Writing Like a Lawyer

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Provocation from *Clarity*

I am a member of *Clarity*. It describes itself as a worldwide group of lawyers (and interested lay people) having the aim of achieving the use of good, clear language by the legal profession. Its website goes on to say it hopes to achieve this by:

- avoiding archaic, obscure, and over-elaborate language in legal work;
- drafting legal documents in language that is both certain in meaning and easily understandable;
- exchanging ideas and precedents, not to be followed slavishly but to give guidance in producing good written and spoken legal language;
- exerting a firm, responsible influence on the style of legal language, with the hope of achieving a change in fashion.

Worthy aims, perhaps, but certainly incomplete. I would at least add the following:

- always choosing the wording of a particular text so that it suits the nature of its intended readership.

The *Clarity* list makes me uneasy as a lawyer. Do we really want to advertise to the world that we think ourselves guilty of such undesirable habits? Are we wise to shout from the rooftops that we commonly use archaic and over-elaborate language in legal work? People may start to believe it. We are crying stinking fish, which has always been regarded as a silly thing for any supplier to do. We are fouling our own nests.

Recently I received a note from *Clarity* which said its next meeting on "Plain language in legal education" was proving popular. Among suggested questions for the meeting was Do law students get extra marks for plain language, *or must they write like a lawyer*? This provocative question caused me to speculate on what writing like a lawyer really means.

I ought to know what it means, since I have been writing like one sort of lawyer or another for over sixty years. It began in 1948, when I spent a year in the editorial department of *Halsbury's Statutes* while waiting to take Bar finals, and has gone on ever since. In all cases I tried to choose the wording of my text so that it suited the nature of its intended readership. Over nearly a lifetime, my readerships have been very varied: law teachers, law students, practising solicitors, lay clients, legal civil servants, non-legal civil servants, MPs of all sorts, judges, advocates and other users of Acts of Parliament, and the public generally (as with a letter in a newspaper, of which I have written many). Often there have been mixed readerships, when the lowest common denominator comes into play.

A deadly syllogism

That provocative question buzzes away. Look at it again. Do law students get extra marks for plain language, or must they write like a lawyer? It presents two alternatives:

Use plain language

or

The necessary implication is that it is one thing or the other. You can't do both these things. You can't use plain language *and* write like a lawyer. The deadly syllogism is:

Lawyers do not use plain language.
I am a lawyer.
Therefore I do not use plain language.

This is absurd of course, and casts a poor light on the *Clarity* organisation as a body of lawyers. It is a gross insult to practising lawyers and a considerable libel on what has for centuries been regarded as a learned profession. The first President of the new United Kingdom Supreme Court, Lord Phillips of Worth Matravers, recently confirmed to me in a letter that he believes the law is still a learned profession, despite all recent efforts to demote it from that status.

What is a learned profession?

Do the *Clarity* organisers who thought up that provocative question think they belong to a learned profession? It seems unlikely. What indeed is a learned profession? I attempted an answer to that question in an article which I do not wish to lengthen this piece by repeating, so I request readers to be kind enough to read it on line.[1] I will call it my 2008 article.

One thing my 2008 article discusses is the question of legal terminology. It gives as examples, and discusses, the following law terms (I will omit the italics; we all know Latin when we see it): acknowledgment of service, affidavit, amicus curiae, ancillary relief, answer, certiorari, co-respondent, cross petition, decree absolute, decree nisi, divorce petition, ex parte,

guardian ad litem, interim, in terrorem, maintenance pending suit, Mareva injunction, freezing injunction, issue (verb), leave, maxim, party cited, periodical payments, petitioner, plaintiff, prayer, pro bono, res ipsa loquitur, respondent, writ of summons.

For a discussion of these terms please see my 2008 article. It describes how a UK government department, over-influenced by the plain language movement, is seeking to replace these terms of art of the legal profession by what it calls 'easier to understand language'. This illustrates the damage that can be done by the plain language movement. The argument is that the wording of our professional documents should be easier to understand not by lawyers but by the general public. Lawyers well know the legal meanings of the terms listed; the lay public may not. They should be given requisite information in language tailored for them, plain language if you like. It is neither necessary nor desirable to interfere with professional terminology as used by professionals to each other.

