A movement to simplify legal language

Patron: Lord Justice Staughton

No 40: August 1997

Contents

Annual meeting

The annual meeting will be held in Cenral London on Saturday morning, November 15th. The venue will be arranged in September and will be announced in the October newsletter.

The timetable is:

Formal business &discussion of CLARITY issues:	10.30
Coffee break:	11.15
Talk by His Honour Judge Paul Collins of Wandsworth County Court: *Clarity in pleadings in the light of the Woolf report*	11.30
Questions and discussion:	12.00
Casual lunch at a convenient pub or restaurant:	1.00

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Rewriting British tax law

from an INLAND REVENUE release

On 31st July the Inland Revenue published their first exposure draft. It contains the initial clauses covering the income tax treatment of the trading income of individuals.

In answer to a parliamentary question, Dawn Primarolo MP, financial secretary to the treasury, said:

> **I am delighted to report that the Tax Law Rewrite project continues to make good progress. The Inland Revenue have today published the project's first exposure draft containing draft clauses. A number of innovative techniques have been adopted. The rewritten legislation incorporates easier to understand language, a more logical structure and shorter sentences.**
>
> **I very much support this important project, which aims to bring clarity and certainty in our direct tax legislation for businesses and individuals. Full consultation is the key to its success, and I urge everyone with an interest in tax law to take this opportunity to comment.**

The aim of the project is to rewrite UK direct tax legislation so that it is clearer and easier to use. The project has been warmly welcomed by tax practitioners in this country.

The key points of the project are:

- the use of plain language and other techniques to make tax law clearer and more user-friendly;
- a clearer, more logical structure for tax legislation;
- more consistent and better signposted definitions;
- no simplification of main tax policies;
- possibly some minor changes of policy, where these enable greater simplification;
- full consultation with interested parties; and
- first rewrite Bill to be ready for enactment in 1997/98 Parliamentary sess ion.

The project's work programme for 1997 mainly concentrates on the income tax provisions for individuals. The current aim is to complete the rewrite of most of the tax treatment of trading income and employment income during the year. The first exposure draft features the rules central to the income tax treatment of trading income.

The basic rules for taxing the trading income of individuals date from the early 19th century. They are often not conceived or expressed in a way which is relevant for a modern business. Their operation cannot be understood except in the light of extensive case law. In addition numerous supplementary provisions have been added piecemeal over the years, and practices have developed from the common understanding of users. The draft clauses in the first exposure draft reflect this material in clearer and more logically structured legislation while preserving, as far as possible, the existing meaning. The case law will of course remain relevant.

In particular, the draft clauses propose three significant changes of approach. These involve making explicit that in the calculation of profits for tax purposes:

- generally accepted principles of accountancy are the starting point;
- capital items are generally excluded; and
- relief can be given for part of an expense which is incurred for more than one purpose.

The first two proposed changes of approach are a distillation of numerous judicial interpretations. The third embodies a generally accepted and well-understood practice which stems from case law. All the changes of approach maintain the effect of the current law.

The draft clauses also translate into statute three Inland Revenue practices (one of which is published as a statement of practice) and two extra-statutory concessions. In addition it is proposed that one extra-statutory concession is abolished. The concessions and practices selected for rewriting are simply the ones which seemed to lend themselves most easily to be put on a statutory basis. There is no difference in status between those which have been included in the rewrite and those which have not.

This draft presents clauses at a relatively early stage in the rewrite process. The project team fully expects to make significant changes to the clauses in the light of this

consultation and in order to accommodate issues which arise as clauses are worked up in other areas. The publication of this first tranche of draft clauses is important in order to ensure the views of users are taken on board at the earliest opportunity. Additional opportunities to comment will arise as further draft clauses are published.

A small, high-level Steering Committee, chaired by former Chancellor of the Exchequer Lord Howe of Aberavon QC, was set up to oversee the project. It held its first meeting on 26th February 1997. At the same time, a consultative committee of representative bodies and other interested parties is considering issues and clauses in more detail.

Brief extracts appear below. Copies of the full draft can be obtained free of charge from

Inland Revenue Information Centre
Bush House (South West Wing)
Strand
London WC2B 4RD
Tel: 0171 438 6420
or
http://www. open. gov. uk/inrev/rewrite. htm.

Comments should be sent by 30th Sept to:

Ajit Philipose
Tax Law Rewrite
Inland Revenue
Room 652
Bush House
(as above)
email: nmunro.ir.bh@gtnet.gov.uk

Extracts from Exposure Draft 1

New drafting techniques

2.10 Apart from the key question of structure, the rewrite project raises a number of important questions about the way in which the legislation is drafted, the design and layout of rewritten tax law, and the numbering system to be adopted.

2.11 Our consultative document of July 1996 outlined various drafting issues for further discussion. These included:

- the use of short sentences;
- the possibility of second-person drafting - addressing the taxpayer as “you”;
- avoiding archaic terms, legal jargon and drafters’ shorthand;
- more consistent and better signposted definitions;
- gender-neutral drafting; and
- greater use of explanatory material.

2.12 In October 1996 we published some illustrative examples of rewritten legislation which sought to employ many of these techniques, including an experiment in second person drafting.

2.13 The general response varied, although most commentators welcomed any move towards shorter sentences, clearer and more consistent use of definitions and (provided legal accuracy was not inadvertently affected) more up to date language. Many of the terms in the existing law have been interpreted by case law and this clearly might constrain the scope for changing the existing wording in some instances.

2.14 There was little enthusiasm for second person drafting [unlike the Australian version (see p.7, "Style") - ed]. Although some commentators agreed that the experiment clearly demonstrated the direct impact such an approach could have, they felt that it would be confusing where provisions affected more than one party. They also considered that the other examples — which were drafted in the third person — achieved a suitably direct impact.

2.15 There was also relatively little enthusiasm among the main users of the legislation for gender-neutral drafting. Most of those who commented felt that such an approach could often make the text less clear and precise than it would otherwise be. Nevertheless, we recognised that some people feel very strongly about this issue and indicated that we would normally adopt a gender-neutral approach unless to do so would conflict with the main objectives of the project — such as clarity and precision.

2.1 6 It was generally agreed that the rewrite would adopt a multi-character numbering system, and that the proposal to leave gaps in numbering of statutory provisions would not be helpful.

Proposed rewrite changes

2.17 As noted above, the project is about simplifying the language and structure of tax legislation. There is no intention of changing the underlying tax policy. Such policy changes will continue to be dealt with in the normal way through the Budget and Finance Bill process. However, in the course of the rewrite, there will be instances where further simplification can be achieved by minor changes to rules, subject of course to the approval of Ministers and Parliament. In other cases, it will be desirable to enact current extra-statutory concessions or statements of practice and to discard provisions which are obsolete. In general, such minor changes to enable further simplification — which we describe as "proposed rewrite changes" — will be included in the relevant rewrite Bill. But, before any decisions are taken, they will be flagged up clearly for full public consultation.

Design and layout

2.18 We are also considering possible improvements in the format of the re-written legislation, taking full account of the work which has already been done in this country and elsewhere. The question of how, and in what format, the rewrite Bills will be published is of course a matter for Parliament to decide.

Parliamentary procedures for enacting rewritten legislation

3.1 A crucial issue for the project is how Parliament will handle tax rewrite Bills intended to enact the rewritten tax law. These Bills will not be consolidation Bills. But it will clearly not be possible for Parliament to deal with them under the ordinary Public Bill procedure. A new procedure is required to enable Parliament to scrutinise the rewritten legislation properly but without opening up the debate on the full range of fiscal policy matters.

3.2 This question was considered in 1996 by a working party set up by the Tax Law Review Committee and chaired by Lord Howe of Aberavon. This proposed that tax rewrite Bills should be introduced in the House of Commons and then should be referred, after Second Reading in the House of Commons, to a Joint Committee of both Houses, with a Commons majority and a Commons Chairperson.

3.3 This general approach was endorsed by the House of Commons Select Committee on Procedure in February 1997. A Standing Order was passed by the House of Commons on 20 March 1997, setting out the broad procedurefor the enactment of the rewrite Bills. However, the details of the terms of reference and membership of the Joint Committee were left to be resolved by the new Parliament.

Extract from the draft Bill

Part 3 - Trading income

Plan of Part 3

Chapter 3.1 - What income is taxed as trading income

Plan of Chapter 3.1

Introduction

3.1.1 Income taxed as trading income

(1) Tax is charged under this Part on the profits of a trade, profession or vocation.

(2) Chapter 3.2 contains rules about how to calculate profits for this purpose.

(3) This Part is drafted in terms of trades and trading but unless otherwise indicated the provisions of this Part apply equally to professions and vocations.

3.1.2 Trading income of UK residents

(1) If a UK resident carries on a trade wholly or partly in the United Kingdom, tax is charged under this Part on profits arising to that person from that trade, wherever it is carried on.

(2) Profits arising to a UK resident from a trade carried on wholly outside the United Kingdom are taxed under Part 9 (foreign income).

3.1.3 Trading income of non-UK residents

(1) Tax is charged under this Part on profits arising to a non-UK resident from a trade carried on in the United Kingdom as follows.

(2) If the trade is carried on wholly in the United Kingdom, tax is charged on all the profits arising from the trade.

(3) If the trade is carried on partly in the United Kingdom and partly elsewhere, tax is charged on the profits arising from the trade to the extent that they arise from the part of the trade carried on in the United Kingdom.

Meaning of "trade"

3.1.4 Meaning of "trade"

(1) In this Act ***trade*** includes every venture in the nature of trade.

(2) An activity may amount to a trade although the profits are earned wholly or partly from the occupation of land or the exploitation of land or its natural resources.

Such activities are not taxed under this Part if, or to the extent that, they are taxed under Part 5 (income from land).

(3) This section does not apply to professions and vocations.

3.1.5 Farming and market gardening

(1) All farming and market gardening in the United Kingdom is treated as the carrying on of a trade, or part of a trade, whether or not the land is managed on a commercial basis and with a view to the realisation of profits.

(2) All the farming carried on by a particular person or partnership is treated as one trade.

Trading income and income from land

3.1.4 Trading income and income from land

(1) The profits of a trade are not taxed under this Part if, or to the extent that, they derive from rents or other receipts within Part 5 (income from land).

This is subject to the qualification mentioned below.

(2) Rents and other receipts brought into account as trading receipts under the following sections are not taxed under Part 5 —

section 3.1.7 (tied premises),
section 3.1.8 (caravan sites),
section 3.1.9 (surplus business accommodation),
section 3.1.10 (electric line wayleaves, &c.).

The original includes "defined terms" details omitted here for want of space.

Rewriting Australia's income tax law

by K.E. JONES

Synopsis

This article discusses a current project to rewrite Australia's income tax law in a simplified form. It begins by discussing the problems with the existing law that led to the rewrite and the reasons for those problems. It discusses the aims and approach of the rewrite and the process adopted. It concludes with a comment about the future of the rewritten law.

Background

Australia's existing income tax law was enacted in 1936 and has been regularly and extensively amended since. Because of problems resulting from this process (discussed below), a Parliamentary committee recommended in November 1993 that a broadly-based task force be set up to rewrite the income tax law. The task force, called the Tax Law Improvement Project, was set up in December 1993.

Reasons for the rewrite

Structure of the in come tax law

Extensive amendments made to the 1936 Act over the years resulted in a complex and unwieldy structure. The original structure was quite simple and clear, and the law was relatively short. The Act was divided into Parts dealing with liability to taxation, administration, assessment and collection and recovery. The liability Part dealt with all relevant income items separately from expenditure items, and contained only brief special provisions relating to entities such as trusts and partnerships. In total, the Act covered 81 pages.

By 1993, the simple structure had disappeared, largely because of the piecemeal addition of extensive regimes providing special rules to determine the tax liability of certain taxpayers (eg superannuation funds and controlled foreign corporations) or to determine the tax treatment of certain expenditure (eg mining and petroleum) or certain income (eg dividend imputation). The law had grown to over 40 times its original length, and had even spilled over into other Acts (eg appeal and offence provisions had been removed to another Act).

As the structure of the law became increasingly burdened by complex and lengthy additions, pressure developed to fit changes that would normally warrant a new Subdivision or Division into a single new section or as few new sections as possible. Typically, such a single section would consist of numerous lengthy definitional subsections followed by the operative subsection and further subsections containing qualifications, exceptions and interpretative provisions. Without the assistance of any guidance in the form of summary provisions or subsection headings, the task of understanding such a section became very difficult.

Style

The 1936 Act was drafted in a relatively simple and clear style. One reason for this was the comparatively simple fact situations that it addressed. Typically, the only activities relevant to determining a person's tax liability for a year were those taking place in that year. The Act therefore avoided detailed context-setting by referring throughout simply to "the year of income" and "the taxpayer". However, since the 1960s this style has been abandoned in amendments because of the difficulties of using it to describe complex arrangements involving activities taking place over several years and involving a variety of persons.

Also, at about this time, the courts began to favour a literalist rather than a purposive approach to the interpretation of the income tax law, which encouraged a cautious "black-letter law" style of drafting. No value at all was placed on readability.

An example of the excesses of this style is at appendix A (inset opposite).

Numbering system

The 1936 Act was numbered in the traditional way. When the Act was amended, new provisions were inserted between existing sections using alphanumeric references (eg 133A, 133B etc). Also, the practice was adopted of inserting most new tax liability Divisions at the end of the tax liability Part which, unfortunately, was in the middle of the Act. This placed enormous pressure on the alphanumeric system, which eventually meant that numbers like "159GZZZZH" had to be used at the end of the liability Part. To avoid this, new Parts were later added at the end of the Act.

However, by this time the damage had been well and truly done, and deficiencies in the numbering system played a significant role in pressure to rewrite the income tax law.

Consequences of problems with the law

Critics of the amended 1936 Act argued that the difficulties in the law had led to increased costs for taxpayers and government administration because of the excessive time and effort being expended in understanding, interpreting and applying the law.

Appendix A: Example from amended 1936 Act

(4) For the purposes of this section, a person shall be deemed to be a person who had, or would have had, a right to receive indirectly for his own benefit the whole or a particular fraction of a dividend that might be, or might have been, paid by a company or of a distribution of capital of a company, or 2 or more persons shall be deemed to be persons who had, or would have had, between them a right to receive indirectly for their own benefit the whole or a particular fraction of such a dividend or distribution of capital, if, in the event of a payment of a dividend by the company, or of a distribution of capital of the company, the person or persons would, otherwise than as a shareholder or shareholders of the company or as a trustee or trustees, receive or have received the whole or that fraction, as the case may be, of that dividend, or of that distribution of capital, if there had been successive distributions of the relative parts of that dividend, or of that distribution of capital, to and by each of any companies or trustees interposed between the company paying the dividend, or making the distribution of capital, and that person or those persons.

The rewrite aims and approach

Aim

The aim of the rewrite is to make significant savings in the cost of complying with the income tax law by simplifying the law. To redress all of the deficiencies it was considered necessary to rewrite the law completely "from the ground up" with a new structure, mode of expression and numbering system.

In doing so, only minor changes are being made to policy in the interests of reducing complexity. Reduction in complexity and length will be facilitated by the fact that provisions in the existing law that are spent or of limited future operation will not need to be reproduced or reproduced in the same form.

Structure

The new structure is intended both to facilitate use and understanding of the income tax law and to be robust enough to cope with substantial future amendment without major distortion.

After consideration of various models, including overseas income tax laws, the rewrite team decided to adopt what it calls a "pyramid" conceptual structure for the new law. This involves the initial presentation (at the apex of the pyramid) of central or core concepts applicable to determining the tax liability of most taxpayers, followed by general liability provisions applying to a wider group of taxpayers and finally by tax liability provisions relating to specific groups of taxpay-ers or imposing special obligations. Then come collection and recovery provisions and other administration provisions. At the end of the new Act (or base of the pyramid) is a provision (called the "Dictionary") in which all terms defined in the Act will either be defined or listed. If listed, the definitions will be located in the provisions in which they are used, at the place that will best aid understanding.

A summary of the new structure, extracted from material tabled in Parliament in connection with the new law, is at Appendix B.

Style

The hallmark of the rewrite style is the use of clear, plain language, addressed to the widest audience. The audience selected for particular provisions is the broad class of professional tax adviser likely to use those provisions. While the rewrite is generally not intended to be understood by all taxpayers, special attention has been given to improving the readability of those provisions that will have broad application to the typical individual taxpayer. In particular, those provisions will address the taxpayer directly, in the second person (eg "you must lodge a tax return ...") The rewrite team has argued that this will make the law less intimidating and will also impose a discipline on the drafter in favour of simplicity. Critics of this approach have pointed to its potential to patronise the reader, and to the fact that it is not directed at the real user of the provisions, the tax agents who prepare a large proportion of income tax returns for individuals.

Presentation of concepts

The new approach involves much more than mere use of clear, plain language. A considerable amount of attention has also been given to the fundamental question of how best to present the concepts involved. A communication consultant has worked closely with the rewrite team, and also with drafters who continue to work on the day-to-day drafting of amendments to the existing tax law. One result of this process is recognition of the importance of orientation material in the presentation of concepts (discussed below). Other matters of importance to reader cognition include:

- focussing on underlying principles or key conceptual building blocks and separating them from qualifications and exceptions;
- ensuring that concepts "flow down" through the structure to the section level, using the "foothold principle" of moving in successive steps from the familiar to the unfamiliar;
- ensuring that provisions are structured so as not to exceed the limits of short-term memory capacity (about 7 pieces of information);
- giving prominence in a sentence to the verb, which should contain the central idea;
- recognising the need for appropriate visual presentation by having well-designed formats (discussed below) and using graphics such as tables and diagrams;
- recognising the importance of tone, by avoiding words with adverse connotations and adopting a user-friendly style.

Orientation etc material

Psychologists and educationists have long stressed the importance of using summary, overview or orientation material to provide a frame of reference to assist in processing information (referred to as "mind-mapping"). The rewrite makes extensive use of such material throughout the new Act. Another function of this material is to assist the reader in locating provisions of relevance as quickly and accurately as possible.

Guides

One type of orientation material is what the new law calls a "Guide". A Guide is typically located at the beginning of a unit such as a Division and consists of:

- a brief summary of the purpose or object of the Division;
- a table of contents comprising descriptive section headings; and
- a diagram or chart summarising the operation of the Division.

