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Fothergill v. Monarch Airlines Ltd Lord Diplock; R. v. Ottwell; Re Castioni; R. v. O'Connor; Merkur Island Shipping Corp v. Laughton [1983] AC 570; Davy v. Leeds Corporation [1964] 1 WLR 1218; R v. O'Connor [1987] VR 496

LEGISLATION REFERRED TO:

Australian Acts Interpretation Act 1987; Uniform Commercial Code; Australian Broadcasting Act 1942; UK Timeshare Act 1992; Taxes (Consolidation) Act 1997; Acts Interpretation Act

TEXT:

I. INTRODUCTION

For some time now, a great debate has been taking place on the subject of plain language. The calls for the use of plain language are not by any means restricted to the legal world. It transcends many disciplines n2 and is being implemented at all levels. n3 In this debate, considerable emphasis has been placed on the need for legislation to be drafted in plain language. The more enthusiastic proponents of plain language are promoting it on the basis that its use in the context of legislative drafting will render the law more accessible to the public. While the merits of using more modern and plain language are without question, is plain language really the panacea that its proponents make it out to be?

The term 'plain language' has a broad meaning—it is a multifaceted creature. The calls for change emanating from the plain language school range from the moderate to the extreme. For convenience it seems helpful to divide the demands of those who fall within the plain language school into three categories: language; structure; and style.??? Language—the first, and largest category refers to the calls for the adoption of the following: simple language, shorter sentences, shorter words, the avoidance of double negatives, the avoidance of words with similar meaning such as, 'give, and bequeath' and 'null and void', the use of the positive rather than the negative, the use of the active rather than the passive voice, the non-use of provisos n4 , the non-use of words like 'shall', 'notwithstanding', 'heretofore' and the avoidance of Latin terminology.??? Structure—the second category refers to appeals for structural changes to be made to legislation so as to render it more visually accessible and reader friendly. Suggestions in this regard call for the arrangement of provisions in temporal sequence, grouping together provisions which have a common subject, the use of enhanced side notes, the use of running heads, the use of full stops in subsections, the highlighting of key provisions within the legislation and the use of visual aids and formulae.??? Style—the final category is referable to the calls for the abandonment of traditional style of drafting in favour of drafting in general principles, or alternatively the adoption of the drafting by reference style.

Part of the problem with the present traditional style of drafting is said to be the use of specialised legal language. The problem being that few outside the world of law can readily access this language. According to one proponent of plain

language, this development of a specialised legal language 'is a social phenomenon, as language is used to distinguish jurists from other sections of the population'.ⁿ⁵ Needless to say, the reasons for the use of specialist terms are far more compelling than this commentator suggests.

II. PLAIN LANGUAGE

(A) ORIGINS OF TODAY'S STYLE

Down through the Middle Ages Latin was used as the legal language. In the UK, laws continued to be drafted in Latin until 1487.ⁿ⁶ This was mainly due to the significant contribution which the church made to the drafting of legislation during this period. The drafting style was also quite different then. At that time laws tended to be casuistic, in that they would describe a set of circumstances illustrating where a penalty would befall the actor. In terms of ease of understanding, legislation drafted in this way would seem to be preferable, particularly as it allowed the reader to actually visualise a situation in which that provision would operate. In contrast, the predominant drafting style in use today could be described as being quite abstract in that it is devoid of any illustrative aspect and does not provide the reader with an insight as to how that legislation would interact with day-to-day life. However, the shift towards the traditional style of drafting appears to have arisen out of necessity rather than any desire to complicate legislation. In the face of growing complexity of policy, the casuistic style of drafting did not lend itself well to fulfilling the drafters' main goals of accuracy and clarity.

The initial calls for the use of plain language and simplicity in general appear to have come from dissatisfaction expressed in the 16th and 17th centuries. Edward VI is believed to have expressed the wish that 'the superfluous and tedious statutes were brought into one sum together, and made more plain and short, to the intent that men might better understand them'.ⁿ⁷

The passing of centuries has seen a number of significant changes in legislative drafting—such as in the UK, the change from Latin to Englishⁿ⁸ and also the change from casuistic to traditional style of drafting. However, to a great extent the phraseology and choice of words in legislation have largely remained Victorian and antiquated. This assertion forms one of the key criticisms of the predominant style of legislative drafting employed in the common law world today. One lawyer articulated the essence of the problem:

We lawyers cannot write plain English. We use eight words to say what could be said in two. We use old, arcane phrases to express commonplace ideas. Seeking to be precise, we become redundant. Seeking to be cautious, we become verbose. Our sentences twist on, phrase within clause, glazing the eyes and numbing the minds of our readers. The result is a writing style that ... is wordy, unclear, pompous and dull.ⁿ⁹

The fact that the language of the law has remained static for quite some time may, as one commentator suggests, be due to the fact that legislative drafters learn how to draft by looking at existing laws—and it is this which has perpetuated the use of turgid and archaic language.ⁿ¹⁰ However, this might not be an entirely accurate reflection of the situation. It could be contended that the language of the law has not been seen to progress with the times because the English in general usage today does not lend itself to the high level of accuracy and precision which legislative drafting demands. It would be relatively easy to draft legislation in plain language so that it could not be misunderstood. However, the compelling reason as to why accuracy is so essential to drafters is because of the ingenuity of lawyers who are only too willing to apply their enterprising minds to manipulating and working the laws in the interests of their clients. The search and exploitation of loopholes forms a considerable part of this ingenuity.

(B) AMENDMENTS—AN OPPORTUNITY TO USE UPDATED LANGUAGE

When presented with the task of amending a rather old piece of legislation—a clear opportunity to use more modern language—there is a tendency amongst drafters to perpetuate the archaic wording of older statutes in the amending legislation on the basis that they must adhere to the style of the principal Act.ⁿ¹¹ Driedgerⁿ¹² points out that a change in the language used in the re-enactment of a provision must be presumed to be of some significance. This point has also been made by Ctⁿ¹³ who said that:

At common law, it is presumed that modifications are specifically intended to change the meaning of an enactment ... the legislator is deemed to modify the law to change its substance rather than to improve its form ...

So a decision to utilise more modern style and language in amending older legislation is not without its difficulties. There are many lawyers who are only too willing to apply their industrious minds to exploiting any opportunities which

might be presented to them on occasions such as these. The potential for litigation arising from a clear change in the type of language used would be greatly diminished by adopting an interpretation provision similar to that done in Australia. Section 15AC of the Australian Acts Interpretation Act 1987 reads:

Where:

- (a) an Act has expressed an idea in a particular form of words; and
- (b) a later Act appears to have expressed the same idea in a different form of words for the purpose of using a clearer style;

the ideas shall not be taken to be different merely because different forms of words were used.

