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Any footnotes are shown at the bottom of each page
For full version of abbreviations click 'Abbreviations' on FB's website.

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*.

Widening the aims of legal clarity reformers

by Francis Bennion

CLARITY describes itself as 'a movement to simplify legal English'. There are similar organisations in other countries. Having for some years been a reader of the CLARITY journal, and studied other reforming literature worldwide, I have come to believe that there is a danger of well-meaning reformers damaging the law and its functioning.

To explain this I begin by setting out 8 propositions which I believe to be incontrovertible. I then comment on them using citations from the last issue of CLARITY, which was full of interesting material.

The 8 propositions

1. To function efficiently as a social service, law needs to be stated and promulgated efficiently and to be operated by efficient lawyers.

2. At present law is not stated and promulgated efficiently, and this prevents lawyers operating efficiently (whether or not they are efficient in other ways). In particular it adversely affects the clarity of legal English.

3. Law is an expertise. It cannot be fully understood by lay persons, any more than medical science can be fully understood by lay persons (they haven't studied or practised it). Bear this in mind if you are a lay reformer.

4. If you wish to simplify legal English, act only in ways that do not further impair the law's efficiency.

5. It is dangerous for lay persons to think they can understand the law unaided by experts. It may cause them to infringe criminal law or incur loss under civil law. If they are reformers it may cause them to damage the law unwittingly.

6. In considering the clarity of a legal statement (whether written or oral), you need to know whether it is intended for an expert or a lay audience. There may be gradations within these categories, and you need to bear these in mind too.

7. If you are a lawyer making a statement, try to make it as clear as it can possibly be for its intended audience.

8. Where your statement is intended for more than one type of audience, give priority to legal effectiveness. Where you are drafting legislation, legal effectiveness requires that a court would give the intended interpretation. Where you are drafting a judgment, legal effectiveness requires that the legal effect on the parties is what you intend and that it is clear (to experts) what your decision is and what effect (if any) it has on existing law under the doctrine of precedent. Where you are drafting a statement (such as a tax return form) intended to be acted on by lay persons without expert advice, legal effectiveness requires that they can understand it without such advice.

1. Comments on the 8 propositions

Readers of Clarity will be mainly interested in these propositions so far as they deal with the audience for a legal text or other statement. I have written about this before (Clarity 27, April 1993, p 18) and will not repeat what is said there. Instead I will add some further points drawn from Clarity 30. Before doing that I need to say a little about technical language.

When lawyers speak to each other they use technical language. One feature of this is that it omits explanations. One lawyer does not explain to another what he or she means by some legal term or reference which the other ought to understand without explanation. Another feature is that it includes technical terms. No expertise can do without these. They are often criticised as jargon, but that is inappropriate where the audience is an expert one. Technical terms used without explanation in a statement intended for a lay audience are 'jargon'.

In Clarity 30, David P Sellar (pp 3-5) takes exception to a piece of jargon (or is it?). In the phrases 'we hereby acknowledge receipt' and 'hereby assign and transfer' he finds the word hereby 'both archaic and unnecessary'. Yet it does stress that this piece of paper and no other is the receipt and that it is no use looking round for anything else as effecting the transfer. People now run a mile from hereby and thereby but when accuracy is essential they have their uses. The same is true of said and even the hated aforesaid. Or herein and therein. Our ancestors used such terms to attain precision. Aren't we interested in that any more?

Next Mr Sellar enters on the important question of the audience, expert and lay. He criticises a form of transfer because its tortuous wording obscures the meaning for the client, 'who is likely to regard it as mainly lawyers' jargon'. He unluckily says that 'in order to be clear a document must generally be concise'. It is unlucky because on the opposite page is proof that he is wrong. A case is mentioned where the Court of Appeal held that an undertaking to pay rent 'without any deduction' did not apply to one kind of deduction at least. The undertaking was too concise to convey the full meaning.

Mr Sellar is not a lay reformer. He is a solicitor. But still he thinks that the Law Society's standard form of offer