

1/10/3

CONSTITUTIONAL ASSEMBLY

PLAIN LANGUAGE WORKSHOP

DOCUMENTATION

**IT IS ENOUGH FOR MOST
LEGAL DOCUMENTS TO
CONTAIN GOOD PROSE;
A CONSTITUTION MUST
ASPIRE TO POETRY.**

CONSTITUTIONAL ASSEMBLY, REPUBLIC OF SOUTH AFRICA

Presentation to

**The Constitutional Assembly
Republic of South Africa**

By

Philip A. Knight, LL.B.

Agenda

	Minutes
What is plain language ?	5
Why is plain language important ?	5
What does it mean to draft plainly ?	10
Drafting tools	5
But, does it really work ?	15
Ideals of constitutional language	15
Considering the draft Bill of Rights	30



Plain language is ...

- ◆ A clearer and simpler writing style.
- ◆ Writing from the reader's point of view.
- ◆ Easier for people to read and use.
- ◆ More effective, because readers understand what you write.
- ◆ More efficient, because readers understand more quickly.
- ◆ An important part of creating a justice system that people can access, use, and respect.

CONSTITUTIONAL ASSEMBLY, REPUBLIC OF SOUTH AFRICA



Plain language is important to justice . . .

- ◆ By making the language of law clear to all, we show that ordinary people and professionals have equal value before the law.
- ◆ Clear laws will be reflected in clearer regulations, forms, guide books, pleadings, briefs, debates, and decisions.
- ◆ Clear laws are easier to explain to people who cannot read the law for themselves.
- ◆ Clarity allows people to visualize themselves as subjects of the law.

CONSTITUTIONAL ASSEMBLY, REPUBLIC OF SOUTH AFRICA

Plain language legal drafting . . .

- ◆ Balances the demands for certainty and clarity.
- ◆ Respects and clarifies established legal meaning.
- ◆ Enhances legal certainty.
- ◆ Reduces administrative problems and costs.

CONSTITUTIONAL ASSEMBLY, REPUBLIC OF SOUTH AFRICA

Drafting in plain language means . . .

- ◆ **Organize the whole law, and each part of the law, in a way that makes sense - from your reader's point of view.**
 - ◆ Place the most important topics first.
 - ◆ Similar subjects should be clustered together.
 - ◆ Present general statements, then conditions and specific cases, then exceptions.

CONSTITUTIONAL ASSEMBLY, REPUBLIC OF SOUTH AFRICA

Drafting in plain language means . . .

- ◆ **The voice of the law should be either -**
 - ◆ **Mandatory** (use "must" to impose a duty);
 - ◆ **Permissive** (use "may" to confer a power);
 - ◆ **Prohibitive** (use "may not" to forbid an action);
 - ◆ **Declaratory** (use "to be" to state a fact).
- ◆ **Consider -**
 - ◆ *Every person shall have the right . . .*
 - ◆ **Is this a prediction, a promise, a power, or a duty?**

CONSTITUTIONAL ASSEMBLY, REPUBLIC OF SOUTH AFRICA

Drafting in plain language means . . .

- ◆ The law should be active rather than passive.
- ◆ The law should clearly name those who bear a duty under the law.
- ◆ Consider -
 - ◆ All dogs shall be kept on a leash in the park.
 - ◆ A child shall undergo vaccination by age six.
 - ◆ The car shall come to a full stop before entering the intersection.
 - ◆ The payment shall be received before the first day of the month.

CONSTITUTIONAL ASSEMBLY, REPUBLIC OF SOUTH AFRICA

Drafting in plain language means . . .

- ◆ The law must speak to all citizens equally. It must be gender-free.
- ◆ As much as possible, the law should be expressed in ordinary words used in their ordinary meanings.
- ◆ The law should be expressed in reasonably short sentences.

CONSTITUTIONAL ASSEMBLY, REPUBLIC OF SOUTH AFRICA

Just this . . .

