consumers can understand about the sharing of their personal information?
4. ensure that consumers can compare sharing practices across financial institutions?
5. enable consumers to understand how to opt-out?

Prototype evolution

As with most design development projects, a key challenge was how to select and organize the content of the notice to address these goals and questions. We used the information and elements required by the law, organizing them in different ways throughout the process to arrive at a final organization of the content that worked.

We developed and tested a variety of designs, ultimately structuring the disclosure of information-sharing practices in a table format. We also experimented with a prose design of the disclosure information, but the table design worked far better in helping consumers easily access, understand, and compare sharing practices. We learned that we needed to include an educational component in the notice, as consumers had no prior understanding of information-sharing practices. To do this, we identified the key information that would draw the reader into the notice and provide sufficient information to enable understanding of the disclosure table. Supplemental information, such as definitions and additional information required by the GLBA, was provided on page 2 of the prototype. Testing showed that consumers could work with page 1 alone, although they appreciated the supplemental information on page 2 for further clarification.

The prototype notice

The prototype has four key components—the title, the frame, the disclosure table, and the opt-out form—that contribute in multiple ways to its effectiveness.

The title

The title helps consumers understand that the notice is from their bank and that their personal information is currently being collected and used by their bank.

The frame

The frame is at the heart of ensuring comprehension, because it provides basic information about financial-sharing practices as a context for consumers to understand the details of their particular bank's sharing practices. The key frame on page 1 provides a context for the consumer and gives key details. The secondary frame on page 2 also includes a series of frequently asked questions, more required information, and more detailed definitions of terms on page 1. The frame is necessary for understanding the disclosure information.

The disclosure table

The disclosure table is at the heart of the prototype. It not only shows what the individual financial institution is sharing, but also includes seven basic reasons any financial

institution can share information. The disclosure table, therefore, enables consumers to understand the details of their financial institution's sharing practices in the context of how other financial institutions can share. It is critical for comprehension and comparability.

The opt-out form

The opt-out form identifies how a particular financial institution allows consumers to limit a particular type of sharing.

Meta-themes

Six meta-themes informed and guided the development of the prototype. To an extent, these meta-themes are universal design principles. The tendency in the design development of a complex product is to say too much, to let design decorate, to attract attention at the

FACTS

WHAT DOES NEPTUNE BANK DO WITH YOUR PERSONAL INFORMATION?

Why? Financial companies choose how they share your personal information. Federal law gives consumers the right to limit some but not all sharing. Federal law also requires us to tell you how we collect, share, and protect your personal information. Please read this notice carefully to understand what we do.

What? The types of personal information we collect and share depend on the product or service you have with us. This information can include:

- social security number and income
- account balances and payment history
- credit history and credit scores

When you close your account, we continue to share information about you according to our policies.

How? All financial companies need to share customers' personal information to run their everyday business—to process transactions, maintain customer accounts, and report to credit bureaus. In the section below, we list the reasons financial companies can share their customers' personal information; the reasons Neptune Bank chooses to share; and whether you can limit this sharing.

Reasons we can share your personal information	Does Neptune Bank share?	Can you limit this sharing?
For our everyday business purposes—to process your transactions, maintain your account, and report to credit bureaus	Yes	No
For our marketing purposes—to offer our products and services to you	Yes	No
For joint marketing with other financial companies	Yes	No
For our affiliates' everyday business purposes—information about your transactions and experiences	Yes	No
For our affiliates' everyday business purposes—information about your creditworthiness	Yes	Yes (Check your choices, p. 3)
For our affiliates to market to you	Yes	Yes (Check your choices, p. 3)
For our nonaffiliates to market to you	Yes	Yes (Check your choices, p. 3)

Contact Us Call 1-800-898-9698 or go to www.neptunebank.com/privacy

Title

Key Frame

Disclosure Table

FACTS

WHAT DOES NEPTUNE BANK DO WITH YOUR PERSONAL INFORMATION?

Sharing practices

How often does Neptune Bank notify me about their practices?	We must notify you about our sharing practices when you open an account and each year while you are a customer.
How does Neptune Bank protect my personal information?	To protect your personal information from unauthorized access and use, We use security measures that comply with federal law. These measures include computer safeguards and secured files and buildings.
How does Neptune Bank collect my personal information?	We collect your personal information, for example, when you <ul style="list-style-type: none">• open an account or deposit money• pay your bills or apply for a loan• use your credit or debit card We also collect your personal information from others, such as credit bureaus, affiliates, or other companies.
Why can't I limit all sharing?	Federal law gives you the right to limit sharing only for <ul style="list-style-type: none">• affiliates' everyday business purposes—information about your creditworthiness• affiliates to market to you• nonaffiliates to market to you State laws and individual companies may give you additional rights to limit sharing.

Definitions

Everyday business purposes	The actions necessary by financial companies to run their business and manage customer accounts, such as <ul style="list-style-type: none">• processing transactions, mailing, and auditing services• providing information to credit bureaus• responding to court orders and legal investigations
Affiliates	Companies related by common ownership or control. They can be financial and nonfinancial companies. <ul style="list-style-type: none">• <i>Our affiliates include companies with a Neptune name; financial companies, such as Orion Insurance; and nonfinancial companies, such as Saturn Marketing Agency.</i>
Nonaffiliates	Companies not related by common ownership or control. They can be financial and nonfinancial companies. <ul style="list-style-type: none">• <i>Nonaffiliates we share with can include mortgage companies, insurance companies, direct marketing companies, and nonprofit organizations</i>
Joint marketing	A formal agreement between nonaffiliated financial companies that together market financial products or services to you. <ul style="list-style-type: none">• <i>Our joint marketing partners include credit card companies.</i>

Secondary Frame

Page 2

expense of balance, to provide the specifics without a context, and to standardize without discrimination. The final prototype—our design and content decisions—grows out of and is grounded in the following themes, our particular research methodology, and our research results.

Keep it simple.

Our research consistently showed that consumers are overwhelmed by too many words, complex information, and vague words and phrases. In fact, when faced with complex information, often they won't even bother to read. Our evolution of the prototype focused on minimizing burden on the consumer by continually simplifying the notice. We eliminated redundancies, reduced words, used simpler words, clarified meaning, and provided key context information up front. At the same time, we did not oversimplify. A notice that strips away all contextual information

will be short but uninformative. The challenge is to find the balance between as few words as possible and enough information so consumers understand.

Good design matters.

Good design delivers important information in a format that reinforces the content. Our research repeatedly showed that consumers responded positively to the table design, headings, white space, bold text, bulleted lists, a larger font size, and full-size paper. These design techniques, combined with the simplified content, helped consumers better understand the information. They recognized that it looked different from other privacy notices, commenting that it was easier to read and that it looked more inviting. The easy-to-read design created the impression that the bank wanted the information to be read and understood.

F A C T S		WHAT DOES NEPTUNE BANK DO WITH YOUR PERSONAL INFORMATION?												
If you want to limit our sharing														
Contact us	By telephone: 1-800-898-9698—our menu will prompt you through your choices On the web: www.neptunebank.com/privacy By mail: Neptune Bank Privacy Department PO Box 36775 Phoenix, AZ 88709 Unless we hear from you, we can begin sharing your information 30 days from the date of this letter. However, you can contact us at any time to limit our sharing.													
Main-in form														
Check your choices	Check any/all you want to limit: (See page 1)													
<i>Your choices will apply to everyone on your account.</i>	<input type="checkbox"/> Do not share information about my creditworthiness with your affiliates for their everyday business purposes. <input type="checkbox"/> Do not allow your affiliates to use my personal information to market to me. (I will receive a renewal notice for this use for marketing in 5 years.) <input type="checkbox"/> Do not share my personal information with nonaffiliates to market their products and services to me.													
	<table border="1"> <tr><td>Your name</td><td></td></tr> <tr><td>Your address</td><td></td></tr> <tr><td>Your account number</td><td></td></tr> </table>	Your name		Your address		Your account number		<table border="1"> <tr><td>Mail to:</td></tr> <tr><td>Neptune Bank</td></tr> <tr><td>Privacy Department</td></tr> <tr><td>PO Box 36775</td></tr> <tr><td>Phoenix, AZ 88709</td></tr> </table>		Mail to:	Neptune Bank	Privacy Department	PO Box 36775	Phoenix, AZ 88709
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Privacy Department														
PO Box 36775														
Phoenix, AZ 88709														

Opt-out Form

Page 3

Careful design decisions ensure neutrality.

The point of privacy notices is to provide information, not direct a decision. They need to deliver information about financial sharing practices in a way that reports the information truthfully. We, therefore, focused on using factual language, objective presentation, and non-inflammatory words. In each round of testing, we listened for comments, reactions, and perceptions from consumers that indicated areas of potential bias in the notice. The iterative testing process allowed us to make design decisions that led to a final notice that is intended to be clear, neutral, and unbiased.

A “whole-to-part” design is critical to comprehension.

Our research showed that consumers needed a context for understanding the information in the notice. Most consumers do not have an operational understanding of information-sharing. Therefore, the notice needed to provide enough context that consumers could understand the detail both at the general level and at the table level.

The key frame component provides a context about financial-sharing laws and personal information so consumers can understand the disclosure table.

The disclosure table frames the bank’s sharing practices by giving reasons why financial institutions can share information. Consumers can then distinguish and understand the specific sharing practices of their bank and compare them to other institutions.

Consumers need the context of both the whole and part to understand the critical details. Without context, they understand virtually nothing.

Standardization is highly effective.

Standardization of form and content helped consumers recognize the notice and the information in it. As they became familiar with the prototype, they learned where to look for the differences. Standardization reduces cognitive burden because consumers recognize the information without having to continually re-read notices word for word.

The disclosure table is critical.

The disclosure table is at the heart of the prototype. It shows consumers how their personal information might be shared, how their particular bank shares it, and what sharing they can limit. Simple, concise, and highly visual, the standardized disclosure table simplifies highly complex and mandatory information into a design that consumers can understand without undue burden. Our research showed that consumers preferred the standardized disclosure table, could understand the disclosure information with greater ease than with the prose design, and could accurately compare sharing practices across financial institutions. The disclosure table, with its whole-to-part structure, is critical to consumer understanding and comparing financial sharing practices.

Conclusion

Ultimately, the prototype derived from eight rounds of testing ensures that the information about financial privacy laws and sharing practices is available to the public in a clear and understandable notice that can be easily adapted by any financial institution. Now, the very reason the GLBA was enacted—to protect and inform consumers via clear and transparent disclosure—has a chance to be effective.

The report extensively details the evolution of the prototype through each of the test rounds, illustrating how the prototype clearly and conspicuously informs consumers, who can, therefore, make informed choices. That was the crux of the Form Development Project—and its success.

The full research report is available online at www.kleimann.com.

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Endnotes

¹ The six federal agencies are: Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Federal Trade Commission, National Credit Union Administration, Office of the Comptroller of the Currency, and the Securities and Exchange Commission.

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Two items from the US

We reproduce here two items of interest, particularly to US readers. The first concerns developments at the US Securities & Exchange Commission. The second concerns important legislative developments.

US Securities & Exchange Commission

Many *Clarity* readers will have heard of the important lead being taken by the US Securities & Exchange Commission in promoting plain language in securities documents and prospectuses. A number of other Securities Commissions around the world are considering following the US lead. Earlier this year, the Chairman of the US Commission appeared before the US Senate Committee on Banking, Housing and Urban Affairs to testify about the Commission's initiatives and priorities to improve financial disclosure for individual investors. The following is an edited text of his testimony. The full text is available at <http://www.sec.gov/news/testimony/ts042506cc.htm>

Improving financial disclosure for individual investors

Christopher Cox

U.S. Securities & Exchange Commission

April 25, 2006

Thank you for giving me the opportunity to be here today to testify about the initiatives and priorities underway at the Securities and Exchange Commission to improve financial disclosure for individual investors.

Several years ago, in the midst of rampant financial scandals and a crisis of investor confidence, this Committee held a series of exceptionally important hearings on corporate responsibility and investor protection. Those hearings, and the work of the Members of this Committee that followed, laid the foundation for landmark reforms that have restored investor confidence and the health of our capital markets. I commend each of you for your efforts, and am happy to report that the SEC is using the new tools that you have given us to insure that those reforms are implemented exactly as intended by the Congress.

A lot has happened in the nine months since I last sat at this table. I very much appreciate this opportunity to give you a report on the new initiatives the SEC has undertaken, as well as to hear from you about your priorities.

