 Website: www.francisbennion.com
Document No. 1993.001 *Clarity* 27, April 1993, p 18

Introductory Note by FB

The article below is a further addition to my writings on understanding legislation. Others are included within the Topic 'Understanding legislation'. The Topic can be found on this website at *www.francisbennion.com/topic/understandinglegislation.htm*.

The Readership of Legal Texts

by Francis Bennion

I believe CLARITY will be helped in achieving its aims by having regard to the intended readership of legal texts. The requirements differ as the readers differ. What would be clear to an adult might not be clear to a child. What would be clear to a lawyer might not be clear to a lay person. And so on. In this article I particularly have in mind legislative texts.

Some definitions

CLARITY describes itself as 'a movement to simplify legal English'. Let's start by looking at some definitions.

The Oxford English Dictionary (OED) defines 'simplify' as 'To make simple; to render less complex, elaborate, or involved; to reduce to a clearer or more intelligible form; to make easy'. It defines 'simple' as 'Free from duplicity, dissimulation, or guile; innocent and harmless; undesigning, honest, open, straightforward'. Another OED meaning of 'simple' is 'Free from elaboration or artificiality; artless, unaffected; plain, unadorned'. So we might expand 'to simplify' as meaning to put into a form which is as clear (that is intelligible and free from elaboration) to the intended reader as is practicable.

The word 'practicable' is defined by the OED as 'Capable of being put into practice, carried out in action, effected, accomplished, or done; feasible'. Here it is useful to remember that apart from differences in readership there are limitations on clarity imposed by the nature of the English language. Often particular words do not have a clear meaning, or have several meanings. Also there are broad terms used to confer discretion on the interpreter, or authorise the exercise of judgment in choosing from a range of meanings. Another language problem is that of differential readings, where different people legitimately and genuinely differ in their perception of the meaning of a passage. As Lord Dilhorne said 'due in part to the lack of precision of the English language, often more than one interpretation is possible' (Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG [1975] AC 591 at 622).

So we might translate 'practicable' as feasible having regard to the limitations of the English language, the need to carry out the relevant purpose(s), and the need to be understood by the intended reader(s).

Next, what does CLARITY mean by 'legal English'? It might be equivalent to 'legalese', defined by the OED as 'The complicated technical language of legal documents'. However we get nearer the object if we equate it to the language of legal documents generally. This extends to texts not yet in being, and so not yet complicated or technical. (Perhaps they never need be.) Before even starting to draft, we need to have the intention that our product shall be 'simple' for the intended reader or readers.

Legislative texts

So far no one would disagree. However I now have to tackle matters of controversy. In his Utopia Sir Thomas More said: 'All laws are promulgated to this end, that every man may know his duty; and, therefore, the plainest and most obvious sense of the words is that which must be put upon them' In my textbook *Statutory Interpretation* I quoted More's statement, adding 'This might apply in Utopia, but sadly does not hold good in real life' (2nd edn, 1992, p 21). Was I right? Many CLARITY supporters would say no.

For me, this question goes back at least to 1966, when I wrote the first of many articles and books I have produced on the subject of statute law. All were directed to improving the state of our legislation, but all were written on the basis that the legislative readership is a professional one. My main concern, throughout my work, has been to bring about improvements in the form of legislation, with a view to helping professional users. (For a summary of users' difficulties and their cause see my textbook *Statute Law*, 3rd edn, 1990, chapter 13.)

Commenting on an earlier draft of this paper David Elliott pointed out that legislative texts are not exclusively addressed to lawyers, adding 'many professionals in their fields of practice are able to comprehend, interpret and apply legislation'. I accept that they ought to be able to do so, but it still leaves the readership a professional one. What is clear to a skilled professional cannot be expected to be always clear to a lay person. Indeed if the text is intended for a professional audience it would often be inappropriate, and in some cases impossible, to try to word it as if a lay audience were intended. Too much would need explaining. As the Association of First Division Civil Servants told the Hansard Society Commission on the Legislative Process, and the Commission accepted, 'What appears clear to the layman may not be certain in meaning to the courts; and much of the detail in legislation, which can appear obfuscatory, is there to make the effect of the provisions certain and resistant to legal challenge' (cited in paragraph 219 of *Making the Law,* the report of the Commission, issued on 2 February 1993).

