

# LEGISLATING TO COMMUNICATE: PLAIN ENGLISH GUIDELINES EXPLICATED USING THE *USA PATRIOT ACT 2001*

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*In Lifting the Fog of Legalese,<sup>1</sup> Joseph Kimble offered a set of guidelines for writing in clearer language. He does not provide a method for the interpretation and grammatical analysis of those guidelines. This article provides that analysis. Examples are taken from the USA Patriot Act 2001 to explicate and validate them and to assess whether that Act is expressed clearly, simply, and precisely. It was found that that Act contained some long and syntactically complicated sentences which result from the unnecessary adherence to the single provision/single sentence structure. If adherence to this structure were abandoned, comprehension could be enhanced and the legislation made more accessible to lawyers and lay persons alike.*

## I INTRODUCTION

The Plain English Movement swept the United States in the 1970s. The current research sought to evaluate whether the Movement has left an indelible impression on the drafting of legislation in the USA. The author has previously evaluated the impact of the Movement on legislation drafted in Australia and the European Community.<sup>2</sup> The heuristics of plain English are now clear. When drafting documents, lawyers should aim to be clear, simple, and precise. This requires them to be aware of their intended audience and to appreciate that plain English guidelines are not rules to be applied rigidly. The effective application of guidelines leads to better communication. Research and good writing practice suggest that guidelines should not be seen as a final destination—a cure for all the problems created by conventional legal English.<sup>3</sup> Rather, they should be regarded as a remedial pathway towards more comprehensible documents.

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<sup>1</sup> Joseph Kimble, *Lifting the Fog on Legalese* (Carolina Academic Press, 2006).

<sup>2</sup> See Edwin Tanner, 'Seventeen Years On: Is Victorian Legislation Less Grammatically Complicated?' (2002) 28(2) *Monash University Law Review* 403–423; Edwin Tanner, 'Legislating to Communicate: Trends in Drafting Commonwealth Legislation' (2002) 24(4) *Sydney Law Review* 592–557; Edwin Tanner, 'Communications Strategies: Understanding the *Racial and Religious Tolerance Act 2001* (Vic)' (2003) 27(1) *Melbourne University Law Review* 139–162; Edwin Tanner, 'Clear Simple and Precise Legislative Drafting: Australian Guidelines Explicated Using an EC Directive' (2004) 25(3) *Statute Law Review* 150175; Edwin Tanner, 'Clear Simple and Precise Legislative Drafting: How does an EU Directive Fare?' (2006) 27(3) *Statute Law Review* 150–175.

<sup>3</sup> Janice Redish and Susan Rosen, 'Can Guidelines Help Writers?' in Erwin Steinberg (ed), *Plain Language Principles and Practice* (Wayne State University Press, 1991) 83.

In *Lifting the Fog of Legalese*, Joseph Kimble<sup>4</sup> offers a set of guidelines for writing in clearer language. He does not provide a method for the interpretation and grammatical analysis of those guidelines. This article provides that analysis. Examples are taken from the *USA Patriot Act 2001*<sup>5</sup> to explicate and validate them. For that purpose, a systematic random sample of 10 per cent of the provisions was taken. Kimble's guidelines were then used to assess whether the Act is expressed clearly, simply, and precisely. Although no attempt has been made to analyse the policy behind the *Patriot Act 2001*, it was chosen because it has been more extensively criticised by members of the United States citizenry, and civil libertarians, than perhaps any other USA statute in the last 30 years.<sup>6</sup> Its impact on the widest possible demographic can be seen from the powers it confers on USA law enforcement and intelligence agencies. The Act authorises the indefinite detention of immigrants.<sup>7</sup> It empowers law enforcement officers to search homes or businesses without the owner's or the occupant's knowledge.<sup>8</sup> Further, it expands the use of National Security Letters. These permit the FBI to search telephone, e-mail, and financial records without a court order.<sup>9</sup> Finally, it grants extensive powers to law enforcement agencies to access business records, including library and financial records.<sup>10</sup> Despite the fact that this Act has come under the scrutiny of US lawmakers, on 27 February 2011 President Obama signed a one-year extension of its sunset clauses.<sup>11</sup>

<sup>4</sup> Kimble, above n 1, 59–73.

<sup>5</sup> *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA Patriot Act)* Pub. L. No. 107–56, 115 Stat. 272 (2001).

<sup>6</sup> See for example: John Beralu, 'Show Us Your Money: The *USA Patriot Act* Lets the Feds Spy on Your Finances. But Does it Help Catch Terrorists?' (November 2003) *Reason* 22–39; Paul Magnusson and Lorraine Woellert, 'Don't Tread on Us; The Revolt Against the *Patriot Act*' (May 19 2003) *Business Week* 51; Thom Hartmann, 'Bush's War Against America: The 'War on Terror' Damages US Civil Liberties, Not al-Qaeda, the Most' (July/August 2003) 33(6) *The Ecologist* 14; Amitai Etzioni, *How Patriotic is the Patriot Act: Freedom versus Security in the Age of Terrorism* (Routledge, New York, 2004); P T Jaeger, C R McClure, J C Bertot, J T Snead, 'The *USA Patriot Act*, the *Foreign Intelligence Surveillance Act*, and Information Policy Research in Libraries, (April 2004) 74(2) *The Library Quarterly* 99–121; Henry Giroux, 'Dirty Democracy and State Terrorism: The Politics of the New Authoritarianism in the United States (2006) 26(2) *Comparative Studies of South Asia, Africa and the Middle East* 163–177; Jeanne Lenzer, 'Doctors Outraged at *Patriot Act*'s Potential to Seize Medical Records', (14 January 2006) 332 *British Medical Journal* 69.

