Clarity

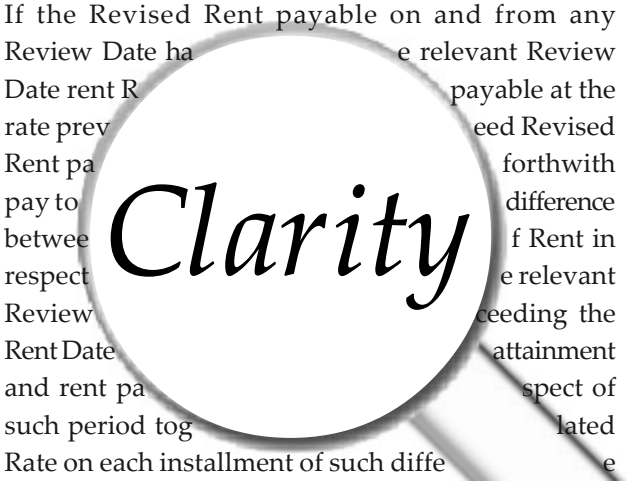
Number 54 **November 2005**

Journal of the international association promoting plain legal language

Editor in chief:
Julie Clement

Guest editors for this issue:
Nicole Fernbach and Edward Caldwell

In this issue



An international association promoting plain legal language

www.clarity-international.net

President
Professor Joseph Kimble
kimblej@cooley.edu

Clarity … the journal

Published in May and November

Editor in chief
Julie Clement
PO Box 13038
Lansing, Michigan 48909
Fax: 1 517 334 5781
clementj@cooley.edu

Guest editor for next issue
Annetta Cheek
Federal Aviation Administration
Office of the Administrator
800 Independence Ave, SW
Washington, D.C. 20591
annetta.cheek@faa.gov

Advertising rates
Full page: £150
Smaller area: pro rata
Minimum charge: £20
Contact Joe Kimble, kimblej@cooley.edu

Copyright policy

This issue

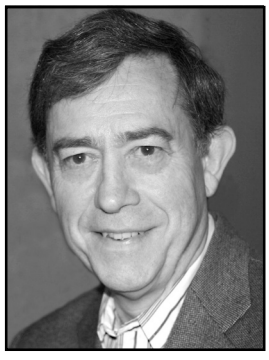
Clarity number 54 concentrates on the legislative drafting exercises that helped to make the Boulogne conference in July so successful. We think that this may be the first time three drafters have been asked to prepare three Bills from the same set of instructions with a view to their drafts being published. Although we are used to seeing the results of the legislative drafter's craft, it is rare to see the starting point. Legislative drafters would have a more sympathetic audience if their skill in unravelling the tangled threads that are presented to them as instructions and the extent to which they add value in the process of preparing legislation were more widely known. But any sympathy we feel for them after reading about the drafting exercises will be tempered by the papers contributed by Nicola Langton, Vicki Schmolka, Robin Ford and Mark Hochhauser. Nicola reminds us of the pioneering work started by Professor Bhatia in the early 1980s and of the development of "The Template" in Hong Kong and its later refinement. Vicki's plea for more testing and Robin's description of the impressive work being done in British Columbia suggest that there may be scope for them to get together for a future article for *Clarity*. And finally, Mark reminds us that assessing readability is not just a matter of pressing a button on your computer but is best left to the experts. This issue of *Clarity* is indeed a cracker.

Nicole Fernbach
nicole@juricom.com

Edward Caldwell
edward.caldwell@lawcommission.gsi.gov.uk

Nicole Fernbach *is both a lawyer trained in France and a linguist. She has practised legal translation in Canada for the past 30 years.*

Edward Caldwell *is an English lawyer who has been drafting legislation for the UK Government for 36 years.*



Country representatives

Australia: Christopher Balmford
Cleardocs.com
PO Box 2225
Hawthorn VIC 3122
61 02 9555 4849 (fax 61 03 9818 0599)
christopher.balmford@cleardocs.com

Bangladesh: A.K. Mohammad Hossain
1188/1 E Shewrapara, Kafrul Dhaka
880 2 7162881 (fax 880 2 7171536)
mita_mohiuddin@yahoo.com

Brazil: Dominic Minett
Lex English Language Services Ltda
Rua Humberto I, 298
Bloco B, Sala 2, 2o andar, Vila Mariana
Sao Paulo, SP 04018-030
011 5084 4613 (phone & fax)
dominic@lexenglish.com.br

Canada: Philip Knight
1074 Fulton Avenue
W. Vancouver, BC V7T 1N2
604 628 0387 (fax 925 0912)
philknight1@mac.com

Finland: Anu Sajavaara
Confederation of Finnish Industries
PO Box 62, 00131 Helsinki
358 9 68684715 (cell 358 40 7050939)
anu.sajavaara@ek.fi

France: Anne Wagner
Département Droit
Université du Littoral Côte d'Opale
21, rue Saint-Louis, BP 774
62327 Boulogne sur Mer Cédex
03 21 99 41 22 (fax 21 99 41 57)
valwagnerfr@yahoo.com

Hong Kong: Wai-chung Suen
Department of Justice
9/F Queensway Government Offices
66 Queensway, Admiralty
2867 4171 (fax 2845 2215)
wcsuen@doj.gov.hk

Israel: Myla Kaplan
POB 56357, 34987 Haifa
054 3132010 (fax 04 8110020)
mylakaplan@yahoo.com

Italy: Christopher Williams
Via Taranto 33
70031 Andria (BA)
0883 554171
cjwilliams72@hotmail.com

Japan: Kyal Hill
Apartment 706 Presle Tamaishi
4-15-28 Toshima, Kita-ku
Tokyo 114-0003
080 3415 2082 (fax 03 5390 1700)
kyal.hill@mhmjapan.com

Malaysia: Juprin Wong-Adamal
Department of Human Resources Development
7th Floor, Block A, Wisma MUIS
88999 Kota Kinabalu, Sabah
88 218722 ext. 199 (fax 88 211 554)
Juprin.Adamal@sabah.gov.my

Mexico: Salomé Flores Sierra Franzoni
Subdirectora de Estudios Comparados
Insurgentes Sur 1735 8o piso ala norte
Col. Guadalupe Inn
Deleg. Álvaro Obregón
01020 Mexico, D.F.
1454-3000 ext. 4154
sflores@funcionpublica.gob.mx

New Zealand: Richard Castle
148A Tinakori Road
Thorndon, Wellington 6002
04 938 0711
schloss@paradise.net.nz

Nigeria: Dr. Tunde Opeibi
Department of English
University of Lagos
Akoka, Lagos
234-1-5454891-3/1214
tundeopeibi@yahoo.com

Philippines: Victor Eleazar
4/F Unit C-2 Marvin Plaza Building
2153 Chino Roces Avenue
Makati City 1200
02 816 7673 (fax 816 7740)
attyvye@msn.com

Singapore: Lei-Theng Lim
Faculty of Law
National University of Singapore
13 Law Link, 117590
6874 6464 (fax 6779 0979)
leitheng@nus.edu.sg

South Africa: Candice Burt
Plain Language Communications Ltd.
Box 1362
Bedfordview 2008
27 83 3806893 (fax 27 450 1585)

candice@burtmeaden.co.za

Sweden: Barbro Ehrenberg-Sundin
Justitiedepartementet
SE-103 33 Stockholm
08 405 48 23 (fax 20 27 34)
barbro.ehrenberg@justice.ministry.se

UK: Paul Clark
Cripps Harries Hall LLP
Wallside House
12 Mt Ephraim Road
Tunbridge Wells
Kent TN1 1EG
01892 515121 (fax 01892 544878)
pec@crippslaw.com

USA: Prof Joseph Kimble
Thomas Cooley Law School
PO Box 13038
Lansing, Michigan 48901-3038
1 517 371 5140 (fax 334 5781)
kimblej@cooley.edu

Other European countries:
Catherine Rawson
legal_easy@hotmail.com

All other countries:
Please contact the USA representative

Country reps wanted

If you are in a country without a Clarity country representative and you would consider taking on the job, please contact Joe Kimble at kimblej@cooley.edu.

Part 2 of Catherine Rawson's article *Just fix the English* will appear in *Clarity* 55. Part 1 appeared in *Clarity* 53.

Clarity: electronic or paper?

We publish *Clarity* in both electronic (.pdf) and paper forms, in May and November. The electronic version reaches you sooner because the paper version has to be posted from the US all around the world. You can ask for *Clarity* to be delivered to you either or both ways.

Just let your country representative know if you want to change the way you receive *Clarity*.

The founding of Clarity

John Walton

Remarks at the ceremony opening Clarity's second international conference in Boulogne, France, July 2005.

It's a great pleasure and honour for me to be invited to attend this international conference on *Clarity and Obscurity in Legal Language* — a significant event in the development of clear legal expression.

Another significant event once occurred — so legend has it — at a public school in the English town of Rugby. A plaque on the headmaster's garden wall *commemorates the exploit of William Webb Ellis who, with a fine disregard for the rules of football as played in his time, first took the ball in his arms and ran with it, thus originating the distinctive feature of the Rugby game, AD 1823*.

Exactly 160 years later — at a town hall just a few hundred metres from Rugby School — another originating event occurred. As a local government solicitor, I had been trying for some years to write legal documents and correspondence in ordinary English that could be understood by those who were to read it. I was using everyday language, short sentences, even — the ultimate heresy — punctuation! Not, I thought, an unreasonable strategy (though I sometimes felt I was fighting a lone battle against the might of the legal establishment).

My earliest attempts to make a difference had been timid by today's standards. As a young drafter, for example, I'd been puzzled by the apparently obligatory use of those formulaic introductory words: *now this deed witnesseth as follows*. How had this archaic verb-form managed to survive for hundreds of years in impregnable isolation? So one day, when feeling particularly cavalier, I drafted a 30-page commercial lease — omitting the word *witnesseth* and using *witnesses* instead. My draft lease was returned by the lessee's solicitor approved as amended in red, the only amendment — you've guessed it — being the reinstatement of the Shakespearean suffix.

It was the same with punctuation. I was uncomfortable sending out draft documents without punctuation, especially when standard precedents often included unbroken sentences of

250 words or more. They were difficult to read, almost impossible to understand, and I'd discovered that the dense verbiage often concealed imprecision and inaccuracy. I dared to include punctuation in one of my drafts — and it too was returned, with all the marks carefully deleted in red ink.

But I did keep trying and managed a few small successes, even convincing some of my colleagues of the benefits of clear legal drafting. Then in 1982, my Council was presented with a Plain English award for a tenancy agreement I'd drafted for small industrial units — in straightforward English, even describing the parties to the transaction as *we* and *you*!

Then, in January 1983, I read a letter in the Law Society's Gazette from a chartered surveyor complaining about the apparent inability of lawyers to draft a simple, unambiguous document in terms that its parties could understand. He posed the question: *when are members of the legal profession going to drag themselves into the last quarter of the 20th century?*

I was moved by this challenge and began to wonder if there were other lawyers out there who were equally opposed to archaic, over-complicated legal language. So I responded — suggesting an organised group of solicitors, barristers, and legal executives whose aim would be to write in good, clear English and to persuade others to do the same. I even suggested a name for the group: CLARITY — to embody the two concepts of certainty and intelligibility. I like to think that the name also had a certain resonance with *Solidarity*. After all, this was 1983, in an era of hope within Eastern Europe — the same year that Lech Waleza was awarded the Nobel Peace Prize.

On a much, much smaller scale, the response to my modest invitation was encouraging. On 8 June 1983, I was able to announce the birth of CLARITY. We had 28 founder members and a clear statement of aims. Our first, 4-page newsletter (primitively naive by today's professional standards) — suggested a £5 annual subscription and an exchange of precedents. There was even a letter of support from the Master of the Rolls, the late Lord Denning: *All best wishes for success in the aims of CLARITY — it is after my own heart.*

Word spread throughout the legal press and CLARITY's membership grew rapidly — to over 250 within the first 12 months. We held our first annual meeting at Rugby in September 1984, appointing a working committee of Mark Adler, Ken Bulgin, Katharine Mellor, Richard Thomson, and me.

These were pioneering days, and I'm thrilled to be able to share some small credit for being part of the team that helped CLARITY make those first few faltering steps.

And here we are today, with around 1,000 members in 40 different countries. My, how our baby has grown! From that uncertain infancy, CLARITY has matured into a strong adult, with the ability to make a real difference to the fashion of legal expression and, I hope, enhance the credibility of our profession. I am truly humbled when I read the many articles from much more learned minds than mine in the latest 72-page edition of *Clarity*, the journal of the *international* association promoting plain legal language.

I'm delighted to see that this association, like William Webb Ellis, has shown "a fine disregard" for obscurity in legal language, and I'm sure that, under your leadership Mr President and of those who follow you, CLARITY will continue to *take the ball in its arms and run*.

John Walton *is a solicitor living in Coventry, England. Now retired from legal practice, his career in the public and voluntary sectors has included posts as a local authority chief executive and as company secretary of an international development charity. He founded Clarity in 1983.*

Master Class No. 2, Boulogne Conference:

Drafting from scratch — three versions

Introduction

As part of the conference on "Clarity and Obscurity in Legal Language" in Boulogne, we organized two panels of expert drafters — two master classes. We thought it would be interesting and instructive to see how different experts approached the same drafting assignment.

In this issue, we report the results from Master Class No. 2. In the next issue, we will report on Master Class No. 1.

For Master Class No. 2, the three panel members were asked to draft a bill from scratch and also to revise part of a rule. For the from-scratch exercise, the process was as follows:

Six weeks before the conference, each drafter was given the same drafting instructions for a noise bill.

The drafters did not consult with each other (or anyone else) in preparing their initial drafts. They were told to assume the instructions were 'real'.

The drafts were presented at the conference.

Edward Caldwell's comments on his instructions, on pages 7–8, were given to the panelists after they had prepared their drafts.

Noise Bill instructions — prepared by Edward Caldwell

Instructions for a Noise Bill:

1. These instructions have been prepared by counsel acting on behalf of the Confederation of House Purchasers. The Confederation hopes to be able to persuade a Member of Parliament who is successful in the next ballot for Private Members' Bills to adopt their Noise Bill.
2. Counsel is instructed to draft a Bill to provide a remedy where the vendor of a house deliberately conceals from the purchaser a source of troublesome noise.
3. The policy background to the Bill is that an increasing number of complaints are being made (including complaints to Members of Parliament at constituency surgeries) from people who have moved into new houses and have subsequently found that they are seriously troubled by noise from neighbours, aircraft or nearby roads or commercial installations.
4. Sometimes these are problems of which the purchaser should, and could, have made himself aware. But very often they are problems which are unlikely to, or which do not, emerge except on prolonged exposure or at particular times (such as during the night).
5. The law may presently provide redress where an inquiry before exchange of contracts was negligently or dishonestly answered. But the Confederation is not aware of many cases in which existing remedies have proved successful.
6. Counsel is therefore instructed to provide a civil remedy allowing a purchaser of a property to apply to the court for an award where the vendor has concealed a source of noise.

