TAX LAW REVIEW COMMITTEE

FINAL REPORT ON

TAX LEGISLATION

11 JUNE 1996

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FOREWORD TO THE INTERIM REPORT

By the President of the Tax Law Review Committee

The Rt Hon. Lord Howe of Aberavon, PC, QC

"Parliament is judged, amongst other things, by the quality of the laws that we produce and by that standard we deserve to be harshly judged". My words from almost twenty years ago[1], as I denounced - even then - the "incoherent drift towards a tax system that is incomprehensible, unrespected, unenforceable - and spinning like a top".

Now, alas - after years in government, almost half of them as Chancellor or Leader of the House of Commons and in a position, or so it might be thought, to do something about all this - I have to confess that nothing has changed. Save that the task of diagnosing the disease and prescribing the remedy has passed into younger and hopefully more vigorous hands. Graham Aaronson and his colleagues have produced, in this first interim report of the TLRC, an excellent description of what is needed. More important than that, they have proved beyond doubt that it *is* possible for tax legislation to be drafted in plain English and in a form which the citizen and his or her advisers can actually understand.

The central responsibility comes back to the legislature itself. In that same talk almost 20 years ago, I described our existing machinery for tax legislation as "about as appropriate to a modern industrial democracy as tally sticks to the international money market" and I concluded that it was only parliamentarians who could change the system. It is democracy itself, I said, that suffers most from "the universal scorn that greets the legislative output of our present system".

It is not for want of trying that the system remains so little changed today. But we did not try hard enough. It is my Presidential hope that this strikingly clear Report will inspire a fresh generation to try again.

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1 British Tax Review [1977], page 97: address to the Addington Society on 16 February 1977.

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EXECUTIVE SUMMARY

Last November we published our *Interim Report on Tax Legislation* in which we put forward three propositions:

- that tax legislation could be - and should be - written in comprehensible English;
- that explanatory memoranda should accompany the legislation to give people more help in understanding it; and
- that the merits of a complete rewrite of existing tax legislation should be tested by means of a pilot exercise.

We invited comments. This Final Report records the responses we received as well as our final conclusions.

Shortly after we published our Interim Report the Inland Revenue produced its own report on essentially the same subject - *The Path to Tax Simplification.* The conclusions of that report were very much in line with ours, and we are pleased that the debate has moved on from *whether* a more comprehensible drafting style is possible to *how* it should be adopted. The very substantial culture change which we said was vital has started to happen.

We have no doubt that the solutions are those we identified last November:

Plain English

Firstly, tax legislation should be drafted in a plain English style using shorter sentences and a clearer structure. In our Interim Report we showed by rewriting two blocks of existing legislation the sorts of improvement which could be made. The Inland Revenue's report included two further examples. We have nothing to add to this; we believe the point has been proved beyond doubt.

Nevertheless, in this Final Report we comment further on a few points of detail, principally the ways in which definitions should be drawn to users' attention and the changes in drafting style to which the advent of electronic media leads.

Explanatory Memoranda

The second solution is the provision of explanatory memoranda. In our Interim Report we proposed that Ministers should present to Parliament explanations of each clause of the annual Finance Bill. These would include background information, the purpose of the clause, how it would operate and other details to help users understand and interpret the legislation.

Further reflection has enabled us to simplify the proposals we made in the Interim Report. We now propose that an explanatory memorandum should be provided for each and every clause of the Finance Bill and amendments to it; that they should be published contemporaneously

with the Bill, amendment or new clause; and that publication of a compendium of these memoranda should be left to commercial publishers.

These explanatory memoranda would be helpful to Parliament as the Finance Bill progresses through its Parliamentary stages, they would help users of the legislation, and they would assist the courts in resolving difficult points of interpretation.

Rewriting Existing Legislation

The third principal proposal we made in our Interim Report was to pilot a rewrite of existing tax legislation. It is this legislation which we criticised as being frequently impenetrable and at times wholly incomprehensible. It needs to be rewritten in plain English. But we recognised in our Interim Report that such a rewrite could only be undertaken if we could be reasonably sure that the transitional costs - which would be substantial - were justified by the benefits. We could not, and we still cannot, make this judgement. In our Interim Report we therefore recommended a pilot project to test the position.

The Government has subsequently decided that the rewrite will go ahead, but it will take stock after the first tranche of rewritten legislation has been produced. As long as a genuine review of costs and benefits is then made, we believe this will be equivalent to a pilot project. A number of issues will need to be resolved, though, before a start can be made on rewriting any of the legislation. Many of these will need to be thought through carefully by the project team.

But one issue is of crucial importance to the quality and acceptability of the output. This is the control of the project team - to whom should it report? We believe non-Revenue input will be vital through professional, taxpayer and Parliamentary representation on a steering group with executive powers to oversee the rewrite.

Purposive legislation

In our Interim Report we were doubtful whether the use of general principles drafting would be an improvement. The stumbling block we saw was that supporting materials could not be adequately scrutinised. We have now reconsidered this and have come to the conclusion, in discussion with parliamentarians, that changes in Parliamentary procedures may be achievable. If a new Parliamentary committee were created with powers to review and amend drafts of Statutory Instruments for tax, it would become possible to draft primary fiscal legislation in general principles. This would form a framework around which necessary layers of detail - less than the detail required at present - could be added, mainly through secondary legislation. We see distinct advantages to this structure as long as the Parliamentary process is robust enough to guarantee proper scrutiny of both primary and secondary legislation. However, in view of the need to change Parliamentary procedures first, we see the move to purposive legislation as a longer term aim.

Other than one residual issue on the Parliamentary handling of rewritten tax legislation, this Final Report brings this project to a conclusion. We hope the package of recommendations set out in the following pages and summarised above will offer, if not a total solution to the problem of complexity in tax legislation, at least a very substantial improvement.

11 June 1996

CHAPTER 1: INTRODUCTION

1.1. This *Final Report on Tax Legislation* is the follow-up to our *Interim Report on Tax Legislation*, published on 23 November 1995.[1] In that interim report we recorded a number of preliminary conclusions and we also indicated a few areas where we intended to reflect further. We invited comments on any of the matters raised in the interim report.

1.2. In this chapter we summarise our interim report and the comments we have received.

1.3. Shortly after we published our interim report the Inland Revenue delivered its report to Parliament - *The Path to Tax Simplification*[2] - as required by Finance Act 1995. This report covers much of the ground which our interim report had trodden, and it reaches many of the same conclusions. In Chapter 2 we give our comments on the Inland Revenue's report.

1.4. In Chapters 3 to 8 we analyse and respond to the comments on our interim report, and we develop the issues which we flagged up in the interim report as needing further thought.

1.5. We have kept this report as brief as possible. A fuller examination of many of the issues raised will be found in our interim report. However, in Chapter 9 we summarise our final conclusions and recommendations, including some made in our interim report on which we have not otherwise commented in Chapters 1 to 8.

SUMMARY OF OUR INTERIM REPORT

1.6. In our interim report we found that tax legislation has not merely increased in volume - it has quadrupled in length since the early 1950s - but that much of it is impenetrable and incomprehensible. We concluded that this is unnecessary and that a simpler and more accessible style *is* achievable without any consequent loss of precision. We showed, in redrafting two existing pieces of legislation, how this could be done by the use of plain English - i.e. adopting shorter sentences and clearer structure. This new style aimed to improve clarity and accessibility, features which we believe to be undervalued by the traditional drafting style.

1.7. Our second principal proposal was that new Finance Bill legislation should be accompanied by explanatory memoranda. The Government would publish these alongside the Finance Bill clauses and amendments to help MPs and others to understand the legislation during its passage through Parliament. They would be published as a collection after Royal Assent and thereby be available to practitioners to aid understanding of the (by then) Finance Act. And we proposed that the courts should be able to refer to them to help resolve any ambiguities in the legislation, on a similar basis to Hansard reports of Ministerial statements following the House of Lords decision in Pepper v Hart[3].

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1 *Interim Report on Tax Legislation*, available from Institute for Fiscal Studies (0171 636 3784) price £12.50 (non-members), £6.00 (IFS members).

2 HMSO, 12 December 1995. Separate Background Paper also published by HMSO.

3 [1992] STC 898; [1992] WLR 1032; [1993] 1 All ER 42; [1993] AC 593.

1.8. We recognised that these proposals, on their own, would only improve *existing* legislation very gradually as it is amended or replaced. The alternative would be to rewrite this legislation from scratch - an exercise which would be costly in the short-term. We noted that whether these costs are worth bearing boils down to a simple question: do the long-term benefits of more user-friendly tax law justify incurring them? Our third principal recommendation was that a pilot be established for a project to rewrite systematically the existing income tax, corporation tax and capital gains tax legislation. Such a pilot would resolve a number of preliminary issues as well as helping to show what benefits a full rewrite would offer.

OVERVIEW OF COMMENTS RECEIVED

1.9. In our interim report we invited comments on the preliminary conclusions we had reached. We are extremely grateful to the twelve individuals and eight organisations who responded. The comments sent to us by the representative professional bodies are reproduced in the Appendix to this report, with their kind permission.

1.10. In the remainder of this report we shall refer to the comments of the representative professional bodies using the following abbreviations:

ACT	The Association of Corporate Treasurers
CIOT	The Chartered Institute of Taxation
ICAEW	The Institute of Chartered Accountants in England and Wales, Faculty of Taxation
IoD	The Institute of Directors
LS	The Law Society
LSS	The Law Society of Scotland
SCCB	The Special Committee of Tax Law Consultative Bodies

1.11. The responses raised a number of points of detail and these are dealt with in succeeding chapters. But overall, they all supported the principal conclusion of our interim report, that tax legislation is excessively and unnecessarily complex and that it can be - and should be - drafted in plain English. There was also almost total agreement that explanatory memoranda would be a useful additional aid to understanding and interpreting tax legislation.

1.12. Perhaps not surprisingly, there was less agreement on the desirability and method of rewriting existing legislation. In our interim report we had been unable to say whether the benefits of a rewrite would justify the costs, and we therefore proposed a pilot exercise to help answer this question. The views of respondents ranged from strong support for a full rewrite (ICAEW) to reservations about the value of even a pilot study (LS). Other responses supported our proposal of a pilot project. We discuss these in more detail in Chapter 6.

CHAPTER 2: THE INLAND REVENUE'S REPORT

SUMMARY OF THE REPORT

2.1. The Inland Revenue's report to Parliament, *The Path to Tax Simplification*, was required by an amendment, sponsored by Tim Smith MP, to the 1995 Finance Bill.[4] The report covers much the same ground as our interim report and reaches much the same conclusions although it focuses rather more on simplifying existing legislation and a little less on future Finance Bill legislation. It reviews both the growth of tax legislation, as we did in Chapter 1 of our interim report, and the criticisms which have been made of it by various commentators, including us.

