

In support of plain law: an answer to Francis Bennion

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Introduction

In *Confusion Over Plain Language Law* (CPLL for short)² Francis Bennion dismisses

the plain language movement... [as] a misconceived and hopeless project ... [which] has failed ... because there are five things which are basically wrong with it:

1. The plain language movement does not recognize that law is an expertise.
2. It fails to distinguish clearly between four distinct types of relevant text, namely (a) a text which is law³, (b) a text which furthers an act in law, (c) a text otherwise addressed to lawyers [in the extended sense he gives "lawyers" in his footnote], and (d) a text about law which is addressed to non-lawyers.
3. Because of 2 it muddies the waters by agitating for changes in one type of text which are needed instead in another type of text (if they are needed at all).
4. It has distracted attention from needed reforms in law that are more important.
5. By holding that non-lawyers can do things which only lawyers can be trusted to do, it endangers the public.⁴

These five points (which I hope to rebut below) are the only basis offered for his assertion that the project is misconceived, an assertion which fails to take into account the well-documented need for and benefits of reform⁵.

¹ Mark Adler recently retired from practice as a solicitor.

² *The Commonwealth Lawyer* (16 2007, pp 63-68).

³ "Law text" for short.

⁴ CPLL p.63.

⁵ From academic lawyers, see, for example, Professors David Mellinkoff: *The Language of the Law* (Little, Brown & Co, 1963) and Joseph Kimble: *Answering the Critics of Plain Language and Writing for Dollars, Writing to Please* (in *The Scribes Journal of Legal Writing* Vol 5, 1994-95, and Vol 6, 1996-97).

From the bench, see, for example, *Trafalgar House Construction v. General Surety & Guarantee Co* (1994 66 Building Law Reports 47) and *Bank of Credit and Commerce International SA v. Munawar Ali & others* (2001 UKHL 8; 2001 1 All ER 961; 2001 2 WLR 735 paragraph 38). In the first, Lord Justice Saville (supported by Lord Justice Beldam and Sir Thomas Bingham MR) said: "I would only add a suggestion both to those who seek and to those who provide securities for the performance of commercial obligations. They would save much time and money if in future they heeded what Lord Atkin had said so many years ago and set out their bargain in plain modern English without resorting to ancient forms which

Nor does Mr Bennion explain in what sense he asserts that the project has failed. Admittedly, it has not yet succeeded, as most lawyers still write in the traditional style, but there has been considerable progress and it is continuing⁶.

Moreover, the plain language movement is composed of many individuals and organisations around the world. Clarity alone has about 1,000 members, almost all lawyers or law institutions, spread around some 40 countries. PLAIN (an acronym of Plain Language Association InterNational)⁷ is another major organisation in the field but is concerned with all disciplines rather than just law and consequently has more non-lawyer members. There are many other organisations and many unaffiliated individuals who could be considered part of the plain language movement, though there is no clear boundary between active campaigners and those who merely support the movement.

To attribute a single belief or a single technique to such a diverse collection of people is far less realistic than attributing an intention to parliament. Parliament at least is a single body which meets in one building and votes. In contrast, the plain language movement has no machinery for forming collective decisions, or even for all the constituent parts to communicate with each other, not least because no-one knows the identity of, nor how to contact, all the individuals involved.

It is difficult to deny Mr Bennion's propositions about what the movement believes or does without making the same mistake, but I will try to answer his points on the basis of my own practice, discussions over the years with other plain language proponents, and my reading of their books and articles. I think the views expressed here are sufficiently

were doubtless designed for legal reasons which no longer exist." In the second case, Lord Hoffmann said: "The modern English tradition, while still erring on the side of caution, is to avoid the grosser excesses of verbiage and trust to the judges to use common sense to get the message. I think that this tendency should be encouraged."

From a non-lawyer, see for example Martin Cutts: *Lucid Law* (Plain Language Commission, 2nd edn, 2000).

From practising lawyers, and for many more examples, see Michèle Asprey: *Plain Language for Lawyers* (3rd edn, Federation Press 2003; Mark Adler: *Clarity for Lawyers* (2nd edn, Law Society, 2006); and Clarity's website at <www.clarity-international.net>.

The need for reform is also explored in detail in the book criticised in Mr Bennion's article: Peter Butt and Richard Castle: *Modern Legal Drafting* (2nd edn, Cambridge University Press 2006).

⁶ See, for example, the UK Arbitration Act 1996, the tax law revision projects in the UK, Australia, and New Zealand, the Australian Commonwealth's Corporations Act 2001, the Civil Procedure Rules in the UK, and the Federal Rules of Civil Procedure and the Securities & Exchange Commission requirements for plain prospectuses in the USA. For many more examples, see Butt & Castle and Asprey (both cited in footnote 5), and all issues of *Clarity*.

