

# Clarity

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**Country representatives**

**Argentina**

Maximiliano Marzetti  
maximiliano.marzetti@  
erasmusmundus-alumni.eu

**Australia**

Christopher Balmford  
christopher.balmford@cleardocs.com

**Bangladesh**

A.K. Mohammad Hossain  
mita\_mohiuddin@yahoo.com

**Brazil**

Dominic Minett  
dominic@article1english.com

**Canada**

Nicole Fernbach  
juricom@juricom.com

**Chile**

Claudia Poblete Olmedo  
claudia.poblete@uv.cl

**Finland**

Anu Sajavaara  
anu.sajavaara@ek.fi

**Hong Kong**

Jonathan Hugo  
jhugs43@yahoo.co.uk

**India**

Dr. K.R. Chandratre  
krchandratre@vsnl.net

**Israel**

Myla Kaplan  
mylak@law.haifa.ac.il

**Italy**

Christopher Williams  
cjwilliams72@hotmail.com

**Japan**

Kyal Hill  
kyal.hill@mhmjapan.com

**Lesotho**

Retsepile Gladwin Ntsihlele  
ntsihlele@lec.co.ls

**Malaysia**

Juprin Wong-Adamal  
juprin.adamal@sabah.gov.my

**Mexico**

Salomé Flores Sierra Franzoni  
sflores@funcionpublica.gob.mx

**New Zealand**

Lynda Harris  
lynda@write.co.nz

**Nigeria**

Dr. Tunde Opeibi  
tundeopeibi@yahoo.com

**Philippines**

Victor Eleazar  
attyvye@msn.com

**Portugal**

Sandra Ramalhosa Martins  
info@portuguesclaro.pt

**Singapore**

Lei-Theng Lim  
leitheng@nus.edu.sg

**Slovakia**

Ing. Ján Rendek  
jan.rendek@gmail.com

**South Africa**

Candice Burt  
candice@simplified.co.za

**Spain**

Cristina Gelpi  
cristina.gelpi@upf.edu

**Sweden**

Barbro Ehrenberg-Sundin  
barbro@  
effektiv-kommunikation.se

**UK**

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sarahcarr@btconnect.com

**USA**

Prof Joseph Kimble  
kimblej@cooley.edu

**Zimbabwe**

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wzure@cbz.co.zw

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# Clarity

## An international association promoting plain legal language

[www.clarity-international.net](http://www.clarity-international.net)

### President

Christopher Balmford  
[christopher.balmford@cleardocs.com](mailto:christopher.balmford@cleardocs.com)

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### Editor in chief

Julie Clement  
PO Box 13038  
Lansing, Michigan 48901  
Fax: 1 517 334 5781  
[clementj@cooley.edu](mailto:clementj@cooley.edu)

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### Submissions

We encourage you to submit articles to be considered for publication in *Clarity*. Send submissions directly to editor in chief Julie Clement. Please limit submissions to approximately 1,500 or 3,000 words.

## This issue

Greetings! *Clarity 60* includes an eclectic mix of articles from around the world, starting with Judge Mark Painter's narrative of his trip to Malaysia to speak at the International Conference on Modern Legal Drafting. The conference theme was modernising construction contracts, and in our second article, educators Hep Yi Chong and Mohamad Zin Rosli examine a form contract used in the construction industry in Malaysia.

In the U.K., the plain-language movement continues, and our third article is Christopher Williams's brief update on some of those efforts.

My goal was to introduce some "new voices" in *Clarity 60*, so I'm excited to include Shawn Harris's article describing her introduction to plain language. Welcome, Shawn!

Our next two authors provide insight from plain-language experts on the job. First, Mark Hochhauser discusses a case on which he worked as a consultant. Second, Professor Wayne Schiess discusses his experience as a writing consultant on an important redrafting project for the Texas courts.

Some time ago, guest editor Sarah Carr challenged *Clarity* readers to view current articles as inspiration for future articles. In that spirit, solicitor Richard When now follows up on Dr Robert Eagleson's article in *Clarity 58*, which compared plain-language and traditional approaches to a client letter of advice. Richard provides an example of the two approaches, followed by his observations. Next, Alec Samuels takes Richard Castle's *Clarity 58* article, *What makes a document readable*, a step further. Alec observes that an effective oral address is not equally effective when it is published in the written form.

Finally, in *Linguistic Lingo for Lawyers*, Sarah Carr discusses linking verbs' relationship to active voice. Sarah has an enviable grasp of the structure of the English language!

As we wrap up *Clarity 60*, I hope you are off to Mexico City for *Clarity's* third international conference. Many thanks to conference organizer Salome Flores Sierra Franzoni and to the people who assisted her. Until May, all the best!

# Plain language—(literally) halfway around the world from Cincinnati

## Mark P. Painter

*Judge, Ohio First District Court of Appeals (USA)*

*When the email came from Naseem, asking me to come to Malaysia to talk about plain language, of course I was intrigued. Spreading the word about plain-language legal writing has become a passion. And I would be one of three “world-class experts” to present at the International Conference on Modern Legal Drafting.*

*There would be two seminars, one in Kuala Lumpur July 22 and then again in Penang on July 24. The Malaysian government, specifically the Construction Industry Development Board, was the sponsor, along with many other groups. Who could resist?*

## A place almost too far

Though I knew where Malaysia is, I hadn't been in that part of the world. But then, after a bit of Mapquesting, the reality dawned—it is a long way. As the crow flies, it's 9,500 miles from Cincinnati. (Compare: Tokyo 5,700; London 3,950; Moscow 5,050; Baghdad 6,500; Cape Town, 8,300.) The route we (my wife Sue Ann Painter braved the trip) flew was almost 10,500 miles. If you go much farther from Cincinnati, you start coming back. When we returned, we left from the Equator and flew over the polar ice cap—what's left of it.

## A missed day

We left Cincinnati on July 17 and arrived in Kuala Lumpur (everyone calls it KL) on July 19. We missed the 18th—I'm not sure where it went.

Thirty-two hours after our departure, and not as worse for wear as we expected, we arrived at the KL airport, which is new and impressive. We were fetched by a driver holding a name card with my name on it. That's never happened before. I could get used to it.

The KL airport is about an hour ride from town—it was the first place they could find enough flat land. The area around KL is what we would call “rolling,” with some mountains in the near distance.

A vibrant city of about 3,500,000 people, KL is the Malaysian capital, sort of. The government has just built a new administrative capital about 15 miles outside the city.

## The seminars

The construction industry is at the forefront of the plain-language movement in Malaysia. At first that seemed strange—but who depends on contracts more? And most construction clients, architects, contractors, subcontractors, and managers have trouble with legalese—as does everyone else.

My contact was Sr Noushad Ali Naseem bin Ameer Ali, whom I met through a plain language international listserve. (The Sr is a designation equal to Dr—it means surveyor—but not in the sense we would understand it. A surveyor is a value surveyor—someone who is a construction industry consultant. Naseem has degrees in architecture and construction management and is working on his PhD.)

Naseem asked four “world class” experts, only one of whom declined—because of the length of the trip. I came the farthest. The two others both came from Sydney, Australia—Professor Peter Butt (former head of Clarity!) of the University of Sydney College of Law and Dr Robert Eagleson, a retired English professor and head of the Victorian Law Reform Commission.

The local presenters were no less accomplished: a retired judge, a practicing lawyer who heads the committee to reform construction contracts, and Naseem, the driving force. All speaker bios are here: <http://www.cidb.gov.my/cidbweb/corporate/event/speaker.html>.

In KL we had a surprising turnout of more than 350 attendees: lawyers, architects, contractors, subcontractors, administrators, and government officials.

All the presentations were on plain language, with different emphasis. Professor Butt gave his “myths” of legal drafting: the reasons why some people think “legalese” is better are all myths.

Dr Eagleson gave examples of documents drafted in legalese, then converted to plain English. As usual, the difference was stunning.

Lawyer Tan Swee Im showed some of the “before” language of the standard construction contract, then the “after.” The committee that she heads had been able to cut the number of words by 40%, while gaining, not losing, meaning.

Sr Naseem had a great video presentation on the benefits of plain language in a variety of situations.

At the end of both seminars, the audience was asked whether they wanted to stay with the old legalese or switch to plain language. For the latter, every hand went up.

### Victory

About six weeks later, I received a thank-you letter from Sariah Abdul Karib (pictured here), with this language: “The conference has generated overwhelming support from the audience. . . . Following the conference, the Design and Build Form Construction Contract is now being redrafted in modern style.”

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Mark P. Painter has served as a judge on the Ohio First District Court of Appeals for 13 years, after 13 years on the Hamilton County Municipal Court. Judge Painter is the author of 380 nationally published decisions, 120 legal articles, and 6 books, including *The Legal Writer: 40 Rules for the Art of Legal Writing*, which is available at <http://store.cincybooks.com>.



Judge Painter has given dozens of seminars on legal writing. Contact him through his web-site, [www.judgepainter.org](http://www.judgepainter.org).



*From Left: Marziah Manap (event secretary), Sr Noridah Shaffii (event planner), Dr. Robert Eagleson, Prof. Peter Butt, Tan Swee Im, Judge Mark Painter, Sariah Abdul Karib (event organizer), Sr Naushad Ali Naseem, Dato' Syed Ahmad Idid Abdullah Aidid, Jocelyn Yusof (emcee), Belinda Kaur (recorder), Amnah Mohammed Salleh (recorder) and Farah Fazini Mohamad (program manager).*



*The crowd of 350 in Kuala Lumpur.*



*Judge Painter speaks at the International Conference on Modern Legal Drafting.*

# Construction contract administration— an approach on clarity

**Hep Yi Chong**

*Lecturer, Universiti Tunku Abdul Rahman, Malaysia*

**Mohamad Zin Rosli**

*Senior Lecturer, Univeristi Teknologi Malaysia*

Contract administration is the process of administering a business contract that governs contracting parties' interests. In the construction industry, it typically involves the pre-construction, construction, and post-construction stages after signing the contract. Often, a standard form contract is used by the contracting parties to regulate their legal relationship and to provide administrative procedures in the particular construction work. Thus, the question is, how can the parties maintain their legal relationship without properly understanding the legal language, which is often drafted in an archaic, "legalese" style in the contract?

## **Nature of the Construction Industry**

The construction industry involves a fragmented process and is adversarial in nature.<sup>1</sup> Every construction project has conflict and dispute. The root cause comes from many sources. One of the sources is poor understanding of the construction contract. A recent study revealed that contractors have problems understanding the contract documents and concluded that they have to be well versed in the interpretation of the conditions of contract.<sup>2</sup> The interpretation difficulty could be traced to a lack of clarity in contract clauses<sup>3,4,5</sup> and to the use of legalese,<sup>4,6</sup> which can cause many disagreements between the parties on their perceived contractual obligations and expectations. Even worse is when the first language in the nation is not English. Hence, contract clauses must be clarified to achieve an easily understood purpose.<sup>5</sup>

## **Study on the Clarity of a Construction Contract**

Appreciating the contractual principles and obligations at the earliest stage of a dispute is crucial. It acts like a soft-skills resolution technique (avoidance)<sup>7</sup> to create teamwork and harmony<sup>8</sup> in dispute resolution. Hence, this paper aims to encourage effective contract administration through a clarity-centered approach. A survey was conducted to identify language structure problems in the standard form contract from the viewpoint of professionals, as well as to identify measures to overcome those problems. The study on language structure divided the problem into two categories: lack of clarity and use of legalese. Legalese is a formal and technical language often used by legal drafters or lawyers.<sup>9</sup> It often leads the contract users to wrong interpretations or misunderstood scenarios.

The survey focused on construction professionals like architects, quantity surveyors, and engineers at the district of Johore Bahru, Malaysia. The scope of the study was the PWD 203A standard form contract, which is the most popular and widely used in the public construction sector. The form was published in 1983, and about 24 years later, it has yet to be revised.