It is suggested that a provision of this kind would go a long way in facilitating a move towards more modern and plain language.

(C) TO WHOM IS LEGISLATION ADDRESSED? n14

We are writing not for each other but for the layman. Let us not lose sight of that. n15

Is this a grave misconception, an idealistic view, or a fact? A definitive answer to the question—'to whom are our laws to be addressed'—seems as elusive as ever. The hypothesis of plain language proponents is that legislation must be intelligible to its key audience—the ordinary citizens. To suggest that legislation should be both accessible and understandable to the ordinary man is a most laudable aim and few would disagree with that sentiment. One New South Wales Parliamentary Counsel n16 believes that the ordinary people are and should be the intended audience:

The ordinary person of ordinary intelligence and education [should] have a reasonable expectation of understanding ... legislation and of getting the answers to the questions he or she has. This is of critical importance.

If it is established that the key audience of all legislation in a country is indeed, laypersons, then the reasons for adopting plain language are compelling. Where this is established, any true democracy has a duty to ensure that all legislation is addressed to those people in a clear and readable fashion. If on the other it is to be concluded that the key audience of legislation is not laypersons, but rather lawyers, judges, regulators, law enforcers, interest groups etc., then the arguments in favour of using plain language seem less convincing.

While the level of public interest in a particular piece of legislation will vary greatly, depending on the subject-matter which it addresses, the task of communicating the content and meaning of the law is an entirely separate function, as distinct from that of the drafter. n17 These sentiments were expressed by Francis Bennion who in a newspaper article said:

No law can be directly comprehensible by non-experts because law is and has to be an expertise. It needs to be explained to the lay person, whether by officials or professionals in private practice. n18

He reiterated these views in the following year in another article: n19

... the man, or woman, in the street should not attempt to interpret legislation. I refer, of course, to legislation still in the form in which it was enacted. What the lay person needs is explanations and summaries.

In Bennion's opinion, the primary audience of our laws is 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.' 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. While recognising that plain language does have a small part to play in achieving this aim, Bennion appears to adopt a more broad and pragmatic approach where he says that we should in fact be focusing on improving the arrangement of the law—more consolidation and codification and improving the methods of finding the law.

Even though there are divergent views as to who the actual audience of our legislation is, the search for the answer to this question is one which has captivated the minds of a number of commentators. One suggested way of determining the legislative audience is that of 'audience analysis'. Devised as a concept which could be applied in the legal and non-legal world, Schriver n20 favours an audience focused approach. She highlights three different approaches which may be used to identifying the audience of a particular piece of work. The first approach, the 'classification-driven audience analysis' involves classifying audience by reference to their features. While the second approach, known as the 'intuition-driven audience analysis' requires the author to visualise and reflect on the audience. The third approach is the 'feedback-driven

analysis' and this involves ascertaining the actual views of the readers of the text. In his article, Berryⁿ²¹ takes the concept and advocates its use in the legislative drafting process. He suggests that an audience analysis would be carried out by the drafter in the early stages of drafting a piece of legislation. Berry suggests that when beginning to draft a piece of legislation, on asking the following questions, the drafter should have a broad view of the future effect of the document:

What audiences are affected?

What is the purpose for which each audience will use the legislation?

Is the audience's interest(s) friendly or hostile to those of the Government?

How long will an audience use the document—short-term or long-term?

What is the audience's educational background and experience? ⁿ²²

While recognising that the pressures on drafters to produce a draft document within a short time-frame might preclude parliamentary counsel from conducting an audience analysis, he is a strong advocate of the benefits of adopting this approach. Though in favour of this approach, Professor Ruth Sullivan concedes that the public are not particularly interested in reading statutes. ⁿ²³ If this is indeed true, is it reasonable to ask drafters to play to an audience who are not even in the auditorium?

A major premise of the plain language proponents is that the audience is lay people and as such the language used should be plain and understandable. However, Jack Stark, a critic ⁿ²⁴ of the plain language school contends that the plain language school is a reader-response school, and he argues that acceding to the demands of the plain language school requires the devotion of one's attention to the reader.

Another approach that sits comfortably within the plain language school is the reader expectation theory as devised by George Gopen. ⁿ²⁵ The basis of his theory is that the reader has a limited amount of energy to invest on a passage of writing. So according to Gopen, if the reader spends too much time trying to understand the structure of the document, then he or she will not have sufficient energy to understand the content of the document. As its name suggests, the theory requires the writer to conform to the reader's expectations concerning structure. The application of this theory in a legislative drafting context is fully explored in an article by Jack Stark. ⁿ²⁶ In his article, Stark examines Gopen's application of his theory in a revision of the Uniform Commercial Code. Stark finds that there are so many errors in Gopen's revision that he suggests categorising them. His criticism is based on the claim that the structural changes, poor word choice, and syntactical errors have resulted in a change of meaning. He goes on to criticise Gopen's reader focused approach and concludes that Gopen's theory is counterproductive.

In response to the audience focused approach, one could argue that by changing the drafting style of each piece of legislation so as to match the audience, this would clearly lead to inconsistencies of approach within the statute book and would also have grave implications for interpretation. An audience focused approach to drafting legislation can greatly detract from both the consistency and quality of legislation. This is particularly apparent where a piece of legislation is believed to have a range of addressees who have varying degrees of understanding. To some, the audience focused approach essentially requires the drafter to become all things to all people—and this, as has been well established, is an unattainable ideal.

Aside from audience related considerations, there remains the question as to whether all laws should be drafted in the same way? It must be stated that irrespective of the kind of legislation being drafted and irrespective of the anticipated audience, all legislation should be drafted with a great degree of clarity, and a great degree of certainty so as to prevent wilful misinterpretation. While maintaining these standards throughout all pieces of legislation, the overtones of the language may be heightened or reduced depending on the legislation's relationship to its readers. For example, a piece of social welfare legislation conferring benefits is likely to enjoy a mainly friendly readership, whereas, a piece of criminal legislation which is prohibitive in its nature is likely to be greeted with hostility by those against whom it is enforced. Accordingly, the latter type of legislation must be drafted with increased vigilance, and an eye towards any possible weaknesses so as to guard against any possible loopholes. Invariably the circumstances and the subject matter will dictate whether the legislation needs to be drafted using technical language.

In Ireland, the lay person does not seem to concern him or herself directly with the intricacies of the law. The principal readers of our laws are 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. So the contention that laypersons are a key audience in the context of legislation, simply does not stand up to anything more than a fleeting glance.