⁷ www.plainlanguagenetwork.org

common to justify treating them as the mainstream position, though I invite correction.⁸

The five points

So let us look at the five supposed flaws:

1. The plain language movement does not recognize that law is an expertise.

Mr Bennion offers no support for this extraordinary assertion, and I know of no plain language proponent who would deny that law is — obviously — an expertise. A straw poll I conducted by circulating PLAIN's email discussion group produced a unanimous response against abolishing lawyers. Here are two typical comments, both from non-lawyers:

We will always need lawyers for their knowledge of the law. Even if all laws were written in plain language we would still need to consult experts on the law, because it's such a huge subject area⁹.

I'm not at all in favour of dispensing with lawyers (or doctors, or engineers, or financial advisors). I'm in favour of enlightening them¹⁰.

Patients who understand what their doctors tell them do not believe as a consequence that diagnosis and treatment are unskilled.

I practised law in the high street for some 30 years, and was always conscious of how much more there was to know than one person could grasp in a lifetime. But even in areas where I felt confident in the law it was tedious and frustrating to waste a large part of each day trying to unravel semi-literate English before I could advise on the substance of what the writer had been trying (often unsuccessfully) to express.

2. It fails to distinguish clearly between four distinct types of relevant text....

It is of course necessary to distinguish between the four types of text at one level; they each have a different purpose, and writers must write with both their present purpose and their intended audience in mind. But at the level above they share common characteristics: they are all documents connected with the law. And at the level above that, they share common characteristics with non-legal documents. In trying to write

⁸ None of the plain language proponents (listed at the end) who read drafts of this article disagreed. But my thanks to them for correcting various errors and infelicities and for suggesting improvements, many of which I have incorporated.

⁹ David Fox, The Word Centre: email 15.11.07.

¹⁰ Debra Isabel Huron: email 15.11.07

plainly we are not confusing different sub-categories; we are applying the principles of good writing to all types of text. Statutes and advice to clients will have different purposes, different audiences, and different tones, but both types of text are amenable to the principles of good writing.¹¹

I am far from sure that I accept Mr Bennion's axiom that the law "resides only in [the] words [of a law text]"¹², a doctrine reminiscent of the discredited¹³ theory that thought resides only in words. Pioneering judges formulating a novel legal principle try to put into words the principle they have in mind (and which, according to convention, is *already* the law); later judges restating the principle do so in their own, different, words. In each case the principle precedes the words. This may also apply to statute law, whose words are intended to embody "the will of parliament" and may — in America at least — *not* constitute the law if the statute is unconstitutional. But I am straying from my theme.

Mr Bennion argues:

The purpose of a law text is geared to this function of *constituting* the law.... (I)t is not the function of a legislative text to explain the law. Explanations should be given *aliunde*¹⁴.

But a law text must explain the law to someone — if only to lawyers — so that they can pass the information in simpler form to the public. So a function of the text *is* to explain. We only disagree about the extent of the audience for which it is to be designed.

Moreover, many plain language proponents have pointed out that lawyers also benefit from plain language. It makes their documents more effective and in particular saves them — whether they are writers or readers — time, money, and mistakes¹⁵. There is no reason to disapply this finding to legislation.

¹¹ On 9 August 2008 Justice Antonin Scalia of the US Supreme Court said this while accepting a lifetime achievement award from Scribes, the American Society of Legal Writers:

I do not believe that legal writing exists. That is to say, I do not believe it exists as a separate genre of writing. Rather, I think legal writing belongs to that large, undifferentiated, unglamorous category of writing known as nonfiction prose. Someone who is a good legal writer would, but for the need to master a different substantive subject, be an equivalently good writer of history, economics or, indeed, theology.

¹² *CPLL* p.63.

¹³ This is outside my field but see, for instance, Steven Pinker: *The Language Instinct*, Penguin Books, 1994, p.55 and following.

¹⁴ *CPLL* p.63.

¹⁵ See the sources cited in footnote 5.

Even if lawyers were perfect, explanation (and other forms of translation) never can be. Words are blunt instruments, and even the best writers can only sharpen them so far. There will inevitably be differences between the original text and the translation; if not, the translation could stand as the law. Plain legislators seek to make their text both constitute and communicate the law, as far as is practicable, not only for economy and convenience but to avoid this source of error.

3. Because of 2 it muddies the waters by agitating for changes in one type of text which are needed instead in another type of text (if they are needed at all).

The main part of this criticism falls with point 2.

The afterthought in parentheses suggests that Mr Bennion doubts that any improvement is needed in legal writing. Yet in his second paragraph he acknowledges that “all right-thinking people admire plain language and seek to promote it” and he restricts his criticism to the extent to which the reform is “overdone” (in that it is applied to all documents rather than just those for which it is suitable). He acknowledges that:

... the contribution of the plain language movement has been positive ... (for) text which gives legal guidance to a lay client or to members of the public generally, or is designed for use by lay persons (such as a statutory form for a self-assessment tax return or hire-purchase contract).¹⁶

Putting the afterthought to one side, the thrust of point 3 is that although “[m]any pre-twentieth century Acts of the Westminster Parliament were not fit for [their] purpose¹⁷ ... [l]egislative drafting in England and elsewhere in the Commonwealth has now reached [the] high degree of precision” needed to prevent misunderstanding even by a reader in bad faith. A 1963 dictum of Lord Reid is cited in support.