7. If a local authority environmental health inspector is called to the property by the purchaser to investigate noise, a certificate issued by the inspector as to any findings made by him is to be conclusive evidence of the facts certified unless the contrary is proved.
8. The court should be able to award a sum not exceeding 10% of the value of the property. The court should also be able to award damages against the solicitor who advised the purchaser on the purchase if the court believes that the solicitor was at fault. The court should also be able to award damages against the estate agent who handled the sale if the court believes that he was wholly or partly to blame.
9. Where a property is sold within five years of a previous sale, the remedy should lie against previous vendors up to a limit of 25 years.
10. Counsel is also asked for concealment of the kind mentioned in paragraph 5 to be an offence punishable with a fine or imprisonment.
11. It should not be possible to obtain a double remedy by proceeding under the new provisions and under the existing law. If the court believes that it can take action of another kind to address the nuisance complained of (such as an order under the Environment Act 1995) it should not take action under the new provisions.
12. Counsel is further instructed that 10% of any award or fine under the new provisions should be paid into an Environmental Enhancement Fund. The fund is to be established under the Bill and administered by local authorities for the purpose of enhancing the local environment of neighbourhoods within their areas and reducing noise generally. In spending money paid to them out of the Fund, local authorities should follow guidelines issued by the appropriate Secretary of State and present separate reports to him on their use of sums so paid to them.
13. An estate agent who contravenes the new provisions should be prevented for 10 years from practising without disclosing that he has contravened the provisions. The same goes for a solicitor.
14. Although these instructions are drafted by reference to houses, the provisions are to apply equally to commercial premises if they are also used for rest and recreation and to leasehold property.

Edward Caldwell's comments on the instructions

When putting together the instructions for the Noise Bill, I was keen to make it clear that they were not instructions for a serious legislative project. So there are a number of obvious problems. But they should be realistic in demonstrating that the draftsman's proper role is not to just draft what he is asked to. The notion of deliberately concealing a source of troublesome noise misses the centre of the target. The vendor will not have concealed the source (for example, by burying it). He may have failed to reveal that the property is affected by troublesome noise and that he knows what the source is.

"Deliberately" is a tricky word. It figures in paragraph 2 of the instructions but has disappeared by the time you get to paragraph 6. Is paragraph 6 meant to lead to strict liability?

The penalty of up to 10% of the value of the property looks as though it is not linked to how troublesome the noise is. It looks like a punitive penalty rather than damages. But the provision for also going against the solicitor is expressed in terms of damages.

Is the 10% to be calculated by reference to the price paid for the property or its present value?

Is the test of "troublesome" objective or subjective? Do we penalise the vendor when the purchaser finds something troublesome even though a reasonable person would not be troubled by it?

How troublesome is troublesome?

If the solicitor is to be made liable in damages, why not the estate agent? The particulars of the property drawn up by the vendor's selling agent may well be the point at which the concealment began. Paragraph 13 requires an estate agent to disclose that he has contravened the provisions of the legislation. But it is not clear how an agent could contravene them. The only persons made liable are the vendor and his solicitor.

The provision asked for in paragraph 9 is arbitrary, and probably unworkable. What does "lie against the previous vendors" mean? What if there were several? Will a previous vendor be liable to be penalised only if he concealed the source? If more than one previous vendor is liable, how is the penalty to be apportioned between them?

Paragraph 10 asks for concealment to be a crime in addition to giving rise to a civil claim. But is it to be a crime of strict liability or must there be some mental element?

Does the 5 year/25 year rule mentioned in paragraph 9 apply in relation to the criminal offence? If so, how?

What does "address the nuisance complained of" mean? Is the idea that there may be a way of getting rid of the noise?

But what about blight? Any property that has been the subject of litigation under this legislation would be likely to be much more difficult to sell. Paragraph 11 suggests that there will be no compensation if a way can be found to get rid of the noise.

There seems to be no differentiation between a permanent noise problem and a temporary problem. Just concealing the fact that there is troublesome noise gives rise to liability no matter how short-lived the noise will be.

Paragraph 12 is delightful nonsense. The single fund cannot be administered by "local authorities". In any jurisdiction there will be numerous different local authorities. Joint administration is a non-starter. What does "enhancing the local environment of neighbourhoods" mean? What is a local environment and what is a neighbourhood? Does the enhancing have to be noise-related? It seems not.

Paragraph 14 (commercial premises) is just the kind of thing that policy-makers throw in at the last moment. But it is difficult to see how this bit of the jigsaw would work. Does the purchaser have to be buying commercial premises that are already being used for rest and recreation, or can he recover if he buys "ordinary" commercial property and then decides to use it for rest and recreation? What is rest and recreation? Does it cover facilities for factory workers taking restorative time out? Riddled with problems.

Version 1 — by David Elliott

This draft included color features that are not reproduced here. The Part headings, for instance, were in blue, and the Section headings in green.

Introductory Notes

1 The following draft is based on written instructions for a Private Member's Noise Bill.

2 The instructions are a brilliant example of typically muddled drafting instructions — which usually have to be untangled in too-short a time.

3 In preparing the draft I made the following assumptions:

the instructing client is nowhere to be found, so my draft is based on guesses about what the client really wants

the draft is prepared for an imaginary jurisdiction that has some form of Canadian-like interpretation act

I am free to decide on formatting and section numbering.

4 Some words and phrases have square brackets around them. These indicate a particular uncertainty about their appropriateness or correctness. Additional questions and issues will be discussed at the conference.

5 I have ignored procedural rules about Private Member's Bills.

TROUBLESOME NOISE DISCLOSURE ACT

Contents

Section #

We, the people's representatives, convened in Boulogne-sur-Mer, France, enact the following:

PART 1
DISCLOSING STATUTORY TROUBLESOME NOISE

Information note: *Six words are defined in the Dictionary of Definitions contained in the Appendix to this Act:*

- *buyer*
- *court*
- *environmental health inspector*
- *property*
- *seller*
- *statutory troublesome noise (stn).*

In several sections statutory troublesome noise is shortened to "stn" and the Environmental Enhancement Fund (established in Part 2 of the Act) is shortened to "EEF".

Purpose

1.1(1) The main purpose of this Act is

(a) to require disclosure of statutory troublesome noise to prospective purchasers so that they can make informed decisions about acquiring property, and

(b) to provide a remedy if troublesome noise is not disclosed.

(2) No person can release or waive a right, benefit or obligation under this Act, and any attempt to do so is ineffective.

(3) The definitions in the Appendix to this Act (the *Dictionary of Definitions*) are part of this Act.

What the Act applies to

1.2 This Act applies to

(a) the sale of [residential property];

(b) the sale of property used for sport or recreational purposes;

(c) [the lease or assignment of a lease] of property used for [residential?] sport or recreational purposes.

Non-disclosure of statutory troublesome noise: a remedy

1.3(1) This Act establishes a right to damages, in the circumstances described in this Act, for intentional non-disclosure of statutory troublesome noise.

(2) Statutory troublesome noise (***stn for short***) means noise emanating from human endeavour or activity that a reasonable person would find troublesome.

[For example: Statutory troublesome noise could include

- *noisy neighbours*
- *noise from aircraft*
- *noise from road traffic*
- *noise from construction sites*
- *noise from commercial, industrial or business undertakings.]*

Duties of seller, solicitor, and estate agent

1.4(1) A seller must tell a prospective buyer, in writing, about

(a) statutory troublesome noise of which the seller is aware or should have been aware occurring in the [5 years] before [the date the transaction is complete],

(b) the source of the noise, and

(c) the time or times at which the noise occurred or occurs.

(2) If a solicitor or estate agent, or both, act for the seller, the obligation on the seller is shared jointly and individually among the seller, the solicitor, and the estate agent involved, unless the court declares the contrary under section 1.7(6) [*What the court can do*] or otherwise apportions an award.

Buyer's right to make a claim

1.5(1) A buyer may make a claim for intentional non-disclosure of statutory troublesome noise if the stn is not disclosed in accordance with section 1.4 [*Duties of seller, solicitor and estate agent*].

(2) Subsection (1) does not apply if a buyer has a right to make a claim for stn or anything akin to it under any other enactment.

(3) The claim must be made within [_____] of [_____].

How to make a claim

1.6(1) You, the buyer, may [only] make a claim for an award of damages for intentional non-disclosure of stn by taking the following steps:

(a) step 1 — ask an environmental health inspector to prepare a report containing the information required by section 1.8 [*Stn reports*];

(b) step 2 — read the report and only proceed to step 3 if the environmental health inspector confirms there is or was stn;

(c) step 3 — if you really want to make a claim, fill out a claim form (available from public libraries, court houses and kimblej@cooley.edu) and file it with the court — the court will want a filing fee;

(d) step 4 — serve the claim on everyone from whom you seek damages (court rules will tell you how to do that (see www.uscourts.gov/rules));

(e) step 5 — show up on the court hearing date, (the court will let you know when that is) at the right time and place, with all the documents or witnesses, or both, you need to prove your claim.

(2) If you do not ask an environmental health inspector to investigate, you must prove your claim by other means.

What the court can do

1.7(1) After hearing a claim for damages for non-disclosure of stn, the court may award a buyer damages of not more than 10% of the [purchase price of the property, or the value of the lease or assignment] [value of the property] if the court is satisfied that

(a) there is or was stn, and

(b) the seller, solicitor or estate agent, or any 2 or more of them, intentionally did not disclose stn in accordance with section 1.4 [*Duties of seller, solicitor and estate agent*].

(2) In figuring out what award, if any, to make, the court may take into consideration

(a) what, if anything, the buyer did to discover or inquire about stn;

(b) how much bother the troublesome noise really is;

(c) the reason for the non-disclosure of stn — in particular whether the non-disclosure was intentionally undisclosed;

(d) the duration of the noise and whether it is, or is likely to be, longstanding, temporary or intermittent.

(3) The award may be made against any one or more of the following persons, or the court may apportion the award among the following:

(a) the seller;

(b) the seller's solicitor, if any

(c) the seller's estate agent, if any;

(d) any of the persons described in subsection (5) in the circumstances described in subsection (4).

(4) The court may make the award against any one or more of the persons described in subsection (5) if the claim is made against one or more of those persons [and the property is sold within 5 years of a previous sale — weird?] and the court is satisfied that

(a) the stn occurred when the person owned the property, and

(b) the person intentionally did not disclose the stn when the property was sold.

(5) The persons are

(a) any person who sold the property in the 25 years [before the buyer making the claim for non-disclosure of stn purchased the property];

(b) any solicitor or estate agent who acted for that or those former sellers.

(6) If the court finds that a seller, solicitor or estate agent did not know and with reasonable inquiry could not have known about stn,

(a) the court must so declare,

(b) no award may be made against that person, and

(c) section 1.4(2) [*Duties of seller, solicitor and estate agent*] does not apply with respect to that person.

(7) No award may be made under this Act if the buyer has obtained a full or partial remedy for the same or similar issue under any other enactment or under law.

Stn reports

1.8(1) On request and payment of the fee established by the [local authority], an environmental health inspector must

(a) investigate a complaint of stn;

(b) if stn is identified, prepare a report and make the following factual findings:

(i) identify the source of the stn;

(ii) identify when the stn occurred or occurs, its duration, and the frequency of its occurrence;

(iii) describe the noise or provide a sound recording of it, or both;

(iv) if possible, measure the noise inside and outside a building on the property;

(v) include any other facts that seem pertinent;

(vi) whether stn, in the future, is or is likely to be ongoing, temporary, or intermittent;

(c) if no stn is identified, make a report of the investigation and of that fact.

(2) The inspector may make factual findings on the basis of an opinion if the inspector gives a reason for that opinion.

(3) A report of the environmental assessment officer is conclusive evidence of the facts stated in the report, unless the contrary is proved.

(4) The inspector's report is a public document and a copy must be provided by the local authority to anyone requesting it.

PART 2
ENVIRONMENTAL ENHANCEMENT FUND

Fund established

2.1(1) The Environmental Enhancement Fund (***EEF for short***) is established.

(2) The purpose of the EEF is

(a) to enhance the environment of neighbourhoods;

(b) to ameliorate statutory troublesome noise so that elected officials stop getting complaints and get more votes.

Board of directors

2.2(1) The EEF Corporation is established.

(2) The corporation is composed of representatives of local authorities, constituted as a board of directors, appointed by the [Secretary of State] in accordance with the regulations made under section 2.6 [*Regulation-making authority*].

(3) The purpose of the corporation is to administer the EEF.

Payments into the EEF

2.3(1) There must be paid into the EEF,

(a) by the person who receives an award under this Act, 10% of the award received;

(b) by the Crown, 10% of any fine imposed under this Act that is received by the Crown.

(2) Non-payment into the EEF by a person who receives an award constitutes a debt due to the EEF Corporation which may be recovered by a civil action for debt.

Payments out of the EEF

2.4 The EEF board of directors may make payments out of the EEF to [local authorities] in accordance with the regulations.

Reports and accountability

2.5(1) The board of directors must report to the [Secretary of State] on or before March 31 each year and include in the report, for the preceding calendar year,

(a) an audited financial statement;

(b) a report on the operation of the EEF and the achievement of its purposes;

(c) anything else the Secretary of State requests.

(2) The recipient of any benefit from the EEF must report on the use made of the benefit to [the Secretary of State] in accordance with the regulations.

Regulation-making authority

2.6 The Secretary of State may make [regulations] [guidelines]

(a) respecting the appointment of the members of the board of directors of the EEF corporation from [local authority councillors];

(b) respecting the terms of office, reappointment and termination of appointment of members of the board of directors;

(c) prescribing travelling and living expenses for members of the board of directors, but not remuneration;

(d) respecting the appointment of a chair and vice chairs;

(e) respecting rules of procedure and the internal management and operation of the board of directors;

(f) respecting the investment of money held by the EEF, including interest or other money accruing from investments;

(g) respecting a scheme for applications to be made by local authorities, to the board of directors, for loans, guarantees, grants or other disbursement of money in the EEF to further the Fund's purposes;

(h) respecting the administration, operation and management of the EEF and reports by recipients of EEF benefits;

(i) delegating any one or more of the matters referred to in clauses (a) to (g) to the board of directors.

PART 3
OFFENCES AND PENALTIES

Offences and penalties

3.1(1) A person is guilty of an offence who

(a) contravenes section 1.4(1) [*Duties of seller, solicitor, and estate agent*],

(b) gives false, inaccurate, or misleading information about stn to a buyer, a solicitor, estate agent, or environmental health inspector, or

(c) gives false, inaccurate, or misleading information about stn to support or defend a claim under this Act.