(D) ACCURACY OR SIMPLICITY?-THE DRAFTER'S DILEMMA

Legislation by its very nature, and because of the demands it has to meet, does not lend itself to simplicity. But that is not to say it cannot be made simpler in some degree, or that we should not try. n27

Drafters are faced with two competing interests—on the one hand it is the determination to express the law in a simple and clear manner—as against the inherent desire to achieve certainty of meaning and accuracy on the other. In a speech delivered as Attorney General of Britain, Sir Patrick Mayhew n28 spoke of attempts to reconcile these competing interests, and was of the view n29 that it was a 'moral certainty' that Parliament will not accept a simplification if it means potential injustice in any class of case, however small. This point had also been expressed by the Renton Committee, who in their report n30 stated:

... the draftsman must never be forced to sacrifice certainty for simplicity, since the result may be to frustrate the legislative intention. An unfortunate subject may be driven to litigation because the meaning of an Act was obscure which could, by the use of a few extra words, have been made plain.

Judicial pronouncements on the plain language debate have been relatively rare and modest in tone. Of some considerable surprise therefore are the views of Lord Donaldson MR n31 who 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. n32 Clearly, a less than ideal solution.

Many plain language proponents would be quite critical of the drafting style in use in Ireland and a number of other common-law jurisdictions. In fact some would go so far as to suggest that the language is turgid and something more fitting to the 19th century, and not the 21st. The traditional style of drafting has been criticised on the grounds that it is loaded with 'long, convoluted sentences, archaic legal expressions, Latin words, and pompous language'. Despite this, it is widely recognised that the effect of the traditional style is 'usually very precise'. n33 However, some proponents of plain language would argue that the traditional style of drafting is far too concerned, or even obsessed with, precision—to the detriment of the intelligibility of legislation.

The difficulties encountered in the interpretation of legislation framed in turgid terms have been expressed many times, however, none so evocative as the words of Harman LJ: n34

To reach a conclusion on this matter involved the court in wading through a monstrous legislative morass, staggering from stone to stone and ignoring the marsh gas exhaling from the forest of schedules lining the way on each side. I regarded it at one time, I must confess, as a Slough of Despond through which the court would never drag its feet but I have, by leaping from tussock to tussock as best I might, eventually, pale and exhausted, reached the other side ...

Though all documents, regardless of their audience should strive to be both clear and accurate, these requirements become ever more important in the realm of legislative drafting because of the gravity of the subject matter, such as rights etc. which a piece of legislation may confer, and in some cases restrict. Consequently, there are those of the view that these key requirements—clarity and accuracy—should not be sacrificed in the interests of plain language or ease of understanding.

While recognising that the plain language approach does indeed carry some benefits, those who are sceptical of the plain language approach often argue that a shift to plain language will inevitably detract from the level of clarity which the present form of drafting allows. Consequently, such persons are more inclined to favour a simplification of language rather than fully adopting the plain language school and all which it entails.

One argument commonly used in the defence of the traditional style of drafting is that parliamentary counsel have become fearful of wilful misinterpretation and its ensuing litigation. This fear has deepened their determination to make their drafts as watertight as possible, and this in turn has had the effect of rendering some legislation unintelligible to many. The drafter's fear n35 in this regard is quite legitimate in that it may be said to stem from first, the increasing litigious tendency of citizens and secondly, the possibility of judicial misinterpretation of a legislative provision.

The contention that the latter consideration is one which exercises the mind of drafters was supported by a parliamentary counsel in his submission to the Renton Committee, n36 where he said:

The object is to secure that in the ultimate resort the judge is driven to adopt the meaning which the draftsman wants

him to adopt. If in doing so he can use plain language, so much the better. But it is often easier said than done.

In *Fothergill v. Monarch Airlines Ltd* Lord Diplockⁿ³⁷ appeared to accept that at least some of the blame for the level of complexity found in legislation lay at the door of the judiciary, alluding to the fact that this complexity has to some extent arisen from the narrow and restrictive interpretation of legislation. However, plain language drafting may not necessarily be the most appropriate means of addressing this issue. In *R. v. Ottwell*,ⁿ³⁸ Lord Reid aptly pointed out that the imprecise nature of the English language renders it very difficult to draft any provision in such a way that it is not capable of having two different meanings ascribed to it. However, the English language is not unique in this regard; this view could of course be equally valid of most other languages.

The reasons why the widespread use of plain language is unsuitable in legislative drafting was succinctly expressed by Stephen J in *Re Castioni*ⁿ³⁹ where he emphasised the need for precision as:

people continually try to misunderstand, and in which therefore it is not enough to attain a degree of precision which a person reading in good faith can understand; but it is necessary to attain if possible to a degree of precision which a person reading in bad faith cannot misunderstand. It is all the better if he cannot pretend to misunderstand it.ⁿ⁴⁰

In their report, the Renton Committee also alluded to the fact that, invariably, the use of plain language in legislative drafting will not suffice:

If any room is left for argument as to the meaning of an enactment which affects the liberty, the purse, or the comfort of individuals, that argument will be pursued by all available means. In this situation, Parliament seeks to leave as little as possible to inference, and to use words which are capable of one meaning only.ⁿ⁴¹

Some opponents of the plain language school would go so far as to say that there is already evidence to illustrate that acceptance of the viewpoints of those advocating plain language has had a negative effect.ⁿ⁴² One of the great downfalls of plain language drafting is its inherent ambiguity. For example, in the Australian Broadcasting Act 1942, the phrase 'commercially viable' was inserted in the 1980s without any accompanying definition. Following demands, this phrase was defined in 1991 in a provision thirteen lines long and was later again defined in a provision seventeen lines long.ⁿ⁴³

Attempts by proponents of plain language to illustrate in a practical way its benefits, have not been entirely successful. The common practice is to take a piece of legislation and translate it from its enacted form into plain language form, while emphasising the great ease with which it has been carried out. Inevitably, along with the benefits of plain language, this exercise also exposes weaknesses in the use of plain language. One such illustrative exercise was carried out by Martin Cutts,ⁿ⁴⁴ a plain language proponent who claimed to have translated the UK Timeshare Act 1992 into plain language. A response to this translation came in the form of considerable criticism by the Parliamentary Counsel who drafted the Act, Euan Sutherland.ⁿ⁴⁵ In his opinion, the translation had resulted in altering the meaning of many of the provisions of the Act considerably, it had omitted some provisions and had rendered the Act misleading in some respects. In a newspaper article, Francis Bennionⁿ⁴⁶ also levelled some criticism at Mr Cutts, by advising that 'reformers like Mr Cutts need to start by understanding that law is an expertise'.