## **Research Methodology**

The Likert scale method was selected for the questionnaire design, in which a set of items was proposed with respect to a particular attitudinal object for respondents' scaling.<sup>10</sup> The data collected through the survey was analysed using the average index method.<sup>11</sup>

$$\text{Average Index} = \frac{\sum a_i x_i}{\sum x_i}$$

Where  $a_i$  = value of scale ( $i = -2, -1, 0, 1, 2$ )  
 $x_i$  = respondent frequency ( $i = 1, 2, 3, 4, 5$ )

Subsequently, the classification of the rating scales was carried out for ease of analysis<sup>12</sup> as shown below:

'Disagree'	= -2.00 ≤ average index < -0.5
'Undecided'	= -0.50 ≤ average index < 0.50
'Agree'	= 0.50 ≤ average index ≤ 2.00

### Analysis and Results

Out of 100 questionnaire forms distributed through postal mail to construction professionals, 30 forms were completed and returned to the researcher. The 30 respondents consisted of architects, quantity surveyors, and engineers. The majority of respondents were project engineers and executives, while the others were quantity surveyors and principals or directors of consultant firms. Most of the respondents (53%) had more than 5 years of work experience.

First, the survey questioned whether the PWD 203A contract form achieves clarity. The analysis showed that more than half (53%) of the respondents agreed that PWD 203A does not achieve clarity. Then, the questionnaire asked about specific aspects of problems involving clarity and legalese. Out of 11 clarity aspects surveyed and analysed, 8 aspects were selected as a result of their average index. The average index and standard deviation for all 11 of the aspects of clarity in language structure are shown in Table 1.1.

For legalese, three quarters of its aspects were agreed upon by the respondents. Table 1.2 shows the analysis on the problems of legalese in the average index and is sorted according to its ranking. For an aspect to be considered in this study, it needed to fall within the range of 'agree' category ( $0.50 \leq \text{average index} \leq 2.00$ ).

Clarity Aspects	Average Index/Mean	Standard Deviation	Ranking
<b>Sentence is too long</b> (e.g. Clause 32 b has 113 words in a sentence)	1.00	0.871	1
<b>Too many cross references between clauses</b> (e.g. Clause 3 (a), 5(a), 42, 44, etc.)	0.93	0.944	2
<b>Repetition of words</b> (e.g. "claim by any and every...", Clause 34a, etc)	0.90	0.803	3
<b>Too many passive voices</b> (e.g. "Any costs incurred by the Contractor in relation to...", Clause 35a, etc)	0.87	0.776	4
<b>Negative style of language</b> (e.g. "shall not be removed except for use upon the Works, unless the S.O. has consented...", Clause 10, etc)	0.83	1.053	5
<b>Ambiguous word or sentence, more than one meaning</b> (e.g. "inclement weather", Clause 43b, etc)	0.80	0.961	6
<b>Complexity of noun phrase</b> (e.g. the Government shall in no circumstances be liable to...", Clause 29a, etc)	0.80	1.031	7
<b>Too many "shall"</b> (e.g. "No work shall be done on...", Clause 18, etc)	0.77	1.104	8
<b>Poor word formation, e.g. grammar in the contract</b>	0.23	0.898	9
<b>Poor explanation on procedure or process</b> (e.g. S.O.'s instruction to be in writing, Clause 5 c, etc)	0.20	0.887	10
<b>Controversial as technical terms</b> (e.g. "practical completion", Clause 39b, etc)	-0.17	1.048	11

Legalese Aspects	Average Index/Mean	Standard Deviation	Ranking
<b>Unnecessary length and complexity, such as Clause 32b has 113 words of length in a sentence</b> (e.g. "shall be deemed" at Clause 15, "practical completion" at Clause 39 b, "Liquidated and Ascertained Damages" at Clause 40, "force majeure" at Clause 43 a, mutanis muntandis" at Clause 41, etc)	1.20	0.761	1
<b>Too many legal terms or phrases</b> (e.g. "notwithstanding" at Clause 3 a, "aforesaid" at Clause 5 d, etc)	0.90	1.094	2
<b>Specialised vocabulary or legal jargo</b>	0.87	1.196	3
<b>Overly complicated, dense, repetitive, and outdated</b>	0.27	1.202	4

Figure 1.1 below shows the measures that may be applied to improve the language structure in the PWD 203A form. Referring to the bar chart below, the highest average index was 1.33, which was identified with 'reduce the unnecessary words to keep it short as possible if more than 20 words in a sentence'.

### Discussion

A comparative analysis was carried out on the question whether the PWD 203A contract form achieves clarity. This analysis was to find out why 53% of respondents agreed that the contract form does not achieve clarity. More than half of the respondents who agreed

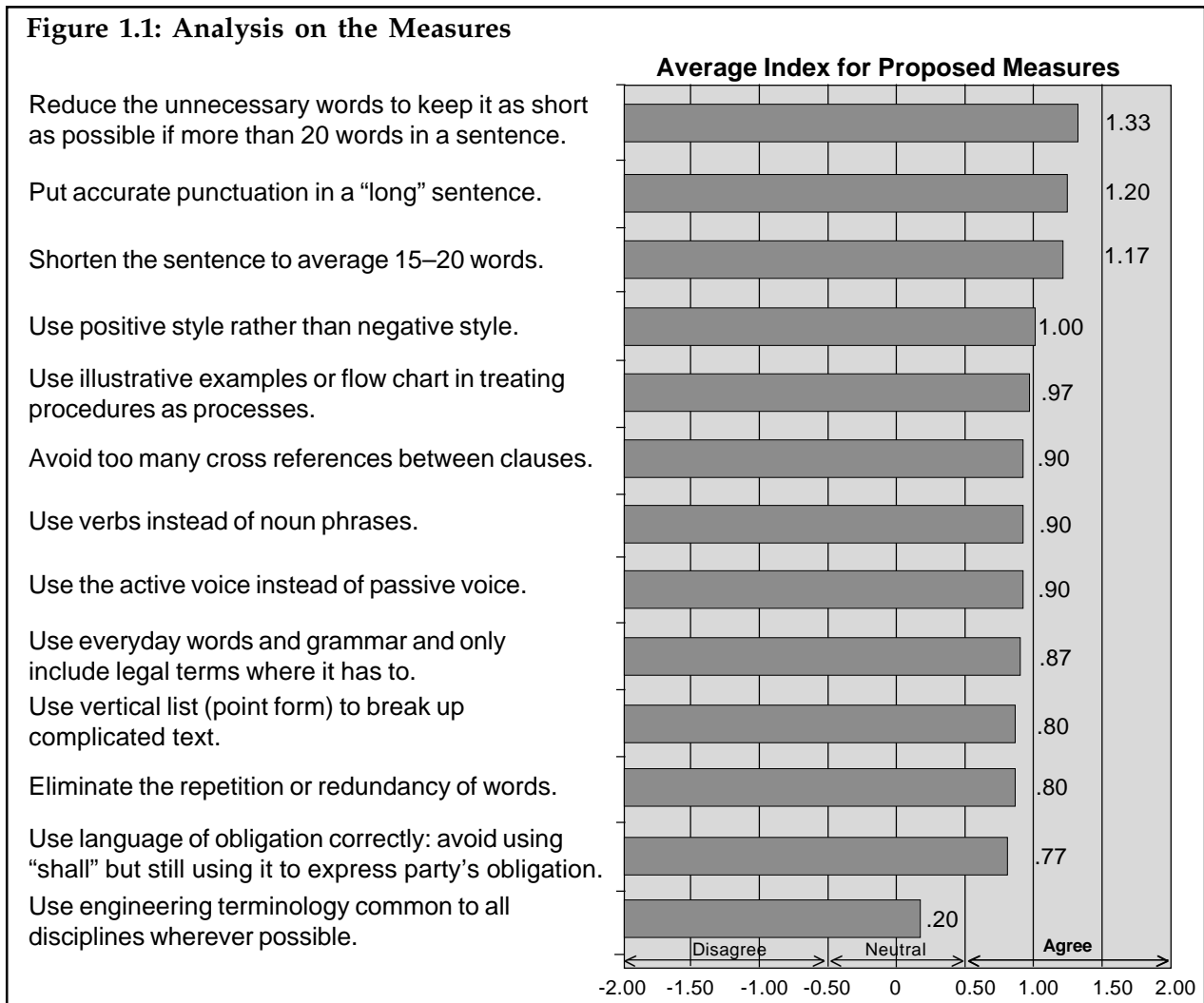




Table 1.3: Comparative Analysis			
Work Experience	Does PWD 203A contract form achieve clarity?		Total
	no	yes	
Less than 5 years	9	5	14
5-10 years	1	2	3
10-15 years	3	1	4
more than 15 years	3	6	9
Total	16	14	30

that the contract form does not achieve clarity were individuals with less than 5 years of work experience. On the other hand, the majority of respondents who agreed that PWD 203A form does achieve clarity were the respondents who had been working more than 15 years in the construction industry. Hence, work experience seems to have a direct influence on understanding the contract form, despite the language structure problems in the PWD 203A form.

Apart from that, only one measure was rejected as a method of achieving clarity: 'use engineering terminology common to all disciplines wherever possible'. This measure was unpopular and was rejected by the professionals. It is probably because the use of engineering terminology varies among the professionals because architects, engineers, and quantity surveyors are from different fields of study in the construction industry. In summary, the fact that the professionals agreed on most of the measures suggests that more improvements could be implemented to achieve clarity.

### Conclusion

Prevention is always the first option in dispute resolution. Appreciation of the contractual obligations enables contracting parties to maintain their legal relationship. This paper highlights that wrong interpretations of contracts due to clarity and legalese problems could lead to unresolved disputes. The significance of this survey is to provide better insight to legal drafters on the use of plain and clear language in form contracts, as well the urgent need to revise PWD 203A.

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 chonghy@mail.utar.edu.my  
 MRosli 2008  
 roslizin123@yahoo.com

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(See page 10 for author biographies and photos.)

Hep Yi Chong is a Lecturer with the Department of Built Environment, Faculty of Engineering & Science, at the Universiti Tunku Abdul Rahman, Setapak 53300, KL, Malaysia.



Mohamad Zin Rosli is a Senior Lecturer with the Department of Structure and Materials, Faculty of Civil Engineering, at the Universiti Teknologi Malaysia, Skudai 81310, Johor, Malaysia.



## *Clarity* seminars on clear legal writing

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### Clarity's 3rd international conference Mexico City: 20-23 November 2008

#### **Legal language: transparent and efficient**

*Transparent* is part of Mexico's anti-corruption activities: unintelligible documents leave room for officials to exploit the vagueness, ambiguity, uncertainty, lack of clarity to request a bribe, etc.

*Efficient* is about reducing costs for the organisations that produce, issue, and administer documents and for the people who have to read, use, apply, and comply with those documents.

Clarity is co-hosting the conference with: Mexico's Underministry of Public Administration, which is responsible for the government's extensive ongoing plain language activities, and a prestigious private university, ITAM (Instituto Tecnológico Autónomo de México).

*All sessions simultaneously translated between each of English, French, and Spanish*

Please send any queries to:

**Salomé Flores Sierra Franzoni**, Insurgentes Sur 1971, Torre III, Piso 5, Col. Guadalupe Inn, C.P. 01020, México, D.F., México

# 'And yet it moves': recent developments in plain legal English in the UK

Christopher Williams

*Professor of English (Italy)*

*Eppur si muove* ('And yet it moves') are the words Italian physicist and astronomer Galileo Galilei is alleged to have mumbled after being found guilty of heresy in 1633 for confirming Copernicus' theory that the Earth revolved around the sun. His expression could also apply to the legal drafting style employed in 21st century Britain. After centuries of following hidebound tradition and of using antiquated legalese, things finally seem to be moving, albeit slowly, towards a more modern drafting style.