Dr Roderick Munday refers to 'the sanitized, surrogate terminology' of the UK's new Civil Procedure Rules, which substituted for the ancient and well-understood term 'writ' the inelegant 'claim form'.[2] Richard Harrison says of this change:

> 'I really would want to poke fun at the notion that the term "claim form" is an improvement on "writ" or that "claimant" is any more accessible to the masses than "plaintiff". A claim form is what you send to an insurance company. It does not convey the required idea that to use the court system is to invoke the coercive powers of the state. The "writ of summons" made clear the element of compulsion and majesty.'[3]

[1] See F A R Bennion, 'Is Law Still A Learned Profession?', 172 JPN (17 May 2008) 316, www.francisbennion.com/2008/016.htm.
[2] Roderick Munday, 'Lawyers and Latin', 168 JPN (2004) 775.
[3] Richard Harrison, 'Linguistics and litigation' 149 NLJ (October 8, 1999) 1491.

In 1969, when my book on the professions[4] was published, it would have been unthinkable for a government department to assert the right to tamper with the technical language used by the legal profession. So far have we departed from the principle of free independent professions.

The harm done by the plain language movement

My 2008 article gives some of the profession's reactions to this impertinent tampering. Here is one. The Family Justice Council objected to the proposal that in divorce proceedings the historic terms 'decree nisi' and 'decree absolute' should be replaced by 'conditional order' and 'final order'.

> '[These] are both terms that are used extensively in other areas of law and [the change] could cause more confusion. If a client is asked whether they have their decree absolute it is generally well understood that this refers to a particular part of the divorce process. If a client is asked whether they have their "final order" it will not be clear whether divorce proceedings, the financial aspects or even children matters are being referred to.'

The UK Justice Minister Bridget Prentice MP said the changes would make it easier for people to follow what is being said in court, adding that outdated language will be replaced by everyday terms that reflect the way people think in the 21st century. To this Richard Harrison rejoined:

> 'There are some assumptions in here, of course: whether the language being replaced is really outdated; whether the replacements do indeed reflect the way people think; and whether their introduction will make it easier to follow what is happening in court. And, possibly, whether that is a desirable thing.'[5]

It is certainly not a desirable thing for non-lawyer civil servants and politicians (Bridget Prentice is a teacher not a lawyer) to monkey about with the terminology used by the legal profession. Embedded in these terms is the whole history of law. They carry with them a host of implications as to their origins, proper use and legal meaning. To change them for a frivolous reason is to complicate and endanger the law unnecessarily. For many years to come lawyers will be required to study and apply legal texts such as Acts of Parliament and law reports which use the old displaced terminology, alongside others which use the new. Both will need to be taught to law students, who have more than enough to cope with as it is. I expressed the irritated response of many lawyers to these pointless changes in the title of a 1994 article: 'If It Ain't Broke Don't Fix It".[6]

Duplex law

Adrian Turner, consultant editor of *Criminal Law & Jusice Weekly*, recently asked, of yet another rejigging of UK sentencing legislation, this time by the Coroners and Justice Act 2009: 'Do we really need this legislation at all?' He added that if governments desisted from such useless interference there would be 'a dramatic reduction in amending legislation, and the criminal justice arena would be a less manic place'.[7] I would add another candidate from the same Act.

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The Suicide Act 1961 s. 2(1) said that a person who aids, abets, counsels or procures the suicide of another shall be liable on conviction on indictment to imprisonment for a term not

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[4] F A R Bennion, *Professional Ethics: The Consultant Professions And Their Code* (Charles Knight, 1969), www.francisbennion.com/1969/001.htm.
[5] Richard Harrison, 'Linguistics and litigation Part 3' 158 NLJ (April 25, 2008) 584.
[6] 15 Stat LR (1994), pp. 164-169, www.francisbennion.com/1994/004.htm. This was a review of the New Zealand Law Commission's proposals for changes in the format of New Zealand legislation.
[7] 174 *Criminal Law & Jusice Weekly* (20 March 2009), p. 162.

exceeding fourteen years. Section 59(2) of the Coroners and Justice Act 2009 Act replaced this by an offence expressed in terms of 'encouraging or assisting' the suicide or attempted suicide of another. An official explanatory note says that s. 59(2) 'modernises the language of the current law with the aim of improving understanding of this area of the law'. No evidence is produced that there is any deficiency in the said understanding, and this is no doubt because it is nothing but a figment of some civil servant's imagination, stimulated no doubt by the outpourings of the plain language movement.