Although the sole and legitimate aim of plain language drafting may be to render the text more comprehensible without changing its meaning, that aim is not always realisable. 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 rather than accuracy, nearly always carry out these redrafts/conversions.ⁿ⁴⁷ However this defence does not necessarily hold true as Mr Cuttsⁿ⁴⁸ has admitted that the rewrite was carried out with the help of two lawyers at Linklaters & Paines, a highly regarded international law firm.

In response to the inevitable criticism of legislation which has been translated into plain English, the Law Reform Commission of Victoriaⁿ⁴⁹ had this to say:

Any errors in the plain English version are the result of difficulties in translation, particularly difficulties in understanding the original version. They are not inherent in plain English itself. Ideally, of course, plain English should not involve translation. It should be written from the beginning.ⁿ⁵⁰

One of the great difficulties with the appropriateness of plain language in a drafting context is that the legislative intent

can only be achieved by using special language. 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. 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. n51 Even those who accept that some change in the traditional style of drafting is needed, offer words of caution that those who are 'berating drafters, ... should bear in mind that a convincing case has yet to be made out'. n52

Rather, if the adoption of plain language is a process to be taken seriously, it places an onerous task on the drafter in that it requires an analytical process to be carried out so as to ensure first, that the choice of the plain word has a clear and widely concurrent meaning and secondly, that the use of that plain word would achieve the very same legislative intent as the use of the alternative term of art.

In a newspaper article, in which he expresses reservations about the adoption of plain language, Francis Bennion n53 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.

According to one US proponent of plain language, Joseph Kimble, n54 in favour of his argument cites the results of a study in the US which show that technical terms and terms of art make up less than three per cent of the average legal document. n55 Opponents of the plain language school might also like to refer to this study and say that this low incidence of the use of terms of art further strengthens their argument that there is no need for such a drastic change of approach as proposed by the plain language school.

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. However, one suggested means of surmounting this difficulty is by shortening the length of the provisions, while increasing the actual number of provisions used to express a policy. n56 However, on this very point Sir John Fiennes n57 had this to say to the Renton Committee:

Shorter sentences are easier in themselves, and it would probably help overall to have them shorter, but of course you are then faced with having to find the relationship between that sentence and another sentence two sentences away, which, if you have it all in one sentence, is really done for you by the draftsman. n58

In their paper, Legacand Tremblay n59 are highly critical of what they call the 'overvaluation' of short sentences. They are of the view that the tendency to limit a sentence to the expression of one thought 'may result in an extremely fragmented text ...'. n60 They conclude by saying that the fragmentation of ideas flies in the face of a basic thought process to the extent that '[i]t decomposes ideas to the point of disintegrating them and altering their content'. n61

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 this task could be made easier 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, Ian Turnbull, acknowledges that plain language drafting is not a complete alternative to traditional style drafting. In his article, n62 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 precision must prevail over simplicity, as was the approach favoured by the Renton Committee. 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.

III. ALTERNATIVES TO PLAIN LANGUAGE

Aside from the calls for the adoption of plain language and for changes to the structure of legislation, there are many in favour of the adoption of a completely different style of drafting. Three distinct styles have been advocated: General principles drafting; Purpose/objects provisions; and, Drafting by reference.

(A) GENERAL PRINCIPLES DRAFTING

One of the main alternatives to drafting in plain language is the possibility of drafting in statements of general principle—often referred to as the 'European style of drafting'. n63 In short, the main feature of this style of drafting is that the drafter deliberately states the law in general principles and leaves the details to be filled in by the courts. The Renton Report quotes from the joint evidence of Lord Emslie and Lord Wheatley who were critical of the legislature's

attempts to draft in exhaustive terms and in doing so, they alluded to the benefits of drafting in general principle:

Most of the problems encountered by the courts flow directly from the tendency of Parliament to ignore the virtue of enacting broad general rules in which the principal and over-riding intention can be readily seen, and to try to legislate in detail for particular aspects of the mischief which presumably the statute intended to curb. It is an eternal truth that one can seldom foresee every combination of circumstances which may arise, and the practical consequences of attempting to do so and of drafting a statute so as to concentrate unduly on foreseen examples is more often than not to conceal the general intention ... n64

General principles drafting is the most favoured style of drafters in continental Europe. The Renton Committee made some observations on general principles drafting in their report: n65

the traditional approach in Europe has been to express the law in general principles, relying upon the courts ... to fill in the details necessary for the application of the statutory propositions to particular cases ... This approach appears to result in simpler and clearer primary legislation where detail is omitted, but equally it lacks the greater certainty which a detailed legislative application of the principles would provide.

The Renton Committee went on to say that while recognising that general principles drafting places a heavy responsibility on the legislature, they expressed a desire that this approach be 'adopted wherever possible'. n66

In *R. v. O'Connor* n67 the Supreme Court of Victoria, Australia were emphatic in their opposition to any moves towards general principles drafting, where they said:

... the legislation is couched in general terms which omit to make Parliament's intention clear and thus greatly increase the work of the courts. If Acts of Parliament are couched in general terms which do not make Parliament's intention clear much time is taken up in the courts by arguments as to the meaning of the section and how the court should apply it. Costs and delays are increased and injustice may follow ... n68

The court went on to say that its function was to interpret and apply the law, adding that '[t]he courts cannot be legislators'. n69 A further criticism of this style of drafting is that citizens would be displeased to see the legislative power held by elected representatives, being shifted to the judiciary.

Further judicial unease with the idea of the judiciary having to fill in the gaps in legislation was expressed by Lord Hailsham LC:

If the subject matter of the statute is so lacking in clear propositions, that the burden of ascertaining the meaning of the legislature is thrown completely onto the judges, this can only bring the judges and hence the law into the field of political controversy with consequent grave implications for the law itself and for the Constitution. n70

The adoption of a wide general principles style drafting in Ireland might be precluded, or at least be restricted in its effect by the doctrine of separation of powers which exists under the Constitution. n71 The adoption of this style of drafting is likely to encounter similar difficulties in other jurisdictions also. n72

In fact, some of the more measured proponents of plain language would contend that drafting in general principles is a method devoid of the clarity required of legislation. In contrast to the complicit role which the traditional style of drafting serves, general principles drafting considerably diminishes the role of the legislature—it is akin to the artist handing his oils, brushes and canvas to the curator of an art gallery and asking him to add the colours to his sketch.

