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**Want to know the law? It'll cost you**

**Law Texts and Legislative History**

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**Summary**

1. Governments should accept that dissemination of the law is not something that can be privatised and used to raise revenue. Every official text which forms the law, or is used to interpret the law, should be treated as being in the public domain, without restriction on, or charge for, its dissemination. Even then legislative complexity means we are a long way from 'getting the message across'. To understand the problems caused by this we need to look closely at the nature of law texts.
2. Lawyers are involved with law texts from two points of view: comprehension and creation. They need to be able to comprehend and manage technical law texts and they need to know how to draft both technical and non-technical law texts. The audience for law texts is divided into lawyers and non-lawyers. We need to 'get the message across' to non-lawyers, but the biggest stumbling block is first communicating the law to lawyers themselves.
3. Law texts can be divided into (1) technical and non-technical texts; (2) texts which do or do not 'embody' the law, (3) official and unofficial texts; (4) fact-general and fact-specific texts.
4. As to technical texts, we should recognise unashamedly that law is an expertise, and technical language is necessary to its functioning. We should accept that this cannot be fully understood by non-experts. It can be dangerous for lay persons to be led to think they can understand a technical text without expert help: it may cause them to mistake what the law is.
5. A law text should be couched in language comprehensible to those who will be its readers, even if it may not be comprehensible to others. Thoughts of the latter must not deflect the drafter from expressing the text in the way which will best achieve its purpose.
6. There are some linguistic limitations that apply equally both to technical and non-technical texts. Legal technicalities are of five kinds: some of which overlap: (1) terms of art; (2) references to, or unexpressed reliance upon, legal rules or doctrines; (3) references to, or unexpressed reliance upon, legal sources; (4) expressions in a foreign language, e.g. Latin; (5) archaisms.
7. Technical law texts can be divided into: (1) texts embodying the law; (2) texts embodying the history of a legal rule; (3) juristic writings; (4) unofficial procedural texts; (5) acts at law; (6) legal opinions. If the text is intended for a professional audience it would often be inappropriate, and sometimes impossible, to try to word it as if a lay audience were intended. Too much would need explaining. Matter might be expressed too simply to do the job.
8. One constraint on the language of new legislation is the need to have regard to the wording of the existing law. Another is that obscurity in legislation is very often caused not by unnecessary complication of language but by complication (whether unnecessary or not) of thought. A further

cause of complication is that a Bill has to undergo debate and amendment in both Houses, to which the answer may be post-enactment processing.

9. Non-technical law texts are: (1) explanatory texts intended to guide lay legislators considering a parliamentary Bill or other draft legislation; (2) official explanations intended to inform the public about a law; (3) official forms such as tax returns or driving licences; (4) correspondence between lawyers and their clients; (5) books, newspaper articles and other unofficial writings intended to inform the public about a law; (6) other legal texts intended for lay readers.
10. The lawyer's art and skill of comprehending, manipulating and drafting technical law texts and drafting non-technical law texts amounts to what may be called law management. How well the law is communicated depends on how efficiently this technique is carried out by practitioners. It is capable of extensive improvement.
11. The precise function of legislative history in interpretation is determined by where the line is currently drawn by the courts. On a strict view this history should be irrelevant, since the object of Parliament is to express its will entirely within the definitive text of the Act itself. That was the basis of the parol evidence rule. The essence of statutory interpretation now lies in resolving the dichotomy between the 'pure' doctrine that the law is to be found in the Act and nowhere else, and the 'realist' doctrine that legislation is an imperfect technique requiring, for the social good, an importation of surrounding information.
12. In England the courts, in *Pepper v. Hart*, recently relaxed the rule forbidding reference to Hansard in interpretation. Recourse to legislative history complicates the law however. Ministers say an Act will be administered in one way, and then it is administered in a different way. Conflicting statements as to meaning may be made in Parliament. The decision in *Pepper v. Hart* has affected the way ministers and others express themselves in the Westminster Parliament.
13. Increased recourse to legislative history may affect drafting practice. The drafter may become discouraged, and take less care about precision of language. The drafter may demand an input on how ministers' words are chosen. Indeed the drafter may end up drafting not only the legislative text but the minister's speech also. Drafters may try to make their drafts 'minister-proof' by stating more propositions expressly and leaving less to implication.

## **Full Text**

### **Introductory**

14. I am honoured to have been asked to contribute to a discussion on a topic very near to my heart, communicating the law.
15. Our statute law is notoriously difficult to grasp. Equally notorious is the reluctance of governments, at least in modern times, to recognise this. We have a current example in the United Kingdom, which is relevant to the first topic in tomorrow's afternoon session. Under recent copyright legislation, unreasonable restrictions are being imposed by Her Majesty's Stationery Office (HMSO) on the publication of statutes, statutory instruments and related texts such as codes of practice, official guidance circulars and the Highway Code. Not only are HMSO demanding payment of royalties for permission to reproduce the material, but in some cases they are refusing to allow publication by anyone but themselves on any terms. British law publishers have been driven to make a public protest about this, which I believe should be strongly supported.<sup>1</sup>
16. Acts of Parliament, like all our laws, are fully binding even upon persons who can have had no opportunity to read them or even to learn of their passing. This goes back to the fourteenth century, when Chief Justice Thorpe said that 'every one is bound to know what is done in

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<sup>1</sup>The protest is reported in *The Times*, 20 June 1994.