2.2. The Inland Revenue's report divides possible solutions into three categories: policy reform; reform of the Finance Bill production line; and the language and organisation of existing law. It concludes that improving language and organisation is "the most practical way of achieving the biggest improvement in a reasonable timescale". It also, as it was required to do, considers but dismisses the suggestion of a Royal Commission or Tax Law Commission.

2.3. The report therefore makes a case for a plain language rewrite of "most of" the existing direct tax code to produce a clearer and more user-friendly version. It suggests that such a rewrite would take around five years at a cost of £5 million a year to the public sector, and that this and the further cost to the private sector would be well justified by the anticipated benefits.

2.4. The Revenue also published a Background Paper which explains its conclusions in more detail.

OUR COMMENTS ON THE REPORT

2.5. We very much welcome the overall thrust of the Inland Revenue's report, many of the conclusions of which mirror our own interim report. This is not, of course, any great surprise to us. We had kept in close touch with the Revenue's simplification team and ensured that they were aware of our thinking as it developed.

2.6. There are, of course, differences between the two reports, but these are more of tone than of substance. Whilst we do have some comments in the following paragraphs we should emphasise that these are really matters of fine-tuning and do not represent fundamental disagreements as to the correct approach.

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4 Now section 160 Finance Act 1995

Explanatory memoranda

2.7. In our interim report we went to some trouble to explain the need for explanatory memoranda to support fiscal legislation and outlined how we saw these being produced. The Inland Revenue's report itself says only that there will be an examination of "the possibilities for expanding the current Notes on Clauses with a view to having improved explanatory material for the 1997 Finance Bill". A little more detail is added on pages 12 and 13 of the Revenue's Background Paper, but the tone remains rather more lukewarm than we had hoped.

2.8. Nevertheless we have been encouraged both by the Government's statement in the House of Lords on 27 March 1996 that:

> "there is something to be said for explanatory memoranda and I do not believe there is a great deal of difference between the reports of the Inland Revenue and the TLRC in that regard"[5]

and by the discussions we have had with Revenue officials. The enhancements to the current Notes on Clause which they are studying would, if implemented, differ only in minor detail from the explanatory memoranda which we called for in our interim report and which we discuss further in Chapter 5 below. The Revenue intends to consult with the tax professional bodies later this year on the form their new-style Notes on Clause should take, and we look forward to giving our comments then.

2.9. We set out our final views on explanatory memoranda in Chapter 5.

Rewriting existing legislation

2.10. In our interim report we said that rewriting existing tax legislation should only go ahead if the long-term benefits were sufficient to justify the short-term costs. We recommended that a pilot be established to gauge whether the benefits would be sufficient. The Inland Revenue's report is more positive, arguing that "the benefits should substantially outweigh the costs". We consider that the position is less clear-cut than that.

2.11. We note, though, that the Inland Revenue's report envisages that "Ministers would probably want to take stock after the first tranche had been completed". We very much hope that they will do so A pilot project would need to go beyond selecting a block of legislation and reproducing it in comprehensible English. This has been done already. It would need to identify and answer all the preliminary questions which would arise on a full rewrite - such as the best structure to adopt, the numbering system, how and when to incorporate case law and extra-statutory material - and decide the order in which a full rewrite would be undertaken. But instead of rewriting in full, only the first tranche of legislation would be rewritten. On this basis, the difference between the full-blown rewrite which the Revenue proposes and the pilot which we proposed is largely semantic.

2.12. In our interim report we proposed that the rewrite project team should report to a steering group on which taxpayers and the professions would be represented as well as the Revenue. The Inland Revenue's report says only that there would need to be a wide-ranging

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5 Speech by Lord Mackay of Ardbrecknish, Hansard 27.3.96, column 1748.

consultative process, and it offers the Self-Assessment Consultative Committee as a possible model. We are concerned that the rewrite project should command respect from all interested parties. There must be no fears that either the content of the rewritten legislation or the process of rewriting it and consulting on it will be one-sided. We believe that non-Government representation on a steering group to which the rewrite team would report is essential to give the project this necessary level of credibility.

2.13. We develop our thoughts on the control of the rewrite project, as well as setting out our final conclusions on rewriting existing legislation generally, in Chapter 6.

CHAPTER 3: PURPOSIVE LEGISLATION

3.1. In our interim report we discussed whether or not tax legislation should be "purposive". This question had been the focus of the public debate on the drafting of Finance Bills in the preceding months. We noted that the term "purposive" could be interpreted in a number of different ways, and in our interim report we considered two distinct categories: firstly, so-called general principles drafting; and secondly, the use of statements of purpose.

GENERAL PRINCIPLES DRAFTING

3.2. Our conclusion on general principles drafting was that no single correct legislative approach could be formulated and that it was a matter of balance and where best to draw the line. On this basis we said that general principles drafting might be appropriate for some provisions where the principle could be stated with sufficient clarity to avoid uncertainty or where the balance lay in favour of supplementing the legislation by regulations or guidance issued by the Revenue departments or leaving it to judicial development. However, we did not recommend the use of general principles drafting as a solution of general application.

3.3. All but one response agreed with this.

3.4. This conclusion was rooted very firmly in two propositions. Firstly, whilst immediate, absolute certainty was unattainable, a detailed provision will very frequently give greater immediate certainty than one based on general principles. The sacrifice of significant immediate certainty would be unacceptable. Secondly, we saw no prospect of any change in Parliamentary procedures to allow greater scrutiny of secondary legislation, the principal and most acceptable way in which immediate certainty could be provided outside primary legislation.

3.5. Since our interim report, we have studied this further in response to comments by Leonard Beighton CB, a former Deputy Chairman of the Board of Inland Revenue.[6] Mr Beighton argued that tax law could be simpler, clearer and more direct if the courts were willing and able to interpret it purposively, and that this would involve setting out general principles rather than attempting to cover in detail the full range of possibilities. Mr Beighton disputes the supposition that such legislation would offer less certainty than detailed drafting provides. He argues that general principles drafting might make it easier to forecast the judicial approach in individual cases and that far from transferring power from Parliament to the Government, it would enhance Parliament's strength.

3.6. We agree that there are attractions in drafting primary legislation by reference to general principles. The primary legislation would form a policy framework, setting out purposively the main terms of the provision. To this framework would need to be added at least some detail. Mr Beighton considered that this further elaboration could be given in non-statutory practice notes or guidance but we do not believe this would give taxpayers sufficient

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6 British Tax Review 1996, Number 1, page 1.

protection. In our view it would have to be provided through properly scrutinised secondary legislation in the form of Statutory Instruments. If this were done, a hierarchy of legislative provisions would be created with clear benefits over the present arrangements. Firstly, the primary legislation would be much shorter and more comprehensible and, consequently, it would be easier to see the right answers to cases at the margins where the application of the detailed rules is unclear - frequently a problem at present. Secondly and leading on from this, we believe that less elaboration would frequently be required than at present so that the total package of primary and secondary legislation would be smaller than the primary legislation typically is at present.[7] Thirdly, Parliament would be able to concentrate on the policy merits of the primary legislation without the detail obscuring these. Fourthly, the legislation would be less cast in stone; the secondary legislation could more easily be amended if this became necessary.

3.7. But we see major obstacles which would need to be overcome before we could regard general principles drafting as acceptable. Our concerns stem both from the constitutional requirement for democratic scrutiny of tax laws and from the commercial requirement for certainty. Firstly, Parliamentary procedures would need to be modified in such a way as to give us confidence that the Statutory Instruments would be fully scrutinised before coming into effect. Secondly, the timing of that scrutiny would be crucial. The devil is often in the detail, so the effective scrutiny of the primary legislation would depend upon the Statutory Instruments being available sufficiently early. For Parliament to pass the primary legislation in a vacuum would not be satisfactory. Moreover, if the Statutory Instruments were scrutinised after the primary legislation had been enacted, it might not be possible to make desirable amendments to them.

3.8. Parliamentary procedures are a matter for Parliament itself, but we have given some thought to the sort of process which would be needed before we could recommend a move to general principles drafting. In the initial, pre-Parliamentary stage all Statutory Instruments of this kind would be exposed to public consultation. As part of this process, we believe the Government and professions would need to establish a standing consultative committee of tax practitioners which would discuss and comment on the drafts. Hopefully, many issues could be resolved at this stage but inevitably there would be residual issues of which no resolution could be found. These residual issues would need to be referred to Parliament.

3.9. At present, Parliament cannot scrutinise Statutory Instruments adequately: it can accept or reject them in full, but it cannot amend them. A full Parliamentary scrutiny procedure would need to allow amendments. But to amend a Statutory Instrument which had already been laid and could have come into effect would create great confusion and uncertainty. Parliament would therefore need to be able to debate the Statutory Instruments in draft, before they were laid.

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7 Precisely how much detailed elaboration would be required for each provision would depend upon the way in which the policy was formulated. Present arrangements focus attention on the detailed rules, not on underlying principles. With general principles drafting this should change. For example, if a provision such as the Business Expansion Scheme had been drafted in terms of general principles, it might have focused less on the arbitrary rules and more on its objective, and this might have led to fewer and less frequent changes to those rules.

3.10. Since existing Parliamentary arrangements are unable to accommodate this, we believe that a new Parliamentary committee would have to be created. This would be very different from the ad hoc committees which review Statutory Instruments currently. It would also differ from the Finance Bill Standing Committee: firstly, it would be a permanent committee; and secondly it would not report its conclusions back to the floor of the House (other than under the negative Resolution procedure) since to do so would merely replicate the procedure for primary legislation. In this way, it would resemble a Select Committee. Such a committee would need to be able to take evidence: at minimum it would receive a report from the consultative committee of tax practitioners referred to at paragraph 3.8; it might also examine Inland Revenue and Customs & Excise officials; and there could be times when it would wish to take evidence from other parties.

3.11. This is no more than a rough skeletal outline of the sort of Parliamentary procedure which would be needed before general principles drafting could begin to be used for Finance Bills. We are aware that it leaves a number of issues which would need to be thought through very carefully. It is worth mentioning three of these. Firstly, we do not see general principles drafting as a way in which *existing* tax legislation could be improved - the changes needed would in most cases be too radical - and therefore it would apply only to future Finance Bill legislation. Secondly, whilst we conceive that much of what we have said may apply outside the tax field, we have given no thought to non-tax legislation; our proposals are accordingly confined to tax legislation. Thirdly, matters which are currently dealt with in secondary legislation - for example, PAYE regulations - would not necessarily be subject to the new procedures we are proposing. Instead, it would be possible to apply them selectively. However, we hope that all secondary legislation would be given the increased scrutiny we are proposing.

3.12. We therefore consider that general principles drafting would be worth adopting for new legislation in future Finance Bills, but not for the rewrite of existing legislation which we discuss in chapter 6, subject to the full satisfaction of the following conditions:

- a new and sufficiently robust Parliamentary procedure for prior scrutiny of draft Statutory Instruments would firstly need to be established; and
- this procedure and the pre-Parliamentary consultation process would need to allow the timing of the scrutiny of the Statutory Instruments to be co-ordinated with the passage of the primary legislation.