One advocate of plain language counsels caution on the use of general principles drafting, he says:

So far as practicable a legislative instrument should contain sufficient details to enable persons affected by the legislation to ascertain the law and its consequences without the need to resort to expensive litigation. n73

The length and complexity of a particular piece of legislation tends to be reflective of the subject with which it is dealing. In circumstances such as this, general principles drafting would prove wholly inadequate. This method of drafting seems to pose far more questions than it answers, by delegating the intricacies of legislation to the court. Reading a piece of legislation drafted in this way will not be as informative as legislation drafted in the traditional way, as it will have to be read in conjunction with a collection of judgements. And case law is practically unattainable for the ordinary reader. It would render the law disjointed and incoherent. In practice, the true meaning of a piece of legislation could not be ascertained until a succession of points have been raised before the courts.

(B) PURPOSE/OBJECTS PROVISIONS

Irish legislation does not contain purpose provisions as such. However, each Irish statute contains a 'long title' at the beginning. This title effectively expresses the object of the Act and can be of assistance to both the reader and the courts in the interpretation of the legislation. In its report, the Irish Law Reform Commission, n74 found one of the only recent and rare examples of the use of a purpose provision in the Taxes (Consolidation) Act 1997. n75 Purpose provisions are becoming a more frequent feature of British legislation and are a standard feature in EU law.

Although practitioners are clearly divided on the efficacy of purpose provisions, n76 their use has the potential to avert many contentious disputes concerning interpretation. However, there is equal merit in the contention that in its passage through the legislature, a purpose provision might well become the vehicle for populist amendments. This could give rise to discrepancies between the actual meaning of the legislative provision itself and the potentially misleading impression given the purpose provision.

(C) DRAFTING BY REFERENCE

Another style within the broader plain language school is drafting by reference. This style of drafting involves applying a provision to one situation and then modifying it and applying it to another situation. Although the use of this approach throughout a piece of legislation would render it shorter, it can however be difficult for the reader to follow. For this reason it has been the subject of considerable criticism. n77

IV. PLAIN LANGUAGE-THE WAY FORWARD?

The adoption of plain language appears to have worked particularly well in situations where there is a high degree of interface between consumers and documents such as standard form contracts, insurance policies etc. which have a substantive legal element. It seems that plain language is best suited to situations such as this where ordinary citizens are directly concerned with the legal aspects of a document. However, the question as to what degree plain language can realistically be adopted in the context of legislative drafting really remains to be seen.

A variety of initiatives have been taken in different countries. The Irish position on plain language has been the subject of considerable scrutiny by the Law Reform Commission. In its recent report entitled 'Statutory Drafting and Interpretation: Plain Language and the Law', n78 the Commission advocates the adoption of a number of key policies in this area. n79 As its title would suggest, a substantial portion of this Report is concerned with statutory interpretation. On the question of plain language, the Report is measured in its tone and proposes moderate reforms. The LRC report makes seventeen well-considered recommendations and observations. This Report seems destined to be far more fully implemented than the Renton Report has been in Britain. In fact, some ten years after the launch of the Renton Report, Lord Renton noted that only half of the conclusions of the Renton Report n80 had been implemented, and in rather disenchanted tones he added: 'I venture to mention that the Australian Parliament has stolen a march on the Mother of Parliaments by implementing more of it than we have done.' n81 Amongst other proposals, the Commission recommended that a programme of reform of Irish law be embarked upon with a view to expressing the law in plain language. n82 It also advocated the use of familiar vocabulary and the use of shorter sentences. However, fundamental to the Commission's recommendations in this regard is its caveat that 'Plain language should never be utilised at the expense of legal certainty ...'. n83 The publication of this Report was welcomed by the Office of the Parliamentary Counsel to the Government who have already moved to incorporate many of the Commission's proposals in this area into its Drafting Manual. n84 While the adoption of policies such as the use of familiar vocabulary, shorter sentences and the use of the active rather than the passive voice will make Irish legislation more readable, it is clear that a more radical approach towards the adoption of a plain language policy is required in order to bring plain language legislation to fruition.

In Denmark, the difficulty with the unintelligible nature of its laws from its citizen's perspective was first discussed by Parliament in 1890. n85 A committee was then established so that all bills would be examined with a view to ensuring that the language used was intelligible. However, in the absence of any significant achievements, the committee was dissolved in 1918. However, a more recent initiative in Denmark was taken in 1969 (and supplemented in 1987) with the issuing of a set of guidelines dealing with the language in acts. Despite this, one commentator protests that 'legal rules are still written in a style far from the language of the common man'. n86

In the UK the Renton Committee was established to review the form of Bills drafted, with a view to achieving greater simplicity. n87 In its 1975 Report, the Committee expressed 121 conclusions, eighty-one of which were recommendations. Ten years after the publication of the Report, Lord Renton commented on how relatively little of it had

been implemented. n88

In Sweden, the Legal and Linguistic Division of the Ministry of Justice reviews all draft statutes so as to ensure that plain language is being used; n89 whereas in Slovenia, also a civil law jurisdiction, the drive towards plain language has not arisen to great extent as that country has been drafting in relatively straightforward language since its independence just over ten years ago.

In recent years, both the Parliamentary Counsel of Queensland and of New South Wales have responded favourably to the drive for the adoption of plain language. n90 In 1985, the Attorney General for the Australian State of Victoria proclaimed that all legislation in Victoria must be drafted in plain English. Two years later, the Law Reform Commission of Victoria produced a report, n91 a drafting manual and some plain English versions of some legislation and a selection of legal documents. The report states that statutes and also other legal documents can and should be written in plain English. Having adopted plain English drafting, the State of Victoria has amended the Acts Interpretation Act, by inserting section 15AC which I have set out earlier.

As a precursor to any proposed change in drafting style, various jurisdictions have commissioned reports on these and related topics. One thing which is clear is that any significant change in the style of drafting—be it plain language, general principles, or otherwise—will require that the rules governing interpretation also undergo something of a transformation. What is clear is that if plain language or even simplification of legislation is to happen it must be matched by the same level of commitment as that given to this cause by people at all levels in the private sector.

V. COMMUNICATION OF THE CONTENT OF LAW: EXPLANATORY MATERIALS

Where it is established that the primary audience of legislation is not laypersons, the benefits of adopting plain language lose considerable weight. However, this in no way suggests that the lay person is ambivalent as to the content and effect of the law. It is in this context that the focus should then turn to establishing some kind of formalised structure to effect the dissemination of the content of laws in ways which take cognisance of the citizens' needs and abilities. Dissemination of the meaning of the law is the real way in which we can serve the needs of the citizens, not through distracting stratagems.