Introduction

The principal subject of this brief testimony is improving disclosure for the benefit of individual investors. If I may, I'd like to take a step back and put these efforts into context.

Most of your constituents are not investment bankers, or lawyers, or accountants. But most of them are investors. It is a stunning fact of life in the 21st century that a majority of Americans now own stocks, either directly or through mutual funds. It is chiefly to serve these people that the SEC exists. Our mission—to protect investors, promote capital

formation, and maintain orderly markets—must always put ordinary Americans first.

In a well ordered market, educated consumers can choose from a number of competitive products and find what they want at a price they are willing to pay. But in order to educate themselves, investors need comparative facts. So while investors must bear the responsibility of learning what they can about their investment choices, the correlative duty of sellers of investment products is to provide the relevant information. What's more, in order for investors to make sound decisions, the seller's information has to be understandable, accessible, and accurate.

These are the basic ingredients of healthy competition in every corner of the financial marketplace.

To more closely match the theory of a well ordered market with today's reality, the SEC is currently pursuing four key initiatives to improve the quality and usefulness of disclosure for individual investors. These initiatives, taken together, are designed to insure that investors have access to more accurate and understandable information about the securities they own or are considering buying.

These four initiatives are:

1. Moving from boilerplate legalese to plain English in every document intended for retail consumption;
2. Moving from long, hard-to-read disclosure documents to easy-to-navigate Web pages that let investors click through to find what they want;
3. Reducing the complexity of accounting rules and regulations; and
4. Focusing our anti-fraud efforts on scams that target older Americans.

Making disclosure understandable for ordinary investors

It's the SEC's job to see to it that financial data and qualitative information about the issuers of securities are fully and fairly disclosed. But surely we can't say we've achieved that objective if the information is provided in a way that isn't clearly understandable to the men and women for whom it is intended. Empowering investors doesn't just mean better access to information—it also means

access to better information. Simply put, the question is: once that SEC-mandated information is available, is it understandable? The answer all too often is a resounding and frustrated "no."

Even though they are nominally written in English, the disclosure in some documents that are provided to investors is often so full of legal jargon and boilerplate disclosure that it can actually obscure important information. Convoluting language and disclosure in footnotes may serve lawyers and insurance companies, but it doesn't improve an investor's ability to understand the most important facts about a particular investment.

Exhibit A, when it comes to convoluted disclosure, is today's regime for reporting executive compensation. Ordinary American investors have a right to know what company executives are paid because those investors own the companies. The executives work for them.

It's a direct corollary of the fact that more than half of Americans own stock today, that executive compensation will be judged just like every other labor and material cost that a firm incurs. Gone are the days when investors were mostly privileged, high-income elites. Today's investors come from middle class households that sit around the kitchen table and make tough choices about their monthly budgets. They expect the companies they invest in to do the same.

But how can an investor judge whether he's getting the best executive talent at the best price? Too often, the most important parts of total compensation are hidden away in footnotes, scattered in different parts of the proxy statement, or—depending on the form the compensation takes—not even disclosed at all until after the fact.

Three months ago, the Commission voted unanimously to propose an overhaul of the executive compensation rules. This marks the first time in 14 years that the SEC has undertaken significant revisions of the disclosure rules in this area.

The proposal would require better disclosure on several fronts.

First, companies would report a "total" figure—one number—for all annual compensation, including perquisites.

Second, retirement benefits would be clearly outlined in new tables showing the defined-benefit and defined-contribution plans of top officers.

Third, there would also be clear descriptions of payments that could be made if an executive is terminated. No such disclosure is required under our current rules.

Fourth, for the first time, all compensation for the last year to board members would be fully disclosed.

Fifth, a new Compensation Discussion and Analysis section would replace the Compensation Committee Report and the performance graph, which is now often mere boilerplate and legalese. This new narrative section will allow the board members to have a frank discussion with their bosses, the shareholders, about how they have gone about determining the compensation for the company's top executives.

By improving the total mix of information available to investors, the directors who work for them, and the marketplace, we can help shareholders and compensation committees to better inform themselves and reach their own conclusions.

Sixth, and finally, since the purpose here is to improve communications, the proposed rules require that all of this disclosure be in plain English—the new official language of the SEC. That will be true whether the information is in a proxy statement, an information statement, or an annual report.

Plain English uses plain words—and, among other basic ingredients, the active voice. We want to promote the use of the active voice not just because it makes for punchier sentences, but because it requires a definite subject to go with the predicate. That's the only way that investors will be able to figure out who did what to whom.

And we won't stop there. Some years ago, under Chairman Arthur Levitt, the SEC began a crusade for plain English in investor documents. It was a noble first step that has been carried on by both Harvey Pitt and Bill Donaldson. During my time at the Commission, I hope to advance this cause still further, so that ultimately every communication aimed at retail investors is so free of jargon and legalese that it could pass muster with the editors of the Money section of *USA Today*.

Accounting complexity

When it comes to giving investors the protection they need, information is the single most powerful tool we have. It's what separates investing from roulette. But if the SEC is truly to succeed in helping investors with more useful information, we'll need one more ingredient: an all-out war on complexity.

It is, of course, true that a complex world often requires complex solutions. And certainly, there are desirable states of complexity—the ones that arise from a thing's intrinsic nature: DNA. A snowflake. Encryption algorithms. There, the complexity is essential to the function. But it's the contrived, artificial complexities that cause the problems—intricacy without function. Winston Churchill said it best: "However beautiful the strategy, you should occasionally look at the results."

That, Mr. Chairman, is what we're now doing at the SEC. We're looking at results from the vantage point of the ordinary investor. And what we're finding is that, in many cases, we're not getting the right results. The complexity of the disclosure mandated by our rules too often adds nothing to function.

It is not just public companies that sometimes have difficulty using plain English. Our accounting rules and regulations also can sometimes be complex and difficult to interpret. And when the rules are difficult to interpret, they may not be followed very well. And if the rules aren't followed very well, then intentionally or not, individual investors inevitably will suffer.

Not surprisingly, users of financial statements—investors and regulators alike—are looking for more balance in making financial reporting comparable and understandable. Preparers and auditors are also looking for standards that are easier to understand and implement.

The first step is to systematically re-address specific accounting standards that do not provide the most relevant and comparable financial information. Examples of standards in need of reworking for this reason include consolidations policy, certain off-balance sheet transactions, performance reporting, and revenue recognition.

The second task is to codify Generally Accepted Accounting Principles [GAAP]. The codification will be a comprehensive and integrated collection of all existing accounting literature,

and it will be organized by subject matter. The aim is to provide a single, easily accessible source for all of GAAP. A dividend of this project is that it will provide a useful roadmap to those areas most in need of simplification.

A third priority is to stem the proliferation of new accounting pronouncements from multiple sources. We are encouraging the FASB [Financial Accounting Standards Board] to consolidate US accounting standard setting under its auspices, and to develop new standards more consistent with a principles-based, objectives-oriented system.

The final element of this strategy is to strengthen the existing conceptual framework for US GAAP in order to provide a more solid and consistent foundation for the development of objectives-oriented standards in the future.

Making financial reporting more user-friendly goes far beyond the work of the FASB. Weeding out the counter-productive complexity that

has crept into our financial reporting will require the concerted effort of the SEC, the FASB, the PCAOB [Public Company Accounting Oversight Board], and every market participant. This cannot be a one-time effort; we will have to commit for the long term. But it will be well worth it.

Conclusion

Mr. Chairman, members of the Committee—thank you for your interest in these vital issues. Each of the four initiatives I have outlined is part of an overall strategy to make the individual investor—the average American—the ultimate beneficiary of all that we do at the SEC. Our agency has for many years proudly worn the badge of the “Investor’s Advocate.” In the months and years ahead, we are pledged to rededicate ourselves to that mission.

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Legislative update:

Plain language and government accountability office regulation review

OMB Watch reports the following:

The House Government Reform Committee has reported out two bills relevant to regulatory policy: one to facilitate compliance by encouraging agencies to draft regulations in plain language, and another to bring the Government Accountability Office [GAO] into the process of regulatory reviews.

Regulation in Plain Language Act of 2006

The committee reported without amendment H.R. 4809, the *Regulation in Plain Language Act* of 2006, which requires that federal agency rules be written in plain language. A bipartisan bill ..., the *Regulation in Plain Language Act* was designed to make regulation compliance and enforcement more effective and to encourage clarity in rulemaking. The use of plain language is expected to reduce the business practice of using statutory ambiguity in order to avoid regulation and save multiple parties money in their attempts to interpret federal regulations.

The bill would amend the *Paperwork Reduction Act* (Title 44, chapter 35 of the US Code) to create general standards for plain language and create a new staff position in the agencies to encourage regulatory drafting in plain language. The new standards define plain language as clear, straightforward language, understandable to the intended reader. The bill encourages the use of short phrases, grammatical clarity, and visual aides.

Backers of the bill depart from the usual anti-regulatory trend by seeking to make compliance less costly without reducing the protections that the public enjoys. Proponents argue that when federal regulations are clear,

enactment is sure to increase, along with higher expectations that allow for stricter enforcement. The shift encourages fairness, allowing a greater proportion of the population to understand regulations, without the need for expert interpretation. The goal is to create concise yet intelligent regulations that are easy enough for everyone to follow and clear enough to reduce manipulation or avoidance.

Truth in Regulating Act Amendment

The committee also reported out a bill to amend the *Truth in Regulating Act*. The *Truth in Regulating Act* of 2000 authorized a pilot project in which the Government Accountability Office would, upon request, review agencies' regulatory impact analyses for economically significant rules. The project was never funded, and GAO never conducted any reviews.

H.R. 1167 would amend the *Truth in Regulating Act* to make the pilot project permanent. The amendment would simply strike the "pilot project" heading and institute the authority permanently.

In committee mark-up, the bill was altered by Rep. Henry Waxman (D-CA), to limit the authorization to only 3 years, dependent on funding of no less than \$5 million per fiscal year. The bill was reported out with this amendment, and the title will now read, "A bill to amend the Truth in Regulating Act to authorize an additional period of 3 years for the pilot project for the report on rules."

This is a slightly edited version of the original. For the full original text, go to: <http://www.ombwatch.org/article/articleview/3467/1/308?TopicID=1>

Understanding barristers' opinions: a discourse analytical perspective

Christoph Hafner

In legal writing, whether it be legislation, a letter to a client, or as in this case, an opinion from a barrister to a solicitor, it is important that the writer bear in mind the intended audience. The coherence of a text depends not only on how it is written, but also on how it is interpreted by the reader¹. And different readers may impose different coherent readings on the same text, so that what 'makes sense' to one person may not 'make sense' to another.

In the process of writing, we commonly assume some shared background knowledge on the part of our reader. Where these assumptions hold, this will facilitate communication. However, the same assumptions can lead to difficulties in communication for some readers. Legal writing is often especially challenging because there can be a wide variety of possible readers, each with different expectations.

Thus, it is helpful for writers to be aware of the full range of assumptions that they make on the part of their readers. In this preliminary study of barristers' opinions in Hong Kong, I highlight some of the categories that barristers draw on when writing opinions, and show how barristers rely on their readers to recognize those categories, draw inferences and construct coherent meaning. The study draws on six opinions written by five different barristers in Hong Kong, who responded to three different sets of (made up) instructions. The opinions were originally requested as a means of informing teaching practice at City University of Hong Kong.

Background

A solicitor typically requests an opinion from a barrister when the solicitor has a case with which he or she wants specialist help (though there may be other reasons)². Normally the solicitor will draft a set of instructions to the barrister, summarising the facts of the matter and asking a number of questions. The solicitor

will also enclose any relevant documents and files. The barrister's task is to respond to the instructions by analyzing the situation and answering the questions. Thus the basic purpose is to provide the solicitor with advice on how to proceed in a given case, and how best to serve the interests of the solicitor's lay client.

Barristers participating in this study indicated that they felt they were primarily writing for their instructing solicitor. Nevertheless, they all referred to the possibility of the opinion being read by the lay client as well. This raises the question: how accessible are these opinions for these two different kinds of audiences?

As suggested above, this depends to a large extent on the kinds of assumptions that barristers make of their readers. Barristers commonly assume that their reader has:

1. an understanding of the fact situation
2. an understanding of basic legal reasoning and conventions
3. an understanding of basic legal principles.