In seeming contradiction, Mr Bennion continues:

To an extent law texts are now comprehensible *to lawyers*. But there is still much that needs to be done in the way of reform. ¹⁸ [*his emphasis*]

Although Mr Bennion cites *Lucid Law*¹⁹, he does not challenge any aspect of its criticism of the drafting of the Timeshare Act 1992, nor point to any error in the revision

¹⁶ *CPLL* p.67.

¹⁷ Though only because they were poorly organised (*CPLL* p.64).

¹⁸ *CPLL* p.64

¹⁹ See my footnote 5.

by Martin Cutts (a non-lawyer).

The work of parliamentary counsel in the UK is generally clearer — more precise and less obtuse — than that of most lawyers in private practice. But I disagree with the suggestion that since 1963 (or at any time since) our legislation has been so good that it has needed no help from the plain language movement.

The late Lord Renton put it more robustly, writing in 2006 of the effect of his committee's 1975 report *The Preparation of Legislation*²⁰:

Our conclusions were broadly unanimous, and the Report was welcomed by both Houses of Parliament. However, the Parliamentary draftsmen and the Civil Servants did not welcome our recommendations, for it meant that, instead of drafting legislation in varied ways that they preferred, it would have to be drafted in accordance with broad principles which we had defined. Therefore, although those principles had been welcomed by the Lords and the Commons, the Civil Servants and Draftsmen carried on in their own way. The Lord Chancellor and the rest of we Parliamentarians were simply ignored, except occasionally; and so our statutes have not for the most part improved their drafting—and clarity has not been achieved to a great enough extent.²¹

If Mr Bennion was right about the precision of modern drafting *Pepper v. Hart*²² would not have been necessary. But the problems arising from unclear legislation were considered so important that seven law lords heard the case, and they unanimously overturned long-established principle to allow the court

to permit reference to Parliamentary materials where ... [l]egislation is ambiguous or obscure, or leads to an absurdity

And they applied their new rule in that case because

Subsections (1) and (2) of section 63 of the Finance Act 1976 introduced an element of ambiguity.

Loophole readers hardly need my help in listing post-1963 examples of unclear

²⁰ Cmnd 6053, London, HMSO 1975.

²¹ *Clarity* 56, November 2006.

²² (1993 AC 593); www.bailii.org/cgi-bin/markup.cgi?doc=/uk/cases/UKHL/1992/3.html&query=pepper+and+v.+and+hart&method=boolean

legislation but I have chosen one at random from 2007²³:

All the amounts and sums authorised by this Act and the other Act mentioned in Schedule 1 to this Act for the service of the year ending with 31st March 2008, totalling, as is shown in the said Schedule, £429,937,119,000 in amounts of resources authorised for use and £393,991,012,000 in sums authorised for issue from the Consolidated Fund, are appropriated, and shall be deemed to have been appropriated as from the date of the passing of the Acts mentioned in the said Schedule 1, for the services and purposes specified in Schedule 2 to this Act.

Does this 96-word sentence justify complacency about our drafting standards? For instance, what, if any, is the intended difference between an “amount” and a “sum”? There are ten instances of “amount” in the Act. In seven the reference is to “amounts and sums” but each word is used elsewhere independently of the other. The duplication seems to have been introduced in the 2001 Act, earlier Appropriation Acts making do with “sum” alone.

Legislative drafting *has* improved since 1963, and much credit goes to the current generation of parliamentary counsel — and some recently retired — (who I doubt were responsible for the recent Appropriation Acts). But this improvement is a *result* of their commitment to plain language, and does not constitute an argument that plain language is misconceived or unnecessary.

Meanwhile, most lawyers in private practice continue to draft in traditional style, but with far less skill than parliamentary counsel. Improvement is hardly “misconceived”.

4. It has distracted attention from needed reforms in law that are more important.

Mr Bennion does not identify any alternative reform that has suffered.

But even if his assertion was correct the distraction could not be said to have caused the failure of plain language; if anything, it would have contributed to the failure of the *other* campaigns. That apart, the relative merits of the candidates for reform are a political matter, logically independent of the inherent merits of any particular reform.

²³ I looked on BAILII for the UK’s 2007 Acts — to be as up-to-date as possible when this was written last year — and chose the first in the alphabetical list, which happened to be the Appropriation (No.2) Act. Ignoring its first two clauses as too short to be representative or instructive, I took the next sub-clause, 3(1).

