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What works best for the reader? A study on drafting and presenting legislation

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Abstract

The study described in this article was carried out, in the United Kingdom, by the Office of the Parliamentary Counsel and The National Archives during 2012 to try and understand–

- *more about what it is like to be a reader of legislation, and*
- *whether particular drafting techniques or styles can assist readers of legislation.*

The study gave a much greater awareness of the difficulties readers of legislation face which in turn has–

- *prompted further work on the way in which United Kingdom legislation is presented online, and*
- *led to specific changes to drafting guidance, some of them quite subtle.*

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Background

The Office of the Parliamentary Counsel (OPC) is established as a central drafting office to draft most United Kingdom primary legislation (Bills that become United Kingdom Acts of Parliament) and some secondary legislation.

Among many other roles, The National Archives has the function of publishing all legislation in the United Kingdom, which covers Acts of Parliament and Acts of the Scottish Parliament, the National Assembly for Wales and the Northern Ireland Assembly; it also

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publishes secondary legislation. The National Archives publishes legislation both in print and online.[2]

OPC, like other legislative drafting offices across the United Kingdom, has adopted a generally "plain language" style of drafting.

Thirty years ago, when the plain language movement was in its infancy, there might have been enough of a gulf between what was then seen as "modern" and the style that had gone before for it to be obvious that *any* plain language version was clearer than the same text drafted in the old style. At that stage, the marginal improvement achievable by adopting one plain language style rather than another was perhaps not considered material. Now that drafters in the United Kingdom generally try to draft in accordance with plain language principles, the question whether some plain language drafting styles are clearer than others has assumed more importance.

Guidance for drafters in OPC (called, simply, "Drafting Guidance"[3]) consists of two parts. One is called "Clarity" and covers techniques for clear drafting. The other deals with specific drafting techniques and matters (such as numbering and the order in which standard provisions should appear) on which consistency between drafters is important.

Drafting Guidance is generally not prescriptive. Points on which it directs a particular approach are generally those where variations in drafting style are unlikely ever to be needed and would be likely to confuse readers. Many of the observations made in the "Clarity" part of Drafting Guidance are based on common sense and accepted tenets of good drafting. So, typically, in OPC it is left to a drafter to decide which of the possible versions is clearer. But is the drafter's view reliable? It must inevitably be based on the drafter's own judgement. But a typical drafter is not a typical reader of legislation – the drafter's experience of legislation cannot be unlearned and sets the drafter apart from most other readers.

This leads on to the question: is it possible to establish objectively whether one plain language technique is more effective than others?

And is there an optimum point beyond which the usefulness of some plain language techniques tails off? For example, does there come a point beyond which breaking a complex proposition down into more, shorter, sentences is counter-productive?

Embedded in those questions are some important elements. First, they cannot be answered theoretically, so an "objective" answer must be an empirical one. Further, in order to know whether a technique is "effective", one needs to know who is using the legislation and why. And it is important to be clear about what "effective" means here.

[2] www.legislation.gov.uk.

[3] www.gov.uk/government/publications/drafting-bills-for-parliament.

The study described in this article was designed to find answers to these questions and to test various prototype changes to the website on which legislation is published (legislation.gov.uk).

Who reads legislation and why?

While lawyers represent an important group of readers of legislation, typically accessing legislation through a subscription service (whether online or hard copy), there is now a very large audience of non-lawyers who will typically access United Kingdom legislation through www.legislation.gov.uk, which is a free-to-access United Kingdom government site run by The National Archives.[4] The site has around 2 million separate visitors per month and provides more than 400,000,000 page impressions per year.[5]

The National Archives has amassed a considerable body of research about users of legislation.gov.uk and from it has distilled three categories, for each of which it has constructed a "persona" to represent a typical member. The three categories identified by The National Archives, and their related personas, are–

- a non-lawyer who needs to use legislation for work, for example a police officer, a local council official or a human resources professional; a persona known as "Mark Green" is assigned to this category, which represents about 60% of users of legislation.gov.uk.
  - Mark Green might need to quote legislation as part of his work, for example if prosecuting a breach of environmental health law; typically he would not have access to legislation via subscription services.
- a member of the public seeking to enforce his or her rights or those of a relative or friend, such as rights to welfare benefit claims or appropriate educational provision for children with special needs; this category is assigned the "Heather Cole" persona.
  - Heather Cole might wish to quote legislation to give weight to her case, or to feel more confident of her own ground, or might have had a particular statutory provision invoked against her and want to see for herself what it says.
  - The Heather Cole category also covers the growing number of litigants in person.

[4] Many other Commonwealth and European countries have similar sites. See for example. http://laws-lois.justice.gc.ca/eng/ in Canada.

[5] www.gov.uk/government/publications/central-government-websites-reporting-on-progress-2012-2013 shows 49,317,302 visits in 2012-13; because of repeat visits to the website, this is a different measure from the number of separate users per month. In 2013-14 there were 440,568,153 page impressions.

- a lawyer; this category is assigned the "Jane Booker" persona.
  - Jane Booker represents all kinds of lawyers from senior lawyers in private practice to law librarians; she would typically have access to subscription services and would look at legislation.gov.uk alongside them.

It is not the purpose of this article to consider whether legislation ought to be written for judges and lawyers alone or for the public at large. As The National Archives' research has shown, there is in fact a very significant readership among non-legally qualified professionals and large numbers of members of the public actually read legislation.

In any case that would matter only if the aim of making legislation as readily understandable as possible for all readers, including non-lawyers, were incompatible with the requirements of judges and lawyers, principally, that legislation provides certainty, and that it is clear and no longer than necessary.

Effectiveness: understanding and preference

The study was designed to compare the effectiveness of different drafting techniques. For this purpose, a drafting technique was regarded as more effective if its use makes for legislation that is better understood.

Whether, and how easily, legislation can be understood is important. Legislation must not only give effect to the policy but also communicate it. If it fails to do that, it is not effective. If people cannot understand what legislation requires them to do, that is quite simply not fair. If they fail to do what is required because they do not understand what that is, the legislation is not having the desired effect. And if they just ignore it because it is too difficult to understand, that starts to undermine the rule of law.

Even if legislation is comprehensible, if it takes longer to understand it than it should, that time is an unnecessary economic cost: it means that advisers' fees are higher and small businesses and others dealing with legislation (such as the "Mark Green" persona) spend more time than necessary tied up with understanding it.

Readers' preferences are important, too. If legislation looks off-putting they may shy away from it, even if it is in fact comprehensible.

What readers prefer is not necessarily the same as what they understand best. And what readers think they understand best is not necessarily what they do understand best; rather it should be seen as a manifestation of preference. The point here is that measuring readers' preferences among various drafting techniques is not, by itself, a route to measuring the effectiveness of those techniques. It is quite possible that the two are correlated but that is something that cannot be established without evidence.