3.13. We recognise that these conditions mean that general principles drafting will not be introduced quickly. Our recommendation should therefore be seen as a medium- to longer-term objective.

STATEMENTS OF PURPOSE

3.14. In our interim report we concluded that statements of purpose within the primary legislation are not essential but that the draftsman should use them where they are helpful.

3.15. The responses to this conclusion varied. LSS was concerned that the statements should not be so abbreviated as to be useless. They also wanted more thought to be given to the interaction between statements of purpose and the marginal notes which we also recommended. We agree that statements of purpose are only likely to be helpful where they add something to the remainder of the text. They are not, though, meant to be a comprehensive exposition of or substitute for the provision itself, and they are therefore, by their very nature, abbreviated. However, neither are they a mere summary of the provision and this is the difference between them and marginal notes: the marginal note is a bald summary of the subsection, designed principally to aid navigation through the legislation; the statement of purpose explains as much *why* a section or chapter has been enacted as *how* it operates.

3.16. ICAEW suggested that more research should be done since there was little point in statements of purpose if the courts ignored them. They cited section 776(1) Income and Corporation Taxes Act 1988 as an example. As noted above, we agree that statements of purpose will only be of value if they add something to the detailed provisions which follow them, and they cannot do so if they are ignored. However we do not accept that the judicial interpretation of section 776 gives the cause for concern which ICAEW implied.[8] But we accept that statements of purpose will need to be drafted very carefully so as not to leave either conflicts with the detailed provisions or ambiguity as to their scope.

3.17. There is an important linkage between statements of purpose and explanatory memoranda. As we noted in our interim report, there has been an increasing trend in recent years for the courts to interpret legislation by reference to Parliament's intention - the purposive approach. We believe the availability of explanatory memoranda which explain Ministers' intentions in putting the legislation forward will reinforce this trend. But in some cases statements of purpose may be a better way to identify Parliament's intention since they have full legislative force.

3.18. There may also be a further linkage between, on the one hand, statements of purpose and explanatory memoranda and, on the other, general principles drafting. To the extent that statements of purpose or explanatory memoranda make the legislation's purpose clear, the courts may have greater confidence to adopt purposive *interpretation*. And to the extent that they consistently interpret legislation purposively, the draftsman may have greater confidence to *draft* purposively. In this way a virtuous circle may be created.

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8 Section 776(1) provides that "This section is enacted to prevent the avoidance of tax ...". In Page v Lowther, Walton J said (at [1983] STC 68-99):

> "... it would ... be dangerous in the extreme for a judge to take it upon himself to modify the meaning of words in subs. (2) ... according to his own conception of what does and does not constitute tax avoidance."

This was supported by the Court of Appeal (at [1983] STC 799 and 805). Some have taken this to mean the courts would not apply subsection (1). However the more realistic interpretation seems to be that subsection (1) *does* apply, that if there is no tax avoidance the section cannot apply, but that the term "avoidance of tax" is objective (was tax avoided?) and not subjective (was there an avoidance motive?).

SUMMARY

3.19. We see considerable advantages in the use of general principles drafting for future Finance Bills. We do not believe it would be possible to redraft existing legislation in general principles. However, general principles drafting will only become possible once Parliamentary procedures permit satisfactory scrutiny of secondary legislation, which would need to play a more prominent role. We therefore see this as a longer-term recommendation.

3.20. In the short term, we expect that where detailed provisions are required these will normally, as now, be included in the primary legislation and not in secondary legislation. However, as we noted in our interim report, there will be occasions when the principle can be stated with sufficient clarity to avoid uncertainty without the need for additional levels of detail, and on these occasions general principles drafting should be used.

3.21. We also see advantages in the use of statements of purpose prefacing detailed drafting. We see no reason to depart from our original judgement that they are not essential but should be used when they are helpful.

CHAPTER 4: LANGUAGE

OVERVIEW

4.1. In our interim report we argued that there is a strong prima facie case that tax legislation *can* be written in clearer, more accessible and more comprehensible terms without losing its accuracy. We supported this conclusion with two examples of the ways in which existing legislation might be redrafted to be more user-friendly.

4.2. All the comments we have received have endorsed this conclusion, either explicitly or implicitly. No-one disagreed with the proposition that plain English drafting should supplant the current drafting style.

4.3. Some respondents expressed preferences for one or other of the styles exemplified by our two redrafts and by those reproduced in the Inland Revenue's report. As we said in our interim report, we do not believe that any single style will be suitable in all circumstances. The choice of style will need to be informed by several factors such as the nature of the legislation, the types of taxpayer it affects, and so on.

4.4. The remaining substantive comments on this chapter of our interim report focused on specific aspects of plain English drafting, and these are covered in the following paragraphs.

TARGET AUDIENCE

4.5. IoD disagreed with our conclusion that the target audience for tax legislation should be accountants, lawyers, tax inspectors and other professionally qualified users. They argued that the aim should be "the widest possible understandability compatible with certainty" and that "as much as possible of the system should be understandable by the reasonably intelligent layman". LSS also wanted tax laws to be "clear and comprehensible so far as possible to the intelligent man in the street".

4.6. We could not disagree with these sentiments; of course, the draftsman should make the legislation as clear as he can, and if this enables it to be understood by laymen so much the better. In many areas we think it doubtful that this will be achievable without loss of certainty. As far back as 1936, the Income Tax Codification Committee thought that laymen would never be able to understand fiscal legislation[9] and the legislation has become considerably more complex since then. We said in our interim report that the draftsman should accord equal importance to clarity and accessibility as to accuracy; we would not wish to see accuracy relegated to a position of lesser importance than clarity. There will always be room for commercial publications and Revenue leaflets to explain the law to the non-qualified.

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9 Quoted by the Renton Committee at paragraph 17.9 (Cmnd. 6053).

4.7. Nevertheless, we firmly hope that, in at least some areas, tax legislation will become accessible to laymen who are willing to devote some time to understanding it. We believe that our proposal that explanatory memoranda should be made available (see chapter 5) will significantly assist here. The change we foresee is one of degree; whilst we cannot expect that all legislation will be understood by everyone, writing it in plain English and supporting it with explanatory memoranda should enable a significant number of additional people to understand it without having to employ a tax professional to explain it to them. This will be an important advance with self-assessment being introduced next year.

DEFINITIONS

4.8. In the redrafted legislation which we appended to our interim report we italicised definitions on their first appearance. The intention was to put readers on notice that a word or term had a defined meaning which would be found elsewhere in the legislation. IoD and CIOT both considered that identifying the first appearance of a defined term was insufficient. IoD pointed out that legislation is not read from beginning to end like a novel but is frequently dipped into for the answers to specific questions. Moreover, some definitions apply throughout an Act, and yet the user may be studying a provision which appears part way through that Act. For example, "chargeable period" is defined in relation to the whole of the Capital Allowances Act 1990[10] and first appears in section 1, in relation to industrial buildings allowances. Anyone claiming machinery and plant capital allowances would not be put on notice by italicising only the first appearance of the term.

4.9. We have therefore concluded that *every* appearance of a defined term needs to be identified. This is already done in some form by the commercial publishers in both paper and electronic editions; the latter have "hypertext links" which allow immediate access to definitions by clicking on (highlighted) defined terms. However, since this highlighting is designed to aid understanding, we would prefer to see it in the Bill as soon as it is published, rather than wait for commercial publishers to add it later.

4.10. But there is a separate issue as to the best identifier. Although we used italics in our redrafts, there are alternative approaches. Emboldened or coloured text might suit some people's tastes but would differ only superficially from italicised text. And these types of highlighting are arguably less appropriate for legislation in paper form than in electronic form. More substantive alternatives are to identify each defined term by:

- a *marginal note* - for example, SCCB's redraft of Rent-a-Room relief[11];
- a *footnote* - for example, the Australian approach[12]; or
- a *"navigational aid"* immediately below the relevant subsection - for example, as proposed by Australia[13].

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10 Section 161(2) Capital Allowances Act 1990.
11 Reproduced as Example 1 in the Revenue's Background Paper.
12 Reproduced as Example 4 in the Revenue's Background Paper.
13 Also reproduced as Example 4 in the Revenue's Background Paper.

4.11. In our view, marginal notes are the best solution where definitions need to be identified on every occurrence. Italics already have a special use in some legislation making it less easy to use them to highlight definitions. Moreover, they would interrupt the flow of the legislation, especially in some technical provisions where a high proportion of the text is defined.[14]

4.12. As we said in our interim report, we do not accept the argument that it is not easy to distinguish defined terms from undefined ones, that the draftsman would not know where to draw the line and that identifying only some definitions would cause confusion. In particular, we have considered whether the courts would infer from an isolated, inadvertent failure to include a marginal note for a defined term that the definition was intended not to apply. We do not believe that they would.

4.13. A comment from an individual suggested that definitions should be gathered together in one or more places within the Taxes Acts, rather than scattered around as at present. And LS proposed that definitions should appear at the beginning. For users of the legislation in electronic form this is perhaps a less important issue. But for paper legislation we agree that users need to know where they can find definitions. We believe that three principles can be distilled:

- There is some sense in gathering general definitions into one place, or alternatively providing an index of all such definitions in an Act. Section 288(8), Taxation of Chargeable Gains Act 1992 is a very good example of such an index.
- There is little point in centralising definitions which apply only for one section or block of sections - such as the definitions of *old assets* and *new assets* for roll-over relief. These should be located with the legislation to which they relate, although it would be helpful in addition to include references to these in the index mentioned above.
- Whether definitions are given at the beginning or the end of the legislation is relatively unimportant. What is far more important is that a consistent approach should be adopted so that users know where to look for definitions.

4.14. One additional point has been drawn to our attention. Some definitions operate by modification of other definitions, which can be very confusing and difficult to work with. We would prefer a new definition to be set out in full in these circumstances, even if this is longer.

WORKED EXAMPLES

4.15. In our interim report we said that worked examples should be provided to show how the legislation was intended to operate in some practical situations. All the respondents who commented on this proposal supported it.

4.16. However, we suggested that the worked examples might be placed either in the legislation itself or in the explanatory memoranda - there are precedents for each approach - and we asked for comments on which was preferable. Some, including LSS, were happy to see them in the legislation, the method we adopted in our redraft of capital gains tax roll-over

14 For example, paragraph 1(7), Schedule 19AB, Income and Corporation Taxes Act 1988.

relief at Appendix 1 to the interim report. By contrast, IoD thought that as aids to interpretation, as opposed to legislation, they should be provided only as explanatory material; CIOT agreed; ACT reached the same conclusion, fearing confusion if they were used to illuminate the tax treatment of different facts.