Additional narrative text may also be included. The intention is to provide a conceptual overview as well as an indication of the theme or purpose of the operative provisions. Headings are used to separate Guides from operative provisions.

Provisions have been included to clarify the legal status of Guides in the interpretation of the law. While Guides form part of the Act, they are subordinate to the operative provisions and may only be taken into account for such purposes as determining the underlying purpose or object and resolving ambiguities. The potential for inconsistency between the Guides and operative provisions should be minimised as a result of the intended drafting methodology:

Guides should not be drafted separately from the operative provisions; rather they should emerge as an integral part of the drafting process. For example, conceptual overview diagrams should be drawn from material prepared by the drafter or instructors in analysing the policy content of the law that is to be drafted.

Signposts

Another kind of orientation material is what the rewrite team describes as "signposts". This material directs the reader to the location of particular provisions. For example, notes are used throughout the new Act at the end of sections to direct readers to other provisions of relevance. Another kind of signpost is the use of checklists in the core provisions. For example, the Act will contain a list of all amounts treated as income for the purposes of determining the tax liability, and of all amounts of expenditure that are taken into account for that purpose.

An example of the use of Guides and signposts is at Appendix C (not reproduced here).

Format

The rewrite adopts a new format that is significantly different from that of the 1936 Act. With the exception of some minor differences, the new format has been adopted for all Acts of the Australian Parliament. It is the

product of extensive consideration, taking into account developments in other jurisdictions as well as the advice of experts in communication and document design. It involves greater use of white space around text, greater prominence for headings and the use of running page headings.

The example at Appendix C (not reproduced here) shows the new format.

Numbering System

The rewrite has adopted a new numbering system. Its aim is to reduce the need for complex alphanumeric section numbers and at the same time implement a system that is simple and predictable. In essence, the system works by treating each Division in the new Act as an independent unit for section numbering purposes. The sections within each Division begin afresh with the number 1 and the Division numbers themselves increase sequentially throughout the Act, regardless of groupings into Parts and Chapters. As a result, each section can be uniquely identified by a composite of the Division and section number (eg 25—130, where 25 is the Division number and 130 is the number of the section within the Division).

A more detailed description of the numbering system, extracted from material tabled in the Parliament in connection with the new law, is at Appendix D.

The rewrite process

A staff of 2 drafters (later increased to 5), about 50 technical and administrative support officers from the Australian Taxation Office and 2 private sector tax professionals was brought together in the first half of 1994 to form the rewrite team. A leading communication consultant was engaged to assist the team and a consultative committee consisting of business, professional and community representatives was established to provide guidance. The team then spent about a year developing and testing its basic techniques and approach.

The team decided to rewrite the income tax law progressively through a series of Bills, rather than attempt to do so in a single Bill which would not be complete until the end of the process. It also decided to publish a series of information papers and exposure drafts of provisions to allow community input before the introduction of legislation into the Parliament.

In November 1994, pilot provisions (dealing with substantiation of expenditure) were introduced into the Parliament. They were enacted in April 1995. The emerging approach was further refined in a series of exposure drafts in 1995, culminating in the introduction of a Bill in December 1995 containing the core provisions, establishing the structure of the new Act and including rewrites of 2 major topics. This Bill was enacted in March 1997 after detailed Parliamentary scrutiny. In the meantime, a Bill containing the second instalment of the new Act, consisting of provisions that had been exposed for comment during 1996, was introduced into the Parliament in December 1996. This process will continue in annual instalments until the rewrite is complete.

The income tax law will be contained in 2 Acts as the existing Act is progressively replaced by the new Act. The core tax liability provisions are located in the new Act, but much of the law about income and expenditure is at present found in the existing Act. Confusion is reduced by the use of checklists in the core tax liability provisions of the new Act that refer to the relevant provisions of both Acts.

The future

The ultimate success of the rewrite will depend heavily on the extent to which its approach is imported into the ongoing "business-as-usual" amendment process that gives effect to tax policy changes. These changes are often extensive, and are made in a radically different environment from that in which the rewrite is taking place — often under extreme pressure and with priority given to political considerations that tend to add complexity. Critical to the success of the new Act in the long term will be the ability of drafters to assimilate the new techniques to the point where they become an integral part of drafting skills rather than an additional overhead, and the willingness of bureaucrats and politicians to eschew what has been described as a "culture of complexity". It may be that some form of ongoing rewrite team presence will be required to guide, monitor and if need be rewrite ongoing amendments after they are made.

Appendix B:

Proposed structure of the new Income Tax Assessrnent Act

Overview of this chapter

This chapter discusses the structure of the

proposed new Income Tax Assessment Act.

Aim of the new structure

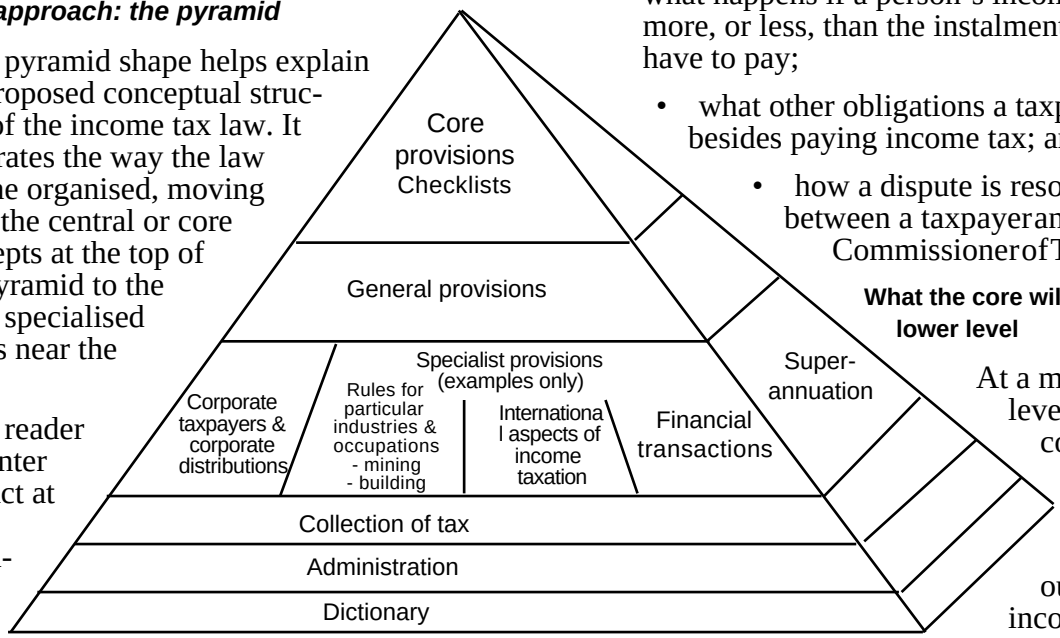
The new structure will make the law easier to follow and use. Readers will find it easier to:

- understand what the law requires;
- identify the general principles of the law; and
- follow a path to the provisions they need to read.

The new structure will be flexible enough not to be distorted by the future addition of substantial amounts of new law.

New approach: the pyramid

The pyramid shape helps explain the proposed conceptual structure of the income tax law. It illustrates the way the law will he organised, moving from the central or core concepts at the top of the pyramid to the more specialised topics near the base.



The reader can enter the Act at the beginning, the top of the pyramid, and read the basic concepts of income tax law.

The top layer - the core

The most basic statement of how much income tax a person must pay can be put as an equation:

IT = (AI-D) x TR - O.

That is, *income tax* equals (*assessable income* minus *deductions*) multiplied by the *tax rate(s),* minus *offsets*.

All the rest is detail. The law details what is assessable income, what is deductible, and what are offsets. Sometimes that detail applies to all or most taxpayers, sometimes only to specialist groups or in particular circumstances.

In the new law, all the concepts relating to that core equation at its most basic level will be in the top layer of the pyramid. They will be known as the core provisions of the Act.

What the core will do - top level

The core provisions will operate at different levels of detail. At a conceptual level, it will lead you to:

- what the Income Tax Assessment Act is about, and how to use it;
- who must pay income tax, and when and how they have to pay it;
- how to work out how much income tax a person must pay;
- what happens if a person's income tax is more, or less, than the instalments they have to pay;
- what other obligations a taxpayer has besides paying income tax; and
- how a dispute is resolved between a taxpayer and the Commissioner of Taxation.

What the core will do - lower level

At a more direct level, the core will explain:

- how to work out taxable income;
- the relationship between assessable income and exempt income;
- how assessable income consists of ordinary income and statutory income; how these concepts depend on whether a taxpayer is an Australian resident or not and on the source of the income;
- what makes an amount exempt income;
- about deductions - both general deductions and specific ones;
- what a taxpayer can deduct under the general deduction provision; and
- that there are lists of all the provisions that affect income, exempt income and deductions.

The core provisions will contain the general income and general deduction provisions, which determine whether amounts are assess-

able income or allowable deductions in the majority of cases.

The core (and the new law generally) will retain concepts that have been developed by an extensive body of court decisions over time. These include the ordinary concepts of income, and the meaning of such key notions as when income is derived and when an expense is incurred.

There will be no general explanation or statement of the purpose of the Act but the new provisions will provide a conceptual and practical framework for the way the Act works.

The top layer - the lists

The lists are checklists of, and signposts to, the provisions that specifically affect what is income, exempt income, deductions and offsets. They will help readers quickly find their way to the operative provisions they need. These provisions may be in either the second layer of the pyramid - the general provisions - or the third layer - the specialist provisions.

The second layer - the general provisions

The general provisions are provisions that apply to a wide group of taxpayers and some that don't fit into any specialist grouping. They will specify how the law deals with particular kinds of income, deductions and offsets. For example, they will include the rules about depreciation and trading stock (when these are rewritten) because they affect most businesses.

The third layer - the specialist provisions

The specialist groupings will bring together provisions that relate to specific groups of taxpayers or special tax obligations. For example, they will eventually include these topics:

- capital gains tax;
- corporate taxpayers and corporate distributions;
- partnerships and partnership distributions;
- trusts and trust distributions;
- co-operative and mutual societies;
- financial transactions;
- superannuation;
- life insurance;
- rules for particular industries and occupations (such as general mining, quarrying and petroleum mining, Australian films, primary production, and research and development);
- international aspects of income taxation;
- attribution of income; and
- anti-avoidance provisions.

Other specialist topics may be added to this list.

Collection and recovery provisions

The collection and recovery provisions will cover such topics as:

- the various income tax instalment systems (such as pay-as-you-earn, the prescribed payments and reportable payments systems, provisional tax and company tax instalments);
- withholding tax liability and collection;
- returns and assessments;
- Medicare levy and HECS collection; and
- how unpaid tax is recovered.

The collection and recovery provisions do not directly affect liability to tax. However, they are important aspects of the tax system that can apply to any taxpayer.

They will appear in the Act after the third layer, that is, after the specialist provisions.

Administration provisions

The administration provisions will come next. These include such topics as:

- general administration;
- tax file numbers;
- tax agents;
- prosecutions and offences;
- penalties;
- record keeping and other obligations.

Like the collection and recovery provisions, the administration provisions do not directly affect liability to tax.

Definitions - the Dictionary

In the new Act, all defined terms will be listed in the Dictionary in clause 995-1. However, not all definitions will be located there; many definitions (*just-in-time definitions*) will be located where they can best help to understand the material.

All defined terms (except some frequently used basic terms - see clause 2-15) will be identified by an asterisk appearing at the start of the term. However, defined terms will only be asterisked the first time they occur in each subsection. Any subsequent occurrences in that subsection will not generally be asterisked. The footnote that goes with the asterisk will appear at the bottom of each page and will refer you to the Dictionary starting at clause 995-1.

Definitions in the Bill will only apply to the Bill and not to the 1936 Act unless the 1936 Act expressly adopts them.

A defined term will be used in one sense only throughout the new law. If a different meaning is intended, another term will be used. This has prompted some standardising of terms.

Sections, Divisions, Parts and Chapters

While the conceptual structure of the new law can be explained in terms of a pyramid, all the material in it will be presented in a normal publishing format. This will allow for a convenient presentation and grouping of information for use in written or screen based form.

The existing tax law breaks material down into sections, which are the basic unit of information. Each section deals with one main idea only. Related sections are then grouped into Divisions. In turn, related Divisions are grouped together as Parts.

The new law will maintain sections, Divisions and Parts. However, to better support the structure, it will introduce a higher level of grouping of material at the chapter level. There will be six chapters in the new law:

Chapter 1: Introduction and core provisions;

Chapter 2: Further liability rules of general application;

Chapter 3: Specialist rules affecting liability for income tax;

Chapter 4: Collection and recovery of income tax;

Chapter 5: Administration;

Chapter 6: The Dictionary.

Appendix D :

The new numbering system

Overview of this chapter

This chapter discusses the new numbering system proposed for the new Income Tax Assessment Act.

Problems with the old numbering system

Amendments of the existing law have overloaded its numbering system, so that the Income Tar Assessment Act 1936 included section numbers such as 1590ZZZZH. Such numbers confuse and disorient readers, and waste their time in locating material.

These awkward results happen because of limitations caused by the existing structure of the law. Most new law affecting liability to income tax used to be inserted between sections 158 and 161 of the Income Tax Assessment Act 1936. More recently, new law has just been added to the end of the Act.

If the law was renumbered using the existing numbering system this would not provide sufficient flexibility to avoid the same numbering problem arising again over time. Consequently, the Bill adopts a new numbering system that bas been carefully designed to minimise the possibility that the old problems will recur.

Aims of the new numbering system

The new numbering system sets out to meet the following ideals:

- Each unit of law should have a unique number to identify it.
- For any two numbers in the system, it should be immediately apparent which one is higher.
- Numbers should be easy to read.
- Numbers should be able to be said aloud without being ambiguous.
- The system should flow naturally and be predictable.
- Each number should identify the area of law to which it belongs.
- It should cope well if a large amount of new material is inserted later.

Main features of the new numbering system

Section numbers will have two components, separated by a dash. The first component will be the number of the Division in which the

section is located. The second component will be the number of the section within the Division.

Example

Section 601-22 is a section of Division 601.

The new numbering system

Each Division will number its sections, starting from one.

Example

Section 601-1 is the first section of Division 601.

Section numbers will be separated with gaps. Except for the first section in a Division, section numbers will run in multiples of 5, to allow new sections to be nserted without using alpha characters.

Example: 43-1, 43-5, 43-10.

Unlike section numbers, Part and Division numbers will run in sequence through the new law. They will not start again, at one, with the start of each new Part (or chapter).

After the last Division in a Part, or the last Part in a Chapter, the new law will usually leave a gap (of five numbers) in the sequence of Division and Part numbers. By keeping numbers in reserve, when new Divisions and Parts are inserted they will not interrupt the flow by extensively using combinations of numbers and alpha characters as the present law does.

Part numbers will identify the Chapters in which the Parts are located.

Example

Part 5-10 means Part 10 of Chapter 5.

Cross references

In the new law, cross references to other provisions of the law will usually specify the heading or title of the provision, as well as its number.

Example

See section 10-5 (List of provisions about assessable income).

Detail of the new numbering system

Chapters will have a single component number.

Example: Chapter 5.

Parts will be numbered in components separated by a dash. The first number w ill refer to the Chapter, the second will refer to the Part.

Example

Part 5-10 shows that it is Part 10 within Chapter 5.

Divisions will have a single component number.

Example: Division 600.

Subdivisions will be numbered in components separated by a dash. The first component is the number of the Division. The second component is a capital letter, identifying the Suhdivision, in the sequence A, B, C, etc.

Example

Subdivision 5-A is Subdivision A of Division 5.

There will be no change to the way subsections, paragraphs and subparagraphs are numbered. However:

- there will be fewer subsections in a section;
- paragraphs will be less frequently divided into subparagraphs; and
- sub-subparagraphs will not be used.

How the numbering system will cope with new material

The Bill leaves gaps in the sequence of both Division and section numbers. That will allow space for Parts of the law that will be rewritten in later stages as the new Act is built up progressively.

Gaps will not guarantee against eventually needing recourse to section and Division numbers that include letters, but they will significantly postpone this eventuality and the possible incidence of it.

K.E. Jones is Second Parliamentary Counsel in the Australian Office of Parliamentary Counsel.

Mr Roy Wilson QC said that the plaintiff had "devoted himself to scientific enquiry and research, specialising mainly in entomology, herpetology..."

Denning LJ: "Let us have it in English - insects, snakes. What else?"

Buntin v. Thorne RDC, *The Times*, 12.3.57

Lords promote plain legislative drafting

On 26th June Lord Brightman, the former law lord, moved an amendment in the House of Lords to the National Health Service (Pnvate Finance) Bill. The amendment was intended only to reduce the wordy original to plain English, and was supported by Lord Simon of Glaisdale, Lord Renton, Lord Hooson, Viscountd Ullswater, and Baroness Anclay of St Johns.

Lord Brightman: My Lords, I believe that plain English should be used in the drafting of Acts of Parliament. My amendment does nothing except turn a subsection of the Bill into plain English. Clause 1(6) reads as follows:

> **Nothing in this section affects the validity of any agreement made by a National Health Service trust if the agreement has not been certified under this section; but would have been an externally financed development agreement for the purposes of this section if it had been so certified.**

The subsection tells us that an uncertified agreement is valid if it would have been an externally financed development agreement for the purposes of the Act if it had been certified. But we know that already. Any agreement is by definition an externally financed development agreement if it is certified as such. Clause 1(2), at line 7, tells us that. It reads:

> **an agreement is an externally financed development agreement if it is certified as such.**

So what does subsection (6) really mean?

A lawyer will probably be able to work out what subsection (6) is driving at. But what about the manager of an NHS trust; the manager of a bank which is to put up the money for a development; or the building contractor who will build the new hospital? Will they be certain what subsection (6) means?

They can find out what the subsection is meant to say by coming to the House of Lords, going to the Printed Paper Office and asking for the *Notes on Clauses.* If they do that, they will read:

> **Subsection (6) ... The validity of an agreement which meets the conditions set out in subsection (3) cannot be challenged merely because it has not been issued with a certificate under this clause.**

The wording is crystal clear. It is also the precise wording of my amendment. Why can we not have that wording in the Bill?