5. By holding that non-lawyers can do things which only lawyers can be trusted to do, it endangers the public.

This is the nub of Mr Bennion's disagreement with plain language proponents. But it is a dispute about degree, not principle: about *how much* can be left to non-lawyers, not whether *anything* can. And we must consider separately what reading and what writing can be trusted to non-lawyers.

Reading

Perhaps we can agree that lawyers should minimise the difficulties their clients have with text the lawyers have written, to avoid any *avoidable* need for clarification. But *CPLL* seems to advocate that texts of type (a) to (c) should be written more obtusely than is necessary to ensure that only lawyers can understand them.

If this is Bennion's position it can be challenged at two levels: principle and practice.

Principle

The principled argument, as it applies to statute law, was recently set out in *Presentation of New Zealand Statute Law*²⁴:

It is a fundamental precept of any legal system that the law must be accessible to the public. Ignorance of the law is no excuse because everyone is presumed to know the law. That presumption would be insupportable if the law were not available and accessible to all. The state also has an interest in the law's accessibility. It needs the law to be effective, and it cannot be if the public do not know what it is.²⁵ ...

It seems once to have been supposed that law was the preserve of lawyers and Judges, and that legislation was drafted with them as the primary audience. It is now much better understood that Acts of Parliament (and regulations too) are consulted and used by a large number of people who are not lawyers and have no legal training. Many people refer to legislation in their jobs. People who work in the registries of universities and other educational institutions make constant reference to education legislation; employers and trade union officials need to be well versed in employment legislation; the staff of many government departments, many of whom are not legally trained, work closely with the legislation that their departments administer; the staff of local authorities need to access the large quantity of local

²⁴ By the New Zealand Law Commission in conjunction with Parliamentary Counsel Office (Law Commission, Wellington, 2007, available from www.lawcom.govt.nz/ProjectIssuesPaper.aspx?ProjectID=132).

²⁵ Paragraph 1.

government legislation; and company officers need to consult company and financial reporting legislation. At other times ordinary people refer to Acts of Parliament to find the answers to problems that affect them in their personal lives: difficulties with a neighbour may lead to them consulting the Fencing Act 1978; domestic difficulties may lead to them consulting our family and relationship legislation.²⁶

This contrasts with the view which Mr Bennion attributes²⁷ to Sir Geoffrey Palmer, the Law Commission's president, under whose name that report was published but whom Bennion quotes in support of his own view that it is unsafe for the public to have access to statutes. But the full text of the paragraph from which Mr Bennion takes his quotation reads:

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?*²⁸
[my emphasis]

And in paragraph 29 of that Address Sir Geoffrey says:

The establishment of the Law Commission ... was fuelled by the vision that the law could be accessible, understandable, coherent and administered fairly by institutions that are neutral and behave with integrity. These are hopes that ought not to be abandoned lightly.

The implication that we ought to keep legal texts more obscure than necessary to protect the public from itself is politically (and to me, morally) unacceptable.

Practice

The practical argument seems even more telling. The idea that all (or even many) of those who need advice can receive it from a competent lawyer is a utopian dream.

Lawyers are expensive beyond the reach of most people. How will those who cannot afford a lawyer understand the subtleties hidden by the drafter?

²⁶ Paragraph 11.

²⁷ At page 64. But no primary source is cited and the fragment that Mr Bennion quotes is inconclusive.

²⁸ *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. <www.lawcom.govt.nz/UploadFiles/SpeechPaper/d0c9b674-5a55-405d-9b3c-2cfd467a0d5d//Law%20Reform%20and%20the%20Law%20Commission%20in%20NZ%20after%2020%20years.pdf>

Lay people affected by law texts and by documents in Bennion's category (b) — texts which further an act in law, such as wills, leases, and other contracts²⁹ — benefit enormously from being able to consult these documents themselves when either cost or convenience make legal advice impracticable. The Civil Procedure Rules 1998 are a notable example. In language readily understandable by litigants in person but in a tone also suitable for lawyers, Lord Woolf rationalised the County Court Rules and the High Court Rules, removing anomalies and combining them into a single coherent system. In what sense was this reform “misconceived and hopeless”?³⁰

Moreover, many of the lawyers who *are* consulted are *not* skilled. The selection of lawyers in private practice is much less rigorous than that of parliamentary counsel. Often — in England at least — the only training they receive in drafting skills is to repeat verbatim what they find in precedents, uncritically and with little regard for their clients' needs. And few have the time or (I suspect) the inclination to keep up with all the changes in the law; certainly no busy general practitioner ever could remain up-to-date in all their fields. Many examples of the consequent mistakes are quoted in the sources cited in footnote 5.

Even the privileged minority who have a competent lawyer are inadequately protected. Only the rashest practitioners would be confident that they had picked up all the ambiguities and omissions in long stretches of turgid legalese. And only the most resolute clients would remain awake throughout the attempted explanation; none will be keen to pay for that explanation or for the negotiation of any corrections necessitated by bad drafting.