<sup>7</sup> *USA Patriot Act* s 412.

<sup>8</sup> *Ibid* s 505.

<sup>9</sup> *Ibid* s 218.

<sup>10</sup> *USA Patriot Act* ss 204, 209.

<sup>11</sup> 'Obama Signs Last-Minute *Patriot Act* Extension', Editorial Fox News May 27, 2011 <<http://www.foxnews.com/politics/2011/05/27/senate-clearing-way-extend-patriot-act/>> Accessed 31 May 2011.

## II RESEARCH METHOD

Sentences drafted in conventional legal English are often difficult to understand. To understand them, it may be necessary to analyse their structure and trace out their referencing systems. The first step is to identify all finite verbs, their subjects and other sentence components. This process identifies clauses and their functions. It also reveals reduced relatives, passives, prepositional phrases, embedding, and whether essential sentence components have been kept together. During analysis, other features become apparent. These include nominalisations, multiple negatives, misplaced phrases, doublets and lists of synonyms, deontic modals, and words with cross-varietal meanings (for example, ‘trust’ and ‘consideration’).

## III KIMBLE’S GUIDELINES EXPLICATED

Kimble published a set of plain English guidelines in 2006.<sup>12</sup> Only those of his guidelines that relate to the drafting of legislation and word and sentence structure have been analysed, explicated, and applied to the Act.

Kimble’s guidelines include:

1. Sentences should average no more than 20 words. Use parallel structure where appropriate.
2. Keep essential sentence components together.
3. Don’t pile up conditions or qualifications before the main clause.
4. In most sentences, put the subject near the beginning and keep it short and concrete and make it something the reader already knows.
5. Put the central action in strong verbs and not in abstract nouns.
6. Prefer the active voice. Use the passive voice if the agent is known or unimportant, or use it, for continuity, or when you want to focus attention on the object of the action instead of the agent.
7. Banish ‘shall’; use ‘must’ instead.
8. Omit unnecessary words.

It should be noted that Kimble’s guidelines are not independent of each other. For example, maintaining an ‘average sentence length of no more than 20 words’ whilst ‘using parallel structure where appropriate’ should ‘keep the essential sentence components together’. It should also result in the passive voice only being used to enhance comprehensibility.

<sup>12</sup> Kimble, above n 1.

A *Guideline 1: Sentences should average no more than 20 words.  
Use parallel structure where appropriate.*

Sentence length is often an indication of grammatical complexity, but is not a necessary determiner of comprehensibility.<sup>13</sup> No matter how long a sentence is, comprehension is unlikely to be impeded by material set down in parallel structure. This type of structure involves the use of a set of items which are essentially identical in syntax and which have a common referent. As an example of a provision that could have been cast in parallel structure, consider s 324 of the *USA Patriot Act 2001*. This section reads:

S 324 Report and Recommendation

Not later than 30 months after the date of enactment of this Act, the Secretary, in consultation with the Attorney General, the Federal banking agencies (as defined at section 3 of the Federal Deposit Insurance Act), the National Credit Union Administration Board, the Securities Exchange Commission, and such other agencies as the Secretary may determine, at the discretion of the Secretary, shall evaluate the operations of the provisions of this subtitle and make recommendations to Congress as to any legislative action with respect to this subtitle as the Secretary may determine to be necessary or advisable.

Section 324 consists of one sentence of 96 words expressed as two main (that is, independent) clauses, each of which has a relative clause dependent on it. The two main clauses have a common subject, 'the Secretary'. The verbs are 'shall evaluate' and '[shall] make' and the objects of these verbs are 'the operations' and 'recommendations', respectively. There are 13 words in an adverbial phrase before the subject head of the sentence. There are 46 words, including a relative clause between the subject and the verb 'shall evaluate', and a further 11 words before the verb 'shall make'. The scope of the 13-word adverbial phrase that precedes the subject head, extends over the whole section, but refers particularly to the second main clause. The phrase 'as defined at s 3 of the *Federal Deposit Insurance Act*' is a reduced clause qualifying the noun 'agencies'. It is reduced from the relative clause 'that are defined at s 3 of the *Federal Deposit Insurance Act*'.

To process that first main clause, the 46 words which follow the subject head must be held in the short-term memory until the verb of the first main clause 'shall evaluate' is reached. All the 46 words plus another 11 must be held in the short-term memory before the verb of the second main clause 'shall make' is reached. As a result, the section is unnecessarily difficult to process. The section could be redrafted in a form that is much easier to read and understand. In this form it might read:

<sup>13</sup> Alexander Wearing, 'The Recall of Sentences of Varying Length' (1973) 25(2) *Australian Journal of Psychology* 155–161.

- (a) The Secretary must consult:
  - (1) the Attorney General
  - (2) the Federal banking agencies (that are defined at s 3 of the Federal Deposit Insurance Act);
  - (3) the National Credit Union Administration Board;
  - (4) the Securities and Exchange Commission; and
  - (5) any other agencies that the Secretary at his or her discretion may decide.
- (b) Together they must:
  - (1) evaluate the operations of the provisions of this subtitle; and
  - (2) recommend to Congress any legislative action that the Secretary may decide to be necessary or advisable about this subtitle.
- (c) Congress must receive these recommendations from the Secretary within 30 months after this Act is enacted.