(2) A person guilty of an offence is liable on summary conviction to [a fine of not more than $] or to imprisonment for not more than ___ years, [or both?].

(3) On conviction, the court may, in addition to or in place of any other penalty imposed, order that the person convicted publicize the conviction in a manner and for a period [of at least 10 years] specified by the court.

PART 4
TRANSITIONAL SECTIONS, AMENDMENTS TO OTHER LEGISLATION, AND COMING INTO FORCE

Transitional

4.1 *[Sections may be needed to deal with "in-process" purchases when the Act comes into force.]*

Amendments to other legislation

4.2(1) *Possible amendments to other legislation governing solicitors and estate agents to impose professional obligations to disclose stn.*

(2) *Possible amendments to local authority legislation to permit councillors to serve on the board of directors — consider any conflict of interest issues.*

(3) *Possibly amendments to legislation governing environmental health inspectors — for congruence between this Act and their prime legislation.*

(4) *Possible amendments to other legislation to impose financial expenditure controls and auditor general oversight on the EEF.*

(5) *Possible amendment to other legislation to stop double-dipping under that legislation.*

Coming into force

4.3(1) This Act comes into force on _____.

(2) *Provisions may be needed to describe how the Act applies to past transactions.*

Appendix
Dictionary of Definitions

Definitions

1 In this Act

buyer means

(a) the purchaser of property, or

(b) the leasee or subleasee of property;

court means the High Court of *Clarity*;

environmental health inspector means a person appointed with that title under the [*Environmental Health Act*];

property means the property to which this Act applies described in section 1.2 [*What the Act applies to*];

seller means

(a) the seller of property, or

(b) the person who leases or assigns a lease of property to another person;

statutory troublesome noise (stn) has the meaning given to it in section 1.3(2) [*Non-disclosure of statutory troublesome noise: a remedy*].

David Elliott *is a legislative drafter who works on contract for government and nongovernment organizations.*

Version 2 —
by Eamonn Moran

Noise Act 2005

TABLE OF PROVISIONS

Clause

First Draft
21/6/2005

A BILL

to provide new remedies to purchasers of dwellings affected by undisclosed noise, to make it an offence for a vendor to give false or misleading information about noise in certain circumstances, to establish an Environmental Enhancement Fund and for other purposes.

Noise Act 2005

The Parliament of the United Kingdom enacts as follows:

PART 1—PRELIMINARY

1. Purposes

The main purposes of this Act are—

(a) to enable a purchaser of a dwelling affected by undisclosed noise to seek damages from the vendor, the solicitor or the estate agent; and

(b) to make it an offence for a vendor to give false or misleading information when asked by the purchaser about noise; and

(c) to establish an Environmental Enhancement Fund to be applied to enhance local neighbourhood environments and generally reduce noise.

2. Commencement

This Act comes into operation on a day to be proclaimed.

3. Definitions

In this Act—

"contract date" means the date on which the purchaser under a contract of sale enters into the contract;

"dwelling" means any building, or part of a building, used or intended to be used as a dwelling and includes any adjoining or nearby land or building used by the purchaser in connection with the dwelling;

"environmental health inspector" means a person employed by a local authority as an environmental health inspector;

"estate agent" has the meaning given by the **Estate Agents Act 1979**;

"Fund" means Environmental Enhancement Fund established by section 10;

"local authority"—

(a) in relation to England, means the Greater London Authority, a county council, a district council or a London borough council; and

(b) in relation to Wales, means a county council or a county borough council;

"noise" means noise of any kind coming from a source outside a dwelling that may be heard inside the dwelling, regardless of whether any door or window of the dwelling is open;

"solicitor" has the meaning given by the **Solicitors Act 1974**.

PART 2—CIVIL REMEDIES

4. Purchaser may bring proceeding against vendor

(1) The purchaser of a dwelling under a contract of sale may bring a proceeding in a court of competent jurisdiction against the vendor under that contract claiming damages in respect of noise.

(2) A purchaser may only recover damages in respect of noise if—

(a) the vendor knew of the existence of the noise before the contract date; and

(b) the vendor ought reasonably to have disclosed that noise to the purchaser before the contract date but failed to do so; and

(c) the purchaser did not know of the existence of that noise at the contract date and could not reasonably be expected to have found out about that noise before that date; and

(d) the noise is such as to interfere with the purchaser's reasonable enjoyment of the dwelling.

5. Purchaser may bring proceeding against solicitor or estate agent

(1) The purchaser of a dwelling under a contract of sale may bring a proceeding in a court of competent jurisdiction against—

(a) the solicitor who acted for the purchaser in the matter; or

(b) the estate agent in the matter

claiming damages in respect of noise.

(2) A purchaser may only recover damages against a solicitor or estate agent in a proceeding under this section if—

(a) the purchaser did not know of the existence of the noise at the contract date and could not reasonably be expected to have found out about the noise before that date; and

(b) the noise is such as to interfere with the purchaser's reasonable enjoyment of the dwelling; and

(c) the solicitor or estate agent caused, or contributed to, the purchaser not knowing of the noise at the contract date.

(3) A court that awards damages against a solicitor or estate agent in a proceeding under this section must order the solicitor or estate agent to disclose, in accordance with sub-section (4), the making of the award or cause it to be so disclosed.

(4) Disclosure, for the purposes of sub-section (3), is disclosure, in writing, to any client of the solicitor or estate agent before he or she is retained to provide legal services to, or do estate agency work for, the client in any matter.

(5) A solicitor or estate agent is retained by a client if any firm of which he or she is a member or by which he or she is employed is retained by the client.

(6) An order under sub-section (3) remains in force for the period of 10 years commencing on the day on which it is made.

(7) A purchaser may commence a proceeding under this section irrespective of whether the purchaser has commenced a proceeding against the vendor under section 4.

6. Damages—overall limit and Fund contribution

(1) The maximum total amount of damages that may be awarded in any proceedings under this Part in respect

of any single contract of sale is 10% of the purchase price under that contract.

(2) 10% of each award of damages under this Part must be paid into the Fund.

7. Time limit on proceedings

(1) A proceeding under this Part may be commenced at any time within 25 years after the date on which the contract of sale was entered into even if the purchaser has since sold the dwelling to another person.

(2) Despite sub-section (1), a purchaser who has sold the dwelling to another person may only commence a proceeding under this Part within 5 years after entering into the contract of sale with that other person.

8. Court must dismiss proceeding if adequate remedy otherwise available

A court must dismiss a proceeding commenced under this Part if satisfied that, in the particular circumstances—

(a) an adequate and more appropriate remedy is available otherwise than under this Part; or

(b) the matter has been adequately dealt with otherwise than by a proceeding under this Part.

PART 3—MISCELLANEOUS

9. Offence for vendor to give false or misleading information

(1) A vendor of a dwelling under a contract of sale must not, if asked by the purchaser about noise before the contract date, give information to the purchaser that is false or misleading in a material particular.

Penalty: Level 9 imprisonment (6 months maximum) or level 9 fine (60 penalty units maximum).

(2) It is a defence to a charge under sub-section (1) for the vendor to prove that, at the time of giving the information, the vendor believed on reasonable grounds—

(a) in the case of false information—that it was true; or

(b) in the case of misleading information—that it was not misleading.

(3) Despite anything to the contrary in section 59 of the **Sentencing Act 1991**, 10% of any fine imposed on a vendor under this section must be paid into the Fund.

(4) A contract of sale is not void or unenforceable only because the vendor is guilty of an offence against this section.

10. Environmental Enhancement Fund

(1) The Environmental Enhancement Fund is established.

(2) The Fund is to be administered by the Secretary of State.

(3) There must be paid into the Fund all amounts required to be paid into it under section 6(2) or 9(3).

(4) There must be paid out of the Fund to a local authority any amount requested by the local authority in accordance with section 11.

11. Application of the Fund

(1) Money standing to the credit of the Fund may be applied for the purpose of—

(a) enhancing neighbourhood environments; or

(b) generally reducing noise.

(2) Subject to and in accordance with guidelines issued by the Secretary of State under sub-section (3), each local authority is entitled to—

(a) request that there be paid to it out of the Fund any money paid into the Fund in relation to a dwelling situated within the area over which it has jurisdiction; and

(b) direct how that money is to be applied within that area for the purposes referred to in sub-section (1).

(3) The Secretary of State may, by notice published in the Government Gazette, issue guidelines as to the manner in which—

(a) a request may be made by a local authority under sub-section (2)(a); and

(b) a local authority may apply money paid to it out of the Fund.

(4) The guidelines—

(a) may be of general or limited application; and

(b) may differ according to differences in time, place or circumstances.

(5) Within 3 months after the end of each financial year, a local authority must submit to the Secretary of State a report for that financial year, in the manner and form determined by the Secretary of State, giving details of—

(a) any amounts paid to it out of the Fund during that year; and

(b) how any of the money paid to it out of the Fund in that or any preceding financial year has been applied by it during that year.

12. Certificate of environmental health inspector

A certificate purporting to be issued by an environmental health inspector certifying as to any matter relating to noise that may be heard inside a dwelling is admissible in evidence in any proceeding under this Act and, in the absence of evidence to the contrary, is proof of the matters stated in it.

13. Transitional provision

This Act only applies in relation to a contract of sale entered into on or after the date of commencement of this Act.

Eamonn Moran *is Chief Parliamentary Counsel in Victoria, Australia. He has been a legislative drafter for more than 30 years and has worked as a part-time member of the Law Reform Commission of Victoria on its plain English references.*

Version 3 — by Michèle Asprey

The endnotes are not meant for the Bill; they are my explanations of some things. They appear on page 21.

Noise Bill 2005

Chapter 1 Preliminary[1]

Part 1 Objects of Act

1 Objects

The objects of this Act are:

to ensure that when people buy a new property[2] to live in, or for rest and recreation, they are aware of noise problems that could interfere with their enjoyment of the property; and

to create a fund to enhance neighbourhoods by eliminating noise, out of money paid by persons who disobey this Act.

Part 2 Key concepts[3]

2 Offensive Noise

Offensive noise is —

recurring[4] noise or vibration coming from aircraft, road traffic or people using or occupying a ***Property*** and which, because of its nature, loudness, or the time at which it is made[5], unreasonably interferes with the enjoyment of the ***Property***.

3 Noise Statement

A ***Noise Statement*** is —

a written statement signed and dated by the seller of a ***Property***, in the form set out in the Schedule at the end of this Act, disclosing whether or not any ***Offensive Noise*** has been heard or experienced at the ***Property***, in the 6 month period before the date of the statement.

4 Property

Property means —

any premises intended to be used or occupied by a buyer as a residence or for rest and recreation, and whether its title is freehold or leasehold.[6]

5 Local Authority

Local Authority means—

the Council[7] of a Municipality in which the ***Property*** is located.

6 Inspector

Inspector means—

a person employed by a ***Local Authority*** who has power to investigate complaints about ***Offensive Noise***.

Chapter 2 Disclosing Offensive Noise

Part 1 Seller's obligation

7 Seller must give a Noise Statement

(1) At least 7 days[8] before a buyer enters into a contract to buy the Property, the seller must give a signed and dated Noise Statement about the Property to the buyer or the buyer's lawyer.

(2) The Noise Statement must be true at the time it is signed and dated.

(3) The Noise Statement must still be true at the time a buyer enters in a contract to buy the Property. If it is not (because something has happened in the meantime), the seller must give to the buyer or their lawyer, another Noise Statement to correct the earlier one.

8 Missing or untrue Noise Statements

(1) If a seller deliberately[9] does not do what section 7 requires, then:

(a) the Court can order the seller to pay compensation to the buyer; and

(b) the seller commits an offence.

Maximum penalty for an offence: a fine of $10,000 or 6 months' gaol.

(2) The amount of the compensation the Court can order is up to 10% of the value of the Property being sold.

(3) The Court must not order compensation[10] if it considers that the Offensive Noise that was not disclosed in a Noise Statement, can be stopped by some other order, for example, an order under the *Environment Act* 1995.

Chapter 3 The obligations of property agents and lawyers

Part 1 Seller

9 Seller's property agents and lawyers

(1) If a seller uses a property agent[11] to sell the Property, and the property agent knows that the seller has not done what section 7 requires, the property agent must tell the buyer before the buyer enters into any contract to buy the Property.

(2) If a seller uses a lawyer to sell the Property, and the lawyer knows that the seller has not done what section 8 requires, the lawyer must tell the buyer before the buyer enters into any contract to buy the Property.

Part 2 Buyer

10 Buyer's lawyer

If the buyer uses a lawyer to buy the Property, the lawyer must use reasonable care to make sure that the requirements of this Act are satisfied.

Part 3 Consequences

11 Consequences for property agents and lawyers

(1) If a seller's property agent or seller's lawyer does not do what section 9 requires, then:

(a) the Court can make it a condition of their right to practice that for 10 years they must tell everyone they deal with in their practice that they have breached their obligations under the Noise Act; and

(b) in the case of the seller's property agent, the Court can order them to pay damages to the buyer.

(2) If a buyer's lawyer does not do what section 10 requires, the Court can order them to pay damages to the buyer.

Part 4 Rights of subsequent buyers

12 Resales within 5 years

If someone sells the Property within 5 years of an earlier sale, any previous seller who has breached section 8 during the 25 years before the resale, has the same liability under this Act as if the buyer had bought from that seller.

Chapter 4 Evidence in legal proceedings

13 Certificates by Inspectors

If an Inspector signs a certificate saying that in their opinion Offensive Noise was heard or experienced at a particular Property on a particular date, the certificate can be used as evidence in any Court, and cannot be challenged.

Chapter 5 Environmental Enhancement Fund

14 Local Authorities must establish an Environmental Enhancement Fund

(1) Every Local Authority must establish a fund with a bank account, called its 'Environmental Enhancement Fund'.

(2) The fund is only to be used for the purposes of this Act.

15 Payments to the fund

(1) If anyone receives compensation under section 8 (1)(a) for the purchase of Property[12], they must pay 10% of the compensation amount into the Environmental Enhancement Fund of the Local Authority for the Property.

(2) If anyone is fined under section 8(1)(b) concerning the purchase of a Property, the person receiving the fine must pay 10% of its amount into the Environmental Enhancement Fund of the Local Authority for the Property.

16 Using and administering the fund

(1) A Local Authority can use the money in an Environmental Enhancement Fund only:

(a) to enhance the local environments of their neighbourhoods; **or**

(b) to reduce noise generally in their neighbourhoods; **and**

(c) in accordance with the guidelines issued by the Secretary of State.

(2) Every Local Authority must give to the Secretary of State a report every 12 months showing how they have used the money in their Environmental Enhancement Fund.

Schedule

(Form of a ***Noise Statement***)

Noise Act, 2005

Statement about the property ……
[write in the address of the property being sold]

Date of this Statement: ……
[write in the date this is signed]

What this Statement is about

The *Noise Act* was brought in because of complaints from people buying properties not knowing that they were affected by 'Offensive Noise'. Offensive Noise is noise or vibration from aircraft, road traffic or people using or occupying private or commercial property which unreasonably interferes with the enjoyment of any property, because of the nature, loudness, or timing of that noise.