In Denmark, as well as other countries, legislation often contained a requirement that it be read out in the streets or that it be available in a specific place—such as a church. n92 There was a requirement that some legislation be read from the pulpit, but as this method of communication grew, it had to be curtailed as it was regarded as interfering with the spirit of the ceremonies. It seems that in Sweden, the official proclamation of laws was carried out in churches until 1894 when the law gazette took over this role.

In 1870, the Danish Parliament established a law gazette and this is the forum used to announce and publish the full text of laws passed. This is done in compliance with the obligation under Article 22 of the Danish Constitution. The gazette was initiated on the belief that it would be a means by which citizens would read of legislative developments. A similar channel of communication exists under EU law. Once passed, EU legislation cannot come into force until notice has been published in the Official Journal.

In Ireland there is a requirement that the fact of a Bill having been signed into law by the President appear in the State's official journal. n93 This requirement arises from Article 25.4.2 of the Constitution of Ireland. n94 The Constitution does not in any way direct the dissemination of the legislation which has been passed. Each Bill is accompanied by an Explanatory Memorandum which is prepared by the Government Department sponsoring the Bill. It sets out in non-legal terms a summary of the object of the legislation and the general effect of each provision as it stood on the initiation of the Bill. However, the explanatory memoranda are not revised to reflect changes made to the Bill during its passage through Parliament. The explanatory memoranda are available on the Government web site and are also available for purchase. However, they are not directed solely at members of the public.

The diffusion of the law in Ireland is not as formal as it might be. Unfortunately, there is no centralised body with responsibility for communicating the content of the law to the citizens. Consequently, the diffusion role is played by a number of different groups entirely at their own discretion, ranging from state bodies, n95 to various interest groups. n96 The dissemination of the law as carried out by these bodies tends to take the form of information leaflets, public announcements, and, in the case of commercially oriented interest groups, briefings to members.

Some would contend that a truly democratic society is one in which its laws are binding on all of its citizens only after those laws have been publicly announced or distributed. Is the validity and enforcement of our laws dependent on

the ability of everyone to understand those laws? In an ideal world, the answer is likely to be 'yes'. However, in reality, the answer is a firm 'no' and this is borne out in practice. It is clearly beyond the bounds of reasonableness to require that laws be understood by all members of the public before such laws may be said to be enforceable. In his paper entitled 'Clear Legislation', n97 Grard Caussignac recognises that drafting legislation which will be comprehensible to everyone is an unattainable ideal but adds that 'this is an ideal that, as far as we possibly can, we should attempt to attain'. n98

A further issue of concern is the well known principle—ignorance of the law is no excuse. n99 This principle derives its origins from Roman Law, at a time when laws were considerably less complex and citizens were actively informed of legislative developments. n100 In Denmark, information leaflets on the content of particular pieces of legislation are distributed through the public libraries. This method of distribution is believed to reach many citizens. In contrast to this, in societies where the law or the meaning of the law is not available, or has not been disseminated (as is the case in many countries), the vast majority of its ordinary citizens will, in reality, be plainly unaware of the great body of law produced by its legislature on an on-going basis. How then, in circumstances such as these, can the application of this maxim be sustained in any truly democratic society? If a court were to find that the turgid language of a piece of legislation had the effect of depriving a member of the public from ascertaining its affect, this could have grave consequences for any democracy. One means of avoiding such consequences is to provide the public with a document explaining the effect of legislation in simple and straightforward terms.

Bennion has expressed the view that the dissemination of the meaning of our laws is a function as distinct from that of drafting. This view is also shared by Peter Blume n101 who proposes that the meaning 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 meaning 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:

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. n102

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 20th 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, n103 their desire and need to familiarise themselves with the intricacies of raw legislation has waned considerably.

VI. CONCLUDING REMARKS

The language of our legislation cannot be reduced to baby talk for consumption by the masses. Professor Bates n104 has suggested that drafting in plain language is subject to at least two fundamental constraints—the first being 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. The second constraint which he identifies is the actual nature of legislation itself, saying that: 'Statutes impose rights and obligations and the public is entitled to expect those rights and obligations to be stated precisely'. n105 This point was succinctly expressed by the then UK First Parliamentary Counsel n106 in a memorandum submitted to the Select Committee on the Modernisation of the House of Commons: n107

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.

Attaining precision and accuracy is made even more difficult in legislative drafting because legislation is often drafted so as to regulate future events, the precise nature and effect of which may not be apparent at the time of drafting. The attainment of precision and accuracy occasionally gives rise to the need for the use of difficult language.

Plain language, simplification, and all the other novel suggestions, are not the panaceas that some of the more enthusiastic proponents would have us believe. Some considered thoughts offered by The Hon Mr Justice Nazareth should be borne in mind:

Too much should not be expected in the way of simplification. Many of the improvements mentioned have long been effected in some jurisdictions. They have neither stilled the complaints nor simplified the statute book significantly. n108

There is a need to recognise that the principal function of a drafter is to enshrine policy in an accurate and precise manner. Secondly, there is a need to 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 the law in question.

There is a clearly established need for the adoption of more reader friendly language in legislation to achieve the level of regulatory quality of which the OECD speak so often. n109 Perhaps the answer to resolving the conflict between the need for clarity and the need for comprehensive statements of complex issues lies in the making available of high quality, informative explanatory materials.

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FOOTNOTES:

n1 Dip LS, BA, MLitt, Dip LS, Dip Int Arb, ACI Arb. Research Officer, Office of the Parliamentary Counsel to the Government, Ireland. I am grateful to Kieran Mooney, Edward Donelan and Dalton Tattan for their helpful comments on a draft of this article. The views expressed are personal and do not necessarily reflect the views of the Office of the Parliamentary Counsel to the Government.

n2 Banks, insurance companies, telephone companies, and a wide range of other service providers, including state bodies, have made a determined effort to use plain language on their standard form contracts, application forms etc. See further, J. Kimble, 'Writing for Dollars, Writing to Please' (1966-97) 6 *Scribes J. Legal Writing*. Also available at www.plainlanguagenetwork.org/kimble/dollars.htm

n3 In 1978 US President Carter signed an order which directed that regulations should be as simple and clear as possible. In June, 1998 the US President, Bill Clinton issued a memorandum on plain language, setting a deadline for the use of plain English in many of the Government's new documents.

n4 Spring Yuen-Ching Fung, 'The Rise and Fall of the Proviso' (1997) 18 *Stat. LR* 104; D. Berry, 'A Content Analysis of Legal Jargon in Australian Statutes' (*Clarity* 33, London) 26.

n5 P. Blume, 'The Communication of Legal Rules' (1990) 11 *Stat. LR* 189 at 199.