Parliament, even although it has not been proclaimed in the country; as soon as Parliament has concluded any matter, the law presumes that every person has cognizance of it, for Parliament expresses the body of the realm.<sup>2</sup> Later Lord Ellenborough put it in this way: ‘Public Acts of Parliament are binding upon every subject, because every subject is in judgment of law privy to the making of them, and therefore supposed to know them . . .’<sup>3</sup>

17. It follows that the Government has a duty to ensure that statute law is widely promulgated, and that no obstacle is placed in the way of this. Certainly no royalty or other charge should be exacted from anyone who disseminates the law. They are doing the Government’s job for it.
18. Before the development of mass media of communication this spreading of knowledge was accomplished through the action of the king’s officer, the sheriff. In England statutes were proclaimed in the county court, successor to the Saxon shire moot, of which in medieval times the sheriff was president. He was required to proclaim the statute not only in the full county court but also in the townships. He had to make copies and transmit them to knights of the shire, justices of the peace and other leading figures.<sup>4</sup>
19. In 1796 the authorities in England ordered printed copies of the statutes to be distributed throughout the country without charge as soon as possible after enactment. In 1801 the House of Commons passed a resolution requiring the King’s Printer to supply copies of Acts, again without charge, to listed judicial and administrative officers. This practice continues. The list, which is revised from time to time, is known as the promulgation list.
20. Governments should accept that dissemination of the law is not something that can be privatised and used to raise revenue. No official text which forms the law, or is used to interpret the law, should be restricted in any way. From the start, it belongs in the public domain.
21. Even if that principle were accepted (and today it is under challenge), we would still be a long way from getting the message across, to use the subtitle of this seminar’s topic. Statutes have become too complicated for a promulgation list to be much help. To understand the problems this causes, I believe we need to look closely at the present nature of law texts. After all, they are what we have to ‘get across’.

### **Modern law texts**

22. Let me start with some definitions. By a law text I mean any document in legal language. By legal language I mean language used by a lawyer about the law. By a lawyer I mean anyone with legal expertise, whether they qualified as a barrister or solicitor or as some other professional such as a planner or accountant. By legal expertise I mean the skilled professional knowledge and experience possessed by a competent lawyer. (I acknowledge the circularity of these definitions: this time round, we are not bound by the rules of philosophy.)
23. Lawyers are involved with law texts from two points of view: comprehension and creation. They need to understand law texts and they need to know how to create, that is draft, them. To be a little more precise, lawyers need to be able to comprehend and manage technical law texts and they need to know how to draft both technical and non-technical law texts. (It is assumed that lawyers will have no problem with understanding non-technical law texts since, if properly drafted, these should be capable of being followed by anyone of normal education and intelligence.)
24. What about non-lawyers, you may ask? Isn’t it of them the organisers of this seminar are mostly thinking when they title it COMMUNICATING THE LAW: GETTING THE MESSAGE

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<sup>2</sup>*R. v. Bishop of Chichester* (1364) Y.B. 39 Ed. 3 fo. 7. Cited in abridged form in 4 Co. Inst. 26.

<sup>3</sup>*R v Sutton* (1816) 4 M & S 532 at 542.

<sup>4</sup>1 Stat. Realm, Intr. p. lxxxvii. See also 4 Co. Inst. 26, 28; 1 Bl. Comm. 184.

ACROSS? Well maybe it is, maybe it isn't. I have a feeling the biggest stumbling block is communicating the law to lawyers themselves. Unless lawyers are clear about the nature and characteristics of law texts there is not much chance that anyone else will be.

25. So let's look at some categorizations. Let's first look at a categorization about the audience for law texts, dividing their readers into lawyers and non-lawyers.
26. Law is an expertise, though some language reformers deny this. They believe that even technical law texts should be capable of being understood by non-lawyers. (Or possibly they believe that there should not be any technical law texts, which amounts to the same thing.) These reformers confuse what is desirable with what is practicable. If they were right we would not need law schools, and experience would count for little. They are not right. Technical legal language is necessary to the functioning of the law. It cannot be fully and accurately understood by non-experts in law, any more than technical medical language can be fully and accurately understood by non-experts in medicine. They have not studied or practised the body of knowledge of which it is a reflection.
27. Yes, legal texts are a reflection of law. It could be said that law is nothing but text, since it has to be expressed in language. We prefer to think of it as more substantial than that. Law is the will of society as to how its affairs are to be organized and run. Language is its reflection, and skill in handling that language is what makes a lawyer.

### **Categorizations of law texts**

28. I suggest that the first step in acquiring this basic skill is to understand four further categorizations, which govern legal texts themselves. The most important divides technical and non-technical texts. Because of its complexity, I will leave it till last.
29. *Texts which do or do not 'embody' the law* The second categorization is between texts which actually constitute the law and other texts. Those in the former sub-category, which we may call 'texts embodying the law', are always official texts and are always in technical language. Those in the latter sub-category may be in technical or non-technical language.
30. Examples of texts embodying the law are an Act of Parliament and a Court of Appeal judgment. Examples of texts not embodying the law which are in technical language are: pleadings, a hire-purchase contract and a conveyance. Examples of texts not embodying the law which are in non-technical language are: an income tax return, a statutory notice and a solicitor's letter to a client.
31. An important species of law text not embodying the law is documents, such as items of legislative history, which may be used by the courts in arriving at the legal meaning of a text which does embody the law. This material may be in technical language (e.g. an official circular addressed to professionals) or in non-technical language (e.g. a passage in Hansard, the official report of parliamentary debates). As the subject of this session is the influence of the use of legislative history by the courts on the drafting, enactment and interpretation of legislation, I shall be considering this type of material in more detail later. I pause here to point out, to anyone still not convinced that law is and must be an expertise, that the use of legislative history in interpretation is itself a highly complex subject, and complicates the law. It is also controversial, as we shall see.
32. *Official and unofficial texts* The third categorization of law texts is between official and unofficial texts. All texts embodying the law are official. Texts used to help in construing the law may be official, such as the examples just mentioned, or unofficial (e.g. a textbook or article). Other official texts not embodying the law include correspondence by government departments, local authorities etc. Much legal writing is unofficial, being drafted by professionals in the course of their private practice or private-sector employment. It may be in technical or non-technical language.
33. *Fact-general and fact-specific texts* The fourth categorization divides legal texts into fact-general texts and fact-specific texts. The former deal with facts in a collective way, and apply whenever