The law now says that before anyone can sell a private or commercial property, they have to tell the buyer whether the property has been affected by that sort of noise in the six months leading up to the sale.

What the seller says about this Property

Question: Has any 'Offensive Noise' been heard or experienced during the 6 months before the date of this notice, at the property specified in this Statement?

Seller's answer: ……
[write in 'yes' or 'no']

Notice to the Seller

You can be fined or sent to gaol if your answer to the question is untrue.

Buyer's rights

The law says:

At least seven days before you make any contract to buy a property, the seller has to give this notice to you or your lawyer.

If anything happens after this notice is given to you which makes it untrue at the time you are about to sign a contract to buy a property, you have to be given a replacement notice which is true at that time.

If the seller does not do these things, the Court can order the seller to pay you compensation.

If you do not understand anything about this notice, speak to your lawyer or contact the Department of Fair Trading on 9999-5555.

……..
[Seller must sign here]

[1] The Bill is somewhat over-structured into Chapters, Parts *and* Sections, but I wanted to show a pattern for more complexity if needed.

[2] I was originally using the word 'house', which I love, but I felt it misleading when it includes apartments. 'Property' was the best I could think of to cover both unambiguously, given it covers rental property and certain commercial property where people don't actually have to live (which cuts out 'residence').

[3] Key Concepts (Definitions): Because the Act is quite short, and there aren't many defined terms, I have listed them in my perceived view about how important they are to understanding the Act, rather than alphabetically. I've also bold highlighted defined terms within definitions, but not in the text of the Act because I think that is a bit of a distraction there.

[4] This is to exclude isolated incidents.

[5] I have added these parameters because there needs to be more than simply noise (however slight) from the specified sources. The drafting instruction says that the noise in question is of the kind that 'seriously troubles' a purchaser.

[6] The drafting instructions, read strictly, could include commercial leasehold property which is not used as a residence or for rest and recreation. I have drafted the definition of 'Property' on the assumption that this is not what is intended.

[7] 'Councils' and 'Municipalities' are what we call them in Australia, and are very common terms.

[8] This is so that the buyer can take advice and make enquiries. If this was not considered necessary, you could make the obligation to give the certificate just before a contract is signed, and this would avoid having to include sub section 3.

[9] This is to reflect the drafting instruction that focuses on sellers 'concealing' noise, and avoids strict liability. If you wanted to cast the onus on the defence rather than the prosecution, you could delete this and provide for a 'reasonable grounds' defence, the onus of which is on the seller.

[10] I assume from the drafting instructions that the seller can still be fined.

[11] Or 'real estate agent'; whatever name people know them to go by.

[12] I use 'Property' in order to link it to the relevant Local Authority which is to receive the money.

Michèle Asprey *is an Australian lawyer, a plain language writing consultant, and the author of Plain Language for Lawyers (3rd ed, 2003, The Federation Press, Sydney).*

Edward Caldwell's comments on the draft Bills

Our three drafters coped remarkably well with their inadequate instructions, and the result is three impressive Bills that may help to throw a little light on the curious, and seemingly rather secretive, craft of the legislative drafter.

What is particularly striking about the three drafts is that they are so different, both in the language used and in the results that they would produce. In part that can be explained by each drafter's having had to invent policy where the instructions were defective. In some places the drafter has decided to draft in a way designed to emphasise a problem with the instructions or to raise a question that may have been overlooked by the policy-makers. And of course each drafter will be conditioned to some extent by the rules and practices of their own jurisdiction. But even if the instructions had been perfect and the drafters had been drawn from a single jurisdiction, the three Bills would still have been significantly different. Legislative drafting is not a science. Each drafter brings to the craft a range of skills and a breadth of experience that will inevitably place his or her own stamp on each draft.

We are looking here at first drafts. At this stage the drafter ought to be concentrating on—

> understanding the purpose of the legislation (which in this case is to do something, though we are not entirely sure what, about undisclosed troublesome noise in the context of domestic property);
>
> identifying the results that the client wishes the legislation to produce (changing the behaviour of sellers and their agents and providing legal remedies);
>
> looking for problems with the instructions and spotting where essential elements are missing;
>
> raising questions that seem to have been overlooked by the policy-makers; and
>
> designing a structure for the legislation that will stand up when it comes under attack in the legislature.

I am afraid that at this stage polishing the language has to take second or even third place. You must, if you have time, try to maximise the clarity and simplicity of your draft, but that often has to be a distillation process embarked on after the policy has finished fermenting. Your draft may, of course, bubble its way through the legislature, and the policy may never stop fermenting.

Each of these drafts has a purpose clause somewhere towards the front of the Bill. What strikes me as interesting about these clauses is how different they are. The three Bills seem to have significantly different purposes. But that should not surprise us. Purpose clauses are inevitably rather subjective and depend heavily for their content on the particular features of the legislation that the drafter and client wish to emphasise. There is no science to purpose clauses.

The language used in the Bills is relatively simple. But is some of it too simple? To some extent the answer will depend on the legislature for which the Bill is prepared. In the Troublesome Noise Disclosure Act some of the language, while being admirably clear and simple, has a colloquial flavour that would invite criticism in at least one legislature. I can see a mischievous legislator balking at being asked to require a person to "show up" or asking the sponsoring Minister to explain the precise difference between a person who wants to make a claim and one who really wants to make a claim. The drafter tends to have to work within a language register which is slightly more formal than that used on the street.

What about the structure of the three Bills? They differ significantly. To what extent do readers feel that starting a Bill with a raft of preliminary, scene-setting provisions such as purpose clauses, introductory notes and definitions deflects attention away from the core provisions of the legislation? Does it matter, for example, that Part 2 of Version 2 sets about providing remedies before the reader knows what the obligations that give rise to the remedies amount to? Is the structure of Version 3 better because Part 2 starts by setting out the seller's obligations?

Questioning the instructions and the policy that lies behind them is an important aspect of the drafter's work. In Version 3 the definition of "offensive noise" in clause 2 raises the question whether the boundary between noise and vibration is sufficiently clear. Some low frequency noises come with powerful vibrations. Should offensive vibrations be treated in the same way as offensive sounds, particularly where the two cannot be disentangled? But if bad vibrations are to be covered by the legislation, what about offensive smells?

What the three draft Bills demonstrate, above all, is that drafting legislation is very much an iterative process. First drafts often act as no more than a starting point designed to help both the drafter and the client focus more clearly on the end result and the means of getting there. I think that our three drafters are to be congratulated for making such good progress from such woefully bad instructions.

Master Class No. 2, Boulogne conference:

Revisory drafting — three revisions

Below is part of a current rule from the U.S. Rules of Civil Procedure, which are used in federal courts. Each of the three drafters on the panel was asked to revise it.

(g) Signing of Disclosures, Discovery Requests, Responses, and Objections

(1) Every disclosure made pursuant to subdivision (a)(1) or subdivision (a)(3) shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the disclosure and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made.

(2) Every discovery request, response, or objection made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, response, or objection is:

(A) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(B) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(C) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at state in the litigation.

If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and a party shall not be obligated to take any action with respect to it until it is signed.

(3) If without substantial justification a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the disclosure, request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

Revision 1 — by David Elliott

This draft assumes that the provisions of the original must continue to be contained in one rule.

(g) Signing and certification of disclosures, discovery requests, responses, and objections

(1) An attorney of record or unrepresented party must sign and certify

(A) a disclosure made under subdivision (a)(1) or subdivision (a)(3), and

(B) a discovery request, response, or objection.

(2) When a disclosure is made under subdivision (a)(1) or subdivision (a)(3), the attorney of record or the unrepresented party must certify the following:

(A) the signer made reasonable inquiry before making the disclosure, and

(B) to the best of the signer's knowledge, information and belief the disclosure is complete and correct.

(3) When a discovery request, response, or objection is made, the attorney of record or the unrepresented party must certify the following:

(A) the signer made reasonable inquiry before making the request, response, or objection, and

(B) the request, response, or objection

(i) is consistent with these rules and permitted by law, or if it is not, that there is a good faith argument for extension, modification, or reversal of the law,

(ii) is not made for an improper purpose (*subsection (4) gives some examples of what would be an improper purpose*),

(iii) is not unreasonable or unduly burdensome or expensive considering

(I) the needs of the case,

(II) the discovery already made,

(III) the amount in controversy, and

(IV) the importance of the issues in the litigation.

(4) Examples of an improper use of a discovery request, response or objection include requests, responses or objections to harass, cause unnecessary delay, or needlessly increase the cost of the litigation.

(5) If an attorney of record signs the disclosure, discovery request, response, or objection, the attorney must

(A) sign his or her individual name, and

(B) state their address.

(6) If an unrepresented party signs the disclosure, discovery request, response, or objection, the unrepresented party must also state their address.

(7) If a discovery request, response, or objection is not signed,

(A) the party to whom it is directed need take no action until it is signed, except to bring the lack of a signature to the attention of the person who should have signed it, and

(B) the person omitting to sign it must then promptly sign it.

(8) [On application] the court must strike out a request, response, or objection that is not promptly signed.

(9) If the court finds that a certification under this rule is [untrue, incorrect, inaccurate, or contrary to these rules], the court, on [application] or on its own initiative, must sanction the person responsible, unless the court decides that the person had a substantial justification for making the certification.

(10) The sanction may include an order

(A) to pay the reasonable expenses of a person because of the [untrue, incorrect, or inaccurate certification or contravention of the rules], and

(B) to pay a reasonable attorney's fee.

Revision 2 — by Eamonn Moran

Rule 26(g)

1. Signing of court documents

(1) In this rule **"court document"** means a document containing—

(a) a disclosure made under subdivision (a)(1) or (a)(3); or

(b) a discovery request, response or objection made by a party to a proceeding.

(2) A court document filed in a proceeding must be signed—

(a) by the filing party; or

(b) if the filing party is legally represented, by a legal representative of the party.

(3) By signing a court document the signer is certifying that, to the best of their knowledge, information or belief formed after making reasonable inquiries—

(a) in the case of a document referred to in sub-rule (1)(a), the disclosure is complete as at the date of signing; and

(b) in the case of a document referred to in sub-rule (1)(b), the request, response or objection—

(i) is made in accordance with these rules and in good faith; and

(ii) is not made for an improper purpose; and

Examples

Causing unnecessary costs or delay or harassing a party are improper purposes.

(iii) is reasonable in all the circumstances.

(4) The signer must ensure that their address is stated on the court document.

(5) A document referred to in sub-rule (1)(b) that is not signed as required by sub-rule (2) has no effect.

(6) A document that has no effect by force of sub-rule (5) may be signed after its filing and, if signed as required by sub-rule (2) as soon as practicable after the filing party is notified of it not being signed, has effect for the purposes of this rule.

2. Consequence of non-complying court document

(1) If the court is satisfied, whether on its own initiative or on the application of a party to a proceeding, that—

(a) a court document as defined in rule 1(1) filed in the proceeding does not comply with the certification specified in rule 1(3); and

(b) there is no reasonable justification for the non-compliance—

it may make any order that it considers appropriate against the filing party or the party's legal representative or both.

(2) Without limiting sub-rule (1), an order under that sub-rule may order the payment to any other party to the proceeding of any reasonable costs and expenses incurred by that party because of the non-compliance.

Revision 3 — by Michèle Asprey

1 Disclosures, discovery requests, responses and objections must be signed

- A disclosure under subdivision (1)(1) or subdivision (a)(3); and
- a discovery request, response or objection

must be signed.

2 Who must sign

2.1 If a party has an attorney in the case, at least one attorney must sign as an individual, and state their address.

2.2 If a party has no attorney in the case, the party must sign and state their address.

3 What is the effect of signing?

3.1 By signing a disclosure, the attorney or party certifies that:

- after making reasonable inquiries, and
- to the best of their knowledge, [information and belief,][1]

the disclosure is complete and correct at that time.[2]

3.2 By signing a discovery request, response or objection, the attorney or party certifies that:

- after making reasonable inquiries, and
- to the best of their knowledge, [information and belief,][1]

the discovery request, response or objection is:

3.2.1 consistent with these rules; and

3.2.2 justified by existing law, or a genuine argument to change the law; and

3.3.3 not for an improper purpose (for example, to harass, to cause unnecessary delay, or to increase the cost of litigation needlessly); and

3.2.4 not unreasonable[3] or too difficult or expensive, taking into account:

- what is necessary in the case,
- the discovery so far,
- the amount in dispute,
- how important the issues of the case are.

3.3 An attorney or party must not sign unless they are able to certify as stated in rule 3.1 or 3.2 (as the case may be).

3.4 The court can punish the attorney, the party, or both, if the person who signs disobeys rule 3.3 without a substantial excuse. The punishment can include ordering them to pay reasonable expenses (including a reasonable fee for an attorney).[4]

3.5 The court can act under rule 3.4 if a party brings a motion, or on its own initiative.

4 What if there is no signature?[5]

4.1 If a discovery request, response or objection is not signed, it has no effect, and the court must reject it.

4.2 If the party making the discovery request, response or objection learns that it is not signed, and then promptly signs it, it then takes effect, and the court must accept it.[6]

Endnotes

[1] Term of art? It is in Australia.

[2] This last phrase is here (which is slightly unsatisfactory) to be parallel with next paragraph.

[3] Unfortunately not the same thing as 'reasonable'.

[4] No such thing as a 'reasonable attorney'?

[5] Gap: this deals only with a discovery request, response or objection. What if a disclosure isn't signed?

[6] This seems fraught with difficulty to me!

The revision that emerged from the project to "restyle" the U.S. Federal Rule of Civil Procedure

(g) Signing Disclosures and Discovery Requests, Responses, and Objections.

(1) ***Signature Required; Effect of Signature.*** Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name — or by the party personally, if unrepresented — and must state the signer's address. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

(A) with respect to a disclosure, it is complete and correct as of the time it is made; and

(B) with respect to a discovery request, response, or objection, it is:

(i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law;

(ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the litigation costs; and

(iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

(2) ***Failure to Sign.*** The court must strike an unsigned disclosure, request, response, or objection unless the omission is promptly corrected after being called to the attorney's or party's attention. Until the signature is provided, the other party has no duty to respond.

(3) ***Sanction for Improper Certification.*** If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.