Surveys of readers' preferences have tended to produce quite general, impressionistic comments about the overall style of a document. It can be quite difficult to derive useful guidelines from that as readers rarely home in on a particular drafting technique. There have

been studies of the comprehensibility of legislation, comparing a whole Act with a version of it redrafted in plain English. Even if such a study can be used to show clearly how one version is easier to understand than the other, any results tend to relate to the whole of a version rather than particular techniques used in either version. Again it is difficult to translate those results into guidance about which particular techniques might be clear for a given proposition.

The object of the study was to compare various particular techniques and styles of drafting – and the aim was to do so in a way that made sure that participants actually engaged with legislation, rather than just reading it as a piece of prose. Whether people are more likely to *comply* with what they prefer or understand best is a separate question which the study did not seek to address.

Outline of the study

The National Archives funded the study as part of its regular user-testing; the study was conducted by Bunnyfoot Ltd. Its main object was–

- to find out whether it is possible to establish empirically whether some particular drafting techniques or drafting styles are better understood than others, and
- if so, to establish which techniques and styles are best understood.

This was done by means of–

- an *online survey* on legislation.gov.uk comparing small scale drafting techniques;
- *face-to-face user testing* designed, among other things, to compare other drafting techniques.

The three National Archives personas were central to both parts of the study; the online survey was carried out on the legislation.gov.uk website, whose readership is represented by those personas, and participants in the user testing were selected using criteria based on those personas. So, a further aspect of the study was to find out whether there are categories of readers who are an important part of the audience for OPC drafters but who do not fit any of the legislation.gov.uk personas.

The study began with a couple of sessions at OPC when drafters–

- identified the categories of reader for whom they write, to compare those categories with the legislation.gov.uk personas, and
- chose a handful of drafting techniques to test.

Online survey

The first part of the study was an online survey, designed to compare drafting styles. It lent itself to comparing ways of drafting quite short propositions.

The survey was part of one of The National Archives' regular surveys on legislation.gov.uk. Anyone who clicked onto that website over several days was invited to take part. Initially the survey appeared as a tab on one side of the home page; a few hundred people responded. For the final few days the survey was given far more prominence – anyone landing on the home page had to click past a pop-up invitation to take part in the survey – and there were far more responses. Participation in the survey was entirely voluntary.

The survey typically took more than 30 minutes to complete. Despite that, 1,901 people completed the survey and there were over 3,300 partial responses. Large numbers of people left comments or expressed their willingness to take part in further research.

The first part of the survey gathered data about participants.

The second part compared drafting styles for five topics. For each, OPC devised a short example (a subsection or two, or a short clause), and redrafted it in different ways. All the versions for each topic were intended to be examples of good drafting. Often, when a plain language version is compared with its predecessor version, the latter can appear grotesque and the plain language version obviously preferable. By contrast, the intention in the survey was that no version should be clearly "worse" than any other version in a way that might nudge participants to choose one rather than another. All the examples used were designed not only to be clear but also to provide certainty.

For each topic, participants were shown one of the versions, then asked a comprehension question; they were then shown one or two alternative versions (options) and asked "Which option do you feel would best support you to work out the answer to the question?" Finally they were invited to explain why they had chosen that option.

The comprehension questions were designed to require participants to engage with legislation in a way that they would have to do if applying it in real life.

The order in which participants saw the versions was rotated, so that different participants saw different versions before answering the comprehension question. However, there were some practical limitations. It was not possible to stop participants from going back and changing their answer to the comprehension question having seen the alternative version(s), nor was it possible to tell whether they had done this. It was also not possible to measure how long a participant took to answer the comprehension questions.

The topics tested and results are discussed in the next section. For each of the topics, however, the proportion of participants who answered the comprehension question for that topic correctly was broadly the same across the topic regardless of which version they were shown before seeing the comprehension question.

So the order in which participants saw the examples did not seem to affect significantly the likelihood of their answering the comprehension question correctly. But it is not possible to reach a firm conclusion on this because it was not possible to tell whether participants

changed their answers after seeing the other examples, and therefore whether the results would have been the same had they only seen the first example shown.

The five topics tested during the online survey

This section describes the five topics tested, records the material used, and discusses the findings for each of them.

Topic A: conditions

Examples

Option 1

Power of tribunal to impose financial penalty

Where an employment tribunal determining a claim involving an employer and a worker –

(a) concludes that the employer has breached any of the worker's rights to which the claim relates, and

(b) is of the opinion that the breach has one or more aggravating features,

the tribunal may order the employer to pay a penalty to the Secretary of State (whether or not it also makes a financial award against the employer on the claim).

Option 2

Power of tribunal to impose financial penalty

(1) An employment tribunal may order an employer to pay a penalty to the Secretary of State where Conditions A to C are met.

(2) Condition A is that the tribunal has determined a claim involving the employer and a worker.

(3) Condition B is that the tribunal concludes that the employer has breached any of the worker's rights to which the claim relates.

(4) Condition C is that the tribunal is of the opinion that the breach has one or more aggravating features.

(5) It makes no difference whether or not the tribunal also makes a financial award against the employer on the claim.