particular facts conform to the description laid down. Thus an enactment might say 'Where a person commits an indictable offence, any constable in uniform may arrest him or her'. This applies whenever any person commits an indictable offence. On the other hand a contract by which a trader agrees to supply identified goods is fact-specific.

34. An important area of law management is concerned with the technique of applying a fact-general text to a particular case. This is brought into play whenever a lawyer has to advise on, argue, or otherwise deal with, the way a legal rule affects the circumstances of his or her client. It also applies where a fact-general unofficial text, such as a contract of employment, needs to be construed in relation to some particular factual situation that has arisen.
35. So there are the four categories. Their use is to help lawyers avoid woolliness in thought and discussion. We gain in precision and accuracy of working if we can identify a particular text as say 'a fact-general official text which does not embody the law and is (or ought to be) expressed in technical language' or 'a fact-specific unofficial text which does not embody the law and is (or ought to be) expressed in non-technical language'.

### **Technical and non-technical legal language**

36. As we have seen, law texts fall into the sub-categories technical and non-technical. The former may contain what is unkindly called jargon. Another pejorative term is legalese, defined by the Oxford English Dictionary (O.E.D.) as the complicated technical language of legal documents.<sup>5</sup> This is intended to be read by lawyers, while non-technical language is intended to be read by non-lawyers.
37. A text should be designed for its intended audience. It should be couched in language comprehensible to those who will be its readers, even if it may not be comprehensible to others. The others do not matter, since the text is not for them. Thoughts of them must not deflect the drafter from expressing the text in the way which will best achieve its purpose. So a technical text must be as brief as possible, eschewing explanations which are not needed by the experts to whom it is addressed. It must use the correct technical language, rather than some less biting paraphrase or précis. It is true that the desired effect can sometimes be achieved without the use of special language. However it takes a lawyer to know whether simple words in what should be a technical text really have achieved their aim. Very often, as with home-made wills and contracts, it will be found, sometimes by bitter experience, that they have not.
38. There is confusion about all this among legal language reformers. Some of these recently formed the body known as CLARITY, which publishes a journal of that name. It describes itself as 'a movement to simplify legal English'. Here it is useful to remember that apart from differences in the readership of law texts there are practical limitations on clarity imposed by the nature of language. Often particular words do not have a clear meaning, or have several meanings. Also there are broad terms used to confer discretion on the interpreter, or authorise the exercise of judgment in choosing from a range of meanings. Another language problem is that of differential readings. Here people may legitimately and genuinely differ in their perception of the meaning of a passage, even though it does not use broad terms. Lord Dilhorne said: 'due in part to the lack of precision of the English language, often more than one interpretation is possible'.<sup>6</sup>
39. These are linguistic limitations that apply to both kinds of legal text, technical and non-technical. These types of text, as I have said, are intended for different readerships, the expert and the non-expert. How is that manifested? The essence is that one type is necessarily arcane while the other

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<sup>5</sup>2nd edn., 1989.

<sup>6</sup>*Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G.* [1975] A.C. 591 at 622.

is not, or ought not to be. Legal technicalities are of the following five kinds, some of which overlap.

1. Terms of art.
  2. References to, or unexpressed reliance upon, legal rules or doctrines.
  3. References to, or unexpressed reliance upon, legal sources.
  4. Expressions in a foreign language, e.g. Latin.
  5. Archaisms.
40. *Terms of art* Every expertise has its terms of art, that is expressions which convey meaning to the expert but have little or no significance for outsiders. Law has many of these.
41. *Legal rules or doctrines* A technical text may refer expressly to a legal doctrine such as the doctrine of consideration in contract or the requirement of mens rea (guilty mind) in a criminal case, or a feature of property law such as the rule in Shelley's Case or the rule against perpetuities. Or there may be an implicit reference to legal doctrines, for example those embodied in what is called legal policy. This has been evolved by the courts when deciding cases. It comprises such basic principles as the presumption against doubtful penalisation and the rule preventing a person being condemned unheard.
42. *Legal sources* A technical text will often refer, expressly or by implication, to some text embodying the law. A lay person cannot be expected to have access to this, or be able to understand it fully if they do.
43. *Expressions in Latin etc.* Early English law was expressed in Anglo-Saxon or Danish, according to whether the territory was Wessex or Mercia or the Danelaw. The very word law is of Danish origin. Later, medieval French and medieval Latin took over. Many words and phrases in these languages survive in modern English law. In 1994 an English judge complained about the presence in the law of theft of 'the antiquated finery of "choses in action" from the law French chose, a thing.<sup>7</sup> Often it is difficult to translate such terms without altering their legal meaning, though 'thing in action' has gained acceptance. Some foreign-language expressions stand for principles or doctrines which might appear intended to be changed if another term were used.
44. *Archaisms* Lawyers tend to be conservative and resistant to change. This is for good reason. Once a form of words becomes established, and it is known that it effectively does the job required, it may be unwise to change it merely to update the language. The new untried wording might be held by a court to be defective. 'There is a safety in forms and precedents which readily commends itself to any professional man who has to advise clients.'<sup>8</sup>
45. The drafter of the English Companies Act 1981 tried to update the language of earlier enactments reproduced in that Act. The result was thus dismissed by Millett J: 'This case illustrates the dangers which are inherent in any attempt to recast statutory language in more modern and direct form for no better reason than to make it shorter, simpler and more easily intelligible'.<sup>9</sup> The judge held that the redrafting had produced an unintended change in the law whereby foreign subsidiaries were now enabled to buy the shares of their English holding companies.
46. Useful and helpful words in ordinary use fall out of fashion. They then appear archaic if lawyers continue to employ them. Examples are words like hereby and herein, thereby and therein and said and aforesaid. All these are much disliked by language reformers. Yet they are concise and useful. Reformers object to them because it is said they obscure the meaning for the client, who is

