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Doc. No. 2009. 011 18 Com L (Apr 2009) 23-27
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Article in The Commonwealth Lawyer

Complex Legislation: Is Redaction The Answer?

Francis Bennion

Introductory Note by FB

The article below is a further addition to my writings on the use of plain language in legislation. Others are included within the Topic 'Plain language law'. The Topic can be found on this website at *www.francisbennion.com/topic/plainlanguagelaw.htm*.

Preliminary Note by Francis Bennion In his Editor's Note on p. 5 Dr Venkat Iyer wrote:

"The much awaited 17th Commonwealth Law Conference is at last upon us. The local organisers in Hong Kong have, as many of you attending the conference will discover, gone to considerable lengths in putting together an intellectually stimulating and culturally enriching programme which, we are sure, will result in the delegates carrying home some good memories of both the place and the event.

We too have a varied fare in this special issue. Francis Bennion, one of our regular contributors and a doughty defender of clarity in legislative drafting returns to do battle with his detractors in the 'Plain English' lobby who have repeatedly taken exception to his view that it would be unrealistic to expect non-lawyers to understand and act upon raw legislation. In his latest blast, Bennion argues that redaction might offer a solution to the long-standing problems arising from the fact that, while ignorance of the law is no excuse to the citizen, a lay person cannot fully understand the law without legal advice. We are privileged to be chosen as a platform for this important debate."

Complex Legislation: Is Redaction The Answer?

Francis Bennion

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Introduction

Should a non-lawyer be expected to understand and act upon raw legislation without skilled help? (By raw legislation I mean legislation in the form in which it is officially promulgated.) I discussed that question in an article published in this journal in 2007.[1] My answer is no. Plain language supporters criticised the article because their answer is yes. I cited the organisation *Clarity* as saying that laws should be readily understood by those affected by them, which means everybody.

There is a certain unreality about the question because non-lawyers are in a majority among the legislators who actually enact the law, but then they receive skilled help in doing this. Another aspect of unreality is that when people say raw legislation should be readily understood by lay people they are in truth asking the impossible.

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[1] August 2007, p 61. For the text of the article see http://www.francisbennion.com/2007/018.htm.

If that desirable position is in fact impossible, is there any practical alternative? I have thought and written about that thorny question for many years without finding an answer. Now at last I believe I may have one, which will be disclosed in the final section of this article.

The intractable statute book

Meaning 2 of the OED definition of the adjective *intractable* is: 'not to be manipulated, wrought, or brought into any desired condition; not easily treated or dealt with; resisting treatment or effort'. That seems an accurate description of the statute books of most western countries (using the term statute book to mean all primary and secondary legislation).

I sat down to write this article when I had just been leafing through a popular law review, as one does. It was as usual stuffed with complaints about the complexity of British legislation. At random I picked out an article by David Burrows, a practising solicitor.[2] He was writing about the British government's recent overhaul of tribunals. Here is an extract.

> Inexpensive? Only if you . . . don't have to pay a lawyer to unravel some of the most complex and frequently amended of modern delegated legislation. [It] has a schedule which runs to 346 paras, through which the layman will have to trawl . . . The sharp-eyed layman who spots [an] omission will have to discover why by osmosis . . .

Par for the course. Non-lawyers *ought* to be able to understand the law that binds them, and in a perfect world they would. In our world they can't. Not fully, and safely. If they think they can, and act on that, they may find they have inadvertently broken the law, or taken on an unwanted obligation, or missed an entitlement, or suffered in some other way. So they had better not try.

Many lawyers rail against this situation. Here is an example from the judiciary relating to an Act I drafted myself, the Consumer Credit Act 1974 ('the CCA'). The drafting was criticised by Clarke LJ, who started one of his judgments with the following:

> These appeals raise a number of issues under [the CCA] which has recently provided so much work for the courts. Like others, this case demonstrates the unsatisfactory state of the law at present. *Simplification of a part of the law which is intended to protect consumers is surely long overdue so as to make it comprehensible to layman and lawyer alike.* At present it is certainly not comprehensible to the former and is scarcely comprehensible to the latter.[3]

With his legal training and experience, Clarke LJ ought to know that he is demanding the impossible here. It simply is not practicable for legislation which is required to do the work that the CCA is required to do to be 'comprehensible to the layman'. It would be dangerous for lay persons to think they could extract the legal meaning of such texts without skilled help.