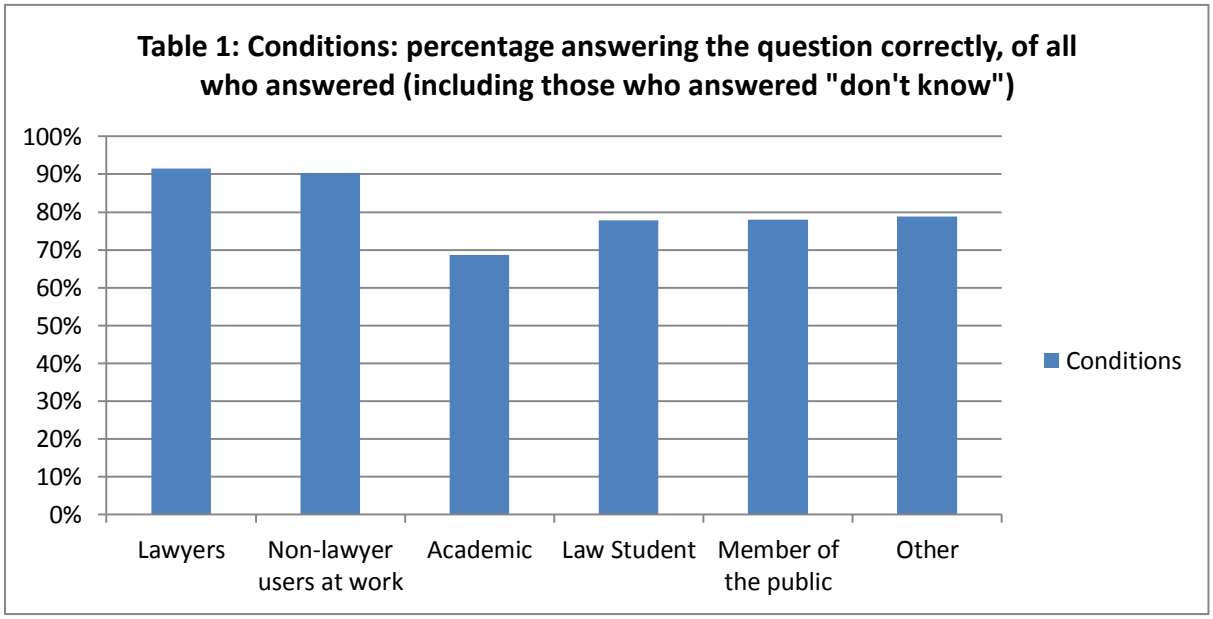
Question

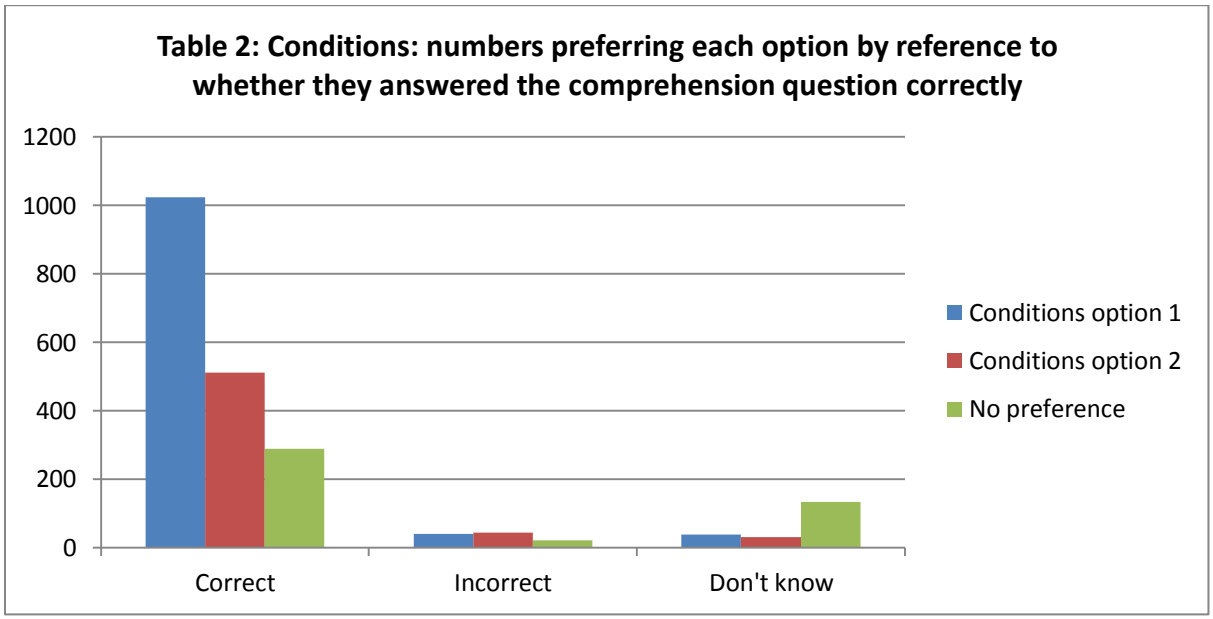
Bob, an employee of Trevor, makes a claim against Trevor in the employment tribunal for not allowing him time off work for trade union activities. The tribunal makes a declaration that Trevor has infringed Bob's entitlement to time off for these activities, and orders Trevor to allow Bob the appropriate time off in future. The tribunal also finds that, in turning down Bob's request for time off, Trevor used abusive language, which it decides was an aggravating feature. However it decides not to order Trevor to pay compensation to Bob.

May the employment tribunal order Trevor to pay a penalty to the Secretary of State?

- Yes (correct)
- No
- I don't know

Results





Discussion

Option 1 sets out a tribunal's powers in a fairly typical way in a single sentence. Option 2 breaks down the proposition into a series of separate conditions. It is typical of a style that has been used a lot in rewritten tax legislation in the United Kingdom.

Most people, in all categories of users, answered the comprehension question correctly (overall, 85% of participants who responded). As described in the previous section, that proportion did not depend on whether they saw option 1 or option 2 first. However, the likelihood of answering correctly did depend on the category of user. Professional users at work who are not lawyers but are familiar with legislation (those who fit The National Archives' "Mark Green" persona) showed a high level of comprehension.

Table 2 shows that most people preferred option 1. Of the very few people who answered incorrectly (less than 4%), slightly more preferred option 2 than preferred option 1, but the numbers were probably too small for it to be possible to read very much into this.

Option 1 has what is sometimes referred to as a "leading" structure ("If A, B and C, then X") whereas option 2 has what might be called a "trailing" structure ("X if A, B and C"; the consequence appears first and is followed by the conditions that must be met in order for the consequence to apply). It is sometimes suggested by advocates of plain language that a trailing structure is clearer, but that was not matched by the results of the survey. In fact, it was clear from comments made by participants in the survey that the leading/trailing structure was only one of a number of factors and less important than the fact that option 1 was a single sentence and option 2 was broken down into a series of short sentences.

This highlights two points–

- the nature of language makes it extremely difficult to isolate a single factor for testing;
- the most appropriate structure in one context may not be the most appropriate in another. The study was testing comprehension and preference in a document written with a view to making the law as a whole as clear as possible. It was not concerned with providing the reader with an incentive to read on. It is possible that a trailing structure might be more effective in ensuring compliance, which might make it more appropriate for a document designed for the purpose of bringing about behavioural change (such as guidance or advertising) where a statement of the consequence at the outset might catch the reader's eye and provide a reason to read on.

One result of this part of the survey is that OPC's Drafting Guidance has been revised so that it no longer encourages the use of conditions in the form of option 2.

Topic B: Formulas

Examples

Option 1

In this Part, "scheme transfer factor" means the amount of any sums transferred on the scheme transfer reduced by the relevant relievable amount and then divided by the standard lifetime allowance at the time when the scheme transfer took place.

Option 2

Definition of "scheme transfer factor"

In this Part, "scheme transfer factor" means –

$$\frac{T - R}{S}$$

where –

T is the amount of any sums transferred on the scheme transfer,

R is the relevant relievable amount, and

S is the standard lifetime allowance at the time when the scheme transfer took place.