4.17. We do not agree that worked examples belong in the explanatory memoranda *because* they are non-legislative. If they were incorporated into the legislation they *would be* legislative. Nevertheless, we accept that they should normally appear in the explanatory memoranda. However, there should be no bar to their being located in the legislation itself where this is more natural or for other reasons, as long as the text of the legislation expressly takes precedence over the examples if there is a conflict.

DESIGN

4.18. In our interim report we recommended that the design of tax legislation should be modernised. We also said that we would be examining whether additional features need to be incorporated into the design of the legislation to achieve compatibility with new electronic delivery media such as CD-ROM.

4.19. We foresee that tax legislation will increasingly be stored on and accessed through electronic media in the future. Many people already use this format and within a few years a majority of practitioners are likely to do so. Tax legislation and the various supporting materials are ideally suited for this: they take up a considerable amount of space in paper form; regular changes are made; and they are predominantly used in a "non-linear" way - for concurrent reference to several different extracts (as contrasted with, say, a novel which is read linearly from start to finish).

4.20. This means that the legislation needs to be capable of supporting a search function. Human searches are laborious but precise formulation of the terms is unimportant. By contrast a computerised search can be extremely rapid, but the parameters must be absolutely precise: if the computer is asked to find references to Shakespeare it will ignore references to the Bard. The most important consequence of this for tax law is that statutory references need to be in a standard form (for example, FA95 section 90(1)). At present the legislation might refer to a provision in any of several different ways.[15]

4.21. But there are also more substantive ways in which the draftsman's approach to writing legislation affects the electronic publisher. For example:

- *structure* tax legislation normally follows a pre-set structure (act, part, chapter, section, subsection) and this is used as a navigational tool in the electronic legislation; departure from this norm creates problems;
- *headings* headings are also used for navigation; problems arise if headings are inserted where they do not normally appear.

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15 For example, section 12, Finance Act 1996 contains three references to the Betting and Gaming Duties Act 1981 in the following terms: "Schedule 4 to that Act", "that Schedule" and "this Schedule".

4.22. Electronic delivery also highlights one way in which legislation can be made more user-friendly. It is fairly common for current legislative provisions to commence "subject to section/subsection x" leaving the reader to cross refer to that provision to discover what it is about. In the electronic form, hypertext links obviate the need for the section/subsection number to be expressed; consequently the legislation can indicate the subject matter of the cross reference, thereby saving some users the need to read the provision referred to. For example, section 200A ICTA 1988 which begins "subject to subsection (2) below" could instead say "subject to the authorised maximum", with the definition of that term indicated in the margin as we recommend at paragraph 4.11 above. If you already know what the authorised maximum is, you are not distracted by the cross reference.

4.23. None of these issues requires any special approach to the drafting of paper legislation since electronic publishers can find their own solutions. Indeed, to draft explicitly for the electronic version - for example, by standardising references - might significantly detract from user-friendliness of the paper version of the text. But such solutions involve the expenditure of time by the publisher's professional staff, adding to costs which are passed on to the user - the tax adviser - and ultimately to the taxpayer. Assuming that tax publishing is a competitive business, if savings in these costs could be identified these would be passed on.

4.24. We recognise that a number of pressures, many of them conflicting, affect the draftsman and that a balance must be drawn between them. Subject to this, we believe that, without adding to the burden on the draftsman or detracting from the clarity of the paper legislation, an effort should be made to draft legislation in a way which minimises the costs of converting it into electronic form. This is a subject which we understand has previously been considered by a sub-group of the Lord Chancellor's Advisory Committee on Statute Law. We suggest that it could best be advanced in discussions between the electronic publishers and that sub-group.

SUMMARY

4.25. We believe that the case for plain English drafting of tax legislation has now been made.

4.26. The legislation should be as clear as possible. Whilst it is unrealistic to expect the legislation to be written so clearly as to be readily intelligible to a large number of people who are not tax experts, we hope that the balance will be shifted to some extent at least. But, as we said in our interim report, increased clarity and accessibility must not come at the expense of accuracy.

4.27. Some of this improvement in intelligibility can be obtained by making changes in the areas we have indicated - marginal notes to identify definitions, modernised typographical design, and as we said in our interim report, shorter sentences, clearer structure, improved cross references and side notes to subsections as well as to sections.

CHAPTER 5: EXPLANATORY MEMORANDA

OVERVIEW

5.1. In our interim report we proposed that explanatory memoranda should be made available to explain each clause of the Finance Bill. Of course, the Treasury already makes its Notes on Clauses available, but these give only very limited information and at times merely reproduce the words of the legislation itself without adding very much to it.

5.2. There was almost total acceptance by those who commented that such explanatory memoranda are needed. Only ICAEW were against the idea but their objections relate only to the weight explanatory memoranda would be given by the courts in attempting to resolve ambiguities in the legislation.[16] We return to the status of explanatory memoranda at paragraph 5.15 below.

5.3. As noted in Chapter 2, the Inland Revenue's report is less enthusiastic about explanatory memoranda than is our interim report, but we have subsequently had very encouraging discussions with them. We hope that when the Revenue's own proposals are published later this year there should, as the Government spokesman said in the House of Lords on 27 March, not be "a great deal of difference" between us.[17]

PRODUCTION OF EXPLANATORY MEMORANDA

5.4. Our interim report proposed that an explanatory memorandum should be produced for each clause or block of clauses, that it should contain useful information concerning the purpose of the clause, how it operated, why it was phrased in a particular way and other background information, and that worked examples should be provided. With one proviso, none of the comments we have received disagreed with this. Moreover, our discussions with the Revenue indicate that their provisional thinking also accepts this.

5.5. The proviso is that LS wanted the explanatory memoranda to set out the full, prospective text of legislation which was being amended; at present, the original text of the legislation and the textual amendment proposed in the Finance Bill must be read together to discover what the amended text will be. We agree that some mechanism for publishing the new text of such amended provisions would be helpful. This is especially so as regards

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16 In their original comments ICAEW were against the idea "because of the difficulty in defining their status". However, in their follow-up letter they explained that "the publication of detailed explanatory material by the Inland Revenue would be useful [b]ut only as an aid to the use of the legislation by practitioners, not as an authoritative aid to interpretation by the Courts".

17 Lord Mackay of Ardbrecknish, Hansard 27.3.96, column 1748.

Committee Stage amendments to the original text of the Finance Bill[18], but the problem is acute whenever a series of textual amendments is made to an existing provision.

5.6. We said in the interim report that the explanatory memoranda should be published either at the same time as the Finance Bill or, if time pressures dictated, within a few weeks thereafter. LS were unhappy that additional time should be available; LSS, by contrast, were concerned (as we had been when we wrote the interim report) that useful explanatory memoranda might not be possible within current time constraints. However, the Revenue have told us they think it likely that they will be able to publish useful explanatory memoranda without any additional time requirement. This was the ideal which we said in the interim report we would wish to see.

Amendments and new clauses

5.7. Our interim report also proposed that each Government amendment or new clause should be accompanied by an explanatory memorandum. However, we suggested that there might be two exceptions to this:

- where the amendment was self-explanatory, and
- (exceptionally) where there was insufficient time available to produce one.

We had one further suggestion:

- that supplementary memoranda could be published to clarify particular points.

5.8. We put these suggestions forward to allay any possible fears in the Revenue that explanatory memoranda might become a straitjacket; we recognised that ideally they would not be necessary. Our subsequent discussions with the Revenue indicate that these features are unlikely to be required and consequently we are happy to withdraw them.

5.9. We therefore now propose that the Government should publish an explanatory memorandum with the Finance Bill for each and every clause and that it should publish a new explanatory memorandum for each and every Government amendment or new clause and should encourage their publication with non-government amendments and new clauses.

5.10. The amount of detail to include in each explanatory memorandum will require the exercise of judgement. But an issue arises in connection with Committee Stage and Report Stage amendments to the Finance Bill. Whenever such amendments are made there will be two or more explanatory memoranda: one covering the original clause and one for each amendment (or block of amendments). For clarity we refer to these as "the original explanatory memorandum" and "the new explanatory memorandum". Where a minor change in the wording of the legislation is proposed - for example, the inclusion of a few additional words to clarify the meaning without altering the original intention - the new explanatory memorandum may not need to be more than a few lines. However, an amendment which makes a substantive change - especially one which alters the way the legislation is intended to work - may make the original explanatory memorandum for the clause wholly or partly

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18 LS cited by way of example the 30 pages of Government amendments to the legislation on corporate and government debt - now Part IV, Chapter II, Finance Act 1996.

incorrect. Clearly in these circumstances the new explanatory memorandum would need to contradict the original explanatory memorandum. This could be a source of much confusion if the new explanatory memorandum was limited to commenting on the changes made by the amendment - equivalent to the problems caused by non-textual amendment of the legislation. We propose that to avoid problems in these circumstances the new explanatory memorandum should both:

- explain the change the amendment is designed to achieve; and
- set out the amended position for the full clause, in effect showing how the original explanatory memorandum would have looked had the Finance Bill incorporated the amendment from the outset.

Consolidation

5.11. Our interim report proposed that commercial publishers should produce a consolidated set of explanatory memoranda once the Finance Bill has received Royal Assent. In fact, "consolidation" is not the correct word since we did not propose to allow any departure from the text provided to Parliament during the passage of the Finance Bill. It would be more correct to refer to this as a compendium of the explanatory memoranda for the Bill.

5.12. All but one of those who commented agreed that publication of such a compendium by commercial publishers was the preferred course. The alternative was for the compendium to be published by the Government.

5.13. CIOT wanted explanatory memoranda to be amended after the Finance Bill has passed through Parliament in order to take account of amendments to the legislation. In effect, they suggested an official explanatory note on sections of the Finance Act. It would be impossible for changes to be made at this late stage without the loss of a major part of the value of the explanatory memoranda, namely that they were before Parliament when it passed the legislation and can therefore be seen as having some, albeit limited, authority. Nevertheless, we agree that it will be important for users to be able to see the final picture, not just a snapshot of the Finance Bill before amendment. We believe that publication of a compendium of explanatory memoranda represents the best solution available.

5.14. LS asked that the compendium include the explanatory memoranda for clauses or amendments which were not accepted by Parliament. We have some doubts about the usefulness of such material, the audience for which may be very limited. But we propose that questions such as these should be left to market forces - if commercial publishers believe their customers want this information they will include it.

STATUS OF EXPLANATORY MEMORANDA

5.15. Several respondents mentioned the status of explanatory memoranda; ICAEW was sufficiently concerned to come down initially against the proposal. It is self-evidently important to be clear about what is being proposed. Explanatory memoranda would *not* be legislation; they would *not* have the force of law. Principally they would have two audiences:

- Parliament - they would be available to MPs and so should influence the Parliamentary debate; and
- users of the legislation.