Subsection (6) is an important provision. Many people involved in the smaller PFI schemes may not wish to go for a certificate if they can safely avoid it because of the delay that may be involved. The *Notes on Clauses,* and my amendment in the same terms, make it abundantly clear that they can dispense with a certificate if the conditions of subsection (3) are satisfied.

I suggested to the Minister in Committee that the wording of the *Notes on Clauses* should be used instead of the obscure wording of the Bill. My suggestion received a partial blessing. The noble Baroness said that I raised:

> **an interesting and sensible point.**

She helpfully added:

> **anything which adds clarity in that way and simplifies the drafting is entirely to be welcomed.**

However, 1 am told that my wording—the wording in the *Notes on Clauses* — has been turned down by the parliamentary draftsmen.

All I ask now is that your Lordships should say which is plainer English, the provision in the Bill, which states that an uncertified agreement is valid if it

> **would have been an externally financed development agreement it had been so certified**

or the *Notes on Clauses,* and my amendment in exactly the same terms:

> **The validity of an agreement which meets the conditions set out in subsection (3) cannot be challenged merely because it has not been issued with a certificate under this section.**

I beg to move.

Lord Simon of Glaisdale: My Lords, I support this amendment by my noble and learned friend. We have simply no right to legislate in a manner that is incomprehensible to the people to whom the legislation is

addressed and who are primarily concerned, particularly if the matter can be put in lucid and plain terms as it has been by my noble and learned friend, to whom we are deeply indebted. Like many great Chancery lawyers, my noble and learned friend is a gifted draftsman. It behoves us all, including parliamentary counsel, to show a little humility in the face of that.

This is not a new style of drafting. It is a form of drafting based on hypothesis. When I gave evidence to the Renton Committee on the preparation of legislation, I drew attention to a provision in a national insurance Act which went very much on the same lines. I venture to read it:

> **For the purpose of this Part of the Schedule a person over pensionable age, not being an insured person, shall be treated as an employed person if he would be an insured person were he under pensionable age and would be an employed person were he an insured person.**

Your Lordships will see the relationship between the two styles of drafting.

The matter was put very plainly by my noble and learned friend. It is extremely important because the legislation is a vital part of the process whereby democratic society frames rules which bind of themselves. If the rules are incomprehensible, then the process of democratic legislation has broken down.

The noble Baroness the Minister is perfectly capable of judging this matter for herself. She has noble genes of brains and character built into the double helix of her DNA, which she has cultivated. to our admiration, and demonstrated at both Dispatch Boxes. I say “for herself" because she is indeed left to herself. At the end of every brief that a Minister has are the words: “accept", “reject", or "consider”.

Judging by what happened in Committee, I should think it pretty certain that the word “reject” is at the end. The noble Baroness shakes her head. I am very relieved to hear that. In any case. it is for the noble Baroness, who is in charge of the Bill, to accept this amendment if it commends itself to her.

I remember the occasion in the previous Parliament when the noble Earl, Lord Ferrers, was in charge of a Home Office Bill in relation to which the brief undoubtedly ended with the word “reject”. He read it solemnly and with increased consternation. In the end he accepted the amendment. I hope that will be a model to the noble Baroness.

Lord Renton: My Lords, I wish briefly. but warmly, to support the amendment moved by the noble and learned Lord, Lord Brightman. The interesting quotation given by the noble and learned Lord, Lord Simon of Glaisdale, was in fact a piece of legislation drafted by a former first parliamentary draftsman who was a member of our committee. We teased him about it a certain amount. He had the grace to say that we should draw attention to it in an appendix to our report — the noble and learned Lord quoted that. He conceded that it could have been done better.

What I find very interesting about the amendment is that the noble and learned Lord, Lord Brightman, was prompted to draft it having studied the *Notes on Clauses.* The *Notes* frequently declare the Government's intention as to what the legislation should contain. However, instead of sticking to the simple language of the *Notes on Clauses,* the draftsman very often thinks that he has to elaborate it in what he considers to be more legal English, and defeats his own purpose in doing so.

I stand open to correction, but I believe that this is the first time that an amendment has been tabled in identical language to that contained in the *Notes on Clauses.* I hope that the noble and learned Lord, Lord Brightman, has perhaps introduced a useful precedent.

Noble Lords: Hear, hear!.

Lord Renton: As the noble and learned Lord, Lord Simon of Glaisdale, said, we have a duty to make our laws easily understood, especially to those who have to observe them. Sometimes our laws are rather technical and those who have to observe them may not have had any kind of legal training. They may be technically excellent in their own work but not in legal matters. It is therefore essential that we should try to get the matter right.

I hope that I am not out of order in concluding with a very general comment. We know from the Queen’s Speech that a great deal of legislation will be coming before us, particularly in this Session of Parliament and the next. I believe that we should, as far as we can, follow the example of the noble and learned Lord, Lord Brightman, by being vigilant and trying to improve it whenever necessary.

Lord Hooson: My Lords, from these Benches I congratulate the noble and learned Lord, Lord Brightman, on raising this very important matter. It seems to me that he flatters lawyers when he says that subsection (6) can probably only be understood by a lawyer. I did not understand it; its meaning only became clear when I turned to the noble and learned Lord's amendment. I had not had the wit to go to the *Notes*.

The noble and learned Lord raises a very important point. We are continuing with an old style of draftsmanship which is no longer relevant or acceptable. The new style, which, on this occasion, happens to have been imported from the exact language of the *Notes* to help people understand the original draftsmanship, shows that we have reached a watershed. The House and the legislature should consider whether it is time to adopt the new style of direct-approach English imported into the amendment. I am sure that the House will be intrigued to hear the noble Baroness's answer. When a former Law Lord puts down an amendment which he says spells out exactly what the legislature intends, is the parliamentary draftsman's view nevertheless to take precedence?

Viscount Ullswater: My Lords, at earlier stages of the Bill I made a rather narrow point about small PFI projects financed by the contractor or the service provider himself. The Minister replied — I think quite properly — that a certificate would not be required in such instances and that an NHS trust would be entitled to enter into such agreements under the original legislation setting up the trusts. However, I believe that the amendment introduced by the noble and learned Lord, Lord Brightman, gives great clarity to a situation where contractors and the like may be working with a series of contracts, some of which may be externally financed and which may be held up considerably if the contractor has to consider which contracts require a certificate and which do not. I ask the noble Baroness to look again at the clarity of the legislation. It appears from what is said by people much more learned in the law than I am that subsection (6) is not easy to interpret. The point of the amendment is that, however these contracts are made, they would not be *ultra vires.*

The Bill starts in this House. It may be inappropriate to try to amend it at Report stage here.

Noble Lords: Why?

Viscount Ullswater: My Lords, several speakers have said that the clarity given by the amendment is necessary. If the noble Baroness is not inclined to accept the amendment at this stage, perhaps she should look at it while the Bill is passing through another place.

Noble Lords: No!

Lord Monkswell: My Lords, when my noble friend responds to the debate, perhaps she can clarify one matter. It appears to me that the purpose of the Bill is to provide indemnity for the bankers that a project is certificated and the Government will therefore underwrite it in the last resort.

There is a provision in the Bill which suggests that if a project meets the criteria laid down but has not been submitted for certification, it will be deemed to have a certificate. That is one occasion when a project will not have a certificate. Another is when a project has been refused a certificate by the Government. We need to draw a distinction between a project which meets the criteria and which could expect to obtain a certificate if had been submitted for one and a project which meets the criteria and has been submitted for a certificate but, for whatever reason, is refused one. That is the crux of the question and I hope that my noble friend can clarify the point. I suspect that the answer may be that the Bill has got it right and that the amendment, which is no doubt well meaning and which provides some clarity, would change the meaning of the Bill.

Baroness Anclay of St Johns: My Lords, when the noble and learned Lord, Lord Brightman, introduced his first redrafting of subsection (6) at Committee stage, he made the comment that he thought that our deliberations on the subsection would not prove absorbing. My goodness, the noble and learned Lord has been proved wrong today! In Committee the noble and learned Lord set himself the task of rewriting Clause 1(6) so that it had greater clarity. I welcomed his efforts, providing his amendment did not undermine the policy intention of the subsection. The Minister assured us that,

> **the existing text satisfies the reasonable concern that the validity of an agreement which meets the conditions set out in subsection (3) cannot be challenged merely because it has not been issued with a certificate under this clause.**

She went on to say that the noble and learned Lord's amendment made an unnecessary point in suggesting that,

> **the validity of any agreement into which a trust enters, whether externally financed or otherwise, should not be affected**

adding that,

> **a trust has express powers to enter into such contracts — under paragraph 16 of Schedule 2 of the 1990 Act which set up the trusts.**

I was content to accept that explanation as to the legal position and I remain so. But the noble and learned Lord, Lord Brightman, has today provided us with a rewrite of subsection (6) which seems to me, first, to be much clearer and intelligible than the form in the Bill and, secondly, to meet the points made by the Minister in Committee. The noble and learned Lord spoke in Committee and today about the need to use plain English in legislation wherever possible. Like other speakers, I agree wholeheartedly with him.

When I read Bills I often feel myself transported back some 30 years to my days at university when I struggled with the convoluted syntax of Latin texts. I hope we can escape that one day — 30 years on my nightmares ought to have finished. I hope that one day we shall find a way of following the noble and learned Lord's example and write legislation in plain English.

Today, we on these Benches recognise the valuable contribution that the noble and learned Lord has made in rewriting this subsection. We support his amendment.

Baroness Jay of Paddington: My Lords, the House will not be surprised to hear that, as an active supporter of the Plain English Campaign and a non-lawyer, I am extremely grateful to the noble and learned Lord for his proposed amendment. Indeed, I do understand that it seeks to clarify the Bill. I am also grateful to him for his enormous courtesy in discussing this matter with me before he tabled the amendment and then discussing the exact terms of his amendment once he had done so. The amendment's objective is one with which we are in full agreement. I am grateful to the other noble Lords for their animated discussion of the particular points as they relate to this Bill and even more so for the general points that they raised about the nature of legislation.

Certainly, I do not wish to prolong the debate or appear to raise red herrings in the course of the comments that I want to make. But I am afraid that I may have to be slightly lengthy in trying to explain why, although officials and indeed I myself have spent some time poring over the amendment since the Committee stage, we still have some difficulty with it.

It may help if at the outset I explain a little more about the background to subsection (6). As my noble friend Lord Monkswell just said, the underlying purpose of the Bill is to meet anxieties about *vires* raised by certain banks in relation to some of the very substantial PFI projects being promoted by NHS trusts. However — this is a point made by the noble Viscount, Lord Ullswater — as well as those large projects, many agreements of a less costly nature are regularly entered into between NHS trusts and private sector companies, for example, to provide equipment. Although they may seem to have the characteristics of PFI contracts, these agreements have not given rise to any practical concerns about *vires*. It is not our intention that these less costly agreements should attract the certification procedure of the more costly ones. As a matter of practice, agreements worth less than £1 million may be entered into by some NHS trusts without reference to the Secretary of State.

Clause 1(6) — we are discussing the amendment to it — has been included to displace any doubts which might otherwise arise, by reason of the enactment of the Bill, about the *vires* of agreements which appear to have the features of PFI agreements but which have not been certified under Clause 1. Our approach in preparing subsection (6) has been to avoid the need to determine whether a particular agreement could or would have been certified had it been put to the Secretary of State for that purpose. Paragraph (b) of the subsection simply recognises that an agreement would have been an externally financed development agreement had it been certified — I agree that the language is cumbersome — but it does not require any examination of the question whether the particular agreement would in fact be eligible for certification — or, indeed, if it were found to be eligible, whether the Secretary of State would choose to certify it.

Against that background, we can now look at the amendment proposed by the noble and learned Lord, Lord Brightman. The amendment sets out to identify the class of agreements to

which subsection (6) is to apply by reference to the conditions in subsection (3). At face value, the test whether an agreement meets those conditions may seem to be a convenient and straightforward one. However, on close examination of the conditions, the exercise turns out to be very difficult, because it is necessary first to determine the attitude of the Secretary of State to the particular agreement. Paragraph (a) of subsection (3) requires that:

> **in his [the Secretary of State's] opinion the purpose or main purpose of the agreement is the provision of facilities in connection with the discharge by the trust of any of its functions.**

So, until one knows the opinion of the Secretary of State regarding the purpose or main purpose of the agreement in question, one cannot tell whether or not the agreement meets the condition in paragraph (a). It was precisely in order to avoid the need to make that kind of detailed and subjective judgment — one might almost call it psychological analysis — in the case of each uncertified agreement that subsection (6) was drafted in its present terms.

I appreciate the considerable efforts which the noble and learned Lord, Lord Brightman, has made in seeking to furnish your Lordships with a provision which, on its face, certainly appears shorter and clearer than the existing subsection (6). I am also conscious — several noble Lords have referred to this point, as did the noble and learned Lord himself in bringing forward the amendment — that this present amendment reflects closely, in fact is similar to and identical with, some of the terms of the *Notes on Clauses* as they relate to this particular Clause 1(6). But, as your Lordships will know, those notes are not intended to be more than a guide in general terms as to the kinds of agreements to which the subsection is to apply. Inevitably—I am sure that this will have been your Lordships' experience in other Bills—the notes paraphrase and summarise to some degree the actual provisions of the Bill; but they cannot replace them; nor can they be regarded as exhaustive. So it does not follow that a subsection which is drafted in terms similar to or even identical with one of the *Notes on Clauses* will necessarily be effective as a legal provision. We believe that this amendment gives rise to the practical difficulties that I have described.

I hope that the noble and learned Lord and indeed other of your Lordships who have spoken in support of the amendment will appreciate that, although the language that he suggests is undoubtedly simpler, that simplicity may be an illusion, because it may create further complications in the enactment of the Bill. However, taking due regard of the point made by the noble and learned lord, Lord Simon, about humility, I am certainly willing to take further what the noble and learned Lord, Lord Brightman, may wish to say.

Lord Brightman: My Lords, I am most grateful to all of your Lordships who spoke in favour of the amendment and for the kind remarks made about my crusade. I wonder whether I understood the noble Baroness correctly. Am I right in thinking that she would be prepared to reconsider this matter and perhaps let me have a word?

Baroness Jay of Paddington: My Lords, that is certainly my intention. I fear that my reading of the brief has been so dominated by legal language that perhaps I was unclear in my response, for which I apologise to your Lordships. I was certainly saying, particularly in reaction to the points made, for example, by the noble Lord, Lord Renton, about the need for clarity in legislation in general and by the noble and learned Lord, Lord Simon, about the need for humility in the face of great legal expertise, that I should certainly be willing to look at this again.

Lord Brightman: My Lords, I am very grateful to the noble Baroness. In those circumstances, I beg leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Editorial comment

I could not follow the minister's explanation (though the definition of a PFI agreement — which the Lords may have had — might have helped). But the Act has since been passed with Lord Brightman's revised amendment, which reads:

> **The fact that an agreement made by a National Health Service trust has not been certified under this section does not affect its validity.**

We welcome the Lords' support for plain drafting and hope that their views will come to the attention of, and influence, some of the obfuscatory High Street practitioners.

The proof of the opinion is in the shortening

WILLIAM F. HAGGERTY suggests 10 ways in which judges could improve their opinions

Plain language gurus and acolytes have reason to be (mildly) pleased. An informal survey of recently published appellate opinions reveals that some jurists at least are taking seriously and applying plain language principles. With greater precision has come fewer words — the opinions are getting shorter. All is not bliss, however; many authors still revel in logorrhea (see Garner, *A Dictionary of Modern Legal Usag*e, 2d ed, p 538.) By way of solace, the following suggestions are offered:

1 Opinions are not law review articles. There is no need to pattern the scope or length of an opinion after a law review article. Most cases involve limited issues, precluding exhaustive treatment of a general topic in the text, as well as an all-inclusive digest of related and semirelated case law in the margin.

2 All the facts (fit or otherwise) need not be printed. Unless a case involves complicated and interrelated issues that arise from a convoluted factual background (the exception, rather than the rule), only the salient facts need be recited. Side excursions into the land of narrative, while adding color, generally do not advance exposition. If the defendant stabbed the victim thirty-two times, a simple statement of that fact will suffice. The gory details of the mutilation can remain a reward for the enterprising researcher.

3 There is no need to respond to every issue raised by every party. By analogy to the rule that a case will not be decided on constitutional grounds where other grounds will suffice: where one issue is dispositive of a case, the remainder can be ignored (at least until another day). Banning the phrase "We need not decide, but . . ." from all opinions would be a helpful first step.

4 Nor is there a need to respond to every issue raised in the concurring or dissenting opinions. Or for that matter, to respond to the response that responded to an earlier response. Such "responses" usually are only partly edited out before publication, and the residue often contains cross-references to nonexistent statements. Perhaps the inter-office memo could provide a forum for resolving such differences.

5 Extensive quotations from transcripts generally are unnecessary. A few short, well-chosen examples will provide the requisite flavor, leaving paraphrasing to drive home the point, usually with greater effect.

6 String citations should be eschewed. Use of overly long string citations, even in footnotes, "may cast doubt on the credibility of [a] claim[] because they give the impression that [the] case is so weak that [it has to be] substantiate[d] with every source [that can be found]." Charrow & Erhardt, *Clear and Effective Legal Writing* (Boston: Little, Brown & Co, 1986), ch 3, p 64. Where the law is well settled, citation of the leading case (or cases) and a recent case that restates the principle usually will be enough.

7 Lengthy quotation of treatises is unnecessary. Most treatises are widely available. Learned counsel should not be deprived of the joy of browsing. A brief statement of the point to be made (quoted or paraphrased) generally will be sufficient.

8 Likewise, lengthy quotation of case law is unnecessary. A narration of the development of the law in a given area with appropriate citations will provide the reader with the background necessary to appreciate the conclusions drawn in the case at issue.

9 Fine tuning for future cases usually will be futile. It is a losing battle to try to anticipate all possible ramifications of today's decision. There always will be a distinguishable scenario. Rather than trying to resolve (in dicta) as many potential alternatives as possible, it would be better to await another day and the benefits of the briefing and arguments of counsel.

10 There is no need to insert lengthy blocks of clerks' memos to please them. Writing samples other than published cases can be included with their job applications.

William F. Haggerty is the Reporter of Decisions of the Michigan Supreme Court, responsible for the editing and publishing of the opinions of the Court, and for preparation of syllabi and headnotes that accompany the opinions. This piece is adapted from an item given each year to new law clerks. While it never has been directly condemned by any justice of the Court, still, its contents are outgrowths of the Reporter's mind exclusively, and in no way should be taken as having been officially endorsed by the Court.