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<sup>7</sup>R. v. Hallam (1994) *The Times*, 27 May.

<sup>8</sup>J.H. Baker, *An Introduction to English Legal History* (2nd edn. 1979) p. 75.

<sup>9</sup>*Arab Bank plc v. Merchantile [sic] Holdings Ltd.* [1994] 1 All ER 74 at 76.

likely to regard them as lawyers' jargon. Yet a reference to 'any warranty herein' is shorter and just as informative as 'any warranty contained in this agreement'. A legal document will refer to a payment 'receipt of which is hereby acknowledged'. Reformers would omit 'hereby' as surplusage. But it does make clear that it is no use looking elsewhere for a receipt.

### **Sub-categories of technical law texts**

47. Technical law texts can be divided into six sub-categories: (1) texts embodying the law; (2) texts embodying the history of a legal rule; (3) juristic writings; (4) unofficial procedural texts; (5) acts at law; (6) legal opinions. These I will now briefly examine one by one. Then I will look at the nature of non-technical law texts.
48. *Texts embodying the law* The most important technical texts are those in which the law itself is embodied. As I have said, they also form a sub-category in another categorization, which distinguishes them from law texts not embodying the law, and they fall within the further sub-categories of official texts and fact-general texts.
49. Here we are concerned with the language in which law is expressed. It may be the language used by Parliament when legislating, or by the executive when framing subordinate legislation, or by the courts when issuing their judgments. The first two are in the language of command. The last is in more discursive terms.
50. The courts and other constitutional bodies cannot function without rules of procedure. These official procedural texts form part of what is called adjectival law, as opposed to the substantive law that grounds substantial legal rights and claims. Adjectival law is the machinery that enables rights to be delivered and claims to be enforced.
51. *Language of legislative texts* As I have said, what is clear to a skilled professional cannot be expected to be always clear to a lay person. Indeed if the text is intended for a professional audience it would often be inappropriate, and sometimes impossible, to try to word it as if a lay audience were intended. Too much would need explaining. Matter might be expressed too simply to do the job. 'What appears clear to the layman may not be certain in meaning to the courts; and much of the detail in legislation, which can appear obfuscatory, is there to make the effect of the provisions certain and resistant to legal challenge'.<sup>10</sup>
52. One inexorable constraint on the language of new legislation is the need to have regard to the wording of the existing law. An Act intended to amend the law (as most Acts are) must fit snugly into the existing corpus juris or body of law as well as expressing the reforming intention of the legislator. It must accommodate not only the existing language (which may well be unnecessarily complex if we could start again) but also the existing concepts. I say this with feeling, remembering desperate occasions when I strove to draft a Finance Bill clause so that it fitted effectively into the tangled mess that is the English Income Tax Acts and did not cost the country millions in lost revenue.
53. Another point to note is that obscurity in legislation is very often caused not by unnecessary complication of language but by complication (whether unnecessary or not) of thought. When I started drafting the Sex Discrimination Act 1975 I began by writing 'A person discriminates against a woman if on the ground of her sex he treats her less favourably than he treats or would treat a man'. The intolerable complexity of that Act arose not from any wish of mine but because those instructing me insisted on overlaying it with innumerable refinements, exceptions, conditions and exclusions. In doing so they were genuinely seeking to conform to the popular

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<sup>10</sup>Evidence of the Association of First Division Civil Servants to the Hansard Society Commission on the Legislative Process, cited in paragraph 219 of *Making the Law*, the report of the Commission, issued on 2 February 1993.

will as manifested in representations from trade unions, women's groups, employers' organisations and other lobbies.

