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## ***Plain Language in Legislative Drafting: An Achievable Objective or a Laudable Ideal?***

Brian Hunt

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# Plain Language in Legislative Drafting: An Achievable Objective or a Laudable Ideal?

Brian Hunt<sup>1</sup>

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*“They were so excited that they hadn't eaten a thing for almost two days. Then they broke more than a dozen laces trying to have themselves laced up tightly enough to give them a fine slender shape. They were continually in front of their looking glass. At last the happy day came.”<sup>2</sup>*

## 1. Introduction

At the outset, let me state that I am moderately in favour of the use of plain language in legislative drafting, but only in so far as it does not alter the meaning and does not give rise to ambiguity in the legislation. Professor Butt once said that “A dose of healthy scepticism never goes astray.”<sup>3</sup> However, this afternoon, I hope to do more than play the role of a sceptic. In fact, what I would really like to do is present some convincing arguments as to why plain language is not entirely suitable in legislative drafting.

Plain language – when used appropriately and sensibly – is a very effective tool. In our attempt to ensure that as few words as possible and the most simple words possible are used to express a concept, we must not be blinkered. By this I mean, we must recognise that plain language is not the answer to all our problems. And in particular, it is not the answer to the problem of turgid and inaccessible legislation. Rather than just pouring cold water on the arguments of plain language proponents, I will present a realistic and operable alternative to plain language legislative drafting.

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<sup>1</sup> Dip. L.S., B.A., M.Litt., Dip. L.S., Dip. Int. Arb., A.C.I. Arb. Research Officer, Office of the Parliamentary Counsel to the Government, Ireland. This paper is dedicated to Natallia Sergei. Special thanks to Edward Donelan. I welcome any comments by e-mail: [brian\\_hunt@ag.irlgov.ie](mailto:brian_hunt@ag.irlgov.ie) The views expressed are personal and do not necessarily reflect the views of the Office of the Parliamentary Counsel to the Government. © 2002.

<sup>2</sup> Taken from *Cinderella*. A depiction of the two sisters eagerly preparing themselves for the ball.

<sup>3</sup> E. Nugee, ‘Legislation from the User’s Perspective’ a paper delivered at Clarity/Statute Law Society Conference, Cambridge 12 – 14 July 2002.

## 2. Factors Influencing Drafting Style

Many people who advocate plain language in legislative drafting would have us believe that the style of writing used to create stories like *Cinderella* should also be used in the drafting of legislation. This is a fundamental error which plain language proponents make. Drafting legislation is not a literary exercise. In contrast to the fairytale of Cinderella – statutes were never intended to be a bed-time read. They were never intended to be entertaining, browsed through, or read from cover to cover. Books like *Cinderella*, *Ulysses* and *Catcher in the Rye* are written to entertain, captivate or even teach the reader. Statutes are drafted for an altogether different purpose - statutes are drafted so as to give effect to policies and principles in law – which will invariably be subject to close scrutiny and interpretation by the Courts.

The authors of books, brochures, letters etc. enjoy a far greater freedom than that enjoyed by the legislative drafter. This is evident from reading any book - the free style of writing, the mode of expression, the words chosen, the emphasis and the atmosphere are all apparent. In legislation, words are chosen for a specific purpose too – but an altogether different purpose. Those words are not chosen for entertainment value or ease of reading – rather, they are chosen for their precise meaning and consistency of meaning – so that ideally, all who read those words will be united in their understanding and interpretation.

In their book<sup>4</sup>, Butt & Castle set out some of the main factors which influence traditional legal drafting. For example:

- Familiarity and habit - the security that comes from adopting forms and words that have been used before and seen to be effective
- Conservatism in the legal profession, allied to the common law tradition of precedent
- The litigious environment of legal practice
- The desire to avoid ambiguity

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<sup>4</sup>P. Butt & R. Castle, *Modern Legal Drafting: A Guide to Using Clearer Language* (Cambridge, 2001) at p. 5.