The latter audience would potentially be very large although in practice a smaller number of people would be likely to refer to the explanatory memoranda directly. The majority would usually do so indirectly through their use of other explanatory materials, produced by the revenue departments or the commercial publishers, the authors of which would have been guided by the explanatory memoranda.

5.16. A numerically very small but nonetheless highly important group of users would be the courts. In our interim report we said that explanatory memoranda could be used in two different ways by the courts. Firstly, judges could use them as background reading - aids to understanding - to help them work out for themselves what legislation means. Secondly, they could be used in the same way as Hansard statements under the Pepper v Hart[19] rule to resolve ambiguities in the legislation. We suggested that all explanatory memoranda should potentially have both uses.

5.17. ICAEW did not agree that explanatory memoranda should have Pepper v Hart status, considering that "the giving of a special interpretative authority to explanatory memorandum is objectionable in principle [and] impractical in application". The objection in principle arose from our assertion that if explanatory memoranda were presented to Parliament alongside the Finance Bill, MPs could be said to have passed the legislation in full knowledge of their contents. ICAEW thought that MPs would "almost certainly not consider the cumulative effect of explanatory memoranda in interpreting the legislation". We do not accept this criticism. The constitutional position is that Ministers put forward the Finance Bill and invite Parliament to pass it. Those Ministers defend the Bill at its various Parliamentary stages by giving appropriate explanations. Explanatory memoranda would support those oral explanations. As ICAEW says, the will of Parliament can only be obtained from the plain words of the statute, but the principle of interpreting the legislation in the light of - albeit not necessarily in accordance with - Ministerial explanations was established in Pepper v Hart. This report is not a forum for discussing the pros and cons of that decision but whilst it remains the law we are unable to accept that giving explanatory memoranda the status we propose would be objectionable in principle.

5.18. ICAEW's practical objections were threefold:

- Firstly, that the courts would strain the wording of legislation to fit the explanatory memorandum. We agree that the absolute primacy of the legislation must remain, the explanatory memoranda acting merely as a tie-breaker to resolve ambiguities, not to create them. We hope that ICAEW's fears will prove unfounded but this is an area which will have to be left to the exercise of judgement by the courts.
- Secondly, that the legislation will alter as it goes through Parliament and that unless they are consolidated - which ICAEW opposed - the explanatory memoranda would be out of date by the time the courts consider them. We believe that our proposal at paragraph 5.10 should ensure that there is no real difficulty in using the explanatory memoranda.

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19 [1992] STC 898; [1992] WLR 1032; [1993] 1 All ER 42; [1993] AC 593.

- Thirdly, that pitching the explanatory memoranda at the level of the generalist practitioner would only infrequently provide material to enable ambiguities to be resolved. We recognise that this may be so, but disagree that this means the courts should be prevented from making use of such material when it is available.

5.19. We do not therefore accept ICAEW's objections. All the other respondents who mentioned explanatory memoranda agreed, either explicitly or implicitly, that they should have Pepper v Hart status. This is our conclusion.

5.20. We said in our interim report that it would require legislation for explanatory memoranda to be accorded this status as aids to interpretation, and we recommended that such legislation be introduced. On reflection, we no longer believe that legislation would be necessary. Explanatory memoranda would be Parliamentary materials, available to MPs at the time they were invited to pass the relevant legislation. In our view, a good case can be made that they would be available to the courts by reference to the existing criteria laid down in Pepper v Hart. Moreover, even if they are not, we anticipate that the courts would be keen to amend those criteria so as to have access to the explanatory memoranda. We therefore do not believe that primary legislation is necessary. Nevertheless, we believe this pragmatic approach would be assisted if the Minister who presents the first explanatory memoranda to Parliament were to indicate their purpose, as outlined above.

5.21. We also postulated in our interim report that a statutory provision may be needed to reinforce the courts' willingness to interpret legislation purposively. CIOT did not want to see the courts "effectively second guessing the words of the legislation to try and determine parliament's apparent purpose". But that is in reality what they do at present, and we are satisfied that the position is now well enough established for a statutory injunction to be unnecessary. Explanatory memoranda should enable the courts to establish the statutory purpose without the need to "second guess" the legislative wording.

5.22. IoD went further and was concerned that such a statutory provision would be harmful, introducing uncertainty. We see the force of this. We therefore now accept that a statutory reinforcement of judicial purposive interpretation is neither necessary nor desirable.

5.23. There is also an issue as to the interaction of explanatory memoranda and Ministerial statements (which are already available to the courts under Pepper v Hart). We said in our interim report that it would be for consideration whether Ministerial statements should cease to be available to the courts where there was an explanatory memorandum. We did not - and we do not - express a view other than to record that a number of issues would first need to be resolved.[20] But we reiterate that whilst Hansard remained available to them, it would be for the courts to judge the relative weights of the different interpretative materials before them.

5.24. ACT also asked whether, in cases where the courts find that an explanatory memorandum is inconsistent with the legislation, taxpayers could rely on the explanatory memorandum in relation to transactions undertaken previously. If such a case were to arise, the courts would, in giving judgement for a particular interpretation of the legislation,

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20 For example, how would relevant Ministerial statements be taken into account? Would a mechanism be needed whereby the explanatory memoranda could be amended to reflect these?

effectively be striking down the explanatory memorandum. Therefore, neither the appellant nor other taxpayers would be able to rely on it for earlier periods. We consider that the occasions on which the revenue departments would ask the courts to interpret legislation in a manner inconsistent with an explanatory memorandum would be very rare. Nevertheless, this raises what we believe to be a very important point. Our intention is that taxpayers should be entitled to rely on explanatory memoranda and we would like the revenue departments to give a clear undertaking to apply legislation consistently with the explanatory memorandum. In any (rare) case in which they wished to depart from the interpretation set out in an explanatory memorandum, they should give notice of the new interpretation they intended to apply, and this should have effect only for transactions taking place after the date of the notice.[21]

EXISTING LEGISLATION

5.25. CIOT asked that explanatory memoranda be provided for existing legislation. As we said in our interim report, this depends upon how the rewritten legislation is presented to Parliament. If (although it seems unlikely) a consolidation procedure were used it would not be appropriate to provide explanatory memoranda - the procedure would not justify giving them Pepper v Hart status. But if the rewritten legislation were subject to full Parliamentary scrutiny, we agree that explanatory memoranda should accompany it.

EXPLANATORY MEMORANDA FOR SECONDARY LEGISLATION

5.26. In our interim report we noted that it would in principle be desirable to have explanatory memoranda to assist understanding and interpretation of secondary legislation, but that there were difficulties stemming from Parliament's inability to amend Statutory Instruments laid before it. We therefore said we were still considering this issue. CIOT commented that they saw no reason not to provide explanatory memoranda for secondary legislation.

5.27. Since then we have revisited our conclusion about the merits of purposive legislation and in chapter 3 above we recommend that general principles drafting should be adopted as a longer term aim. The precondition for this is that Parliament should establish a reliable procedure for prior scrutiny of draft Statutory Instruments. Once this is in place it will be clear beyond any doubt that explanatory memoranda should accompany secondary legislation.

5.28. However, in the short term should explanatory memoranda be published for secondary legislation which is subject to the current level of scrutiny? We have concluded that they *should* be provided on the same basis as for primary legislation and that they should have the same status, including before the courts.

5.29. We recognise that the lesser degree of Parliamentary scrutiny of Statutory Instruments in comparison with primary legislation would offer no real procedure for MPs to challenge the

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21 In the circumstances postulated by ACT, the taxpayer might then have either an administrative remedy (a complaint to senior Revenue management or the Adjudicator) or an administrative law remedy (via judicial review) depending upon the facts of the case.

explanatory memorandum (i.e. by challenging the legislative provisions themselves), and that this could lead to a fear that a revenue department slant would be put on the explanatory memorandum. However, the stark choice we have is between:

- making explanatory memoranda available so that MPs can debate (albeit not amend) Statutory Instruments with full information; or
- continuing to keep them in the dark so that they debate without full information.

We do not believe the latter course is sustainable.

5.30. At paragraph 5.19 above we recommend that explanatory memoranda for primary legislation should be available to the courts on the same basis as Ministerial statements under Pepper v Hart. We have considered whether explanatory memoranda for secondary legislation should be published but *not* be available to the courts. We have rejected this. The reason for allowing the courts to consider an explanatory memorandum in interpreting a provision in primary legislation is that Parliament would have passed that provision in full knowledge of the contents of the explanatory memorandum. The same would be true of Statutory Instruments. Moreover, the fear that the revenue departments would slant the explanatory memoranda does not ring true: if the process of scrutiny of the secondary legislation is thought to be inadequate, they could with better effect slant the Statutory Instruments instead!

5.31. Accordingly, if there is a problem it is in the Parliamentary process for scrutinising secondary legislation, not in the principle of providing explanatory memoranda and according these the same status as we have proposed that explanatory memoranda for Finance Bills should have.

SUMMARY

5.32. We confirm the view we took in our interim report that the Government should provide explanatory memoranda to support Finance Bills and that these should contain explanations of the legislation's purpose, how it is intended to operate, worked examples and other useful information.

5.33. However we have simplified our recommendations for the way in which these should be produced. We now propose that they should be provided for each and every clause and for each and every amendment or new clause, and that they should be made available when the Finance Bill, amendment or new clause is published. We confirm out original view that a compendium of explanatory memoranda - we originally called this a consolidated set - should be published by commercial publishers after Royal Assent.

5.34. We originally said that legislation should be introduced to give the explanatory memoranda a status equivalent to Ministerial statements to Parliament. This would enable the courts to have regard to them to resolve ambiguities. We still believe that the explanatory memoranda should have this status, but we no longer think that a statutory provision is required. Instead we believe the courts will bring them within Pepper v Hart in appropriate cases.

CHAPTER 6: REWRITING EXISTING LEGISLATION

OVERVIEW

6.1. In our interim report we noted that drafting Finance Bills in plain English and supporting them with explanatory memoranda would improve the comprehensibility of *future* legislation, but that there are already thousands of pages of tax legislation on the Statute Book. We saw two basic ways to deal with this *existing* legislation:

- to replace it gradually over many years through a process of natural renewal as new Finance Bill legislation drafted in plain English displaces existing, less comprehensible legislation; or
- to rewrite systematically either the whole or selected parts of the old legislation.

6.2. We did not regard natural renewal as a satisfactory option as it would result in a mixture of drafting styles which would persist for a very long time. On the other hand, we were unable to estimate either the costs or the benefits of a systematic rewrite and we were therefore unable to say positively that such a rewrite should be undertaken. We proposed a pilot project to establish whether the benefits of a systematic rewrite would justify the costs.

6.3. Following the publication of our interim report, the Inland Revenue's report announced a project to rewrite existing income tax, corporation tax and capital gains tax legislation over a five-year period.