- ◆ (1) The Fundamental Rights and Freedoms conferred by this chapter may not be abridged or abolished by -
 - ◆ (a) any law made by Parliament or any subordinate authority; or
 - ◆ (b) any action of the Executive or any agency of Government.
- ◆ (2) A competent Court may either-
 - ◆ (a) declare that a law or action that contravenes, abridges, or abolishes any of the Fundamental Rights and Freedoms conferred by this chapter is partly or entirely invalid; or
 - ◆ (b) grant the impugned law or action temporary validity on any conditions for a specified time to allow Parliament, the subordinate authority, the Executive, or the concerned agency of Government to change the impugned law or action so that it no longer contravenes, abridges, or abolishes any Fundamental Right or Freedom conferred by this chapter.

CONSTITUTIONAL ASSEMBLY, REPUBLIC OF SOUTH AFRICA

Plain language drafting tools

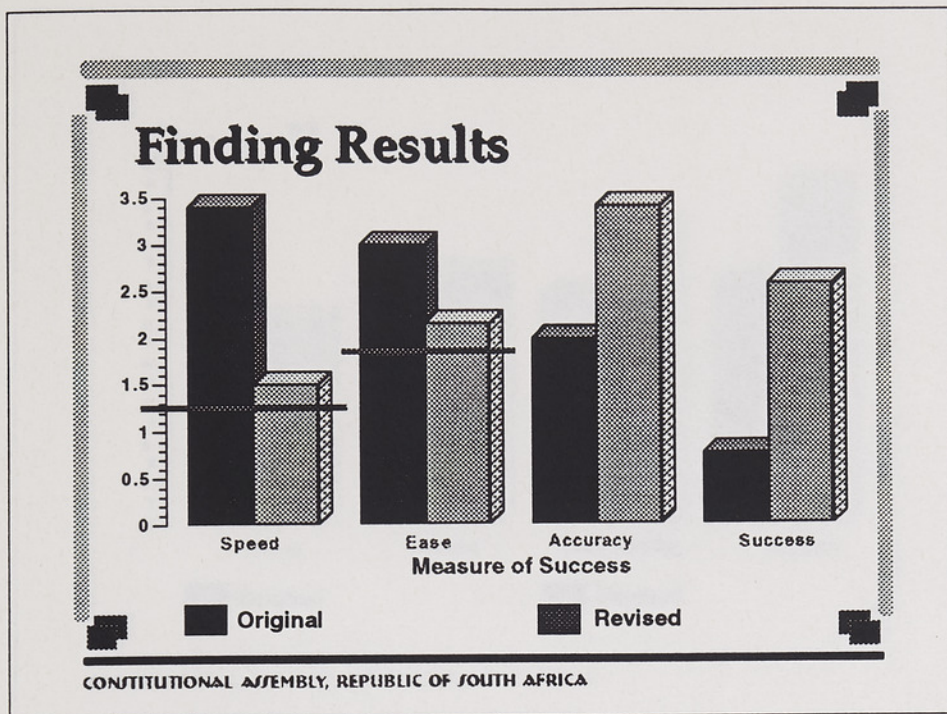
- ◆ **Sentence Structure**
 - ◆ Use the "Subject - Verb - Object" form.
 - ◆ Present familiar information before new information or ideas.
 - ◆ Fly, but not like a butterfly.
 - ◆ Use the active voice, unless there is a reason for the passive.
 - ◆ Introduce conditions with single words (if, when, etc.)
 - ◆ Put multiple conditions or functions in a point form list.
 - ◆ Remove excessive cross referencing.
 - ◆ Make multiple negatives positive.
- ◆ **Word choice**
 - ◆ Prefer verbs to their abstract noun counterparts.
 - ◆ "I applied" rather than "I made application".
 - ◆ Remove excess words and unnecessary detail.
 - ◆ Avoid legalese, archaic words, Latin, and jargon.