There is a more pressing reason to ensure comprehension, which I put this way in *Clarity for Lawyers*:

Our oblique language allows us to exclude clients from their proper part in the decision-making. We should be acting as guides to our clients; if we are to do so,

²⁹ CPLL pp.63 and 66.

³⁰ Mr Bennion's only criticism of the Civil Procedure Rules is the superficial point that “the term *writ* is now abolished in favour of *claim form*. There's elegance!” (CPLL p.66) I agree with him that some of the name changes seem unhelpful and inelegant (as in *statements of case* for *pleadings*) but this is a minor and debateable matter. And the old word *writ* was open to criticism; it was generally used by the profession to mean the document issued by the plaintiff to begin a High Court action, but:

- *Summons* was used for the document used in county court actions (a distinction of which few non-lawyers were aware), and some High Court actions were begun by originating application; and
- There were other types of writ in the High Court, for example the *writ of fieri facias* and the *writ of habeas corpus*.

they must be able to follow us.

Apart from the clients' right to make the decisions, they should be part of the team. Usually they will know their case better than we do, and it is important that they should be able to correct mistakes, remedy oversights, and contribute suggestions.

In many years of drafting pleadings, witness statements, and affidavits, it is only in the most trivial circumstances that I have ever been able to treat the first draft as the completed document. However careful I am, I expect in distilling detailed instructions into a coherent story to put the occasional wrong shade of meaning (if not an outright mistake) into the client's or a witness's mouth, and sometimes I have missed a point altogether. It is essential that those affected can read and correct the drafts before their opponents can benefit from the mistakes, and of course before signing a statement of truth.³¹

The same principle applies to contractual and probate documents. Those drafted so as to be unintelligible to our clients inevitably contain the mistakes the clients were unable to see.

Mr Bennion also challenges the notion that respect for the law requires that it be comprehensible to a lay audience. He quotes³² Clarity's submission to the Hansard Society³³:

If laws cannot be readily understood by those most affected by them the social cost is an increasing ignorance of the law and growing disrespect for the law and those who administer it.

Bennion replies:

This is a *non sequitur*: the inference or conclusion does not follow from the premise. The fact that law texts cannot be readily understood by those most affected by them does not inevitably lead to an increasing ignorance of the law.

But the expression "non sequitur" is wrongly used. Nobody is suggesting that it is a *logical* inference, merely that *in fact* this is what is likely to happen.

Writing

Mr Bennion is right to deny the assertion that "persons lacking legal training can

³¹ 2nd edn, p. 26.

³² CPLL p.63.

³³ *Using Plain English in Statutes*, June 1992 (written by David Elliott, an experienced legislative drafter).

safely be trusted to rewrite legal documents in plain language”³⁴ but he is wrong to call that assertion an error of the plain language movement.

In drafting or improving legal documents (in any of Bennion’s four classes) a reputable plain language expert — even a lawyer, if not a specialist in the relevant field — would expect to work with, or at least have the work checked by, a lawyer who *was* such a specialist.³⁵

In Dr Robert Eagleson’s words:

The process of removing gobbledegook from a document may uncover injustices and cumbersome procedures and lead to their removal. Indeed, any properly conceived project to improve comprehensibility should begin with an examination of the underlying policy content. ... But the ultimate responsibility for these changes in content does not rest with the language experts. ... The simplification of content falls squarely in the province of the professionals in the area; only they are expert to know what is necessary and what can be omitted safely. The best results in simplification come from comprehensive collaboration of all those concerned with a document.

This point must be emphasised: the thrust for plain English is concerned with communication, not with the law or policy as such. We are seeking to improve the quality of that communication. The role of parliamentary counsel and officials as practitioners and interpreters of the laws and policies is not in question. Plain English will never reduce the scope of the law, but it will rescue its expression from obscurantism and mumbo-jumbo in which it is often encased.³⁶

The attack on *Modern Legal Drafting*

In support of his thesis Mr Bennion selects for criticism extracts from Peter Butt and Richard Castle’s *Modern Legal Drafting*³⁷.

He quotes with disapproval Butt and Castle’s statement:

³⁴ *CPLL* p.65.

³⁵ I know of one firm that does seem to rely overmuch on unqualified writers; it has produced over-simplified text and other poor work. But the existence of a few incompetent doctors does not mean that the practice of medicine is misconceived.

³⁶ Discussion Paper No. 1 *Legislation, Legal Rights and Plain English*, Victorian Law Reform Commission August 1986, pages 7-8. Dr Eagleson, a linguist widely known for his skill in applying plain language principles to legislative drafting, had been appointed to the VLRC as Commissioner-in-charge of the government’s reference on *Plain English and the Law*.

³⁷ Cited in footnote 5 above.