In this article I intend to focus on three areas where changes are already—or should shortly be—visible:

- the UK Tax Law Rewrite Project
- the Acts of the Scottish Parliament
- gender-neutral drafting in the UK.<sup>1</sup>

As is well known, the Renton Committee was set up in 1973 "with a view to achieving greater simplicity and clarity in statute law", some 103 years after the first inquiry was launched on how Acts of Parliament should be drafted. But the Committee's recommendations were largely ignored, as Lord Renton himself lamented in 2006: "our statutes have not for the most part improved their drafting—and clarity has not been achieved to a great enough extent."<sup>2</sup>

Despite the praiseworthy activities of plain language associations in the UK during the 1980s and 1990s, which did much to raise awareness about the turgid legalese that abounded in official documents, there was relatively little improvement in the way Acts of Parliament were drafted. More recently, government-sponsored attempts at embracing the "Plain English Revolution" have been good PR exercises. But the rhetoric has not always been matched by the facts, as James Kessler pointed out over the hype surrounding the Coroners Reform Bill of 2006.<sup>3</sup> Here the novelty

lies solely in the introduction of 'Explanatory Notes' written in plain English to help the lay reader understand the Bills themselves. But the language of most Acts of Parliament, even today, is still hard for non-experts to decipher, e.g.:

Where a person is authorised to exercise any function by virtue of subsection (1), anything done or omitted to be done by or in relation to that person (or an employee of that person) in, or in connection with, the exercise or purported exercise of the function shall be treated for all purposes as done or omitted to be done by or in relation to the Commission.<sup>4</sup>

This is not to say that nothing has happened at all. Besides the introduction of plainly written Explanatory Notes accompanying new Public Acts, there have been a few encouraging signs of change in the way laws are drafted.

## The UK Tax Law Rewrite Project

The project to rewrite the 6,000 pages of Britain's tax legislation began in 1996 with the blessing of Kenneth Clarke, then Chancellor of the Exchequer in John Major's Conservative government. More than 12 years later, the rewrite, run by Her Majesty's Revenue and Customs, is still ongoing. The project was originally supposed to last five years.

The project's main aim is to ensure that the rewritten legislation is clearer and easier to use than before. However, that remit "excludes the possibility of making substantive changes to the law, other than minor identified changes at the margin".<sup>5</sup> Given the enormity of the task, it was decided to introduce the newly styled laws in stages—a process known as 'staged implementation'—rather than all at once (the 'Big Bang' approach). Since tax law is intrinsically complex, even a major rewrite can only go so far in making it comprehensible to the general public. But a close look at the Tax Law Rewrite Project's website (<http://www.hmrc>

gov.uk/rewrite/)—which is clearly set out and informative—shows just how much thought has gone into the project. Since the direct costs alone of the project are £3 million per annum, this may be some consolation to the tax-paying public! According to HM Revenue & Customs, the administrative savings from rewriting income tax law are estimated at £70 million a year.

To date, five pieces of restyled tax legislation have been enacted, and the project to rewrite corporation tax law is nearing completion. It is calculated that this will result in a further saving of £25 million a year. The legislation “is rewritten with the intended audience in mind, which, in the case of corporation tax, is tax professionals.”<sup>6</sup>

The drafting style includes using “colloquial English wherever we can, adopting shorter sentences in the active, rather than passive, voice”, replacing archaic expressions with more modern ones, harmonizing definitions, making greater use of signposts to guide the reader, using shorter subsections and sections, as well as shorter sentences, etc.

Let’s look at a typical piece of text taken from the Income Tax Act 2007:

#### **64 Deduction of losses from general income**

(1) A person may make a claim for trade loss relief against general income if the person—

- (a) carries on a trade in a tax year, and
- (b) makes a loss in the trade in the tax year (“the loss-making year”).

(2) The claim is for the loss to be deducted in calculating the person’s net income—

- (a) for the loss-making year,
- (b) for the previous tax year, or
- (c) for both tax years.

(See Step 2 of the calculation in section 23.)

(3) If the claim is made in relation to both tax years, the claim must specify the tax year for which a deduction is to be made first.

(4) Otherwise the claim must specify either the loss-making year or the previous tax year.

Perhaps the most glaring discrepancy between stated intentions and actual results lies in the

absence of anything that could vaguely be termed “colloquial”. No legislative text is ever going to be written in a colloquial style: that would be inappropriate and highly dangerous. What we do find here, rather, is a modern, formal style shorn of outdated legalese: there are no cases of *aforesaid*, *hereinafter* and the like. Lists are used a lot to help break down information into manageable chunks. The sentences are indeed relatively short: for example, the final sentence cited above beginning with *Otherwise* would probably have constituted the second half of the previous sentence in more traditional texts. Elsewhere in the text (comprising over 300,000 words) we can find 107 instances of *But* in initial position, and even five cases of *And* in initial position, a clear indication that the drafters were serious about wanting to reduce sentence length. *Must*, *is/are to* (e.g. ‘a deduction is to be made’), and the present simple are all adopted as replacements for *shall* which only appears, relatively rarely, in the last third of the text where textual amendments are being made.

The final result, then, would seem to be a decided improvement even compared with the style of many recent Acts of Parliament drafted at Westminster. Of course, fiscal matters are highly technical, largely confined to the realm of experts: Albert Einstein once remarked that “[t]he hardest thing in the world to understand is income tax law.” But today experts—and even lay readers—will have an easier time in finding their way around the intricacies of tax law than their predecessors.

It does seem a pity, though, that this experiment has been confined to restyling tax law. So far, there would appear to be no intention in Westminster to make this type of drafting policy mandatory for all Bills. But at least it’s a start and, as we will see below, its influence has been felt north of the border in Scotland.

#### **The Acts of the Scottish Parliament**

In 1998, as part of the Devolution package introduced by Tony Blair’s Labour government, the Scotland Act set up a Scottish Parliament, the first time Scotland had had its own Parliament since 1707.

Before the new millennium, the Scottish Parliament only managed to pass one Act of Parliament. But since 2000, it has passed on average about 15 Acts a year. Some of the earliest Acts—in particular the Abolition of

Feudal Tenure etc (Scotland) Act 2000 and Adults with Incapacity (Scotland) Act 2000—were drafted in a very traditional style, with a liberal sprinkling of archaic terms and Latinisms, not to mention an abundance of Scots legal terminology. But these were texts that had been previously drafted in Westminster on topics considered to be in urgent need of reform, and were hence enacted without being restyled. Most of the other Acts of the Scottish Parliament of that period were drafted in a slightly less traditional way, though there was not much to distinguish the drafting style in Edinburgh from that used in Westminster.

However, it was not long before the Office of Scottish Parliamentary Counsel (OSPC) began debating the need to adopt a more modern drafting style following the principles of plain language. In March 2006, the OSPC published its *Plain Language and Legislation* booklet online (<http://www.scotland.gov.uk/Publications/2006/02/17093804/0>).<sup>7</sup>

In Chapter 3 on ‘International Comparisons’, which provides a brief synopsis of plain language drafting in the English-speaking world and in the EU, the OSPC acknowledges its debt to the Tax Law Rewrite Project:

The Scottish Parliament adopted a design for its Bills and Acts which is similar in style to that used in the Tax Law Rewrite Project and is more user friendly than the form previously used for Scottish legislation enacted at Westminster.

Chapter 4 is devoted to plain language techniques such as choosing “words that are plain and commonly understood”, avoiding technical terms and jargon where possible, avoiding archaic terms, Latin terms, and neologisms, preferring the active voice to the passive, using the present tense “wherever possible”. While observing that usage of *must* “is gaining momentum”, the OSPC does not suggest doing away with *shall* entirely, but allowing for its occasional use in declarations “because of the resonance it can add (e.g. ‘there shall be a Scottish Parliament’).”

To see whether the OSPC had indeed introduced some of the changes proposed in the booklet, I compared the Scottish Acts of Parliament passed in 2000 with those passed in 2006–2007. Six of the latter texts (all related to transport) were excluded from my corpus because they were not drafted by the OSPC but by lawyers working for external authorities:

all six texts, incidentally, were drafted in a very traditional fashion.

Of the remaining texts, firstly I looked at the archaic terms that the booklet suggested had “served their time”, namely *aforsaid*, *foregoing*, *forthwith*, *hereinafter*, *notwithstanding*, *said*, *therein* and *whatsoever*. I noted that there had been a 75 per cent drop in usage when comparing the 2000 texts with the 2006–2007 texts, from one occurrence per 1,740 words in the former to one in 7,594 in the latter. *Hereinafter* and *therein* had completely disappeared.

Secondly, I examined the frequency of use of *shall* v. *must* in the two sets of texts. *Shall* had dropped by 80 per cent, from 10,753 occurrences per million words in 2000 to 2,252 occurrences in 2006–2007, whereas usage of *must* had more than doubled from 1,082 occurrences per million words to 2,801.

The Adoption and Children (Scotland) Act 2007 is perhaps a good illustration of what the newly styled drafting techniques amount to. Here is a typical sample:

#### **14 Considerations applying to the exercise of powers**

- (1) Subsections (2) to (4) apply where a court or adoption agency is coming to a decision relating to the adoption of a child.
- (2) The court or adoption agency must have regard to all the circumstances of the case.
- (3) The court or adoption agency is to regard the need to safeguard and promote the welfare of the child throughout the child’s life as the paramount consideration.
- (4) The court or adoption agency must, so far as is reasonably practicable, have regard in particular to—
  - (a) the value of a stable family unit in the child’s development,
  - (b) the child’s ascertainable views regarding the decision (taking account of the child’s age and maturity),
  - (c) the child’s religious persuasion, racial origin and cultural and linguistic background, and
  - (d) the likely effect on the child, throughout the child’s life, of the making of an adoption order.<sup>8</sup>

The style is formal without being stiff, and you don’t need legal training to understand the

terms used. The sentences are generally short (by legal standards!) and the information is set out in a way that is easy to follow. The present simple, *must* and the *is/are to* form are all in use, depending on the 'degree of intensity' of the obligation, the present simple being the weakest, *must* the strongest, *is/are to* coming somewhere in the middle.

Not all of the more recent texts are as user-friendly as this one, but overall there has been a discernible improvement in drafting style during the short life of the Scottish Parliament. And the fact that the OSPC has officially taken to heart the principles of plain language drafting means that the changes are here to stay. If only the Parliamentary Counsel Office in Westminster were as sensitized to plain language issues: but their online 'Drafting Techniques Group recommendations' paper of July 2007 is decidedly disappointing.<sup>9</sup>

### Gender-neutral drafting in the UK

The July 2007 paper does, however, include a brief section on gender-neutral drafting, which begins as follows:

Government Bills are to take a form which achieves gender-neutral drafting so far as it is practicable, at no more than a reasonable cost to brevity or intelligibility.

This was the result of the much-heralded statement made by Jack Straw, Leader of the House of Commons, on 8 March (Women's Day) 2007, reiterated by Meg Munn, then Minister for Women and Equality, officially pledging that future legislative drafting in Westminster would be gender-neutral.

Many English-speaking countries, such as Australia, New Zealand and Ireland, had already implemented gender-neutral drafting years ago. Within the United Kingdom the situation is somewhat variegated. For example, the members of the Tax Law Rewrite Project initially considered the issue to be of marginal importance, as is clearly expressed in their 1997 annual report:

Gender-free drafting is a desirable goal, but the vast majority of responses saw it as a low priority and were concerned that it could be inconsistent with other priorities, in particular achieving maximum clarity. We agree. We will aim to use gender-free drafting only where it does not conflict with our other objectives.<sup>10</sup>

It is only since 2004–2005 that the issue has been put back on the agenda after disappearing for several years.