Option 3

In Part, "scheme transfer factor" means –

$$\frac{A}{B}$$

where –

A is the amount of any sums transferred on the scheme transfer minus the relevant relievable amount, and

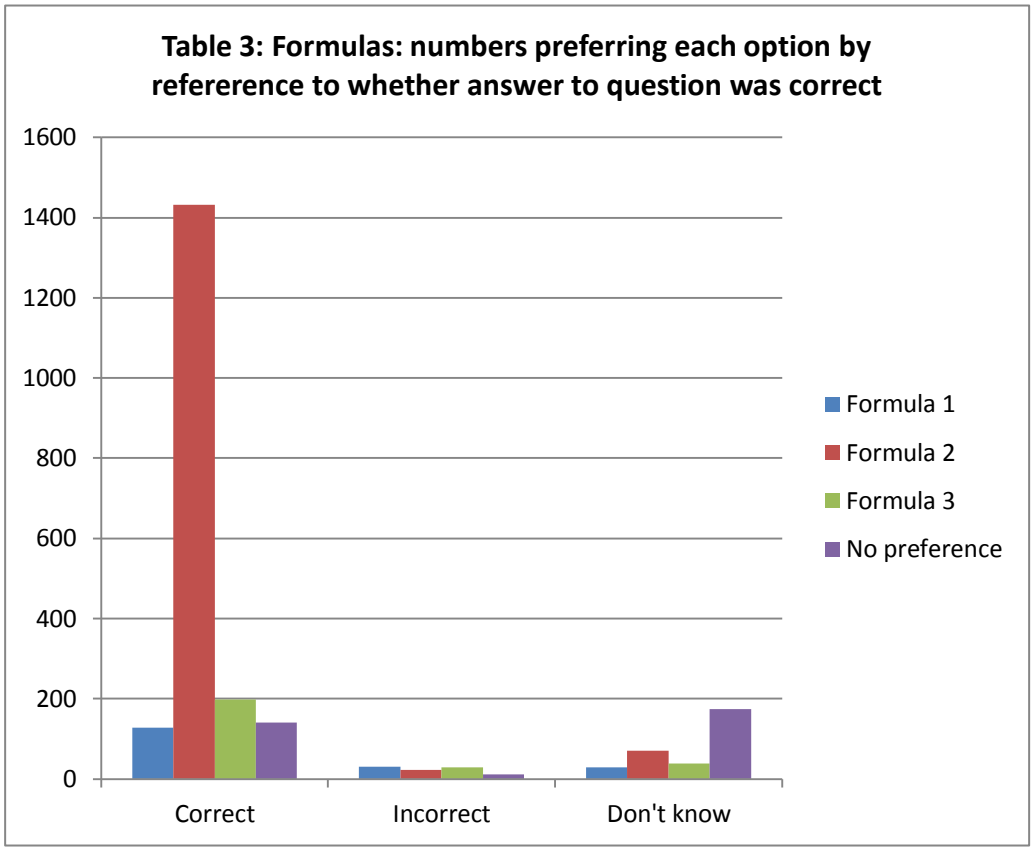
B is the standard lifetime allowance at the time when the scheme transfer took place.

Question

If the amount of sums transferred on the scheme transfer is £5,000, the relevant relievable amount is £1,000 and the standard lifetime allowance at the time when the scheme transfer took place is £200, what is the "scheme transfer factor"?

- 20 (correct)
- 30
- 4995
- or I don't know

Results



Discussion

Option 1 is purely narrative, option 2 is a straightforward formula and option 3 is a mixture of narrative and formula.

The vast majority of participants answered the question correctly and among those who did there was a very clear preference for option 2, the formula.

Interestingly, most of those who answered the question incorrectly actually preferred option 1 or 3 rather than option 2. Nevertheless, the numbers of incorrect answers were fairly small and the majority of those who preferred option 1 or 3 still answered correctly.

As a result of this finding, OPC's Drafting Guidance, which had previously advised caution in the use of formulas, has been revised to tilt the balance and support their use where the drafter considers it appropriate.

Topic C: "subject to"

Examples

Option 1

(1) Subject to the following provisions of this section, the Chief Officer for Environmental Protection may direct a person to take specified steps in order to remedy the effects of contamination of land or water described in the direction.

(2) A direction may only be given to a person under subsection (1) if, in the Chief Officer's opinion, the person is responsible for the contamination.

(3) The Chief Officer may not give a direction under subsection (1) unless he or she believes that direction is necessary –

(a) in the interests of the protection of wildlife;

(b) for the purpose of protecting one or more areas of woodland;

(c) subject to subsection (4), for the purpose of safeguarding the environmental well-being of the locality affected by the contamination.

(4) A direction is not to be considered necessary on the ground falling within subsection (3)(c) unless the Environment Agency certifies that the steps which the Chief Officer proposes to specify in the direction are proportionate having regard to the effects of the contamination.

Option 2

(1) The Chief Officer for Environmental Protection may direct a person to take specified steps in order to remedy the effects of contamination of land or water described in the direction.

(2) A direction may only be given to a person under subsection (1) if, in the Chief Officer's opinion, the person is responsible for the contamination.

(3) The Chief Officer may not give a direction under subsection (1) unless the Chief Officer believes that the direction is necessary –

(a) in the interests of the protection of wildlife;

(b) for the purpose of protecting one or more areas of woodland; or

(c) for the purpose of safeguarding the environmental well-being of the locality affected by the contamination.

(4) The ground mentioned in subsection (3)(c) may only be relied on where the Environment Agency certifies that the steps which the Chief Officer proposes to specify in the direction are proportionate having regard to the effects of the contamination.