In the previous article I said that law, like medicine, is an expertise for the acquisition of which lawyers, like doctors,

have to undergo lengthy training. But, I added, the plain language movement does not recognise this. That got me into trouble. Enthusiasts lined up to assure me that *of course* they accepted that law is an expertise and that lawyers have to be trained. So what on earth was I talking about?

When I said that the plain language movement does not recognise law as an expertise, I simply meant that a movement that wishes the public to read and act on raw legislation without professional guidance obviously does not truly believe law to be an expertise. Either

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[2] 159 *New Law Journal* (16 January 2009) 57.
[3] *McGinn v Grangewood Securities Ltd*. [2002] EWCA Civ 522 at 1. Italics added.

that or it wishes inexpert people, perhaps to their peril, to read and act on important material they cannot properly comprehend, which is irresponsible.

So the plain language movement is impaled on Morton's Fork, though it will not accept that. To use a common phrase, it is in denial. It should stop playing around and recognise that a belief that law must be drafted so that the general public can understand it does not sit with a belief that law is an expertise. Otherwise it is being dishonest. As I will show, one supporter of the plain language movement, the Right Honourable Harriet Harman MP, has proved herself to be dishonest in this matter, though she declines to admit it and does not seem to care that she is charged with it. She persists in this dishonesty, even after having been shown up. She is of course a politician, but that scarcely excuses her.

One of my opponents in the controversy cited a remark by Sir Geoffrey Palmer, president of the New Zealand Law Commission:

> The common law and judicial decisions interpreting statutes are inaccessible to ordinary citizens so it may be asked, is it safe to give them access to statutes? People may come to grief advising themselves. There is a tendency in some quarters to think that the law is a mysterious science that should be only revealed to those who are initiated, namely lawyers. But is this defensible in a democratic society?[4]

My answer would be no, it is not defensible – but it is not the state we are in. Anyone can become 'initiated' – if they have the intelligence and energy. Law is not a mysterious closed circle.

If examined, that throwaway remark by Sir Geoffrey Palmer is seen to be a bundle of contradictions. The first two sentences support my position (which is why I quoted them in the previous article). The third sentence contradicts them by raising the *Bleak House* bogey of a profession which, in the supposed words of Bernard Shaw, is a conspiracy against the laity. The last sentence invites a negative answer which hangs in the air. The state we are in, for whatever reason, is the state I indicated in the opening paragraph. We had better recognise the fact.

What is the reason?

One critic suggested that there is an implication from my argument that we ought to keep legal texts more obscure than is necessary so as to protect the public from itself. As an experienced legislative drafter I do not intend any such implication; which would be absurd and improper. What I do intend to say is that lawyers should not encourage the public in the false belief that it is safe for them to rely on their unaided reading of raw legislation. The reason is by now obvious, but again I will spell it out.

Most if not all systems of statute law would need to be revolutionised before it was safe for the public to rely on their own reading of legislation. We cannot expect this to happen. I myself have been a reformer in this field for over forty years, since setting up the Statute Law Society in 1968.[5] I have not had much success, though I have had some. I found that there are a great many difficulties in the way of reform. Politicians see no votes in it, and will not allocate the necessary funds. The judiciary decline to research the matter seriously or give support to those who do. There is indifference by the profession generally[6].

This indifference was displayed for example over my attempted reform known as composite restatement, where the text of an Act is conflated with the texts of delegated legislation made

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[4] 'Law reform and the Law Commission in New Zealand after 20 years – We need to try a little harder', Address to the New Zealand Centre for Public Law, Victoria University of Wellington, 30 March 2006, para 62.

[5] See F A R Bennion, 'Statement on the Statute Law Society', http://www.francisbennion.com/1979/015.htm; *Statute Law Review* (Spring 1983) 4, pp 63-64, 128, http:www.francisbennion.com/1983/002.htm.

[6] For evidence of this see 'Statement on the Statute Law Society', referred to in the previous footnote.

under it.[7] This method does half the work for you (that was its slogan). It would greatly help practitioners if they could be bothered to understand and use it. To assist them I wrote a four-volume looseleaf book using the method. *Consumer Credit Control* was published by Longman in 1976. It ceased publication in 2000, the composite restatement system not having proved popular.[8] A list of some of my other reform proposals, with complaints about the neglect of these, is given in a 1993 article of mine published in the journal *Clarity*[9].