Example extract

It will be helpful to discuss these assumptions with reference to a concrete example. I have chosen the following 3-paragraph extract for a number of reasons. Firstly, it is one self-contained analysis of a legal issue. Secondly, it illustrates a number of the assumptions mentioned above. Thirdly, while on the whole it is well-written, it illustrates possible problems that can arise when the writer assumes knowledge on the part of the reader.

The example is taken from an opinion that is roughly 900 words long and written on a simple problem in conveyancing. The facts involved a dispute between a landlord (New Wave Ltd.) and would-be tenant (Hair Flair). The issue addressed below is whether the tenant can enforce an oral agreement for a lease based on acts of part performance.

One way of understanding this is by looking at the rhetorical strategies or moves³ employed by the writer.

Approach to the problem

In resolving this problem the writer adopts a rule-based (as opposed to a 'relational')

Part Performance	Raising an issue (implicit)	approach ⁴ . In other words, what may have begun as a story of human relationships is (re)constructed here in the language of rights, duties and legal argument. This becomes clear if we examine the thematic structure of each paragraph ⁵ . Analyzing the thematic structure allows us to gain insight into the topicalised information in
11. <i>Even if I am wrong regarding the effect of the correspondence, section 3(2) of the Conveyancing and Property Ordinance provides that an action may still be brought on the oral agreement if there has been an act of part performance by Hair Flair.</i>	Stating a rule/principle	
12. <i>In Chan Yat v Fung Keong Rubber Manufacturing [1967] HKLR 364, the fact that the plaintiff (the landlord) had stopped trying to let the premises, completed the building of the factory, permitted the defendant to install machinery and drill a well, and paid the cost of electrical installation, were part performance.</i>	Stating a rule/principle	
13. <i>Although our case is less strong, I believe that there is a reasonable chance that Hair Flair can demonstrate that the fitting out plans sent by Hair Flair and approved by New Wave (documents ix and x) constituted sufficient part performance.</i>	Giving an opinion Reasoning (implicit)	

Preliminary comments

At a glance, these three paragraphs seem to read rather well. Although the sentences are on the lengthy side, they are not overly long. Each paragraph is unified and makes a clear point, with reference to relevant law and facts.

The example demonstrates a fairly typical instance of legal problem-solving at work. The writer raises the legal issue in the heading 'part performance'. The question to be decided is this: is there sufficient part performance for Hair Flair to enforce its oral agreement? Note that this is not made explicit at any stage and the reader must infer the question. In paragraph 11 the writer states the relevant rule in broad terms. Then in paragraph 12, he cites a relevant case authority, describing its circumstances and holding. Finally, in paragraph 13 he gives his opinion on the likely outcome in this case.

The question I would like to examine is: what assumed knowledge must one have, in order to be able to construct a coherent interpretation of these three paragraphs?

each clause. In this case the salient themes in each paragraph (italicized) refer mostly to probabilities and legal rules. For example 'even if I am wrong...' (arguing in the alternative), 'section 3(2)...' (authority for rule), 'an action' (substance of rule).

The writer's underlying assumption is that the reader will share this approach. This would be a safe assumption where the reader is an instructing solicitor, but perhaps not in the case of a lay client.

Rhetorical structure—rules

In addition, the writer assumes that the reader will understand the underlying rhetorical structure of the opinion. In order to correctly interpret the opinion, the reader must be able to understand how each paragraph advances the argument.

Paragraph 12 is likely to be problematic to some readers. By beginning 'In Chan Yat...' the writer announces 'I am now going to tell you about an analogous precedent, Chan Yat.' The reader is expected to infer that this illustrates the relevant legal principle and will serve as a point of comparison to the client's situation.

This strategy is, of course, extremely common in legal argument. However, in order to interpret this correctly, the reader must understand the common law convention that courts are bound by their previous decisions, where the facts of the case are sufficiently similar. Again this is a safe assumption with a legal audience, but must be treated with care where the audience is the lay client.

In fact, the real purpose of paragraph 12 is to define (by analogy) what may be considered to be part performance. Yet the words 'part performance' are the last 2 words of the paragraph! In addition, the paragraph is presented as a kind of narrative, rather than as an explicit definition. The paragraph would more clearly reflect its purpose if it began 'Part performance can include...'. The reader is expected to infer the general principle from the examples given. As this kind of reasoning by analogy is a particular feature of legal argument, I would expect certain readers to have difficulty with this.

Rhetorical structure—reasoning

Paragraph 13 also demands considerable inferential work on the part of the reader. The purpose of paragraph 13 is to give an opinion on whether there is part performance in the current case. An informed reader would probably also expect to see explicit reasons for this opinion⁶.

Somewhat surprisingly, the writer appears only to be stating his opinion and briefly referring to the facts. The reader is expected to infer that the circumstances of the present case are similar to the precedent described. This is all the more surprising given that the writer begins with a contrastive 'Although our case is less strong...'.⁶

This leaves open the question: on what grounds does the writer believe that the lay client's situation is similar to the precedent? The writer does not explain the relationship between facts and law. Rather, it is the reader who infers this relationship, based on their knowledge of the facts and of the law.

The writer relies heavily on the reader to construct meaning here. A lay client with little knowledge of the law would probably need to have this part of the opinion ex-

plained to them. Indeed, barristers in the study suggested that they expected instructing solicitors to perform this function. However, in this case, the instructing solicitor may have to engage in some guesswork too. By failing to go into the details of his reasoning, the writer has failed to communicate his own assumptions about the facts. This would possibly make it difficult for both the instructing solicitor and lay client to interpret the opinion with certainty.

Conclusion

This analysis has highlighted some of the assumptions that barristers make in writing their opinions. I have tried to show that these assumptions can make the opinions less accessible to a lay audience, and occasionally also to a legal one. The study highlights the difficulty of writing for multiple audiences: reference to assumed common knowledge can facilitate communication with some but hinder it with others.

The study also raises an interesting question for plain language practitioners. At what level should plain language practitioners focus their efforts? While there is much to be gained by making texts more accessible at a word and sentence level, this effort is unrewarded if the underlying rhetoric and logic of a text serves to exclude anticipated readers.

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Endnotes

- ¹ See Fairclough, N. (1992), *Discourse and Social Change* (Cambridge: Blackwell).
- ² See Inns of Court School of Law (2002), *Opinion Writing* (Oxford: Oxford University Press), pp 40–41.
- ³ See Bhatia, V. K. (1993), *Analysing Genre: language use in professional settings* (London: Longman).
- ⁴ See Mertz, E. (1996), "Recontextualization as socialisation: text and pragmatics in the law school classroom", in M. Silverstein & G. Urban (Eds.), *Natural Histories of Discourse* (Chicago: University of Chicago Press), pp 229–249.
- ⁵ See Halliday, M. A. K. (1985), *An Introduction to Functional Grammar* (London: Edward Arnold).
- ⁶ See above, note 2, at p. 51

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Plain language: a survey by Sydney law students

Kathryn O'Brien

This article is a summary of a lengthy study of legal language, made by four senior law students at the University of Sydney. The study received the highest grade possible at the University. Clarity readers may be interested to read this synopsis of the students' findings. Ed.

Background

This article is a summary of research undertaken by four final year law students at the University of Sydney Law School. The research was part of the course requirements for one of the elective subjects at the Law School. We researched: (1) whether students, academics and legal practitioners in Sydney feel that there is an emphasis on plain language drafting at law school; and (2) whether any such emphasis (or lack of it) at university level has an impact on the way that law students communicate with clients (or with laypersons generally) on graduation.

Our research comprised both empirical and anecdotal elements. It involved distributing short written surveys and interviewing people in person. Because the research was unfunded, our resources were limited. Only a relatively small sample of people could be interviewed, and so the results of our study cannot be described as definitive. Nevertheless, we were able to interview and survey enough people to discern some consistent themes.

The people who participated in the study

Fifty law students, 11 academics and 13 legal practitioners participated in the survey. We asked them to respond to a series of short yes/no questions.

The students came from four leading Australian law schools: the University of Sydney, the University of New South Wales, Macquarie University, and the University of Technology, Sydney. The majority—52%—

were from the University of Sydney. All were in their final or penultimate year of study.

The legal practitioners were from both large inner-city practices and smaller suburban practices in Sydney. The large practices included some in the top tier of commercial practice in Australia; they are large firms even by world standards. The smaller practices tend to specialize in conveyancing, family law and probate.

The 11 academics were from the Faculty of Law at the University of Sydney. Their fields of expertise include Real Property, Torts, Corporate Law, Jurisprudence and International Law. Most of the students whom we surveyed from the University of Sydney had been taught by these academics.

An explanation of 'plain language'

The survey questions contrasted what we described as 'plain language' and 'legal jargon'. In an attempt to clarify what we were seeking to test, we attached a brief explanation of our understanding of those terms:

When we use the term 'legal jargon' throughout this survey, we are referring in a broad sense to the opposite of what is referred to as plain English drafting. We are referring, for example, to the use of Latin phrases (eg, 'prima facie', 'mens rea', 'locus standi', etc), and in a more general sense to the use of complex, arcane writing styles that can be used to articulate difficult legal arguments, but which are generally thought to be more difficult for a layperson or client to understand than 'plain English'.

Of course, our survey was not the first of this kind. Michèle Asprey had conducted a survey of New South Wales solicitors some years earlier. In contrast to our approach, she deliberately avoided defining 'plain language'. She wrote: 'it was agreed that there was no

one form of plain language, and that it would be counter-productive to confine ourselves to one rigid definition.¹ Joseph Kimble had also surveyed lawyers' attitudes to the use of plain language.² Kimble produced samples of traditional legal writing that had been rewritten in plain language. Our approach was less sophisticated than Kimble's. However, we thought that a short explanation of 'plain language' and 'legal jargon' was useful for the purposes of our small study.

Results of the surveys

We found a considerable disconnect between the responses given by students and the responses given by academics. While 86% of the academics surveyed felt that they encouraged their students to use plain-language writing techniques, only 51% of the students surveyed agreed that this was the case. Of the students, 90% felt that the law readings set by their lecturers were dense with legal jargon. Although 74% felt that they were not encouraged to adopt legal jargon in classroom discussion, approximately half felt that they were expected to use legal jargon in their written work order to perform well in university assessments.

By contrast with the students (who felt there was little instruction in plain-language writing techniques at university level), 86% of the legal practitioners surveyed felt that there was a significant emphasis on plain English communication in their professional work. Respondents from large commercial firms told us that instruction in the use of plain-language forms part of their in-house training programs, both for graduates and for more senior solicitors. It was also clear, however, that the resources of smaller firms do not allow for in-house training programs. One respondent, a sole practitioner, noted that he had received guidance on the use of plain English through attendance at a Continuing Legal Education seminar.

The students' perception of little or no emphasis on plain-language drafting at university level perhaps reflects the reality that few law schools offer a dedicated course on legal writing. Some prospective employers see this as unfortunate. Others see it as an advantage: they can instruct graduate lawyers as they see fit, working with a 'clean slate' as it were, unhindered by any teaching in this area at university level.

Interviews

In addition to written surveys, we conducted interviews in person with a small number of academics, practitioners and students.

Academics

One of the academics we interviewed was Professor Peter Butt of the University of Sydney. He said that the work he does on plain-language drafting tends to be more with practising lawyers and parliamentary drafters than with university students. Professor Butt has, in the past, run stand-alone legal drafting courses for students. However, he told us, changes to the Law Faculty's curriculum made teaching a stand-alone course of this kind impracticable. He told us that he does, however, weave legal drafting, and particularly the techniques of plain language, into two optional property-related courses at the University of Sydney: Advanced Real Property and Conveyancing. The students who do those courses get at least an introductory exposure to the techniques of writing in plain English. Professor Butt doubts whether other law students receive specific instruction in legal writing techniques. The University of Sydney until recently had a compulsory course called "Legal Research and Writing". However, the legal writing component was removed from the course outline, and the subject is now called "Legal Research". This contrasts with courses at American law schools, where legal writing is generally a compulsory subject for first-year students. Professor Butt considered it a great pity that the University of Sydney no longer offers a course in legal writing. In his view, this is partly due to a culture among academics that the techniques of clear writing are not worthy of academic study, and therefore are not something academics should teach.

Professor Butt noted that while few legal practitioners in Australia see themselves as being "against" plain language, this does not necessarily mean that in practice they actually use what we might describe as 'plain English'. This seems also be the case with legal academics. As already mentioned, while the overwhelming majority of academics who participated in the study felt that they encourage their students to use plain English, only half of their students felt that to be the case.