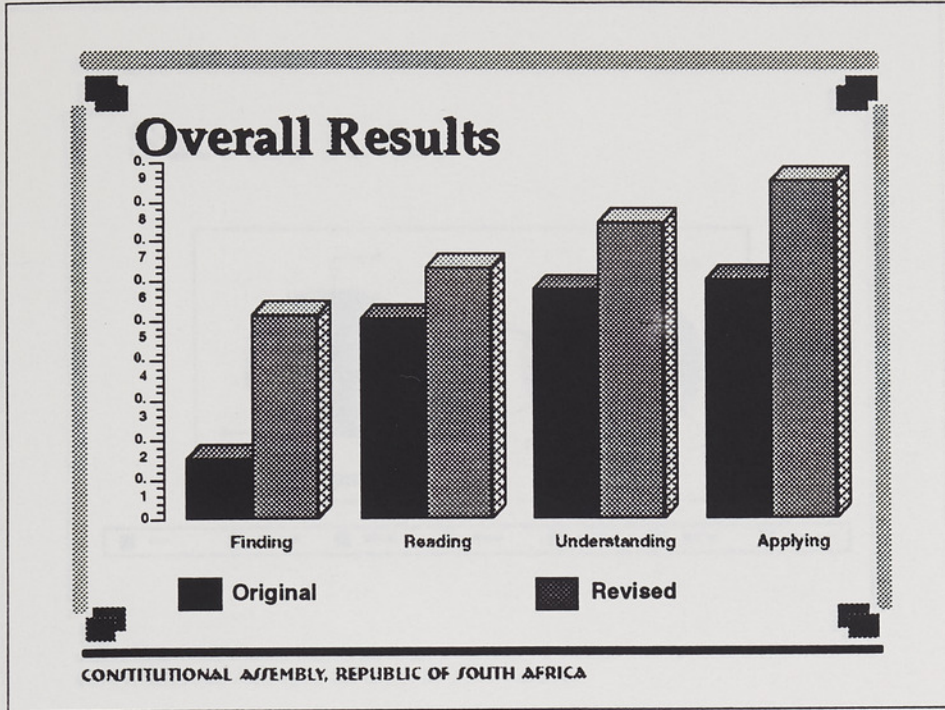
CONSTITUTIONAL ASSEMBLY, REPUBLIC OF SOUTH AFRICA

Test: The Human Rights Commission Act

- ◆ **Finding**
 - ◆ Each person asked to perform 5 searches in which they had to locate and identify a section of the Act that dealt with a specified subject.
- ◆ **Reading**
 - ◆ Each person asked to replace missing words from the text of 5 sections of the Act.
- ◆ **Understanding**
 - ◆ Each person asked to read and paraphrase five sections of the Act.
- ◆ **Applying**
 - ◆ Each person asked to solve five "scenario" problems.

CONSTITUTIONAL ASSEMBLY, REPUBLIC OF SOUTH AFRICA





Summary of Results

- ◆ The original form of the statute works poorly. Certain South African readers had modest success with it, namely -
 - ◆ People whose first language is English, and
 - ◆ People who have university education.
- ◆ The revised (plain language) form of the statute worked 5 times better on average for the whole test group.
 - ◆ Failure rate was reduced 90%
 - ◆ Passing Grade rate was increased 400%
 - ◆ The revised text was easier to use, and people had better success with it, regardless of -
 - ◆ First Language
 - ◆ Level of Education
 - ◆ General ability with texts.
 - ◆ The English language, university educated group did best with the revised text.

CONSTITUTIONAL ASSEMBLY, REPUBLIC OF SOUTH AFRICA

Plain Language ...

- ◆ Improves access to the law for ordinary citizens.
- ◆ Increases equality of access to the law because it overcomes personal disadvantages of -
 - ◆ Birth language
 - ◆ Education
 - ◆ Literacy

CONSTITUTIONAL ASSEMBLY, REPUBLIC OF SOUTH AFRICA

**THE LANGUAGE OF A
CONSTITUTION MUST SATISFY
NOT ONLY THE REQUIREMENTS
OF ACCURACY, BREVITY, AND
CLARITY, BUT ALSO THE TEST
OF BEAUTY AND INSPIRATION.**

CONSTITUTIONAL ASSEMBLY, REPUBLIC OF SOUTH AFRICA



**THERE IS NO PASSION ON EARTH
LIKE THE PASSION TO EDIT
ANOTHER PERSON'S DRAFT.**

CONSTITUTIONAL ASSEMBLY, REPUBLIC OF SOUTH AFRICA

Write accurately & respect the law

- ◆ Page 8, section 9, Option 1, para 1.
- ◆ Every person including the press and other media shall have the right to freedom of speech . . .
 - ◆ In common language, "the press and other media" denotes a set of concepts, not entities.
 - ◆ Does your law recognise these as entities having legal personality?
- ◆ Every person has freedom of speech and expression, including -
 - ◆ freedom of the press and other media; and
 - ◆ freedom to receive and impart information and ideas.