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There are four major obstacles preventing the unassisted lay public in the United Kingdom from safely understanding raw legislation. One is that we are lumbered with a huge statute book going back many years. All new legislation has to amend it, and fit in with it. The second is that there are many other relevant texts, such as the gigantic mass of subordinate legislation, the gigantic mass of European Union legislation, the tangle of devolved legislation, and the large number of important treaties such as the EU treaties, the European Convention on Human Rights, and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (which is currently giving trouble).

The third major obstacle is that statutory interpretation is a complex matter, since to arrive at the legal meaning of a legislative text it is necessary to take into account all relevant interpretative criteria of which there are a great number.[10] These criteria are not of course known to the lay public.

Finally there is the fact pointed out by Sir Geoffrey Palmer that the common law and judicial decisions interpreting statutes are inaccessible to ordinary citizens (which is another way of saying, and meaning it, that law is an expertise).

My sober conclusion is that it is unrealistic to suppose that it is going to be practicable in the foreseeable future, if ever, to remove these major obstacles so that expert legislative drafters can produce laws that it is possible and safe for citizens to understand for themselves. That this *ought* to be practicable has deluded the starry-eyed plain language movement into thinking that it *is* practicable.

Legislative drafters should go on trying to improve their techniques, but they should be recognised as techniques for producing texts suited to lawyers not lay readers. Here plain language certainly has a place. However, it is in my opinion far from being the most important factor in reform, let alone the be-all and end-all. Treating it as the be-all and end-all by the plain language movement has led to protests that the movement has distracted attention from more important reforms.

In considering the plain language movement (my previous article attacked the movement, not plain language itself) it should be remembered that many of the objects of the movement were being pursued by legislative drafters long before the movement itself came into existence. I myself started as a legislative drafter in 1953, when the movement had not been heard of. My then colleagues in the Westminster Parliamentary Counsel Office (PCO) all regarded achievable clarity of language as part of good drafting. As one would expect, the PCO has continued to strive for improvements in drafting technique. To think this attitude is due to the

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[7] For an explanation of the composite restatement method see *Bennion on Statute Law* (3rd ed, 1990, Longman) pp 334-340, http://www.francisbennion.com/1990/002/ch23.htm. For a transcript of my video demonstrating this method see http://www.francisbennion.com/1981/013.htm. For a review of the video see 1983 *Statute Law Review*, pp. 60-62; http://www.francisbennion.com/1983/nfb/006.htm.

[8] For an illustration of the composite restatement method as used in *Consumer Credit Control* see *Bennion on Statute Law* (3rd ed, 1990, Longman) pp 346-349, http://www.francisbennion.com/1990/002/apb.htm.

[9] *Clarity* 19 (29 Dec 1993), http://www.francisbennion.com/1993/005.htm.

[10] The fifth (2008) edition of *Bennion on Statutory Interpretation* runs to 1,579 main pages plus 267 preliminary pages.

urgings of the plain language movement is to commit the logical fallacy of *post hoc ergo propter hoc* (after this therefore because of this).

There is really no such thing as a plain language drafter, though some claim to be such. Rather, there are good drafters and bad drafters. Good drafting requires many other attributes apart from plain language. Most crucially, it needs to be legally effective to achieve the legislative purpose. Insistence on plainness alone distracts from other desirable qualities, such as avoidance of tautology or unintended ambiguity, misuse of implication, and failure to include needed consequentials. The PCO reckons it takes ten years constant drafting work to make an expert drafter. I myself have had around twenty years of such experience, though I have worked in the field of statute law and legislation for over sixty years, starting with a year in 1948-49 working on the editorial side of *Halsbury's Statutes*.

Some have mounted general attacks on my earlier article without mentioning that it heaps praise on one aspect of the plain language movement, saying this has been 'a triumphant success'. I refer to the aspect relating to its work in achieving simplification of texts which give legal guidance to a lay client or to members of the public generally, or are designed for use by lay persons (such as a statutory form for a self-assessment tax return or hire-purchase contract).

Some have criticised my attack in the article on the book *Modern Legal Drafting* by Butt and Castle. However the authors themselves are relaxed about this, and allow that my criticisms have substance. Richard Castle was courteous enough to tell me in an e-mail that he enjoyed the article, adding:

> I accept that a lot of what you write is really pertinent. Peter Butt and I will undoubtedly take it into account when we prepare the next edition, if there is one.