Cleaning up the act: using plain English in legislation

Nicola M. Langton

Cardiff Law School, Cardiff, Wales, UK

Introduction

While the style of legislative Common Law texts may have improved in recent times, the underlying traditions have not evolved to fundamentally change the nature of the texts themselves. In Common Law jurisdictions where principles of Plain Language in legal drafting have not been fully adopted, much of the language of legislation is not straight forward at best and incomprehensible at worst. The reasons for this arise from the use of common words with uncommon meaning, legalisms, old-fashioned formal phrasings, attempts at flexibility and precision, passives and nominalisations, conditionals/conditionality, modals/modality, unusual multiple negatives and prepositional phrases, complex adverbial clauses, and whiz (*wh*-words) deletion etc.[1]

This article illustrates a six-stage approach used to teach readers and users of legislative texts how to handle such texts for study or work purposes. Students develop strategies for identifying the purposes and problematic sections of legal texts and learn how to rephrase or reformulate the texts in ways that not only respect traditional drafting approaches but also draw on the principles of Plain Language. This approach was initially developed by Bhatia[2] but which I refined with the addition of *The Template* guidelines[3] on legislative drafting while teaching various *English for Legal Purposes* courses in Hong Kong between 1998 and 2004.

The six-stage model

The purpose of this staged approach is to suggest ways to access difficult-to-read legislative texts, identify typical features, and determine how these features make the text difficult to read. Depending on what is revealed, the next step is to examine reasons for these problems and select methods for improving the accessibility of the texts and resolving potential and actual ambiguity, misplacement of qualifications, etc. The six-stage model enables students to gradually apply the principles and methods covered. Over time, the stages can be merged depending on the nature of the texts dealt with.

Stage 1: Surface Textual Analysis

This first stage raises awareness about general linguistic and grammatical characteristics of legal English used in legislative texts. It is important that students analyse extracts from various legislative texts so that they can identify a) communicative purposes and intended audiences; b) features that make the text easy or difficult to read and why; and c) whether those features are necessary. In eliciting the answers, the students are likely to come up with a list of features similar to those mentioned earlier.

Stage 2: Cognitive Structuring

Legal rules are generally expressed as action rules (to define duties, obligations, and rights and to define prohibitions, powers, & penalties), stipulation rules (to set out how the rules apply and when), and definition rules (to provide special meanings that apply to whole or part of the particular Act).[4] These rules are further narrowed down or broadened through three types of qualification: preparatory (case descriptors as to when the rule applies), operational (how the rule applies), and referential (what other sections of the Act or other Acts need to be read too).[5] In other words, how a legislative text is constructed is intrinsically linked to and dependent on the lexico-grammatical structures typically used in some classes of text to state and elaborate on the legal rules.

This relationship between cognitive structuring, rule statements, and the use of qualifications can be seen in Figure 1 on page 29. By effectively 'removing' the various clause insertions, the basic provision on the left is revealed. The cognitive structure also reveals how the opening stipulation is separated from the subsequent action rule through the use of a prepositional clause ('*in ascertaining…*') and how the various qualifications narrow down how the rule applies ('*or*' clauses) and when the rule will apply (propositional phrase '*on or after*'). The use of parallel structures and key word repetition in the subsequent action rule elaborations add clarity and precision. Each

qualification in the right-hand column clearly refers back to what it elaborates on or restricts. The lexico-grammatical features identified in stage 1 help achieve this coherence, as does the placement of the qualifications themselves. Also, the interactive role of these elaborations and qualifications make the provision precise and all inclusive and so answer the 'who, what, when, where, how' questions about the context and how the rule or provision applies. Other than the layout, the only real problem is the position of the action rule before the legal subject ('*any consideration*').

Cognitive structuring is clearly a practical tool for revealing potential language or comprehension problems present in the text and the nature of legal rule drafting. However, to understand why legal rules are drafted the way they are, it is important to understand the nature of legal reasoning itself and how this influences traditional legal drafting methods.

Stage 3: Templating

It has been established that legal reasoning underpins traditional legal drafting[6] in that most legal sentences in Common Law legislative texts take a direct or indirect form of the legal reasoning formula:

> *If **X** (case) then **Y** (legal subject) shall be/ do **Z** (legal action)*

The Template guidelines[7] confirm the role of legal reasoning and propose that when analysing any complex legislation or legal text, the true structure of a rule should, wherever possible, be case, condition, sub-condition, legal subject, and legal action. In other words, any (pre-) conditions and case descriptors should precede the action rule. *The Template* suggests turning passive voice main clauses (usually phrased using nouns and qualifying phrases or clauses) into the active voice to identify true legal subjects and making the verb in the first principal clause active voice if possible. Everything after this main verb represents the legal action of the section/subsection. Once legal subject(s) and legal action(s) are identified, the next step is to see if the legal subject(s) or action(s) are qualified by cases, pre-conditions, or conditions. Template labeling the text can also reveal other potential or actual problems with language or structure as illustrated in Figure 2 on page 30.

Here, there are two distinct cases, each with its own legal subject and action to qualify and define to whom, where, and when the action rule applies. Both are positioned according to *The Template* and phrased such that the action rule clearly relates to either or both cases as circumstances require. There is, however, a potential ambiguity as to who the phrases '*whatever his nationality or citizenship and wherever he may b*e' refer to — the accused or the victim? The way the clauses are structured seem to suggest that the phrases refer to the intended victim. This ambiguity does not seem to derive directly from drafting principles but from linguistic choices. The use of 'any person' is also problematic as it does not always refer to the same subject.

Combining stage 3 templating with stage 2 cognitive structuring can also be a practical way to identify other problems cognitive structuring alone may not reveal. For example, Figure 3 on page 30 illustrates how Template labeling can reveal if a text is poorly structured because it does

Fig. 1: Cognitive Structure of s.7c Inland Revenue Ordinance CAP 112 (HK)

s.7c Bad Debts

(1) In ascertaining the assessable value of any land or buildings or land and buildings under this Part for any year of assessment commencing on or after 1 April 1983, there shall be deducted any consideration in money or money's worth, payable or deemed to be payable on or after 1 April 1983 to, to the order of, or for the benefit of, the owner in respect of the right of use of that land or buildings or that land and buildings and proved to the satisfaction of the assessor to have become irrecoverable during that year of assessment

Main Provision	Subsidiary provision/qualification	Rule type
(1) In ascertaining the assessable value of any land	or buildings or land and buildings under this Part for any year of assessment commencing on or after 1 April 1983,	*Stipulation* *Action Rule*
there shall be deducted *any consideration* payable	in money or money's worth, or deemed to be payable on or after 1 April 1983	
to,	to the order of, or for the benefit of,	
the owner (for) the right of use of that land and	in respect of or buildings or that land and buildings	
proved to have become irrecoverable	to the satisfaction of the assessor during that year of assessment.	*Stipulation*

not clearly follow traditional drafting techniques.

Here, there is one legal subject with qualifying legal actions in the case descriptor as distinct from the other legal subject in the main rule (introduced by 'then'). These features are in line with traditional drafting techniques and *The Template* guidelines. However, there is a problem with the position of '*if the person making the misrepresentation would be liable to damages*' after the word 'then'. The template labeling suggests that this qualification is actually a pre-condition, so it could be read as part of the case descriptor. The other problem is that the legal subject of the main rule is referred to as '*by another party thereto*', '*the person making the representation*', '*that person*', and '*he*'.

Fig. 2: Cognitive Structure of s 5 Offences Against the Person Ordinance CAP 212 (HK)

Main Provision	Subsidiary provision/qualification	Template
All persons who conspire, to murder any person, and *any person* who, solicits, any person to murder any other person, shall be guilty of an offence and shall be liable to imprisonment for life	within Hong Kong confederate, and agree whatever his nationality or citizenship and wherever he may be, within Hong Kong encourages, persuades or endeavors to persuade, or proposes to whatever his nationality or citizenship and wherever he may be,	LS1 **C** LA1 **A** **S** **E** ***X1*** *Stipulation* LS2 **C** LA1 **A** **S** LA2 **E** ***X2*** *Stipulation* *Action Rules* LA2/3 (LS1/2) LA3/4 (LS1/2)

Stage 4: Easification

After identifying any actual or potential problems with the text, the next stage is to select appropriate easification strategies to make the text more accessible without losing any of the essential form and content of the original text. The purpose of easification is not to modify or rewrite content but to clarify and make content more accessible.[8]

Most texts lend themselves to easification and greater accessibility simply through textual mapping and reducing information overload strategies and by moving misplaced embedded clauses and controlling superfluous wording (e.g. double negatives) and excessive cross references. Consequently, stage 4 easification involves applying *The Template* guidelines on reordering and phrasing and employing principles of Plain Language to make the text clearer (not simpler). *The Template* indicates that legal qualifications should be rephrased if necessary to reflect the underlying legal reasoning (*'If X, then Y shall do/be Z'*) and the text reordered where possible as case (situation), condition/sub-conditions, legal subject(s), and legal action(s). Main rules should be phrased in the active voice, while subsequent qualifying subsections can be phrased in the passive voice if necessary and appropriate.

Fig. 3: Cognitive Structure of s 3 Misrepresentation Ordinance CAP 284 (HK)

Main Provision	Subsidiary provision/qualification	Template 1
(1) Where a person has entered into a contract and as a result he has suffered loss, **then**, if *the person making the misrepresentation* would be liable to damages *that person* shall be so liable unless *he* proves that he had reasonable grounds to believe that the facts represented were true.	after a misrepresentation has been made to him by another party thereto thereof in respect thereof had the misrepresentation been made fraudulently, notwithstanding that the misrepresentation was not made fraudulently, and did believe up to the time the contract was made	LS1 **C** LA1 **A** *Stipulation*/**S** *Condition* **E** LS1/LA2 **X** *LS2* LA1 *Stipulation/ Condition* *LS2* LA2 *Action Rule* *Exception* *LS2*/LA3 *Action Rule* *Stipulation/ condition*

Figure 4 illustrates how application of these easification strategies to s.5 Offences Against the Person Ordinance resolves many of the problems mentioned earlier (Figure 2). By regrouping ideas to reduce information overload, reducing direct repetition, and using bullet points to create one legal subject and one case descriptor, the problem with

the confusing use of '*any person*' to refer to two different people is removed. These measures, together with the use of some ordinary language ('*anyone/ they*'), also remove the potential ambiguity as to nationality and location without significantly changing the scope or content of the original text.

The main problem with s.3 Misrepresentation Ordinance (Figure 3) was the position of the condition between the case descriptor and rule ('*if the person making the misrepresentation would be liable to damages*'). Figure 5 shows that by using some direct repetition, following *The Template* guidelines on re-ordering, and inserting some additional words (in italics) and '*If/then* 'clauses to reflect the underlying legal reasoning and nature of legal rules, the problem is resolved without significant change in scope or intended meaning.

Stage 5: Templating check

The next stage is to double check the final easified version against the original stage 2 cognitive structure and *The Template* guidelines used in stages 3 and 4 to ensure there are no fundamental changes. It is not always possible to reorder according to *The Template* guidelines without creating a completely different text, especially if the '*If/then'* constructions are in the wrong place. So the basic rule of thumb is to be guided by what the cognitive structure and initial LS/LA labeling reveals and employ Plain Language principles where to do so makes the text clearer. It is also important to double check the use of any textual mapping devices, Plain English vocabulary and ordinary English sentence structure, etc. to make sure that content is not oversimplified and that nothing new has been added or a new ambiguity created.

Stage 6: Simplification

Most texts do not lend themselves readily to other easification devices (introducing purpose clause, explanatory notes, subheadings, etc.) since their use can run the risk of oversimplifying and significantly changing the original content and intended meaning of the original text. In a classroom context, adopting simplification strategies generally only arises if an original text needs to be explained to or summarized for a non-specialist audience and where the simplified version is not intended to replace the original in any way. If such situations arise, then simplification could be used and other appropriate easification devices selected. For example, Human Resources personnel often need to explain maternity leave benefits to staff, and the original text of s.14(3) Employment Ordinance Cap 57 (HK) is not exactly helpful.

s.14 Payment for maternity leave

…

(3) Maternity leave pay payable under this section shall be calculated-
(a) in the case of a female employee whose wages are computed by reference to a monthly rate, at four-fifths of her monthly rate of pay; and (Amended 66 of 1995 s.2)

(b) in any other case, at four-fifths of the average daily wage earned by the female employee, and for the purposes of this paragraph the average daily wage shall be the average of the daily wages earned by the female employee on each day on which she worked during every complete wage period,

Fig. 4: Easified s.5 Offences Against the Person Ordinance CAP 212 (HK)

Text	Template	Rule Type
IF anyone within Hong Kong	LS1	cond 1 **C**
a) conspires, confederates and agrees to murder any person, and/or	LA1	**A**
		cond 2 **S**
b) solicits, encourages, persuades or endeavors to persuade, or proposes to another	LA2	**E**
to murder any person		**X**
(whatever the nationality or citizenship or location of that person)		cond 3
THEN they shall be	LS1	*Action*
i) guilty of an offence and	LA3	*Rules*
ii) liable to imprisonment for life	LA4	

Fig. 5: Easified s.3 Misrepresentation Ordinance CAP 284 (HK)

Text	Template	Rule Type
IF a person has entered into a contract	LS1/LA1	
a) after a misrepresentation has been made to him by another party *to the contract*, and		Cond 1 **C** **A**
b) he has suffered loss *as a result*,		**S**
and,		**E**
IF the person making the misrepresentation would be liable to damages for that loss had the misrepresentation been made fraudulently,	*LS2* LA1	Cond 2 **X**
THEN the person making the misrepresentation shall be so liable	*LS2* LA2	*Action*
Even if the misrepresentation was not made fraudulently,		*Rule*
That person will not be liable	LS2/LA3	*Action Rule*
ONLY IF he	*LS2*	**Exception**
proves that he had reasonable grounds to believe (and did believe) up to the time the contract was made that the facts represented were true.	LA3	Condition to defence

comprising not less than 28 days and not more than 31 days, immediately preceding or expiring on the commencement of her maternity leave: (Amended 66 of 1995 s. 2)

Provided that in a case to which this paragraph applies maternity leave pay shall not be payable in respect of a day on which the female employee would not have worked had she not been on maternity leave. (Replaced 48 of 1984 s. 8)

Even after stage 2 cognitive structuring and stage 3 template labeling, stage 4 easification does not render the text much clearer. However, a simplified version that uses the cognitive structure, respects *The Template* guidelines, and adopts Plain Language and other easification devices makes all the difference as Figure 6 illustrates.

Fig. 6: Simplified s.14(c) Employment Ordinance Cap 57

How to calculate maternity leave pay?