54. There are further causes of legislative complication. An obvious one is that a Bill has to run the gauntlet of parliamentary debate and amendment in both Houses. This imposes specific requirements on the drafter.<sup>11</sup> The drafter could usually produce a much better text if free to start all over again rejigging the finished Act. Consequently I have advocated improving the presentation by post-enactment processing, without of course altering the basic official wording.<sup>12</sup>
55. *Language of court judgments* Some language reformers say a court should ensure that its judgment can be directly understood by the litigants. Thus Robert Eagleson insists that-
56. 'Accuracy or correctness of content is not sufficient, There also has to be comprehension. If parties to the proceedings are going to appreciate the reasonableness of the ruling - or at least grant it some credence - then they must be able to understand it'.<sup>13</sup>
57. Eagleson's meaning is that the parties, usually lay people, must be able to understand the judgment directly, just by hearing or reading it. This is absurd. A judgment is a technical legal text, not a non-technical one. It is primarily addressed to experts. It cannot be expressed in language suitable for non-experts without failing in its function.
58. In any case it is dangerous for lay persons to be led to think they can understand a technical text without expert help: it may cause them to mistake what the law is. They may then infringe it unwittingly, with dire consequences to themselves or others. Buckley L.J. expressed the position as follows-

'Litigants are entitled to know on what grounds their cases are decided. It is of importance that the legal profession should know on what grounds cases are decided, particularly when questions of law are involved.'<sup>14</sup>
59. By this he did not mean that litigants should be able to tell directly from the judgment what the grounds are, though they may of course glean some idea. The second part of the dictum has in mind, among other considerations, the need for the legal adviser to be in a position to explain the judgment to the client. That is where the explanation should come from.
60. *Texts embodying history of a legal rule* A text embodying the law cannot be construed in a vacuum. If for example it is contained in an Act of Parliament we may find it necessary to consult a committee report on which the Act is based, or a parliamentary debate in which the Bill for it was discussed. Such materials are collectively described as legislative history. Where the text is a judgment it may be necessary in construing it to refer to similar materials underlying the judgment.
61. *Juristic writings* The function of textbooks, articles etc. in the understanding of law is an important one, which I have not time to go into here. In England at any rate it is perhaps undervalued.

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<sup>11</sup>For the nature of these see my book *Statute Law* (3rd edn. 1990), pp. 28-40. For a detailed examination of the vices that block comprehension of legislative texts see chapters 14-19 of that book.

<sup>12</sup>For this type of processing, used in composite restatement, see *ibid.*, chapter 23.

<sup>13</sup>'Judicial decisions: acts of communication' by Robert D. Eagleson, *Clarity* 29 (December 1993), p. 11.

<sup>14</sup>*Capital and Suburban Properties Ltd v Swycher* [1976] Ch 319 at 325-326.

62. *Unofficial procedural texts* Pleadings and other procedural texts which are drafted by lawyers representing the parties to litigation are an important sub-category of technical law texts. Again, we do not expect non-lawyers to be able to understand them.
63. *Texts embodying acts at law* The term ‘act at law’ is a convenient one to denote an instrument having legal effect, other than an instrument which itself embodies the law. Thus it is an act at law to enter into a contract, or execute a conveyance or will, and the documentation embodies this. Much of the work of a lawyer consists of drafting, construing or advising on such texts. Because of their nature, they need to be in technical language. Where they are not this does not deprive them of all effect, though the effect may not be what was desired.
64. *Legal opinions* Counsels’ opinions and similar technical law texts drafted by lawyers convey unofficial explanations and views as to the law and its effect.

### **Sub-categories of non-technical law texts**

65. Non-technical law texts fall into the following six sub-categories.
66. 1. Explanatory texts intended to guide lay legislators considering a parliamentary Bill or other draft legislation.
67. 2. Official explanations intended to inform the public about a law.
68. 3. Official forms such as tax returns or driving licences.
69. 4. Correspondence between lawyers and their clients.
70. 5. Books, newspaper articles and other unofficial writings intended to inform the public about a law.
71. 6. Other legal texts intended for lay readers.
72. When we come to consider non-technical law texts, we have two things in mind. One is that they must be comprehensible without legal knowledge. The other is that they must be accurate. Here lies a difficulty, which I will briefly explore.
73. Very often, the law is obscure on a particular point. How then can a lawyer explain it to a lay person in terms both comprehensible and accurate? It can’t be done. The obvious answer is to improve the law, so that it ceases to be obscure. While waiting for that (and the wait may be a long one), the lay person must be left to some extent baffled, no doubt with a feeling of grievance against the law and lawyers.
74. Where the law is not obscure, there is a heavy onus on lawyers to ensure that non-technical texts are both clear and correct. An effective way of doing this is the usability test.<sup>15</sup> This takes a group of actual users of the text, perhaps an official form such as a tax return, and tests how they find it, using various methods.
75. One method is the think-aloud system. Here an observer tests each participant individually and records their behaviour and comments. Participants, as they do the test, think aloud. This gives information on terms found confusing, inadequate instructions, and other difficulties.
76. Another method is the structured interview, where each participant is asked the same set of questions about the document. By asking participants to define terms, or explain a term in their own words, it can be discovered how far they understand the document.
77. The U.S. Revenue Service (I.R.S.) asked the Document Design Centre (D.D.C.) in Washington to redesign one of its forms. The D.D.C. carried out a usability test not only with lay participants but

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<sup>15</sup>See Dumas and Redish, *A Practical Guide to Usability Testing* (1993) Ablex Publishing Corporation, Norwood, N.J.

also tax practitioners. They found that 95% of lay participants filled in the form incorrectly. Even among the practitioners the number of errors was considerable.<sup>16</sup>

78. Not all documents to be read by non-lawyers can be freed from technicality. An obvious example is the technical document which is being prepared on the instructions of a lay client. If the lawyer is drafting a document which the client is to be asked to sign, such as a will, lease or contract, the lawyer will need the client's approval of the draft. How is the client to make sure of understanding it before signing? The answer must be that the lawyer should draft the document in technical language, and then in ordinary language advise the client as to its legal meaning. The client must be able to trust this advice.