In its redrafted form the section has been cast as three commands. Subsection (a), is a main clause. Its object consists of five noun phrases listed in parallel. The last of these has a relative clause depending on it. Subsection (b) consists of two parallel main clauses with the subject ‘they’ and the deontic modal ‘must’<sup>14</sup> common to both clauses. The second clause has a relative clause qualifying its direct object, ‘action’. Subsection (c) consists of a main clause.

The practice of expressing each section or subsection (that is, provision) in a single sentence is a feature of conventional legal English.<sup>15</sup> This practice arose because lawyers erroneously believed that the semantic connections between the elements of a single sentence are clearer and more precise than between two or more sentences containing the same information.<sup>16</sup>

To achieve the single provision/single sentence structure, a number of conflating devices are employed. These include nominalisations, reduced clauses (especially relatives), excessive use of embedding and the repetition of nominals in the place of pronominals. The resulting structure is likely to be tightly woven and clausally complex. Extensive research in such fields as psycholinguistics, cognitive psychology and instructional theory has demonstrated that the over-use of conflating devices impedes comprehension and clouds clarity.<sup>17</sup>

<sup>14</sup> When the operators ‘shall’ and ‘may’ are used to express obligation, prohibition, and permission, they are referred to as deontic modals. ‘Must’ and ‘may’ can be used in their place without loss of deontic force.

<sup>15</sup> Brenda Danet, ‘Language in the Legal Process’ (1980) 14 *Law and Society Review* 445–563.

<sup>16</sup> The author established the erroneous nature of this belief—see Edwin Tanner, ‘The Sanctity of the Single Legal Rule/Single Sentence Structure?’ (2002) 26(1) *Monash Law Review* 203–211.

<sup>17</sup> Edwin Tanner, ‘The Comprehensibility of Legal Language: Is Plain English the Solution?’ (PhD Thesis, University of Melbourne, 1998) 77–103.

Embedding of ‘clause within clause’ and ‘phrase within clause’ usually disrupts the nexus between essential sentence components. This practice may hinder comprehension, as was confirmed by Otto Behagel, whose Second Law states: ‘That which belongs together cognitively should be placed close together’.<sup>18</sup> This law has been supported by research<sup>19</sup> which has shown that the short-term memory can hold approximately seven unrelated units of information at any one time. Comprehension difficulties may arise because material which disrupts a nexus must be held in the short-term memory until the relationship between essential sentence components can be established.

The careful use of parallel structure when appropriate and an awareness of a 20-word average limitation on sentence length should limit the inclusion of non-essential information in a sentence. It is also likely to minimise syntactic complexity and the disruption of the nexus between essential sentence components.

### B *Guideline 2: Keep essential sentence components together*

Every clause in a sentence in legislation is in declarative form. The components of a declarative sentence are subject (S), finite verb (V), object (O) and/or complement (C) and adverbial (A). The essential components are S and V and, if present, the O and/or C in that order. Because the function of a component is determined by its position in a sentence, English is classified as an SVO word-order language.<sup>20</sup> If the order of the words is changed, the meaning is changed. Note the difference between, ‘The man saluted the flag’ and ‘The flag saluted the man’.

The subject slot in the sentence is filled by a noun or noun equivalent. A noun equivalent may be a clause, for example, in the sentence, ‘That the man broke the law is proven’, the clause, ‘That the man broke the law’ is the subject of the verb, ‘is proven’. It can also be a pronoun. For example, in the sentence, ‘He broke the law’, the pronoun ‘he’ is the subject of the verb, ‘broke’. The present participle form of the verb may also act as the subject. For example, in the sentence, ‘Breathing is essential’, the present participle ‘breathing’ is the subject of the verb ‘is’.

The object slot is also filled by a noun or noun equivalent. For example, in the sentence ‘The man swore that the owner of the premises ran away’, the clause ‘that the owner of the premises ran away’ is the object of the verb ‘swore’. In the sentence, ‘The man hit her’, the pronoun ‘her’ is the object of the verb ‘hit’.

Section 316 of the *USA Patriot Act 2001* provides an example of a breach of the subject/verb nexus. This provision, in part, reads:

<sup>18</sup> Otto Behagel, *Deutsche Syntax*, Volume 4 (1923) 4.

<sup>19</sup> George Miller, ‘The Magical Number 7, Plus or Minus 2: Some Limits to our Capacity of Processing Information’ (1956) 63 *Psychological Review* 81–97.

<sup>20</sup> Kate Burridge and Jean Mulder, *English in Australia and New Zealand: An Introduction to its History, Structure and Use* (Oxford University Press, 1998) 253–256.

## S 316 Anti-terrorist Forfeiture Protection

- (a) RIGHT TO CONTEST—An owner of property that is confiscated under any provision of law relating to the confiscation of assets of suspected international terrorists, may contest that confiscation by filing a claim in the manner set forth in the Federal Rules of Civil Procedure (Supplemental Rules for Certain Admiralty and Maritime Claims), and asserting as an affirmative defence that –

In this provision, the nexus between the subject ‘an owner’ and the verb ‘may contest’ has been disrupted by the 17-word relative clause ‘that is confiscated under any provision of law relating to the confiscation of assets of suspected international terrorists’. The comprehension problems created by this 17-word disruption could be overcome if the provision were redrafted as:

- (a) RIGHT TO CONTEST—If a property is confiscated under any provision of law relating to the confiscation of assets of suspected international terrorists, its owner may contest that confiscation by filing a claim in the manner set forth in the Federal Rules of Civil Procedure (Supplemental Rules for Certain Admiralty and Maritime Claims), and asserting as an affirmative defence that –

In the redraft, the disruptive relative clause has been expressed as a conditional clause.