On the other hand, the National Assembly for Wales, set up in 1998 but unlike its counterparts in Belfast and Edinburgh only entitled to pass subordinate legislation, almost from the outset used gender-inclusive language in some (though not all) of its texts. One technique was to eschew the so-called 'masculine rule' whereby he, his and him subsume she and her, a principle which had been in force in British legislation uninterrupted since the 1820s via a series of Interpretation Acts, the most recent dating back to 1978. Since 2003, most of the Welsh Assembly's Statutory Instruments have been gender-neutral, e.g.:

### Prohibition on disclosure of trade secrets

16. If a person enters any premises by virtue of regulation 14 or 15 and discloses to any person any information obtained on the premises with regard to any trade secret he or she is, unless the disclosure is made in the performance of his or her duty, guilty of an offence.<sup>11</sup>

However, many drafters in the English-speaking world are averse to inserting *he or she*, *his or her* etc. because it can make the text unwieldy, especially if repeated frequently. This aspect is highlighted, for example, by the OSPC in *Plain Language and Legislation*, particularly when "a non-gender specific pronoun is also needed to cover the eventuality of the person referred to being a body rather than an individual (i.e. *he, she* or *it*)." But the OSPC recognizes that "those who otherwise strive to use plain language usually also consider gender neutral drafting to be desirable, and both issues are connected by association with modernising agendas."

In practice there is no easy solution to the problem. Where feasible, the best policy would seem to be to avoid gender-specific terms, e.g. by using neutral terms such as *person* or *individual*; by repeating the noun (e.g. *the employer*); by using the plural *they* rather than singular pronouns *he* or *she*; or by adopting neutral alternatives for masculine-based nouns, such as *firefighter* instead of *fireman*.

For the outsider, it is not easy to gauge whether a text containing no instances of *he, she, him, her* etc has been painstakingly purged of all

gender-specific terms, or whether gender neutrality was never at issue in the first place. What is clear is that the switch to gender-neutral drafting will not take place overnight. Several recently passed Acts of Parliament—in Westminster, Edinburgh and Belfast—still contain occurrences of the ‘masculine rule’, e.g.:

### 309G Preparation and revision of the strategy: procedural matters

(1) In preparing or revising the health inequalities strategy the Mayor shall have regard to any guidance given to him by the Secretary of State about the matters which he is to take into account.<sup>12</sup>

There are two main reasons why cases of the ‘masculine rule’ can still be found even in recently passed legislation. Firstly, the rule about gender neutrality only applies to new bills drawn up since the autumn of 2007, and it often takes many months, even years, before a bill becomes law. Secondly, where a law is textually amending an older law, the policy is to adopt the style of the older law so as avoid misinterpretations.

But I have been assured from a number of official sources that the question of gender-neutral drafting is being taken seriously, and that the changes will become more visible over time as new laws are enacted.

### Conclusion

The overall picture, then, of legal drafting in the UK today is one of gradual change towards a more modern style. And with the partial exception of the proposal to introduce gender-neutral drafting which was contested by members of the Conservative Party (notably Ann Widdecombe), the changes have generally been welcomed. But much still remains to be done, especially on the part of the Parliamentary Counsel Office in Westminster which still refuses to take on board many of the plain language principles that have been successfully applied for years in several other English-speaking countries, notably Australia and New Zealand.

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cjwilliams72@hotmail.com

### Endnotes

- <sup>1</sup> A more detailed analysis of the first two points can be found in my article ‘Crossovers in legal cultures in Westminster and Edinburgh: some recent changes in the language of the law’, *ESP Across Cultures*, vol. 4, pp. 101–118. A more detailed analysis of the last point can be found in my article ‘The end of the “masculine rule”? Gender-neutral legislative drafting in the United Kingdom and Ireland’, *Statute Law Review* (forthcoming).
- <sup>2</sup> Lord Renton, ‘A retrospect for *Clarity*’, *Clarity* 56 November 2006, p. 6.
- <sup>3</sup> James Kessler, ‘Plain English revolution officially announced’, *Clarity* 56 November 2006, pp. 17–18.
- <sup>4</sup> Part 1, Section 8 (4) of Child Maintenance and Other Payments Act of 5 June 2008, available at [http://www.opsi.gov.uk/acts/acts2008/ukpga\\_20080006\\_en\\_2](http://www.opsi.gov.uk/acts/acts2008/ukpga_20080006_en_2).
- <sup>5</sup> Tax Law Rewrite Report and Plans 2008–09.
- <sup>6</sup> *Ibid.*
- <sup>7</sup> See also Andy Beattie, ‘Plain language in Scottish legislation’, *Clarity* 56 November 2006, p. 10. I am grateful to Andy Beattie for clarifying a number of points (personal communication) relating to the drafting of Acts passed by the Scottish Parliament. Any remaining errors are, of course, my own.
- <sup>8</sup> Available at [http://www.opsi.gov.uk/legislation/scotland/acts2007/asp\\_20070004\\_en\\_2](http://www.opsi.gov.uk/legislation/scotland/acts2007/asp_20070004_en_2).
- <sup>9</sup> Available at [http://www.parliamentary-counsel.gov.uk/drafting\\_techniques.aspx](http://www.parliamentary-counsel.gov.uk/drafting_techniques.aspx).
- <sup>10</sup> See <http://www.hmrc.gov.uk/rewrite/plans97/chap3.htm>.
- <sup>11</sup> The Official Feed and Food Controls (Wales) Regulations 2007, available at [http://www.opsi.gov.uk/legislation/wales/wsi2007/wsi\\_20073294\\_en\\_2](http://www.opsi.gov.uk/legislation/wales/wsi2007/wsi_20073294_en_2).
- <sup>12</sup> Greater London Authority Act 2007.

Christopher Williams is a professor of English at the Law Faculty at the University of Foggia in southern Italy. His main research interests are in the field of tense, aspect and modality in contemporary English and in legal English. His most recent monographic work is *Tradition and Change in Legal English: Verbal Constructions in Prescriptive Texts* (Peter Lang). He is Italy’s representative for *Clarity*. He is also co-editor of the journal *ESP Across Cultures*.



## Stepping stones to plain English

**Shawn B. Harris**

*Writer and Business Consultant (USA)*

### **My Introduction to Plain English**

My initial encounter with plain English resulted from a short-lived internship during the summer of 2005. I was to work with a consultant contracted by a company to rewrite its annual report in plain English according to the rules outlined by the US Securities and Exchange Commission (SEC). We met over lunch to discuss the project, and she handed me some sections of the annual report to review. As I read the content, I had no inkling of what to do with the text to make it “plain English”. This was a foreign term to me, and I tried my best, but honestly, I was completely perplexed. Due to a series of events, the internship did not pan out. I filed away the annual report sections and did not give plain English much thought after that.

Fast-forward six months to a mild winter in Houston, Texas, and I would again think about the subject of plain English. This time, I needed to propose a topic for my graduate thesis. As I wrote a list of topics, I still had not named one that was strong enough to hold my interest. When the SEC’s *A plain English handbook: How to create clear SEC disclosure documents*<sup>1</sup> resurfaced at my home from the previous summer, I was struck with a moment of clarity and quickly added plain English to my shortlist of topics. I naturally gravitated toward the plain English option as it seemed to fit comfortably with my background in finance and my newly learned skills as a technical communicator. Thus, the winter of 2006 is when I committed myself to study plain English as the central focus of my graduate thesis.

I can admit that the one thing I learned about plain English from the summer of 2005 was that the concept intrigued me. Plain English intrigued me enough to want to study it more

as the focus of my graduate thesis. At the time, I did not know the type of study I would conduct, but I knew if I stayed along the lines of corporate financial disclosures I would not get bored with the subject matter. I have a Bachelor of Science degree in Finance, and I spent the first half of my career in finance- and accounting-related roles, so I relished the opportunity to blend my financial past with my technical-writing present to create the study. The end result was my thesis, *Plain English: The efficacy of US Securities and Exchange Commission recommendations in corporate annual reports and implications for individual investors*.<sup>2</sup> The following is an overview of my thesis research.

### **Thesis Study**

When I began the research for my study, I did not anticipate the limited body of literature that exists on the topic of plain English use in SEC disclosure documents. Literature in the area of plain English focuses heavily on government, legal, and medical communications; however, literature on plain English used in annual report disclosures coupled with investor feedback is non-existent.

I was astounded, yet elated, when I realized that my study would be a unique addition to the existing body of literature. My thesis is the first to add to the body of literature on annual reports written in plain English and its impact on individual investors’ opinions and research habits. To contribute something unique, I exploited new methods of researching and analyzing data in annual reports, and I solicited feedback from individual investors who make investment decisions based in part on language used in annual reports.

The SEC has taken measures to ensure that disclosure documents like annual reports benefit individual investors. The agency claims that when the disclosure is written plainly, investors will more likely understand their investments and can make informed opinions about whether to buy or sell an investment.

A goal of my study was to investigate the SEC’s claims. By going directly to annual-report writers and individual investors, I was able to assess the impact of poorly written and plainly written annual reports and make conclusions based on my findings.



## Research Questions

I sought to orient the readers of my study to the views and opinions of annual-report writers and individual investors. To do so, I addressed the following questions throughout my research.

1. *Does a company's compliance with plain English in SEC disclosures create better-informed investors?*
2. *Has disclosure language desensitized investors from distinguishing writing style differences such as plain English patterns?*

## Methodology (interview & survey)

I used both qualitative and quantitative methodologies to conduct research for my thesis. The qualitative study produced data gathered from interviews I conducted with annual report writers. I interviewed annual report writers because they are instrumental to successfully instituting and enforcing the use of plain English in corporate disclosures. Through the questionnaire I created for my interviewees, I examined their involvement in writing annual reports, their transition to writing the reports in plain English, and their commitment to using the SEC's *Handbook* as a resource. I targeted the writers' processes for writing annual reports and examined how the inclusion of the SEC's plain English recommendations impacted their processes.

I intended to have a much larger qualitative study than my end result of two interviews. While the participant interviews did advance knowledge around some annual-report writers' use of plain English, the two interviews were not sufficient to substantiate a stand-alone qualitative study. Nevertheless, the interviews were beneficial to the overall development of my study. They aided the quantitative research design by mobilizing my selection of company samples that accompanied the survey.

To conduct the quantitative component of the study, I designed a survey. I included with the survey excerpts from two annual reports for each of three publicly traded companies in the United States. The excerpts came from the companies' 1997 and 2005 annual reports. I labeled the excerpts as company samples and asked the participants to read them before beginning the survey because the questions referred back to the text. I did not include the company names on the samples (to control

for any unforeseen biases). I specifically selected 1997 and 2005 because 1997 is the year before the SEC's 1998 *Plain English Disclosure* rule took effect, and 2005 was the year before writing my thesis and seven years after the rule, which was ample time for companies to comply.

Twenty-eight investors participated in the survey. This is a small population by most statistical standards. However, the survey generated valuable feedback on investor understanding of language used in annual reports. It also provided correlational data for analysis on the relationship between plain English used in annual reports and investors' propensity to invest.

## Other Instruments

In addition to the interview and survey, I put the company samples through vetting processes. I used the Flesch Reading Ease scale as the first process to show I was unbiased in selecting the samples and to foster comparability with other studies. The second part of the vetting process included assessing the company samples based on the seven common problems found in disclosure documents, which the SEC listed in its *Handbook*. These vetting processes allowed me to further explain and support the results generated by the interview and survey studies.

## Results

The interview study does not answer the research questions. However, the results provide some insight into the experiences of annual report writers. The writers interviewed have written or been involved in writing upwards of 20 annual reports each. They both share a commitment to write disclosures that comply with the SEC's plain-English rule, and they both lead their company's progress toward compliance.

Of the two companies that clearly made a transition to plain-English writing patterns in the 2005 samples, investors reported they understood those samples more easily and that they were better informed to make investment decisions. Responses for the third company indicated investors did not recognize a noticeable difference between the 1997 and 2005 samples and equally rated them unfavorable to generating understanding and being better informed.

The results presented from the survey show that investors are more willing to invest in a company that communicates using plain English writing patterns. Also, the results do not prove investors have become desensitized by language used in annual reports.