One of the inexorable constraints on legal language is the need to fit into the language of the existing law. An Act intended to amend the law (as most Acts are) must fit into the existing *corpus juris* or body of law as well as expressing the reforming intention of the legislator. It must fit not only the existing language (which may well be unnecessarily complex if we could start again) but also the existing concepts. A document such as a will or mortgage has the prime purpose of being effective as a legal instrument, that is successfully doing what it is intended to do. Where the two aims conflict, as they sometimes do, it is more important that the text should be effective than that it should be clear. (I say this remembering desperate occasions when I strove to draft a Finance Bill clause so that it fitted effectively into the frightful mess that is the Income Tax Acts and did not cost the country millions in lost tax revenue.)

Another point to note is that obscurity in legislation is very often caused not by unnecessary complication of language but by complication (whether unnecessary or not) of thought. When I started drafting the Sex Discrimination Act 1975 for example I began by writing 'A person discriminates against a woman if on the ground of her sex he treats her less favourably than he treats or would treat a man'. The intolerable complexity of that Act arose not from any wish of mine but because those instructing me insisted on overlaying it with innumerable refinements, exceptions, conditions and exclusions. In doing so they were genuinely seeking to conform to the popular will as manifested in representations from trade unions, women's groups, employers' organisations and other lobbies.

There are other causes of legislative complication. An obvious one is that a Bill has to run the gauntlet of parliamentary debate and amendment in both Houses. This imposes specific requirements on the drafter. (For the nature of these see my *Statute Law*, pages 28-40. For a detailed examination of the vices that block comprehension of legislative texts see chapters 14-19 of that book.) The drafter could usually produce a much better text were he or she free to start all over again rejigging the finished Act. It is for this reason

that I have advocated improving the presentation by what I call post-enactment processing, without of course altering the basic wording (see *Statute Law* chapter 23).

What of the legislator who, like most, is a non-lawyer? Am I really accepting that Bills and draft statutory instruments have to be beyond the understanding of their nominal creators? This would be paradoxical, if not perverse. There is quite a long history about this aspect, too long to examine here. Until recently Bills were drafted according to the four corners doctrine, under which legislators were supposed to be able to understand the gist of a Bill without going beyond its four corners (that is without looking at any other document). Unfortunately this distorted the finished product, so a system of textual amendment was adopted instead (for the story see my *Statute Law* pp 32 and 228-229).

A Bill or statutory instrument needs to be drafted in the way that is best from the point of view of its ultimate user. Lay legislators should be told exactly what it means by explanatory statements and notes, as they are under the present system (though this could be considerably improved).

Conclusions

I don't want anyone to take away from reading this article the idea that I am lukewarm about CLARITY's aims. I have tried to present some practical considerations, distilled from the experience of 45 years of working in the field of statute law. That has taught me that bringing clarity into the law is a slow job, though it is a very worthwhile one.

One thing I am sure about is that progress will be quicker if would-be reformers study the efforts that have been made in the past, the results of them, and the proposals that have been on the table for some time (such as my own ideas mentioned above). It is also necessary to realise and accept that, whether we like it or not, law is an expertise. A lay person would not think they could do better than a professional in assessing symptoms of illness, carrying out a diagnosis, performing a surgical operation, and issuing the prognosis. It's just the same when it comes to improving the products of our legislative process.

I end positively with another quotation from David Elliott's comments to me.

> ‘[I have difficulty with] the notion that clarity and effectiveness are, if not mutually exclusive, at least not of equal importance and so should not be given equal attention . . . I would like drafters to go the extra mile and make their drafts as intelligible as possible. The possibilities may be limited in difficult areas, but the attempt should be made, without loss of effectiveness . . . If drafting is approached with a built in attitude to clarity (which includes a knowledge of those things which assist comprehension and of those things which impede comprehension) I think we might see some dramatic improvement and some bold experimentation in legal drafting.’

Those are inspiring words, which I would like to endorse.

[1993.001 Published in *Clarity* 27, April 1993, p 18.]