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Clarity, petitions, and private bills

by RICHARD OERTON

At a recent meeting of the CLARITY committee, someone remarked that he had been reading a petition against a parliamentary bill and had found it verbose and legalistic. The meeting happened to follow my retirement from Bircham & Co, a Westminster firm of solicitors practising in association with Dyson Bell Martin, who are parliamentary agents; and I mentioned that, by way of giving assistance to the latter firm, I had on occasion been called upon to draft these petitions. I echoed the committee member's view about them and, for good measure, voiced some regret about the approach taken by the parliamentary authorities to the drafting of private bills which are also the province of the parliamentary agent. The editor then asked me to write an article about all this for *Clarity*, and I realised too late that I had opened my mouth too wide.

Parliamentary agents

Parliamentary agents (not on any account to be confused with the parliamentary counsel, who are government lawyers responsible for the drafting of public Bills) are solicitors or barristers in private practice. They are few in number and their world is a neglected corner of the legal landscape. But the comprehensive examination which it may perhaps deserve will not come from me: I was never one of them and my knowledge of their doings is at best partial and peripheral. The thoughts which follow are confined to the particular matters already mentioned.

The form of a petition

When a private (or a hybrid) Bill is introduced in the House of Commons or the House of Lords, those who object to its provisions have a limited time within which to petition against it. This they do by lodging a petition with the House in question. As I write, I have in front of me a petition against the Channel Tunnel Rail Link Bill. The heading goes like this:

IN PARLIAMENT

HOUSE OF LORDS

SESSION 1995 - 96

CHANNEL TUNNEL RAIL LINK

P E T I T I O N

Against the Bill - On Merits - Praying to be heard by Counsel, &c.

TO THE RIGHT HONOURABLE THE LORDS SPIRITUAL AND TEMPORAL IN PARLIAMENT ASSEMBLED

THE HUMBLE PETITION

of

[names of petitioners]

SHEWETH AS FOLLOWS: -

The substance of this Petition, like that of others, falls into two parts. The first begins

> **I . A Bill (hereinafter called 'the Bill") has been introduced into and is now pending in your Right Honourable House intituled "An Act to provide for the construction, maintenance and operation of a railway between St Pancras, in London, and the Channel Tunnel Portal at Castle Hill, Folkestone, in Kent, together with associated works, and of works which can be carried out in conjunction therewith; to make provision about related works; to provide for the improvement of the A2 at Cobham, in Kent, and of the M2 between junctions 1 and 4, together with associated) works; to make provision with respect to compensation in relation to the acquisition of blighted land; and for connected purposes."**

and then says who the Bill is promoted by and goes on to paraphrase, as it were by way of recital, all the provisions of the Bill which give rise to, or bear on, the objections which the petitioners wish to raise.

Since the petitioners are likely to be a commercial undertaking affected by a number of different provisions, these "recitals" may be very lengthy. In reading them, one finds that clause so-and-so empowers the Secretary of State to do such-and-such; that, although some other clause provides for compensation, its amount is limited in certain stated ways; and that yet further clauses make provision for this, that and the other, doing so in this way, that way or the other way.

Then, and only then, come the objections themselves. Very occasionally petitioners will petition against a Bill lock, stock and barrel. But nearly always (either because they do not wish to do this or because they recognize that an objection in principle would have no

chance of success) they will concede the aims of the Bill and complain only about the particular provisions already "recited". In doing so, they will be concerned to argue that — for reasons and in ways which they explain in detail — these provisions have a particularly adverse effect upon them. In this part of the petition one finds paragraphs beginning:

> **Your Petitioners believe that ...**,
>
> **Your Petitioners apprehend that ...**,
>
> **Your Petitioners fear that ...,**

or even

> **Your Petitioners are gravely concerned that ...**

and one pictures them sitting round the board-room table, faces ashen, heads in hands.

And then, after the detailed statement of objections, comes the final clause saying

> **Your Petitioners therefore respectfully submit that the Bill should not be allowed to pass into law in its present form.**

and then this:

> **YOUR PETITIONERS THEREFORE HUMBLY PRAY your Right Honourable House that the Bill may not be allowed to pass into law as it now stands and that they may by heard by themselves Counsel or Agents against the clauses and provisions of the Bill and in support of other clauses and provisions for their protection and that such other relief may be given to your Petitioners as to your Right Honourable House may seem meet.**
>
> **AND YOUR PETITIONERS WILL EVER PRAY, &c.**

If the Petition is to the House of Commons, 'Right Honourable" is changed to 'Honourable".

Thoughts about petitions

Perhaps there was a time when all this made pretty good sense. Perhaps the archaic language was then current usage. Perhaps the exaggerated (even craven) obsequiousness was necessary politeness. Perhaps Lords or MPs actually sat down and read the petition from start to finish, and it was convenient that it should set out the Bill's long title, and then recite at length its relevant provisions, so that they could understand what was going on without having to plough through the Bill itself.

But none of this is true today. The archaism and obsequiousness would not survive for five minutes in any everyday area of the law. And the reciting of the Bill has become a nonsense: it really is doubtful whether this part of the petition is ever read by anyone at all (apart from the drafter whose task, if my experience is anything to go by, combines boredom with difficulty to an excruciating degree). Nowadays the real purpose of a petition is to create a situation in which the promoters of the Bill sit down with the petitioners and thrash out a basis (perhaps involving amendment of the Bill, but more probably depending on undertakings given outside it) on which the latter are prepared to withdraw their objections. If this negotiating process fails to produce that result, the matter could come before a parliamentary committee, but this outcome is rare.

Shorn of all its frills, the petition serves a necessary purpose: it enables objectors to put their objections on record within the relevant time limit, so that they can then negotiate with the promoters without losing the right to fight the Bill if they have to. But the objections themselves are the only part of the petition which is necessary to serve that purpose and, I would suggest, the only part which deserves to see the light of day. The long title and the recitals are unnecessary, and the opening and closing flummery should be taken as read. Even the objections themselves could surely be whittled down to a series of relatively brief statements in which the gravity of the petitioners' concern need not be mentioned and from which, arguably, many of the supporting details could be omitted. These details, and the statements about the ways in which the Bill could be modified, surely play no necessary part: they will emerge in the negotiations and, if need be, they could be added if the petition comes to be considered in parliament. On that basis, a dozen pages of petition could probably be reduced to two or three, sometimes perhaps to a single sheet of paper.

None of these changes could be brought about by parliamentary agents off their own bats. All would have to be sanctioned by the parliamentary authorities. In particular, there is at present a rule that a petition, unlike pleadings, cannot be amended once it is deposited: for that reason alone, petitions usually contain more material than necessary.

But does the present situation really matter? Perhaps this question could serve, within the membership of CLARITY, to separate the purists from the pragmatists. The latter might

argue that, precisely because petitions are read by so few people, the features mentioned above do little harm and, since they add up to a mildly interesting historical curiosity, might as well be left alone. The purists, of course, would say otherwise. I think I should side, on balance, with the purists. The place for historical curiosities is the museum, the archive, or the history book: if they are reproduced day in and day out in lawyers' offices they become anachronisms. Bills like the Channel Tunnel Rail Link Bill may give rise to hundreds of petitions. Can there be any justification for the time wasted turning out so much gobbledegook?

Thoughts about private Bills

Another main feature of the work of parliamentary agents is the private Bill, of which the Channel Tunnel Rail Link Bill is an example. These are mainly promoted by local authorities or other public bodies of one kind or another, and they serve to give them powers to do things which require legislative authority.

Although an authoritative condemnation of a particular private Act appears below, complaints about the quality of private legislation are few and far between. This may be a tribute to the ability of the parliamentary agents — and, in passing, it *is* quite remarkable that a group of lawyers in private practice, trained only by one another, should produce so great a volume of legislation so successfully — but public ignorance may also have something do with it. Private legislation is, to most people, a closed book, and very many have no idea that it exists. Yet it impinges every day on people's lives. (To take one tiny example, the penalty fares exacted from passengers on the London underground are authorised by a private Bill promoted by London Transport and drafted by parliamentary agents.)

Although some private Bills break new ground and call for originality — I was given a few of these to draft and very funny things happened to most of them on their way to the statute book - most private Bills do things (or include provisions doing things) which have been done before. And here, it seems to me, they have something in common with petitions, because in these situations the parliamentary agent is bound to find it easier and safer to copy word for word the provisions included in earlier private legislation to do the same job. Nor is this mere cowardice or laziness, because the authorities who are responsible for the procedures governing private legislation will ask of a Bill's provisions, "Are they precedented?" and, if assured that they are, will smile on them benignly. The concept of bog standard provisions might have been invented for private legislation.

The trouble is, of course, that the provision which is by now standard was drafted years, and sometimes very many years, ago. It may never have been a very good example of the art of drafting: the only thing to recommend it may be that once long ago, it happened to get through parliament. But whatever its original virtue may or may not have been, its language and its conceptual approach have inevitably become more and more outdated as the years have passed.

The problem is exacerbated when several standard provisions appear in a single Bill. In *Argyle Motors (Birkenhead) Ltd v. Birkenhead Corporation* (1974 2 WLR 17), Lord Wilberforce said of one private Act, passed in 1965, that it

> **... contains a farrago of sections, loosely pinned together from various precedents, which have neither clarity nor mutual consistency. In face of this, the normal tools of interpretation fail to operate: attempts to construe the Act as a whole lead to perplexity: to attribute a consistent meaning to particular words...leads to absurdity: to try to ascertain the intention of Parliament leads to conflicting conclusions. In fact, golden rules must yield to instruments of baser metal. One can only search for the occasional firm foothold and cautiously proceed from there.**

Everything nonetheless militates against change. The parliamentary authorities do not seem to want it; and the parliamentary agents, though they might like to produce Bills which are concise, modern and easy to follow, are conscious of the labour involved, not only in drafting the new provisions, but in piloting them through parliament — and conscious, too, that the cost of all this would be unacceptable to their clients. And here again, of course, there is no clamour from pressure groups or from the public at large, for innovation.

I am very grateful to Dyson Bell Martin, and in particular, to Nick Brown, for help in preparing this article, but the views expressed are mine alone.

Richard Oerton retired this year. His book, *A Lament for the Law Commission,* arose from his stint as an assistant solicitor there early in his career.

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Document testing and research

by PHILIP KNIGHT

Purpose of this paper

Many writers of legal documents seek to write as clearly as possible. They are becoming more concerned with measuring the clarity of those documents, and are particularly interested in knowing whether non-professional readers can easily understand their work.

In discussions during the 1996 Tax Simplification Conference in Auckland, it became clear to me that planners in this field, while familiar with the idea of testing in a general sense, felt somewhat overwhelmed by the apparently confusing array of test methodologies and results. Furthermore, while anecdotal research reports provide useful test ideas and procedures, they offer little guidance on the larger question of test purposes, strategies and functions.

In this paper, I attempt to -

(a) provide an overview of the theories and function of testing, and the methods available; and

(b) provide a conceptual framework for planning communication tests.

Research Theories

Many reports of document tests do not state outright that the research was based on a particular theory of communication or philosophy of what it means to "be plain". Nevertheless, by assessing what the researcher has done and the conclusions drawn from what has been done, it is possible both to infer that there was an underlying theory (even if not recognised by the researcher) and to classify it in one of four broad categories. I have identified the following apparent theories at work within each category.

Writer-Based Theories

The common element of writer-based theories is a belief that the writer is best placed to determine if and when the document clearly reflects the intended meaning. It can be summarized in this way -

> **Clarity is recognising in the text what I, the writer, intended to convey through the text.**

These days, when discussing law or other technical writing, there are few proponents of this theory, though it still has a vibrant life and many supporters in pockets of the legal profession.

Though they will usually agree that peer review is useful to catch errors that the primary writer has overlooked, those who subscribe to this view see no need to test documents with readers. Indeed, some consider it egregiously wrong to do so.

The professed rationale for not testing with readers is that the technical nature of the work, and the degree of objective accuracy required, make it inappropriate for testing with readers who lack the relevant technical knowledge. Ironically, the effect of this position is to move the class of accurate technical non-fiction writing into the arena of review generally thought appropriate for fiction literature.

Document-Based Theories

Document-based theories are so called because each of them attempts to assess the clarity of a text by reference to the document in isolation from either its writer or reader. There are five members of this family, as follows:

The Prescriptive twins (Product and Process)

In both cases, theorists assert that clarity is achieved when the document itself reflects an objectively determinable set of features. The "Product" twin can be summarized as

> **Clarity exists when a document meets these standards . . .**

There are many variations on just what the document ought to be. Invariably drawn from standard works on good design and writing, some prescribe design elements, some typography, some pagination, some vocabulary, some navigational aids, some all these elements. But in every case, the implication is that you can test for clarity by looking to see if the product - the document itself - has the required features. If so, say the proponents of this theory, the text is "plain".

By contrast, the "Process" twin is more concerned with how the document was created than what it looks like. This idea of clarity can be summarized

> **Clarity exists when the creator of the text took**

the following steps . . .

Again, there are many variations on the theme, and different prescriptions of the steps that are needed to get the desired result. Again, the necessary steps are drawn from standard works on rhetoric and good writing. And again, the basis of assessment is similar, implying that you can test for clarity by examining the process followed in creating the text. If it matches the prescribed steps (whatever they may be) the text is declared to have been "written plainly".

The Readability twins (Word-sentence, and Sentence-context)

The common element of these twins is that they lead our concern away from the whole document and toward a specific feature of the text. Specifically, they each focus attention on the words and sentences used, though their particular interests are markedly different from each other.

The Word-sentence school is primarily concerned with vocabulary and sentence length. It can be summarized as holding that

> **Clarity exists when the average sentence is neither excessively long, nor overloaded with difficult words.**

It is typified by formulas that require sampling the text, counting the words (or syllables) and the sentences in the sample, and factoring in certain absolute values derived from psychologists' research. The formula yields an index or grade estimation of the readability of the selected text.

The Sentence-context twin, recognizing some fairly obvious shortcomings of its formulaic sibling, takes a different tack, while still concentrating attention on the sentences that make up a text. This school of thought is more concerned with the structure of the sentence than with its bulk and agility. In particular, proponents look to the vocabulary used (and avoided), the grammatical patterns followed and the information load of the sentence. They also concern themselves with the ordering of the sentences within the paragraph, and indeed, with the entire organization of the text. This theory can be summarized as holding that

> **Clarity exists when the best words are used in the best order.**

Testing based on this theory will generally be performed as some sort of expert analysis, in which a professional will examine the text, comparing its organization, grammar, information flow, and vocabulary against pre-determined standards. Those standards might have been laid down in the design for the text or based on an application of previous psychological research, or they might follow methods of socio-linguistic text analysis, or be determined by the expert based on professional experience with similar texts.

Observed Effect

This is the final member of the family of Document-Based Theories, and is somewhat of a misfit in the clan. While still avoiding reference to the readers or the writers of the text, the concern here goes beyond the document itself, looking to its functional effect on the institution or society within which the text is used. In particular, it attempts to determine whether introduction of the document has had a positive or negative effect on the social setting in which it is used. The theory can be summarized as holding that

> **Clarity exists when a desirable effect is realized on demand for information or assistance, error rates, administrative costs, reading or completion time, etc.**

This school uses benefit analysis to measure the effect of a text, and assumes that any text that effects a reduction in cost, inconvenience or incidence of error must be clearer and easier to use than whatever preceded it. It can be used in either of two applications — as a comparative study across competing jurisdictions, or competing methods and forms (including "before" and "after" forms), or as an absolute assessment against pre-determined acceptable standards.

Reader Based Theories

The third category is so named because proponents of these ideas are primarily concerned with either of two effects of the document on the intended readers.

Emotional Response

Historically, this has been the more commonly applied theory in this category. It is based on the assumption that readers always prefer clarity over obscurity, that they can best judge the clarity of a document, and that if asked, will readily and accurately tell you whether or not your document is "user-friendly". This theory can be summarized as

> **Clarity is a good feeling about the document.**

Applying this theory, researchers survey sample populations, solicit reply cards, consult focus groups, or conduct personal interviews of readers. Typically they are looking for readers' reactions to different features of a text, to the text as a whole; whether it was easy or difficult to use or understand, whether the presentation was pleasing or bothersome, how the readers felt about the text and its creator, how the text compared to either the readers' expectations, or to some other real or imaginary text, and finally, which of various texts the readers prefer.

There are many examples of surveys in which a document has been created to satisfy one or more of the document-based theories, and then has been referred to readers in a test for emotional response. When, as often happens, the readers express a preference for the text, or a good feeling about it, the survey report has concluded that the response of the readers has validated both the document involved and the document-based approach to determining what is "plain".

Useability

This is the second type of Reader-Based Theory and is less concerned with how readers feel about a document and more interested in what they are able to do with it. This school presumes that legal and other technical documents are created for known purposes that invariably involve readers. Its proponents seek to determine whether or not those purposes are achieved in test conditions. It may be summarized as

> **Clarity is being able to use a document easily, for its intended purposes, in relevant circumstances.**

Tests of useability (also known as comprehension tests) usually involve personal interviews in which sample readers are asked to perform a task or set of tasks that typify the use of the document in real life. Each task is scored, the results for each task weighted in proportion to the importance of that task in the use of the document, and the average scores across all respondents calculated. That average is then compared with the results from a parallel test of a previous version of the text, a similar text in another jurisdiction or setting, or a similar benchmark text in the same setting, and the variance between test results analyzed to determine the relative useability of the new text.

Alternatively, a single text may be measured against pre-determined useability goals established for the project.

These tests can yield accurate estimates of readers' assessment of the ease of use of the document, its actual ease of use and comprehensibility, and the probability that any randomly selected member of the intended readership will be able to use the document effectively.

They can also yield a probability curve for the entire subject population predicting percentage useability of the document for each percentile of the population. In other words, the creator of the texts could be told that, e.g. 20% of the readers will be at least 80% likely to use the text properly, 40% will be at least 60% likely to do so, 60% will be at least 40% likely, and 100% of them will be at least 15% likely to do so. Unfortunately, as helpful as the probability curve can be, it can only be evaluated comparatively, or against pre-determined standards for the project, because no one has developed a standard scale of acceptable aggregate comprehension for legal texts.