### **Law management**

79. The lawyer's art and skill of comprehending, manipulating and drafting technical law texts and drafting non-technical law texts amounts to what in a recent book I call law management.<sup>17</sup> How well the law is communicated depends on how efficiently this technique of law management is carried out by practitioners.
80. It is a technique that is capable of extensive improvement. I have spent much of the last quarter of a century devising and putting forward suggestions for achieving such improvement, so far without much success. In the remainder of this talk I want to concentrate on one aspect of the technique, related to the use of legislative history.

### **Legislative history**

81. When we consider the use of legislative history in interpretation we confront the dilemma challenging all legislative texts. The central idea of legislation is to provide a structure which in itself constitutes a basis upon which the person bound can safely stand. Once a building is erected the scaffolding can be taken down, and should thereafter be irrelevant. This may be defeated in the field of legislation by the inadequacy of language, the fallibility of legislators and drafters, and the fact that the future they seek to regulate is unknown, and unguessable.
82. The precise function of legislative history in interpretation is determined by where the line is currently drawn by the courts. On a strict view this history should be irrelevant, since the object of Parliament is to express its will entirely within the definitive text of the Act itself. That was the basis of the parol evidence rule, which formerly applied to the construction of all documents.<sup>18</sup> That this eminently convenient doctrine has proved too idealistic and theoretical in practice is regrettable.

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<sup>16</sup>For details see Anita D. Wright, 'The value of usability testing in document design', *Clarity* 30 (March, 1994), pp. 24-30.

<sup>17</sup>'Teaching law management' in *Reviewing Legal Education* (ed. Professor Peter Birks), Oxford University Press 1994. The book collects together papers on legal education delivered at a 1994 seminar held at All Souls College Oxford under the chairmanship of Lord Griffiths.

<sup>18</sup>Historically a record could not be contradicted by parol evidence, which includes, in addition to its literal meaning of oral evidence, any writing not consisting of a specialty or record: *Rann v. Hughes* (1764) 7 TR 350-351n; *Gibson v. Kirk* (1841) 1 QB 586. An Act of Parliament is both a specialty and a record: *Cork & Bandon Railway Co v. Goode* (1853) 22 LJCP 198; *Collin v. Duke of Westminster* [1985] QB 581. 'Now, in construing the act of parliament, 6 G.1, I do not think it is competent to a court of justice to make use of the discussions and compromises which attended the passing of the act; for, that would be to admit parol evidence to construe a record': *Earl of Shrewsbury v. Scott* (1859) 6 CBNS 1, *per Byles J* at 213.

83. So the essence of statutory interpretation now lies in resolving the dichotomy between the ‘pure’ doctrine that the law is to be found in the Act and nowhere else, and the ‘realist’ doctrine that legislation is an imperfect technique requiring, for the social good, an importation of surrounding information. Parliament’s overall intention is to be gathered from the words of the Act. These are to be given an informed interpretation however, and legislative history is an important element here.<sup>19</sup>
84. In England the courts have recently changed their self-imposed rule forbidding reference to Hansard in interpretation.<sup>20</sup> The former Law Commissioner B. J. Davenport observes that as a result failure to carry out a needed Hansard search adequately ‘will be a breach of professional duty for which the lawyer may be liable’.<sup>21</sup> Peter Vaines, a barrister and chartered accountant, says of the carrying out of the duty by legal advisers ‘If their own professional pride does not force them to do so, their insurers will’.<sup>22</sup> The Right Honourable Denzil Davies M.P. says-
- ‘Where there is a dispute about the meaning of words in a statute, the lawyers will be compelled to pour (sic) over the pages of Hansard in case they provide clues to the intention of Parliament. Often the task will be fruitless, but nevertheless it will have to be embarked upon.’<sup>23</sup>
85. Recourse to legislative history undoubtedly complicates the law. It is not infrequent for an official spokesman to say during the passage of a Bill conferring powers on a Government department that the resulting Act will be construed by the department in a certain way, and then for it to be construed by them in a different way. This happened in *Pepper v. Hart* itself.<sup>24</sup>
86. Another tax example is furnished by the House of Lords decision in *Leedale (Inspector of Taxes) v. Lewis* [1982] STC 835. This turned on the meaning of the term ‘interests’ in the Finance Act 1965 s. 42(2), and concerned the taxation of capital gains made by a trust fund. During the passage of the Bill the Government spokesman had said that in relation to trusts where the trustees were non-resident the provision would be construed by the Revenue in the less onerous of two possible ways. This was departed from in practice and the more onerous interpretation was upheld in *Leedale*. Peter White remarks: ‘There was quite a fuss about that decision, which led to a change in the law’.<sup>25</sup> The application of *Pepper v. Hart* might lead to the reversal by the courts of such decisions where Parliament has not stepped in.
87. A difficulty that may arise is that it is not unknown for ministers and sponsors to make conflicting statements about the meaning and effect of a Bill. Which version is then to be accepted by the court? What is to happen where the sponsor’s statement is authoritatively contradicted by another

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<sup>19</sup>For the informed interpretation rule see my textbook *Statutory Interpretation* (4th edn., 2002), Part XIII.

<sup>20</sup>*Pepper (Inspector of Taxes) v. Hart* [1993] AC 593. For an account of the decision see my article ‘Hansard - Help or Hindrance?’ 14 *Statute Law Review* (Winter 1993) 149, which also contains brief accounts of the position in Canada, Australia, and New Zealand.