Practitioners

Two partners from the Sydney office of Mallesons Stephen Jaques (one of Australia's largest law firms) agreed to be interviewed by the group. Their responses indicate that the firm dedicates considerable resources to training its lawyers to communicate in plain English. Jason Watts, a partner in the Mergers and Acquisitions group, noted that: "our clients require us to take complex structures and document them in the simplest way that we can. That's because they need to be understood by commercial people. While our clients are generally sophisticated and understand the complexities behind these structures, they nevertheless like to see them documented in a simple and intelligible way."

Nuncio D'Angelo, a partner in the Financial Services group, notes that in his experience plain language drafting has changed the life of both lawyers and clients. "Clients get a better appreciation of what we do; it's not just a mysterious black art (which can be a real risk in financing transactions)." D'Angelo has seen a particular benefit for young law graduates. He remembers from his early days in the law a perception that lawyers had to speak in legal jargon to be thought of as clever. Adopting plain language "has broken down barriers, both between lawyer and client, and between lawyer and lawyer—and between senior and junior lawyer, teacher and pupil if you like." At Mallesons Stephen Jaques, D'Angelo notes, lawyers receive instruction in plain-language drafting techniques in the firm's formal training programs from the outset, and this is reinforced by a culture among the partners and senior lawyers that is very supportive of plain English.

Students

The group conducted a small focus group of four law students, three studying at the University of Sydney and one at the University of New South Wales. One student noted that for an Equity assignment at the University of Sydney in 2005, students were asked to write their paper twice, with two different audiences in mind. Firstly, the students had to write an advice on technical legal points as though directed to another lawyer. Secondly, the students had to write the same piece of advice addressed to a layperson. The student felt that this task emphasised the difference

between communicating in 'plain English' and 'legal jargon'. Interestingly, however, the student's response indicated a perception that the exercise encouraged students to adopt plain language when corresponding with clients, but to maintain 'legalese' with other lawyers. Apart from this one example, the students did not mention having received any instruction in legal writing.

Conclusions

One of the most interesting things to come from the study was that legal academics overwhelmingly think that they encourage their students to write in plain English, but that their students disagree. Students see legalese as a barrier to their understanding of the law, and practitioners see it as a barrier to their relations with clients. The argument needs to be put that instruction in plain-language techniques should be a properly-funded aspect of university education. As in American law schools, courses in legal writing should be mandatory for all students. Effective instruction in legal writing is not something that should be left for the most part to the training programs of a student's future employer.

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Endnotes

- ¹ Michèle Asprey, 'It's Official: New South Wales Solicitors Favour Plain Language' (March 1995) 32 *Clarity* 3 at 3.
- ² Steve Harrington & Joseph Kimble, 'Survey: Plain English Wins Every Which Way' (1987) 66 *Michigan Bar Journal* 1024.

Based on research in a course on Sociological Jurisprudence, by Kathryn O'Brien, Antonia Garling, Jessica Saya and Jason Fitch.

Kathryn O'Brien is a final year law student at the University of Sydney. She is currently researching judicial attitudes to plain language, for which she has interviewed 20 of Australia's most senior judges. This survey is the first of its kind in Australia. Kathryn is hoping to publish the results of the survey next year.

Plain language in legal agreements: is it safe?

Speech by Lord Justice Rix

*Clarity seminar at Denton Wilde Sapte
10 October 2006*

I am very grateful to the organisers of this event for bringing me face to face with the subject matter of this talk.

At first I received the invitation with some pleasure: it was, I thought, a compliment. But a moment's further reflection showed me that it could be no such thing, for the simple reason that I could hardly think of another judge less suitable or less qualified to talk on tonight's topic. Not for me the brevity and wit of Sir Christopher Staughton. My judgments are known, if at all, for their length. Not for me the pithy style and snappy sentence of a Denning: I was educated for years to reproduce the complex sentence of Cicero, a style of sentence so long it was called a "period"!

And quite apart from all that, what do I know, what experience do I have, in the drafting of contracts? In truth, that difficult and creative work is performed almost exclusively by solicitors: barristers and judges spend their time, construing but unconstructively, merely shaking their heads over the ensuing difficulties. And so I am beginning, I suppose, with an apology.

However, as I said in beginning, I am grateful for being set the task of confronting face to face, perhaps for the first time so far as I am concerned, the virtues or vices of the use of plain English techniques in the drafting of contracts.

And as I warmed to my theme in preparing for this event, I managed to make such progress that my talk of, I suppose, a couple of hours or so has been reduced to more manageable proportions. So don't look too alarmed. It will be all right. I hope.

So, first, what are plain English techniques? They are such things as the use of direct and easily understood language, conveniently and logically organised, in short sentences, avoiding complexity, redundancy, archaisms, legalese, jargon and pomposity—how's that for a selection of complex and Latinate nouns? Such techniques are important not only in contracts, but also in legislation, in the drafting of official forms, and all kinds of communications.

My talk will concentrate on the context of contracts. I will give you an example of the old and the new. Here is a traditional clause:

"Upon any such default, and at any time thereafter, Secured Party may declare the entire balance of the indebtedness secured hereby, plus any other sums owed hereunder, immediately due and payable without demand or notice, less any refund due, and Secured Party shall have all the remedies of the Uniform Commercial Code."

Here is the plain language version:

"If I break any of my promises in this document, you can at any time demand that I immediately pay all that I owe."

Now, the plain language campaign is only some 30 years old in the law. Traditionally it is said to originate in the decision taken in 1973 by an American bank, now metamorphosed into Citibank, to rewrite its standard customer consumer loan note. This rewriting turned out to be a tremendous success: it increased the bank's market and at the same time reduced its litigation. That was a good start.

Since then lawyers and legislators throughout the world have encouraged the use of plain language techniques. In the United States there is legislation, for instance, that warrants, if they are to be enforceable at all, must

be written in “simple and readily understood language”. In Australia there is case law that even the signed disclaimer “I have carefully read and understood this contract” did not avail the other party.

As it is, the demand for simplicity and the complaint that lawyers obfuscate go back much further. Cervantes said: “But do not give it to a lawyer’s clerk to write, for they use a legal hand that Satan himself will not understand”. Judge Learned Hand warned: “The language of law must not be foreign to the ears of those who are to obey it”. And Dean Rodell of Yale law School cracked: “There are only two things wrong with most legal writing. One is its style. The other is its content”.

There is also recognition that simplicity, although desirable, is difficult. There is a proverb that says: “Hard writing makes easy reading”. Leonardo da Vinci said: “Simplicity is the ultimate sophistication”. He may not have been talking about writing, but it is true also about writing. And we would all do well to remember what Shakespeare said, that “Men of few words are the best men”. (I feel inclined to sit down at this moment.)

So, how is this to be applied to the writing of contracts, and, in particular—this is the question that has been posed to me, for you—is it safe to leave behind what is sometimes described as the “tried and tested” language of contract forms and precedents in order to strike out for the brave new world of plain English?

Is it safe? Well, what does one mean by safe? The dictionary will tell you that safe can mean “not exposed to risk”, or “unenterprising”, or “based on good reasons”. In other words we cannot answer the question without considering risks and rewards, and the ratio between them.

What are the rewards? As I understand the literature, they have come to be well established. Plain English improves relations with the client, because the language of the documents is more open and transparent, and less obscured by the professional jargon of the legal priesthood. Plain English contracts are also more marketable with the public, which is of particular importance in the consumer context. They involve less queries, fewer disputes, and less litigation. As a result, they

entail less time and expense. An example from the United States: according to a Ford Motor Credit press release, borrower complaints and questions decreased by 50% when the company introduced a plain language version of their vehicle financing contract.

These rewards are of particular concern to the lawyer’s client, but perhaps they may seem less enticing to the lawyers. I would suggest, however, that lawyers do not succeed by giving their clients an inferior service: and, as the plain English project gathers pace and strength, so lawyers who fall behind in it will suffer rather than prosper. Their clients will come to expect a service which they can get elsewhere.

What, on the other hand, are the risks? Again, as I understand the literature, there is a school of thought which says: our precedents are tried and tested; they reflect the wisdom of ages, their language reflects the jurisprudence of the courts. To change runs the risk that old problems which we had learned to overcome will arise again, or new problems will be created by the new language. We will not reduce disputes and litigation but create trouble where there was peace. That will be of no assistance to our clients; and it may cause severe problems to us, the lawyers, who may be susceptible to claims in professional negligence.

How do I, as a judge, react to these scenarios? I emphasise the words “as a judge”, for I lack the direct in-house experience of lawyer or client.

I would start by making what I consider to be three important points.

The first is what I call “horses for courses”. Not all contracts are of the same type. I will identify three basic categories. (Of course there are more, and there are hybrid categories as well.) Thus there are consumer contracts, which are written for the consumer by mass marketing companies, like banks, insurance companies, and consumer credit companies. Next, there are commercial contracts, which are on standard trade forms, with or without additional clauses, like charterparties and bills of lading, and commodity contracts. Thirdly, there are bespoke contracts, which may also contain within them some boilerplate clauses—sometimes a lot of boilerplate clauses, but for all that the contracts are bespoke.

In the first category, consumer contracts, clarity and understandability among the public at large are particularly important. Here simplicity and the absence of jargon are real aids to marketing and the avoidance and resolution of disputes. It is of course particularly important here to remain abreast of legislative changes; and to write contracts in ways which will withstand scrutiny under fair contract terms provisions.

Commercial standard forms, on the other hand, are not so much a marketing tool as something promoted by trade organisations. They are in general use as an aid to business in the trade. There is more room here for jargon, which in any event is likely to be trade jargon rather than legal jargon. A charter-party is perhaps a decent example of such a contract type. It is a pretty concise and businesslike contract in its language, and its basic clauses have had quite a going over in the courts, which is useful. Such contract forms cannot easily be changed on a unilateral basis: it takes an industry-wide effort to bring them up to date, if they need bringing up to date. And in the meantime such forms tend to accumulate an accretion of additional clauses, which are often drafted by brokers rather than lawyers, and admittedly frequently lead to disputes. It is not easy to involve lawyers at the point of contract, because in these commercial contracts the deal is made by the brokers and the clients: the lawyers are not involved. The deal is made there and then by email or telex, or on the telephone, and this is, in lawyers' terms, lay drafting.

Finally there are the bespoke contracts, which might arise in any commercial field, and these raise all the problems of the other categories, but here lawyers tend to have a large input. A commercial lease is an example of a standard form of contract which is usually negotiated between lawyers, and also contains a lot of boilerplate clauses. So it is in a way both a bespoke contract and a standard contract, and it certainly involves lawyers in its negotiation.

And so, the consumer contract has to be prepared well in advance for commercial exploitation, to a general public of consumers, for whom legislature and courts have particular concerns; the commercial standard contract is a matter for trade negotiation, but is overlaid by broker dealing; and the bespoke contract raises problems of all kinds.

That was my first important point. The second important point I want to make is that reviewing or rewriting contracts to render them into plain English is very hard work. It cannot be done without preparation. It cannot be done quickly. It therefore cannot be a cheap process. In 1987 the Government began a five-year programme to rewrite 5,000 pages of tax legislation in plain English. That five-year programme is still in being, and the cost so far, as I understand it, is something like £26,000 per page, still rising.

I quoted earlier the saying "Hard writing makes easy reading". I want to emphasise the "hard writing" aspect of that proverb. The process is indeed a hard one. You have to know what you want to say. As Lord Bingham says in his foreword to the new edition of Mark Adler's *Clarity for Lawyers*: "You cannot write clearly unless you know clearly what it is you want to say". A beautifully crafted and pungently clear sentence. But knowing clearly what you want to say is hard work. You have to know what you want to say; and why; and what the law is, or might turn out to be; and why the precedents say what they say, and whether those reasons, if they still exist, are good or bad. I do not want in any way to minimise the difficulty of that task for the reviewing lawyer—a task that cannot be undertaken lightly, or by drafters who are inexperienced or untrained in their task, or rushed in time. In such work, there is plainly room for error.

Who will pay for such work? If, as in the case of the Citibank or Ford Motor rewrites, a specific client commissions the task, it will be properly rewarded. But if the preparation is uncommissioned, for instance work on a firm of solicitors' contract precedents, then there is an element of faith in the future. I am sure, myself, that that faith is justified. The point I want to make is that you cannot expect the genie of plain English to come on the instant out of the bottle marked "Drink Me".