(a) For monthly paid employees:

Maternity Leave Pay = 4/5 x monthly rate x maternity leave period

e.g.
IF Monthly Salary is HK$10,000 & Maternity Leave Period is 10 weeks (2.5 months),
then Maternity Leave Pay (for the whole period)

$$= \frac{4}{5} \times \text{HK\$10,000} \times 2.5 \text{ months} = \text{HK\$}\textit{20,000}$$

(b) For non-monthly paid employees:

Maternity Leave Pay = 4/5 x monthly rate x maternity leave period

where

1) Average Daily Rate = $\frac{\text{total daily wages earned during Complete Wage Period}}{\text{total number of days of the Complete Wage Period}}$

and

2) Complete Wage Period = the period (between 28 to 31 days) immediately prior to an employee's maternity leave.

e.g.
IF complete wage period is 30 days, Maternity Leave Period is10 weeks (i.e. 70 days) and the daily wages earned during the completed wage period total HK$30,000,

then Maternity Leave Pay (for the whole period)

$$= \frac{4}{5} \times \frac{\text{HK\$30,000}}{30} \times 70 \text{ days} = \text{HK\$56,000}$$

Note: *The maternity leave pay includes the pay on the days that the female employee would have worked on a normal working date.*

This simplified version renders the original content accessible and easy to read due to judicious use of other possible easification devices. While the format is 'untraditional', there is no loss of scope or intended meaning. This is achieved by using a sub-heading in the form of a question to reveal legislative intent, moving some content into explanatory/definition note sections, using formulae instead of words to set out how maternity pay is calculated, and using clear examples to illustrate calculation rules with *if/then* clauses. Also redundant cross-referencing and multiple negative phrasing have been removed.

Conclusion

By adopting this six-stage approach, learners will discover that more often than not there is no significant loss of purpose or scope if the legal text is written differently and principles of Plain Language adopted. In particular, they will quickly develop effective reading and writing strategies to help them overcome the typical problems of unusual sentence/grammar structures, information overload, and unwieldy qualifications because they are respecting the cognitive structure and *The Template* guidelines on legal drafting throughout the process.

langtonn@cardiff.ac.uk

[1] See Mellinkoff, D. (1963). *The Language of the Law.* Boston: Little Brown; Danet, B. (1980). Language in the Legal Process, *Law and Society Review,* Vol 14, No 3, (Spring 1980) pp 445–564

[2] See Bhatia, V. K., (1983). Simplification v Easification: the case of legal texts. *Applied Linguistics*. 4,1, (42–54) and Bhatia, V.K. (1993). *Analysing Genre: Language Use in Professional Settings*. London: Longman

[3] Fung, S & Watson-Brown A (1994). *The Template. A Guide for the Analysis of Complex Legislation*, pp 34–37, 69–71

[4] Gunnarsson, B.L. (1984). Functional comprehensibility of legislative texts: experiments with a Swedish Act of Parliament. *Text* 4 (1-3), pp 71-105

[5] See endnote 2 second entry and Bhatia, V. K. (1982)."An Investigation into Formal and Functional Characteristics of Qualifications into Legislative Writing and Its Application to English for Academic Legal Purposes." British Library, 1982

[6] See Coode, G. (1948). On legislative expression or language of written law. Introduction to a digest of the Poor Laws, appendixed to the 1843 Report of the Poor Law Commission. Repr. In E.A. Drieger (1957), *The Composition of Legislation;* and Crystal, D. & Davy, D. (1969). *Investigating English Style.* Longman: London

[7] See endnote 3

[8] See endnote 2 second entry

Nicola Langton *L.LB; MA, is an E-learning Development Officer in the Law School, Cardiff University. She practiced as a solicitor in England for several years before turning to teaching in France and Hong Kong where she developed and delivered client-specific courses for the insurance, banking, legal, and corporate sectors. She also created and taught* English for Legal Purposes *courses for undergraduates and post-graduates at City University of Hong Kong. Her research interests and teaching expertise include a) developing professional legal and business communication competence at undergraduate and practitioner level; and b) developing life-long learning skills and critical self-reflective practices for legal study and practice.*

Clarity on the net

Each issue of *Clarity* since No 40 is posted on the Clarity website <www.clarity-international.net>. But we do not post an issue until it is superseded by the next one, so that members get the chance to read each new issue before the rest of the world can.

Testing — we need to do more, more often

Vicki Schmolka

At the "Clarity and Obscurity in Legal Language" international conference in Boulogne-sur-mer, only a very small amount of time was spent talking about testing. No jurisdictions reported routinely testing draft statutes and regulations with typical readers, and no one reported on recent test results. This is unfortunate, as testing a draft document is a guaranteed way to identify failures in clarity.

Testing was discussed during one panel presentation. Although few participants had experienced the benefits of testing a draft document, participants easily identified questions they have about their writing that they thought testing could help to answer.

Is the document easy to understand?

Can a reader find information?

Is the document written at the right level?

Will the document get the reader to do "x"?

Will a reader be motivated to read the document?

Can readers use the document to achieve their goals?

Is the document compelling?

Is a choice of word (for example, "tween" for 10 to 12 year olds) acceptable?

Has the writer made any mistakes?

Does the reader feel confident after reading the document?

How does the reader feel about the organization that produced the document?

Does the tone and language match the audience for the document?

Is reading the document enjoyable?

Would the reader return to the document to read it again?

Given that testing can provide the answers to these types of questions and can be done for a limited amount of money over a short period of time — although, of course, there are always more extensive and elaborate possibilities — why is more testing not being done? Participants at this panel presentation provided some insights about the perceived impediments to testing:

cost

time

might be humiliating

possibility of conflicting results, might disagree with the results, might get an answer you don't want

danger that test participants will say what you want to hear

difficulties finding the right methodology

difficulties analyzing the results

material to test is confidential.

Legislative drafters, writers within governments and corporations, and probably any writer whose task is to craft text for someone else are used to having their words changed and their work edited. As Canadian plain language specialist David Elliott said at a drafting master class at the conference, "Drafters shouldn't get invested too quickly in their first draft". Knowing that changes are inevitable, why are we so reluctant to find out what readers have to say about a draft?

If clarity is the goal of good legal writing, it is essential that we work harder not only at improving the way we write and present legal information but also at finding out, from our readers, if we have been successful. At the next Clarity conference, let's hope that there are more testing results to report.

Vicki Schmolka *is a lawyer and plain language consultant who, a few years ago, tested a few draft statutes and regulations for the Canadian government and recently tested a web site on family violence written for youth. This article is based on her presentation at the Clarity conference.*

Plain language at the Regulator[1]

Robin Ford

Commissioner, British Columbia Securities Commission

I will cover two things in this article. First, I will describe what we are doing now at the British Columbia Securities Commission to use and promote plain language, and what we plan to do next. Second, I will speculate about what I personally think we might do in the future in the plain language area. I will suggest:

A more holistic approach to plain language training and better integration of plain language, with other tools, in our work,

Recognizing that plain language is a tool whose use should be assessed in the wider context, as with any other tool.

What have we done so far?

The BCSC is the regulator of securities trading in British Columbia. We make rules, communicate with the market about compliance, enforce the rules when they are breached, and inform and educate investors. In all of these tasks, plain language is a critical tool.

Several years ago we made a public commitment to use plain language at the BCSC. We think "plain language means better regulation".[2] Everyone who participates in the securities market should be able to understand securities regulation — from securities professionals to investors, whatever their skills and experience.

These are some of the things that we have done:

We made plain language a strategic priority and assigned responsibility for plain language at the top — a vice-chair of the commission initially led the project.

We developed a plain language manual and published our plain language style guide in 2002. We give it to every member of staff and you can find it on our website (www.bcsc.bc.ca).

All existing and new staff receive plain language training for two days and receive refresher training a year or two later.

We aim to draft every document in plain language — this includes rules, guidance, regulatory decisions, letters, internal memos and educational material.

Using plain language is an important factor in performance appraisal for all staff.

Now that we have made a firm commitment to use plain language, we are beginning to ask for the same commitment from the people we regulate. This includes the public companies that issue shares and the brokers who trade them. Most important, we expect clear and meaningful disclosure to investors and prospective investors, especially retail investors.

Why we need to do better

We are making good progress. Our plain language training and objectives have been effective. We are now far more aware of the benefits of plain language. Most of us have been trained and most of us now try, for example, to reduce the use of the passive tense and to write more concisely. Some of us do much better than that.

But we need to do even better. Our new securities legislation (not yet in force) will, for the first time, impose an express plain language requirement on the community we regulate.

Companies that issue securities will have to prepare in plain language any documents they file with us or send to investors. Brokers will also have to provide information to their clients in plain language.

To ensure that these requirements are enforceable, we developed a definition of plain language:

For the purpose of these rules, a record is in plain language if its form, style and language enable an ordinary investor or client, applying reasonable effort, to understand it.

We will learn by applying this test how well it works.

We cannot impose plain language requirements on the firms and individuals we regulate without further improving our own performance. So what are we doing to take ourselves to next level?

What are we doing next?

We have for the first time set ourselves objective plain language targets. Earlier this year Wordsmith Associates performed a plain language audit of a variety of our documents, including a regulatory decision, policy papers, various enforcement documents, guidance, and so on. We have set ourselves a target to improve our use of plain language by about 2% over the year.

We are also building partnerships for plain language with our self-regulatory organizations. We are encouraging them or helping them to train their staff in the use of plain language. These bodies are owned by the industry they regulate, but operate independently of their owners under

the supervision of the provincial securities regulators (like BCSC). The SROs work closely with the market participants they regulate and are primarily responsible for monitoring information given to investors. Plain language training and a commitment to use plain language should give the SROs greater credibility with the regulated community when they ask that community to provide plain language disclosure to investors.

Where do I think we might be going in future?

What follows are my personal views.

Plain language is a powerful tool. I am, however, increasingly coming to realize that plain language may be more productively used if we more consciously combine it with other tools. This should both improve our use of plain language generally, and help us better to achieve wider goals like cost-effective regulation. An exclusive focus on plain language may even inhibit, or distract us from, wider policy goals.

One place to start is with plain language training. So far, we have tended to train staff on plain language without directly linking it to wider policy goals.

Let me give you an example. When I attended our plain language course last year, we looked at a letter from one of our managers to a regulated company about certain compliance issues. We all started to root out the passive tense, shorten the sentences, and get rid of the "unreasonable" words.

Before too long, however, someone said — 'hang on, what message is the writer trying to send?' We then discussed what we thought the manager's message might be. Then we moved on to discuss what it *should* be, which led to a collective decision that most of the letter should probably be scrapped.

This part of the discussion moved us well beyond the expertise and focus of the plain language trainer, but was a very valuable exercise. It got us thinking about the content of the message and how to change it to one that was in plain language, but also met our broader goals of cost-effective and outcomes-focused regulation.

So we talked about whether the message was the right one and how different ways of expressing the right message could reinforce or detract from that message in different ways. For example, in addition to telling the company what in our view the deficiencies were, should we tell the company how to fix them? Probably not, if we want to encourage senior management responsibility and a culture of compliance. Should we be listing all deficiencies? Probably not, if we are serious about applying a risk-based approach to the way we regulate. How should we set out our expectations and the 'next steps' for the company to minimize further work or involvement by our staff? And so on.

A more holistic approach

I told this story to illustrate two points.

First, plain language should not be viewed in isolation. We need to look at the words, but we must also remember to step back and think about other desired outcomes. Plain language requires a certain amount of scene setting, such as establishing who the reader is, the purpose of the message, and how you want the reader to respond — and this is helpful. But it is not enough.

The regulator also needs to think about the message in the context of wider policy goals. This is not at all to argue against plain language. Plain language is a key tool in our work, and we need more of it. By making the message clearer, plain language helps us to make sure we get it right, as well as making it more understandable to the reader. But we need to avoid clear documents which do not contain the correct message or which should not have been written at all.

Do we still start with two days of plain language training? Absolutely. But we need to get more creative about what we do next.

I think we need to take a more holistic approach. Plain language will be most effective when we integrate it with other tools like assertiveness, good time management, project management, lean policy making, and a risk-based approach to regulation[3].

Our training should make clear that, for example:

- plain language or clarity is part of assertiveness and good time management ,
- in a risk-based approach to regulation, and lean policy making, the identified risk or the problem to be fixed must be clearly set out.

This should ensure that improving our plain language skills will be seen as an important aspect of a broader transformation of our regulatory culture at BCSC and that plain language will be well integrated into our regulatory culture.

Plain language as a tool

My second point is that plain language is a tool, or a means to an end. It should help us to communicate clearly with our stakeholders and with each other. We need to do that so we can regulate more efficiently and effectively. As with all tools, however, there is always a balancing act to be performed in deciding which tools to use and in what measure.

Good writing takes time. When there are always competing uses for our time — to what extent will we use our time to achieve the greatest Clarity and to what extent for another valuable purpose? We might, for example, spend more time on drafting a new rule and less on an urgently needed decision on a takeover bid or a routine internal memo.

Of course, in practice the issue does not arise in such stark terms. We now have acceptable-to-good plain language skills at BCSC. As we continue to improve those skills, it will be harder to tell the difference between documents prepared quickly and those that were reviewed and revised many times, and we will not have to compromise plain language for prompt action so often.

But there is always a cost/benefit balancing act to be done, and we must be realistic about it. It is part of the regulator's job to assess how best to use this tool along with the others available to it. Some documents will need to be immaculately drafted. Others will not.

You will have gathered that I am not sure we should ever reach 100% in our plain language scorecard. That could be contrary to our regulatory approach, which is risk-based and outcomes-focused. But there is no doubt that we can do better, and perhaps some of what I have set out above will help us to get there.

PS. Don't forget to inject some humour. With the permission of the author, here is one example.

> *We have seen the enemy and they are long sentences.*
>
> *They are everywhere; in our letters, our examination reports, our memos to the Commission. They have infiltrated all of our writing. Single sentences that masquerade as paragraphs. Long long lines of text with no breaks. They burden our readers and weaken our messages. This must end. No more will these appear in our documents.*
>
> *And you will be our best line of defense in stamping out this menace.*
>
> *You do great work already but I am asking for one more thing. Watch for these culprits, these sneaky serpentine sentences. Let none get through. When a sentence over 35 words shows up on your screens, ring the alarm and send it back to the author. They will know what to do.*
>
> *There is no shortage of periods, just the resolve to use them.*
>
> *I am confident of our success. We will win this fight.*[4]

rford@bcsc.bc.ca
www.bcsc.bc.ca

1 This article is based on my presentation to the Conference Clarity And Obscurity in Legal Language, July 2005, Boulogne-sur-Mer.

2 See Joyce Maykut, then Vice-Chair at the BCSC, "Plain Language at the BCSC: A case study in culture change", presented at the Fourth Biennial Conference of the Plain Language Association International (PLAIN), Toronto, Canada, September 26 – 29, 2002 and Doug Hyndman, Chair, BSCS, "Plain language means better regulation", *Clarity*, No 51, May 2004, p 14.

3 A risk-based approach involves addressing the more important problems in the most efficient and effective way. See - http://www.bcsc.bc.ca/uploadedFiles/Hyndman_2004-09-15.pdf - "A New Approach to Securities Regulation More Effective — Less Costly".