In Butt and Castle's view<sup>5</sup>, these factors have operated as a hindrance to "innovative legal drafting". However, it is important to emphasise that these are all legitimate and very real factors of influence. They cannot be written off or simply ignored. In response to a letter from Martin Cutts a plain language expert, Peter Graham the then UK First Parliamentary Counsel, articulated the reality:

"We do not needlessly make things complicated: we have as great a love of the English language as the next man: we do draft against a background of judicial decisions, rules of interpretation, the basic premise that statute law is an intrusion into the common law and, perhaps most important, the salutary rule that all enactments are construed against the Crown (using that expression in its widest sense) and in favour of the subject."<sup>6</sup>

The reasons why legislation needs to be expressed in a precise and accurate manner are well established. This point was succinctly expressed by another UK First Parliamentary Counsel<sup>7</sup> in a memorandum submitted to the Select Committee on the Modernisation of the House of Commons<sup>8</sup>:

"A Bill's sole reason for existence is to change the law. The resulting Act is the law. ... A consequence of this unique function is that a Bill cannot set about communicating with the reader in the same way in which other forms of writing do. It cannot use the same range of tools. In particular, it cannot repeat the important points simply to emphasise their importance or safely explain itself by restating a proposition in different words. To do so would risk creating doubts and ambiguities that would fuel litigation. As a result, legislation speaks in a monotone and its language is compressed. It is less easy for readers to get their bearings and to assimilate quickly what they are being told than it would be if conventional methods of helping the reader were freely available to the drafter."

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<sup>5</sup> *ibid.*, at p. 13.

<sup>6</sup> An extract of this letter is set out in Cutts, *Lucid Law* (2<sup>nd</sup> ed., London, 2000) at p. 44.

<sup>7</sup> Sir Christopher Jenkins.

<sup>8</sup> First Report 'The Legislative Process' House of Commons Session 1997-98 (Cmnd. 190).

Legislative drafters and other lawyers understandably take great comfort from using terms that have a well established meaning and which have also been reinforced by judicial interpretation. However, Butt & Castle fail to recognise the importance of this fact and dismiss it as a mere “notion”<sup>9</sup>. As so often recounted, Reed Dickerson<sup>10</sup> once described ambiguity as “the most serious disease of language”, and nowhere is the absence of this disease more important than in legislation. The avoidance of ambiguity is aided in a very significant way by the drafter’s reliance on words which have a well established meaning.

Those who enthusiastically advocate the use of plain language in legislative drafting, make two serious assumptions and they use these assumption to justify the need for plain language.

### **3. Assumption: “Ordinary people have a desire to read legislation”**

#### ***Public Readership Dimension***

A primary feature of most materials which are identified as being suitable for plain language – is what I call the “public readership dimension”. Books, leaflets, forms and documents are designed to communicate directly and convey information to members of the public – to be informative. However, absent from legislation is the public readership dimension. If it were shown that legislation was widely read by ordinary citizens, I have no doubt that the style of drafting would be altered so as to take account of that audience. However, in discussing plain language in legislative drafting, I fear that we are effectively talking in the dark. Those who advocate the use of plain language in legislative drafting are making one very large – and I say, unwise – assumption. That assumption is that members of the public are interested in reading raw legislation. However, this premise is less than well established. In the absence of substantive evidence that such public interest in legislation exists, I believe that the arguments in favour of plain language legislative drafting are very weak indeed.

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<sup>9</sup> P. Butt & R. Castle, *Modern Legal Drafting: A Guide to Using Clearer Language* (Cambridge, 2001) at p. 14.

<sup>10</sup> R. Dickerson, *The Fundamentals of Legal Drafting* (2<sup>nd</sup> ed., Boston, 1986) at p. 32.

In the absence of research on the extent of public interest in legislation, in Ireland, there are few guides by which we can test their level of interest. One such barometer is the publication by the Law Reform Commission of their Consultation Paper<sup>11</sup> entitled "Statutory Drafting and Interpretation: Plain Language and the Law" and subsequent Report<sup>12</sup>. Their publication generated little public interest and the muted public reception could certainly not be regarded as being indicative of an appetite for plain language legislative drafting.<sup>13</sup> The publication of the "Towards Better Regulation" Consultation Document<sup>14</sup> by a High Level Group appointed by the Government – a perfect opportunity for the cries for plain language to be amplified - was greeted with similar apathy by the wider public.<sup>15</sup>

From the perspective of an ordinary citizen, the significance of the enactment of a new piece of legislation has greatly declined. Part of this change in attitude is referable to the increased recognition that both civil and personal rights enjoy in the 20<sup>th</sup> Century. Today's citizens know their basic rights. The rights and freedoms of individuals are no longer at the whim of the legislature. Individuals are aware that many of these rights cannot be defeated by the operation of law, and it is the comfort of knowing this that precludes them from becoming overly concerned with the activities of the legislature. It is for this reason that despite the increasing availability of legislation to citizens<sup>16</sup>, their desire and need to familiarise themselves with the intricacies of raw legislation has waned considerably.