My third major point in answering the risk/reward question is that it is important to be clear-eyed about the causes of disputes. Not all contractual disputes arise out of difficulties of language, however they may be dressed up. Of course, nearly all contractual disputes are dressed up as difficulties over language—but I am making a different point. They do not in truth arise out of such difficulties.

Disputes occur for all kinds of reasons: because markets have changed and disappointed expectations; because one or other party fails financially; because one party wishes to get out of its contract; because events have shown that the contract is unbalanced; because of misfortune; because it is simply impossible to anticipate everything; because of non- or misperformance.

Can clarity in drafting avoid all these disputes? In my opinion, no. But, of course, the less room there is for argument in matters of construction of the contract, the easier it may be to avoid or settle such disputes, or to renegotiate terms, when they arise. It must also be remembered that many contracts are only concluded because a penumbra of uncertainty or ambiguity has been allowed to remain in the drafting. Disputes which arise out of that cause cannot be avoided by clarity in drafting: the whole point of the contract being successfully concluded is that a certain amount of ambiguity has been built into it. So one must not claim too much for the techniques of plain English.

Having made those three points, I am now in a position to answer the question whether it is safe to bring plain English techniques to bear on so-called tried and tested contract precedents. It is a ratio of risk and reward. It cannot be said that the hard work necessary to achieve the rewriting will be accomplished faultlessly. And, however immaculate the draftsmanship, it cannot be guaranteed that new wording will not create its own problems and its own disputes.

An example which comes to mind—although it is not a contractual one, it arises in a commercial setting—is the comparatively modern 1996 Arbitration Act. That Act was a long time in gestation; it was given the most careful thought; it had the most prestigious of draftsmen, including Lord Steyn and Lord Saville; it was drafted in a modern and user-friendly style. Nevertheless, it has engendered quite a bit of litigation, for all of the reasons which I have touched upon.

Even so, the rewards are, I think, great. I have stated them earlier, and I believe them to be genuinely claimed, although I cannot of course speak from personal experience. Intuitively, however, they make good sense to me.

And so the balance needs to be struck. It seems to me that, although one cannot eliminate all risk, and certainly cannot do so without hard work and intelligence, the balance is well on the right side of the line. Like our homes, and our clothes, and everything about us, there is a constant need for maintenance and refurbishment. You cannot rely on the old for ever; you cannot keep on patching; from time to time you have to have a proper overhaul. That is what plain English is about. And if you do not carry out that overhaul, then the risk of simply carrying on in the old way is greater than the risk of undertaking the new. And if the work is done with care and intelligence, the risk of error which might involve a claim of negligence is likely to be small. And it is there in any event: and is perhaps all the greater where you follow unthinkingly in an old path, rather than rethink everything in a fundamental and intelligent way.

A few years ago, I visited a country in a state of semi-war, accompanied by others from London. Our visit was a private one, but for our protection on occasions we were in military hands. Travelling down a road one day in a military armoured jeep, my companion with me in the back seat of the jeep asked the driver if it was safe. The driver looked at his colleague who had his machine gun resting on his knee, and who looked back at the driver. It was the driver who spoke. "Safe? Yes, it's safe. Not safe, safe. But safe." That may be a possible comment on the question I have posed.

The sponsors of this talk have suggested to me certain other questions which I might like to consider: such as the use of "must" rather than "shall"; such as whether the style of documents coming before the judges has changed over the years; and such as whether plain language is harder or easier to interpret than complex language. But I would prefer, if I may, to leave such issues, or any others that you may have, to question-time after I have sat down.

In the meantime, I think I would like to end by propounding my own Ten Commandments for the drafting of contracts. To some extent they reflect the insights of plain English; but altogether they reflect my own experience in practice and for the last 13 years or so on the bench. So here goes:

1. Be clear in your own mind about what you are seeking to achieve, including about the nature of the contract you are drafting. Different contracts require different techniques.
2. Use short sentences, or at any rate as short as the context will allow. I think Einstein praised the virtues of simplicity but also said “don’t be more simple than is necessary”. It is best, of course, if a sentence is concerned with only one thought at a time.
3. The clarity of your contract, and the ease of construing it sensibly, will be increased if you state in the contract its fundamental purpose or purposes. That will assist in construing the problems that might arise.
4. Use definitions accurately to assist in concise drafting. Check that the definition in question works in each place where the defined word or phrase is used. (It is too easy to think you have got a good definition, and so you slot it in here, there and everywhere and then, if you were to read back the definition in full, in the place where you used the word or phrase which is the handle for your definition, you would find that things are going wrong.)
5. Clarify in your own mind the role of concepts or variables discussed in the contract. (I think you know what I mean by a concept on which the contract may play, or a variable—it might be a time variable or it might be a variable of some other kind. Contracts play with these variables and concepts, and it is important that you are very clear in your mind what the role of these concepts are, particularly when they might come together, when you have two variables acting upon one another, or a variable acting on a concept, or a different variable acting on a concept, or two concepts perhaps coming in clash with one another.) Make sure that these concepts and variables are accurately deployed in the drafting. Problems often arise because it is not clear how such concepts or variables operate in tandem with one another.
6. Clarify in your own mind and in the contract the role of conditions and conditions precedent. What is vital to the operation of the contract? What breach will or ought to imperil the continuation of the contract? I am thinking here of a condition in the technical sense—in the Sale of Goods Act sense—as an obligation, any breach of which will entitle the other party to bring the contract to an end. There is always litigation about this question, and one ought to get it clear.
7. When you have drafted your contract, stand back and adopt a “What if?” approach. This will often test your draftsmanship, sometimes to destruction. Of course, you cannot anticipate everything, and in any event it may detract from the success of your contract that you seek to cover unlikely events or possibilities, particularly events or possibilities which are very unlikely. In this context, do not allow the best to become the enemy of the good.
8. Take care to clarify your proper law, your forum, your dispute resolution provisions. Litigation on such subjects is often hugely expensive; and the answer could be vital to the substantive result.
9. Get a second view, ie an outsider to review and help you to edit your draft. He or she will see things that you are too close to see for yourself. If you have to explain to an outsider why you have drafted things as you have, or why you have left something uncovered, light will shine where there has been darkness or confusion.
10. Institute a proper system of maintenance. Disputes or decided cases will test your contract. Adjust for the next time what needs adjustment. Keep up to date.

I will leave this inexhaustible subject there, if I may. And if you want to know how the editors of the Dictionary of National Biography express to potential contributors the principle of conciseness, which they require of their contributors, it is, I am told, by this example: “No flowers, by request”!

Thank you very much.

Questions & answers

Have you ever known the legal expression “for the avoidance of doubt” to actually help avoid any doubt?

Rix LJ: I think here again there are contracts and contracts. It has been well said, in the context of charterparties for instance (forgive me banging on about them, for that represents a lot of my background) that surplusage—surplus wording—is not necessarily a guide to construction. You start from the general principle that no words are surplus to the contract. The plain English campaign itself proves that words are always being used in a redundant and surplus way. I think judges in construing contracts have got to see through the natural rule which one should, I suppose, apply, which is that a well-drafted contract has not got a single word which is unnecessary. You just have to see through it.

Paul Clark: If I could add to that, as a drafter, I think there is merit in complex contracts in giving examples. If “for the avoidance of doubt” is giving an example of what you’re trying to say, then provided that’s its function I personally see no harm in it.

Statutory instruments frequently have an explanatory note at the end which many of us, I think, turn to first to see what they are all about. Does Lord Justice Rix think it would be useful in any contract of any complexity to have an opening paragraph which perhaps can be declared not to bear on the construction of the contract itself but in which the parties try and say, broadly speaking, what it is they are seeking to achieve by the contract?

Rix LJ: Yes, I feel that quite strongly although I don’t have presently in mind examples of cases where such a drafting technique has avoided a problem or the absence of it has created a problem. But I do feel that is a very useful matter. In fact I think that—I am just looking for which commandment it was—one of my commandments, I think, spoke of “your contract would be improved if you state its fundamental purpose or purposes in the contract itself” and that is what I had in mind.

There is a problem about explanatory notes. I don’t want to get involved in the separate issue of statutory interpretation, but there is a problem where you have got on the one hand the statute which is what you have got to interpret then you have got on the other hand an explanatory note which is not referred to in the statute at all and whose status is really unknown. I think there have been some recent statements in the House of Lords which have suggested that it is legitimate to cast an eye at these explanatory notes. The last time that I looked at an explanatory note for the purpose of a problem of statutory interpretation, only last week in the Criminal division of the Court of Appeal, it seemed to me that the existence of the explanatory note had been used as an excuse for obscure statutory draftsmanship, because what was discussed in the explanatory note did not exist at all in the language of the statute. There was an explanation, but it was a very odd use of an explanatory note.

Now what I was thinking of in my third commandment was not so much an explanatory note the function of which or status of which might be controversial in relation to the contract but actually putting into the contract what its purpose or fundamental purposes are. It’s rather like putting an example into your contract; it illustrates what it is you are seeking to achieve and therefore you don’t have the problem of “what is the status of this?”: the status is, it is part of the agreed contract.

It’s rather like, if you think about it, the first part, the opening part, of the new Civil Procedure Rules of Lord Woolf. They start with the fundamental purpose of the rules and all the interpretation of the hundreds and hundreds of rules which follow is guided by that opening principle. I think contracts can work in that way as well.

Paul Clark: I have had resistance from other lawyers to purposive statements. You will see in my CV a reference to a product called a lease book which simply means it’s a lease in two parts: the variables all in a deed, two or three pages long, and then the operative part of the lease comes in a set of conditions much like an insurance policy, a booklet. The booklet in this lease book is divided into chapters. So you have a chapter dealing with insurance, a chapter dealing with repair, a chapter dealing with alterations; the property lawyers among

you will recognise all those. Now I start those chapters with an opening phrase “the purpose of this chapter is ...” and some lawyers object because they say “I need to read the text to understand what you are trying to say: I don’t need to be told what it is”. I still insist, if I can get away with it, in putting in the purpose because I think it is helpful in case of ambiguity to enlighten those who have got to interpret the document.

Rix LJ: I think I can give you an example where it would have worked magic. There is a case in the House of Lords in recent years called *AIB*¹: it’s a case about a banking mortgage, which was drawn up for the purposes of two friends, partners in a sense (but I don’t think they were formal partners), who worked together on property development or investment. They borrowed money from the bank and they entered into a series of bank mortgages which were essentially in standard wording and talked about their joint and several liability. What happened was they worked together on (I shall make the figures up, say) 15 properties. One of the partners had five properties of his own which he worked on and the other partner had another 20 properties of his own that he worked on.

In the end the question was: was there joint and several liability across the 15, the 5 and the 20 as a whole, or were they really only talking about joint and several liability on those property transactions where they were working together, the central 15? The House of Lords was split on that. The answer depended on a definition of “mortgagor”. I think Lord Millett wanted to go in a different direction but a majority of their Lordships said “this is an all moneys joint and several mortgage and it covers absolutely everything”.

Now a clause in that contract which had said “the purpose of this contract is to provide joint and several cover to the bank only on those matters where we co-operate” would have solved the whole question.

Paul Clark: A very amusing case, because I think it was Lord Millett who gave the example of a possible other interpretation to the literal one which, Lord Justice Rix, was in fact on definitions and the misuse of definitions in a sense. He said he was trying what he called a distributive approach. “Mr and Mrs Smith took their children to school”: we all understand that the children were children of both

Mr and Mrs Smith. But if you say “Mr Smith and Mrs Jones took their children to school” then one naturally assumes that Mr Smith’s children and Mrs Jones’s children had differing parents. That we do quite naturally as a use of English and I think Lord Millett was trying to imply that here and in the end I agree voted with the majority.

Mark Andrews: Well I am very much in favour of explanatory notes and statements of principle but I have just a word of caution here: they don’t always help. A document that I spend an awful lot of my life reading and particularly enjoy is the European Insolvency Regulations. It’s very fascinating—I would recommend it to you all. It has a very, very long explanatory statement that comes with it and about half of the accumulated European jurisprudence is about what the explanatory statement means. So it doesn’t always take you straight away to the absolutely clear and undoubted guide to where you are intended to be going.

Mr Clark,—who knows very well that in his journal [*Clarity*] he covers the problems of other languages as well as English—talking about plain language, I wonder whether you can give advice to the many translators here today, who are particularly interested in how we deal with everyday problems of translating from lawyers who write in foreign languages and by tradition, by formation, or by demand of their clients, obscure language. Should we be equally obscure or should we try and interpret them?