6.4. There was a wide range of responses to our suggested pilot exercise. ICAEW strongly supported a full rewrite and quoted with approval the Revenue's view that the benefits would substantially outweigh the costs. LSS also favoured a rewrite but went along with our recommendation of a pilot. IoD strongly supported a pilot, and SCCB thought rewriting was "potentially sufficiently desirable to warrant a pilot exercise". CIOT were not convinced that a total rewrite would be justified, but they were in favour of a pilot project. LS had "reservations about the value of conducting even a pilot study" and thought a full rewrite could be counter-productive. They therefore favoured allowing a process of natural renewal to improve the language of existing legislation gradually over time.

6.5. The two main factors which led respondents to doubt the value of rewriting existing legislation were, firstly, that the costs (both monetary and non-monetary) would be high and, secondly, that without significant policy changes the benefits would be small. We consider these two aspects in the next two sections.

COSTS OF A REWRITE

6.6. In our interim report we noted that a rewrite would involve transitional costs for taxpayers, practitioners and the Revenue departments but that it would offer long-term benefits

for all users of the legislation. We said that whether a rewrite was justified boiled down to a simple question (albeit one which is far from easily answered): do the long-term benefits justify incurring the short-term costs? We were unable to answer this question. Our proposed pilot project was intended to help answer it.

6.7. ICAEW were evidently persuaded that the question can be answered in the affirmative. LS answered it in the negative - "the benefit would not justify the upheaval".

6.8. Our interim report noted that the costs included "the direct costs of passing legislation through Parliament and of rewriting reference books, familiarisation and retraining, and the indirect costs during the transition of uncertainty and the opportunity cost of time spent on non-productive work" and that they might also include the loss of some case law. ACT, CIOT and LS commented on the costs of a rewrite but we are not aware of any other categories of cost which need adding to this list. Nor are we any more able to quantify the costs than when we wrote our interim report; we await the pilot project to shed light on this subject.

REVIEWING POLICY

6.9. The second factor leading respondents to doubt the value of a rewrite was the concern that making only linguistic improvements would be insufficient. There were two distinct viewpoints. Firstly that an opportunity to make greater improvements in the legislation would be missed. Secondly, and more directly relevant to the question posed at paragraph 6.6 above, that the benefits of a rewrite would be too small to justify the costs without significant policy simplification. But both these approaches reach the same conclusion: that there should be a policy review running either ahead of or alongside the rewrite.

6.10. We recognise that complexity does not only derive from the way the legislation is expressed. Broadly, there are three types of complexity:

- linguistic, where the mode of expression renders the concept difficult to grasp;
- policy, where the concept is inherently difficult to grasp; and
- compliance, where the concept and expression may (or may not) be easily understood but administrative requirements, such as record-keeping, make compliance difficult.

A comprehensive tax reform would need to address all three categories of complexity if its aim was to produce an objectively simple tax system.

6.11. Whether such a tax system could be produced is a theoretical question which we are content to leave to others to argue over. Moreover, as a practical consideration, there is a grave risk that the rewrite project would achieve nothing if it attracted controversy as a result of trying to make simultaneous changes in both language and policy.

6.12. Therefore, whilst we recognise the force of the argument that without policy changes the benefits from rewriting existing legislation are limited, we cannot go beyond the recommendations in our interim report. Our proposals therefore relate only to a rewrite of existing legislation with a view to making linguistic improvements, although, as we noted in

our interim report, we believe that some minor corrections and alignments - changes of policy with a small 'p' - will need to be made.

OTHER CONCERNS

6.13. Both SCCB and ACT were concerned that the rewrite project should not lead to the diversion of scarce Inland Revenue resources away from other worthwhile activities. LS thought that better legislation could be produced earlier by making more resources available, and that this would be a higher priority call on the public purse than the proposed rewrite of existing legislation. We do not believe this is realisable, for two reasons. Firstly, with tight control over public expenditure, the one-off cost of rewriting existing legislation is more likely to receive funding than a continuing demand for more resources for tax policy work. Secondly, Parkinson's Law is likely to apply so the benefits may not materialise in practice - extra people would do extra things, not the same things better.

ISSUES ARISING ON A REWRITE

6.14. Despite these concerns about costs, policy and other matters, our view on rewriting existing legislation remains unchanged. We believe a proper judgement cannot yet be made as to whether a full rewrite of existing legislation would be justified and that a pilot project in the terms discussed at paragraph 2.11 above - or a project for a full rewrite subject to a review once the first stage has been undertaken - is the best way to resolve the doubt.

6.15. In our interim report we highlighted some issues which will need to be addressed in the context of such a rewrite. Many of these probably fall within the category identified by IoD as the "mass of methodological, procedural and logistical problems which can only be resolved by a 'live' exercise". Nevertheless we have further comments on a few of them as follows.

Control of the rewrite

6.16. One issue, already mentioned in Chapter 2, is how the project team should be managed and to whom it should report. In our interim report we expressed no view on whether the rewrite should be undertaken inside or outside the Revenue, but we said that there should be a small steering group on which the professions and taxpayers (as well as the Revenue) would be represented.

6.17. Following the publication of the Revenue's report, the decision that the Revenue will manage the rewrite has been taken. A start has been made on establishing a rewrite project team, and a Project Director has been in place since 1 June. The issue which remains unresolved is what non-Revenue input there will be. ICAEW commented that there must be "adequate representation by professional and other bodies" and IoD strongly agreed that there should be private sector representation on a steering group.

6.18. We believe that there needs to be non-government involvement at three levels, the first two of which were recognised in the Inland Revenue's report:

- firstly, private sector expertise will be needed in the rewrite project team itself, and this will require secondments of lawyers, accountants, plain language experts and others;
- secondly, there will need to be a consultative committee to consider carefully each line of the rewritten legislation; and
- thirdly, a higher level steering group will need to oversee the project to ensure that adequate checks and balances are built into the project and followed, and as a safety valve for any concerns which develop as the project proceeds.

6.19. As we noted at paragraph 2.12 above, the steering group is needed to ensure that the rewrite project commands respect from all interested parties. Without it, there could be a perception that the project was one-sided.

6.20. A range of questions will need to be resolved as to, in particular, the composition and terms of reference of the steering group, who would make the necessary selections, who would chair it, whether it would make reports and if so how and to whom, and whether it would have a role in advising Parliament once the rewritten legislation becomes a Bill.

6.21. To answer these questions it is first necessary to have a clear idea of the way in which the steering group is intended to operate. One possibility is that it could act as an *advisory committee* with no executive power as such. The steering group would inform the Government whether it was satisfied with the way the project was proceeding and how it should be developed, but it would be for the Government to decide how to act upon that advice. The alternative is for the steering group to act as an *executive committee* with power to steer the rewrite project, monitoring and directing the project team. Our preference is for an *executive committee*.

6.22. On this basis, we believe that the answers to the questions posed at paragraph 6.20 are as follows.

6.23. We do not believe that the size of the steering group is especially important; more crucial will be to ensure that the members are of sufficient standing and that all the "stakeholders" are represented. Outside Government, these are taxpayers and the professions; we believe the Committee should contain at least one person representing each of the following categories: accountants, lawyers, small taxpayers, and larger businesses. In addition, there should be a Scottish member and MPs from each of the main political parties (so as to ensure that control of the work was seen as non-party-political). There should also be representation from within Government, including a Treasury Minister. Whether the balance of the Committee should give the Government an in-built majority is relatively unimportant. As long as the steering group is composed of the right individuals:

- in practice, we do not believe the question of sides, "us and them", will arise and neither side will want to outvote the other; and
- the real sanction against the Government lies not in being outvoted but in having to explain resignations.

6.24. This leads to how the members of the steering group are to be chosen. In our view the Government should select and issue invitations to suitable candidates.

6.25. As long as the steering group is to act as an *executive committee* with decision-making powers it should be chaired by a Minister. If we had recommended an *advisory committee*, we should instead have proposed an independent chairman.

6.26. If we had recommended an *advisory committee*, a mechanism would have been needed to enable it to report any unresolved concerns to Ministers. However, this is unnecessary if the steering group is to operate as an *executive committee*. Nevertheless, we believe that when rewritten legislation is presented to Parliament as a Bill, the steering group should report on the consultation process. As we noted in our interim report, there will be ways in which the rewritten legislation does not have the same effect as the existing legislation it is to replace. The steering group will need to confirm it is satisfied that all such changes have been identified, considered and flagged up for Parliament to consider.

Subject matter of the pilot

6.27. Although we did not address the issue in the interim report, IoD and LSS volunteered views on an appropriate subject for the pilot project. LSS suggested Schedule E but would include "lateral interaction" with the equivalent National Insurance rules. IoD ruled out Schedule E on the grounds that problems in practice stem from the rigour of the underlying policy, not from the way in which it is expressed. They suggested either capital allowances or the corporation tax group relief rules.

6.28. In our view, as noted at paragraph 2.11, this is one of the questions for the pilot project to address. It cannot be satisfactorily addressed until the preliminary issues - such as structure - have been dealt with.

Codification

6.29. In our interim report we said that the existing body of case law should not be thrown away and that, wherever possible, words and phrases which have been judicially interpreted should be retained. Everyone who commented agreed, but ACT and LS were concerned that there would still be doubt about whether the old case law remained relevant. We do not believe this will be a problem in practice.

6.30. Our interim report left open the question of the extent to which existing concessions, Revenue practice and explanatory material should be incorporated into the redrafted legislation. IoD wanted as much of this material codified as possible, other than where it was of a transitory nature. They also wanted existing case law to be codified as far as was reasonable. As we found when we rewrote roll-over relief[22] it is very difficult to rewrite legislation which has been on the Statute Book for many years without codifying at least some explanatory material. However, it will be for the pilot project to determine broad criteria. We agree with IoD that where non-statutory material is incorporated it is essential that this be clearly flagged during consultation and when the rewritten legislation is presented to Parliament.

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22 Appendix 1 to our interim report.

Parliamentary handling

6.31. As we noted in our interim report, one very important issue will be Parliamentary handling. If a full rewrite is undertaken there will be thousands of pages of rewritten legislation which Parliament will somehow have to process. The sheer volume would create severe indigestion (and extensive opportunities for party politicking) if it had to be scrutinised as though it were a Finance Bill. The Chancellor recognised this difficulty in his Budget speech last November. It was also raised in a debate in the House of Lords, initiated by Lord Howe, on 27 March 1996. Lord Howe said then that "there is a clear need for special legislative vehicles, special tax simplification Bills, and an equally clear need for a special track for the processing of such Bills".[23]

6.32. We are unable to add anything to this at present. However, Lord Howe is chairing a working party of parliamentarians who will study the problem in detail and report their conclusions later in the year.

SUMMARY

6.33. We confirm the view we took in our interim report:

- firstly that existing tax legislation needs to be rewritten in plain English; but
- secondly that we are unable to say whether this should be done by means of a systematic full or partial rewrite or by a process of natural renewal, and that the best way forward is a pilot project for a rewrite.