CONSTITUTIONAL ASSEMBLY, REPUBLIC OF SOUTH AFRICA

Write Unambiguously

- ◆ Page 8, Section 10
- ◆ Every person shall have the right to assemble and demonstrate with others peacefully and unarmed, and to present petitions.
 - ◆ Does "peacefully and unarmed" modify "others" or "every person"?
 - ◆ Does it apply to assembly and demonstration, or just one?
- ◆ Every person may -
 - ◆ Assemble peacefully and unarmed;
 - ◆ Demonstrate peacefully and unarmed with others; and
 - ◆ Present petitions.

CONSTITUTIONAL ASSEMBLY, REPUBLIC OF SOUTH AFRICA

Be Accurate, Direct and Strong

- ◆ Page 11, Section 17, Option 1
- ◆ Every person shall have access to all information held by any organ of State.

◆ Direct?



◆ Active, strong, and short but robust?



◆ Declaratory ?



◆ Accurate?



CONSTITUTIONAL ASSEMBLY, REPUBLIC OF SOUTH AFRICA

Clarity and Brevity - Sentence organisation

- ◆ Between the front end of the verb, and its tail end and the object -
 - ◆ Lie 46 words, representing 50% of the sentence,
 - ◆ Containing 4 distinct thoughts,
 - ◆ requiring calculations of numbers,
 - ◆ and requiring an knowledge of the legal concept of a "court date".
- ◆ Only the most extraordinarily mentally agile reader can hope to hold the opening thought while sorting through the codswallop of administrative detail that found its way like a cancer into the heart of this fundamental right.

CONSTITUTIONAL ASSEMBLY, REPUBLIC OF SOUTH AFRICA

Clarity and Brevity - Sentence organisation

- ◆ **Subject ...** Every person
- ◆ **Verb ...** has the right, within 48 hours of being arrested,
- ◆ **Object ...** to be released, or be brought to a court of law and while there, to be either charged or informed of a reason for the detention to continue.
- ◆ **Exception ...** If the court is not in session within 48 hours of an accused person being arrested, that accused person may be detained until the next day that the court is in session.

CONSTITUTIONAL ASSEMBLY, REPUBLIC OF SOUTH AFRICA

Clarity - Use common words so the common people will know their rights

- ◆ Page 4, section 2, para 4
- ◆ **Prima facie** proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that section, until the contrary is established.
 - ◆ "When I see stuff like that, it is like one of those 3-D pictures in shops. If you know how to look at it right, you see the picture, otherwise it is just a mess."
- ◆ Discrimination on any of the grounds listed in subsection 2 is presumed to be unfair, unless a fair reason for the discrimination can be established.

CONSTITUTIONAL ASSEMBLY, REPUBLIC OF SOUTH AFRICA

Inspired and Inspiring

- ◆ **The majesty of the law and the Constitution**
- ◆ **Japan, 1947**
 - ◆ Government is a sacred trust of the people, the authority for which is derived from the people, the powers of which are exercised by the representatives of the people, and the benefits of which are enjoyed by the people.
 - ◆ Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation . . .

CONSTITUTIONAL ASSEMBLY, REPUBLIC OF SOUTH AFRICA

Inspired and Inspiring

◆ Use elegant language

◆ Every citizen has the right to vote in secret, in free, fair, and regular elections.



◆ Every citizen has the right to a passport, and every person has the right to leave the Republic.



◆ Every citizen has the right to form, participate in the activities of, and recruit members for, any political party.



◆ Compare these to page 23, section 29, para 2.



CONSTITUTIONAL ASSEMBLY, REPUBLIC OF SOUTH AFRICA

A note on preambles

- ◆ **The magic lies in the symbols and the structure.**
 - ◆ Who . . . invoking a sense of association, membership, identity.
 - ◆ Why . . . invoking a sense of history and hope.
 - ◆ What . . . invoking a sense of purposeful change.

CONSTITUTIONAL ASSEMBLY, REPUBLIC OF SOUTH AFRICA