## Conclusions

I offer seven conclusions based on the results of the study. Some are below:

- Disclosure language that follows plain-English guidelines is more likely to attract investors, thus providing momentum for the SEC to continue its advocacy of plain English.
- A relationship exists between the act of investing and documents written in plain English. As company disclosures become clearer, the likelihood of attracting investors will increase.
- Investors prefer disclosures written in plain English, although they do not necessarily recognize what is plain English.

The concluding chapter also includes a discussion on the practical implications of the study.

This study should be the first of many to involve annual-report writers and individual investors so that knowing the impact and refining the process of communicating in plain English is evolutionary. I hope future studies modeled on this one can include more company samples, and I hope the researchers can recruit more writers and investors.

## Moving Forward

My journey to discover plain English has been long, tiresome, exhilarating, and also rewarding. My presentation at the conference in Amsterdam on creating a plain-English certification and this article are my attempts to

contribute to the broader discussion. When I completed my thesis, I decided I would share my work and findings with proponents in the plain-English community as a way of giving back and helping newcomers move the discussion further. Otherwise, my work would simply collect dust on a shelf at the University of Houston-Downtown library. As my time permits, I hope to continue researching and sharing with you many aspects of plain English in business and finance related communications.

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writedecision@comcast.net

## Endnotes

- <sup>1</sup> August 1998.
- <sup>2</sup> Editor's note: Shawn's thesis is not yet published, but interested readers may request a copy by contacting the author directly at writedecision@comcast.net.

Shawn B. Harris holds a Bachelor of Science in Finance and a Master of Science in Professional Writing and Technical Communication. She worked in finance and accounting for several years before transitioning to writing and business consulting. In October 2007, she presented at the Sixth Plain Language Association International



(PLAIN) Conference in Amsterdam on the topic of creating a plain-language Institute that would oversee the issuance of a plain-language certification. Additionally, Shawn has given presentations on plain English before audiences at the University of Houston-Downtown, the American Society of Business Publication Editors (ASBPE) Houston Chapter, and the Houston chapter of the Society for Technical Communication (STC). She is currently serving as a board member for ASBPE Houston. Shawn has served on the Advisory Committee for the University of Houston-Downtown's Plain English Workshop and as a member of the Communications Committee for the Texas Motion Picture Alliance.

## PolishMyWriting.com

Raphael Mudge has recently launched a new website, <http://www.polishmywriting.com/>, which provides the following plain-language aids at no cost to you:

- finds complex phrases and gives suggestions for simple ones
- locates the passive voice
- roots out hidden verbs (also known as abstract nouns or nominalizations)
- searches for redundant phrases and suggests what to drop
- finds clichés and bias-language, so you can cut them from your writing

Give this site a try and let us know what you think.

# An arbitration agreement *designed* not to be read, *written* not to be understood

## Mark Hochhauser

Psychologist; consultant on document legibility, readability, and writing style (USA)

*Author's Note: I've consulted with eleven law firms on consumer agreements, arbitration agreements, wireless service agreements, prepaid funeral agreements, end user licensing agreements (EULAs), food stamp correspondence, software licensing agreements, and tax refund agreements. My earlier work focused exclusively on the readability of those agreements (reading grade level, syllables per word, words per sentence), while my recent work includes legibility analyses—how agreements are designed and laid out on the page based on document design principles of typeface selection, font size, words per line, characters per line, margins, etc.*

*This article is a case study of a payday loan Arbitration Agreement from QC Financial Services that I analyzed (2007) for the Simon Passanante law firm in St. Louis, Missouri. I'm limiting this article to the part of Judge Bresnahan's decision referencing my testimony. The design and readability problems in this Agreement are typical of other consumer agreements I've reviewed.*

## Designed Not to be Read

My dictionary<sup>1</sup> defines *legible* as: "capable of being read or deciphered, esp. with ease, as writing or printing" and *illegible* as: "not legible; impossible or hard to read." Although QC customers had to sign that "You acknowledge that you have read, understand, and agree to the terms the Loan Agreement, including the Additional Terms and Conditions set forth above . . .," serious design flaws in their illegible Arbitration Agreement made it unlikely that customers could read or understand their Agreement.

Judge Bresnahan's 20-page "Order and Judgment" (*DeQuae Woods vs QC Financial Services, Inc. d/b/a Quik Cash*<sup>2</sup>) cited my legibility analysis and its impact (p. 9–10):

"QC also asserts that its clause is not in fine print; however, the evidence presented demonstrates otherwise. Plaintiff's expert, Dr. Hochhauser, testified that the clause contained more than 1,300 words made to fit onto one page. The font was approximately "8" and the spacing of the lines were so close that words from adjacent lines touched and an optical scanner was unable to make out the characters. Dr. Hochhauser predicted that people would have a difficult time reading the font and that, even if they could physically read the words, the average consumer was unlikely to be able to process and understand the document.

"Evidence from the deposition of Darren Walrod, the corporate representative of QC demonstrates that he read an entire line before noticing that he had re-read it, apparently because of the size and spacing of the font. Mr. Anderson, the president of QC and the individual who decided to implement QC's arbitration clause, demonstrated a general lack of understanding of the clause. Plaintiff [Dr. Hochhauser] also provided this Court with a version of the arbitration clause that is double-spaced, 12-point, Times New Roman font. That physically readable version of the clause is six pages long.

"Clauses are to be written to communicate information, not conceal it. The QC arbitration fails the test. It is a non-negotiable, take-it-or-leave-it, form contract in fine print. It is presented to customers who are unlikely to have the ability to understand it. The clause is, considering the totality of the circumstances, procedurally unconscionable."

### *Defining “fine print”*

My dictionary<sup>1</sup> defines *fine print* as: “the detailed wording of a contract, lease or the like, often in type smaller than the main body of the document and including restrictions or qualifications that could be considered disadvantageous. Also called *small print*.”

But that definition is subjective instead of objective. For example, while readability formulas provide statistical grade level estimates, “fine print” refers to misleading “smaller type.” If an agreement is written in a 12-point typeface, and the “fine print” is 10 or 11 points, the fine print is smaller but still legible. So that it’s not just a matter of opinion, perhaps fine print should be defined as any typeface smaller than 9 points. That would eliminate disputes in cases such as this where I testified that the Arbitration Agreement was fine print and the defendant’s attorney asserted that it was not fine print.

### *Very small typeface*

QC’s Arbitration Agreement compressed several pages of text into less than one page by using about an 8-point typeface instead of the 9 to 12 (or even 14) point typeface usually recommended<sup>3,4,5</sup>. If double-spaced, the 1,425 word Arbitration Agreement requires 5 to 6 pages or 2-1/2 to 3 pages if single-spaced.

### *Poor organization*

The Agreement’s title, “ADDITIONAL TERMS AND CONDITIONS OF THE LOAN AGREEMENT,” does not tell customers that it’s an arbitration agreement. The page was not well organized because a) the Agreement was a dense one-page single paragraph instead of recommended short paragraphs<sup>4,5</sup> and b) although sections were numbered 1 through 8, there were no section indentations, except for three clauses all in capitals about “You are waiving your right to . . .”

### *Sans Serif Typeface*

The Arbitration Agreement was a small sans serif typeface, slightly larger than 8 points. However, document designers recommend 9-12 point serif typefaces (such as Times New Roman), but larger typefaces and shorter lines of text for visually impaired readers.<sup>3,4</sup> I’ve reviewed some consumer agreements written in minuscule 6-point sans serif typefaces, producing 32 words and 146 characters per line.

Serif typefaces are easier to read in continuous text. “Body type must be set in serif type if the designer intends it to be read and understood. More than five times as many readers are likely to show good comprehension when a serif body type is used instead of a sans serif body type.” (Weildon,<sup>7</sup> p 60)

### *Using all capital letters*

The Arbitration Agreement included three arbitration provisions in all capital letters. Because all capital letters slow down reading speed, bold lowercase type is better than bold uppercase (capital) type.<sup>4</sup>

### *Justified margins*

Research on justified versus ragged margins is inconsistent. Weildon<sup>7</sup> claims that right justified text is easier to read than ragged text; the SEC<sup>4</sup> recommends ragged right, but Schriver<sup>4</sup> suggests that spacing between words is more important than the margin style. But because the 8-point typeface is so small, spacing between letters and words is also very small, making it hard for readers to separate letters and words.

Plus, the dense text created by the right justified margin and small font makes it hard for the readers’ eyes to go from the end of one line to the beginning of the next line. Readers may get lost and reread the same line<sup>4</sup>—especially with no paragraph breaks in the 69 line single paragraph.

### *Compressed (kerned) text*

Kerned type is the electronic reduction of the natural space between letters.<sup>7</sup> The Arbitration Agreement was kerned so tightly that letters such as r, t, b, and w sometimes touched adjacent letters, converting two letters into confusing images that readers had to decode.

Although document designers recommend about 8 to 12 words per line and 32 to 64<sup>3</sup> or 40 to 70<sup>4</sup> or 50 to 70<sup>5</sup> characters per line, this Arbitration Agreement averaged 21 words and 108 characters per line. The text was so dense that the spacing between lines (inter-linear spacing) was “set solid,” a clear violation of document design principles.<sup>3,4</sup> This created legibility problems because some descending letters (e.g., g, j, p, q, y) touched the top of ascending letters (e.g., b, d, f, h, k, l, t) from the line below.

In his chapter “How to Drive Away your Readers,” Weildon<sup>7</sup> identified small sans serif typefaces and type stretched all the way across the page as two contributing factors. Both features describe this Arbitration Agreement’s layout.

### Written Not to Be Understood

Even if consumers could see the Arbitration Agreement well enough to read it, most would find it hard to read and understand. Readability formulas scored the Agreement at a 4th-year college to 1st-year graduate school (grade 16–17) reading level, “very difficult” on the Flesch Reading Ease Formula. Three readability software programs estimated grade 18 to 23, equivalent to a graduate school (and beyond) writing style.

Although readability researchers recommend about 15 to 20 words per sentence, equal to a 6th- to 8th-grade reading level, this Agreement averaged 32 words per sentence; the longest was 265 words. Our very limited working memory means that readers will probably forget the beginning of long sentences by the time they get to the end; much of what they read will not be remembered.

### Readability is more than grade level

Box 1 summarizes what readability is—and is not—from publications of six readability formula developers: Rudolf Flesch (1949 Flesch Reading Ease), Robert Gunning (1952 Fog Index), G. Harry McLaughlin (1969 SMOG formula), E.B. Fry (1977 Fry Readability Scale), and Edgar Dale and Jeanne Chall (1948/1995 Dale-Chall Formula).

#### Box 1: How Readability Formula Developers Define Readability

##### 1. *Readability = Ease of reading plus interest*

“Actually, to most people, readability means ease of reading plus interest. They want to make as little effort as possible while they are reading, and they also want something ‘built in’ that will automatically carry them forward like an escalator.” (p 158) Flesch, R., *The Art of Readable Writing*, New York: MacMillan (1949).

##### 2. *Readability formulas are not formulas for writing*

“But first a warning. Like all good inventions, readability yardsticks can cause harm in misuse. They are handy statistical tools to measure complexity in prose. They are useful to determine whether writing is gauged to its audience. *But they are not formulas for writing.* Anyone who sets out to pattern his writing to the few factors of a formula alone may find that he is turning out dull, standardized writing that fails to attract readers.” (p 29) Gunning, R., *The Technique of Clear Writing*, New York: McGraw Hill (1952).

##### 3. *Readability = wanting to read more*

“There is no such thing as a valid readability formula. Readability is generally taken to mean that quality of written material which induces a reader to go on reading. Readability formulas—even the one I recently perpetrated myself (McLaughlin, 1969)—do not predict readability. Those formulas which have been adequately validated actually predict comprehensibility. Obviously, anyone who wants to go on reading certain material must be able to understand it. On

the other hand, the fact that certain material is comprehensible to a certain person by no means guarantees that he will find it readable.” (p 367) McLaughlin, G.H., *Temptations of the Flesch. Instructional Science*, 2, 367–384 (1974).