6.34. We recognise that the Government has already announced and begun work on a full rewrite of income tax, corporation tax and capital gains tax legislation. We see no inconsistency with our recommendation of a pilot project as long as there is a pause for serious reflection once the first tranche of rewritten legislation has been published.

6.35. We believe that the control of the rewrite project will be vitally important to its success and acceptability. In our view, the project team should be under the control of a multipartite committee with decision-making powers and chaired by the Financial Secretary to the Treasury or another Minister.

6.36. Another major issue will be Parliamentary handling of the rewritten legislation. We have no doubt that a modified Parliamentary procedure will be required if the new legislation is ever to reach the Statute Book.

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23 House of Lords Debate on "Tax Legislation: Simplification", Hansard 27.3.96, column 1720

CHAPTER 7: CONSTRAINTS

TIME AND CONSULTATION

7.1. In our interim report we noted that lack of time is a major constraint on the draftsman's ability to produce good legislation and that more time needs to be made available before publication of the Finance Bill. We said that more time would be found if Ministers took decisions earlier, but that the main way of creating time is by consulting early on both policy and drafting.

7.2. Those who commented agreed with this. For example, the CIOT considered that complex legislation should be "subject to much more genuine consultation and not rushed through". We are very pleased that the Inland Revenue's report announced an increase in the amount of legislation to be published in draft and that a code of best consultation practice is to be issued. We hope these changes will lead to real improvement.

CANADIAN-STYLE CONSULTATION

7.3. We also asked whether the style of consultation used in Canada would be acceptable in the UK. Virtually all Canadian tax legislation is released in draft and sufficient time is made available for consultation before it becomes part of a Bill. This gives Canadian practitioners a real influence on the final legislation. But, to avoid a long delay, the legislation can take effect from the date the draft is released. Where this happens, there is inevitably a period of uncertainty when taxpayers are taxed by announcement, not by legislation. Our question was whether this would be a price worth paying in the UK.

7.4. The responses were divided. ICAEW considered that, in context, the delay would be acceptable. CIOT did not like uncertainty but they accepted it was inevitable in some cases and were concerned that there should be a maximum period of nine months between implementation and enactment. LS "would support further consideration of the Canadian method". They noted that there is frequently uncertainty already and that this method would be unlikely to increase it by much. LS added, however, that for transactional taxes this approach would not be appropriate.

7.5. Other comments were more negative. IoD wanted no change in the current position. ACT wanted "extensive consultation on tax policy sufficiently early". However, they added that the enactment without advance notice of legislation which has retrospective effect - in which category they placed the legislation on corporate and government debt[24] - was even more objectionable than the Canadian approach. LSS said that "if possible consultation should be swift and effective and legislation should not have effect until the consultation process is completed". But this begs the question: what happens when such consultation is not possible?

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24 Part IV, Chapter II, Finance Act 1996.

We agree that early consultation is preferable - that is why we welcome the Revenue's announcement that more legislation is to be published in draft - but we expect there will be times when this is not thought possible. It was this scenario which we had in mind when we asked whether the Canadian solution would be acceptable.

7.6. Two alternative solutions were proposed. Firstly, SCCB suggested a two-year cycle to produce "fine-tuned" tax legislation. Under this procedure, enactment of legislation would be delayed by a year, the first legislative text being a "green" version for consultation. Secondly, LSS considered that many of the difficulties to which legislation gives rise only become apparent after practitioners have had a chance to assess their practical implications. To deal with this they suggested there should be an independent review of new legislation two years after enactment. They noted that the professional bodies regularly send their Budget proposals to the Chancellor but that "there is little opportunity for these to be taken into account". However, this would effectively make all new legislation provisional for two years, which we consider to be unacceptable.

7.7. We agree with those who want policy changes to be announced early, full and open consultation to take place, and for enactment and implementation to be deferred until satisfactory legislation has been produced. This is how tax policy work ought to be done, and we hope that the Revenue's proposal to increase the amount of legislation published in draft will mean that a higher proportion of tax policy will be done in this way in future. SCCB's suggested two-year cycle may be a useful refinement of this. But we recognise that it is very unlikely to be possible to develop *all* legislation in this way. Some will need to be implemented more urgently. The issue is whether for these cases it is better:

- to enact inadequately prepared legislation early; or
- to defer enactment to allow proper consultation without delaying implementation.

7.8. Of these two second-best solutions, it is in principle preferable to take the time to get the legislation right, even though this may mean a period of uncertainty or "legislation by announcement". As LS observed, current arrangements often result in this sort of uncertainty anyway.

7.9. But in practice we are concerned about two aspects of this. Firstly, there is a danger that bad practice could drive out good. By this we mean that if Canadian-style consultation were available the Government might come to rely upon it more than was strictly necessary, instead of consulting in advance of both enactment and implementation. Secondly, the longer the delay between implementation and enactment the less acceptable this sort of consultation would be.

7.10. Therefore, whilst we can in principle see the advantages of Canadian-style consultation, we remain concerned about the practical issues and cannot wholeheartedly recommend its use. Nevertheless, it should be addressed in the Revenue's forthcoming code of best practice on consultation.

CHAPTER 8: OTHER ISSUES

STRUCTURE AND NUMBERING

8.1. In our interim report we invited views on the structure and numbering of tax legislation. We received few comments, which perhaps indicates that this is not seen as a priority subject. CIOT objected to the amendment of sections for some purposes only[25]; they would prefer different section numbers to be used in such circumstances. LSS expressed irritation at the renumbering caused by consolidations (and we know that others agree). We believe there could be some value in adopting a numbering system which minimised the need for such consolidations. CIOT thought that leaving gaps in the sequence of numbers to accommodate future legislation and enable all changes to be made by amendment of the Taxes Acts would help; but it would be impossible to predict where the gaps should be left or how large they should be. ICAEW favoured the Australian numbering system[26] under which each provision is given a two-part reference - for example 170-5 - to indicate the Part and Section. The advantage of this system is that gaps in the numbering sequence allow new legislation to be slotted in, but the disadvantages are that the numbers are less memorable and if the gaps are not in the right places the numbers may become very unwieldy.

8.2. As regards structure, CIOT commented that the schedular system is "fundamentally out-dated" and should be replaced. But such a change would go far beyond a mere reordering of the legislation; it would inevitably alter people's tax liabilities - CIOT itself argues that more liberal usage of losses should be allowed - and would therefore be a policy matter. Another respondent suggested a Taxes Interpretation Act to contain all definitions, with a separate Act for each tax. However as the Inland Revenue's Background Paper notes[27] this would involve duplication and would not necessarily be simple.

8.3. IoD noted that structure and numbering are becoming less important with the advent of electronic versions of the Taxes Acts.

8.4. In our view these are issues for the pilot project to resolve. But we do see some merit in exploring the Australian numbering system further. One advantage which has not been noted previously is that it would help users of the legislation to appreciate its structure. At present, users are largely oblivious to the structure, focusing only on section numbers.

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25 Under self-assessment, sections 60-69 ICTA 1988 were amended but for a transitional period (1994-95 to 1996-97) the two versions of these sections are both operative. And sections 15, 26, 27, 30, 32 and 34-37 were amended for income tax only, leaving the unamended sections still operating for corporation tax.

26 Examples were shown in Annex 8 of the Background Paper to the Inland Revenue's report.

27 Option 1, page 113.

SCOTLAND

8.5. In our interim report we noted that the application of fiscal legislation in Scotland can be a contentious issue. Incidents had been drawn to our attention in which tax law operated differently in Scotland (and Northern Ireland) than in England and Wales, either by accident, which later had to be remedied, or by design. We accepted the proposition that tax law should prima facie apply uniformly throughout the UK.

8.6. In their comments, LSS explained very cogently some of the problems which practitioners north of the border have faced. We certainly could not disagree with their view that the designer of a tricycle should begin with three wheels and not add a third wheel to an existing bicycle design.

8.7. However, whilst we accept that there appears to be a problem, it seems to us to be the result of failures by policy makers and draftsmen to appreciate the "Scottish dimension" to particular issues. The remedy is not a different approach to drafting but rather for the revenue departments to put in place arrangements to allow early identification of potential problems. Early consultation would also enable "two-wheeled tricycles" to be identified whilst there was still time to make real changes to the design. We hope that such arrangements will be put in place both for the rewrite project and for new legislation.

CHAPTER 9: SUMMARY OF FINAL CONCLUSIONS AND RECOMMENDATIONS

9.1. In this final chapter we summarise our final conclusions and recommendations, including some which we made in our *Interim Report on Tax Legislation* and which have not otherwise been mentioned in the previous chapters of this final report. These latter are shown in *italics*.

General principles drafting

9.2. *At present, general principles drafting to a large extent sacrifices immediate certainty. This is unacceptable in fiscal legislation. (Interim report paragraph 4.8)*

9.3. We consider that general principles drafting would be worth adopting for future Finance Bills, with further elaboration provided through properly scrutinised secondary legislation in the form of Statutory Instruments. But we see major obstacles which would need to be overcome before we could regard general principles drafting as acceptable. In particular there would need to be a new procedure for Parliamentary scrutiny of secondary legislation. We therefore recognise that general principles drafting must, for the most part, be seen as a medium- to longer-term objective. (Paragraphs 3.6-3.13)

9.4. *General principles drafting may be appropriate for some provisions where the principle can be stated with sufficient clarity to avoid uncertainty. However without changes in Parliamentary procedures we do not recommend its use as a solution of general application. (Interim report paragraph 4.15)*

Statements of purpose

9.5. We see advantages in the use of statements of purpose prefacing detailed primary legislation. (Paragraph 3.21)

9.6. *We are looking at the issue of tax avoidance, and the use of purposive anti-avoidance legislation, as a separate research topic. (Interim report paragraph 4.22)*

Language

9.7. We believe the case for drafting tax legislation in plain English has been proved beyond doubt. However, no single drafting style will be suitable in all circumstances. (Paragraphs 4.2-4.3)

9.8. We hope that at least some tax legislation will become accessible to laymen who are willing to devote some time to understanding it. But clarity and accessibility must not be bought at the expense of accuracy and precision. (Paragraphs 4.6-4.7)

9.9. *The objective should not be to convey information in the smallest number of words possible, but to enable the user to understand the message in the shortest time possible. Longer, less compressed legislation is preferable if it can be understood after fewer readings so that the time taken in understanding it is shorter. (Interim report paragraph 5.25)*

Definitions

9.10. Every appearance of a defined term should be identified in the legislation. Marginal notes should be used as the identifier. (Paragraphs 4.9 and 4.11)

9.11. Generalised definitions should either be gathered together in one place or an index should be provided. Definitions which apply only for one section or block of sections should be located with the legislation to which they relate and indexed. The chosen approach should be applied consistently. (Paragraph 4.13)