Where a verb consists of more than one part, there is a very strong connection between the parts, that is, between the auxiliaries and the verb. In some sentences, objects/complements are essential components, and the nexus between them and the verb is strong. The adverbial is not an essential component, and the nexus between it and the verb is quite weak.

Section 403(a)(d) provides an example of a disruption to the auxiliary/verb nexus. That subsection in part reads:

- (d) For purposes of administering this section, the Department of State shall, prior to receiving access to NCIC data but not later than 4 months after the date of enactment of this subsection promulgate final regulations –

In this subsection, the deontic modal ‘shall’ has been separated from its verb, ‘promulgate’ by 21 words. The comprehension problems that this disruption creates could have been overcome by redrafting (d) as:

- (d) For purposes of administering this section, and prior to receiving access to NCIC data but not later than 4 months after the date of enactment of this subsection, the Department of State must promulgate final regulations –

*C Guideline 3: Don't pile up conditions or qualifications before the main clause*

The Law Reform Commission of Victoria<sup>21</sup> stated that putting a condition or qualification at the beginning of a sentence could create comprehension problems for non-lawyers. Any condition or qualification must be kept in the readers' short-term memory while they are waiting for the core of the provision to appear. Section 223'(f) of the *USA Patriot Act 2001* provides an illustration. It reads:

S 223 Civil Liability for Certain Unauthorized Disclosures

- (f) ADMINISTRATIVE DISCIPLINE—If a court or appropriate department or agency determines that the United States or any of its departments or agencies has violated any provision of this chapter, and the court or appropriate department or agency finds that the circumstances surrounding the violation raise serious questions about whether or not an officer or employee of the United States acted wilfully or intentionally with respect to the violation, the department or agency shall, upon receipt of a true and correct copy of the decision and findings of the court or appropriate department or agency promptly initiate a proceeding to determine whether disciplinary action against the officer or employee is warranted. If the head of the department or agency involved determines that disciplinary action is not warranted, he or she shall notify the Inspector General with jurisdiction over the department or agency concerned and shall provide the Inspector General with reasons for such determination.'

Table A contains a clausal analysis of sub-s 223'(f). The Table sets out the clauses in the order in which they appear (see page following).

**Table A: Clausal Analysis of Sub-s 223'(f) of the *USA Patriot Act 2001*.**

Type	Clause
Conditional	If a court or appropriate department or agency determines
Noun	that the United States or any of its departments or agencies has violated any provision of this chapter; and
Conditional	(if) the court or appropriate department or agency finds
Noun	that the circumstances surrounding the violation raise serious questions
Adjectival	about whether or not an officer or employee of the United States acted wilfully or intentionally with respect to the violation,
Main	the department or agency shall, upon receipt of a true and correct copy of the decision and findings of the court or appropriate department or agency promptly initiate a proceeding to determine
Noun	whether disciplinary action against the officer or employee is warranted.
Conditional	If the head of the department or agency involved determines
Noun	that disciplinary action is not warranted,
Main	he or she shall notify the Inspector General with jurisdiction over the department or agency concerned
Main	(he or she) shall provide the Inspector General with the reasons for this determination for this determination.

<sup>21</sup> Law Reform Commission of Victoria, *Plain Language and the Law*, Report No 9 (1987) Appendix 1, Drafting Manual 17.

To avoid the comprehension difficulties caused by piling up conditions before the main clause this provision could be redrafted as:

- (f) ADMINISTRATIVE DISCIPLINE—A department or agency must decide promptly whether disciplinary action against an officer or employee is warranted:
1. if the court or appropriate department or agency decides that the United States or any of its departments or agencies has violated any provision of this chapter;
  2. if the court or appropriate department or agency finds that the circumstances surrounding the violation raise serious questions about whether an officer or employee of the United States acted wilfully or intentionally with respect to the violation; and
  3. if a true copy of the decision and findings of the court or appropriate department or agency has been received.
- If the head of the department or agency involved determines that disciplinary action is not warranted, he or she must:
- (i) notify the Inspector General with jurisdiction over the department or agency concerned; and
  - (ii) provide the Inspector General with the reasons for such determination.

Table B contains a clausal analysis of the recast sub-s 223 (f)

**Table B: Clausal Analysis of Sub-s 223 (f)**

Type	Clause
Main	A department or agency must decide promptly;
Noun	whether disciplinary action against an officer or employee is warranted
Conditional	if the court or appropriate department or agency decides
Noun	that the circumstances surrounding the violation raise serious questions
Adjectival	about whether an officer or employee of the United States acted wilfully or intentionally with respect to the violation
Conditional	if a true copy of a decision and findings of the court or appropriate department or agency has been received.
Conditional	If the head of the department or agency involved determines
Noun	that disciplinary action is not warranted.
Main	he or she must notify the Inspector General with jurisdiction over the department or agency concerned; and
Main	[he or she must] provide the Inspector General with reasons for such determination

*D Guideline 4: In most sentences put the subject near the beginning, keep it short and concrete, and make it something the reader already knows*

In legislation all sentences are in declarative form. The essential components of declarative sentences are subject, verb, and the object/complement in that order. The grammatical subject must therefore come before the verb or object/complement. As a result, the word ‘subject’ in this guideline is taken to mean ‘topic’ rather than the grammatical subject.

Making the topic ‘short and concrete and something already known’ is one of the ways randomly ordered sentences can be converted into a coherent text. The process is known in discourse analysis as the *Given-New* or *Old-New* strategy.<sup>22</sup> This type of discourse analysis has been used later in this article to show how the semantic linkages between a series of short sentences can be preserved, and if used carefully, can result in legislation which is as precise as that drafted in conventional legal English.