4 Langley E. Evans CA, Director, Capital Markets Regulation, BCSC.

Robin Ford *has more than 20 years of experience in regulation and regulatory reform, with degrees in political science from McGill University and the University of Victoria, and in law from the University of Victoria (in British Columbia). After 5 years with the BC Ministry of Attorney General, Ms. Ford spent 16 years in the United Kingdom working in the European law, competition and regulatory fields. For 5 years, she headed the insurance legal team first at Her Majesty's Treasury and then at the newly created Financial Services Authority, where she played a significant role in setting up the new principles-based regime and managing the substantial transformation needed to bring 9 culturally diverse regulators together. She was appointed a fulltime commissioner at the British Columbia Securities Commission in August 2004 for a 4 year term.*

What readability expert witnesses should know

Mark Hochhauser

Psychologist; consultant on document readability and writing style

I've consulted with six law firms on the readability of consumer information, although I've yet to testify because of out-of-court settlements. I routinely recommend user testing of the documents I'm asked to analyze, but time and cost make cognitive testing impossible. So despite the limitations of readability formulas,[1-4] I find they are the only way to evaluate complicated consumer documents. When the problem isn't just readability but illegible "fine print," I analyze the document's layout and design as well.

I've consulted both as a readability researcher of key documents and as a readability evaluator of the readability analyses done by the opposing law firm's readability expert witness.

Approaching readability from the standpoint of legal evidence was new for me. Even though I'd written a Clarity article in 1999[5] (which helped me become an expert witness), I found that readability conflicts that could be discussed at professional conferences or in academic journals took on a completely different meaning within expert-witness testimony. Disagreements mean that expert readability testimony might not be accepted as evidence by a judge, or even submitted. My critique of one plaintiff's readability expert deposition lead to an out-of-court settlement within a week after sending in my analysis for the opponent expert's deposition.

This article summarizes a few major readability formulas, explains how reading grade level is calculated, and suggests questions for lawyers to ask prospective readability experts or the opposition's expert. Some of these points may seem relatively unimportant, but readability experts who make several small mistakes may find their "expert" status questioned and their readability evidence rejected.

What readability formula was used — or misused?

Rudolf Flesh's ***Reading Ease Score*** (1948)[6] calculates readability on a scale from 0 (very difficult) to very easy (100). Available in software, it still remains widely used. As for legal evidence, readability experts and their client law firms should understand that his formula was based on educational-attainment data from the 1940 census — 65 years ago.

Flesch's 80-year-old comprehension measures were based on the 1925 edition of the McCall-Crabbs *Standard Test Lessons in Reading*,[7] whose standardized tests predicted average grade levels of students who correctly answered 75% of the test questions about passages they had read. Thus, the common assumption that "A document written at an 8th-grade level means that anyone with 8 years of education can understand it" is wrong. A document written at an 8th-grade level means that anyone with 8 years of education can correctly answer 75% of the questions about that document.

The ***Dale-Chall (1948) Formula***[8] was updated in 1995. Both the original 1948 version and the 1995 revision[9] were based on words known to 4th graders, although the 1995 formula was based on words known to 4th graders in the late 1970s. Because of Edgar Dale's death, it took Jeanne Chall about 15 years to publish the revised formula.

The ***Flesch-Kincaid (1975) formula*** is featured in Microsoft Word and long been the standard readability formula for many US Government agencies. But because it does not report scores above grade 12 — even though the formula scores to about grade 17 — Microsoft's formula is flawed,[10] and should not be used for any readability analyses.

McLaughlin's 1969 ***SMOG formula***[11] requires text samples of 30 sentences, 10 from the beginning of a document, 10 from the middle, and 10 from the end. His instructions for calculating polysyllabic words — the heart of the formula — tells users to:

> *"Estimate the square root of the number of poly-syllabic words counted. This is done by taking the square root of the nearest perfect square. For example, if the count is 95, the nearest perfect square is 100, which yields a square root of 10. If the count lies roughly between two perfect squares, choose the lower number. For instance, if the count is 110, take the square root of 100 rather than that of 121." (p. 639)*

Computerized SMOG software programs seem to take the square root of the number of polysyllabic words—not the square root of the nearest perfect square.

Is SMOG an acronym? Many readability advocates describe it as a Measure of Gobbledygook (MOG), but there's little online agreement about what the

"S" stands for. My Google.com search on the SMOG Readability formulas found six definitions of "S" — Statistical, Simple, Simplified, Standard, Some, and Short. But McLaughlin wrote (p. 641) that he called it SMOG in tribute to Robert Gunning's FOG Index and the smog from his London birthplace. Readability advocates should know that fact, unless they've made the serious mistake of recommending a formula and citing its source without actually reading the original source.

The 1977 **Fry Readability Scale**[12] requires 300-word text passages. If the expert reports readability data from the FRY, make sure that the document evaluated has at least 300 words

Robert **Gunning's Fog Index** (1952)[13] is based on the percentage of words with three or more syllables in a document. As with Flesch's Reading Ease Score, Gunning's grade-level placement is also based on *the McCall-Crabbs Standard Test Lessons in Reading (1925 or 1950 edition?).*

Instructions (p. 36) for calculating multisyllable words include:

> *"Count the number of words of three or more per 100 words. Don't count the words (1) that are capitalized, (2) that are combinations of short easy words (like "bookkeeper" and "manpower"), (3) that are verb forms made three syllables by adding* -ed *or* -es *(like "created" or "trespasses).*

The example he uses to illustrate his formula includes this sentence from "The Summing Up" by W. Somerset Maugham: "You may find it *difficult* to *understand* the thought of Hume, and if you have no *philosophical* training its *implications* will doubtless escape you; but no one with any *education* at all can fail to *understand exactly* what the meaning of each sentence is." (Italics in original.) Gunning advises readers to "Note the third sentence [above] is actually three complete thoughts linked by a comma, in one instance, and a semicolon in the other. These should be counted as separate sentences."

The difference in scoring may be minimal between Gunning's hand-calculation method and software methods that include capitalized words, combinations of words, or verb forms of more than three syllables, or that count sentences with commas and semicolons as a single sentence or several sentences. But not knowing the difference between Gunning's readability calculation and the software calculation can seriously damage the expert's status.

How much text for readability analyses?

Most readability formulas require a minimal number of sentences to calculate a reading grade level. Because the original readability formulas were developed before computer software was available, these recommendations were based on what could be reasonably accomplished calculating by hand, perhaps with the help of a large desktop calculator. The SMOG formula recommends 30 sentences; Gunning recommends several samples of 100 words; Fry recommends 300 words.

Recommendations for minimal text requirements create a potential problem for readability software programs that can analyze thousands of words in hundreds of sentences. Given that the readability formulas were not developed to evaluate a very long document, but only a text sample, does the use of readability software violate basic readability requirements?

Some researchers run single sentences through a readability software program and report a grade level for that single sentence. That's a complete misuse of readability formulas; grade-level estimates for a single sentence are meaningless and incompetent. Several years ago I reviewed a manuscript in which the authors had run two- or three-word phrases through their readability software to produce "phrase" reading grade levels. I recommended that the manuscript not be published. Using software programs to perform readability analyses that violate the formula's underlying principles only produces readability junk.

How to calculate sentences and syllables.

Most readability formulas are based on the average number of words in a sentence and the average number of syllables in a word. While it's relatively easy for a person to count sentences, words, and syllables, it's very hard to write computer software to do that. As a result, software programs have to convert a readability formula into a software algorithm[14,15] — a way of telling the software to do what the reader can do. But that's much harder than it sounds. Because software programs cannot count sentences or syllables the way people can, programmers have developed ways to estimate sentences, words, and syllables.

Counting sentences

Software sentence counting is based on the program's counting a sentence every time it encounters punctuation such as periods, question marks, or exclamation points, and sometimes colons or semicolons. Because sentence counts can be thrown off by extra periods found in abbreviations (e.g., i.e., Ph.D., M.D., etc., www.worldwideweb.com) readability researchers should take out all extra punctuation marks that might cause the software to give a wrong sentence count. Bullet points, lists, titles, and heading should be removed as well.

This inaccurate count might be a small statistical problem if the text involves a hundred or more sentences, but it could be a more serious measurement problem with text of only a dozen or so sentences.

Counting syllables

Counting syllables automatically is very hard. Because software can't count syllables directly as readers can, programmers estimated syllable counts, typically the number of vowels (or consonants) in a word. Unfortunately, readability researchers have no way of knowing what technique the software used to count sentences, words, or syllables.

In a review of computerized readability assessments,[16] the authors were surprised to find that Flesch-Kincaid reported four different grade levels in four software programs—from 9.0 to 11.0. They could not explain why the same formula should score such different results, but the discrepancy was due to four different software algorithms for counting words, syllables, and sentences. Because the authors did not calculate the Flesch-Kincaid by hand, they could not determine which of the four software programs was most and least accurate.

Experts using software readability formulas should also do a hand calculation to ensure that the hand calculation is consistent with software-based calculation. Also, make sure that readability experts don't rely on only one software program, because opposing experts can report different readability results by using different readability software.

Table #1 lists 11 questions to ask prospective readability expert witnesses or opposing readability expert witnesses. Given different rules of evidence in different countries, it's a subjective judgment about how many wrong or incomplete answers may disqualify someone from being hired as an expert witness or having the credibility of the opposition's expert testimony questioned during a deposition or trial.

How much do readers comprehend?

I'm often asked to give expert testimony about the percentage of consumers who could (or could not)

Table #1: 11 Questions to Ask Prospective or Opposing Readability Expert Witnesses

Questions	*Expected Answers*
1. What readability formula(s) do you use?	1. Justifies choices; explains that some readability formulas (Flesch-Kincaid, Fog, SMOG) are better for technical information written for consumers. Does not use Flesch-Kincaid in Microsoft Word
2. Do you analyze a document's legibility?	2. Considers type size, font, words and characters per line, etc.
3. How do you prepare a file before doing your readability analysis?	3. Removes extra punctuation, headings, titles, bullet lists, etc.
4. Can you analyze a single sentence with your readability programs?	4. No. Readability formulas were not designed for single sentences.
5. How many words/ sentences do you need for a valid readability analysis?	5. Depends on the formula. At least 30 sentences with SMOG; 300 words for others.
6. Ask if a document written at an 8th grade level can be understood by anyone with an 8th grade education.	6. No. Readability tests were based on 50%-75% comprehension; SMOG on 100%.
7. How does your SMOG formula calculate the square root of the number of polysyllable words?	7. Takes the nearest perfect square; if between squares, it takes the lower number.
8. Why did McLaughlin call his formula SMOG?	8. As a tribute to Gunning's Fog Index and the smog in his London birthplace.
9. Does your Fog analysis calculate multisyllable words and sentences based on Gunning's requirements or ignore those criteria?	9. Knows what not to count: capitalized words, combinations of easy words; verbs made into 3 syllables by adding *–ed* or *–es*.
10. Why do different software programs give different reading grade levels for the same formula?	10. They use different methods for counting sentences, words, and syllables.
11. How have changes in educational attainment affected reading difficulty since the 1940s?	11. US adults average about 5 years more of formal education in 2005 than in 1940. Ten percent of adults had any college in 1940; 53% in 2004.

understand key documents. I tell my clients that I cannot give comprehension estimates other than by comparing the reading grade level of the documents to the grade levels attained by U.S. adults based on U.S. Census Data. But even that is a weak comparison.

Comprehension levels are usually misrepresented by assuming that comprehension is based on 100% understanding. If a consumer document is written at an 8th-grade reading level, that does not mean that anyone with an 8th-grade education will have 100% comprehension. Readability formulas are typically based not on 100% comprehension, but between 35% and 75% comprehension. Even the original 1948 Dale-Chall list is based on words known to 80% of 4th-grade children—not words known to 100% of 4th graders. However, not only is the SMOG formula based on the 1961 edition of the McCall and Crabbs *Standard Test Lessons in Reading*,[7] but McLaughlin believed that a 100% comprehension rate was more meaningful than 50% or 75% comprehension — which is why it scores about two grades higher than other readability formulas.

Flesh's 1948 Reading Ease Score is based on educational attainment data from the 1940 census — 65 years ago. As shown in Table #2, the educational attainment of U.S. adults over the age of 25 changed dramatically in the 64 years between 1940 and 2004.[17]

In 1940, the U.S. Census Bureau estimated the median years of education to be 8.6 for adults 25 and over. While they did not give an estimate for 2004, the median seems to fall between grade 13 and 14 — almost 5 years more than in 1940.

If Flesch's Reading Ease Formula places a document in the "Very Difficult" category because only 4.6% of Americans in 1940 had completed college,[18] how does that compare to 2004, where 28% of Americans have completed college? A document written at a college level in 1940 would have been equivalent to only 10% of the population, but in 2004 that document would equal the educational attainment of over 50% of the population. This discrepancy means that linking a readability formula's grade level to educational attainment doesn't have the same meaning in 2004 as it did in 1940. In other words, "very difficult" then doesn't mean "very difficult" now.

Conclusion

Credible readability experts must know more about readability than how to run a document through several software programs. Academic credentials, publications, conference presentations, or awards may highlight a consultant's expertise, but such expertise does not always reflect a thorough understanding of how readability formulas developed. Articles that are cited — but obviously not read — create opportunities for other expert witnesses to challenge an expert's abilities. Using readability formulas without understanding them can make the difference between having one's testimony accepted or rejected.

Table #2: US Census educational attainment for adults 25 and over in 1940 and 2004.

	Years of Education	1940 U.S. Educational Attainment	2004 U.S. Educational Attainment
Elementary School	Grades 0-4	13.7%	1.5%
	Grades 5-8	46.7%	4.8%
		Total: 60.4%	*Total: 6.3%*
High School	1-3 years	15.2%	8.6%
	4 years	14.3%	32.0%
		Total: 29.5%	*Total: 40.6%*
College	1-3 years	5.5%	25.5%
	4 or more years	4.6%	27.7%
		Total: 10.1%	*Total: 53.2%*

1 Redish, J.C. & Selzer, J. (1985) The Place of Readability Formulas in Technical Communications. *Technical Communication*, Fourth Quarter 1985, 46–52.

2 Redish, J.R. (2000) Readability Formulas Have Even More Limitations Than Klare Discusses. *ACM Journal of Computer Documentation*, 24(3), 132–137.

3 Schriver, K.A. (2000) Readability Formulas in the New Millennium: What's the Use? *ACM Journal of Computer Documentation*, 24(3), 138–140.

4 Klare, G.R. (2000) The Measurement of Readability: Useful Information for Communicators. *ACM Journal of Computer Documentation*, 24(3), 107–131.

5 Hochhauser, M. (1999) Pros and Cons of Readability Formulas. *Clarity*, 44, 22–28.

6 Flesch, R. (1948) A New Readability Yardstick. *Journal of Applied Psychology*, 32(3), 221–233.

7 McCall, W.A. & Crabbs, L.M. (1926; 1950; 1961) *Standard Test Lessons in Reading*. New York: Columbia University Teachers College.