Paul Clark: I am going to dodge that question by mentioning that in Australia, which I think in plain language is probably 10 years in front of us, large firms like this would employ two or three linguists on their staff who are not lawyers but whose job is to translate what the lawyers say into plain language. So I think those who are translators here might note that and work closely with a lawyer to see if you can get the lawyer to simplify what he or she is saying in the light of your own linguistic skills.

Rix LJ: I think this is a very interesting, difficult question. I am an awful linguist. I have never really undertaken a job of translation or interpretation. I am ok with Latin and Greek. Any more than that, I am hopeless. So

I can't speak from experience, save for this. On occasions when I have had to read translations of foreign material—this would be, for instance, translations of foreign cases which have been cited to us or of the articles of foreign jurists—it is very noticeable just how difficult it is to translate in a technical subject like the law from one language to the next. I assume that the translations that I am reading have been really skilfully done but almost in every line, certainly in every paragraph, there are problems of interpretation which one is raising to oneself as one reads.

Now, how is that to be avoided? It is partly because the interpreter, excellent as he or she is, is quite properly trying to be as literal as a good translation will permit, partly because the interpreter is not, I assume, himself or herself a lawyer. One might of course well have legal interpreters who are skilled lawyers. But if they are not skilled lawyers themselves, they will not be assessing the legal implications of what they are translating at the same time they are translating. In any event I think that the problem of trying to explain the law of one country to lawyers of another country is a really difficult one because it goes back to mindsets and where you are trained and fundamental concepts and so forth. I think these problems are almost insoluble. I understand that good translation is not necessarily absolutely literal translation, but the good translator will be as literal as they are permitted to be in order to produce a good basic translation that does justice to the original text. So I think this is a very interesting and difficult question.

Mark Andrews: My own admiration of translators is boundless. It never ceases to amaze me how well people manage to translate legal discussion and I am always particularly stunned by the skills of parallel translators. My particular favourite, because it does break down sometimes, was in a conference in Prague which was being done in Czech and in English, doing my stuff in English which was carried off brilliantly by the translators, and sitting back whilst the first Czech speaker came on. I knew broadly what it was about so I didn't bother listening for a while but about 10 minutes in, by which time the speaker was getting quite excited and was waving his arms quite a bit, I thought this was sounding quite exciting, I would like to know what is

going on. So I plugged in to hear what the translator had to say just in time for her to say, "Oh, I am so sorry, I really have no idea what he is talking about". So it can be quite tricky.

I would like to come back, if I may, to the issue that you were discussing earlier—the statement of the fundamental purpose, because I think some of the examples that were quoted were references to statute. I suppose Mark, looking at the European Insolvency Regulation, a lot of that purpose stated at the start is like recitals to so much of European legislation; it was there to create the penumbra which Lord Justice Rix alluded to in connection with contracts. Hopefully, whilst this is common for political reasons in legislation, by and large in contracts the statement of purpose would give clarity, because I think if parties cannot even agree on the purpose of the contract the whole contract is likely to be in a penumbra.

Panel: [no comment]

Why don't more clients ask for contracts in simple English language as opposed to general complex ones that we presently have?

Mark Andrews: Interesting question—why don't more clients demand it?

Paul Clark: In the 70s when plain language first hit me—some of you may recall Parker's Modern Conveyancing Precedents which are so modern I wouldn't use them myself even today—but it struck a chord with me. I was at Linklaters in those days and I thought I would try this modern approach in about 1973. The limit of my trial was instead of starting a deed "This deed dated the so and so date of month one thousand nine hundred and seventy three between ..." I put Agreement: Date: Parties 1, 2, 3. The client took me to one side when he had read it and said "Paul, could you please put this contract in legal language".

Yes, I agree with you: clients need to be educated too but my experience is that the modern client who is, as Lord Justice Rix intimated, trying to market his products will also be glad to have a marketable legal document and that's been my experience.

Some of my work—in terms of lease drafting, which is my speciality—has been for some household names and they are delighted with the modern product. I think you are pushing at an open door today.

I am aware that there is an organisation which awards crystal marks, I think they are called, to well-written documents, principally, I think, in the consumer field. And I am aware that citizens' advice bureaux are always saying that it is helpful if consumer documents are well written. I was just wondering if you could let us know how Clarity works with other organisations to quote the work that we have been talking about.

Paul Clark: Willingly. Clarity doesn't have the same function as something like the Plain English Campaign, which is the organisation which gives the crystal mark. We are a collection of lawyers who have an aim and we want to help each other along that road, that path. There are one or two of us who will redraft documents for a fee. We have explored the possibility of giving some sort of kite mark like the crystal mark but we don't have the resources to do that. We are a voluntary group who get together, as I say, with a view to supporting one another in the plain language aims.

In your golden rules, Lord Justice Rix, you mention the question of short sentences. Clarity people would put that on an average of about 22 words on average as a sentence length to aim for. I was slightly disappointed that you didn't endorse plain language more strongly than you did. I did expect you to be slightly more evangelical, I must say, sir. When we look at a lease, for example, a commercial lease, do you think it is possible to adhere to that rule, or do you think for technical reasons the endless repetition that we see in most commercial leases is for some reason necessary and unavoidable?

Rix LJ: I don't know. I don't know leases particularly well as a form of contract. I think that the shorter your sentences are, the less complex they are, the better off you will be.

I wouldn't be evangelical about anything, actually. If I may change the topic slightly in

order to illustrate the point, I think that one of the evangelical rules of plain English is changing every "shall" for a "must" on the basis that "shall" is an ambiguous word which may be a word of obligation or may be a pointer to futurity. It is sometimes even suggested that it may mean "may", but I can't understand how "shall" can mean "may".

Now I read somewhere that no less than 1,100 disputes have been created by the use of the word "shall". I assume that is a correct statistic—I don't know, I haven't counted myself—which only goes to show that it can create difficulties and I wouldn't dispute that. But what I would be very worried about indeed is a sort of automatic replacement of every "shall" in its obligatory sense—not in its future sense, of course—of every "shall" with a "must" in the contract. I think that would be disastrous because the word "must" is a very strong word. It hints of conditions, for instance, whereas the word "shall" is a language of obligation which leaves open for interpretation what the consequence of a breach may be. And so I don't think you can have absolute rules. Intuitively I react against your idea of an average sentence of 22 words and so forth.

Do you think the trend toward plain English will help reverse the tendency to look at the factual matrix and, in fact, encourage a slightly more old-fashioned black-letter approach through clear and sensible use of English?

Rix LJ: God forbid. I think that any contract lawyer would say this, but certainly any judge would say this: context is everything. I mean language is just too difficult. You cannot black-letter it apart from context. I don't think I have got an example to give you off-hand, but there are so many examples of how language can throw you unless you know the context.

Paul Clark: Lord Hoffmann did say that we should give the natural and ordinary meaning which for me is the cardinal rule for drafting but you have to do it in the context.

[ends with thanks to Rix LJ and all organisers.]

Endnote

¹ *AIB Group (UK) Ltd v. Martin* [2002] 1 WLR 94.

Linguistic lingo for lawyers

'person' and other grammatical terms for personal pronoun forms in English

Sarah Carr

Carr Consultancy and Plain Language Commission

In Clarity 55, I suggested that Clarity could include regular columns called 'Linguistic Lingo for Lawyers' and 'Legal Lingo for Linguists'. Practical and fairly short, they would have advantages for their readers and writers:

- *For readers—the plain-English explanations could improve our knowledge and understanding of technical terms. It would also be interesting to observe others' techniques for explaining technical jargon.*
- *For writers—the process of explaining our jargon in plain English would be interesting and useful, and may even sharpen our own understanding of it.*
- *For both—the columns would provide a building collection of ready-made explanations, which we could use unchanged (subject to Clarity's copyright policy) or as a starting point in our day-to-day work: for example if we needed to explain linguistic or legal terms to a lay audience.*

I asked what you thought: would you like to see these regular columns? Do you have ideas for topics to fill them? Would you like to write for one? Julie Clement (Clarity's editor in chief) and I have received some positive comments, but as yet no ideas for topics or offers to write.

Do email us at clementj@cooley.edu or sarahcarr@carrconsultancy.org.uk if you can help.

This is the second 'Linguistic Lingo for Lawyers' article.

The term 'person' distinguishes the speaker or writer ('first person') from the person or thing being addressed ('second person'), and from any people or things not falling into either of these categories ('third person'). So, for example in the sentence *I told you and him, I* is in the first person, *you* in the second person and *him* in the third person.

Other terms for personal pronoun forms are:

- 'gender'—which marks words as masculine, feminine and neuter
- 'number'—which classifies words depending on how many people or things are referred to
- 'case'—which shows the relation of a word to others in the sentence.

Person, gender, number and case in English and other languages

The following table shows the categories that standard modern English uses in person, gender, number and case for personal pronouns. Occasionally, the archaic second-person pronouns (singular *thou, thee* and *thine*, and subjective plural *ye*) are still used (sometimes altered) in some regional dialects of England and Scotland. They also survive in religion, in writing about old times, and in a few set phrases such as *holier than thou* and *fare thee well*. Some North Americans colloquially distinguish between singular and plural *you* by using *y'all* or *yinz* for the plural; in England and Australia, some speakers use *youse* in the same way.

Other languages may have fewer or extra categories. Here are some examples:

- The Algonquian languages use an extra category—fourth person—for third-person people or things that are less topical. Another use of the term 'fourth person' is for indefinite or generic pronouns (like *one* in English phrases such as *one should do one's best*).

Person	Gender	Number	Case		
			Subjective	Objective	Possessive
First	Masculine, feminine & neuter	Singular	<i>I</i>	<i>me</i>	<i>my/mine</i>
		Plural	<i>We</i>	<i>us</i>	<i>our/ours</i>
Second	Masculine, feminine & neuter	Singular & plural	<i>you</i>		<i>your/yours</i>
Third	Masculine	Singular	<i>He</i>	<i>him</i>	<i>his</i>
	Feminine		<i>She</i>	<i>her</i>	<i>her/hers</i>
	Neuter		<i>it</i>		<i>its</i>
	Masculine, feminine & neuter	Plural	<i>they</i>	<i>them</i>	<i>their/theirs</i>

- Melanesia has two extra categories of number: dual (*we two* or *you two*) and trial (*we three* and *you three*).
- If you think Latin had a lot of cases (six), then try Finnish: it has 15.
- Many European languages have different pronouns to distinguish levels of formality, for example *tu* and *vous* as second-person singular in French.

Relevance of terms to plain English

Of the terms covered in this article, ‘person’ probably crops up most frequently among plain-language practitioners, as we often recommend using the first and second persons where possible.

I find that this guideline is one of the hardest to get health service managers to use. They are worried about their own job security, which puts them off using *I* and *we*, because they feel it makes them too personally accountable. They are happier talking in the third person about an official body, such as *the trust board* or *the finance committee*. They are also under pressure to ensure there is always a robust audit trail, and are concerned that personal pronouns do not make it absolutely clear who or which body has decided about or done something. Sometimes it works to make the first reference in the document *we on the trust board* or suchlike. But *you* also causes problems as they are often writing for a disparate audience.

Wouldn’t it be handy if we could sound human and specific both at once, by inflecting nouns too to mark person, showing, for example, that by *the board*, we meant *we* (as opposed to *they*) *on the board*? As far as I know, no languages allow this.

Pronoun gender can also be a hot topic in plain language, since we need to make sure our use of personal pronouns is not sexist. *They, them, their* and *theirs* seem reasonably well accepted these days as common-sex singular pronouns.

A recent exchange on the Plain Language Association International’s email discussion group highlighted that some people get into a muddle with pronoun cases, often in an effort to sound proper and polite. For example, they might say: *Would you like to come with my friend and I?* They were probably told as youngsters not to say *my friend and me* (which is correct advice if the phrase is in the subjective case) and are now misapplying it to the objective case. *Between you and I* is another example.

Sarah Carr has a first degree in French and Scandinavian with Teaching English as a Foreign Language, and a master’s in business administration (MBA). Sarah worked as a manager in the National Health Service (NHS) for seven years. She now runs Carr Consultancy, specialising in plain English writing, editing and consultancy for the NHS. Sarah is also an associate of Plain Language Commission. Her publications include *Tackling NHS Jargon: getting the message across* (Radcliffe Medical Press, 2002).