<sup>21</sup>109 L.Q.R. (April 1993) pp. 149-155 at 154.

<sup>22</sup>‘*Pepper v. Hart: Reflections*’, 2 *Personal Tax Planning Review*, 1992-93, 85 at 87.

<sup>23</sup>*British Tax Review* (1993) p. 172 at 173-174.

<sup>24</sup>See my article ‘How they all got it wrong in *Pepper v. Hart*’, *British Tax Review* (1995) 325.

<sup>25</sup>‘Hansard’s up!’ (1992) 136 SJ 1224 at 1225. See also J. F. Avery Jones, ‘The Leedale Affair’ [1983] B.T.R. 70. The change was effected by the Finance Act 1981 s. 80.

participant in the debate who is not a minister? An example of the latter concerned the Divorce Reform Act 1969 s. 2(1)(a), which gives as a ground for holding that the marriage has irretrievably broken down that 'the respondent had committed adultery and the petitioner finds it intolerable to live with the respondent'. In *Cleary v. Cleary* [1974] 1 All E.R. 499 the question arose whether these were two separate grounds or living had to be intolerable because of the adultery. The sponsor Lord Stow-Hill disagreed with Lord Dilhorne L.C. about this.<sup>26</sup>

88. Sometimes ministers later correct what they have said in Bill proceedings. 'The practice when misleading statements are made in error or under pressure has been for the minister to put the matter right by writing to the Member to whom the misleading information was given; this will have to be altered so that the correction finds its way into Hansard, presumably by contriving the "planting" of a parliamentary question . . .'<sup>27</sup> A minister mistakenly said in the debate on the Finance (No. 2) Bill 1974 that what became s. 46 (dispositions for maintenance of family) of the Finance Act 1975 would apply to transfers on death. In a written answer he said-

'The exemption afforded by s. 46 applies only to dispositions in the donor's lifetime. In this respect my comment in the discussions on the Finance Bill at Report Stage (official report 5 March 1975) was misleading and I regret this.'<sup>28</sup>

89. A similar incident occurred in relation to an addition made by the draftsman when consolidating the Income and Corporation Taxes Act 1970 s. 276(1) as the Taxation of Chargeable Gains Tax Act 1992 s. 175(1). He inserted the words 'for the purposes of corporation tax on chargeable gains'. It was said of these words-

'If they are not superfluous, they might be thought to limit the ambit of the section in some way. Mr Lamont [the Chancellor of the Exchequer at the time] has confirmed that this is not so. In response to a question (HC Deb Vol. 214 col. 114) he has stated that TCGA 1992, s. 175(1) is not different in substance from ICTA 1970, s. 276(1) and that the slight difference in wording is an editorial consequence of the process of consolidating the tax provisions on capital gains. The reassurance is welcome.'<sup>29</sup>

90. The reassurance may be welcome, but is it legitimate? Since it refers to legislation already enacted it is not within the principle of *Pepper v. Hart*. Moreover it trenches on the exclusive right of the courts to pronounce authoritatively on the legal meaning of legislation.<sup>30</sup> Where a clear slip has been made by a minister, that is where the legislation obviously does not mean what the minister said it would mean, there is no objection to the minister correcting it later. However it is objectionable for a minister to purport to settle a doubt that arises out of, that is because of, the wording of legislation previously enacted.

### **Effect on ministerial statements in Parliament**

91. The decision in *Pepper v. Hart* has affected the way ministers and others express themselves in the Westminster Parliament. The implications of the decision were considered in detail by an

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<sup>26</sup>Vera Sacks, 'Towards Discovering Parliamentary Intent', 1982 Stat. L.R. 143 at 151. Section 2(1)(a) was re-enacted unchanged as the Matrimonial Causes Act 1973 s. 1(2)(a).

<sup>27</sup>Dawn Oliver, *Public Law* (1993) p. 5 at 10.

<sup>28</sup>Cited Ian Ferrier and Roy Greenfield, '*Pepper v. Hart* - a Landmark in Statutory Interpretation' 12 *Capital Tax Planning* (1993) p. 38 at 42.

<sup>29</sup>Ian Ferrier and Roy Greenfield, '*Pepper v. Hart* - a Landmark in Statutory Interpretation' 12 *Capital Tax Planning* (1993) p. 38 at 42.

<sup>30</sup>See my *Statutory Interpretation* (4<sup>th</sup> edn 2002), pp. 552-553.

inter-departmental working group. According to a Government spokesman, 'a number of practical steps for the avoidance or correction of mistakes or ambiguities arising out of ministerial statements during the passage of legislation are being put into practice, for example by guidance to Departments on legislative procedures'.<sup>31</sup>

92. In proceedings on the 1994 Finance Bill Sir John Cope, a minister, said: 'The fact that the words of a Minister on such a clause as this might be used in court inclines Ministers to be much more careful and not produce examples that may prove to be illustrative but not particularly precise'.<sup>32</sup> This is striking testimony to the unreliability of parliamentary statements by English ministers pre-*Pepper v. Hart*.