Phrases of this kind [“de bene esse”, “en ventre sa mere”, “force majeure”, “inter vivos”, “res ipsa loquitur” and “ultra vires”] are best abandoned, for three reasons. First, the average reader will not understand them. Second, their foreign origins convey a sense of precision and technicality which they simply do not possess. Third, they are not true legal terms of art. *Almost* always they can be discarded for an equivalent in modern English.³⁸ [Bennion’s emphasis]

Bennion explains that it is unnecessary to avoid these expressions in law texts, as the texts are designed only for lawyers and “(t)he average lawyer will understand these terms”. Apart from our difference about the need to write for a lay audience, I disagree with this on two grounds. First, a drafter should be writing for all the lawyers who may have to cope with the text, and not just those vaguely categorised as “average”. Second, few lawyers now have a classical education. Although I learned a little Latin I was defeated by two of Butt and Castle’s list and would no doubt fare worse with the less common tags.³⁹

Bennion continues:

... jargon has a value when used between professionals. Some fields of law are highly technical.⁴⁰

But Butt and Castle agree with him:

Jargon may be acceptable in a document that a lawyer drafts solely for another lawyer, but it is not acceptable in a document that a lawyer drafts for a client....⁴¹

To be distinguished from the unthinking and unnecessary use of jargon is the appropriate use of technical terms — “terms of art”. Like other professions, law contains an irreducible minimum of terms of art, that is, terms which have a peculiar and fixed technical meaning, unmodified by context, and which are difficult and sometimes impossible to express in any other way.⁴²

“Inter alia”, for instance, is not a term of art. Mr Bennion feels that its English equivalent,

³⁸ *MLD* p.142. The examples in square brackets are Bennion’s selection from the twelve listed in *MLD*.

³⁹ My father kept a legal dictionary by his phone to get him out of trouble when another solicitor quoted a Latin phrase. He’d look it up, find another at random, and quote that back. As far as I know he was never challenged.

⁴⁰ *CPLL* p.65.

⁴¹ *MLD* p.147.

⁴² *MLD* p.149.

“among other things”, “lacks learning”⁴³. Contrast this view with that of Bertrand Russell:

I am allowed to use plain English because everybody knows that I could use mathematical logic if I chose. Take the statement: “Some people marry their deceased wives’ sisters.” I can express this in language [that] only becomes intelligible after years of study. I suggest to young professors that their first work should be written in a jargon only to be understood by the erudite few. With that behind them, they can ever after say what they have to say in a language “understood of the people”.⁴⁴

Bennion supports his related point that “it is so-called plain language [not traditional legal language] that lacks style”⁴⁵ with an Australian obiter dictum:

The provisions of the Corporations Law that include s.553C are, as I observed in the course of the argument, drafted in the language of the pop songs. Section 435A speaks of “maximis[ing] the chances” and s.435C of “[t]he normal outcome” and “the deed’s administrator”. Section 435C(3) begins with the word “However” and a comma, a style that, at least until recently, has been eschewed by good writers.⁴⁶

Whatever unusual pop songs the judge has heard, he clearly had a nasty smell under his nose, but he is condemning the style of Lords Denning and Scarman and many other eminent jurists.⁴⁷ And he is hardly a credible authority on matters linguistic. As Fowler says:

If the sense calls for *However* meaning “nevertheless” to be placed at the beginning of a sentence, it should be followed immediately by a comma.⁴⁸

The “Jack-and-Jill” jibe has been rebutted many times. For instance, Dr Eagleson characterises plain language as:

Clear, straightforward expression, using only as many words as are necessary. It is language that avoids obscurity, inflated vocabulary and convoluted construction. It is

⁴³ CPLL p.65.

⁴⁴ *How I Write* quoted by Bryan Garner: *A Dictionary of Modern Legal Usage*, Oxford University Press, 2nd edn, 1995, p. 661.

⁴⁵ CPLL p.65.

⁴⁶ Callaway JA in *GM & AM Pearce and Co Pty Ltd v RGM Australia Pty Ltd* (1997 VSC 63); (1997 VICSC 63); www.austlii.edu.au/au/cases/vic/VSC/1997/63.html.

⁴⁷ See my footnote 5.

⁴⁸ Fowler’s *Modern English Usage*, Oxford, 3rd edn, 1996, p. 367.

not baby talk, nor is it a simplified version of ... language.⁴⁹

And Professor Joseph Kimble reminds us that good literature relies on a plain style, describing plain language as:

the style of Abraham Lincoln, and Mark Twain, and Justice Holmes, and George Orwell, and Winston Churchill, and E. B. White. Plain words are eternally fresh and fit. More than that, they are capable of great power and dignity: "And God said, Let there be light: and there was light. And God saw the light, that it was good."

Mr Bennion confuses good plain writers with incompetent ones.