The importance of punctuation

Peter Butt

Traditional legal drafting eschews the use of punctuation. But punctuation—or its absence—can have serious consequences. For example, Sir Roger Casement was said to have been hanged by a comma. In a recent Canadian decision, the presence of a comma—whilst not raising such a life and death issue—caused considerable commercial anguish.

An agreement for access to telecommunications facilities provided that the agreement:

“shall continue in force for a period of five (5) years from the date it is made, and thereafter for successive five (5) year terms, unless and until terminated by one [year’s] prior notice in writing by either party.”

Notice the second comma. Did it have the effect of permitting the contract to be terminated by one year’s notice *at any time*, or only after the initial period of 5 years had expired?

The Canadian Radio-television and Telecommunications Commission held that the contract could be terminated *at any time* (Telecom Decision CRTC 2006-45). In the Commission’s view, the “rules of punctuation” meant that the second comma—placed as it was before the phrase “unless and until terminated by one year’s prior notice in writing by either party”—meant that that phrase qualified both the phrases before it. One party argued that the phrase “unless and until terminated by one year’s prior notice in writing by either party” qualified only “thereafter for successive five (5) year terms”. On this construction, the agreement would continue in force for at least the first five-year period. But that construction would deny the efficacy of the second comma. Hence, the “plain and ordinary meaning” of the clause allowed for termination at any time without cause, upon one year’s written notice.

The Commission’s decision does not mention how much the comma cost the losing party. However, a report of the decision in the Canadian Globe and Mail on 6 August 2006 calculated the cost of the “grammatical blunder” as upwards of \$2.13m—being the cost to the losing party of the winning party’s right to terminate the contract on one year’s notice.

So let no one claim that punctuation in legal documents is unimportant.

Members by country

Australia	126	France	1	Nigeria	8
Austria	1	Germany	3	Philippines	1
Bahamas	2	Gran Canaria	1	Portugal	1
Bangladesh	6	Hong Kong	18	Scotland	10
Belgium	6	India	6	Singapore	8
Bermuda	1	Ireland	5	Slovakia	1
Brazil	2	Isle of Man	1	South Africa	120
British Virgin Islands	1	Israel	3	Spain	3
British West Indies	4	Italy	2	St. Lucia	2
Canada	66	Jamaica	1	Sweden	15
Chile	1	Japan	7	Switzerland	1
Denmark	2	Jersey	3	Thailand	1
Malaysia	1	Mexico	7	Trinidad and Tobago	3
England	322	Netherlands	6	USA	197
Finland	6	New Zealand	18	Wales	7

Total 1,007

Drafting tips recasting a document

Dr Robert Eagleson

Commentary

As we take up plain English in our practice, we frequently need to recast documents or precedents we have previously prepared so that they comply with our new, more effective approach to drafting. As well, clients will approach us to rework a contract or form they have been using so that they can give better service and fairer treatment to their customers.

This note explores some of the steps we should take in approaching such a task. Because of space we cannot reproduce the whole document; so instead we are limiting our remarks to a lengthy clause or section from a document. The general principles we apply are essentially the same whether we are dealing with a whole document or only part of it.

In this column we explain the steps in our procedures. In the right hand column we have first reproduced the section as it appeared in the document, but have added in line numbers to aid references to it during the discussion. Then come various types of reworkings of it, linked as appropriate to the steps in the discussion.

Step 1

The first step is to leave the editorial pen on the desk: don't start by changing a word or phrase here and there. Instead read the entire document to get a feel for what it is trying to do and what it is covering.

The document: original and recasts

The original version

7. Confidentiality

1. The Contractor agrees that the Contractor
2. will hold in strictest confidence, and will
3. not use or disclose to any third party, any
4. confidential information of ABC. The term
5. "confidential information of ABC" shall
6. mean all non-public information that ABC
7. designates as being confidential, or which,
8. under the circumstances of disclosure
9. ought to be treated as confidential.
10. "Confidential information of ABC"
11. includes, without limitation, the terms
12. and conditions of this Agreement,
13. information relating to products of ABC,
14. the marketing or promotion of any
15. products of ABC, business policies or
16. practices of ABC, and customers or
17. suppliers of ABC. If the Contractor has
- any
18. questions as to what comprises such
19. confidential information, the Contractor
20. agrees to consult with ABC. The
- Contractor
21. shall guarantee and ensure its employees'
22. compliance with this Section. The
23. Contractor's obligations under this
24. Section shall survive any termination of
25. this Agreement. "Confidential
26. information of ABC" shall not include
27. information that was known to the
28. Contractor prior to ABC's disclosure to
- the
29. Contractor, or information that becomes
30. publicly available through no fault of the
31. Contractor.

<p>Step 2</p> <p>List the topics covered—and in the order in which they are covered.</p> <p>Don't spend time at this stage re-arranging them into what might appear to be a more reasonable order: this can be done more efficiently later. Just make sure you know what is there.</p>	<p>Topics covered in original</p> <ul style="list-style-type: none"> a) Obligation to hold certain information in confidence b) Obligation not to disclose to others c) Meaning of confidential information d) Other items included e) What to do if in doubt f) Obligations of employees g) Duration of obligation h) What is not included in confidential information
<p>Step 3</p> <p>List any topics that seem to be missing and could be important for the effectiveness of the document. A danger in legalese is that its convolution often makes it hard for a drafter to recognise whether crucial material has been included or not.</p> <p>Just set the missing items down as they occur to you: once we have the full set we can start making decisions about how to arrange them.</p>	<p>Topics not covered</p> <ul style="list-style-type: none"> i) Can confidential information be disclosed to certain consultants? j) Any obligation to notify ABC of improper disclosure? k) Indemnity for improper disclosure l) ABC's rights to reclaim the information m) What if court order requires disclosure? n) Obligations to keep the confidential information secure o) Ownership of the confidential information <p><i>This list is illustrative only; it may not be exhaustive!</i></p>
<p>Step 4</p> <p>Decide which topics are necessary for the particular circumstances you are trying to cover. It may not be essential to include all these topics in every contract or agreement. Some issues may never arise in certain business contexts. To overload the document could distract readers from the crucial obligations. It depends on the real, as opposed to the hypothetical, risks involved.</p>	
<p>Step 5</p> <p>Once we have a full list of essential topics, we can proceed to arrange them in a suitable order and to bring closely related topics next to each other or even merge them. For the purposes of this step, we will assume that the circumstances require all the topics listed under steps 2 and 3 to be covered. All of them were essential in the context for which the original was prepared. During the discussion in step 6 we will take up when and why some of the material may be safely excluded.</p>	<p>A possible organisation for the topics</p> <ul style="list-style-type: none"> p) Obligation to keep certain information confidential (= a) q) What information is involved and what isn't? (= c + d + e + h) r) Who owns the information? (= o) s) When and how can it be used and disclosed by the contractor? (= b + f) t) What if there is a court order? (= m)

<p><i>(Continued from page 56, left column)</i></p> <p>What we are presenting here is only 1 way of organising the material. Other arrangements could also be suitable and efficient. The order we choose depends on the audience and our knowledge of its needs.</p> <p>Remember that people are involved in learning when they are reading a document. If they already know the content, there would be no reason for them to read the document. Learning becomes easier if items of information are arranged in an order that makes sense to readers, that fits in with their notions of importance, and that brings related items together. Haphazard arrangements of material increase the task of learning. Many manuals prove this point over and over again!</p>	<p><i>(Continued from page 56, right column)</i></p> <p>u) What steps must be taken to keep the confidential information secure? (= n)</p> <p>v) What must be done if there is improper disclosure (= j)</p> <p>w) Compensation for improper disclosure (= k)</p> <p>x) How long must the information be kept confidential? (= g)</p> <p>y) ABC's right to reclaim the information (= l)</p>
<p>Step 6</p> <p><i>The comments marked #, *, etc relate to the parallel items in the recast text.</i></p> <p>Once we have established the topics to be covered and an appropriate organisation for them, we are in a good position to start fleshing out the content. Much of the critical thinking has now been done and our writing can flow more speedily.</p> <p>Fixing on an organisation also makes it easy to see how the material can be divided and presented in blocks of information so that it is easy for readers to absorb. It lets us escape from 1 long paragraph, which bedevils the original version. The process also points the way to suitable headings, which improve the access to the content for readers.</p> <p>Spending time on what to include and how to arrange it reduces drafting activity later on.</p> <p># General readers find <i>you</i> and <i>we</i> (the personal pronouns of address) easier to comprehend. The use of more abstract terms, such as <i>contractor</i>, involves readers in an additional process of interpretation. (The practice of using a capital letter with <i>Contractor</i> in the original (line 1, etc) to indicate a defined term is largely ineffectual as this device is hardly recognised in the general community.)</p> <p>^ There are several choices available in modern English to express obligation: <i>must</i>, <i>need to</i>, <i>have to</i>, <i>agree to</i>. <i>Shall</i> is now obsolete in this sense in general usage and has been abandoned for this purpose by lawyers who have adopted plain language because it puzzles general readers.</p>	<p>A complete recast</p> <p><i>The items marked #, *, etc link to the explanations on the text in the left hand column</i></p> <p>7 Confidential information</p> <p>7.1 What information must be kept confidential?</p> <p>#You ^must keep confidential:</p> <p>a) *information about our products and how we market or promote them</p> <p>b) information about our business policies and practices</p> <p>c) information about our customers and suppliers</p> <p>d) the conditions of this agreement</p> <p>e) any other information that we mark 'confidential'</p> <p>f) any other information that, in the circumstances surrounding the disclosure or in the nature of the information, ought in good faith be treated as confidential.</p> <p><Confidential information does not include information:</p> <ul style="list-style-type: none"> • that was known before this agreement was entered into, or becomes publicly available subsequently • that is received from another source that can reveal it lawfully on a non-confidential basis. <p>If you are unsure whether a piece of information you have received from us is confidential, you must check with us first before you use it or disclose it to others.</p>

(Continued from page 57, left column)

In Old English *shall* was used by everyone to express obligation, and only obligation. As English had no distinctive future tense, over the centuries *shall* came also to be used to express the future, a practice encouraged by the fact that most obligations fell due in the future. By the 17th Century this future use had all but displaced the sense of obligation associated with *shall* in general usage, but the old practice lingered on in legal usage. Over time this meant that the forms of language lawyers used in everyday situations differed from the forms they kept in professional contexts. The result was that they became confused on how to use *shall* and frequently made mistakes. Lines 5, 24 and 26 in the original attest this claim. In line 5 there is no obligation on 'confidential information' to mean something; it has its meaning as a matter of fact. What is required is *means* (the universal present tense). Here is another good reason for abandoning *shall*, which in any case has largely disappeared from modern usage in all situations.

* The items included in this list depends on the context of the agreement.

Another solution would be to move the specification of the information involved to the particulars or details portion of the document. This would then allow us to refer simply to 'the confidential information' throughout section 7 and to start with 7.2. This is a convenient solution if you are aiming at a standard form of agreement to be used with many different clients and in various contexts as only the particulars portion would need to be varied.

The original version resorted to the device of a definition to present the material at this point (see lines 5-17). The definition comes in 2 parts: a specification of the meaning in general terms, introduced by *mean*; and a part providing precise examples, introduced by *include* (line 11). This 2-step approach is familiar with lawyers, but many readers prefer a more concrete approach to the material. It is more congenial for them to be presented with specific items which they can recognise. Any broader statement becomes easier for them to cope with if they have the light of the concrete examples to guide them. The broad, general statement can fit nicely as a final catch-all in this approach, as happens in 7.1.

(Continued from page 57, right column)

7.2 Who owns the confidential information?

The confidential information always remains our property. Our disclosure of it to you for the purposes of this agreement does not give you any right, title or interest in it.

7.3 Use and disclosure of confidential information

You can disclose, use or summarise our confidential information and copy or distribute materials containing it only for the business purposes set out in this agreement and only in accordance with this agreement.

You can disclose our confidential information to your employees and contractors and to your legal and financial consultants, but only on a 'need to know' basis and subject to the confidentiality obligations in this agreement.

You can disclose our confidential information if required by a court order or statutory notice but you must:

- a) give us sufficient notice of the requirement so that it can be contested; or
- b) seek to limit the disclosure in any way we reasonably request; or
- c) >obtain written assurance from the judge or regulator that they will give the confidential information the highest level of protection available.

You must not:

- a) use our confidential information for your own benefit; or
- b) disclose it to anyone else without our prior written consent.