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<sup>11</sup> Law Reform Commission, 'Statutory Drafting and Interpretation: Plain Language and the Law' (CP14-1999).

<sup>12</sup> Law Reform Commission, 'Statutory Drafting and Interpretation: Plain Language and the Law' (LRC61-2000).

<sup>13</sup> The Report was however the subject of some media comment: K. Wood, 'Why Plain English Could Spell the End for Latin Lovers' (August/September 1999) *Law Society Gazette* 5; M. Bourke, 'Nice and Easy Does It' (October 1999) *Law Society Gazette* 18; K. Wood 'Sesquipedalian Solicitors Censured for Verbosity' Sunday Business Post 16<sup>th</sup> April, 2000; M. Bourke 'Report's Backing for Wider Use of Plain English in Law is in Interest of Justice' Irish Times 28<sup>th</sup> May, 2001; M. King, 'Statutes and Limitations' (August/September 2001) *Law Society Gazette* 26.

<sup>14</sup> (February, 2002). See [www.betterregulation.ie](http://www.betterregulation.ie)

<sup>15</sup> Approximately 12 members of the public chose to make submissions during the consultation process. See [www.betterregulation.ie](http://www.betterregulation.ie)

<sup>16</sup> Such as governments' internet web sites setting out legislation, or a fully searchable set of legislation on cd-rom.

The harsh reality for many plain language proponents concerning legislation is – that, for the most part, legislation is not read by members of the public. Professor Ruth Sullivan concedes that the public are not particularly interested in reading statutes.<sup>17</sup> If this is indeed true, I have to ask, is it reasonable to ask drafters to play to an audience who are not even in the auditorium?

The Irish experience would seem to suggest that the public readership dimension is absent from legislation. The lay person does not seem to concern him or herself directly with the intricacies of legislation. The principal readers of our laws appear to be those who implement, administer and enforce the law. Some of those who fall into this category are regulatory authorities, the police force and the judiciary - all of whom would approach a legal text with a considerable understanding of the law. The contention that laypersons are a key audience in the context of legislation, simply does not stand up. If it is established that the key audience for legislation is not lay persons, but rather is lawyers, judges, regulators, law enforcers, interest groups etc., then the arguments in favour of using plain language seem unconvincing.

#### **4. Assumption: “Plain language legislation will function as effectively as legislation drafted in the traditional style”**

##### *Does Plain Language Equate with Clear Language?*

Clear language is that which is unambiguous and is capable of only bearing the meaning intended by its author. Plain language is not necessarily clear language. A concept expressed in plain language, will not always carry a clear and unambiguous meaning. Utilising plain language in legislative drafting is likely to increase the incidence of vagueness and ambiguity in legislation – this is a consequence which drafters cannot allow to occur.

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<sup>17</sup> R. Sullivan, ‘Some Implications of Plain Language Drafting’ paper delivered at ‘Legislative Drafting – Emerging Trends’ conference organised by the Office of the Attorney General 6 - 7 October 2000 Dublin, Ireland where she says, at 14: ‘Plain language drafting also tries to accommodate the tendency of members of



If legislation is drafted in terms which are wide and general, this is likely to give rise to different interpretations and inevitable challenge. At the other extreme, the more one tries to be exhaustive, the more vulnerable the legislation will be to omissions and potential challenge. So achieving a healthy balance between the two extremes represents a great challenge to any legislative drafter. It is in this context that the Chief Parliamentary Counsel to the Government in Ireland warns against “over drafting”:

“Precision in drafting is a worthy goal, but can be taken too far. It is frequently unnecessary to name every single thing you are forbidding or requiring. An overzealous attempt at precision may result in redundancy and verbosity. Drafting too precisely may create unintended loopholes.”<sup>18</sup>

Equally he cautions against “vagueness”:

“Just as overdrafting can affect a provision in unforeseen ways, underdrafting is equally dangerous. Although it is often necessary or desirable to create a general or broad legislative standard or directive, beware of language that is so indefinite that it is meaningless or begs a challenge in court as invalid for vagueness. Generally, courts loathe declaring a law invalid on this ground, but careful drafting can eliminate the need for judicial scrutiny.”<sup>19</sup>

In their book, Butt & Castle<sup>20</sup> recommend that “legal documents should be written in modern, standard English – that is, in standard English as currently used and understood.” This seems to amount to a recognition on the part of the authors that words, especially “modern, standard” words, do not have a fixed and uniform meaning.