He continues:

Another shibboleth of plain language campaigners is that lawyers should eschew stuffy legal terms like "hereby" and "thereby". Again they show their ignorance, for such terms have an important function in law. They are ... performative utterances.⁵⁰

Again Butt and Castle had pre-empted this criticism, devoting a whole page to a section headed "*Hereby*":

"Hereby" deserves special mention. Drafters in the traditional style have a particular affinity with it. Nothing is ever simply done; it is "hereby" done. Presumably the drafters consider that "hereby" adds precision. But this is not *always* the case — "hereby" can in fact introduce ambiguity....

It is true that "hereby" can give a particular emphasis to an action. But even then it is *usually* legal surplusage.⁵¹ [*my emphasis in each paragraph*]

Some years ago Professor Butt had reported the *Riltang* decision⁵² (one of his examples in *Modern Legal Drafting*) in *Clarity*:

Most experts on plain language legal drafting recommend that we avoid using "hereby". They make the point that nearly always "hereby" is superfluous. It adds "legal feel" to a document without adding any legal substance. For what it is worth, I would recommend avoiding it also. However, in rare cases "hereby" has proved useful as a backstop to clarify meaning, illustrating that an overly doctrinaire approach to

⁴⁹ *Writing in Plain English*, Australian Government Publishing Service, 1990, p.4. Dr Eagleson helped draft the Corporations Law, though parliamentary counsel retained responsibility.

⁵⁰ *CPLL* p.65.

⁵¹ *MLD* p.148.

⁵² *Riltang Pty Ltd v. L Pty Ltd* (2002 11 BPR 20,281 at 20,286 [para 24]).

so-called "principles" of plain legal language may be self-defeating.⁵³

This triggered a debate in the following two issues⁵⁴ about whether "hereby" was necessary or helpful to distinguish a performative statement from a statement of fact. Donald Revell thought "hereby" was useful for performative statements:

Assume we come across an act that states "The XYZ Corporation is established". This is a statement of fact. It is not an act of creation. It does not tell you the means whereby the Corporation comes into existence. If I ask the question: "Is this an established Corporation?" one would answer: "Yes, it is." But if I ask how it was established, one would answer: "It may have been established by the XYZ Act but I can't be sure".

On the other hand, assume the Act read "The XYZ Corporation is hereby established". This is an act of creation. If the same questions are asked now, the first answer remains the same but the second becomes "It was established by..."

Hereby is not an obsolete word nor is it legalese. While the law will not fall apart if it is dropped, it is my opinion that its elimination makes the law less clear when bodies are being established.⁵⁵

The consensus seems to have been that 'hereby' was best avoided but should be used if ever the alternative was to be unclear.

Bennion goes on to quote with disapproval Butt and Castle's complaint that:

legal language "has a unique tendency to be wordy, unclear, pompous and dull" and "is also impersonal, lacking warmth".⁵⁶

He does not disagree (except that the tendency is unique) but neither does he explain why these defects should not be minimised, except that he ridicules the supposed suggestion that Acts of Parliament should be "arch" or "warm and friendly".⁵⁷ However, at this point Butt and Castle were not talking about legislation but about lawyer-client communications, which should strike the right balance, appropriate for the particular client, between the impersonal and the familiar.

⁵³ *Clarity* 48 (December 2002), p.34.

⁵⁴ *Clarity* 49, (May 2003), p.32; and 50 (November 2003), p.37. All three issues are available from www.clarity-international.net.

⁵⁵ *Clarity* 49 (May 2003), p.32.

⁵⁶ *CPLL* p.65, citing *MLD* p.120.

⁵⁷ *CPLL* p.66.

Mr Bennion then criticises Butt and Castle's suggestion that:

... it may be appropriate to use both "must" and "is to" in the same document. Variation can add interest, provided it does not introduce ambiguity or uncertainty.⁵⁸

He comments:

But it *does* introduce ambiguity or uncertainty — inevitably. It breaks one of the clearest rules of drafting, which is never to change the form of words unless you are going to change the meaning. It is dangerous.⁵⁹

Again, the context draws the teeth of the criticism. Butt and Castle say, discussing "must" as an alternative to "shall":

The tone of a document may be important. For instance, where parties have worked hard to develop a relationship of mutual cooperation and respect, an overuse of "must" in the document which regulates their relationship might be thought to introduce an unnecessarily adversarial attitude. In such a case, the drafter might try "is to".... *And despite the principle that drafters should be rigorously consistent in their use of terminology*, in a lengthy document the drafter may well slip. Indeed, some variation of terminology *may be appropriate in different parts of the document where a different tone is called for*.⁶⁰ [my emphasis]

Although Mr Bennion says that "Butt and Castle ... [is] in many ways ... a useful book" he accuses the authors of "serious errors". The footnote to "serious errors" cites only one:

For example, it praises (p.61) the so-called golden rule of interpretation, citing in support an extra-judicial remark of Lord Macmillan from as far back as 1931. There have been many developments in statutory interpretation since then, and this "rule" was exploded many years ago by the late Sir Rupert Cross.⁶¹

This suggestion of poor scholarship seems particularly misconceived. Butt and Castle devote pages 61 to 72 to developments in the law since 1931, citing 25 cases between 1995 and 2004 alone, and they devote an entire section to the "modern restatement" by Lord Hoffmann.⁶²

⁵⁸ MLD p.203.