The BBC mounts a discussion

There was a recent BBC radio discussion on the subject of plain language legislation. It took place on two days, a week apart. Both sections of the discussion were open to criticism, but because of space considerations I will concentrate on the second.[11] It is typical of the way, on the rare occasions when this topic is extensively aired in the general media, it is mishandled. It is dealt with in a shallow fashion which panders to popular prejudices (such as the supposed common knowledge that every lawyer is solely concerned with lining his or her pockets) and which fails to grasp significant points which would truly enlighten the public.

Here are some examples in the programme of pandering to popular prejudice. A BBC presenter Carolyn Quinn says 'when the workload of the Parliamentary draftsmen grows, it's

good news for the lawyers'. Lord Phillips says 'This tsunami of complex, impenetrable, intrusive legislation, which you know is going to . . . play into the hands of the lawyers and specialists who, of course, thrive on all this plethora of complexity'. Later he says the complication 'ends up making lots and lots of lawyers very happy'. I have yet to meet any person, whether a lawyer or not, who was made 'happy' by having to grapple with legislative complication.

Apart from the First Parliamentary Counsel, Stephen Laws, the only person on the programme who talked really good sense was Sir Malcolm Rifkind MP. He said:

> Ordinary people, normal human beings, do not read Acts of Parliament. The crucially important thing in an Act of Parliament is that it should avoid ambiguity and for it to be clear it has to be precise and if that means using a kind of language which we may not use in conversation, but which the courts can understand and can therefore interpret, then all to the better.

[11] 'The Westminster Hour: the Draftsman's Contract Pt. 2', BBC Radio 4, 14 Dec 2008.

This enlightened remark was dismissed by the presenter, Shaun Ley, with the words 'But, then, he was a lawyer before he became a politician'. There is a depth of undisclosed prejudice in that.

A great deal of the programme revolved around Rifkind's undoubtedly true observation that ordinary people do not read Acts of Parliament. Several were in denial over this. First there was the usual ineffable representative of the Plain English Campaign (PEC). This time the PEC representative was Peter Rodney, described as its legal consultant. He started by reading out, as a supposed example of 'overly complicated' legislation, a provision requiring obedience to Council Regulation (EEC) No 3821/85 (tachographs). He went on:

> I can eventually work out that if I don't have a tachograph in my cab as a lorry driver, and if I don't use it correctly, I am guilty of an offence. But I'm a lawyer; it takes me quite a long time to work all this one out. I would have thought rather difficult for the average lorry driver to understand. It's the lorry driver, who's the one who's actually going to get prosecuted for not obeying the law, why do we have to have a lawyer to explain it to him? He shouldn't have to have a lawyer in his cab as well as the "spy in the cab" in the shape of the tachograph to say, "Ooh, careful: you must have a rest break now".

This is typical smart-aleck stuff. Mr Rodney knows perfectly well that tachograph instructions are given to lorry drivers in concise form by their employer or trade union. It is grotesque silliness to suggest that they need to have a lawyer in their cab. It is meant as a feeble joke, but this is not a joking matter.

The BBC presenter Shaun Ley is on the side of the PEC of course. He says the PEC 'is still campaigning on this, and they have come up with some wonderful examples', following with an example that is not wonderful at all. It defines, in an admittedly tortuous way, when food on sale is to be treated as 'hot'. Then Mr Ley, who knows nothing about statute law technicalities, presumes to say: 'Do we actually need to say in law what is hot and what is not; isn't that common sense?' Stephen Laws, the patient professional, says it is not as simple as that.

Finally the government minister Harriet Harman, a former Solicitor General, said what was untrue:

> The balance to be struck is making the bill sufficiently detailed for it to be clear to the courts what we meant, but not so complex that it might be clear to the courts but it's unclear to everybody else, and that's why we're publishing bills in plain English alongside the kind of legalese.

The government is not doing anything of the kind. Ms Harman is trying to pretend that the official explanatory note to a Bill or Act is the Bill or Act in plain English, when it transparently is not. Indeed it explicitly says it is not. The note to a Bill is suitably adapted when the Bill becomes an Act. Every such note is published with the following warning:

> These explanatory notes relate to the ... Act. They have been prepared by the Ministry of Justice in order to assist the reader of the Act and to help inform debate on it. They do not form part of the Act and have not been endorsed by Parliament. The notes need to be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or part of a section does not seem to require any explanation or comment, none is given.