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the public to read as little of the statute as possible. Unlike legal insiders, who are professionally interested in the law ... a member of the public is interested only in the parts of the statute that relate to her circumstances.’

<sup>18</sup> Legislative Drafting Manual (Dublin, 2001) at para. 4.4. The Drafting Manual has not been published and is not available externally.

<sup>19</sup> *ibid.*, at para. 4.5.

<sup>20</sup> P. Butt & R. Castle, *Modern Legal Drafting* (Cambridge, 2001) at p. 129.

The generic character of most words is of concern to anyone trying to express themselves with precision. This point was succinctly expressed by Potter<sup>21</sup> who said that “Few words have fixed significations like the pure numbers of mathematics.”. This is the primary reason why the adoption of plain language in legislative drafting must be approached with a great degree of caution. As expressed by Professor Bates<sup>22</sup>, one of the fundamental constraints which plain language drafting is subject to is, that language is not plain - as a word may well have a number of meanings. So for example, “attend” cannot be replaced by “turn up”, “notify” cannot become “tell” etc.

At a legislative drafting conference in Dublin two years ago, Peter Rodney<sup>23</sup> sought to illustrate just how easy it is to translate some “pompous” old legislation into plain English. The example he used was a convoluted legislative provision dealing with gratuities to the driver of a taxi. Mr Rodney suggested that it would have been much better to just speak in terms of tipping a taxi driver. In a question and answer session, a Judge from our High Court<sup>24</sup> pointed out that the plain English translation did not have the same meaning, but rather was very very different. He pointed out that the word “tip” could have several different meanings – it could mean: 1. A place where rubbish is dumped 2. Top/apex of an object 3. To tilt/incline 4. To empty/pour 5. To touch gently 6. A Hint 7. A warning 8. A gratuity/reward – this example clearly illustrates just how difficult it would be if we were to use plain language in our legislation. Ambiguity and uncertainty would rein, the Courts would be overwhelmed by cases because each party to a case could legitimately put forward their own interpretation – and in the meantime, the law would be devoid of credibility and totally ineffective.

### ***Words – Vehicles of Many Meanings***

The task of parliamentary counsel is to encapsulate policy within the legal framework and this requires them to facilitate communication of the intent of the legislature. This must be done through the use of precise language. The challenge to the drafter is that he or she must use words and words alone. The drafter cannot lend atmosphere to the legislation. He or she cannot use colourful language, or repetition to illustrate a point. Rather, his or her written

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<sup>21</sup> S. Potter, *Our Language* (London, 1959) at p. 104.

<sup>22</sup> T St J N Bates, ‘Drafting for the User of Legislation’ published in R.C. Bergeron (ed.), *Essays on Legislative Drafting* (Ottawa: 1999) 77.

<sup>23</sup> P. Rodney, Senior Legislative Draftsman for the Government of Gibraltar at ‘Legislative Drafting – Emerging Trends’ conference 6-7 October, 2000 Dublin, Ireland.

words stand alone as monuments to clarity of thinking – or carelessness. Written communication needs to be effected with greater care than oral communication. The drafter of any document needs to anticipate and take cognisance of the range of perspectives from which the readers of the legislation will emerge. For example, the drafter must ensure that the reader who is not prepared to take a reasonable view, or who is hostile towards the legislation, reaches the same conclusion as to the meaning of the legislation as the drafter had intended.

Where a word is capable of having a number of different meanings, the drafter must ensure that the word chosen will carry the same meaning for each reader. Another problem faced by drafters is the challenge to find and use words which are not vague. Some words have clear meanings: numbers, days of the week, periods of time are all capable of precise expression. Some words become vague in accordance with their usage. Some words are designedly imprecise and permit of a subjective interpretation by a third party such as a judge. Examples of these words are: “satisfactory”, “necessary”, “fair”, “reasonable” and “viable”. It is also salutary to point out that words take on the character of those in whose company they are to be found. This point was succinctly expressed by Holmes J. in a much quoted passage from *Town v Eisner*<sup>25</sup> where he said:

"A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in colour and content according to the circumstances in which it is used."<sup>26</sup>

Language itself is not a very precise medium. Words have no "proper" or "absolute meaning". In *Carter v Bradbeer*<sup>27</sup>, in a somewhat fatalistic tone, Lord Diplock said that:

"Words mean whatever they are said to mean by a majority of the appellate committee dealing with the case, even though a minority might think otherwise."