⁵⁹ CPLL p.66.

⁶⁰ MLD p.203. Butt and Castle cite two NSW statutes in which this is done.

⁶¹ CPLL p.67.

⁶² *Investors Compensation Scheme Ltd v. West Bromwich Building Society* (1998 1 WLR 896).

Mr Bennion's final criticism is of Butt and Castle's suggested revision of a contract for constructing a street. They had changed:

The Builder shall at his own expense construct sewer level pave metal kerb flag channel drain light and otherwise make good (including the provision of street name plates in accordance with the requirements of the appropriate District Council and road markings and traffic signs in accordance with the requirements of the Council) the street.

into:

The Builder must construct the street to Council specifications.⁶³

Bennion finds these faults:

1. It omits to say that the work shall be done at the Builder's own expense.
2. It does not mention items whose inclusion may be in doubt if they are not specified, such as sewerage, lighting and street name plates. It speaks of "Council specifications" without identifying the "Council" as the appropriate District Council.
3. More importantly, it places no limit on what under the contract the Council are entitled to specify - though limits there must plainly be. They are left to be gathered by implication, about which there could be endless doubt and argument. No contractor could safely tender for the project when so much was left uncertain. No good lawyer would draft in such terms. If a lawyer did draft this example he or she should be disciplined.⁶⁴

My general reply is that if any of these criticisms is justified the draft can be corrected in plain language, presenting as much detail as necessary, as clearly as possible, and excluding only that which is *unnecessary*. But on the detailed points:

1. This is taken from an agreement under s.38 of the [UK's] Highways Act 1980. These impose obligations on a developer to create roads joining the houses on a proposed estate to the public highway. Builders must do what the agreement requires, and whom they persuade to pay for it is their own affair. If anyone else were to be bound to pay the agreement would say so.

But if this had not been the case the clause could have read:

⁶³ *MLD* p.114.

⁶⁴ *CPLL*. p.67.

The Builder must construct the street at its own expense to Council specifications.

2. The district council (which would have been identified at the beginning of the document) must be the one in whose jurisdiction the road is to be built.

2&3: The specifications are agreed before the agreement is signed.

3. The agreement would have been drafted not on behalf of the builder (as the criticism suggests) but of the highway authority, who would *benefit* from the more general wording of the revision if the specifications remained open. The original drafter left his or her council client open to the undesirable application of *eiusdem generis* and *expressio unius*.⁶⁵

Bennion excuses the poor style of the original building contract:

The actual readership [of this text] is not likely to extend much beyond the legal departments of the two corporations and the clerk of the works of the successful contractor. They will have no trouble with the traditional version's absence of punctuation or lack of elegance.⁶⁶

Again, I disagree. The land registry records s.38 agreements in the charges register of each house sold and a copy is supplied to (and so should be read by) the solicitors for each purchaser. The glut of words and the lack of punctuation *does* give trouble, in wasted time and the risk of error. In particular, I frequently found similar passages whose lack of punctuation made it impossible to tell whether a particular word or phrase modified the adjoining word or was a separate item.

Finally, Mr Bennion prays Lord Bingham in aid, so may I do the same? I think this next quotation reflects the views of most plain language proponents:

Complexity cannot be altogether avoided where the subject matter is complex, and there is great wisdom in the advice attributed ... to Einstein: "Make it as simple as possible, but no simpler".⁶⁷

⁶⁵ My replies to these 3 points have been confirmed by a former client who has worked for many years in the appropriate department of a district council. In particular, he confirms that the specifications are agreed in advance, and he adds:

The original list that you quoted of metalled paved drained etc is commonly used and is an old historic description of a highway that tends to be incorporated in Agreements, but by no means is complete as to what is fully required.

⁶⁶ CPLL p.67.

⁶⁷ Lord Bingham's foreword to *Clarity for Lawyers* (cited in footnote 5).

Conclusion

Despite the sometimes harsh tone of *CPLL*, several passages seem more sympathetic to the ideals of plain language than the parts that have stimulated this reply. As Mr Bennion says, his drafting of the Consumer Credit Act 1974 — with its unusual enactment of examples⁶⁸ — is only one instance of his own commitment to clarity.

Perhaps his disagreement with the plain language movement is only about the extent to which it is practicable (or safe) to clarify. If so, I think that his fears are based on a misapprehension of the movement's standards and that experience justifies greater optimism.

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⁶⁸ Mentioned in *Clarity for Lawyers*, p.74.