n6 *The Preparation of Legislation* (London, 1975) Cmnd. 6053 at para. 2.4.

n7 *Ibid.*, at para. 2.8.

n8 In the intervening period between this change, some legislation was drafted in Anglo-Norman.

n9 R.C. Wydick, 'Plain English for Lawyers' (1978) 66 *California Law Review* 727.

n10 I.M.L. Turnbull, 'Clear Legislative Drafting: New Approaches in Australia' (1990) 11 *Stat. LR* 161.

n11 See further: J. Erasmus 'Plain Language Drafting Meets Interpretative Principles and Rules: A Drafter's Perspective' a paper delivered at the Conference of the Canadian Institute for the Administration of Justice, Ottawa, 9-10 November, 1998.

n12 The 1974 edition of E. Driedger, *The Construction of Statutes* (Butterworths, Toronto: 1974) 104. In the 1994 edition of Driedger on the Construction of Statutes (3rd edn) (Butterworths, Toronto: 1994), Professor Ruth Sullivan says that in Canada, the presumption of substantive change in circumstances such as these is weak and easy to rebut.

n13 P. Ct, *The Interpretation of Legislation in Canada* (2nd edn) (Toronto: 1991).

n14 See further: L.S. Ede & A.A. Lunsford, 'Audience Addressed/Audience Invoked: The Role of Audience in Composition Theory and Pedagogy' (1984) 35(2) *College Composition and Communication*.

n15 P. Rodney, 'Legislative Drafting Style' paper delivered at 'Legislative Drafting—Emerging Trends' conference 6–7 October 2000 Dublin, Ireland.

n16 D. Murphy, 'Plain Language in a Legislative Drafting Office' (*Clarity* 33, London) 3.

n17 The predominant function of the drafter being to articulate the policy as instructed by the government department.

n18 F. Bennion, *The Times*, 1 February 1994.

n19 F. Bennion, 'Don't Put the Law into Public Hands' *The Times*, 24 December 1995.

n20 K.A. Schriver, *Dynamics in Document Design* (John Wiley & Sons, New York: 1997). See also R. Sullivan, 'Some Implications of Plain Language Drafting' paper delivered at 'Legislative Drafting—Emerging Trends' conference 6–7 October 2000, Dublin, Ireland.

n21 D. Berry, 'Audience Analysis in the Legislative Drafting Process' (June 2000) *The Loophole* 61. Also available at www.opc.gov.au/calc/docs/calc-june/audience.htm

n22 *Ibid.*, at 6.

n23 R. Sullivan, 'Some Implications of Plain Language Drafting' paper delivered at 'Legislative Drafting—Emerging Trends' conference 6 October 2000, Dublin, Ireland where she says, at 14: 'Plain language drafting also tries to accommodate the tendency of members of 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.'

n24 J. Stark, 'Should the Main Goal of Statutory Drafting be Accuracy or Clarity', (1994) 15 *Stat. LR* 205 at 210.

n25 G. Gopen, 'Let the Buyer in the Ordinary Course of Business Beware: Suggestions for Revising the Prose of the Uniform Commercial Code' 54 *U Chi LR* 1178.

n26 J. Stark, 'Reader Expectation Theory and Legislative Drafting', (1996) 17 *Stat. LR* 210.

n27 Hon Mr Justice Nazareth, 'Legislative Drafting: Could Our Statutes be Simpler?' (1987) *Stat. LR* 81 at 92.

n28 Sir Patrick Mayhew, 'Can Legislation Ever be Clear, and Certain?', (1990) 11 *Stat. LR* 1.

n29 With reference to the First Parliamentary Counsel's evidence to the Renton Committee at para. 10.6.

n30 *The Preparation of Legislation*, (London, 1975) Cmnd. 6053 at para. 11.5.

n31 *Merkur Island Shipping Corp v. Laughton* [1983] AC 570 at 595.

n32 '... 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.'

n33 I. Turnbull, 'Legislative Drafting in Plain Language and Statements of General Principle' (1997) 18 Stat. LR 21 at 22.

n34 *Davy v. Leeds Corporation* [1964] 1 WLR 1218, 1224.

n35 Described as 'drafting by fear' by Jim Kennan, former Attorney-General of the State of Victoria, Australia in a statement made to the Victorian Legislative Council in May 1985.

n36 *The Preparation of Legislation*, (London, 1975) Cmnd. 6053 at para. 6.5.

n37 [1981] AC 251 at 280.

n38 [1970] AC 642.

n39 [1891] 1 QB 149.

n40 *Ibid.*, at 167-68.

n41 *The Preparation of Legislation*, (London, 1975) Cmnd. 6053 at para. 7.5.

n42 One such opponent being J. Stark, 'Should the Main Goal of Statutory Drafting be Accuracy or Clarity', (1994) 15 Stat. LR 205.

n43 As highlighted in I. Turnbull, 'Legislative Drafting in Plain Language and Statements of General Principle' (1997) 18 Stat. LR 21 at 27.

n44 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.

n45 E. Sutherland, 'Clearer Drafting and the Timeshare Act 1992: A Response from Parliamentary Counsel to Mr Cutts', (1993) 14 Stat. LR 163.

n46 F. Bennion, 'Don't Put the Law into Public Hands' *The Times*, 24 December 1995.

n47 I. Turnbull, 'Legislative Drafting in Plain Language and Statements of General Principle' (1997) 18 Stat. LR 21 at 25.

n48 M. Cutts 'Plain English in the Law' (1996) 17 Stat. LR 50.

n49 Law Reform Commission of Victoria, 'Plain English and the Law' (1987).

n50 *Ibid.*, at 49.

n51 An example of this flippancy may be found in P. Rodney, 'Legislative Drafting Style' paper delivered at 'Legislative Drafting-Emerging Trends' conference 6-7 October 2000 Dublin, Ireland. 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 UK, entitled 'Plain English and the Law' (1985) Stat. LR 139-where he suggests that ridicule is a useful means of promoting the use of plain language. This ridicule manifests itself in the annual Plain English Awards and the Golden Bull Awards which are awarded to the 'six worst examples of gobbledegook'.