Harriet Harman has form on this, going back to 2006. In that year I drew attention to it in the *New Law Journal*.[12] In 2007 I published a full-length article about it.[13] Ms Harman did not

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[12] 'Legislation in Plain English?' 156 NLJ, 23 June 2006, 1001, www.francisbennion.com/2006/025.htm. Similar letters sent to *The Times* and the *Spectator* were not published.

[13] 'Plain English: Harriet Harman Bends The Truth'. 171 JPN (15 December 2007), 886-887,

respond to either. I find this repeated dishonesty on the part of a government minister intolerable.

Is redaction the answer?

I said at the beginning of this article that I may have found a practical alternative to the admittedly unsatisfactory position that, while ignorance of the law is no excuse for the citizen, he or she cannot expect to know the law without professional assistance. Strangely enough, we may have to thank Harriet Harman for this remedy. It would make what she improperly

pretends is the case actually the case. The proposal also builds on my device of composite restatement discussed above.

In outline my proposal is that when an Act is passed it should be accompanied by an official redaction of it which is in the nearest thing that can be managed to plain English. I offer as an example at random the Criminal Evidence (Witness Anonymity) Act 2008. Under my proposal it would be accompanied by an official authoritative text titled 'the Criminal Evidence (Witness Anonymity) Act 2008 Redaction'. A suggested draft of this is given below.

The term 'redaction' is not very familiar, but no other will do. The OED meaning 2a is 'The action or process of preparing for publication; reduction to literary form; revision, rearrangement'. Meaning 2b is 'The result of such a process; a new edition; an adaptation; a shortened form, an abridged version'.

An official redaction would be prefaced by a note such as is contained in the example below. I would like to extend the scheme to include delegated legislation, building on my system of composite restatement. Of course many details would need to be worked out, which I have not space to go into here.

Suggested Redaction of 2008 Act

Note This the official Redaction of the Criminal Evidence (Witness Anonymity) Act 2008 ('the Act'), which received Royal Assent on 21 July 2008 and came into effect on that date. The Redaction presents the terms of the Act in a way that makes it simpler to understand by members of the public. It is not intended to alter in any way the legal meaning of the Act. The Redaction presents the main terms of the Act in broadly the language of the Act. The reader is directed to other terms in helpful language. Some terms are omitted as being minor or unnecessary.

Main provisions [Redaction of sections 1 to 5.] The Act provides for the making by the court in criminal proceedings of a witness anonymity order, which is an order that specified measures be taken to ensure that the identity of the witness is not disclosed. The measures that may be specified include the following.

- That the witness's name or other identifying details be withheld from any person.
- That the witness may use a pseudonym.
- That the witness is not asked questions that may lead to the witness's identification.
- That the witness is screened, except from a member of the court or jury, or from a person appointed to assist the witness.
- That the witness's voice is modulated, except so that the witness's natural voice cannot be heard by a member of the court or jury, or by a person appointed to assist the witness.

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http://www.francisbennion.com/2007/026.htm.

An application for a witness anonymity order may be made to the court by the prosecutor, who must (unless the court directs otherwise) inform the court of the identity of the witness, but need not disclose it (or any information that might enable the witness to be identified) to any other party to the proceedings or his or her legal representatives.

An application for a witness anonymity order may be made to the court by a defendant, who must (unless the court directs otherwise) inform the court of the identity of the witness, but need not disclose it (or any information that might enable the witness to be identified) to any other defendant or his or her legal representatives.

The court may make a witness anonymity order only if it is satisfied that Conditions A, B and C are met.

- Condition A is that the conditions which are to be specified in the order are necessary to protect the safety of any person, or prevent serious damage to property, or prevent real harm to the public interest.
- Condition B is that those measures would be consistent with a fair trial.
- Condition C is that it is important the witness should testify and the witness would not testify were the order not made.

When deciding whether Conditions A, B and C are satisfied the court must have regard to all relevant considerations, including those mentioned in section 5(2) of the Act.

The old rules relating to anonymity of witnesses in criminal proceedings are abolished, but the Act does not affect public interest immunity.

Other provisions [The remaining provisions of the Act are relatively simple. The Redaction will direct readers to such of them as it seems necessary to specify.]

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