Since the primary use of language is for communication, stating the known information first, and making it concrete and concise, should eliminate misunderstanding.

In the *USA Patriot Act 2001*, each section is headed by the topic in bold block letters. In some subsections, too, there are sub-headings in block letters. This is illustrated by s 103. This section is expressed in such a tortured way that it is difficult to understand. It reads:

S 103. Increased Funding for the Technical Support Center at the Federal Bureau of Investigation.

There are authorized to be appropriated for the Technical Support Center established in s 811 of the Antiterrorism and Effective Death Penalty Act of 1996 (Public Law 104– 132) to help meet the demands for activities to combat terrorism and support and enhance the technical support and tactical operations of the FBI [USD] 200 000 000 for each of the fiscal years 2002, 2003 and 2004.

The topic of interest in this provision is the amount of the funding. This sum should appear at the beginning of the section rather than at the end. The section could be recast in a more comprehensible form with the topic near the beginning. In this form it might read:

S 103. Increased Funding for the Technical Support Center at the Federal Bureau of Investigation.

For each of the fiscal years 2002, 2003 and 2004, [USD] 200 000 000 is authorized to be appropriated for the Technical Support Center. These sums are to help meet the demands for activities to combat terrorism and to support and enhance the technical support and tactical operations of the FBI. The Center was established in s 811 of the Anti-terrorism and Effective Death Penalty Act of 1996 (Public Law 104– 132).

In the redrafted section, the *given* information ‘increased funding’ is contained in the heading. The amount and duration of the funding given in the first sentence is *new* information. In the second sentence, the *new* information is repeated as, ‘these sums’, and

<sup>22</sup> Ellen Prince, ‘Fancy Syntax and “Shared Knowledge”’(1985) 9(1) *Journal of Pragmatics* 65-81.

becomes the *old* information, ‘are to help meet the demands for activities to combat terrorism and support and enhance the technical support and tactical operations of the FBI’. In the third sentence, the *old* information is ‘the Center’ and the *new* information is, ‘was established in s 811 of the *Anti-terrorism and Effective Death Penalty Act of 1996* (Public Law 104– 132)’.

E *Guideline 5: Put the central action in strong verbs  
and not in abstract nouns*

Some lawyers think that their writing sounds more important if they increase the number of words they use. They make verbs into nouns and adjectives. After making a noun or adjective out of a meaningful verb, it is often necessary to add a different verb to make the sentence, or clause, grammatical. These ‘empty’ verbs often have no specific meaning. While the use of nominalisations may achieve a formality of tone, it is at the expense of effective communication. Verbs, especially strong ones, communicate more effectively.<sup>23</sup>

Section 2 contains several examples of nominalisations. The section reads:

S 2. Construction; severability.

Any provision of this Act held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, shall be construed so as to give it the maximum effect permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which event such provision shall be deemed severable from this Act and shall not affect the remainder thereof or the application of such provision to other persons not similarly situated or to other, dissimilar circumstances.

In this section, the words ‘invalidity’ and ‘unenforceability’ are nominalisations of the adjectives, ‘invalid’ and ‘unenforceable’. In the adverbial clause, ‘unless such holding shall be one of utter invalidity or unenforceability’, the deontic modal ‘shall’ has been incorrectly used. There are two reasons why it is incorrect. If it is meant to be mandatory, ‘must’ can replace it. The clause then becomes ‘unless such holding must be one of utter invalidity or unenforceability’. This does not make sense and clearly shows that the verb was not meant to be mandatory. If it were meant to express the future tense the necessary auxiliary is ‘will’. The subject of the clause is a third person neuter noun ‘holding’. Under prescriptive rules of grammar a third person subject requires the auxiliary ‘will’ to express future tense. The clause should have been ‘unless such holding is one of utter invalidity or unenforceability’ or more correctly been ‘unless such holding is utterly invalid or unenforceable’.

Section 2 could be better expressed as:

Any provision of this Act may be held to be invalid or unenforceable because of its terms, or because it has been applied to a particular person or circumstance. A provision held invalid or unenforceable must be construed to give it the maximum effect permitted by law. If the holding is utterly invalid or unenforceable, the provision must be deemed severable from this Act. It must

<sup>23</sup> Peter Butt and Richard Castle, *Modern Legal Drafting: A Guide to Using Clearer Language* (Cambridge University Press, 2001) 117.

not affect the remainder of the provision or its application to persons not similarly situated or to other dissimilar circumstances.

In the redraft, the nominalisations have been converted back to adjectives. The provision has been broken into several sentences. The deontic modal ‘shall’ has been replaced by ‘must’, and the present tense ‘is’, has replaced it in the clause ‘if the holding is utterly invalid or unenforceable’.

F *Guideline 6: Prefer the active voice. Use the passive voice if the agent is unknown or unimportant, or use it for continuity, or when you want to focus attention on the object of the action instead of the agent*

When the subject of a clause is the agent of an action, the verb is in active voice. When the subject is the sufferer of an action, the verb is in passive voice. The subject position demands more attention than does the object. A clause with an active verb is more direct and, usually, shorter than the passive form.

Almost 60 per cent of the Act consists of newly drafted material. The remaining 40 per cent deals with amendments to provisions taken from other Acts to form part of the Act. In amended provisions, the passive verb, ‘is amended’, occurs more than 200 times. For example, s 621(a) of the *USA Patriot Act 2001*. This provision reads:

S 621 (a)

DEPOSIT OF GIFTS IN THE FUND—S 1402(b) of the Victims of Crime Act of 1984 (42) USC 1060(b) is amended.