Transactional Analysis

This is the fourth and final category of test theories. It is something of a hybrid of the two types of Reader-Based Theory, but differs from them in that its proponents emphasize that meaning comes about through engagement of the reader with the text. Practitioners in this school attempt to assess whether readers encounter any problems with a text, what those problems are, and why they occur. This theory can be summarized as holding that

> **Clarity is never hitting a mental or emotional block.**

The "think-aloud protocol" is the favoured tool of this school. Individual readers are asked to use a text while they perform various tasks relating to it. They are asked to vocalise every feeling and thought that occurs to them as they perform those tasks. The exercise is observed and recorded and may be followed by an exit interview with the researcher. By comparing actual performance (or failure) of the tasks by all subjects, with their various comments about the text, the researcher can identify both the existence and nature of communication problems with the document.

Some drafters of legal documents practice one of the easiest and certainly the cheapest

form of this sort of test, perhaps without even being conscious that they are testing. They do so by drafting in an open, consultative atmosphere that welcomes debate. As they propose approaches to expressing their ideas, and test those approaches with team members, inconsistency and misunderstandings are discovered. It is very low level testing, and doesn't include lay audiences, but as far as it goes, it is an effective and low cost form of test. It is not the only test that should be used, but it is a test that should always be used.

Summary of Research Theories

What then should be made of all this? Which theory is correct? I believe that everyone of them has its value and place in the document creation or review process.

When the summary statements of the various theories are compiled in one list, it is difficult to disagree with any one of them, and together, they make a quite complete description of an ideal document. Indeed, none of these theories deserves to be dismissed out of hand, as the methods that emerge from each of them are useful to careful and caring writers. A problem arises insofar as any of them is treated either as a complete answer, or as competing with another for correctness. Seizing hold of any of them as the full solution to difficult or obscure text, or misusing any of them, is what causes problems for many advocates of clarity.

Understanding the theories and corresponding methods helps researchers select the best tool for the job when testing is called for. Of course, that depends on what the job is at a particular moment, what you hope to learn, and how you plan to use that knowledge. Ostensibly, the job is always to determine if a text is "plain". But there are many ideas about just what that means.

What does it mean to write plainly?

"Plain language" was originally a readers' label for text, a statement of expectation coined by frustrated and critical readers to label a quality of communication significantly different from the quality they were experiencing. As writers and institutions have attempted to defuse readers' criticism and earn broader acceptance of their work, they have adopted the phrase to mean something slightly different from the readers' meaning.

Typically, readers will describe as "plain" any written presentation that they trust, and that they can understand and act on appropriately, with a degree of effort which they find acceptable in the circumstances.

Writers and institutions tend to use the label differently. Generally they are less likely to use it to refer to the effect of the document on the reader, and more likely to use it to describe either the process they used in developing it, the production standards of the document itself, or the positive effect on the institution of introducing that document.

The distinction is highlighted in the way each discusses clarity of a document. On the one hand, readers tend to say "I don't understand this very well; it is not clear to me", describing their own experience of the document, and using that as a basis for a qualitative judgment about the document. On the other hand, writers and institutions will say, "we have used plain language in preparing this" or "this text is in plain language", emphasizing first the process of creation, and second an instrument by which they hope to have achieved effective communication. The writers' usage of the label is further distorted by those writers who confuse precision of writing with clarity of communication.

This difference in meaning and use of the "plain language" label can create confrontation and exacerbate alienation of an institution's readers. Often, an institution will go to great effort to write a "plain language" text, only to have some readers (and plain language advocates) find fault with it. This is frustrating to everyone involved, but particularly irritating to the readers who hear an implied message that they must be especially dim-witted to have failed to understand what they are assured has been made "plain", just for them.

We needn't be mystified by this. At the heart of the readers' usage lies a judgment about the **sense** of a message, while at its core, the writers' usage deals with the **simplicity** of the document. These are qualitatively different concerns, the first being a subjective assessment of an intangible (meaning), and the second being an objective evaluation of a concrete artifact.

The dissimilar, but compatible, interests of readers and writers cannot be harmonized so long as they continue to talk past each other, using identical code words to convey fundamentally different ideas. Although their respective objectives in seeking "clarity" are

understandably different, the interests of readers and writers are compatible. In my view, while the writers' meaning can be useful in guiding the creation of text, the readers' meaning of "plain language" is the only valid basis against which to finally measure the clarity of a document.

Language is transactional, and readers, text, and reading occasions are all infinitely variable. Consequently, text that one reader declares to be plain, another will decry as horribly unclear, while two objectively similar texts will be judged by the same reader to vary in clarity. Writers and institutions should choose to be guided by experience, following a production process, and selecting quality standards that have resulted in text that readers have understood easily in the past. Doing so will increase the likelihood that similar readers will again find the new text "plain", and would thus justify the writers' expectation that the text should be plain to those readers.

But the most rigorous adherence to the lessons of the past cannot alone justify a writer's claim that the resulting text is "plain". Only readers can determine that, either by describing their feelings about the text, or by demonstrating the effect of the text through appropriate and successful, or inappropriate and unsuccessful, use.

Comprehension

The following steps are necessary for comprehension, and can be measured objectively by testing readers' performance in using a text.

Finding	how well can readers locate the information they need;
Interpretation	how well can readers interpret the vocabulary and symbolism used by the writer;
Comprehension	how well can readers understand the messages presented;
Application	how well can readers apply the information to their own circumstances.

The following elements affect comprehension, and can be subjectively revealed by readers commenting on their feelings about a text.

- The availability of the document;
- The appearance of the document;
- The physical and emotional context in which the text is read;
- The readers' prior knowledge of the subject;
- The readers' interest in the subject;
- The degree to which the writer has used language patterns that are familiar to the reader;
- The readers' familiarity with the language, vocabulary and usage chosen by the writer;

The following are proven inhibitors of comprehension or usability of documents.

- A history, fear, or expectation of hostility or untrustworthiness between the writer and reader;
- Inability to locate information easily;
- Unfamiliar concepts;
- Complex sentence or paragraph constructions;
- Abstractions and inability to relate easily to the subject;
- Vagueness and ambiguity;
- Unusual vocabulary or usage;
- Innumeracy, and fear of numbers.

Tests have been designed and used successfully to measure all the essential elements and to identify the inhibitors. As well, other tests and measures have been designed to assess the probability that a text will communicate clearly and effectively.

Role of research in document management

Of course, it is important to know if a document is "plain", and if it is not, what can be done to correct it, but is knowing that a good in itself, or can research help an institution perform better? Bluntly, besides the satisfaction of "being plain", why should anyone spend good money to test a document?

Here are the four major uses for document research.

1. To experiment, develop knowledge, or establish benchmarks.

   Experimentation and knowledge development may be primarily of academic interest,

but establishing benchmarks is critical to any testing. Without benchmarks, it is impossible to establish meaningful goals for improvement or achievement.

2. To assist the planning and design process.

   In the legal world, most document research takes place (if at all) after the text is completed, or in final draft stage. By definition, the research is reactive, the possible corrections largely cosmetic (or expensive), and the final result often patronising, frustrating and conducive to deepening alienation. It doesn't have to be this way.

   Early testing alerts managers to communication issues that matter to the users. Those issues can then be addressed together with all other imperatives bearing on the project. The document specifications can then be established in the way that maximizes satisfaction of all the needs of all the users.

   Planning based on early testing speeds a project, saves money, yields better documents and enhances public esteem.

3. To assess progress and correct errors.

   However good the planning and the management of document creation, a project can still miss the mark. Preplanning research necessarily deals with abstract concepts. Mid-term assessment is helpful to determine whether the standards need to be reconsidered in light of the users' response to the emergent concrete product; whether the text as it is evolving is measuring up to standards; and if not, what changes are required.

   Mid-term testing affords managers the last chance to determine what is needed to "get it right".

4. To evaluate a finished project

   Finished documents can be tested against either another document or a predetermined objective. The information derived can be used for reports, promotion, instruction, and systems planning, for cost-benefit analysis, and for planning either subsequent editions of the texts or future document projects.

Testing a document

Advocates of plain language encourage institutions to test documents with readers "to determine if they are plain". That phrase masks a multitude of possible meanings. While it is critical to know whether the reader finds the document "plain", when considering the purpose of testing documents, it is probably preferable to think beyond that general label. Testing should have a clearly defined purpose, should be designed to show something about some aspect of the document.

There are several aspects of a document that can impinge on clarity and useability, and that are therefore appropriate objects of testing. When we test a document for "plainness" we are really attempting to determine whether the document (as it has been produced) is as good as it can be, and whether, in any of the following aspects, the document impedes effective, easy use and communication.

1. Document Function

Is the document as a product consistent with its purpose, with the environment in which it will be used, with other documents to which it relates (if any), and with the nature of the relationship between the institution and the intended readers?

Under this heading, the following qualities might be examined:

The trustworthiness of the institution to the user;

The appeal of the document;

The appropriateness of the document for the audience and purpose;

The physical design and appearance;

Efficacy - whether the document is likely to achieve its purpose.

2. Organization

How well does the document lead the user through the content? Is the conceptual structure consistent with the purpose of the document? Is there a logic to the ordering of material, and is that logic natural to the users? Are the relationships between subjects within the content reflected in the organization of the material? If the document deals with concepts that are unfamiliar to the users, are those necessary, are they clearly related to familiar ideas, and are they adequately explained?

Under this heading, the following qualities might be examined:

Readability;

Comprehensibility;

Useability;

Efficiency (cost, time).

3. Language

Are appropriate words used in appropriate ways? This testing should be concerned with words (vocabulary, voice, tone, person, number), sentences (structure, complexity, length, grammar, information load), and composition (information flow).

Under this heading, the following qualities might be examined:

Readability;

Comprehensibility;

Useability;

Application of information to real-life circumstances.

4. Presentation

Does the document design reflect its purpose, and is it helpful in communicating ideas? Are there adequate navigational tools and aids to understanding? Is the page layout appealing, and the typography both readable and appropriate to the purpose? Is the physical structure adequate for the intended environment?

Under this heading, the following qualities might be examined:

Appeal;

Appropriateness;

Physical design and appearance;

Useability;

Efficiency (cost, time).

The Testing Toolbox

Researchers have a wide variety of tools available to them to test the various aspects of a document. As with any toolbox, each device is suitable for its designed purpose but none is suitable for all purposes. The following are general descriptions of the tools typically used and the information they produce. I have clustered them according to their appropriate research role.

Planning tools

1. Review of case law, precedents and academic comment about the law: yield specialized reader understanding of prior text.
2. Audit of error rates, demands for information, past performance, past case histories: yield qualitative and quantitative data concerning the useability and comprehensibility of existing documents.
3. Focus groups: group discussions of questions about the institution or subject of a document: yields qualitative data that identifies communication issues important to the intended users.
4. Surveys: individual interviews or responses to a series of questions about the institution or subject of a document, sometimes based on issues identified through focus groups: yield quantitative data measuring the relative importance of various issues, the frequency of events or opinions, and demographic patterns.
5. Psychographic analysis: uses surveys of large numbers of people to collect data which is analyzed by sub-groups defined according to values, attitudes or behaviour: yields indicators of audiences likely to identify with, and respond favourably to, a particular message.

Assessment tools

1. Computer-based checkers: yield correct spelling and "grammatical" composition.
2. Formula scores: yield grade estimates of readability.
3. Individual or group interviews: yield depends on nature of questions:
   - Subjective questions yield impressionistic data and emotional responses which address matters of appearance, tone, and attitude of the text.
   - Objective exercises yield quantitative data and measures of useability or comprehensibility. By isolating tasks and measuring performance in each, the results can predict probability of success for a typical user, and for a population of users, of the text.
   - Protocol based exercises yield a combination of qualitative, impressionistic, and quantitative data. By matching these threads of data, the results are used to identify the existence and nature of, and possible solutions for, problems in a text.

Evaluation tools

1. Checkers: yield correct spelling and "grammatical" composition.

2. Formula scores: yield grade estimates of readability.
3. Individual or group interviews: yield depends on nature of questions (see above).
4. Cost/benefit analysis: yields quantitative data measuring effect of document revision on other variables such as cost, error rates, administrative demand, etc.
5. Audit of error rates, demands for information, performance, case histories: yield qualitative and quantitative data concerning the useability and comprehensibility of the documents over medium range periods.

Philip Knight is a lawyer in Vancouver. He was the director of the Plain Language Institute of British Columbia and now consults on research into comprehension of legal texts, and concentrates his law practice on legislative and other special drafting projects. In 1996 he advised the Constitutional Assembly of South Africa, helping draft their new democratic constitution.

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Plain English in bank security forms

by GAVIN RITCHIE

This is the text of a speech at the Plain English Campaign's 5th International Conference, London, July 1997, and is printed with permission from Barclays Bank plc and the Plain English Campaign.

When Barclays Bank decided in the early 1990s that its charge forms and guarantees should be revised and improved, several factors came together to determine that the forms used by individuals rather than those used by companies should be revised first.

The things which brought about this decision — apart from the internal need to enhance various charge forms to make them more effective and more in keeping with the needs of the market — were:

- first, the approaching European Directive on Unfair Terms in Consumer Contracts;
- secondly, the approaching first edition of the Good Banking Code of Practice, now commonly known as the Banking Code; and
- thirdly, the need to recommend independent legal advice for every individual giving a guarantee or third party charge.

We knew little about the European Directive on Unfair Contract Terms in Consumer Contracts in those days, but we knew that as we revisited the wording of our charge forms and guarantees we would have to ensure that no unconscionable deeming provisions were tucked away in the boilerplate clauses — or to put it in plain language — that we didn't have any unfair little nasties hidden in the standard wording.

We also knew from early drafts that the Banking Code required guarantees to bear warnings that individuals giving guarantees were recommended to take independent legal advice and to recognise that they might be called on to pay instead of or as well as the borrower.

What, you might ask, does all this have to do with plain English? For all these issues could be addressed without actually changing the language and presentation of the guarantees and third party charges which we were considering. After all, the guarantee form which Barclays used had developed slowly over a century or more and, although there were legal actions from time to time over guarantees, these disputes tended to relate to the conditions in which the guarantee was taken rather than to any doubt about the meaning of the text itself.

It was in fact another part of the Banking Code which inspired us: the part concerning contracts with customers, not charge forms or guarantees at all; it said that contracts must be expressed in plain language. Frorn here our imaginations ran riot and we determined to produce a guarantee with warnings so prominent that they could not be overlooked and wording so plain that no one could claim to have misunderstood the nature of the obligation which they were entering into or tbe extent of their liability. It was here that Barclays' first plain guarantee forms began to take shape.

Beginning with a guarantee document rather than a charge or mortgage form was a particular challenge. A guarantee stands or falls on the document signed by the guarantor; it is a pure contract with no tangible security

content. A charge over a house or an assignment of a life policy, by contrast, have some merit as documents, but relate closely to the thing charged which the chargor always understands is being"pledged", as it were, for someone's liabilities; they can be taken away and sold if the liabilities are not honoured.

Guarantees have turns of phrase such as "continuing security" and "ultimate balance" and "payment in gross" which have been recognised by the courts over the years. Would a plain translation of these magic words be accepted by the courts in the same way? Or would we be setting off on a new voyage of discovery in the coming decade or two to find whether our plain wording would be accepted as the new and equally effective version of the traditional phrase or whether it simply had to be read and interpreted afresh with unknown consequences?

I cannot even now answer some of these questions. Although our plain guarantee form was launched in 1993 and no other form has been taken from individuals since that time (save for Consumer Credit agreements), not a single guarantee has gone to court. The court's reaction to revised wording therefore remains to be seen.

Of course, we did not leave the matter of the court's likely reaction to our new wording entirely to chance. We consulted our favourite QC and a barrister with a specialist knowledge of guarantees. To our surprise we obtained not only advice and comfort on the new wording but enthusiastic encouragement to simplify and modernise the wording and presentation of our charge forms generally. Although dutiful servants in defending the bank's charge forms over many years and with much success, the barristers made it clear that the courts were ill-at-ease in finding against individuals who claimed to have misunderstood the nature or at least the extent of a traditional "gobbledegook" charge form or guarantee.

The first thing that occurred to me when beginning to sketch out the form of guarantee which we wanted was that plain English prefers the use of "you" and "me" or "us" to defined terrns such as "the Guarantor" and "the Bank". Barclays' traditional form of guarantee was not wholly deficient in this respect: although it referred to the guarantor as "the undersigned", at least the bank itself was "you" throughout the document. This was appropriate since the guarantee was being addressed by the guarantor to "you", the bank. Naturally, I wanted to get rid of "the undersigned" and have "you and me" or "you and us."

The trouble was that if the bank was "you", then the guarantor had to be "me/us". Guarantees can be given by one person or by several, so we had to provide for both singular and plural. The ideal solution seemed to be that the guarantor should be "you" (which is the same in both singular and plural), leaving the bank as "us". Linguistically attractive! But the wrong way round in normal guarantee drafting. We overcarne this dilemma on the front page of the guarantee, where the guarantor's name and address appear beside the words

> **This Guarantee is given by you as guarantor on the conditions set out in this document. You agree to be bound by those conditions.**

We worked through literally dozens of drafts of the guarantee before our counsel, solicitors, the Plain English Campaign, and of course we ourselves were happy with the result. We abandoned simple wording such as:

> **You have asked the Bank to provide or continue banking facilities to the Customer, and the Bank has agreed to do so.**

We thought that most guarantors would point out to us that they certainly did not ask the bank to lend the money. Instead we settled for:

> **We have agreed ... to provide ... banking facilities to the Customer. In return you unconditionally guarantee that all Customer Liabilities will be paid or satisfied.**

I have said that the two eminent barrisiers from whom we sought advice were surprisingly enthusiastic and supportive of our efforts. Indeed, they drafted a very p1ain version for us. It was at this point that we realised that there are many degrees of plain English and it is a matter of taste how far one goes in any given context. In the context of a formal guarantee given to a bank for someone else's liabilities, it seemed to us that the language of *The Sun* newspaper was not appropriate: it did not — dare I say it — bestow upon the document the solemnity which it deserved, and could cause someone to give the guarantee with insufficient recognition of the seriousness of the arrangement. Our aim was plain English in the style of *The Economist.*

We think that the resultant guarantee is a success. No guarantor can fail to see the warnings, for they appear on the front of the guarantee and on each signing page. The

forms are a joy to behold and, with their reversed-out clause headings, are visibly divided into digestible chunks for the reader. Gone are the acres of text in our old form, unsullied — as some critic once said —- by a single comma or full stop.