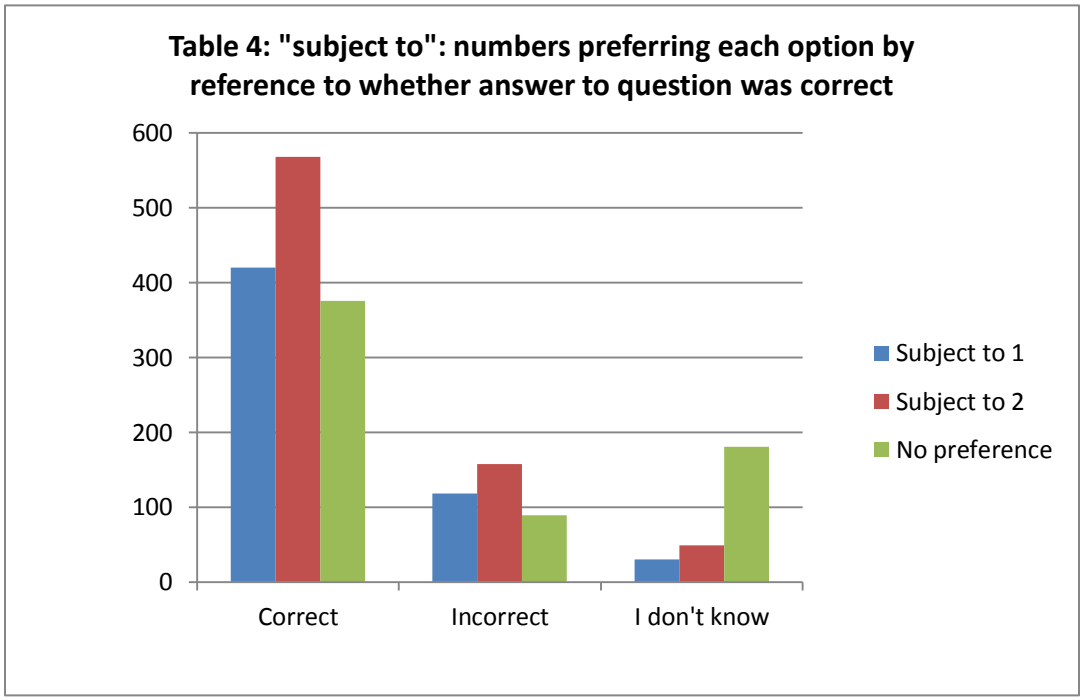
Question

An area of land has been contaminated. The Chief Officer for Environmental Protection believes that a direction is necessary for the purpose of safeguarding the environmental well-being of the locality affected by the contamination.

Can the Chief Officer give a direction (describing the affected land) to the person responsible for the contamination, specifying the steps to be taken to remedy its effects, without the Environment Agency certifying that the proposed steps are proportionate?

- Yes
- No
- I don't know

Results



Discussion

The examples deal with powers to give directions which are subject to qualifications. In option 1, the qualifications are indicated in subsections (1) and (3)(c) by the words "Subject to.....''; in option 2, the reader is not warned in subsections (1) and (3) that the powers to give directions are qualified and is therefore expected to read the whole provision.

The examples necessarily involve one proposition qualifying or elaborating another, so the examples were longer and more complex and fewer people got the answers right.

Although there was a marginal preference for option 2 it was not sufficiently marked to enable any conclusions to be drawn that beginning a proposition with the qualifying words "Subject to" either is helpful or is distracting and to be discouraged.

Topic D: "second sentences"

Examples

Option 1

(1) The Secretary of State may delegate to a person ("the delegate") any of the functions of the Secretary of State under this Part by giving a notice to the delegate.
But the Secretary of State may not delegate—
(a) a function of making regulations;
(b) a function under this section.

(2) The notice must specify—
(a) the functions that are delegated;
(b) the extent to which they are delegated;
(c) the conditions subject to which they are delegated;
(d) the references to the Secretary of State in this Part that are to have effect as references to the delegate.

(3) The Secretary of State may give a subsequent notice—
(a) revising or superseding the existing one, or
(b) withdrawing the delegation of a function previously delegated.

(4) Functions may not be delegated under this section without the consent of the delegate.
This does not apply if the delegate is the Bubble Gum Research Council.

Option 2

(1) The Secretary of State may delegate to a person ("the delegate") any of the functions of the Secretary of State under this Part by giving a notice to the delegate.

(2) Subsection (1) does not allow the Secretary of State to delegate—
  (a) a function of making regulations;
  (b) a function under this section.

(3) A notice under this section delegating functions must specify—
  (a) the functions that are delegated;
  (b) the extent to which they are delegated;
  (c) the conditions subject to which they are delegated;
  (d) the references to the Secretary of State in this Part that are to have effect as references to the delegate.

(4) The Secretary of State may give a subsequent notice—
  (a) revising or superseding an existing notice under this section, or
  (b) withdrawing the delegation of a function previously delegated under this section.

(5) Functions may not be delegated under this section without the consent of the delegate.

(6) Subsection (5) does not apply if the delegate is the Bubble Gum Research Council.

Question

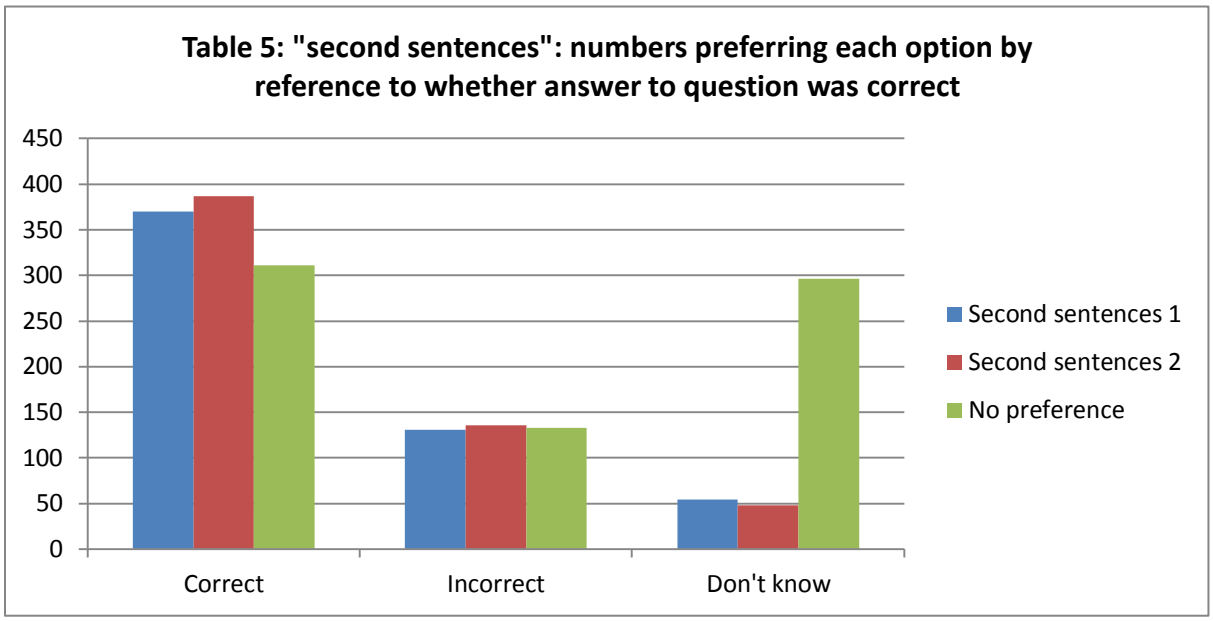
This section falls within Part 3 of the Act it comes from. One of the Secretary of State's functions under that Part is to assess the suitability of bubble gum manufacturers for being granted a bubble gum licence. Another of her functions under Part 3 is to make regulations about bubble gum licences.