##### 4. *Readability: Don’t cheat!*

“Readability formulas are concerned with judging the difficulty levels of writing . . . . Writeability is concerned with writing, rewriting, or editing to get those materials to the desired readability level. *Cheating* is defined as trying to beat the formulas by artificially chopping sentences in half and selecting any short word to replace a long word . . . you can cheat or artificially doctor writing to get a lower readability formula score, but you might not have changed the true readability much and you may have made it worse.” (p77) Fry, E.B., *Writeability: The Principles of Writing for Increased Comprehension*; in Zakaluk, B.L. & Samuels, S.J., *Readability. Its Past, Present and Future*, Newark, DE: International Reading Assn. (1988).

##### 5. *Readability = understanding, reading quickly, and being interested.*

Readability is “the sum total (including the interactions) of all those elements within a given piece of printed material that affect the success a group of readers have with it. The success is the extent to which they understand it, read it at an optimal speed, and find it interesting.” (p 80) Chall, J.S. & Dale, E. *Readability Revisited. The New Dale-Chall Readability Formula*. Cambridge, MA: Brookline Books (1995).

## Conclusion

QC's Arbitration Agreement requires customers to sign that "You acknowledge that you have read, understand, and agree to the terms the Loan Agreement, including the Additional Terms and Conditions set forth above," but that Agreement met none of the standard document design criteria or statistical readability recommendations. Recently, Lord Justice Rix listed Ten Commandments for drafting contracts<sup>8</sup>; legibility was not one of them. Castle<sup>9</sup> noted that readability and legibility are not the same; character and text legibility are essential qualities. Even if this Agreement was written at a lower grade level, illegible characters and text would make it almost impossible to read or understand.

Legibility and readability become even more relevant as payday loan companies offer loans to consumers receiving guaranteed monthly US Government benefits,<sup>10</sup> such as Social Security, Veterans' benefits and disability benefits. Older consumers and those with disabilities may have a very hard time reading and understanding Arbitration Agreements written at a graduate school level in a very small typeface. As Judge Bresnahan put it: "Clauses are to be written to communicate information, not conceal it." Or consumers can't understand what they can't see.

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markh38514@aol.com

## References

- <sup>1</sup> *Random House Webster's College Dictionary*. (2000) New York: Random House.
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- <sup>3</sup> Schriver, K.A. (1997) *Dynamics in Document Design*. New York: John Wiley & Sons.
- <sup>4</sup> SEC. (1998) *A Plain English Handbook*. Washington, DC: U.S. Securities and Exchange Commission. (<http://www.sec.gov/pdf/handbook.pdf>)
- <sup>5</sup> Kimble, J. (2006) *Lifting the Fog of Legalese*. Durham, NC: Carolina Academic Press.
- <sup>6</sup> Bailey, E.P. (1996) *Plain English at Work*. New York: Oxford University Press.
- <sup>7</sup> Wheildon, C. (1996) *Type & Layout*. Berkeley, CA: Strathmoor Press.
- <sup>8</sup> Lord Justice Rix (2006) Plain language in legal agreements: is it safe? *Clarity*, 56, 43–51.
- <sup>9</sup> Castle, R. (2007) What makes a document readable? *Clarity*, 58, 12–16.
- <sup>10</sup> Schultz, E. and Francis, T. (2008) High Interest Lenders Tap Elderly, Disabled. *Wall Street Journal*, February 12, 2008, A1.

Mark Hochhauser is a readability consultant in Golden Valley, Minnesota. He's published over 60 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.



## Call for Papers

The journal ESP Across Cultures ([www.unifg.it/esp](http://www.unifg.it/esp)) will be devoting the whole of vol. 7 (2010) to the topic of 'legal English across cultures'. We therefore invite anyone interested in writing about legal English from a cross-cultural perspective to send an abstract of 250-300 words before 15 July 2009, and the completed paper (approx 5,000 words) by 31 December 2009. Please send your abstracts and any queries to Christopher Williams at [cjwilliams72@hotmail.com](mailto:cjwilliams72@hotmail.com) or [c.williams@lex.unifg.it](mailto:c.williams@lex.unifg.it).

# The Texas pattern jury charges plain-language project: the writing consultant's view

**Wayne Schiess**

*Director of Legal Writing, University of Texas School of Law (USA)*

## **Introduction**

*In 2005 and 2006, the Texas Pattern Jury Charges plain-language task force prepared a revision to a set of jury instructions, mainly the admonitory instructions, from the state bar's Pattern Jury Charges. The task force included a practicing lawyer, a law professor, a judge, a state-bar publishing director, and a legal-writing consultant. It produced a set of revised instructions that were tested along side the original instructions on two groups of mock jurors.*

*The task force hired me as the legal-writing consultant and drafter. This piece discusses the project and the drafting work.*

## **Concerns with the original—just a few**

The original admonitory instructions were in fairly good shape; they were not filled with legalistic jargon or with hyperformal constructions. In the main, the original text was well written and clear. This is good news for the original instructions, for those who prepared them, and for the jurors who had to listen to and obey them.

For me, the drafter, it made the job a challenge. To improve something that is already good is difficult. And the results of the juror testing might not show dramatic improvement. Still, I made the effort.

## **The revision—main goals**

To improve the instructions, I focused on the following plain-language principles:

- Eliminate legal jargon, unnecessary legal terms, and unusual legal terms.<sup>1</sup>
- Make the text more immediate and vigorous by using “I” and “you” more consistently.<sup>2</sup>
- Reduce unnecessary formality in tone,<sup>3</sup> by reducing nominalizations, reducing passive voice, and simplifying complex vocabulary.<sup>4</sup>
- Provide consistency, and where consistency would lead to repetition, avoid unnecessary repetition.
- Shorten sentences.<sup>5</sup>
- Reorder the text for logic and comprehension.
- Provide examples or explanations in some places.

After the drafter prepared a draft revision, I tested it informally on several nonlawyers and received many suggestions. (In these informal surveys, the revised version was better received than the original.) After further revision, I circulated it to other legal-writing experts and some former litigators. I then made more revisions and circulated that revision to members of the task force.

Task-force members, particularly the judge and a judicial colleague of the judge, were helpful in making suggestions and in offering real-world scenarios that allowed the drafter to focus

the language of the instructions. After another revision, a second round of comments from the task force, and more revisions, the draft was given to two members of the Texas Supreme Court, who made valuable recommendations. The draft was then laid aside for a time, and testing on the original began.

The first test of the original raised a few small matters, and I worked up another revision. Finally, during further testing of the original instructions, we learned even more and made final changes to the revision. Thus, in all, the revision went through eight drafts.

### Comparing the original and the revision

Although numerical scores are of limited value and cannot be the main goal, the revision did improve upon the original as follows:

Original	Revision
Words per sentence: 22	Words per sentence: 15
Flesch score: 54	Flesch score: 66
Flesch-Kincaid grade level: 11	Flesch-Kincaid grade level: 8

Perhaps the best way to report on the kinds of changes that were made is to show several examples side by side:

Original	Revision
Do not conceal information or give answers which are not true. Listen to the questions and give full and complete answers.	Be honest when the lawyers ask you questions, and always give complete answers.
Do not make personal inspections, observations, investigations, or experiments nor personally view premises, things or articles not produced in court.	Do not view or inspect places or items from this case unless they are presented as evidence in court.
If you do not obey the instructions I am about to give you, it may become necessary for another jury to re-try this case with all of the attendant waste of your time here and the expense to the litigants and the taxpayers of this county for another trial.	If you do not follow these instructions, I may have to order a new trial and start this process over again. That would be a waste of time and money, so please listen carefully to these instructions.
We shall try the case as fast as possible consistent with justice, which requires a careful and correct trial.	I assure you we will handle this case as fast as we can, but we cannot rush things. We have to do it fairly and we have to follow the law.

One significant place in which the instructions were changed was in the definition of circumstantial evidence. Relying on ideas from the revised California jury instructions, we revised the instructions as follows:

Original	Revision
A fact may be established by direct evidence or by circumstantial evidence or both.	During the trial, you will hear two kinds of evidence. They are direct evidence and indirect evidence.
A fact is established by direct evidence when proved by documentary evidence or by witnesses who saw the act done or heard the words spoken.	Direct evidence means a fact was proved by a document, by an item, or by testimony from a witness who heard or saw the fact directly. Indirect evidence means the circumstances reasonably suggest the fact.

*(continued on page 25)*



**Original**

A fact is established by circumstantial evidence when it may be fairly and reasonably inferred from other facts proved.

**Revision**

Indirect evidence means that based on the evidence, you can conclude the fact is true. Indirect evidence is also called "circumstantial evidence."

For example, suppose a witness was outside and saw that it was raining. The witness could testify that it was raining, and this would be direct evidence. Now suppose the witness was inside a building, but the witness saw people walking into the building with wet umbrellas. The witness could testify that it was raining outside, and this would be indirect evidence.

A fact may be proved by direct evidence or by indirect evidence or by both.

**Testing**

A jury consulting firm called Courtroom Sciences, Inc., in Dallas, Texas, handled the testing.

The original instructions were used in a mock mini-trial conducted in front of 48 eligible jurors from Dallas County, Texas. An actor playing a judge read the admonitory instructions to the jurors, and they received copies. They listened to two lawyers argue a case, after which the judge read them a charge specific to the case; they then retired to deliberate in 4 groups of 12.

The jurors deliberated, filled out a verdict form, and returned to the courtroom, where they completed a questionnaire that asked them about the instructions.

The revised instructions were then used for 48 different jurors. Courtroom Sciences re-created the same mock mini-trial, used the same judge and attorneys, and presented the same case. These 48 jurors completed the same steps as the first 48.

The results of the questionnaires were compiled and summarized in a report prepared by Courtroom Sciences. This proprietary document has not been released by the task force, but I summarize some of it here.

The questionnaires had two types of questions: (1) general, subjective questions (were the instructions simple, readable, understandable, etc.) and (2) specific, objective questions (what is indirect evidence) with multiple-choice options.

On the general, subjective questions, the revised instructions scored well, especially given that the original was already moderately clear and plain. The questionnaires asked 8 questions related to general comprehension for 3 separate sections of the instructions; this is a total of 24 questions. The revised instructions scored better than the original on 22 of the 24 questions. Courtroom Sciences told us that only 6 of those higher scores were statistically significant. But it is significant that the revision scored better 22 out of 24 times.

On the specific, objective questions, which sought correct answers, the questionnaire asked a total of 32 questions about the 3 sections of admonitory instructions and about the verdict form. Jurors using the revised instructions got a higher number of correct answers on 23 of those 32 questions.

**Problems**

Three problems made the project a challenge and probably limited the effectiveness of the revised instructions.

First, the judges on the task force resisted some kinds of changes to the instructions; they wanted the revised instructions to be more formal. For example, they would not allow me to

use contractions. One judge suggested that the tone of instructions served an almost elevating function for the judge:

This is an instruction from a judicial officer to lay persons under his/her control. (Only one step below an order). The tone needs more formality and seriousness. It should not take on the character of a discussion among equals.

Second, the judges on the task force prevented me from dropping the word *preponderance* from the revised instructions and also from creating a new definition for the term *preponderance of the evidence*. This was despite evidence from the drafter's informal testing that nonlawyers often do not understand the term. One volunteer who read an early draft of the instructions was particularly confused by the word *preponderance*:

Why would I pre-ponder the evidence? I thought I was supposed to wait until I got into the jury room to ponder the evidence.

Third, because we believed that testing the revised instructions on jurors who had already read and used the original instructions would skew the results, we test the revised instructions on a different set of jurors. We needed to do it this way, but it would have been meaningful to have been able to ask jurors to compare the two versions directly.

## Update

The project languished for almost a year. But in April 2007, the task force presented a draft of the instructions we had rewritten to the Texas Supreme Court advisory committee. This committee is made up of 60 lawyers and judges from around the state, and advises the Texas Supreme Court before it makes changes to its rules, practices, and procedures. Needless to say, the admonitory instructions we had revised would need to be approved by the court, and before the court would approve the instructions, it wanted to get input from the advisory committee.