7.4 Protecting the security of the information

You must:

- a) »take reasonable steps to protect our confidential information and keep it secure from unauthorised persons
- b) segregate all materials containing our confidential information from the materials of others to prevent them being mixed together
- c) return any confidential information that is no longer needed to carry out an obligation under the agreement.

≠ After giving you reasonable notice, we can visit your premises during normal

(Continued from page 58, left column)

< It is safer for readers to hold all the material on the meaning of ‘confidential information’—what it isn’t as well as what it is—together, especially when they are checking the facts on a later reading.

> This option may not be available in all countries nor required in all situations.

∞ *anyone else* will be more readily recognised than *any third party* (see line 3) and functions satisfactorily in most situations. We have to be alert about slipping into set legal phrases unnecessarily.

≈ This clause 7.4 (a) would be all that was necessary in many agreements. Clause (b) applies in sophisticated contexts.

≠ This requirement would suit only specialist circumstances; it would seem excessive in many agreements.

The bare bones

The original—and hence the complete recast—were prepared for a specific and more complex situation. There can be other situations in which no confidential information may be explicitly made available to contractors but they have to be given access to the owner’s premises to carry out repairs, maintain equipment etc. Inadvertently they may see confidential information or hear staff talking about it. The owner may want to try to exercise some control. In this circumstance it could be possible to reduce the whole section on confidentiality to:

“You must keep confidential any information you learn about our business while you are working on our premises.”

(Continued from page 58, right column)

business hours to review how well you are complying with these requirements for protecting our confidential information

7.5 Prompt notice of improper disclosure

You must:

- a) notify us immediately you become aware of any unauthorised use or disclosure of our confidential information
- b) co-operate in every reasonable way to help us regain the materials containing our confidential information and prevent further unauthorised use or disclosure of the information.

7.6 Compensation for improper use or disclosure

You indemnify us against all loss, damage, expense and costs arising because you do not keep these conditions on the use and disclosure of our confidential information.

7.7 Duration of obligations

Your obligations regarding our confidential information continue even if this agreement has been terminated.

7.8 Right to reclaim the confidential information

At the end of the agreement, or if we ask for it earlier, you must return our confidential information, and all copies, summaries, notes and memorandums relating to it, to us as we direct.

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Mark Adler apologizes for not submitting a drafting column—pressure from other commitments interfered. The second edition of Clarity for Lawyers is being published on December 7. Mark is grateful to Dr. Eagleson for providing this issue’s column. They promise to share the duty in the future, and they welcome other writers as well. We certainly are not limited to a single drafting column per issue. Ed.

From the President

Joe Kimble

Lansing, Michigan, USA

This is goodbye and hello.

My three-year term as president ends on December 31, so this will be my last message in this space. It has been a great honor for me to serve as Clarity's president. I still remember the day—more than 15 years ago, I believe—when I first talked with Mark Adler on the phone. After a moment's hesitation, Mark said, "Oh, you're the chap who has done that testing in the U.S." Yes, that was me. At the time, I was among a handful of U.S. members.

Although I'm stepping down as president, I'll carry on as the membership secretary. Perhaps now's the time to reveal my little secret: the real membership secretary is my long-suffering assistant, Cindy Hurst. She does the work, and Clarity owes her a great debt.

As I reflect on my term, I'd like to think that Clarity has made some significant gains.

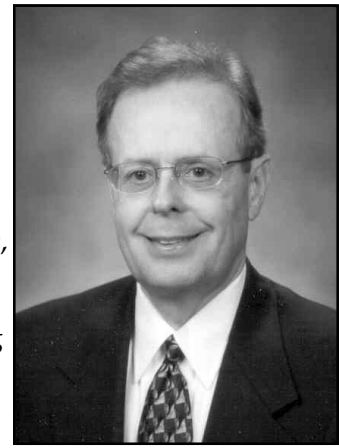
First and most important, we have produced two issues of the journal each year, right on schedule. And the journal has become a substantial, professional product. Here again, though, the credit goes to others: to our editors in chief, Michèle Asprey and Julie Clement; and to our guest editors, David Elliott (No. 51), Jacque Harrison and Nittaya Campbell (No. 52), Catherine Rawson (No. 53), Nicole Fernbach and Edward Caldwell (No. 54), Annetta Cheek (No. 55), and Peter Butt (No. 56). We are not yet at the stage of receiving a flood of unsolicited articles, so I expect that we will need to continue with guest editors for some time.

Second, we have revamped our website, thanks to design guidance from Mallesons Stephen Jaques and the continuing efforts of Mark Adler.

Third, we held a very successful international conference—our second—in July 2005 in Boulogne, France, at the Université du Littoral Côte d'Opale. I reported on the conference in *Clarity* No. 54.

Fourth, we have added new country representatives in 10 countries: Bangladesh, Chile, Finland, Mexico, Nigeria, the Philippines, Portugal, Slovakia, Spain, and Trinidad and Tobago. And we found successors to the former representatives in several other countries. We now have representatives in 26 countries. Imagine that.

Fifth, after many years of a hit-and-miss process for collecting annual dues, I believe that we finally have a system in place. This has taken some effort, as the country representatives know. But we had gone too long without making sure that people who receive the journal actually pay the very modest dues.



My one disappointment is that we have not added a lot more new members. At the end of 2003, we had about 950 members. We now have about 1,000. To a large extent, these numbers reflect the culling that occurred when we finally began to insist that members pay the dues. The good news is that even with the culling, we have increased our membership. Clarity must continue to grow—and for that to happen, we must all make it a point to promote Clarity and try to recruit new members.

Finally, there's the matter of our next president. Clarity is an informal organization. I became the president on the recommendation of our former president, Peter Butt. Now, looking to the future, and after consulting with Peter and with Mark Adler—our immediate past presidents—I'd like to recommend that Christopher Balmford become our new president. Many of you know Christopher. He is our longtime Australian rep, a two-time guest editor of the journal, a speaker at both our conferences, and an active (and reliable) Committee member. More than that, his work in plain language goes back many years, to his time with the Law Reform Commission of Victoria. He is a well-known, well-liked, and highly effective advocate for plain language. I'm sure that he would drive Clarity forward.

At the same time, I do not want to discourage any Clarity member from submitting another nomination. If you have someone you would like to nominate, then please send me an e-mail (before December 15 if possible) with a brief description of the candidate's qualifications. The Committee will then decide on the president.

I might add that the Committee is even now discussing the procedure for selecting a new president when the next term ends.

My sincere thanks to all of you for a rewarding three years.

New members

Australia

Deborah Cao
Griffith University
Brisbane, Queensland

Sue Green
Mallesons Stephen Jaques
Brisbane, Queensland

Scott Whitechurch
Mentone, Victoria

Bangladesh

Moez Uddin
Abedin and Associates
Ramna, Dhaka

Belgium

Ilkka Koskinen
European Commission
Brussels

C. William Robinson
European Commission
Brussels

England

G.F. Martin
Newcastle Polytechnic Law
Department
Tyne & Wear

Hong Kong

Tony Sit
Legal Advisory &
Conveyancing Office
North Point

Mexico

José Alberto Reyes Fernández
Secretaría de la Función
Pública
Mexico, DF

Rose Margarita Galan
Instituto Tecnológico
Autónomo de México
Del. Álvaro Obregón

Nigeria

Toyin Somide
Lagos State Ministry of Justice
Lagos

Olukemi Sowemimo
Lagos State Ministry of Justice
Lagos

Portugal

Sandra Ramalhosa Martins
Lisbon

South Africa

Ebrahiem Abrahams
SHG
Cape Town

Evelyn Amoah-Bertrand
Petrosa
Parow

Nancy Andrews
Liberty Life Group Legal
Services
Johannesburg

Mpho Baleni
Department of Foreign Affairs
Pretoria

Katherine Burger
ICE
Banbury Cross

Bruce Burt
Burt Meaden Attorneys
Bedfordview

Gary Chen
Burt Meaden Attorneys
Bedfordview

Julian Cloete
Liberty Life Group Legal
Services
Johannesburg

Lenisha Devanathan
Burt Meaden Attorneys
Bedfordview

Leeanne Dewey
Liberty Life Group Legal
Services
Johannesburg

Candace Dick
Liberty Life Group Legal
Services
Johannesburg

Kurt Drieselman
UEC Technologies
Mount Edgecombe

Boniswa Dumezweni
Department of the Premier
Cape Town

Frances Gordon
Simplified
Saxonwold

Tobé Hope
Hollard Life Assurance
Company Limited
Randburg

Lovisa Indongo
Windhoek Municipal Council
Namibia

Tjaart Jonker
First National Bank
Johannesburg

Benedict Khumalo
Competition Commission
Pretoria

Johan Krugel
Krugel Heinsen
Witbank

Martin Richard Kok
Engen Petroleum Ltd.
Cape Town

Sheldon Magardie
Cheadle Thompson & Haysom
Braamfontein

Heather Kuziva Mangwiro
Cheadle Thompson & Haysom
Blackheath

Moshe Ishmael Maphoru
Competition Commission
Pretoria

Refilwe Mathabathe
Department of the Premier
Cape Town

Ayanda Mazwi
Burt Meaden Attorneys
Bedfordview

Virgil Rory McGee
Engen Petroleum Ltd.
Cape Town

Richard Meaden
Burt Meaden Attorneys
Bedfordview

Sherlene Moonsamy
Department of Trade &
Industry
Pretoria

Derrick Mosheledi
First National Bank
Johannesburg

Teboho Laura Motebele
The National Energy Regulator
Pretoria

JT (Tousy) Namiseb
Ministry of Justice
Namibia

Steve Naylor
Liberty Life Group Legal
Services
Johannesburg

Bonga Ndaba
Engen Petroleum Ltd.
Plessilaer

Chifundo Ngwira
Lawson and Company
Malawi

Retsipile Ntsihlele
Lesotho Electricity Corporation
Maseru

Gilleon Paulse
Engen Petroleum Ltd.
Pinelands

Nkahloleng Phasha
Department of Labour
Pretoria

Michael Prince
Department of the Premier
Cape Town

Shandukisani Ramubulana
Department of Labour
Sunnyside

Juanette Richardson
ICE
Parkhurst

Shirley Robbins
Capsal Plain Language Centre
Milnerton

Michelle Roodt
ICE
Northcliff

Rietha Schalkwyk
Liberty Life Group Legal
Services
Johannesburg

Mhlaba Gloria Shikhati
Office of the Premier
Letaba

Amanda Spohr
Discovery Marketing Services
Sandton

Richard Steyn
Editors Inc.
Parkview

Zelna Swart
Burt Meaden Attorneys
Bedfordview

Penny Thupa
Burt Meaden Attorneys
Bedfordview

Bongiwe Pearl Tukela
Department of Labour
Sunnyside

Heather van Niekerk
Burt Meaden Attorneys
Bedfordview

Goodman Vimba
Office of the Premier
Letaba

Carina Weise
Old Mutual Group Schemes
Cape Town

Vusikhaya Zoko
Department of Labour
Sunnyside

Walter Zure
CBZ Bank Ltd.
Zimbabwe

Trinidad & Tobago

M. Hamel-Smith & Co.
[Timothy Hamel-Smith]
Port of Spain

Vijay Luthra
Port of Spain

USA

Nancy Marder
Chicago-Kent College of Law
Illinois

Member news

Sir Geoffrey Bowman, first parliamentary counsel for the UK until his retirement this summer, has been appointed honorary QC. (From the *Law Society Gazette*)

The second edition of **Mark Adler's *Clarity for Lawyers*** is being published on 7 December. Details and an ordering link are on www.adler.demon.co.uk/pub.htm. (From the author)

After 25 years of distinguished service in Hong Kong, **Gareth Lugar-Mawson** has returned to private practice in the UK. He can be reached at lugarmawson@clerksroom.com. (From *Clerksroom News*)

Many thanks to **H Devaraja Rao** ("Rao, the copy editor") for suggesting revisions to some of the general notices in *Clarity*. Ed.

Please send news items to Julie Clement at clementj@cooley.edu. We will include them in future issues, as space permits.

(Continued from page 2)

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kimblej@cooley.edu

Other European countries:

Catherine Rawson
legal_easy@hotmail.com

All other countries:

Please contact the USA representative

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.

Application for membership of Clarity

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

1 Individuals

Title *Given name* *Family name*

Name

Firm Position

Qualifications

2 Organisations

Name

Contact Name

3 Individuals and organisations

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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.

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