The Secretary of State wants to delegate to the Bubble Gum Research Council her function of assessing the suitability of bubble gum manufacturers for being granted a bubble gum licence, and also her function of making regulations under Part 3.

Which of these statements is true? The Secretary of State is allowed to delegate to the Bubble Gum Research Council:

- Both of these functions
- Only one of these functions
- Neither of these functions
- I don't know

Results



Discussion

In the United Kingdom, sentences are the basic component of Acts. All Acts are divided into sections; sections may be undivided or may comprise a number of subsections. A subsection (including, for this purpose, a section that is not divided into subsections) is the main building block and generally consists of a single sentence. Thus, in general, each sentence in an Act is numbered.

Paragraphs and sub-paragraphs allow further means for separating out the subordinate components of a subsection, but they are not themselves sentences; rather, they allow the relationship between those subordinate components to be revealed.

Occasionally a second (unnumbered) sentence is used in a subsection. This happens typically where a subsidiary proposition is closely related to the first sentence or does not merit a subsection in its own right. A second sentence can be useful to signal, at the end of a subsection, that the subsection is subject to some other provision. This device offers a way to avoid opening the subsection with the possibly distracting, and certainly inelegant, phrase "Subject to subsection (x)".

The examples were designed to test whether the use of additional sentences, as in subsections (1) and (4) of option 1, were helpful or distracting. Again, no clear preference was shown for one style over the other. The proportions of participants who preferred option 1 and option 2 were more or less equal, regardless of whether they answered the comprehension question correctly, so a preference for one option over the other was not associated with better comprehension.

Topic E: "sandwich provisions"

Examples

Option 1

Offence in relation to export of prohibited or restricted goods etc

If—

(a) any goods are exported or brought to any place in the United Kingdom for the purpose of being exported, and

(b) export of the goods is, or would be, contrary to any prohibition or restriction,

the goods may be forfeited and any person knowingly concerned in the export, or intended export, of the goods is guilty of an offence.

Option 2

Offence in relation to export of prohibited or restricted goods etc

Goods may be forfeited, and any person knowingly concerned in the export or intended export of goods is guilty of an offence, if—

(a) the goods are exported or brought to any place in the United Kingdom for the purpose of being exported, and

(b) export of the goods is, or would be, contrary to any prohibition or restriction.

Option 3

If any goods are exported, or brought to any place in the United Kingdom for the purpose of being exported, and export of the goods is, or would be, contrary to any prohibition or restriction, the goods may be forfeited and any person knowingly concerned in the export, or intended export, of the goods is guilty of an offence.

(Option 4 was not tested.)

Option 5

(1) Subsection (2) applies if—

(a) any goods are exported or brought to a place in the United Kingdom for the purpose of being exported, and

(b) export of the goods is, or would be, contrary to any prohibition or restriction.

(2) The goods may be forfeited and any person knowingly concerned in the export, or intended export, of the goods is guilty of an offence.

Option 6

(1) Subsection (2) applies if—
  (a) any goods are exported or brought to a place in the United Kingdom for the purpose of being exported, and
  (b) export of the goods is, or would be, contrary to any prohibition or restriction.

(2) Where this subsection applies—
  (a) the goods may be forfeited, and
  (b) any person knowingly concerned in the export, or intended export, of the goods is guilty of an offence.

Option 7

If—
  (a) any goods are exported or brought to a place in the United Kingdom for the purpose of being exported, and
  (b) export of the goods is, or would be, contrary to any prohibition or restriction,

then—
  (i) the goods may be forfeited, and
  (ii) any person knowingly concerned in the export, or intended export, of the goods is guilty of an offence.