Because the committee is full of smart and accomplished lawyers, many of whom have strong opinions about writing and about jury instructions, its consideration of the rewritten instructions got a bit bogged down. Some complained that the instructions were too simplistic and informal. One said the revision didn't go far enough. Others had pet topics they wanted included in the revision. Still others proposed specific language revisions to be added in certain places. A few praised the work of the task force and encouraged us to continue.

Ultimately, though, the language and wording of the revised instructions were not scrutinized as closely as the content and coverage. Still, as the drafting consultant, I took even the limited criticism of the text personally.

The most important substantive suggestion from the advisory committee was to try to revise the instruction on preponderance of the evidence. Given the original hostility to changing that instruction, this recommendation has to be considered a success. The task force is now looking at instructions on preponderance of the evidence from other states and will prepare a revised set of instructions that include a new instruction on preponderance of the evidence.

## Conclusion

The project was expensive and time-consuming (the jury consultants were very expensive), and the results were modest. Still, we showed that we can improve the language of jury instructions even when the original is not in bad shape. We also now have some momentum

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wayne@legalwritng.net

## Endnotes

- <sup>1</sup> See Peter Tiersma, *Communicating with Juries*, 10 *Scribes J Legal Writing* 1, 9 (2005–2006).
- <sup>2</sup> See Rudolf Flesch, *How to Write Plain English: A Book for Lawyers and Consumers* 44–50 (Harper & Row 1979).
- <sup>3</sup> See Joseph Kimble, *Lifting the Fog of Legalese* 132 (Carolina Academic Press 2006).
- <sup>4</sup> See Tiersma, *Communicating with Juries*, at 12.
- <sup>5</sup> See Richard C. Wydick, *Plain English for Lawyers* 33 (5th ed, Carolina Academic Press 2005).



Wayne Schiess is the director of legal writing at the University of Texas School of Law and is the author of four books on legal writing. He blogs at [Legalwriting.net](http://Legalwriting.net), which in 2007 was named one of the ABA Journal's Blawg 100: "The best Websites by lawyers for lawyers."

## Members by country

Argentina	2	Gran Canaria	1	Portugal	4
Australia	106	Hong Kong	18	Singapore	7
Austria	1	India	7	Slovakia	2
Bahamas	2	Ireland	2	South Africa	163
Bangladesh	6	Isle of Man	1	Spain	3
Belgium	7	Israel	4	St. Lucia	2
Bermuda	1	Italy	6	Sweden	18
Brazil	1	Jamaica	1	Switzerland	1
British Virgin Islands	1	Japan	7	Thailand	1
British West Indies	3	Jersey	2	Trinidad and Tobago	3
Canada	75	Lesotho	2	United Kingdom	308
Chile	2	Malaysia	1	USA	208
China	1	Mexico	7	Zimbabwe	1
Cote d'Ivoire	1	Mozambique	1		
Denmark	2	Netherlands	6		
Finland	6	New Zealand	18		
France	2	Nigeria	9		
Germany	2	Philippines	1	<b>Total</b>	<b>1,036</b>

## Further thoughts on letters of advice

**Richard Wheen**

*Solicitor (England)*

I was most interested in the article by Dr Robert Eagleson in *Clarity* 58 entitled “Drafting matters—letters of advice”. In that article Dr Eagleson discussed letters of advice to clients and recommended the “plain language approach” rather than the “traditional approach”.

The main difference between the two approaches is the different arrangement of the contents of the letter. These are set out in a table which he gave and which I am reproducing here:

<b>Traditional approach</b>	<b>Plain language approach</b>
<i>addressee</i>	<i>addressee</i>
T1 Subject title of letter	P1 Subject title of letter
T2 Confirmation of instructions	P2 Issue
T3 Relevant background information	P3 Findings/Recommendations
T4 Assumptions of lawyer in arriving at solution	P4 Important considerations/Scope/Assumptions
T5 Evidence forming the basis for a solution	P5 Explanations/Reasons for findings
T6 Findings/Recommendations	P6 Applicable legislation and court rulings
<i>sign off by lawyer</i>	P7 Further action/What you need to do/How we can help you
	<i>sign off by lawyer</i>

Stated simply, the key difference is that, in the plain-language approach, the Findings/Recommendations come near the start of the letter whereas, in the traditional approach, they come at the very end, after the background information, assumptions etc.

It is a pity that Dr Eagleson did not include examples of both forms of letter to show how the two approaches differ in practice. The purpose of this article is to do just that. I am setting out [below/in the box on pages 30–31] the same basic letter in the two formats, as I understand them. The references in square brackets in each letter are to the items in the table above.

### **Comment on the two approaches**

Dr Eagleson says that the two letters will cover the same range of items, and I have made the two versions as similar as possible apart from their sequence. All readers of *Clarity* would surely write both types of letter in plain language. The headings in the two columns of the table above are, however, very different from each other, such that presumably Dr Eagleson expects that the wording of the plain-language version would be different (apart from its location) from that in the traditional type of letter. If not, could we not reword the headings in the table to be identical?

There is one particular anomaly in the table: the plain-language approach includes (as P6) Applicable legislation and court rulings, whereas the traditional approach does not include this heading at all (unless it comes under T5, Evidence forming the basis for a solution).

Personally (and depending somewhat on the sophistication of the recipient), I would be more inclined to put such information in a traditional style letter than in a “plain language” letter. I have in fact included this information in both example letters below, as it is so important in this sort of case.

I would not claim that either of my versions is anywhere near perfect (in particular you might want to add headings). Maybe it does not even correspond with Dr Eagleson’s recommendations. It would be great if he (or other readers) could come up with improvements or completely rewrite the letter. It could then, perhaps, become a useful precedent.

Finally, I wonder which format of letter you prefer. Dr Eagleson clearly prefers the plain-language approach and argues persuasively that both in-house lawyers and lay clients also prefer it. I can readily accept that, in general, long letters of advice may be easier for clients to read if written using the plain-language approach. Is this necessarily true of shortish letters such as those below?

And does not the simplicity or otherwise of the Findings/Recommendations section (T6 or P3) make a difference, in that it might be premature to include long Findings/Recommendations up front if they are “iffy” because of uncertainties mentioned elsewhere in the letter? I suspect that both formats of letter have their advantages in particular circumstances.

By the way, the case of *Jones v Robinson* mentioned in the letters does not exist: I have invented it for the purpose of this exercise.

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#### **Traditional approach**

Dear John

Thank you for coming in to see me yesterday to discuss your dispute with Mr Smith. [T1]. You asked me to advise on the options open to you to resolve the dispute. [T2]

You handed me copies of the constitution and latest accounts of Smith Widgets Limited (the Company) and of your recent correspondence with Mr Smith.

You informed me that:

- Mr Smith is the only other (and the major) shareholder in the Company, and he is also the sole director of the Company.
- The Company, which has been profitable for years, stopped paying dividends a couple of years ago and instead is now paying out all the profits by way of extra salary to Mr Smith. [T3]

I assume that you did not agree to this change in the arrangements, and that there is no shareholders’ agreement between you and Mr Smith which might affect the position. [T4]

Under the Company’s constitution (and this is normal) the amount of dividend payable by

#### **Plain language approach**

Dear John

Thank you for coming in to see me yesterday to discuss your dispute with Mr Smith. [P1] You asked me to advise on the options open to you to resolve the dispute. [P2]

My advice is that, if necessary, you should take legal proceedings, which should result in the court ordering that Smith Widgets Limited (the Company) itself buy your shares at a fair price. The first thing, however, would be for me to write a formal letter to Mr Smith, putting your case and threatening proceedings if no agreement could be arrived at. Only after giving Mr Smith a reasonable opportunity to respond would we actually launch proceedings. [P3]

This advice is based on the following facts/assumptions:

- Mr Smith is the only other (and the major) shareholder in the Company, and he is also the sole director of the Company.
- The Company, which has been profitable for years, stopped paying dividends to a couple of years ago and instead is now paying out all the profits by way of extra salary to Mr Smith.

(continued on page 30)

the Company is decided by the directors (the sole director if there is just one). The shareholders do not have power to compel the Company to pay a higher dividend than the directors recommend.

Section 994 of the Companies Act 2006, however, allows a shareholder to apply to the court in this sort of case. The court has wide powers to make an appropriate order to resolve the dispute. It could, in particular, order the Company to buy your shares at a specified price.

In the decided case of *Jones v Robinson*, whose facts were quite similar to those here, the court ordered the company to buy the minority shareholding at a price reflecting the value of the company on the assumption that it had continued to pay dividends. [T5]

Accordingly, you could certainly take proceedings under section 994 and, although the question of price would need to be resolved, if this matter came to court I would expect the court to make an order similar to that in *Jones v Robinson*.

The first thing, however, would be for me to write a formal letter to Mr Smith, putting your case and threatening proceedings under section 994 if no agreement could be arrived at. We would only launch proceedings, however, after giving Mr Smith a reasonable opportunity to respond.

I attach the sort of letter my firm would write to Mr Smith. Please would you check the facts and let me have any comments on the letter before I send it. [T6]

I look forward to hearing from you.

Yours sincerely

A. Lawyer

- You did not agree to this change in the arrangements, and there is no shareholders' agreement between you and Mr Smith which might affect the position.

You handed me copies of the Company's constitution and latest accounts and of your recent correspondence with Mr Smith. [P4]

Under the Company's constitution (and this is normal) the amount of dividend payable by the Company is decided by the directors (the sole director if there is just one). The shareholders do not have power to compel the Company to pay a higher dividend than the directors recommend.

Section 994 of the Companies Act 2006, however, allows a shareholder to apply to the court in this sort of case. The court has wide powers to make an appropriate order to resolve the dispute. It could, in particular, order the Company to buy your shares at a specified price.

In the decided case of *Jones v Robinson*, whose facts were quite similar to those here, the court ordered the company to buy the minority shareholding at a price reflecting the value of the company on the assumption that it had continued to pay dividends. Although the question of price would need to be resolved, if this matter came to court I would expect the court to make an order similar to that in *Jones v Robinson*. [P5 & P6]

I attach the sort of letter my firm would write to Mr Smith. Please would you check the facts and let me have any comments on the letter before I send it. [P7]

I look forward to hearing from you.

Yours sincerely

A. Lawyer

Richard Wheen *qualified as an English solicitor more years ago than he cares to remember, and specialised in corporate law with Linklaters in London and (for a while) New York. He retired from practice some years back but continues to teach law (including drafting), both with Linklaters and with the College of Law in London.*



## The good lecture and the good paper

### Alec Samuels

*Barrister (UK)*

A person of standing is invited to deliver a lecture or an address or a talk, of an academic or learned nature, to a learned or serious institution, and given the offer or opportunity to have the lecture, or a revised version of the lecture, published in the institution journal. The occasion will be a prestigious occasion. The lecturer naturally goes to a lot of trouble in preparation. He reads the paper to the audience; it is duly published; it all very learned.

The lecture was listened to with respect and attention; there was the usual eulogy given to the lecturer; there was applause. But somehow, in retrospect, the occasion was not that much of a success. The paper in the journal was looked at by many members, but most found it somewhat formidable and heavy going and did not make much of it.

What “went wrong”? In objective terms, the paper was of good scholarly quality. However: The lecturer read the paper. He tried to look up from the text as he went along, he tried to “lighten” it a bit as he went along, he tried to vary the “monotone”. But everybody could see that he was reading the paper. He was not really communicating with the audience. The text was carefully constructed, concentrated, long sentences, deep and rich in content (like a Christmas pudding). The language was carefully chosen, strictly correct, often rather technical, “high falutin”. There were no visuals. The lecture went on for an hour. The members of the audience found that it was a tremendous effort to concentrate and to take in what he was saying.