Our experience of letting these forms loose on the world, and the legal fraternity in particular, has been a happy one. Many solicitors have complimented us on the styleand presentation of the guarantee, particularly bearing in mind that their task was to explain the form to their client. I must say however that it has not all been plain sailing. Particularly in the first year or two some solicitors struggled with our versions of the standard legal phrases. Many times we were asked what are "liabilities which depend upon events which may or may not happen". When given the answer "contingent liabilities" they would say "Oh yes. Of course! Now I see!". There was a distinct feehng that some things had to be converted back into pounds, shillings and pence, as it were, before those well-versed in traditional legal documents could get the measure of them.

Because we coincided issuing plain guarantee forms with a renewed emphasis on recommending independent legal advice as required by the Banking Code, we were bound to receive lots of queries. I am convinced that where most solicitors recognised the turgid prose of the previous form of guarantee which we sought from individuals, they never actually read or troubled to understand all its provisions. When the plain version emerged, suddenly they had no choice but to read this new and unfamiliar form, and for many wrestling with the possible ramifications of a guarante which was stark in its wording to the point of being hard-hitting was a new and not altogether pleasurable experience.

In a way, I wish that I could tell you that the guarantees have also received the approbation of the courts. In another way I am even happier to say that not a singleone has reached the courts.

So attractive was the notion of ensuring that no English-speaking person could fail to understand the nature of the document that we sought Crystal Marks for other forms of security.

We set out to prepare an assignment of life policy and a charge over a house. These were the forms of charge most commonly given by individuals: the house when they were obtaining a mortgage advance or perhaps securing a business facility, and the life policy when the mortgage depended on an endowment policy or simply required life cover. We finished the life policy assignment first because it was less complicated.

Our experience with the guarantee gave us a flying start: we knew what the front page of our new house style required: a clear title, the Plain English Campaign's Crystal Mark, a warning to take independent legal advice, and panels showing the details of the parties to the assignment and the policy itself. We were also able to lift some parts of our plain guarantee and use them almost word for word in the new life policy assignment. For example, the nature and amount of the liabilities secured by the assignment could be described in the same way as the liabilities covered by the guarantee.

We were nonplussed when we took our first reasonable draft of the assignment to the Plain English Campaign, for they told us that it should not becalled an "Assignment"; the word "Transfer" would be better. Neither lawyers nor bankers tlnnk of an assignment as a transfer. To us a transfer is a sale or a gift of the thing transferred, but an assignment can be "with equity of redemption", which means that when you repay the money secured by the assignment, the bank will reassign the policy. Besides, the relevant statute law, and in particular the Policies of Assurance Act 1867, do not give directions about notices of transfers, only notices of assignment. The Plain English Campaign's field teams were consulted on the meaning of "assignment". No. No-one knew what it meant: if we really had to use an obscure word like that, we would have to define it in the list of definitions at the beginning.

Lawyers dislike defining things like "assignment", "motgage", and "charge". To them each one is remarkably similar but subtly different. Of course, they would not agree with that summary; they would argue that these things are quite distinctly different. A mortgage is a dead pledge ("mort" and "gage"), and is like a pawn but without possession of the goods, whereas a charge is a simple security interest. For the sake of a good discussion in the pub you can then put on an innocent tone and ask "Well, what's a charge by way of legal mortgage, then?" Apparently that is a hybrid innovation introduced by the Law of Property Act 1925. The legal world takes a while to assunilate new ideas.

None of this fun and games cut any ice with the PEC: to thm "mortgage" and "charge" would also need defining in our charge over domestic property. They explained that their field teams think a charge is something you have to pay, like bank charges, and a mortgage is a loan for buying a house. Presumably they thought that an assignment was something between a Herculean task and a homework project. In the end, good sense prevailed, and we called the document an *assignment of lifepolicy* with a definition setting out that "assignment" means the transfer of the policy by you to us.

"Fine" said the PEC. "Now we need to define "life policy". In my role as conductor of this orchestra in which the PEC bangs the drum, the lawyers blow their trumpets, and the bankers seem to play second fiddle, the chances of achieving harmony never seemed further away than when the PEC asked for a definition of life policy. "Look", said the lawyers, with all the excitement of Ben Elton in full flood: "A man walks into a High Street Bank and says hewants to borrow some money. "Got any security?" asks the manager. "I got this life policy," says the man. "Great!" says the manager. "We'll take an assignment of that." "What's an assignment?" asks the man, obviously an agent provocateur from the Plain English Campaign. "It's a transfer of the policy by you to us~. "Fair enough!" says the man "What's a life policy?".

'The PEC took the point and conceded that people who offered life policies as security did not need a definition of life policy when they came to assign one.

Documents involving "you" and "us" are all very well so long as you remember which party is "you" and which is "us". Perhaps one day there will he an Even Plainer English Carnpaign which insists that every bank is called "the bank" and every person giving an assignment is called "the assignor". Using "you" is all very well until it becomes just that bit too personal. I've never been entirely at ease with condition 15:

> **If we address a demand to you and you have died, this will be a sufficient demand on you or your personal representatives.**

To say that an assignor has died is somehow more acceptable than "you have died". *

As with the plain guarantee, we were worried that it was tempting providence to begin with a clean sheet of paper to create an *assignment of life policy* without the words "hereinbefore", "hereinafter", "hereunder", and "in witness whereof" and in which all "shalls" become "wills" or "musts" and all "whichs" become "thats". But I have seen enough court judgments in the last few years to convince me that the courts are not hidebound by traditional phraseology. A move away from documents comprising an acre of turgid prose into something more digestible can only be good for customers and courts, as well as for the bank itself.

Gavin Ritchie is a French and German graduate who has been with Barclays Bank for 25 years. Since 1990 he has been assistant head of its law section, with responsibility for the forms and systems used in taking security for advances. He has been working with the Plain English Campaign to modernise the documents.

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* Editor's suggestion:

Your death before we serve a demand will not affect its validity.

Don't Stop Now: An Open Letter to the SEC

by Joseph Kimble

In January 1997, the U.S. Securities and Exchange Commission issued a proposed rule that would require plain English in certain parts of prospectuses — the front and back cover pages, the summary, and the risk-factors section. At the same time, the SEC issued the draft text of *A Plain English Handbook: How to Create Clear SEC Documents.* See Clarity 38 (Jan 97) pp. 19-21.

Both the rule and the *Handbook* include many before-and-after examples. In addition, the SEC and several companies have worked together on two pilot programs that produced a number of documents written in plain English. So much for the argument that some matters are too complex for plain English.

The proposed rule appears in the *Federal Register*, vol. 62, p. 3152. The rule and the *Handbook* are also online at http://www.sec.gov/news/plaineng.htm. (No period after htm.)

The SEC invited comments, and I sent the following letter — which was also published in the *Michigan Bar Journal.*

* * *

Jonathan G. Katz
Secretary, Securities & Exchange Commission
450 Fifth Street, N.W.
Washington, DC 20549-6009

Dear Mr. Katz:

I write to strongly support the SEC's proposed rule to require plain English in prospectuses (File No. S7-3-97).

First, a word about my background. I have taught legal writing for 13 years at Thomas Cooley Law School. Before that, I was a practicing lawyer. I am the managing editor of *The Scribes Journal of Legal Writing* and the editor of the "Plain Language" Column in the *Michigan Bar Journal.* I have written extensively on legal writing and plain language. So I'm familiar with these issues.

Now, the SEC's proposed rule and *Plain English Handbook* do an excellent job of setting out the theory and practice of plain English. The rule disposes of the typical criticisms of plain English, and it sets out well-accepted principles for clear writing. The *Handbook* shows in more detail how to apply those principles. Both the rule and the *Handbook* contain many before-and-after examples of how disclosure documents can be improved.

Also, you have rightly taken a flexible approach to plain English. As the *Handbook* says (page 24), "we are presenting guidelines, not hard and fast rules you must always follow." Of course a writer may occasionally have a good reason for using the passive voice. Of course not every sentence has to have fewer than 25 words (especially if it ends with a list). Of course a technical term may be unavoidable at times (although the writer can still explain what it means). But the need for some flexibility does not begin to justify the current state of writing in prospectuses.

I urge the SEC: please, please do not be dissuaded by the lawyers. They always raise the same arguments. And for anyone who has fairly reviewed the plain-English literature, those arguments do not hold water. We have answered them again and again,

First, the argument that plain English is not precise enough for complex material. I have dealt with this argument, and so has the SEC in its proposed rule. In one demonstration project after another — including the SEC's own pilot programs — we have shown that legal documents can be written in much plainer language without any loss of precision. I'll bet that the SEC got hardly any comments that its pilot-program plain-English documents were imprecise or inaccurate. That's proof that it can be done and that traditional investment documents are full of needless complexity.

If anything, plain English is more precise than traditional legal writing because plain English lays bare the ambiguities and uncertainties that traditional writing — with all its convoluted language and unnecessary detail — tends to hide. In every project that I have worked on, we have found that the original document was not nearly as precise as everyone had thought. So plain English improves not just the style of the document, but the substance as well.

Second, the argument that plain English is impossible because of the need to use technical terms. But true technical terms or terms of art are a tiny part of most legal documents — maybe 1 or 2 percent of the words. The rest can be written in plain English. And again, even technical terms can usually be explained for consumers.

Third, the argument that plain English is subjective. The truth is that all law is more or less subjective because law depends on language, and language will always involve uncertainty at the margins. What is *reasonable doubt*? What is *good cause*? Does *highway* include the shoulder and the traffic signs? Trying to define everything — as legal documents are inclined to do — is often self-defeating; it complicates the document and still leaves uncertainty.

Beyond that, the history of plain-English requirements shows that they are not too subjective for effective compliance. Nine states now have statutes that require plain English in consumer documents. On the whole, those statutes are pretty consistent with the elements of plain English in the SEC's proposed rule. And by all accounts, those statutes have been successful.

I have a letter from the regulatory officer who reviews contracts for compliance in New Jersey. She writes:

> **The New Jersey Plain Language Law has proved to be extremely effective, and the review system is working well. After some initial unease, all segments of the legal profession, the legal publishing industry, other large suppliers of contracts, and individual businesses have cooperated fully .... Contrary to fears, no disruptions of business or major problems arose in any industry because of the new consumer-contract standards.**

After 14 years in New Jersey, there have been exactly four lawsuits over noncompliance with the plain-language statute. The Minnesota statute has also been in force for 14 years. In Minnesota, there has not been a single lawsuit.

Finally, the argument that compliance should be voluntary. That would be nice, but it probably won't happen. As the proposed rule points out, the SEC has been trying for 30 years to get issuers to improve their prospectuses. Nothing changes. And unless the SEC follows through with it rule, I doubt that anything will change.

I'll end on a personal note. I have been involved in this effort for a long time. I have written that plain language is probably the most important law-reform issue that faces our profession. Even after four centuries of criticism, most legal writing remains too long, too dense, and too arcane. It's time to move lawyers off dead center. They owe it to the public to finally stand back, look at the evidence, learn the techniques, and stop copying the old forms. Otherwise, we'll continue to pay the enormous social costs of poor writing in business and government and law.

The SEC is doing the right thing. Don't stop now.

Sincerely,
Joseph Kimble

Joseph Kimble is a professor of law at the Thomas M. Cooley Law School, Lansing, Michigan. His contact details are on page 1.

A few samples from the SEC handbook

One unoriginal but useful tip: Write with a specific person in mind. When writing Berkshire Hathaway's annual report, I pretend that I'm talking to my sisters. I have no trouble picturing them: Though highly intelligent, they are not experts in accounting or finance. They will understand plain English but jargon may puzzle them. My goal is simply to give them the information I would wish them to supply me if our positions were reversed. To succeed, I don't need to be Shakespeare; I must, though, have a sincere desire to inform.

No sisters to write to? Borrow mine: Just begin with " Dear Doris and Bertie."

From the preface by Warren E. Buffett

* * * * *

What is a "Plain English" Document?

We'll start by dispelling a common misconception about plain English writing. It does not mean deleting complex information to make the document easier to understand. For investors to make informed decisions, disclosure documents must impart complex information. Using plain English assures the orderly and clear presentation of complex information so that investors have the best possible chance of understanding it.

Plain English means analyzing and deciding what information investors need to make

informed decisions — before words, sentences, or paragraphs are considered. A document written in plain English presents information to meet its audience's needs.

A plain English document uses words economically and at a level the audience can understand. Its sentence structure is tight. Its tone is approachable and direct. Its design is visually appealing. A plain English document is easy to read and looks like it's meant to be read.

* * * * *

Here's a common sentence found in prospectuses:

> **NO PERSON HAS BEEN AUTHORIZED TO GIVE ANY INFORMATION OR MAKE ANY REPRESENTATION OTHER THAN THOSE CONTAINED OR INCORPORATED BY REFERENCE IN THIS JOINT PROXY STATEMENT/PROSPECTUS, AND, IF GIVEN OR MADE, SUCH INFORMATION OR REPRESENTATION MUST NOT BE RELIED UPON AS HAVING BEEN AUTHORIZED.**

Here's one possible plain English rewrite:

> **You should rely only on the information contained in this document or that we have referred you to. We have not authorized anyone to provide you with information that is different.**

The plain English rewrite uses everyday words, shorter sentences, active voice, regular print, and personal pronouns that speak directly to the reader.

* * * * *

Before:

> **The proxies solicited hereby for the Heartland Meeting may be revoked, subject to the procedures described herein, at any time up to and including the date of the Heartland Meeting.**

After:

> **You may revoke your proxy and reclaim your right to vote up to and including the day of the meeting by following the directions on page 10.**

The plain English version tells you who may revoke a proxy and where to find the information on how to do it. It replaces the abstract "subject to the procedures described herein" with concrete, everyday words: "by following the directions on page 10."

It's not enough merely to translate existing texts — the key is to add useful information.

Drafting snippets

collected by MARK ADLER

In *Armitage v. Nurse* (Law Society's *Gazette* [3.4.97, p.27]) beneficiaries sought to make trustees liable for unconscionable behaviour in the absence of dishonesty. The trust deed excused the trustees unless there was “actual fraud”. The Court of Appeal held that “actual” changed the meaning of fraud so that “actual fraud” did not include constructive or equitable fraud.

* * * * *

A retired business administrator and her professional husband had wills prepared by a solicitor. Despite reading them many times they were unable to understand them, and eventually gave up, assuming that the solicitor knew what he was doing. After the husband died his widow was told that if she had followed him within 30 days a substantial legacy to a particular relative would have been given twice. She was horrified: "That's not what we intended!" she exclaimed.

Their instructions on the point had been straightforward: a gift to X on the first death. There was no logic to the solicitor's arrangement, and it is clear that this was just a drafting mistake. It would have been a very expensive one for the solicitor if events had triggered the second gift.

This mistake was unnecessary. By using pointlessly complex language the solicitor had tripped over his tongue and disabled the clients who could otherwise have pointed out the error in time to correct it.

* * * * *

The following note appeared in a personal injury law newsletter:

> **At present (and most likely for the foreseeable future) courts are unable to enforce a Structured Settlement independently. The burden of responsibility for examination of a Structured Settlement lies squarely on the shoulders of the plaintiff's and/or the defendant's legal advisors....**

But how can "responsibility ... lie ... squarely on the shoulders of (A) and/or (B)"?

The editor, when asked, thought it "clear enough".

Is gender-neutral drafting a plain-language issue?

MARK ADLER questions the influence of political correctness

Why do plain language exponents disagree about whether gender-neutral and similar issues are plain language issues? The resisters believe it is a matter of style unrelated to clarity and that the reformers, in importing political correctness, are confusing two separate issues.

A resister might argue that

Man does not live by bread alone

is as clear as

Humans do not live by bread alone

and that since the second version is longer and less familiar, the generally accepted principles of plain drafting favour version 1.

Reformers sometimes respond with an ethical argument: biased language should be condemned because it is offensive. But this is to accept tacitly that it *is* a different issue. I fell into this trap when writing *Clarity for Lawyers* [1].

But there is a stronger argument. Men and women have always been treated differently by laws and customs. Attitudes are still changing and widely differing views co-exist. So to write as though the masculine includes the feminine is to risk confusion. Research has shown[2] that when American judges instructed jurors to choose a *foreperson* (instead of a *foreman* the percentage of women appointed rose dramatically. This makes gender-neutral drafting a plain-language issue.

A third argument is that plain language aims to help the reader understand the document. This intention is frustrated if the style distracts the reader from the content. And the annoyance caused by biased language seriously distracts many readers.

On the other hand, the clumsiness of some gender-neutral writing is also distracting. This problem has not yet been resolved, but it will be as our language continues its inevitable development to reflect social changes:

> **...(W)e tend to forget that the Latin of Cicero or the French of Voltaire is the product of centuries of development and that language as long as it lives and is in actual use is in a constant state of change** [3].

Meanwhile, we can help by writing gender-neutral language as elegantly as we can. For example:

> **The lawyer who writes in plain language tries to put himself in the reader's shoes**

can become

> **Lawyers who write in plain language try to put themselves in the reader's shoes** [4]

rather than

> **The lawyer who writes in plain language tries to put himself or herself in the reader's shoes.** [5]

1 The Law Society, 1990, pp 71-73.

2 I am afraid I do not have the details. Can anyone help, please?

3 *The history of the English language,* 4th edn, Albert C. Baugh and Thomas Cable, Routledge, 1993, p.16.

4 *Plain language for lawyers,* Michèle M. Asprey, The Federation Press, 2nd edn, 1996, p.139. Ms Asprey gives several other tips for neutral writing.

See also (for example):

The singular use of "They", Robert Eagleson and others, Clarity 34 (January 1996), p.29.

The plain English guide, Martin Cutts, Oxford University Press, 1996, pp 71-74.

Plain language for lawyers, Richard C. Wydick, Carolina Academic Press, 3rd edn, 1994, also pp 71-74.

5 The Women's Press has produced a pair of small books which drafters should find useful:

- *The Handbook of Non-Sexist Writing* argues clearly and sensibly and offers many examples of unobtrusive neutrality.