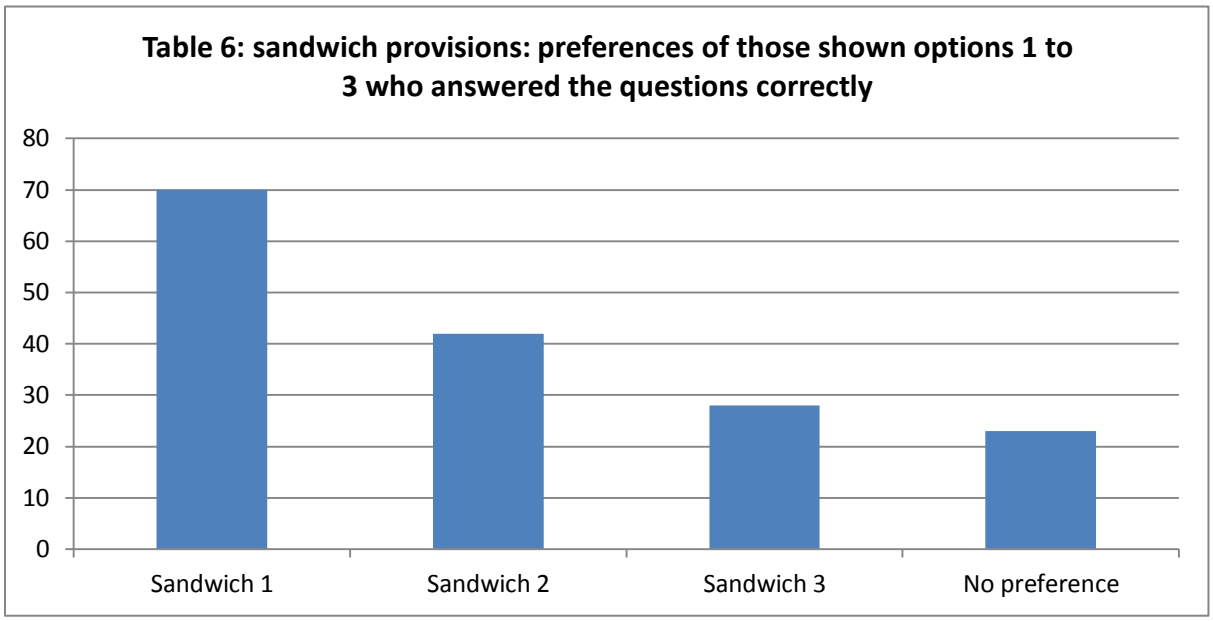
Question

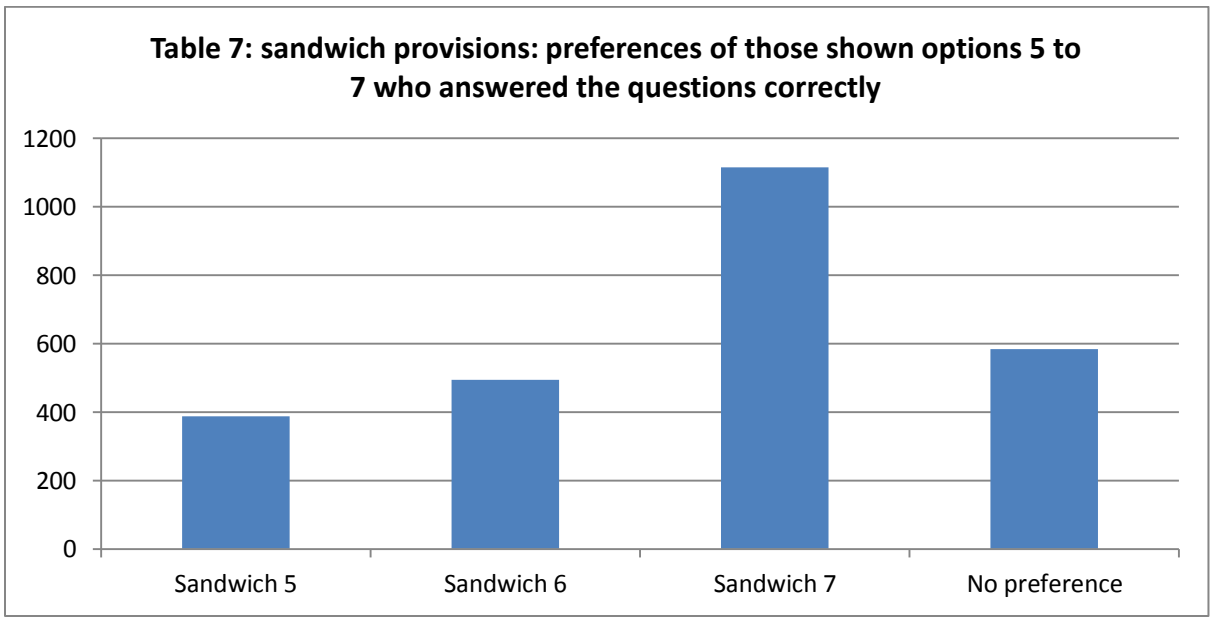
David and Ian plan to export some counterfeit handbags to France. Ian packs them up and David drives them to the port at Dover so that they can be loaded on to a ship. The Counterfeit Goods Act 1994 prohibits the export of counterfeit goods.

Select the statements that are correct (you may select as many as you want):

- Neither Ian nor David is guilty of an offence
- David is guilty of an offence but Ian is not because he did not bring the handbags to a place in the United Kingdom for export
- The handbags may be forfeited
- Both Ian and David are guilty of an offence
- Ian is guilty of an offence but David is not
- The handbags may be forfeited, but only if either David or Ian is convicted of an offence
- The handbags may not be forfeited
- I don't know

Results





Discussion

The final topic was what are sometimes referred to as "sandwich" provisions – provisions which have full out words at the beginning and end, with the text broken into paragraphs in between. Typically these are discouraged, and double sandwiches (which end with further paragraphing) are one of the few structures that drafters at OPC were directed not to use.

Six options were tested, with a complex question. As a result, the results cannot be analysed in the same way as for the other topics – though at least 80% of participants gave the correct answers. Options 1, 2 and 3 were compared with each other, and then options 5, 6 and 7 (option 4 was not used). Because the prominence of the survey on the legislation.gov.uk website changed, far more people saw the second group of options.

Option 1 was a typical sandwich provision with the consequence at the end; option 2 put the consequence in the chapeau and option 3 was not broken down at all. The participants shown those options showed a preference for option 1 but the numbers were quite small (approximately 160 altogether).

Many more people saw options 5, 6 and 7 (approximately 2,500). The style of options 5 and 6 is typical of the tax law rewrite in the United Kingdom: "the [next sentence] applies if ....."; in option 6, the double consequence was split out.

Option 7 is a double sandwich - "If (a) and/or (b), then (x) and/or (y)" - of the kind that is deprecated by most reputable authorities on plain language. It is a rare case of a construction that OPC drafters were directed, rather than just recommended, not to use. Surprisingly, option 7 proved popular, clearly more so than either of the options compared with it.

The limitations of the survey did not allow a comparison across all the options. Nevertheless, OPC Drafting Guidance has been revised to tone down the caution against the use of sandwiches, and the preference shown for option 7 over options 5 and 6 was sufficiently marked for the direction in Drafting Guidance against the use of double sandwiches to have been relaxed.

A double sandwich construction will be appropriate only occasionally, and the cases where it is the most appropriate construction are likely to be fairly rare. But the results of the survey show that there are propositions for which a double sandwich construction is the clearest approach.

The particular example used in the survey contained two conditions of commensurate importance that could be expressed briefly and together gave rise to two conclusions of approximately equal significance. Often the complexity of one or other of the conditions or conclusions, or their different importance, will militate against this approach.

So the firm conclusion that can be drawn from this part of the survey is a narrow one: it provides evidence for changing a general direction against the use of double sandwiches but does not provide evidence for identifying when they should be used.

Face-to-face user testing

Face-to-face user-testing was used to test drafting techniques that did not lend themselves to the online survey format.

This part of the study was used to test whether dividing material between clauses and schedules made it more difficult to understand, and to compare staccato and narrative styles of drafting. "Staccato" here is used to denote a style of drafting which breaks a complex legislative proposition down into a series of short, undivided, sentences, each dealing with a single point, whereas a narrative style typically uses longer sentences, which may contain subordinate clauses qualifying the main proposition, and may make use of paragraphing to provide structure.

As well as the drafting aspects, The National Archives used the user-testing sessions to test various prototype aids to understanding legislation for legislation.gov.uk, for example a "hover over" feature to highlight definitions, and, in the table of contents for an Act, greying out sections which are not in force.

Bunnyfoot conducted 12 sessions of 90 minutes, each with a participant who had been selected as matching one of the three personas developed by The National Archives as users of legislation.gov.uk. The sessions were recorded and could be observed by a video link. Eye-tracking was used to monitor how a user approached material when looking at it online.

The dominant, and unexpected, finding was the striking level of difficulty that users of legislation have in making sense of it. This greatly outweighed any observations about how one drafting style compared with another. Readers seem to have very little grasp of how legislation is structured and organised. Their "mental model" of it is simply not very good. This was true not just for members of the public but for participants of all types, including some of the lawyers. The sessions certainly challenged a drafter's assumptions about the audience for legislation.