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<sup>24</sup> Hon. Mr Justice Daniel Herbert.

<sup>25</sup> 245 U.S. 418.

<sup>26</sup> *ibid.*, at 425.

<sup>27</sup> [1975] 1 W.L.R. 1204, 1203.

A similar lesson was taught by Humpty Dumpty to Alice in *Through the Looking Glass*<sup>28</sup>:

“‘When I use a word,’ Humpty Dumpty said, in a rather scornful tone, ‘it just means what I choose it to mean- neither more nor less.’ ‘The question is’, said Alice, ‘whether you can make words mean so many different things.’”

### ***Simplicity – Apparent or Real?***

The simplicity of a document is mainly an aesthetic feature. The question as to whether a document is useful is an entirely different issue. In the context of the Land Obligations Bill 1968, Lord Wilberforce wrote to the Law Commission to express his views on the Bill. He was concerned by a number of aspects of the Bill, but in particular he stated:

“The language of the draft Bill, is in itself, simple and reasonably untechnical, and as such is to be welcomed: but the question is whether the simplicity is apparent rather than real ...”<sup>29</sup>

The translation of documents drafted in a traditional style into plain language is the customary way in which proponents of plain language seek to illustrate its benefits. A (or more appropriately “The”) leading expert in the plain language field, Martin Cutts has carried out numerous translations of legislation drafted in the traditional way. On an initial glance, the translations are always easier to read and more straightforward. Or is this a classic case of simplicity being more apparent than real?

The translation of documents drafted in the traditional style, into plain language also exposes weaknesses in the use of plain language. The conversion of legislative passages into plain language often has the unintended effect of changing the meaning of legislation. However, plain language proponents would dismiss any suggestion that this is a fatal flaw which renders plain language unsuitable for legislative drafting. Rather, they contend that these changes in meaning only occur because non-drafters, whose minds are set on simplicity

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<sup>28</sup> Lewis Carroll, *Through the Looking Glass* Chapter 6.

<sup>29</sup> Extract from a letter of 23 February 1968 from Lord Wilberforce to Karl Newman of the Lord Chancellor’s Office. See E. Nugee, ‘Legislation from the User’s Perspective’ a paper delivered at Clarity/Statute Law Society Conference, Cambridge 12 – 14 July 2002.

rather than accuracy, nearly always carry out these re-drafts/conversions.<sup>30</sup> In 1993, Martin Cutts<sup>31</sup> translated the U.K. Timeshare Act 1992 into plain language, with the acknowledged assistance of a leading international law firm. The translation was subject to considerable criticism from the Parliamentary Counsel who drafted the Act, Euan Sutherland.<sup>32</sup> In his opinion, the translation had resulted in considerably altering the meaning of many of the provisions of the Act. It had omitted some provisions and had rendered the Act misleading in some respects. However, these matters were addressed in the second edition<sup>33</sup>.

In their text, Butt and Castle<sup>34</sup> state that plain English documents are easier to read and understand, more direct and more easily absorbed. They seek to illustrate this by setting out a traditionally drafted provision, followed by a plain English version of the same provision:

*“Traditional*

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.

*Plain*

The Builder must construct the street to Council specifications.”

Few could disagree that the plain language version is shorter, easier to read and understand. But is it clear? Does it convey the same meaning? Seemingly not. It is vague and ambiguous, devoid of the helpful guidance which the traditional version carries in its detail. One of the problems with plain language is that it often requires compressing what might be a complex policy into a small number of words. Consequently, this can lead to difficulties with interpretation and give rise to uncertainty – as this translation has shown. So one must ask,

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<sup>30</sup> I. Turnbull, “Legislative Drafting in Plain Language and Statements of General Principle” (1997) 18 Stat. LR 21 at 25.

<sup>31</sup> M. Cutts, *Unspeakable Acts? Clarifying the Language and Typography of an Act of Parliament*, a discussion paper published under the auspices of Words at Work in (January, 1993).