- n52 Hon Mr Justice Nazareth, 'Legislative Drafting: Could Our Statutes be Simpler?' (1987) Stat. LR 81 at 92.
- n53 F. Bennion, 'Don't Put the Law into Public Hand' The Times, 24 December 1995.
- n54 J. Kimble, 'Answering the Critics of Plain Language' (1994-95) 6 Scribes J. Legal Writing. Also appears at www.plainlanguage.gov/library/kimble.htm
- n55 See further, Benson Barr et al., 'Legalese and the Myth of Case Precedent' (1985) 64 Mich. BJ 1136; S.M. Johanson, 'In Defence of Plain Language' (1992) 3 Scribes J. Legal Writing 37.
- n56 As suggested by D. Berry 'Legislative Drafting: Could Our Statutes be Simpler?' (1987) Stat. LR 92 at 96.
- n57 Former UK First Parliamentary Counsel.
- n58 The Preparation of Legislation (London, 1975) Cmnd. 6053 at para. 11.9.
- n59 Legac & Tremblay, 'The Fragmentation of Ideas: A Current Form of Legislative Deconstruction' published in R. C. Bergeron (ed.), Essays on Legislative Drafting (Ottawa, 1999) 129.
- n60 Ibid., at 132.
- n61 Ibid., at 144.
- n62 I. Turnbull, 'Legislative Drafting in Plain Language and Statements of General Principle' (1997) 18 Stat. LR 21 at 25.
- n63 See further: I. Turnbull, 'Plain Language and Drafting in General Principles' (July 1995) The Loophole 25.
- n64 The Preparation of Legislation, (London, 1975) Cmnd. 6053 at para. 6.5.
- n65 Ibid., at para. 9.14.
- n66 Ibid., at para. 10.13.
- n67 [1987] VR 496.
- n68 Ibid., at 499.
- n69 Ibid., at 500.
- n70 In his address to the Statute Law Society-Rt Hon Lord Hailsham of St Marylebone, 'Addressing the Statute Law' (1985) Stat. LR 4 at 7.
- n71 In particular, Article 15.2.1 of the Irish Constitution (officially called Bunreacht na hEireann) which reads: 'The sole and exclusive power of making laws for the state is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State.'
- n72 The Supreme Court of Victoria alluded to this difficulty in R v. O'Connor [1987] VR 496 where it said 'The courts cannot be legislators'.
- n73 D. Berry, 'Legislative Drafting: Could Our Statutes be Simpler?' (1987) Stat. LR 92.
- n74 Statutory Drafting and Interpretation: Plain Language and the Law (LRC 61-2000) at para. 6.32.

n75 Section 806(3) reads: 'This section shall apply for the purpose of preventing the avoidance by individuals ordinarily resident in the State of liability to income tax by means of transfers of assets by virtue or in consequence of which either alone or in conjunction with associated operations, income becomes payable to persons resident or domiciled out of the State.'

n76 The Law Reform Commission, *Statutory Drafting and Interpretation: Plain Language and the Law* (LRC 61-2000) at paras. 6.34 & 6.35.

n77 See further: Renton Committee, *The Preparation of Legislation* (London, 1975) Cmnd. 6053 at para. 11.27.

n78 LRC 61-2000.

n79 The Report has been the subject of some commentary by interested parties: 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 April 2000; M. Bourke 'Report's Backing for Wider Use of Plain English in Law is in Interest of Justice' *Irish Times*, 28 May 2001; M. King, 'Statutes and Limitations' (August/September 2001) *Law Society Gazette* 26.

n80 *The Preparation of Legislation* (London, 1975) Cmnd. 6053.

n81 'Renton Report's Tenth Birthday' (editorial) (1985) *Stat. LR* 60.

n82 LRC 61-2000, at p. 76.

n83 *Ibid.*

n84 The Drafting Manual is now available to Parliamentary Counsel and also to Advisory Counsel within the Office of the Attorney General.

n85 See further, P. Blume, 'The Communication of Legal Rules' (1990) 11 *Stat. LR* 189.

n86 *Ibid.*, at 200.

n87 *The Preparation of Legislation* (London, 1975) Cmnd. 6053 at para. 1.1.

n88 Remarks made by Lord Renton at a reception to mark the Report's tenth anniversary. His remarks are reported at 'The Renton Report's Tenth Birthday' (1985) *Stat. LR* 60.

n89 B. Ehrenberg-Sundin, 'Plain Language in Sweden' (*Clarity* 33, London) at 16.

n90 Office of the Queensland Parliamentary Counsel, *Annual Report 1992-93* (1993) at 2-3; Parliamentary Counsel's Office & Centre for Plain Legal Language, 'A Discussion Paper: Review and Redesign of New South Wales Legislation' (1994) 3 at 9.

n91 *Plain English and the Law*, Report No. 9 (June 1987).

n92 See further: P. Blume, 'The Communication of Legal Rules' (1990) 11 *Stat. LR* 189.

n93 This journal is called *Iris Oifigiúil* in the Irish language.

n94 Officially called *Bunreacht na hÉireann* in the Irish language.

- n95 Such as the Office of the Director of Consumer Affairs.
- n96 Such as the Licensed Vintners Federation, Irish Council for Civil Liberties.
- n97 G. Caussignac 'Clear Legislation' published in R.C. Bergeron (ed.), *Essays on Legislative Drafting* (Ottawa: 1999) 109.
- n98 *Ibid.*, at 110.
- n99 *Ignorantia leges non excusat.*
- n100 Fritz Schultz, *Principles of Roman Law* (Oxford, 1936).
- n101 P. Blume, 'The Communication of Legal Rules' (1990) 11 *Stat. LR* 189.
- n102 *Ibid.*, at 209.
- n103 Such as governments' Internet web sites setting out legislation, or a fully searchable set of legislation on CD-ROM.
- n104 T. St J. N. Bates, 'Drafting for the User of Legislation' published in R.C. Bergeron (ed.), *Essays on Legislative Drafting* (Ottawa: 1999) 77.
- n105 *Ibid.*, at 78.
- n106 Sir Christopher Jenkins.
- n107 First Report 'The Legislative Process' House of Commons Session 1997-98 (Cmnd. 190).
- n108 Hon Mr Justice Nazareth, 'Legislative Drafting: Could Our Statutes be Simpler?' (1987) *Stat. LR* 81 at 92.
- n109 For example, 'Today, quality regulation is crucial for government effectiveness. Member countries have, as a consequence, increased their attention to the quality of regulatory instruments. More broadly, they have also focused on the functioning of the administrative processes through which regulations are developed, implemented, adjudicated, and revised. Concerns about regulatory quality have emerged at national and sub-national levels of government, and also at international levels, as international bodies increasingly set rules or co-ordinate national regulations to address problems that cross national borders.' Background Note to the OECD Reference Checklist for Regulatory Decision-Making, published as Appendix 2 in 'Recommendation on Improving the Quality of Government Regulation' which may be found at www.oecd.org/puma/regref/pubs/rco95/backgr.htm

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