There are serious consequences to this nonsense. All the numerous case reports that throw light on the legal meaning of s. 2(1) do so in terms of aiding, abetting, counselling or procuring. This also applies to other cases on this familiar legal language, not connected with the Suicide Act 1961. It is not always straightforward, as shown by the following dictum in a suicide pact case:

> 'It was suicide pact, in my judgment, and whilst there was no counselling or procuring of the suicide of Tony Dunbar, to sit with him on the back seat of the car for three hours with carbon monoxide coming into the car, each of them holding each other's hands and hoping to die in each other's arms, there is an aiding and abetting there. To go up into the roof space of a house or to climb up a ladder with a noose around your neck, and to jointly count to '1, 2, 3' and then both jump, is giving a clearest, it seems to me, instance of aiding and abetting the suicide of another that it is possible to have. To do it a second time merely reinforces that.'[8]

In time another group of cases will no doubt come along which deal with the changed language inserted by the 2009 Act. On this point there will thereafter be what one might call a duplex system of law. So this unnecessary plain language 'improvement' will have the effect of further complicating a system of statute law which is much too complicated already.

An Australian initiative

The Australian expert Jeffrey Barnes refers to the plain language convention *not* to give helpful references, which is designed to shorten texts.[9] This is another example of the harm done by trying to make statutes readable by the laity. As I have said many times, law is an expertise and unqualified people should not be encouraged to read 'raw legislation' (that is legislative texts unaccompanied by explanations designed for the laity). If the explanations are adequate it should not be necessary for non-lawyers to trouble themselves with the actual text.

It is worth spending time over this Australian initiative. (The awful thought strikes me that its purpose might be to prevent a legislative drafter *writing like a lawyer*.) The portion of it referred to by Jeffrey Barnes says that instead of the traditional Version A below an Australian drafter should follow Version B.

Version A

1. A person may apply to the Minister under this section for a licence.
2. An application under subsection 1 must be accompanied by the prescribed fee.
3. On receiving an application made by a person under subsection 1, the Minister may issue a licence to the person.
4. A licence issued under subsection 3 must be in the prescribed form.
5. A licence issued under this section authorises the holder to ...

Version B

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[8] *Dunbar v Plant* [1997] EWCA Civ 2167, [1998] Ch 412, [1997] 4 All ER 289.

[9] Jeffrey Barnes, Senior Lecturer and Director, Teaching and Learning, School of Law, La Trobe University, 'Mastery Of Statutory Interpretation: Beyond The Misconceptions', National Public Sector Legal Officers Forum 2010, Hotel Realm, Canberra, 10-11 March 2010. For the convention see Office of Parliamentary Counsel (Cth), *Plain English,* para. 88, www.opc.gov.au/about/docs/pem.pdf.

1. A person may apply to the Minister for a licence.
2. The application must be accompanied by the prescribed fee.
3. The Minister may issue a licence to an applicant.
4. A licence must be in the prescribed form.
5. A licence authorises the holder to ...

The use of Version B reduces the number of words from 73 to 47, but for the lawyer reading this piece of law there is a cost in clarity and certainty. The changes in subsections 1 and 2 are harmless. The change in subsection 3 is significant. There ought to be a provision that the application must be in the prescribed form, so this draft is defective anyway. The reference in Version B3 to "an applicant" leaves it open to a person to apply in any way he fancies, and to any person. It allows the Minister to supply a licence which is not the one the applicant wanted. Version B4 and 5 do not specify what sort of licence they are talking about.

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My objections may be brushed aside as captious. Defenders of Version B will say that the points in question are obvious. My answer is that Version B depends heavily on implication. Often a drafter does need to rely on this, but it should not be forced on the reader where it is not necessary. It is curious that the first two of *Clarity'*s four objects should be thought to be advanced by exchanging explicit information for inexact and questionable implication, even though there is the minuscule advantage that the number of words used is slightly reduced.

My last word is to refer the reader to section 3 of *Bennion on Statutory Interpretation*.[10] This cites the wise words of Lord Cave LC: 'no form of words has ever yet been framed…with regard to which some ingenious counsel could not suggest a difficulty'.[11] There is more scope for such difficulties in Version B than Version A.[12] Is that kind of obfuscation really the object of the plain language movement? Obviously not. Yet that is what it is in danger of producing if its exponents do not take a long hard look at how it is working.

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[10] LexisNexis, 5th edition 2008, p. 25-26.
[11] *Pratt v South Eastern Rly Co* [1897] 1 QB 718 at 721.
[12] For a recent case where the absence of qualifiers caused doubt see *Re Dairy Framers of Great Britain Ltd* [2009] EWHC 1389 (Ch), [2009] 4 All ER 241, at [42].