<sup>32</sup> E. Sutherland, ‘Clearer Drafting and the timeshare Act 1992: A Response from Parliamentary Counsel to Mr Cutts’, (1993) 14 Stat. LR 163.

<sup>33</sup> M. Cutts, *Lucid Law* (2<sup>nd</sup> ed., London, 2000).

<sup>34</sup> P. Butt & R. Castle, *Modern Legal Drafting: A Guide to Using Clearer Language* (Cambridge, 2001) at p. 86.

when is a reader likely to be more fully informed and aware of the obligations of the Builder? By reading (and even re-reading, if necessary) the traditionally drafted provision, the reader will be confidently aware of the obligations of the Builder. In contrast, by reading the plain language version, the reader will only know that the Builder must construct the street to the Council specifications. This puts the onus on the reader to look elsewhere – have the Council specifications been articulated? Are they available to read? Or are they vague, subjective and ambiguous aspirations? Also, the reader of the plain language version will not know who is to pay for the works and what works must be carried out. Effectively, by redrafting this provision in plain language, the authors have removed some helpful detail and have instead, inserted a little black hole. At a closer look, the simplicity of the plain language version seems more apparent than real. In short, the reader of the plain language provision is less informed. We should not underestimate the intelligence of members of the public. We should not presume that they are unable to understand a provision of this kind.

Plain language proponents would have us believe that the adoption of plain language legislative drafting would result in legislation which would be clear and understandable to all who set eyes on it. Martin Cutts decision to incorporate a “Citizen’s Summary” into his Clearer Timeshare Act<sup>35</sup> is significant. Could it possibly be interpreted as an admission that the nirvana of plain language legislation does not function as they would have us believe?<sup>36</sup>

## **5. The Real Alternative to Plain Language in Legislative Drafting**

### ***The Function of Legislation***

The calls for the adoption of plain language in legislative drafting arise from the contention that legislation is not entirely intelligible to ordinary readers. Francis Bennion<sup>37</sup> acknowledges that terms of art, references to legal rules and doctrines cannot be fully understood by non-experts in law, but likewise, he says, medical language cannot be fully understood by non-experts in medicine. A medical expert is more likely to refer to the

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<sup>35</sup> M. Cutts, *Lucid Law* (2<sup>nd</sup> ed., London, 2000).

<sup>36</sup> He explains the reasoning behind the inclusion of such a summary by saying: “... I believe non-lawyers should be enabled to grasp the background of an Act and its key points without having to read the Act itself.” (at page 29). This, in my view, is like talking about people who want to learn how to drive a car, but couldn’t be bothered getting into a car.

“gastroscope” rather than the “tiny video camera”. When a person is unfortunate enough to encounter a medical problem, she or he will invariably visit an expert in this field - a medical doctor. When a person encounters a difficulty involving a statute, what is so wrong with him/her taking it to an expert in the field – a lawyer? In Bennion’s opinion, the primary audience of our laws are the lawyers and he says “Unless *they* are clear about the nature and characteristics of legislative texts there is not much chance that anyone else will be”<sup>38</sup>. He goes on to suggest that we should not become overly concerned with adopting a plain language approach, rather we should be striving to make the law easier for lawyers to use.

The task of communicating the meaning of legislation is an entirely separate function, as distinct from that served by the drafter. Francis Bennion is of the view that:

“... the man, or woman, in the street should not attempt to interpret legislation. I refer, of course, to legislation still in the form which it was enacted. What the lay person need is explanations and summaries.”<sup>39</sup>

This view is also shared by Peter Blume<sup>40</sup> who proposes that the content of our law should be disseminated by a variety of means. For example, he suggests that special channels of communication should be used in order to disseminate the content of our laws. In preparation for this, he suggests that the laws should undergo a process of reformulation so as to avoid too much detail. While recognising that there should be a distinction between drafting and dissemination of laws, Blume also suggests that:

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<sup>37</sup> F. Bennion, “Don’t Put the Law into Public Hands” *The Times*, 24 December, 1995.

<sup>38</sup> *ibid.*,

<sup>39</sup> F. Bennion, ‘Don’t Put the Law into Public Hands’ *The Times*, 24 December, 1995.

<sup>40</sup> P. Blume, ‘The Communication of Legal Rules’ (1990) 11 *Stat. LR* 189.