93. Later Mr Butterfill addressed the following remarks to Sir John about a particular clause of the Bill-

'As I understand it, the Government intended that the clause as presently drafted should apply to all insurers providing export credit insurance. However NCM and others have taken counsel's opinion on the matter and take the view that the clause as presently drafted would not have that effect, but would have the effect only of excluding that section of the industry that was previously in state ownership . . . [Sir John Cope] has considered the matter and has kindly written to me about it, saying that, having examined it again with parliamentary counsel, he is satisfied that the clause as drafted achieves what the Government intended - that is, it includes all providers of export credit insurance. I can only say . . . that as two leading counsel give differing opinions, there is clearly room for doubt about the way in which the courts might interpret the legislation in future.'<sup>33</sup>

94. Replying, Sir John confirmed that it was the Government's intention that the clause should apply to all insurers providing export credit insurance. He added-

'It seems that some counsel have taken a different view from our counsel about the meaning of [the clause]. We have clear legal advice that the exemption is not limited to ECGD. In that we have the support of ECGD and the counsel who advised us. It is unlikely that the matter would go before a court; I do not know who would bring a case in order to make the distinction.'<sup>34</sup>

95. This indicates a most unsatisfactory state of affairs. The minister's statement was clear in conveying that the Government's intention was that the clause should apply to all insurers providing export credit insurance. However it is equally clear that the words used are open to different interpretations. On *Pepper v. Hart* principles the court should apply the Government's intention. In doing so they would be surrendering their constitutional function of deciding the legal meaning of enactments. If, as Sir John Cope surmised, the matter never gets before a court the Act will be being applied in a way that some experienced lawyers think is contrary to its legal meaning, and there will be no practical means of settling the matter. If it does get before a court the court will be embarrassed and hampered in carrying out its duty of interpretation by what the minister said.

96. Points of this kind may become of reduced legal importance because ministers are likely to be increasingly reluctant to say anything that may be held against them in court. A Treasury minister, Mr Stephen Dorrell, said in debate on the 1994 Finance Bill: 'Following *Pepper v. Hart*, people apparently look at what Ministers say to determine liability, so I shall not seek to interpret the law

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<sup>31</sup>John M. Taylor, *Parl. Deb. (Commons)* 7 March 1994, Written Answers col. 70.

<sup>32</sup>*Parl. Deb. (Commons)* Stg. Cttee. A, 10 February 1994, cols. 173-174.

<sup>33</sup>*Parl. Deb. (Commons)* Stg. Cttee. A, 8 March 1994, cols. 565-566.

<sup>34</sup>*Ibid.*

on the circumstances in which public officials are liable'.<sup>35</sup> This attitude may lessen the legal importance of *Pepper v. Hart* but of course it increases its constitutional importance and strengthens the argument that in its decision in that case the Appellate Committee transgressed article 9 of the Bill of Rights by enabling what is said in parliamentary debates to be 'questioned' in court. It is clear beyond argument that *Pepper v. Hart* is already constricting the freedom of parliamentary debate.

### **Effect of recourse to legislative history on drafting practice**

97. I will conclude by saying a little about what effect increased recourse to legislative history might be expected to have on drafting practice.
98. If drafters know that the court of construction will look solely at the words of the legislative text they have drafted, then they can concentrate on pouring the meaning into those words. It is different if the words are lightly regarded and the court may be expected, as it was memorably put, to go 'fumbling about in the ashcans of the legislative process for the shoddiest unenacted expressions of intention'.<sup>36</sup> The drafter may then be discouraged, and take less care about precision of language.
99. If, as is the tendency, it is the minister's words that are to be regarded by the courts as of particular importance, the legislative drafter may demand an input on how those are chosen. Indeed the drafter may end up drafting not only the legislative text but the minister's speech also. That may be regarded as the logical conclusion, and it would follow that ministers would be expected not to depart from the speech as so drafted or make impromptu additions to it. A counsel of perfection indeed.
100. Apart from this, I would expect legislative drafters to try and make their drafts 'minister-proof'. That involves stating more propositions expressly and leaving less to implication. A minister in debate can scarcely expect to get away with contradicting the express language of the Bill. It is different with implications, which are always open to conjecture and argument. Yet how can we do without implications?<sup>37</sup>

**Author's Biographical details** Francis Bennion began working with legislation in 1948 as an editor of Halsbury's Statutes. He entered the Parliamentary Counsel Office in Whitehall (where all United Kingdom government legislation is drafted) in 1953, finally leaving in 1975 after a break from 1965-73. He is the founder of two charities concerned with reforming statute law, the Statute Law Society (1968) and the Statute Law Trust (1992). His extensive writings on legislation include many articles and three books, *Statute Law* (3rd edn 1990), *Understanding Common Law Legislation* (2001) and *Statutory Interpretation* (4th edn 2002, Supplement 2005). He was formerly law tutor at St Edmund Hall and Worcester College in the University of Oxford and is currently a research associate of the University of Oxford Centre for Socio-Legal Studies and a member of the Law Faculty of the University. As a constitutional lawyer, he has advised the governments of Pakistan, Ghana and Jamaica. He drafted constitutions for Pakistan and Ghana, the latter being described in his textbook *The Constitutional Law of Ghana* (1962). He has written half a dozen other books, including two on the law of consumer credit (he was the draftsman of the Consumer Credit Act 1974). For further details see his website [www.francisbennion.com](http://www.francisbennion.com).

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<sup>35</sup>*Parl. Deb. (Commons)* Stg. Cttee. A, 24 March 1994, col. 847.

<sup>36</sup>Charles P. Curtis, 'A Better Theory of Legal Interpretation' (1949) 4 *The Record of the Association of the Bar of the City of New York* 321 at pp. 327-328.

<sup>37</sup>As to the importance of implications see my *Statutory Interpretation* (4<sup>th</sup> edn 2002), Part IX.