8 Dale, E. & Chall, J. (1948) A formula for predicting readability. *Educational Research Bulletin*, January 21 and February 17, 27, 11–20; 37–54

9 Chall, J.S. and Dale, E. (1995). *Readability Revisited. The New Dale-Chall Readability Formula.* Cambridge, MA: Brookline Books.

10 Hochhauser, M. (2003) *Flesch-Kincaid in Microsoft Word is Flawed*. http://caonline.amcancersoc.org/cgi/eletters/52/3/130

11 McLaughlin, G.H. (1969) SMOG Grading—a New Readability Formula. *Journal of Reading*, 12, 639–646.

12 Fry, E.B. (1978) *Fry's Readability Graph: Clarifications, Research and New Uses*. Providence, RI: Jamestown Publishers.

13 Gunning, R. (1952) *The Technique of Clear Writing*. New York: McGraw-Hill.

14 Coke, E. U. & Rothkopf, E.Z. (1970) Note on a Simple Algorithm for a Computer-Produced Reading Ease Score. *Journal of Applied Psychology*, 54(3), 208–210.

15 Fang, I.E. (1968) Computers in Behavioral Science. By Computer Flesch's: Reading Ease Score and a Syllable Counter. *Behavioral Science*, 13, 249–251.

16 Mailloux, S.L., Johnson, M.E., Fisher, D.G. & Pettibone, T.J. (1995) How Reliable is Computerized Assessment of Readability. *Computers in Nursing*, 13, 221–225.

17 US Census Bureau (2004) *Table A-1. Years of School Completed by People 25 Years and Over, by Age and Sex: Selected Years 1940 to 2004*. http://www.census.gov/population/www/socdemo/educ-attn.html

18 Flesch, R. (1949) *The Art of Readable Writing*. New York: MacMillan.

Mark Hochhauser *is a readability consultant in Golden Valley, MN. He's published over 50 articles on the readability of HIPAA privacy notices, financial privacy notices, patient health information, informed-consent forms, online health information, HMO/managed-care report cards, clinical-trial language, and direct-to-consumer drug ads.*

Members by country

Australia	122	Gran Canaria	1	New Zealand	18
Austria	1	Hong Kong	11	Nigeria	3
Bahamas	2	India	6	Philippines	1
Bangladesh	5	Ireland	4	Scotland	10
Belgium	5	Isle of Man	1	Singapore	12
Bermuda	2	Israel	3	South Africa	76
Brazil	1	Italy	2	Spain	1
British Virgin Islands	1	Jamaica	1	Sweden	13
British West Indies	4	Japan	6	Switzerland	2
Canada	66	Jersey	3	Thailand	1
Denmark	4	Luxembourg	1	Trinidad and Tobago	1
England	339	Malaysia	1	USA	243
Finland	1	Malta	2	Wales	9
France	1	Mexico	1		
Germany	5	Netherlands	5		

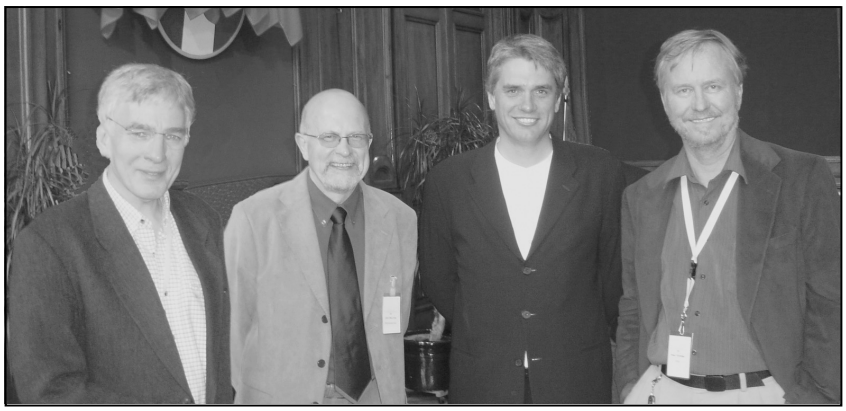
Total 997

Clarity and Obscurity in Legal Language

From 5 to 9 July, 2005
Boulogne-sur-Mer (France)
Université du Littoral Côte d'Opale

John Walton, Clarity's founder, speaking at the opening ceremony. Also pictured: representatives of the Université du Littoral Côte d'Opale, including Anne Wagner at the far end.

The President of the Université speaking at the opening ceremony. Joe Kimble appears at the near end and Anne Wagner at the far end.



Eamonn Moran, John Walton, Christopher Balmford, and Peter Tiersma at the opening reception.

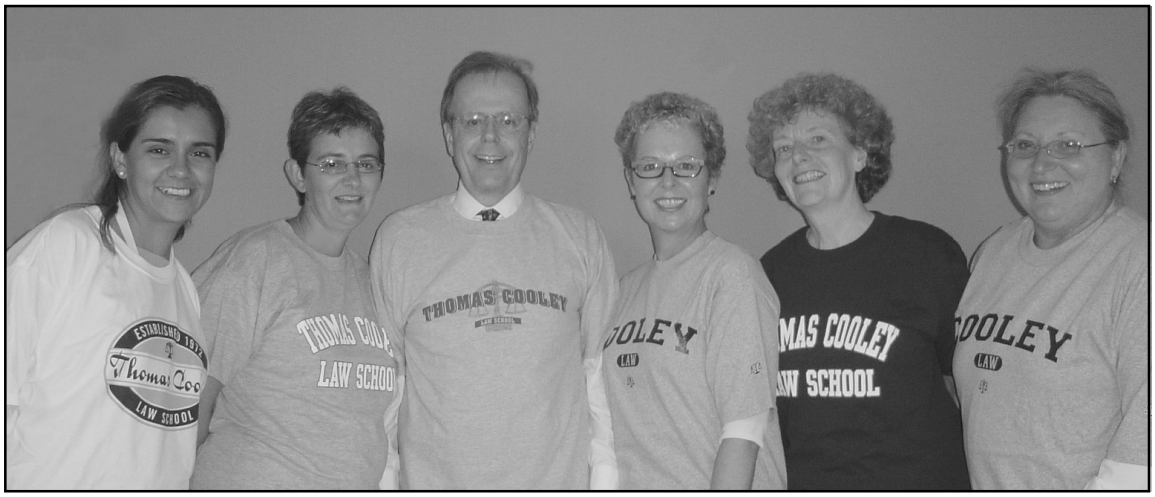
Joe Kimble, receiving a gift from the representative of Boulogne's Mayor at the opening reception. Conrad Dehn from the Statute Law Society is at the far left.

At the gala dinner: Neil James, Lorne Pendleton, Christine Mowat, David Elliott, Peter Butt, Lin Gourlay, and Peta Spear.

At the gala dinner: Larry Solon, Christopher Balmford, Kym Balmford, Halton Cheadle, Rachel Spencer, Bill Lutz, Michèle Asprey, and Lindsay Powers.

Nigel Grant, speaking at one of the international roundtables on plain language. Others at the front tables: Catherine Rawson, Barbro Ehrenberg-Sundin, Judge Eric Battistoni, and Jan Engberg.

One of the conference sessions. The translators are in the booth at the front left.



Clarity Committee members Salomé Flores Sierra Franzoni, Anne Wagner, Joe Kimble, Michèle Asprey, Barbro Ehrenberg-Sundin, and Nicole Fernbach. Anne Wagner and Nicole Fernbach were the conference organizers. Everyone is delighted with their new T-shirts from Thomas Cooley Law School.

From the President

Joe Kimble

Lansing, Michigan, USA

Our July conference in Boulogne was a huge success. About 165 persons attended from 20 countries. Over the three days, we had two sessions running at most times, and we provided simultaneous translation for many of the sessions. The Université du Littoral Côte d'Opale was a gracious host, and the facilities were excellent. On pages 43–45, you will see some photos from the conference.

We owe thanks, once again, to Anne Wagner and Nicole Fernbach for their work in organizing the conference. Thanks, too, to Francesca Quint and the Statute Law Society for organizing a master class on drafting. (The results from that class will appear in the next issue.)

Besides spreading Clarity's name and message, the conference produced other benefits. We gained five new country representatives, and I'd like to officially welcome them now: A.K. Mohammad Hossain (Bangladesh), Anu Sajavaara (Finland), Salomé Flores Sierra Franzoni (Mexico), Dr. Tunde Opeibi (Nigeria), and Candice Burt (South Africa). We thank them all for their willingness to become involved with Clarity.

Finally, the conference produced all but one of the articles that you will find in this issue of *Clarity*.

Speaking of this issue, you have probably noticed that Michèle Asprey has stepped down as editor in chief. We owe Michèle a big debt for her fine work on the last five issues of *Clarity*. We'll greatly miss her energy, reliability, and attention to detail. Our new editor in chief — at least temporarily — is Julie Clement, a professor at my law school. She agreed to step in without the slightest arm-twisting, and she was approved at a committee meeting in Boulogne. She will introduce herself more formally in the next issue.

This was a successful year for Clarity. We held our second international conference. We added dozens of new members and several new country representatives. And we delivered, on schedule, two more issues of our journal — the only international journal on plain language.

Just one cautionary note. I have been working with our country representatives to make sure that we have an effective system for collecting dues. We will inevitably lose some members who have not been paying dues — modest as they are — but this effort had to take place.

I'd like to wish everyone the best for 2006 — and thank you for supporting Clarity.

Congratulations to Sir Kenneth Keith

Congratulations to one of our New Zealand members, Sir Kenneth Keith, on being elected to the prestigious International Court of Justice, commonly known as "The World Court." Sir Kenneth was made a judge of the New Zealand Court of Appeal in 1996. On the abolition of appeals from New Zealand to the Privy Council last year, he was one of five judges elevated to the new Supreme Court. Sir Kenneth takes up his new appointment soon, and is reported to be looking forward to it immensely.

Clarity's 2006 annual meeting

Clarity's 2006 annual meeting has been fixed for Saturday, 4 February at New Square Chambers, 12 New Square, Lincoln's Inn, London.

1030	Coffee
1100	Meeting
1300	End
1330	Lunch in local restaurant (optional at own cost)

Please let Paul Clark know if you are coming, indicating if you would like to reserve a place for lunch.

Tel: +44 1892 506059
Email: pec@crippslaw.com

New members

Bangladesh

Md. Mansur Alam
Senior Legislative Draftsman,
Bangladesh Parliament
Secretariat; Dhaka

A.K. Mohammad Hossain
Joint Secretary, Ministry of Law,
Justice & Parliamentary Affairs
Kafrul, Dhaka

Salma Benthe Kadir
Deputy Secretary, Ministry of
Law, Justice & Parliamentary
Affairs
Dhaka

Mohammad Mohiuddin
Senior Assistant Secretary,
Ministry of Law, Justice &
Parliamentary Affairs
Dhaka

Md. Tanvir Arafath
IT Expert, Ministry of Law,
Justice & Parliamentary Affairs
Dhaka

Canada

Elizabeth Cockle
Toronto, Ontario

Lynn Douglas
Department of Justice
Ottawa, Ontario

Dominique Joseph
St. Romuald, Quebec

Legislative Assembly of Alberta
Edmonton, Alberta

Sharon Nancekevell
Guelph, Ontario

Dr. Donna Williams
Ottawa, Ontario

England

Lanna Castellano
London

Robin Dormer
Deputy Parliamentary Counsel
London

Tony Ford
Surrey

Institute of Legal Executives
[Ms. Diane Burleigh]
Bedfordshire

Felicity Maher
Assistant Parliamentary Counsel
London

Maples Teesdale
[Ms. Laura Cotton]
London

Smarterconsulting Limited
[Mr. Paul Gregory]
Sheffield

Edward Stell
Deputy Parliamentary Counsel
Oxford

William Tobin
Tobin Media Limited
Lancashire

John Wilson
Consultant
Northamptonshire

Finland

Anu Sajavaara
Employers' Association for
Transport and Special Services
(LTY)
Helsinki

Hong Kong

Bloomsbury Books Limited
[Ms. Maureen Wong]
Sheung Wan

Ireland

Eamonn Conlon
A & L Goodbody
Dublin

Israel

Diana Rubanenko
Translator
Moshav Herut

Mexico

Salome Flores Sierra Franzoni
Subdirectora de Estudios
Comparados
Secretaria de la Funcion Publica
Mexico, D.F.

New Zealand

AJ Park
[The Librarian]
Auckland

David Viviers
Wellington

Nigeria

Dr. Olawale Ajai
Legal Advisor
Dunlop Nigeria PLC
Ikeja, Lagos

Mr. Anya Egwu, Lecturer
University of Lagos
Akoka, Lagos

Dr. Tunde Opeibi
University of Lagos
Akoka, Lagos

Scotland

Dundas & Wilson
[Mr. David Hardie]
Edinburgh

South Africa

Paul Benjamin, Director
Cheadle, Thompson & Haysom
Vlaeberg

Candice Burt
Plain Language
Communications Ltd.
Bedfordview

Sweden

Ann-Marie Hasselrot
Language Expert
Ministry of Justice
Stockholm

United States

Kristina Anderson
Easyread Copywriting
New Mexico

Amy Bunk
Attorney
Virginia

Solicitor General
[John Swimmer]
Minnesota

Application for membership of Clarity

Individuals complete sections 1 and 3; organisations, 2 and 3

1 Individuals

Title *Given name* *Family name*

Name .....

Firm ..... Position .....

Qualifications

2 Organisations

Name .....

Contact Name

3 Individuals and organisations

Address .....

.....

Phone ..... Fax .....

Email .....

Main activities

Annual subscription

Australia	A$35
Bangladesh	BDT 1500
Brazil	R50
Canada	C$30
Finland	€ 25
France	€ 25
Hong Kong	HK$200
Israel	NIS125
Italy	€ 25
Japan	¥3000
Malaysia	RM95
Mexico	250 Pesos
New Zealand	NZ$50
Nigeria	3000₦
Philippines	₱ 1500
Singapore	S$40
South Africa	R100
Sweden	SEK250
Thailand	THB1000
UK	£15
USA	US$25
Other European countries	€ 25
All other countries	US$25

How to join

Complete the application form and send it with your subscription to your country representative listed on pages 3–4. If you are in Europe and there is no representative for your country, send it to the European representative. Otherwise, if there is no representative for your country, send it to the USA representative.

Please make all amounts payable to Clarity. (Exception: our European representative prefers to be paid electronically. Please send her an email for details.) If you are sending your subscription to the USA representative from outside the USA, please send a bank draft payable in US dollars and drawn on a US bank; otherwise we have to pay a conversion charge that is larger than your subscription.

Privacy policy

Your details are kept on a computer. By completing this form, you consent to your details being given to other members or interested non-members but only for purposes connected with Clarity's aims. If you object to either of these policies, please tell your country representative. We do not give or sell your details to organisations for their mailing lists.