“The two aspects should be seen as a whole and Parliament has not performed its work satisfactorily if the dissemination function is neglected. When proposing a Bill it should be made clear what dissemination arrangements are planned and what they cost.”<sup>41</sup>

### ***Explanatory Materials***

There is a need to recognise that the principal function of a legislative drafter is to enshrine policy in an accurate and precise manner. In doing so we must also recognise that the communication of the law is an entirely different task. Neither the drafter, nor the legislation itself should be regarded as a vehicle of communication to the public – rather it should form the basis from which the explanatory materials should take root. These explanatory materials, specifically directed at members of the public, should seek to illustrate in plain and simple language, the nature and effect of each piece of legislation.

Regrettably, the Irish Law Reform Commission<sup>42</sup> appear to see plain language as a means of resolving the problems caused by the inaccessible nature of legislation and consequently did not focus in any great detail on the reform of explanatory materials<sup>43</sup>. However, it is imperative that we do not become distracted in our efforts to resolve the difficulty of inaccessible legislation. The focus should turn to establishing some kind of formalised structure to effect the dissemination of the content of legislation in ways which take cognisance of the citizens needs and abilities. From a legislative drafting perspective, dissemination of the content of legislation is the real way in which the needs of the citizens can best be served, not through distracting stratagems.

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<sup>41</sup> *ibid.*, at 209.

<sup>42</sup> Law Reform Commission, ‘Statutory Drafting and Interpretation: Plain Language and the Law’ (LRC 61 - 2000).

<sup>43</sup> The Law Reform Commission (at para. 6.36) were critical of the decline in the standard of Explanatory Memoranda (all of which are prepared by the various Government Departments). In this regard, the Office of the Parliamentary Counsel has prepared a Report entitled ‘Explanatory Memoranda: An OPC Perspective’ which it has submitted to Government Chief Whip (February, 2002). Among other things, it recommended: Changing the title from Explanatory Memorandum to Explanatory Materials; Insertion of a table of contents at the beginning of the Explanatory Materials; A disclaimer – that they are not the law and that they have been prepared as an aid to the Bill (or Act); Set out the historical context from which the Bill arises; The explanation of each provision to be “in a conversational style using plain and simple language; A note as to the manner of commencement; If implements an international agreement, an appendix with text of agreement; Revising and



The adoption of plain language, is not (as its proponents would have us believe) a mere exercise in replacing some turgid words with simple and understandable ones<sup>44</sup>. It is all too easy to become facetious and deride the apparent “inability” of some drafters to accept in full, the contentions of the plain language school.<sup>45</sup> Even those who accept that some change in the traditional style of drafting is needed, offer words of caution to the effect that those who are “berating drafters, ... should bear in mind that a convincing case has yet to be made out”.<sup>46</sup>

## 6. Concluding Remarks

In circumstances where an experienced drafter encounters difficulty in seeking to express complex policy by using precise English and legal terms, how can anyone seriously suggest that the articulation of this policy could be made easier (for the drafter or the reader) if expressed in plain language? Realistic proponents of plain language will admit that plain language drafting is not the complete solution and accept that plain language may not be suitable in situations where the policy is complex. One of the more moderate proponents of plain language, Turnbull acknowledges that plain language drafting is not a complete alternative to traditional style drafting. In his article<sup>47</sup>, he points out that in situations where complex concepts are at issue, plain language might well give rise to ambiguity and might render the legislation disjointed or absurdly long. In situations such as this, he proposes that

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reissuing of Explanatory Notes after enactment; such revision to include full references to parliamentary debates.

<sup>44</sup> Lord Donaldson MR thinks that resolving the problem of turgid legislation is even more straightforward than that! In *Merkur Island Shipping Corp v Laughton* [1983] AC 570 at 595 he effectively suggested that if a government find that their policy is not capable of being expressed in basic English, then the policy should be modified so as to facilitate ease of expression: “... when formulating policy, ministers, of whatever political persuasion, should at all times be asking themselves and asking parliamentary counsel: Is this concept too refined to be capable of expression in basic English? If so is there some way in which we can modify the policy so that it can be so expressed”. Clearly, a less than ideal solution. This line of thought evidences an absence of connection with reality and is the kind of comment which is damaging to the drive for plain language legislative drafting.