The subject of this subsection, ‘S 1402(b) of the *Victims of Crime Act* of 1984 (42) USC 1060(b)’, is the sufferer of the action so the verb is in the passive. Attention is therefore focussed on the particular provision of the particular Act that is to be amended. This information is more important to the reader than, in this case, knowing specifically who is the agent. It must of course be Congress. Compare the passive form, above, with the active form where the agent is the subject and the verb is consequently in the active voice. S 621(a) then would read:

S 621 (a)

DEPOSIT OF GIFTS IN THE FUND—Congress amends s 1402(b) of the Victims of Crime Act of 1984 (42) USC 1060(b).

Note how casting the sentence in the active, places the emphasis on the agent. If the subject, ‘Congress’, had been qualified by a relative clause such as ‘to whom the electorate has given amending power’, the section would become:

S 621 (a)

DEPOSIT OF GIFTS IN THE FUND—Congress, to whom the electorate has given amending power, amends s 1402(b) of the Victims of Crime Act of 1984 (42 USC 1060(b).

In this redraft, the subject/verb nexus has been disrupted, so that the relative clause must be held in the short-term memory until the other essential components of the main clause are reached. The reader has to wait until the chief point of interest is given as the object in final position in the sentence.

The passive form of the original s 621(a) is preferable for two reasons: naming the agent of an amendment is unnecessary since the agent is known; and the identity of the Act and the section to be amended should be emphasised by placing them in initial position.

In the Act, the passive has been used in 72.1 per cent of the clauses—29.6 per cent in full verbs, and 42.4 per cent in reduced relative clauses. The latter has been used as a conflating device to render provisions in single provision/single sentence structures. This can be illustrated by s 403 '(d). This sub-section has 124 words in two clauses in a single sentence. It reads:

S 403. Access by the Department of State and to certain Identifying Information in the Criminal History Records of Visa Applicants and Applicants for Admission to the United States.

- (d) STATUTORY CONSTRUCTION—Nothing in this section, or in any other law, shall be construed to limit the authority of the Attorney General or the Director of the Federal Bureau of Investigation to provide access to the criminal history record information contained in the National Crime Information Centre's (NCIC) Interstate Identification Index (NCIC-III), or to any other information maintained by the NCIC, to any Federal agency or officer authorized to enforce or administer the immigration laws of the United States, for the purpose of such enforcement or administration, upon terms that are consistent with the National Crime Prevention and Privacy Company Act of 1998 (subtitle A of title 11 of Public Law 105-251;42 USC 14611) and s 552a of title 5. United States Code.

[Underlining added]

In s 403'(d) there are two clauses: a main clause with a passive verb, 'shall be construed' and a full relative clause, with the copular,<sup>24</sup> 'are'. These verbs have been underlined. There are also three reduced relative clauses. They are:

- (1) contained in the National Crime Information Centre's (NCIC) Interstate Identification Index (NCIC-III);
- (2) maintained by the NCIC; and
- (3) authorized to enforce or administer the immigration laws of the United States.

<sup>24</sup> A copula is the name given to the forms of the verb 'to be' used to relate subject and complement (for example, 'He is sick').

The italicised items are the past participle part of the present passive forms of the verbs, ‘contain’, ‘maintain’ and ‘authorize’. These clauses have been reduced from the full relative clauses, ‘that are contained’, ‘that are mentioned’, and ‘who is authorised’.

To create reduced clauses the relative pronoun and the auxiliary have been omitted. This particular reduction can be achieved only with passive verbs. The reduced conditional, ‘if known’, has had the pronoun and the auxiliary omitted from the full conditional, ‘if it is known’ or ‘if they are known’. Once again the verb is passive.

The reduced clause is one of the devices used to conflate information into grammatically correct but long, syntactically complicated, single sentence structures. Drafting provisions in a number of short carefully semantically linked sentences minimises the need to use conflating devices and increases comprehensibility.

To overcome the use of reduced relative clauses s 403(d) could be redrafted as:

- (d) STATUTORY CONSTRUCTION—The National Crime Information Centre’s (NCIC) Interstate Identification Index (NCIC-III) contains criminal history record information. The NCIC contains this and other information. Congress has authorized the Attorney General and the Director of the Federal Bureau of Investigation to provide access to this information to certain persons. These persons include any Federal agency or officer who has authority to enforce or administer the immigration laws of the United States. These laws must be enforced and administered on terms that are consistent with the National Crime Prevention and Privacy Company Act of 1998 (subtitle A of title 11 of Public Law 105-251; 42 USC 14611) and s 552a of title 5 United States Code. Nothing in this section, or in any other law, is to be construed to limit the authority of the Attorney General or the Director of the Federal Bureau of Investigation in this matter.

The redrafted section has 145 words in six sentences, giving an average sentence length of 24.16 words. Titles of persons and Acts are essential information but increase the average word count. They cannot be omitted. The sentences are semantically linked. In the first sentence, ‘contains criminal history record information’ is *given* information as it appears in the heading. The ‘NCIC and the NCIC-III’, is *new* information. In the second sentence, ‘NCIC contains this’, is *old* information and ‘other information’ is *new* information. In the third sentence, ‘this information’ is *old* information and the *new* information is ‘Congress has authorized the Attorney General and the Director of the Federal Bureau of Investigation to provide access to certain persons’. In the fourth sentence, ‘These persons include’ is *old* information because it refers back to ‘certain persons’ and the *new* information is, ‘any Federal agency or officer who has authority to enforce or administer the immigration laws of the United States’. In the fifth sentence, ‘These laws’ is *old* information because it refers back to the ‘immigration laws of the United States’, and the rest of the sentence is *new* information. In the final sentence, ‘the Attorney General or the Director of the Federal Bureau of Investigation’ is *old* information and the *new* information is contained consists of the ban, ‘nothing in this section, or in any other law, is to be construed to limit the authority of’.