Contemporary practice is often to deliver an unscripted (though well prepared) lecture with the aid of words on slides, giving a degree of visuality, which may well be seen as helpful by the members of the audience, for they can see the structure of the lecture and the headings and the key phrases. However: There were

lots and lots of slides, and lots and lots of words on the slides, and the lecturer virtually just read aloud the words on the screen, with a bit of commentary, and in a not very exciting manner.

The realities of life in such situations are harsh. Most of us learn little from and remember virtually nothing of a lecture. The human attention and concentration span is very limited. We hear or take in only about every third word. An hour is a long time. The insensitive lecturer may not fully appreciate the level or degree of knowledge and experience and intellectual capacity of the audience. Talking down to them, patronising, may make them irritated, they know all this. Talking up to them, also patronising, may make them irritated, they cannot follow the lecture.

Making the most of the situation and the opportunity is a very personal challenge for the lecturer. General advice might include the following:

- Know your audience, so far as possible.
- Pitch the lecture to their needs and interests.
- Go for simplicity in concept, structure and language.
- Do not overload the lecture.
- Do not hesitate to repeat an important point, perhaps in different language.
- Use visuals, where appropriate, but sparingly.
- Present unscripted (though well prepared).
- Take less than an hour.

### Two different things

The delivered lecture and the printed paper are two very different things. The purpose of the lecture should be to stimulate the interest of the audience. The lecture is almost certainly too idiomatic and loose to suffice verbatim in print. The purpose of the printed paper is a systematic exposition for those seeking a comprehensive knowledge of the subject. The printed paper is almost certainly too heavy to be readily appreciated when read out aloud to the audience.

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councillor.a.samuels@southampton.gov.uk

*Alec Samuels is a JP Barrister, and Councillor who has served in the Law Faculty in the University of Southampton for 50 years. He is a lecturer and writer on legal subjects, a contributor to many journals, and a longstanding member of the Statute Law Society and Clarity.*

# Linguistic lingo for lawyers— linking verbs

**Sarah Carr**

*Carr Consultancy and Plain Language Commission*

At Plain Language Commission, we recently received an email commenting on a sentence we'd given as an example of the active voice: *Armies are on the march*. The sender said that the verb *are* is not active because it doesn't describe an action. He suggested that some verbs—known as 'linking verbs'—are neither active nor passive, and provided a web reference to support this point: <http://jerz.setonhill.edu/writing/grammar/act-pass.htm>. On this website, Dennis Jerz, an associate professor of English at Seton Hill University, Pennsylvania, writes:

*When the verb performs the function of an equals sign, the verb is said to be a linking verb. Linking verbs describe no action—they merely state an existing condition or relationship; hence, they are neither passive nor active.*

Jerz gives these examples of linking verbs: *is*, *was*, *are*, *seems (to be)* and *becomes*.

This way of categorizing verbs—as active, passive or linking—sent me scurrying to my grammar book, as it was new to me. In *A Student's Grammar of the English Language*, Greenbaum and Quirk mention linking verbs, which they also call copular verbs—verbs that are followed by a subject complement—but as an alternative to transitive verbs (those that can be followed by a direct object) and intransitive verbs (those that cannot). They treat voice (that is, whether the verb is active or passive) as a separate taxonomy. Using this approach, all finite verbs in English are either active or passive and this is determined by their form rather than meaning. (In some other languages, there are additional voices, such as classical Greek's middle voice, which describes actions that the subject voluntarily has done by someone else, such as getting hair cut or getting yourself taught.) So,

applying this approach, *Armies are on the march* really is in the active voice.

Further research showed that Kenneth Wilson's *The Columbia Guide to Standard American English* (available online through Bartleby.com), also adopts this approach:

*They [verbs] may be finite or nonfinite, transitive, intransitive, or linking, and they show active or passive voice.*

And for a website that supports this view, see <http://www.notefull.com/vtmf.html>:

*intransitive and linking verbs don't appear in anything but the active voice.*

## Relevance to plain language

In a way reminiscent of Dr Robert Eagleson's observation (in *Clarity 58's Linguistic Lingo*) of 'the limitations and dangers of tables in representing the structural patterns of a language', this email exchange shows there's often more than one way to categorize parts of language. In general, it's unlikely that just one of these is correct, though it may be the more conventional. It's worth being aware of this when teaching people or writing about plain-language guidelines, especially since it's more in keeping with best practice to avoid an overly prescriptive approach. In this case, we suggested we'd just have to agree to disagree on which taxonomy is better.

The other learning point for us was that when teaching people the basics of preferring the active voice (a key plain-writing guideline in many languages), it may be clearer to use transitive (rather than intransitive or linking) verbs as examples. Because these allow the same sentence to be transformed between active and passive forms, they perhaps demonstrate most obviously the difference between active- and passive-voice verbs. For example: 'Armies are invading the country' (active voice) versus 'The country is being invaded by armies' (passive voice).



*Sarah Carr has a first degree in modern languages and English, and an MBA. She has worked as a general manager in the National Health Service, and as a fellow at the University of Manchester. Sarah is now an associate of Plain Language Commission, working as a freelance writer, editor and consultant. Sarah's publications include 'Tackling NHS Jargon: getting the message across' (Radcliffe Medical Press, 2002).*



Please contact Julie Clement, *Clarity's* editor in chief, if you'd like to write for this column or its twin, Legal Lingo for Linguists.

## Does Clarity have your email address?

If you're willing, would you please send your email address to Mark Adler <adler@adler.demon.co.uk> so that he can add you to his email list of Clarity members. We promise not to bombard you with emails, but from time to time Mark sends out information that should be of interest to members. You will also receive a PDF version of the journal as soon as it's available.

## New members

### *Australia*

*NSW Parliamentary  
Counsel's Office  
[Valeria Bolgar]  
Sydney*

### *Belgium*

*Ulf Jonsson  
European Commission  
Legal Service  
Brussels*

### *Canada*

*Educaloi  
[Genevieve Fortin]  
Montreal*

*Helen Finn  
City of Beaconsfield  
Quebec*

*Laverne Garrow  
Foundation of  
Administrative Justice  
Edmonton, Alberta*

*Michel Gosselin  
Department of Justice  
Canada  
Ottawa, Ontario*

*Marta Kennedy  
Legislative Library of Ontario  
Toronto, Ontario*

*Lucie Lauziere  
Quebec*

*Julie Lesage  
Ottawa, Ontario*

*Lorraine Scollin  
Inkster Christie Hughes  
Winnipeg*

*Justice Michel Shore  
Federal Court of Canada  
Ottawa, Ontario*

*Daniel Watts  
Inkster Christie Hughes  
Winnipeg*

*Wise-Gillap Editorials  
[Dave Gillap]  
Scarborough, Ontario*

### *Chile*

*Biblioteca del Congreso  
Nacional de Chile  
[Patricia Bruzzo]  
Valparaiso*

### *New Zealand*

*Anita Jenkins  
Waterview  
Lynne Laracy  
Laracy Communications  
Limited  
Auckland*

*Rachel McAlpine  
Contented Enterprises  
Wellington*

### *South Africa*

*Sybil Lyons-Grootboom*

### *Sweden*

*Eva Thoren  
Ministry of Justice  
Sollentuna*

### *United Kingdom*

*And/or/if  
[Mark Stanton]  
Towcester*

*George Clark  
Seafeld Research and  
Development Services  
Portsoy*

*Thomas Hunter  
Sidley Austin LLP  
London*

### *United States*

*Jessica Price  
Marquette University  
Law School  
Wisconsin*

*Whitney Quesenbery  
Whitney Interactive Design  
New Jersey*

## Member news

### Lord Bingham retires from the bench

*Anthony Heaton-Armstrong*

Tom Bingham, Knight of the Garter, retired at the end of September, a couple of weeks before his 75th birthday.

He is the first UK judge to have held its 3 senior judicial posts—Master of the Rolls, Lord Chief Justice and Senior Law Lord—and will unquestionably be remembered, along with the other judicial *Tom*—Denning—as one of the finest and most well-respected judges of the 20th and, in his case, early 21st centuries.

His finely tuned, economically concise and masterful judgements reflect the workings of a highly incisive and analytical brain and a superb grasp of the issues in question. Independently minded and fearless of government pressure, he has undoubtedly had a major impact on the development of the law in a way which improves and enhances the quality of citizens' lives both in the UK and in other jurisdictions where his powerful influence extends. In and out of court he has supported the use of plain language in the law, and has been a member of Clarity since, as Master of the Rolls, he was an honoured guest at its 10th anniversary reception. Delightfully modest and unassuming (hence, *call me Tom*), he is supportive of juniors and has strongly encouraged, through his willingly provided forewords to their books, legal authors in their ambitions (his son is an established thriller writer).

Acknowledged to be the moving force behind the constitutional changes which led to the establishment of the Supreme Court, his powerful presence and towering intellect will be sorely missed by his colleagues—following the move to their new home at Middlesex Guildhall in 2009—and all those advocates who have enjoyed the privilege and pleasure of appearing before him.

### Nick Lear retires from Clarity

Nick Lear has written that as it is now some years since he practised law and “doubt[s] if [he] can contribute any more” he “think[s] it is time for [him] to edge out of Clarity”. We disagreed with both suggestions and are saddened by his departure, but his mind seems to have been made up. He leaves with the grace and modesty which have marked his substantial contribution to the plain language movement.

It was back in the late 60s or early 70s when Nick and two other commercial-property solicitors at Debenham & Co decided that their documents should be in plain English and clearly and attractively set out. They were supported by their main clients, including some quoted property companies. One of the improvements was to include the variables in a schedule at the beginning of a lease—Landlord, Tenant, Property, Length of Term, Rent, etc—an innovation which in time became the norm. One client was upset by the definition of “the Property”, feeling very strongly that it should be described as “the Demised Premises”, but was over-ruled.

Nick was one of the original members when Clarity was formed in 1983. He joined the committee in 1996 (when there were only 5 committee members, who met for a Saturday morning every 2 or 3 months), remaining for 8 years as the committee became international and electronic and resigning only after he had left the legal profession. Meanwhile, he had guest-edited the 52-page issue 44 of the journal.

Nick: we wish you a very happy continuation of your retirement, and hope we will not lose touch with you.

### Paul O'Brien appointed senior assistant law draftsman

Paul O'Brien has been appointed senior assistant law draftsman in the Hong Kong Department of Justice. He was previously parliamentary counsel in Victoria, Australia.

### KR Chandratre publishes update

The second edition of Dr KR Chandratre's book, *Legal & Business Writing in Plain English*, has been released by publisher Taxmann Allied Services Pvt Ltd, New Delhi.

# From the President

**Christopher Balmford**

## A formal association?

Congratulations to PLAIN, The Plain Language Association InterNational, for ascending to the status of a corporation; see <http://plainlanguageinternational.org/> which has a link to PLAIN's new bylaws.

For non-profit voluntary organisations like PLAIN—or indeed Clarity—to take these steps involves much work, usually by small team of active people.

At various times, Clarity has considered the possibility of—one-way-or-another—becoming a formal organisation. The topic was last raised—with related ideas about Clarity's purpose etc—in my first "From the president" in Clarity May 2007.

So far Clarity has decided not to become a formal organisation—though I expect, given

"the way the world is going", that decision is likely to be revisited. Perhaps it will be something that Clarity's next president takes on in their 2010–2012 presidency.



## Next president

The process for the appointing the next president begins in the May issue next year. I'm mentioning it now, 6 months early. Organisations like ours depend on members giving their time and talents. If you're interested in putting your name forward—or, with their consent, another member's—to be president of Clarity, do let me know.

## Mexico conference

As I write, Clarity's Mexico conference is but a few weeks away. I hope to see you there.

## Annual subscription

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## How to join

Complete the application form and send it with your subscription to your country representative listed on page 2. For the address, please see [www.clarity-international.net/membership/wheretosend.htm](http://www.clarity-international.net/membership/wheretosend.htm).

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.

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