  By Casey Miller and Kate Swift; 3rd edition 1994 (1st published 1980); 178pp inc index; £6.99; ISBN 0 7043 4442 4.

- I found more to disagree with in *the A-Z of Non-Sexist Language,* which includes, as a glossary, items which might have been better omitted; nevertheless, a useful book.

  By Margaret Doyle; 1995); 112pp; £6.99; ISBN 0 7043 4430 0.

Better drafting

Lord Woolf proposes a rule that pleadings be in plain language, and he recommends judge-led litigation. Although his scheme remains only a proposal, courts are already using their discretion to implement some points. Is it not time, then, for all judges to follow the Chancery Division initiative and make plain orders?

The order on the next page, made by a county court district judge earlier this year, is typical of the current style. In the notes below, Mark Adler criticises the layout and wording, and on the following page he suggests a plainer version.

---

1. This heading is used only to tell the court's clerical staff which form to use. It is probably unnecessary, and is in any case duplicated (in tiny print) at the bottom.
2. This strange layout (inserting the solicitors' details here, with those of the other solicitors elsewhere; the box; and the words "Plaintiff's Solicitor" outside the box) can only be justified by its convenience for use with window envelopes. I have kept it, slightly modified, in my rewrite. But "plaintiff's solicitor" is only a guide to the staff filling in the form, so I have reduced its prominence. Finally, "solicitor" is a common noun, and the initial capital is vainglorious.
3. Is the traditional "In the" helpful?
4. This typeface is too small to be effective.
5. Ideally, the names of the parties would be at least as prominent as the name of the court. This may not be practicable where they are typed in, but the two defendants could at least be separated onto different lines.

6 Which defendant.? And it is the solicitor's reference, not that of the defendant himself.

7 Only lawyers talk of being "before" a judge. More to the point: the judge made the order.

8. It could be taken for granted that the judge was sitting.
9. The address of the court is given elsewhere, and need not be repeated here. Even if that hearing had been held elsewhere, the address would not be pertinent to the order.
10. "Upon" = "on". But "after" would be more appropriate. Is it not time to abandon this formula?
11. Neither "Plaintiff" nor "First Defendant" warrant capital letters.
12. The repetition of "upon hearing" is unnecessary.
13. "Judge Oldpen ordered" is shorter and clearer than "Before Judge Oldpen ... Upon hearing X and Y ... It is ordered (by whom?) that ...."

    Now that multi-font word processors have generally replaced typewriters we can use larger and bolder type (and preferably a sans serif style) to emphasise headings, instead of telex-style capital letters the same size and style as the text.
14. "Do" is artificial and unnecessary.
15. "Do provide the further and better Particulars numbered 3 to 6 inclusive" = "answer questions 3 to 6".
16. The document is identified by the date written on it rather than by the date on which it was served (especially as it may be have been served a day or two later).
17. This phrase has wandered too far from the phrase to which it should be linked.
18. It is always best to give the date, not only for ease of reference but to avoid the argument that time only runs from service of the order.
19. "There be" is weak. Who is being ordered?
20. What sort of exchange would not be mutual?
21. This would need explanation to the client or a litigant in person.

» continued on page 42 »

General form of judgment or order[1]

Plaintiff's Solicitor[2]

Seau, Liss, Itor & Co

56 Kingfisher Court
Guildford
Surrey GU1 6AA

In the[3]

BINGLEY

County Court

Case No. *Always quote this*[4]	BOS723823
Plaintiff	Brian Cottrell
Defendant	1. John Richard Thomas Burgess 2. Cohorts & Co[5]
Plaintiff's ref.	KT
Defendant's ref.	LD/Burgess.Rep[6]

Before[7] District Judge Oldpen sitting[8] at 13 - 14 West Street, Bingley, Kent AB1 2CD[9].

.

Upon[10] hearing the Solicitor for the Plaintiff[11] and upon hearing[12] the First Defendant's Solicitor

IT IS ORDERED THAT[13]

1. The First Defendant do[14] provide the further and better Particulars numbered 3 to 6 inclusive[15] sought by the Plaintiff in the Plaintiff's request served on[16] 20 August 1996 within 14 days[17] of today[18].

2. There be[19] mutual exchange[20] of witness statements of fact[21] on or before[22] 28 February 1997 and in default no witness whose statement has not been so exchanged[23] shall[24] give evidence at the Trial[25] save[26] with leave of[27] the Court.

3. The First Defendant do serve on the Plaintiff and the Second Defendant a copy of any expert evidence upon[28] which the First Defendant[29] intends to rely on or before 28 February 1997[30].[31]The Plaintiff and Second Defendant do have leave to[32] serve[33] any expert evidence upon which they intend to rely within 42 days thereafter[34] and in default no expert whose report has not been served in accordance with this Order shall give evidence save with leave of the Court.[35]

4. This matter[36] be transferred[37] and henceforth dealt with[38] in the Chancery List.

5. There be liberty to apply[39].

6. The matter be listed for further directions including a direction on setting down[40] on **Thursday 24 April 1997 at 10.00am** with a time estimate of 15 minutes at 13 - 14 West Street, Bingley, Kent AB1 2CD[41].

7. The First Defendant do pay the Plaintiff's costs of the Application[42] of 14 October 1996[43] to be taxed if not agreed.

Date[44] Order Made: 14 January 1997
Order Drawn[45]: 17 January 1997

Defendant's Solicitor

Long, Tooth & Co
73 Arnison Road
Esher
Surrey KT 10 2JK

Bingley County Court	
13 West Street, Bingley, Kent AB1 2CD Tel: 01234 567890 [Office open Mondays to Fridays from 10am to 4pm]	
Case Number	BOS723823 *Always quote this*
Plaintiff	**Brian Cottrell**
Defendants	**1. John Burgess** **2. Cohorts & Co**

Seau, Liss, Itor & Co

56 Kingfisher Court
Guildford
Surrey GU1 6AA

Ref: KT

Plaintiff's solicitors

Order

made by District Judge Oldpen on 14th January 1997

after hearing solicitors for both the plaintiff and the first defendant

1. This case is transferred to the Chancery list.
2. The first defendant must by 28th January answer questions 3 to 6 in the plaintiff's 20th August 1996 request.
3. The parties must exchange their non-expert witness statements by 28th February.
4. The first defendant must by 28th February serve on the plaintiff and the second defendant the report of any expert witness on which he intends to rely.
5. The plaintiff and second defendant must by 11th April serve on the first defendant and on each other the report of any expert witness on which they intend to rely.
6. No witness may be called without the court's permission unless their statement or report has been served in accordance with this order.
7. ~~Any party may apply to the court for further directions.~~
8. This application is adjourned to a 15-minute hearing on **Thursday 24 April 1997** at **10am**.
9. The first defendant must pay the plaintiff's costs of the 14th October 1996 hearing, to be taxed if not agreed.

Long, Tooth & Co

73 Arnison Road
Esher
Surrey KT 10 2JK

Ref: LD

First defendant's solicitors

» continued from page 39 »

22. The OED gives "on or before" as the relevant definition of "by", so will not "by" do?
23. "No witness whose statement has not been so exchanged" makes "in default" superfluous. The double negative adds to the clumsiness.
24. "May" is neater. Apart from the usual criticism of "shall", it makes poor sense to command "no witness".
25. When else but at the trial? And "trial" does not deserve a capital letter.
26. "Save with" = "without".
27. "The leave of the Court" = "the court's leave (or "permission")". (Bryan Garner has pointed out that the word "of" often signals verbosity.)
28. "Upon" = "on".
29. "He" would do, to avoid repetition.
30. The deadline for the action should be moved away from "rely" and nearer to "serve", which is the verb to which it relates.
31. I would give this its own paragraph, for consistency. All the other paragraphs are restricted to a single order.
32. "Do have leave to" = "may".
33. In the previous sentence the court specified the parties on whom the evidence must be served; here it does not.
34. It is not clear whether the 42 days begin when the first defendant's evidence is served or on the last day on which it might have been served.
35. The inclusion of this long formula as part of the second sentence excludes the first sentence from its ambit. So despite the repetition (after its appearance in the previous paragraph) it does not cover all the witness statements.
36. "Matter" is vague word, like "thing" and "unit". "Case" is what it is.
37. It should be "transferred *to*".
38. "And henceforth dealt with" is both archaic and superfluous.
39. The lawyers know this anyway, and the lay parties don't know what it means. In any case, the next paragraph makes it unnecessary.
40. Does the judge not just mean "this application is adjourned to"?
41. It hardly seems necessary to repeat the court's address here if (as was the case) all hearings are in the same building. If it had to be included, the time-estimate phrase should be in parenthesis.
42. "Application" deserves a capital letter even less that "trial" did.
43. A comma is missing.
44. "Date" is no more necessary here than it is immediately below (where it was omitted).
45. Is the date of drawing significant? The important dates are those of making and serving.
46. This important information is too inconspicuous.

Book review

The new Fowler's Modern English Usage

3rd Edition: R W Burchfield
Clarendon Press 1996; 864pp
£16.99 hardback; also in paperback

Writing correct English is a prerequisite to the practice of English law and writing understandable English is essential to its effectiveness. The new Fowler's provides guidance on both, has already been welcomed in the national press, and will need little further introduction to members of CLARITY.

Other reviews have concentrated on Robert Burchfield's liberal approach to (for example) the judicious splitting of infinitives, and his refreshing use of modern quotations (including self-quotation). Certainly the style is not heavy handed although the advice given is clear and never unnecessarily qualified. Where there is no grammatical or etymological need, Burchfield tends to describe what is the usual construction ("usually spelled such- and-such a way") in preference to prescribing an artificial rule ("such-and-such is correct"), but in relation in particular to pronunciation he inclines to prescription unless there is a clearly established dichotomy of usage, eg where a word has been imported from another language.

Burchfield's own language is enjoyable and admirably economical, a feature which flatters the reader; for example:

> **Stamen, Pl. stamens. The pl. of the Latin original, namely stamina, has moved into English in a different sense.**

At the same time, his comments, especially on the ubiquitous American English (which is treated almost as a separate language), are interesting and illuminating.

He has a lively approach to what many people consider a dry subject, and for pure entertainment value I would recommend his passages on "bafflegab", "hackneyed phrases", "intelligent, intellectual", and "should and would".

This makes the book much more than a guide to usage, but does lead to me to sound a warning note on keeping a copy too close to hand at work.

Francesca Quint

Writing Numbers

ROBERT D. EAGLESON adds a postscript

In *Clarity* 30 (March 1994) I contributed to a discussion on how numbers might be presented in documents, proposing that we should now print all numbers in figures and abandon the conventions that numbers up to 9 (UK) or 101 (US) should be spelt out.

A rather macabre recent example in *The Sydney Morning Herald* (30 June 1997, page 3) shows how the conventions can actually impede the quick grasp of a message and may indeed be visually misleading. Reporting a suicide-murder, the newspaper wrote:

> **A wealthy father cut the throats of his four daughters yesterday before committing suicide....**
>
> **P_____ S_____ killed the girls, aged nine, 12, 14 and 18, before....**

Because they are in figures, 3 of the ages stand out from the text and it is easy to identify 3 of the daughters. In contrast, spelling out "nine" tends to merge it with the text. In this situation it is less obvious and readers skimming the text could be forgiven for believing that there were only 3 daughters.

This example illustrates the pointlessness of the convention of spelling out smaller numbers, especially in the days when numbers are so clearly differentiated from letters in word processing packages.

Loophole

Duncan Berry writes:

Loophole is published irregularly by the Commonwealth Association of Legislative Council (whose chairman, Dennis Murphy, is a member of CLARITY), and is sent free to members. But they hope to publish bi-annually in future. The last issue contained one or two items of interest to CLARITY members. For back numbers or information contact CALC's secretary: Edward Caldwell, Office of the Parliamentary Counsel, 36 Whitehall, London SW1A 2AY. Tel: 0171 (or 44 171) 210 3000; fax: 210 6632.

Letters to the editor

From Alec Samuels, Southampton

The park byelaw said

Dogs must be kept on a lead.

The owner entered the park with his dog. He put his own belt round the collar of the dog. The dog broke loose and "ran wild", the belt trailing behind him. The prosecution said that the dog was not on a lead. The belt was not a lead. The dog was not controlled. The defence said that the belt sufficed for a lead; it need not be purpose-built or tailor-made. The dog was "on a lead" - albeit not held by his owner. The prosecution said that the intention of the byelaw was perfectly clear.

How should the byelaw be better drafted?

Dogs must be kept on a lead at all times ?

Dogs must be held [controlled] on a lead at all times ?

Dogs must be physically controlled by their owner [keeper] at all times ?

* * *

You know how similar looking and similar sounding words can be confusing.

Loathe, loath, loth.

The same, interchangeable, or different? **To loathe** appears to mean to dislike intensely, to hate, to abhor, to detest, to find repulsive, or repellent or disgusting. **Loath** (rhyming with loth, soft th) appears to mean unwilling, reluctant, averse. **Loth** (not in Johnson's Dictionary) appears to mean the same.

One can see the connection, the common ground, but a big gap exists between hatred and reluctance.

Why not keep **loathe** for hatred, and **loth** for reluctance? And abandon the potentially misleading and confusing **loath**?

From Anne Stanesby, Official Solicitor's Dept, London

I have just been trying to compose a letter to one of my clients who has learning difficulties and I have been trying to "translate" the following.

The matter be adjourned generally with liberty to restore. If no application is made to restore by ..... 1997 the applications do stand dismissed...

What I have put is:

At present the court case has been what we call "adjourned". That means it has been put off for now and if no one wishes to go on with it will come to an end completely on ..... 1997.

I should be interested to hear if other CLARITY members think this is a good translation or not.

From Donald K.S. Petersen

I recently went to Moscow for 3 weeks. I worked with U.S., U.K. and Russian lawyers at an accounting firm that is developing a legal practice. Most of their clients are western companies, and they were concerned that the Russian lawyers, who spoke English as a second language, were producing written work their clients wouldn't recognize. Though I wasn't there for that reason, and knowing only that I was a Harvard geek, they asked me to help the Russian lawyers improve their legal writing. They actually were concerned only with punctuation, format etc. They got more than they bargained for. I'm not a writing teacher, but I teach economics at Oakland University and I enjoy convincing students each semester to enjoy it despite thinking they will hate it.

I assumed the beauty of plain English would be obvious to those who hadn't yet developed bad habits. If I could convince them that "plain and simple" was correct, they wouldn't be any wiser! It was, of course, far more difficult than I imagined. All documents had to be translated — Russian and English text appeared side-by-side on each page. Moreover, specific words that we may eliminate as "legalese" were required, I was assured, by the new Russian code. Finally, different terms had different legal meanings after translation.

Well, of the three lawyers with whom I worked, one was unreceptive, one was ambivalent, and one particularly brilliant gentleman embraced it emphatically. Unfortunately, the British and American lawyers were not entirely supportive. After Yurat and I reduced an incomprehensible 14-page document to about 7 pages, he was scolded by his boss. It seems a document that short and plain would

not justify the client's bill, which I suppose was anything but short and plain.

Ah well, live and learn, and never give up. I've learned that a friend may have to litigate over the meaning of "herein" - but it doesn't stop him from using it. I wish you all the best.

From Professor Joseph Kimble, Thomas M. Cooley Law School, Lansing, Michigan ...

I recommend that we modify the numbering system for the journal and newsletter.

I have talked with a couple of our library subscribers, and they are concerned about losing the newsletter. They also may not wish to bind it with the journals. But then, if they lose it or don't bind it, there will be a missing number in their collection.

The next issue of the journal is 40 (a nice round number to change on). How about if we make the next newsletter 40-A, and so on down the line. Then it wouldn't make much difference what libraries chose to do with the newsletter. And besides, giving the newsletter a separate number seems out of proportion anyway.

What do you think?

... and from Philip Knight, Vancouver

I think Joe is on to something with the need to reconsider the numbering. But I would rather we avoid adding letters to numbers. I just makes me wonder if there is a 40 B, etc.

He is right that 40 is a nice round number, and a good time to introduce a change. Could we put a note in issue 40 confirming that the experiment of the past year (2 issues, 2 newsletters) seems to have worked well, and we have decided to stay with it. Starting in 1998, we will (a) number the journals as [1998] 1 and 2; and (b) date the newsletters as April 1998, and October 1998.

That should eliminate the confusion, add the benefit of letting people know when the thing was published, and allow for sequential shelving of the journal and newsletter separately.

We might also think of adding a new element to the newsletter masthead to create a visual distinction from the Journal.

From Roderick Ramage , Stoke-on-Trent, Staffordshire

I was interested to read recently about legislation speaking continuously, leading to discussion on the use of *will*, *shall* and *may* — much the theme of my first effort at legal writing, which I have put on my web site with some other legal articles.

I am now underway with a new edition of Kelly's *Draftsman* and will revise the cross-referencing system which has caused difficulties for some practitioners. As usual I hope that at least the language will be plain. I did dedicate one clause to Clarity in the 16th edition. Any suggestions and requests will be very welcome.

Tel: 01782 202020
email: ramage@law-office.demon.co.uk
web site: www.law-office.demon.co.uk

Campaigning correspondence

Open letter to the Chief Land Registrar

In my practice as a conveyancer I often send clients land registry transfers prepared by other solicitors. These are usually headed

H.M. Land Registry

This understandably confuses the clients, who tend to tell me they have "received (or signed) the H.M. Land Registry", which confused me until I got used to it.

Similarly, you send out copy entries in the land register under the title

OFFICE COPY

which to lay people is no more informative a name for a document than "Original" would be.

Could you call things by more descriptive names? Office copies might be headed, for example:

Land register entries

15 High Street, Dorking

Yours sincerely,
Mark Adler, CLARITY

Reply from Denise Reynolds
(Agency Customer Services Manager)

As far as I am aware, every version of land registration transfers produced by hard copy and electronic publishers states in the top left hand corner what the document is. I enclose a copy of the Transfer of Whole used by electronic publishers to illustrate the point. I would add that one of our lawyers has told me that when he was a conveyancer and had to send a transfer to a client he would describe it as such and in returning it, if there was a covering letter, or in conversation, the client would invariably refer to it as the transfer.

As to office copies of registered titles, the term is used to indicate the nature of the document. Immediately after the words "Office Copy", the document is described: "This office copy shows the entries subsisting on the register on.....". We refer to the document as an office copy to make it clear that section 113 of the Land Registration Act 1925 (admissibility of office copy as evidence and right to indemnity if the copy is inaccurate) applies.