### G *Guideline 7: Banish 'shall'; use 'must' instead*

In legislation drafted in traditional legal English 'shall' is used as both a deontic modal to show different aspects of mandatory authority,<sup>25</sup> and as an auxiliary to indicate the future. Non-lawyers may be unfamiliar with both uses because they are obsolescent. In common usage, the deontic modal, 'shall' has been replaced by 'must', or some form of 'have to', or 'is to' and as an auxiliary indicating future, by 'is (am, are) going to'. The modern trend in law<sup>26</sup> is to replace 'shall' with 'must'. The change does not affect the mandatory force of the modal.

In the *USA Patriot Act 2001*, 'shall' has been used consistently as the deontic modal. 'Must' is never used.

### H *Guideline 8: Omit unnecessary words*

Wordiness and clarity are natural enemies, but this does not mean that the shorter sentence is always the clearer one. One of the most common forms of wordiness in legal documents is the inclusion of details with no particular legal significance. There seems to be a pointless habit of using language that is all-inclusive.<sup>27</sup> As a result, documents are often filled with a mass of unnecessary detail that can confuse and confound citizens. A simple example is provided by s 336(a)(1) which reads:

The Congress established the currency transaction reporting requirements in 1970 because the Congress found that such reports have a high degree of usefulness in criminal, tax, and regulatory investigations and proceedings and the usefulness of such reports has only increased in the years since the requirements were established.

In this provision, 'such' has been used as a demonstrative adjective (ie as a determiner) and the provision is expressed in a single sentence structure. This 48-word provision could be redrafted as:

The Congress established the currency transaction reporting requirements in 1970. It found then that reports of this kind have a high degree of usefulness in criminal, tax, and regulatory investigations and proceedings. Their usefulness has increased since then.

The 38-word redraft is expressed in three sentences averaging 12.7 words. In the redraft, 'such' is replaced by the phrase 'of this kind', and the third person pronoun 'it' replaces 'Congress'.

<sup>25</sup> Mandatory authority includes directing, expressing intention, creating a condition precedent or a condition subsequent, and negating a right, a duty, or a discretion.

<sup>26</sup> See Butt and Castle, above n 23; Michelle Asprey, *Plain Language for Lawyers* (Federation Press, 2<sup>nd</sup> ed 1994); Law Reform Commission of Victoria, *Plain Language and the Law*, Report No 9 (1987).

<sup>27</sup> Barbara Child, *Drafting Legal Documents: Materials and Problems* (West Publishing Company, 1988) 42.

IV APPLICATION OF RESEARCH METHOD TO THE *USA PATRIOT ACT 2001*

The data contained in Table C is derived from analysing a systematic random sample of 10 per cent of the sections in the Act.

**TABLE C: Grammatical Structure of the *USA Patriot Act 2001***

Grammatical characteristics	USA Patriot Act 2001 10% sample
No. of words	4414
No. of provisions	35
No. of sentences	66
Average number of words per sentence	66.9
Range of sentence length	14–293
Percentage of sentences using parallel construction	62.5%
No. of sentences with less than 20 words	4
Percentage of sentences with less than 20 words	6.0%
Total number of clauses	172
Av. no. of clauses per sentence	2.6
No. of sentences with one clause only	34.8%
No. of sentences with less than three clauses	62.1%
No. of sentences with three or more clauses	33.3%
No. of sentences with six or more clauses	4.6%
Range of number of clauses per sentence	1–14
Av. number of words per clause	25.6
No. of reduced relative clauses	112
No. of reduced adverbial clauses	3
No. of sentences in which the grammatical subject is not in initial position	7.6%
No. of clauses with conditionals before the main clause	9 (13.3%)
Percentage of clauses with conditionals before the main clause	5.2%
No. of disruptions to subject/verb nexus	16 (9.3%)
Percentage of clauses with disruptions to subject/verb nexus	13.1 %
No. of disruptions to the auxiliary/verb nexus	6
Av no of words in the disruptions to the auxiliary/verb nexus	6.7
Percentage of clauses with disruptions to the auxiliary/verb nexus	29.8%
No. of disruptions to the verb/object nexus	2 (1.2%)
No. of words in the disruptions to the verb/object nexus	17
No. of disruptions to the referent/relative nexus	4 (2.3%)
No. of times passive used in full verbs	51 (29.6%)
No. of times passive used in reduced relative clauses	73
Percentage of clauses with passive used in reduced relative clauses	42.4%
No. of times ‘shall’ used as a deontic modal	43
No. of nominalisations	4

The following observations can be made about the Act:

- The average sentence length is 66.9 words.
- Only 7.6 per cent of sentences contain 20 words or fewer.
- Parallel structure is used in drafting 62.5 per cent of the sentences. However, when drafting provisions which amend other statutes, the single provision/single sentence structure has been used.
- The average number of clauses per sentence is 2.6.
- The disruptions to the subject/verb nexus is 13.1 per cent.
- The disruptions to the auxiliary verb nexus is 6.7 per cent.
- The disruptions to the referent/relative nexus is 2.3 per cent.
- The disruption to the verb/object nexus is 1.2 per cent.
- Nine of the provisions (or 5.2 per cent) started with conditional clauses before the main clause.
- The percentage of reduced relative clauses in which the passive is used is 42.4.

