

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*.

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Don't put the law into public hands

Leave legal wording alone, says Francis Bennion

A prime cause of the horrendous cost of legal advice and litigation, now under investigation by Lord Woolf, is the obscurity of the law. There have been recent complaints about this from, among others, the National Consumer Council and the Law Commission. But what is meant by 'the obscurity of the law'?

In its recent pamphlet 'The Cost of Justice', the National Consumer Council says that if government departments and the National Audit Office find it difficult to interpret legislation, what chance has the man in the street? My answer, which many people will dislike, is that the man, or woman, in the street should not attempt to interpret legislation. I refer, of course, to legislation still in the form in which it was enacted. What the lay person needs is explanations and summaries.

The Law Commission, in a recent paper on reforms in Judicial Review, says it wants to get rid of Latin terms such as *certiorari*. Jack Beatson, a former Law Commissioner, complains that law students cannot pronounce this word. My answer is that, as their predecessors had to, they should learn to pronounce it. In a letter to *The Times* (1 November 1994), Dr M.J. Pelling objects to replacing concise Latin terms, whose meanings are not hard to learn, with less elegant English terminology.

Another would-be reformer who believes our law should be expressed in plain English is Martin Cutts. The Plain Language Commission has just published Mr Cutts's *Lucid Law*, a report with a foreword by no less than Sir Thomas Bingham, the Master of the Rolls. The press release says it proves that abolition of 'statutory gobbledygook' would save millions in legal fees. So does Lord Woolf have his answer? Again, I think not.

Mr Cutts says his report meets a 1987 challenge by Sir Henry de Waal, then head of what Mr Cutts, using plain English, calls the Government's law-writing office. Its official name is the Parliamentary Counsel Office (I was once a member of it). The challenge was to put a statute into plainer language without losing significant meaning.

Mr Cutts chose to operate on the Timeshare Act 1992, and claims to have vanquished Sir Henry. The Act's draftsman, Euan Sutherland, thinks otherwise (see *Statute Law Review*, Winter, 1993). Sir Thomas Bingham seems to be on the side of Mr Cutts. However, a close analysis of his foreword shows that with commendable judicial impartiality he has refrained from committing himself one way or the other.

The greatly respected Law Lord, Lord Reid, said technicalities and jargon are all very well as a system of shorthand among lawyers, but 'if you cannot explain your result in simple English there is probably something wrong with it.' Lord Reid was too acute a lawyer to mean this. He was addressing the law teachers and, I suspect, pulling their legs.

As a would-be reformer myself, I believe that the biggest stumbling block is communicating the law to lawyers. Unless they are clear about the nature and characteristics of legislative texts there is not much chance that anyone else will be. So reformers like Mr Cutts need to start by accepting that law is an expertise.

In legal texts, unexplained terms of art and references (express or implied) to legal rules, doctrines and sources are essential. Not one of these can be fully understood by non-experts in law, any more than medical language can be fully understood by non-experts in medicine.

True, the desired effect can sometimes be achieved without use of special language. But it takes a lawyer to know whether simple words in what should be a technical text really carry their apparent simple meaning. This brings us to the conclusive argument against Mr Cutts, and anyone else who would have the citizen consult raw legislation. It may be positively dangerous to encourage non-lawyers to think they can understand legal texts unaided by expert advice.

So my advice to Lord Woolf is this. Do not look for savings by trying to make the law easier for lay persons to understand. Instead, make it easier for lawyers to use. Plain English and reducing jargon have only a small part to play in this. Much more important is improving the arrangement of the law (more consolidation and codification), the methods of finding it and discovering whether it has been brought into force or has ceased to be in force, the techniques of interpretation, and the system of transitional provisions. And we need to move quickly towards integrating our law with that of the European Union, and rationalising and combining the interpretative principles applying to each.

None of the above detracts from the need to simplify legal documents, such as forms and explanatory leaflets, which are intended to be read by members of the public. There is plenty that needs to be tackled. All that well-meaning interveners like Martin Cutts do is to distract attention from the real problems and let the Government off the hook.

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