For example–

- there was very little understanding of what it meant for a provision to have been enacted but not be in force, or of what the term "commencement" meant;
- a typical section introducing a schedule – "Schedule 2 makes provision about ....." – left more than one reader completely stumped; modern United Kingdom legislation would not use the italicised words in the expression "Schedule 2 to this Act", but perhaps the desire to streamline has in this instance produced an unexpected outcome;
- even straightforward cross-references to "subsection (2)" or "paragraph 3" were a problem, not so much because readers had to interrupt the flow of their reading, as because they simply did not know what a subsection or paragraph was, so did not know what was being referred to;
- terms like "prescribed", meaning "prescribed by regulations", perplexed and frustrated most readers, some of whom were unsure what regulations were and did not know where to look for them;
- when looking at legislation online, readers tend to click straight through from the table of contents to the provision that appears from its title to be of interest, and may

well not look at the surrounding provisions that are needed to understand it properly – and which the drafter may assume that they will have read.

The user testing was intended to compare drafting styles, but what emerged from it was that the more pressing need is to help readers to "find their feet" when reading legislation.

Some of the difficulties identified could be tackled either by changes in drafting practice or by changes to the way that legislation is presented, and work on both approaches continues. It has provoked quite a radical rethink on how legislation is presented on legislation.gov.uk on which The National Archives and OPC have taken work forward together. And new legislative proposals[6] have been considered to provide a means for legislation to read more straightforwardly.

As regards changes in drafting practice, a small number of discrete changes have been made to Drafting Guidance to reflect particular findings made in the study; for example drafters should now refer to a provision coming into force, rather than commencing.

But, more significantly, the study has provided a new awareness of readers' difficulties and a renewed impetus to produce drafts that people might stand a chance of being able to understand. Drafters who observed any of the user testing sessions described them as "eye-opening" and "arresting". Watching participants struggle with things that many drafters would take for granted as being intelligible left a profound impression.

Telephone interviews

Because participants in the online survey and the user testing sessions were largely confined to the personas developed by The National Archives, the study also tested whether those personas cover all the categories of people who use legislation or whether there are categories of people for whom drafters at OPC write who aren't covered by them.

Drafters at OPC identified the following groups of users of legislation who do not at first sight clearly match any of The National Archives' personas-

- Members of Parliament and Ministers
- Policy officials and Bill managers
- Parliamentary officials
- Lobby groups
- Judges
- Government lawyers
- Private lawyers who read legislation through subscription services

[6] Clause 67 of the Deregulation Bill as amended in Public Bill Committee (House of Commons Bill 191 printed on 26 March 2014) would if enacted confer a power to allow references in an Act to, for example, "the date on which this section comes into force" to be replaced with the actual date once the section had come into force.

A small number of people kindly agreed to take part in 30 minute telephone interviews which were carried out by Bunnyfoot, and in which they were asked the same questions as had been used in developing the personas originally.

The outcome was that, with the exception of Members of Parliament (including Ministers), users in all the categories identified matched one or other of the existing personas. So far as Members of Parliament are concerned, the information at this stage is quite sketchy and further research would be needed before it would be possible to make any generalisation.

The interviews highlighted the raft of information that is produced alongside every Bill, including Explanatory Notes, House of Commons briefings for Members, impact assessments and memoranda about particular aspects of the Bill, such as human rights, and powers delegated to Minsters and others.

Reflections on the study

Not surprisingly, the survey did not produce conclusive evidence that any one drafting style is generally clearer or better understood than another.

One reason is the difficulty of identifying a particular drafting style so that it can be tested in isolation without other factors impinging. And the study could only test a single set of examples for each drafting style. As every drafter knows, every context is different; what is clearest in one context or one kind of situation may not work so well in another context where other factors may be more important.

While the order in which a person saw differently drafted examples of the same proposition did not seem to affect the person's understanding (measured by being able to answer the comprehension question correctly), and the survey was able to identify which style was preferred by those who understood the proposition, that does not *prove* that the preferred style made it more likely that the person would understand the proposition. Further work would be needed for that. Nevertheless it seems reasonable to give some weight to the preferences of those who got the right answers.

Even though the study did not produce positive evidence in favour of general rules that some drafting styles should be used in preference to others, it did provide some evidence *against* general rules that some drafting styles *should not* be used.

The results suggest areas where further research might be profitable.

As already mentioned, it is not the purpose of this article to consider whether legislation ought to be written principally for judges and trained lawyers. In fact, members of the public reading legislation require certainty and clarity just as much as lawyers and judges; all the examples tested were designed to meet those requirements. While some lawyers are highly skilled and very experienced users of legislation, it was evident from the user testing that many lawyers struggle with it at least as much in reading legislation as a lot of non-lawyers.

The examples used were not drafted with particular audiences in mind, but, with one exception, none of the examples was significantly longer than those with which it was compared. The exception was option 2 of the conditions topic, which was markedly less popular than the shorter option.

Together these suggest that the question whether drafters should focus on a primary audience of trained lawyers may be hollow, anyway. It is possible that legislation written principally to meet the requirements of even the most highly skilled judges and lawyers may not in fact be different from legislation written to be as clear as possible for a wider audience. Although the study does not provide evidence for it, the findings are compatible with this proposition.

A more significant working hypothesis suggested by the study is that expressing a proposition in a single sentence, using the layout (including paragraphing) to show its structure (and what is subsidiary), with plenty of white space to make this readily apparent, will often be clearer than breaking the same proposition down into a series of shorter sentences.

A disadvantage of breaking a proposition into shorter sentences (typically, in legislation, a series of subsections) is that part of the reader's attention is diverted from the main proposition into understanding–

- each of the shorter propositions as a proposition in its own right, and
- how those propositions are to be assembled.

In effect, the drafter is introducing a joint into the main proposition and, in order to understand the main proposition, the reader has to understand both the constituent parts and how the joint works.

Another disadvantage of breaking a proposition into a series of shorter unparagraphed sentences, in the form of a series of subsections, is that each runs from the left margin, so all appear to have equal significance and it is not readily apparent how they are related. In a longer sentence, or subsection, paragraphs and sub-paragraphs can be used to show how the components are related.

The results of the study cannot be said to provide evidence *for* this working hypothesis, but tested against it, none of them is inconsistent with it. Indeed, it could perhaps be said to explain the clear preference for the double sandwich option in the sandwich provisions test.

Three final observations

The previous section considered what was learned *from* the study. This article concludes with some observations *about* the study.

- An online survey of the kind described in this article can clearly be a very effective way of comparing two drafting styles – where the comparison can be done using quite short examples.

- An abundance of feedback is available from readers of legislation.
- User testing may produce startling results. Unexpected observations, which may have nothing to do with what is being measured, may turn out to be the most potent and thought provoking.

It would be difficult to overstate the profound sense of realisation with which drafters observing the user testing sessions came to recognise the difficulties that ordinary readers have in reading ordinary legislation.

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