Many of the sentences in the Act are syntactically complicated. Sentences are more than 330 per cent longer than that recommended by Kimble. Disruption of the subject/verb nexus, the auxiliary verb nexus, and the referent relative nexus remain a significant comprehension problem. Although parallel structure has been used in 62.5 per cent of the provisions in the Act it must be remembered that that Act is one which amends several other Acts. Some amendments lend themselves particularly well to parallel structure. However, when drafting amendments to other statutes, the single/provision single sentence structure has been used. Further, in 13.3 per cent of sentences there are conditional clauses before the main clause, and in 7.6 per cent of the sentences, the grammatical subject has not preceded the verb.

What does not emerge from Table C is the overuse of phrases and reduced clauses. These add to the complexity of the syntax. Consider, for example, s 326 '(1)(a)'(4) of the *USA Patriot Act 2001* which reads:

Identification and Verification of Accountholders –

- (4) CERTAIN FINANCIAL INSTITUTIONS—In the case of any financial institution the business of which is engaging in financial activities described in s 4(k) of the Bank Holding Company Act of 1956 (including financial activities subject to the jurisdiction of the Commodity Futures Trading Commission), the regulations prescribed by the Secretary under paragraph (1) shall be prescribed jointly with each Federal functional regulator (as defined in s 509 of the Gramm-Leach-Bliley Act, including the Commodity Futures Trading Commission) appropriate for such financial institution.

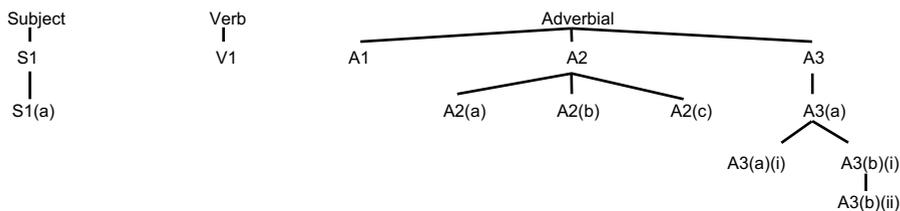
This provision consists of 79 words in a single sentence with one main clause whose subject is 'regulations', and a relative, whose referent is 'financial institution'. This is part of the adverbial and is given in A3(a) below. The syntactic complexity of this provision can best be expressed in Diagram 1, presented overleaf.

Non-lawyers may find s 326 '(1)(a)'(4) difficult to understand because of its syntactic complexity. Most of the identified problems could be removed by redrafting s 326 '(1)(a)'(4) as:

- (1) IDENTIFICATION AND VERIFICATION OF ACCOUNTHOLDERS—
  - (4) CERTAIN FINANCIAL INSTITUTIONS – Certain financial activities are described in s 4(k) of the Bank Holding Company Act of 1956. These activities are subject to the jurisdiction of the Commodity Futures Trading Commission. The business of some financial institutions consists of engaging in these financial activities. Under paragraph (1), the Secretary must prescribe regulations jointly with each Federal functional regulator. Federal functional regulators are defined in s 509 of the Gramm-Leach-Bliley Act. They are appropriate for that financial institution and include the Commodity Futures Trading Commission.

Although the redraft is five words longer than the original, the average sentence length is now 14 words. The redraft does not violate any of Kimble’s guidelines.

**DIAGRAM 1: Diagrammatic Representation of S 326 '(1)(a)'(4)**



Where:

	Component	Type
S1	= the regulations	subject of main clause
S1(a)	= prescribed by the Secretary under paragraph (1)	reduced relative—referent ‘regulations’
V1	= shall be prescribed	verb of main clause
A1	= jointly	adverb
A2	= with each Federal functional regulator	adverb phrase
A2(a)	= appropriate for each financial institution	reduced relative—referent ‘regulator’
A2(b)	= as defined in s 509, Gramm-Leach-Bliley Act	reduced relative—referent ‘regulator’
A2(c)	= including the Commodity Futures Trading Commission	reduced relative—referent ‘regulator’
A3	= in the case of any financial institution	adverb phrase
A3(a)	= the business of which is engaging in financial activities	relative clause—referent ‘financial institution’
A3(a)(i)	= described in s 4(k) Bank Holding Company Act 1956	reduced relative—referent ‘financial activities’
A3(b)(i)	= including financial activities	reduced relative—referent ‘financial activities’
A3(b)(ii)	= subject to jurisdiction of Commodity Futures Trading Commission	reduced relative—referent ‘financial activities’

## V CONCLUSION

Kimble's guidelines proved effective in highlighting the comprehension problems which can result from questionable drafting practices. As was typical of Australian and European Community legislation previously analysed by the author,<sup>28</sup> the *USA Patriot Act 2001* contains many long syntactically complicated sentences which result from adherence to the single provision/single sentence structure. These structures are characterised by a failure to systematically use parallel structure in those provisions which amend other statutes, the breaking of the nexus between essential sentence components, the over-use of reduced clauses and phrases requiring the use of the passive voice, the use of the deontic modal 'shall' where 'must' would have been more understandable to lay persons, the use of nominalisations, and the placing of conditions before the main clause. If adherence to the single provision/single sentence structure were abandoned, comprehension could be enhanced without loss of precision, and the legislation made more accessible to lawyers and lay persons alike. The drafters have failed to consider the linguistic skills of all those who might need to read and understand the Act. If this Act is an exemplar, then little has improved in drafting techniques over the last 30 years.

<sup>28</sup> Tanner, above n 2.