<sup>45</sup> An example of this impertinence may be found in Rodney, ‘Legislative Drafting Style’ paper delivered at ‘Legislative Drafting – Emerging Trends’ conference 6-7 October 2000 Dublin, Ireland. Also, Professor David Mellinkoff in his book *Language of the Law* Aspen Publishers, 1963) famously said that “The most effective way of shortening law language is for judges and lawyers to stop writing”. A more extreme example of facetiousness can be found in an article by Richard Thomas, a legal officer with the National Consumer Council in the U.K., entitled ‘Plain English and the Law’ Stat. LR Autumn (1985) 139 – where he suggests that ridicule is a useful means of promoting the use of plain language. This ridicule manifests itself the annual Plain English Awards and the Golden Bull Awards which are awarded to the “six worst examples of gobbledegook”.

<sup>46</sup> Hon. Mr Justice Nazareth, ‘Legislative Drafting: Could Our Statutes be Simpler?’ (1987) Stat. LR 81 at 92.

<sup>47</sup> I. Turnbull, ‘Legislative Drafting in Plain Language and Statements of General Principle’ (1997) 18 Stat. LR 21 at 25.

precision must prevail over simplicity, as was the approach favoured by the Renton Committee<sup>48</sup>. He sees the drafter as having a constant duty to consider alternative forms of expression and choose the simplest by balancing different degrees of precision against different degrees of simplicity.

Where there are words, there will be misinterpretations. The use of plain language in legislative drafting considerably increases the scope for misinterpretation. Conversely, the use of what are often described as turgid, complex, verbose and wordy provisions arising from traditional legislative drafting considerably limits the scope for misinterpretation and in this way restricts the potential for challenge. Legislation drafted in this way is by far the more odious of the two sisters in Cinderella – functional, but not so easy on the eye.

The calls and demands for plain language legislative drafting derive from the turgid and complex nature which characterises so much legislation. Plain language proponents purport to lend legitimacy to their calls for plain language legislation by assuming that ordinary people actually want to read raw legislation. Having said that, I do recognise that there is a need to modernise and simplify the language of legislation to the extent that it will not give rise to uncertainty. As I said at the outset, I am in favour of the use of plain language in legislative drafting, but only in so far as it does not alter the meaning and does not give rise to ambiguity in the legislation. The legislative drafting manual in Ireland discourages the use of words like herein, hereinafter, hereinbefore, herewith, wheresoever - which are described as “verbose, obsolete or vague terms and are often unclear or unnecessary.”<sup>49</sup>. In recognising that some aspects of the traditional style of drafting can give rise to unnecessarily complex legislation, it seems to indicate that in Ireland, steps are being taken in the right direction so as to reduce the complex and turgid nature of legislation<sup>50</sup>.

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<sup>48</sup> *The Preparation of Legislation*, (London, 1975) Cmnd. 6053.

<sup>49</sup> Legislative Drafting Manual (Dublin, 2001) at para. 5.2.

<sup>50</sup> As advocated by the Chief Parliamentary Counsel in Ireland in the Drafting Manual: “Generally, short words are preferable to long words. A simple sentence is easier to understand than a complex or compound sentence. If the meaning of a complex sentence can be precisely stated in two or more simple sentences, use the simple sentences. If a word has the same meaning as a phrase, use the word. Omit needless words.” Legislative Drafting Manual (Dublin, 2001) at para. 4.3.

I admire the motives and work of people like Professor Butt, Martin Cutts and Professor Kimble. But there must be a recognition of the limitations of plain language in legislative drafting – a recognition that like the glass slipper in Cinderella – plain language is not a “one size fits all” device. A failure to recognise this fact has been, and will continue to be, damaging to the credibility of the drive for plain language. As I see it, the real answer to inaccessible legislation is good quality, plain language explanatory materials – making plain language in legislative drafting - just a laudable ideal.



Plain Language in Legislative Drafting: An Achievable Objective or a Laudable Ideal?

**Brian Hunt**

[www.betterregulation.ie](http://www.betterregulation.ie)

Brian Hunt, Research Officer in the Office of the Parliamentary Counsel to the Government of Ireland, has recently published two articles about plain legal language: "Plain Language: The End of the Road for Recondite Legislation?" *Bar Review*, Vol. 7 (1) (2001); and "Plain Language: Is it Really the Answer?" *Stat. L.R.*, Vol. 23 (1) (2002).