We are grateful for your interest in our forms and terminology and you may be reassured to know that as we come to draft new legislation and forms we try to make them as " user-friendly" as possible. We are engaged on an exercise in relation to application forms at present and I will ask those responsible to ensure that you are included in any forthcoming consultation.

To the Licensing Unit, Westminster City Council, London

I was puzzled by the following licence displayed at a Victoria Station snackbar:

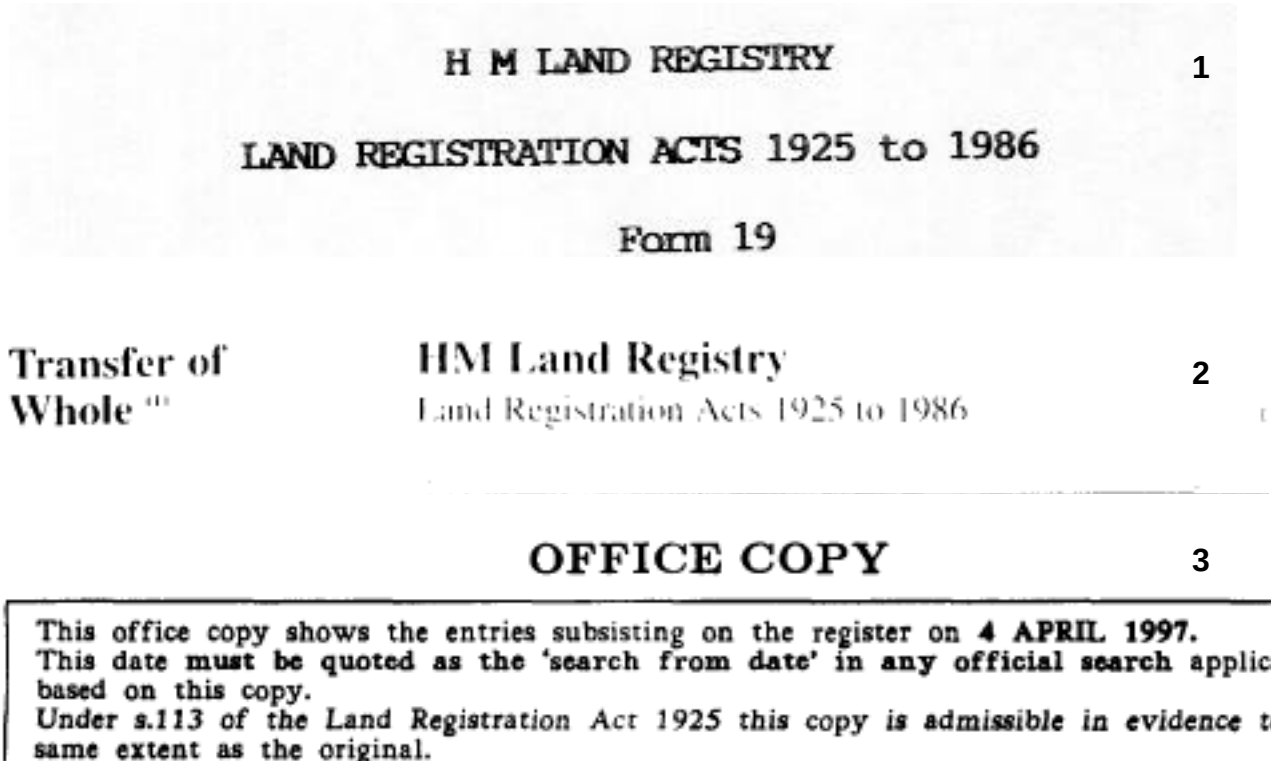
The premises may be kept open from 12.00 midnight on the days Sunday to Saturday to 1am on the day following.

Do you mean by this (for example)

... from midnight at the beginning of Sunday to 1am on Monday (25 hours later)

which might be better expressed as

These premises may remain open 168 hours a week.



H M LAND REGISTRY 1

LAND REGISTRATION ACTS 1925 to 1986

Form 19

Transfer of Whole [1]

HM Land Registry 2
Land Registration Acts 1925 to 1986

OFFICE COPY 3

This office copy shows the entries subsisting on the register on **4 APRIL 1997.**
This date **must be quoted as the 'search from date' in any official search** applic
based on this copy.
Under s.113 of the Land Registration Act 1925 this copy is admissible in evidence t
same extent as the original.

1. A transfer prepared by a solicitor. 2. The Land Registry's official version. 3. "Office copy entries".

Or do you mean

> **... from midnight at the end of Sunday to 1am on Monday (1 hour later)**

which might be better expressed as

> **The premises may be kept open between midnight and 1am every day**

which suggests that I bought my coffee illegally at 9pm?

Or is there a third meaning which I have overlooked?

Yours sincerely,
Mark Adler, CLARITY

Reply from David Chambers
(Client Director (Licensing))

I agree the wording used on the notice is not a model of clarity. What the notice meant was that the premises could, if the licence was granted, remain open from midnight to 1am on every day of the week. We are now reviewing the wording of the notice to improve its clarity.

I would add that in part the confusion arises because a take-away food premises does not need a licence between 5am and midnight. Hence you did not buy coffee illegally at 9pm.

CLARITY news

Promotion in the USA

As a result of his continuing recruiting drive Joe Kimble has accumulated another US$2,000 in his CLARITY account. He is considering ways to use this to take advantage of the remarkable opportunity which now exists for plain language promotion as a result of the SEC (see p.34) and other initiatives.

He is also considering the appointment of local recruiters around the country, particularly in DC, and the possibility of running CLARITY seminars in the USA now that we are so well represented there.

CLARITY Awards

The third CLARITY awards for the use of plain legal language will be presented in late 1998, after which we hope they will be annual.

They are again to be sponsored by DJ Freeman, whose financial support and organisation last year did so much towards making the event a success, with some 70 entries. Next time only one prize will be awarded for explanatory and promotional material, to restrict the soft option and to encourage entrants to clarify their substantive documents;

Several overseas members, in England for the Plain English Campaign's conference, took the opportunity to come to a committee meeting. From left to right: Richard Oerton, Nicole Fernbach, Richard Castle, and Nick Lear. Apologies to Joe Kimble, Phil Knight, Bob Lowe, and Mark Adler, who were underexposed. Apologies also to Richard Oerton for his elongated head. The photographer asks to remain anonymous.

the two-year interval should give firms a chance to work on this.

The closing date for entries will be next summer. Details will be announced early in the new year in *Clarity* and the general legal press.

Editorial board

CLARITY's editorial board has now been formed. It comprises Mark Adler (who remains editor), Professor Peter Butt, Dr Robert Eagleson, Nicole Fernbach, Professor Joseph Kimble, Philip Knight, and Nick Lear.

It has had little involvement in the preparation of this issue, but plans to consider it retrospectively to provide constructive suggestions for the next issue.

Members' news

Australia

Plain language lawyer and author **Michele Asprey** now has her own web page at:

http://www.ozemail.com.au/~mmasprey

Britain

Peter Bright has joined Wolferstans' medical negligence department, in Plymouth.

Lyndsay Bryning has left her consultancy with Hancock & Lawrence and is practising as a freelance matrimonial solicitor and mediator from her home in Helston, Cornwall.

Judge Michael Cook, Surrey's principal civil circuit judge, has been appointed ombudsman to the Law Society's *Gazette,* to adjudicate disputes between the *Gazette* and readers about "editorial content".

Dave Fox has left Plain English Campaign and has set up a writing consultancy under the name *The Word Centre*.

Julie Francis is now practising on her own account as Francis & Co in Ewhurst, Surrey.

Stewart Graham has moved from personal injury litigation at Coleman Tilley to become practice manager at the unrelated Evill & Coleman in Putney.

Tony Holland has retired from private practice and is now Principal Ombudsman at the Personal Investment Authority.

Steven Pearce, a solicitor specialising in commercial property and construction law, has moved to McGuinness Finch in London.

John Ward has retired from the National Consumer Council and is working part-time as a consultant on his own account.

Canada

Peg James has moved across the Rockies from Vancouver to become Risk Management Advisor at the Law Society of Alberta.

Hong Kong

Duncan Berry , on secondment from Australia, is to remain in Hong Kong drafting legislation for a while. He is presently preparing the Legislative Council Bill to enable the first post-independence elections. He is also editing the next issue of *Loophole,* the parliamentary counsel's journal. (See also page 43.)

New Zealand

Bill Sewell has recently left his post as senior researcher at the Law Commission to become a freelance editor and writer specialising in legal communication.

USA

Joe Kimble has been granted tenure and a full professorship.

Professor Mark Wojcik has been elected to the board of directors of the Legal Writing Institute (where he joins Joe Kimble).

Other news

Australia

The Centre for Plain Legal Language in Sydney closed at the end of June. So far as we know, no other plain legal language institute survives it. As with the others which have closed, it has been successful in all but acquiring permanent funding.

It was set up as a joint project of the Law Foundation of New South Wales and the Faculty of Law, University of Sydney, in 1991. It has been a member of CLARITY (either in its own name or through its directors)

throughout its life.

It has been one of the few organisations in the world that was devoted to research into the use of plain language. In 1995, it was involved in a major research project with the Centre for Microeconomic Policy Analysis, University of Sydney, investigating the costs and benefits of introducing plain language documents. A few years ago it worked with the New South Wales Parliamentary Counsel's Office on the *Legislation Review and Redesign Project*, which demonstrated that by applying modern views of document design, legislation can be made easier to use and more accessible. The Centre has also written a monthly plain language column for the NSW *Law Society Journal*.

The Centre has helped to increase awareness in the legal profession, government and private industry, of the need for and the benefits of plain language. Through its publications and its drafting and training courses, the Centre has promoted alternatives to traditional drafting.

Recent legislative changes in Australia have given momentum to the plain language movement. In 1994 the Industrial Relations Reform Act came into force. Under this Act the Industrial Relations Commission must make sure that awards are written in plain English. At the same time, the Uniform Consumer Credit Code began its passage through the Australian Parliaments. The Code, which came into operation in late 1996, makes credit providers concentrate on the language and design of their documents. The Corporations Law Simplification Program, and the Tax Law Improvement Project have shown the Commonwealth Government's commitment to plain language initiatives.

The support for plain language is gathering force. The Centre has played a part in this important movement, and we regret its passing.

* * * * *

A local plain language group is being formed in **Adelaide, South Australia** by CLARITY members Shelley Dunstone and Stephen Palyga with (so far) about 10 others. Details are still under discussion but we hope to know more in time for the October newsletter.

Britain

The UK's **tax law rewrite** has cross-party support and has therefore not been affected by the change of government.

* * * * *

The English **Court of Appeal** has taken a refreshingly unorthodox approach to precedent. Lord Justice Saville began his judgment in *Bannister v. SGB plc* (decided in April):

> **This is the judgment of the court to which all three members of the court have contributed equally. As we will explain, we have chosen these 19 appeals and two applications out of more than a hundred appeals and applications which were awaiting disposal by the court in March of this year, in order to give us the opportunity of dealing with a very large number of unresolved issues on the proper interpretation of Order 17 Rule 11 of the County Court Rules. We are also using the occasion to restate the existing law on this topic in a single judgment. Such is the scale of the difficulties that have been confronting the lower courts that we have asked that a copy of this judgment should be sent immediately to every county court in England and Wales (for distribution to the judges who sit at that court), as well as to all the parties in all the appeals and applications awaiting decisions by this court. The text of this judgment is to be made available immediately on FELIX, the judges' electronic bulletin board and on the Internet (website http://www.open.gov.uk/lcd/lcdhome.htm). If this country was in the same happy position as Australia, where the administration of the law is benefiting greatly from the pioneering enterprise of the Australasian Legal Information Institute (AUSTLII), we would have been able to make this judgment immediately available in a very convenient electronic form to every judge and practitioner in the country without the burdensome costs that the distribution of large numbers of hard copies of the judgment will necessarily impose on public funds.**

As a result of this initiative many rule 11 cases following *Bannister* in the lists were settled, and in July the same three judges finished hearing the rest, concluding with *Greig Middleton & Co v. Denderowicz.*. They then amended their *Bannister* judgment to take account of the later problems and ordered that the revised version replace the published original. This concentrates as much judicial authority as possible into a single source.

Lord Justice Saville has since been appointed a Lord of Appeal in Ordinary. He was jointly responsible — unusually for a judge — for the first draft of the plainly written Arbitration Act 1996.

Six members of CLARITY gave presentations to the **Plain English Campaign**'s international conference in London in July. Other speakers included Securities and Exchange Commissioner Hunt and Professor William Lutz, who both discussed the demand for plain financial documents.

Canada

Lawyers for Literacy is a committee of the British Columbia Branch Plain Language Section. They have published an information kit for lawyers to suggest ways they can improve communications with clients in a way that benefits the clients with literacy problems.

The kit is now available online (thanks to BC CLE) at http://www.cle.bc.ca/literacy

Contact Cheryl Stephens of *Plain Language Partners :* Email: plain@web.net
http://plainlanguage.com

* * * * *

The ***Plain Language in Progress*** **conference** is to be held in Calgary from Sept 24 to 26.

Attractions include:

- hands-on workshops simplifiying documents.
- marketing ideas for introducing plain language.
- a debate on technology and plain language.
- news of the plain language movement in India.
- details of the Securities and Exchange Commission's initiative in America.
- information from Australia about training staff in legal writing.
- an opportunity to meet government policy makers and project personnel, educationalist, literacy experts, industrialists, and plain legal language specialists.

The schedule is listed at

http://www.web.net/~raporter/English/Organizations/IPLCN/plip97.html

Registration

Full conference	$300
Full day	$150
Half day	$100

Please mail your details, and a cheque drawn in Canadian dollars in favour of *The Plain Language in Progress 97 Conference* to:

Kate Harrison, c/o The Parker Group
#1800, 639 - 5 Avenue SW, Calgary
Alberta, Canada T2P 0M9
Tel: 1 403 277 9987; Fax: 1 403 215 3229
Email: plkate@web.net
http://www.web.net/~raporter/English/Organizations/IPLCN/index.html

USA

President Clinton's signature is expected next month on an executive order which will require federal regulations to be written plainly.

* * * * *

Last August the **American Bar Association** changed its code so that law schools must (if their courses are to be recognised) "offer to all students an educational program designed to provide its graduates with basic competence in ... oral and written communication".

* * * * *

CLARITY member Carol Ann Wilson is president of **Legal Secretaries International Inc**., a professional association emphasizing education and networking for legal secretaries.

Formed in April 1995, they have grown to almost 500 members in 30 states in the US and in England and Canada. They publish newsletters and a quarterly journal containing articles of interest for legal secretaries, both active and retired. They want contact with their counterparts in ther countries, and are actively seeking members around the world. With the low annual dues of $25 US, their mission is to make education and networking affordable to all interested legal secretaries and their employers. They offer specialty certification examinations in civil trial law and probate law.

Carol Wilson is secretary to Houston attorney John M. O'Quinn, and is the author of *Plain language pleadings* (reviewed in *Clarity* 38 (January 1997), page 39). She can be reached at:

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Telephone: 281 847 9754; Fax: 281 847 2121
E-mail: carolw@oqlaw.com
http:www.compassnet.com/legalsec

Welcome to new members

(with contact names in brackets)

Australia

Jan Bowen, Plain English Comm's, Mosman, WA
Christopher Boyle, lawyer, Articles Training Program, Mt Lawley, WA
Greg Calcutt, parliamentary counsel, Perth, WA
Export Finance & Insurance Corporation (Claudia Bels), Sydney, NSW
David Knoll, lawyer, Energy Australia
Ros MacDonald, Faculty of Law, Queensland University of Technology, Brisbane
Helen Thompson, lawyer, St Kilda, Victoria
La Trobe University (P.R. Longley), Bundoora,Vict.

Canada

Janet Erasmus, lawyer, Ministry of Attorney-General, Victoria, British Columbia
Wendy Gordon and **John Mark Keyes** , lawyers, Department of Justice, Ottawa

England

Gemma Brennan, law student, Halifax, West Yorks
Carter Lemon (Margaret Lang), solicitors, London
Simon Cockshutt, solicitor, London
Carol Cook, solicitor, Huddersfield University, Yorks
Cripps Harries Hall (Mrs Janet Higbee), solicitors, Tunbridge Wells, Kent
Paul Double, barrister, City of London Remembrancer's Office, London
Editor Software (UK) Ltd (Rosemary Tilley and Nick Wright), Dursley, Gloucestershire
Dave Fox, writing consultant, Word Centre, Sheffield
Gregory Hammond, Australian lawyer, Mallesons Stephen Jaques, London
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Pinney Rogers & Co (A.J.C. Allen), solicitors, Essex
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As we go to press on 21st August we have 802 members in 26 countries.

A stocking which extends wholly below the knee and has a weftknitted stocking-leg being shaped and dimensioned to provide a top horizontally elastic and leg-gripping garter zone above the calf of the user, and an intermediate vertically and horizontally elastic calf-gripping calf-zone which is shaped to overlie the calf of the leg of the user, and a lower non-elastic zone which extends substantially to the bottom of the leg of the user, the elastic calf-zone consisting of inner elastic body yarn and outer substantially non-elastic plating yarn which is heavier and thicker than the inner elastic yarn and covers the inner elastic body yarn, the outer non-elastic plating yarn limiting the horizontal stretch of the inner elastic body yarn to a maximum of substantially twice the normal flat diameter of the calf-zone, all the yarn of the lower zone being non-elastic and being the plating yarn, the plating yarn being knit in the calf-zone under greater tension than the elastic yarn.

U.S. Patent No.2901901 to Julius Kayser & Co

This, and the quotation on page 14, were collected by Dr. M.J.Russell

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Editor's note

My thanks to the many people who have sent contributions, news, and suggestions.

I am sorry that I am a just over a month behind schedule in sending this to the printer.

I am torn between a wish to thank Nick Lear for agreeing to read the proofs and a reluctance to pass the blame for any mistakes which slip though. I have never understood how elementary errors seem to remain invisible until after publication, and then glare.

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It helps to have contributions by email or on disc (preferably in Microsoft Word), in either case with a hard copy from which to reinstate lost formatting.