Plain Language in Law

by Francis Bennion

Note In the case of Anglophones, references in this paper to Plain Language should be read as referring to Plain English (sometimes called Easy English[1]).

I received a request from the Australian Law Reform Commission of Victoria to comment on its 1986 discussion paper 'Legislation, Legal Rights and Plain English'. I complied, but heard no more from the Commission. It was abolished by the Victorian Law Reform Commission Act 2000, by which its functions were redistributed between the Department of Justice, the Parliamentary Law Reform Committee and a committee chaired by the Chief Justice.[2]

The following is an enlarged version of my report to the Commission. It consists of a set of principles expressed in Plain Language. They are based on my experience as a legislative draftsman in several Commonwealth countries, but mostly the United Kingdom. They are distilled from my textbooks *Statute Law* and *Statutory Interpretation* and my other writings on this vexed topic. They are applicable to all common law jurisdictions.

LEGAL MEANING, LAW TEXTS, LEGAL TEXTS, AND EXPLANATORY TEXTS

Plain Language in law is needed because law is important, and therefore must be made known.

We do not have Plain Language in law, and never have had. The reasons for this are complex.

A reader must first understand the nature of *legal meaning*, *law texts*, *legal texts*, and *explanatory texts*.

The reader must also distinguish between the grammatical meaning and the legal meaning of a text. The two do not always correspond.

Legal meaning

The legal meaning of a term or passage is what the court says it is on an *informed* reading. Where different courts say different things the point is decided by the legal doctrines of court seniority and precedent.

The legal meaning usually, but not always, corresponds to the grammatical meaning.

Where they are said not to correspond, the question is decided (as a question of legal expertise) according to the interpretative criteria laid down by law.

Law texts

A law text, such as an Act or statutory instrument, is part of the state's body of law. It does not stand alone, but must fit into the rest of the law. Moreover the rest of the law affects its meaning. Since the rest of the law includes material in arcane, archaic or chaotic form, this creates problems.

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[1] See, e.g. http://www.lawreform.vic.gov.au/our-approach/publication-types/lawreform-numbering-of-commission-publications

[2] For criticism of this change and a general survey see 'Law Reform in the 21st Century – Some Challenges for the Future', http://www.lawreform.vic.gov.au/vlrc-voice/law-reform-21st-century-%E2%80%93-some-challenges-future

The chief problem it creates is that the legal meaning of a law text can be directly grasped only by a reader who is a legal expert. This should not be so, but it is. No practicable reform is likely to change it.

For a reader who is not a legal expert to rely on understanding a law text without the aid of a legal expert can be dangerous. This is true even if the law text is in Plain Language.

To be fully understood by one who is not a legal expert, a law text must be read along with an explanatory text.

Legal texts

A legal text, such as a contract or tax return, is a text, other than a law text, that has legal effect. That means it may alter the legal position of some person. If wrong, it may cost money - or even liberty.

A legal text may not achieve its purpose if its wording fails to comply with relevant law texts, or is not understood.

To be fully understood by one who is not a legal expert, a legal text must be read along with an explanatory text.

Explanatory texts

An explanatory text, such as a leaflet or a note of explanation on a form, is written by a legal expert to describe for those who are not legal experts the legal meaning of a law text or legal text.

DRAFTING OF LAW TEXTS

How a law text should be worded and laid out

Every law text drafter must accept a duty to make texts comprehensible, using Plain Language where possible. A drafter must have the courage to depart from precedented forms of words, since otherwise we are fated to be forever prisoners of the past.

A law text drafter should not try to cram too many different factual situations into one verbal formula. Use separate statements, each designed for its own facts.

A law text drafter must ensure that the law laid down by the text is stated correctly and unambiguously.

A law text must not be based on a mistaken view of related law or facts.

A new law text must be accompanied by clear and accurate transitional and commencement provisions.

State agencies responsible for producing law texts should recognise the ongoing need for research and reform of the system. They must never say ‘we have got it right’. Improvement is always possible.

Uniform optimum methods for drafting law texts should be worked out by the responsible state agencies, and used. So should standard or model clauses (otherwise known as boilerplate), wherever these are practicable.

Those instructing a law text drafter should not insist on carrying out over-complex policies. Many abstruse law texts are due to these. So keep to an absolute minimum exceptions, qualifications, special cases, and provisos.

There is often a conflict between simplicity and certainty. A provision giving a judge or official a discretion or a duty to exercise judgment can usually be put simply. But until the judge or official has decided what to do, the parties may still be in doubt. Also, different judges or officials may conscientiously give different discretionary or judgmental rulings on the same facts.

If it can be secured, certainty is best. But it usually needs more words.

Drafting and interpretation of law texts are skilled tasks. There are many applicable criteria. Study and experience are needed, and thorough training should be given before judges or officials are entrusted with this task.

A law text drafter must allow (or be allowed) enough time to get the draft right. Hasty work will often be obscure, or contain mistakes, or both.

Amendments to a law text should if possible be framed by its drafter, to secure consistency. When a law text is amended, the drafter must make sure necessary consequential alterations are not missed.

Full use should be made of computer technology. This can frame some kinds of law so that the citizen, by the use of a home terminal, is able to obtain direct answers to queries. That is always possible where the law gives answers that are certain, and do not depend on the exercise of someone's discretion or judgment.

Responsible state agencies should *process* law texts to make them more easily comprehensible. Typographical devices can aid understanding, e.g. by splitting up complex sentences. Composite restatement can bring scattered law texts together without altering the legal meaning.

Law texts must be continually updated, as necessary.

HOW A LAW TEXT SHOULD BE CONSTRUED

Unless the interpreter of a law text is a judge trying a case, he or she should construe the text as a judge would do. If the interpreter is a judge, he or she should construe it in the way expected by other interpreters.

The interpreter of a law text must know all the accepted interpretative criteria. These consist of rules of interpretation laid down by common law or statute, presumptions as to the legislator's intention which are based on the nature of legislation, principles of legal policy, and linguistic canons of construction. There are many of them, and each one is useful when relevant. They need to become more familiar.

The law text interpreter must select the criteria relevant to the case, and weigh the resulting factors. This process, if skilfully done, will yield the right answer.

General principles of interpretation should not be laid down by statute unless the statute is fully comprehensive. To select certain principles for inclusion in such a statute, and leave out others, is confusing. It raises doubt as to the respective status of enacted and unenacted interpretative criteria.

HOW A LEGAL TEXT SHOULD BE WORDED AND LAID OUT

So far as possible, the principles stated above in relation to law texts need to be applied to legal texts also.

A legal text must conform to relevant law texts, since otherwise its purpose may not be achieved.

A legal text should so far as possible be comprehensible to those who are parties to it. Arcane or archaic language must be eschewed, when not needed to give legal efficacy.

If intended to be understood by persons who are not legal experts, a legal text must by accompanied by an explanatory text.

HOW AN EXPLANATORY TEXT SHOULD BE WORDED AND LAID OUT

An explanatory text must wholly use Plain Language, and should take full advantage of current techniques of typography and layout. It should use flow-charts and similar aids when these are helpful.

Having first stated to whom it is addressed, an explanatory text should use the second person rather than the third. It should use the active voice rather than the passive.

An explanatory text should not cover too many different cases. A separate text for each case is better, but the user must be told how to find the right one.

An explanatory text can give only an *outline* of the law. The user should be warned that it may not tell the whole story.

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References:

None