9.12. Definitions should not operate by modification of other definitions. (Paragraph 4.14)

9.13. Worked examples should be provided. Normally these should be in the explanatory memoranda but there should be no bar to their being located in the legislation itself. In the latter case, the text of the legislation should expressly take precedence over the examples if there is a conflict. (Paragraphs 4.15 and 4.17)

Design of legislation

9.14. The design of tax legislation should be modernised. (Paragraph 4.18)

9.15. Electronic delivery of legislation does not require any special approach by the draftsman, as such. But the draftsman should nevertheless, where possible, aim to minimise the costs of converting paper legislation into electronic form. (Paragraphs 4.23-4.24)

Explanatory memoranda - production

9.16. The Government should publish an explanatory memorandum with the Finance Bill for each and every clause. It should publish a new explanatory memorandum for each and every Government amendment or new clause and should encourage their publication with non-government amendments. (Paragraph 5.9)

9.17. Where a Finance Bill amendment substantively changes the original wording and operation of a clause, a new explanatory memorandum should both describe the effect of the amendment and set out the new position in full. (Paragraph 5.10)

9.18. Explanatory memoranda should contain explanations of the legislation's purpose, how it is intended to operate, worked examples and other useful information. (Paragraph 5.32)

9.19. *The Government should judge the amount of material which each explanatory memorandum needs to contain in the light of the nature of the legislation and the likely needs of its users. They should not be so comprehensive that they become enormously lengthy and a burden on practitioners. The primary market for explanatory memoranda should be those*

generalist practitioners who deal with the subject matter of the legislation. (Interim report paragraph 6.19 and 6.20)

9.20. *The explanatory memoranda should be written by the officials within the revenue departments. They should be approved both by Parliamentary Counsel and by Ministers. (Interim report paragraph 6.22 and 6.23)*

9.21. Once the Finance Bill has received Royal Assent, commercial publishers should produce a compendium of the related explanatory memoranda. Whether the compendium should include additional material such as the explanatory memoranda for clauses or amendments which were not accepted by Parliament should be left to market forces. But the wording of the explanatory memoranda should not be altered after the Finance Bill has passed through Parliament. (Paragraphs 5.12-5.14)

9.22. The Government should publish, along with the Finance Bill, the full, prospective text of existing legislation which is amended by a provision in the Bill. (Paragraph 5.5)

9.23. Whether explanatory memoranda should be provided for existing legislation depends upon how the rewritten legislation is presented to Parliament and the level of Parliamentary scrutiny it receives. (Paragraph 5.25)

9.24. Explanatory memoranda should be provided for secondary legislation on the same basis as for primary legislation. (Paragraph 5.28 and 5.31)

Explanatory memoranda - status

9.25. Explanatory memoranda should have the same status in the courts as Ministerial statements in Parliament under Pepper v Hart. We do not believe that legislation is necessary to achieve this. But to encourage the courts to give them this status spontaneously, the Minister who presents the first explanatory memoranda to Parliament should indicate their purpose in clear terms. (Paragraphs 5.19 and 5.20)

9.26. The revenue departments should give a clear undertaking to apply legislation consistently with the explanatory memorandum. If they wish to depart from the explanatory memorandum's interpretation, they should give notice of the new interpretation they intend to apply and this should have effect for future transactions only. (Paragraph 5.24)

9.27. A statutory provision to reinforce the courts' willingness to interpret legislation purposively is neither necessary nor desirable. (Paragraph 5.22)

Rewriting existing legislation

9.28. Existing legislation needs to be rewritten into plain English, either systematically - whether fully or partially - or by a process of natural renewal. But a proper judgement cannot yet be made as to whether the costs of a systematic rewrite would be justified by the benefits. A pilot project (or a project for a full rewrite subject to a review once the first stage has been undertaken, as the Government has announced) remains the best way to resolve the doubt. (Paragraphs 6.1, 6.8 and 6.14)

9.29. We recognise that complexity does not only derive from the way the legislation is expressed and that without policy changes the benefits from rewriting existing legislation are not maximised. But the rewrite project would achieve nothing if it tried to change both language and policy. (Paragraphs 6.10-6.12)

Handling a rewrite

9.30. Non-government involvement in the rewrite is needed at three levels:

- in the rewrite project team itself;
- through a consultative committee which should study the rewritten legislation line by line; and
- on a higher level steering group to oversee the project. (Paragraph 6.18)

9.31. The higher level steering group should act as an *executive committee* with power to steer the rewrite project, monitoring and directing the project team. (Paragraph 6.21)

9.32. Members of the steering group should be of sufficient standing. All the "stakeholders" - Government, taxpayers and the professions - should be represented; the steering group should contain an accountant, a lawyer, a small taxpayer representative, a larger business representative, a Scottish member and MPs from each of the main political parties, and there should be representation from within Government, including a Treasury Minister. Whether or not the Government has an in-built majority is relatively unimportant. (Paragraph 6.23)

9.33. The Government should choose the members of the steering group which should be chaired by a Minister. (Paragraphs 6.24 and 6.25)

9.34. When the rewritten legislation is presented to Parliament as a Bill, the steering group should report on the consultation process. (Paragraph 6.25)

Other issues on a rewrite

9.35. *On a rewrite, changes in the effect of the legislation could not be ruled out. Major policy changes should be made separately, but with careful co-ordination between the rewrite project and the ordinary Budget process. Small changes in policy, designed mainly to iron out the anomalies and inconsistencies in existing legislation which a rewrite would highlight, should be allowed. A balance should be struck between achieving clearer legislation and generating so much change that it adds significantly to the costs of implementation. (Interim report paragraph 7.26 and 7.27)*

9.36. The extent to which existing case law, concessions, Revenue practice and explanatory material should be incorporated into the rewritten legislation should be determined by the pilot project. Where such material is codified it should be clearly flagged during consultation and once the rewritten legislation is presented to Parliament. (Paragraph 6.30)

9.37. *Changes in the effect of the legislation should also be clearly flagged. (Interim report paragraph 7.34)*

9.38. We have no doubt that a modified Parliamentary procedure will be required if the new legislation is ever to reach the Statute Book. Lord Howe is chairing a working party of parliamentarians who will study this in detail and report later in the year. (Paragraphs 6.32 and 6.36)

Constraints

9.39. *There is a large number of constraints on the draftsman's ability to produce comprehensible legislation. Lack of time is by far the most important. (Interim report paragraph 8.4 and 8.6)*

9.40. *Lack of time boils down to trying to do too much with too few resources. If this requires an increase in the number of draftsmen, additional funding should be provided. (Interim report paragraph 8.7)*

9.41. *The point at which additional time needs to be made available is before the Bill has been published. (Interim report paragraph 8.12)*

9.42. *Wherever possible, Ministers should take early decisions on tax changes. (Interim report paragraph 8.13)*

9.43. We are very pleased that more legislation is to be published in draft and that the Inland Revenue is to issue a code of best consultation practice. (Paragraph 7.2)

9.44. *Comments on drafting should be welcomed. Where necessary, there should be a willingness to rewrite draft clauses from scratch in a more user-friendly style. Consultation should be entirely open wherever possible. As part of a full consultation process, the draftsman should be available to discuss drafting points with those who are consulted. (Interim report paragraph 8.19 to 8.23)*

9.45. Wherever possible, policy changes should be announced early, full and open consultation should take place, and enactment and implementation should be deferred until satisfactory legislation has been produced. But this will not always be possible. Where legislation needs to be implemented more urgently, it is in principle preferable to defer enactment to allow proper consultation, even though this amounts to "legislation by announcement". But we remain concerned about the practical issues. These should be addressed in the Revenue's forthcoming code of best practice on consultation. (Paragraphs 7.7-7.10)

Other issues

9.46. The structure and numbering system are issues for the pilot project to resolve. But there could be some value in adopting a numbering system which minimised the need for periodical consolidation of the legislation, and we see some merit in exploring the Australian numbering system further. (Paragraphs 8.2-8.4)

9.47. The revenue departments should put in place arrangements - for the rewrite project as well as for new legislation - to allow early identification of the "Scottish dimension" to particular issues. (Paragraph 8.7)

APPENDIX

COMMENTS RECEIVED FROM THE PROFESSIONAL BODIES

We append below the comments on our *Interim Report on Tax Legislation* sent to us by the following representative professional bodies:

A The Association of Corporate Treasurers (ACT)

B The Chartered Institute of Taxation (CIOT)

C The Institute of Chartered Accountants in England and Wales (ICAEW)

D The Institute of Directors (IoD)

E The Law Society (LS)

F The Law Society of Scotland (LSS)

G The Special Committee of Tax Law Consultative Bodies (SCCB)

A

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7th March 1996

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THE ASSOCIATION OF
CORPORATE TREASURERS

Dear Mr Davidson

Thank you for your letter of 23 November 1995 enclosing a copy of the Tax Law Review Committee's Interim Report on Tax Legislation.

The Association of Corporate Treasurers welcomes the publication of the Interim Report, and, as previously note, is broadly in agreement with its main proposals. We also welcome the announcement by the Chancellor that a project to simplify tax legislation will be undertaken in 1996.

The Chancellor has endorsed the main recommendation of the TLRC that plain language should be used to make future tax legislation simpler and clearer. We were dismayed therefore to find that one of the first sets of new draft legislation, that dealing with Corporate and Government Debt, was in parts almost incomprehensible. We would urge you to work closely with the Revenue to improve future drafting and believe that some of the examples in your Interim Report such as Appendix I on Rollover Relief could serve as a useful template.

One of your other main suggestions is to extend the use of explanatory materials to supplement new law. This was only mentioned in passing in the Chancellor's Statement but we are pleased to note that explanatory statements have now been issued for the new draft legislation on Corporate and Government Debt. However it is important to be clear about the legal status of explanatory memoranda. Perhaps most importantly, could a taxpayer be entitled to rely on them in relation to transactions undertaken before a court holds that they are inconsistent with the actual wording of the legislation?

Rewriting Existing Legislation

In your report you recommend that a pilot be undertaken to establish whether the long term benefits of rewriting existing legislation justify the short term costs. The Revenue has now announced that they propose to rewrite most of the existing direct tax law in the new style over a period of about five years. We are concerned that this will require massive resources, possibly diverted away from writing simpler current tax law. In addition, great care will be needed if the rewritten law is to have exactly the same scope as the provisions which it replaces. We would prefer to see scarce resources devoted to getting new tax law right.

Inclusion of examples

We agree that worked examples can be used to advantage to illustrate the operation of the legislation. However, we believe that these need to be used with caution. In some cases an example can serve to confuse the interpretation of law where an attempt is being made to apply the law to a different set of facts. For this reason we would prefer to see the worked examples in the explanatory memoranda rather than in primary legislation.

Consultation

In your report you mentioned that in Canada, draft clauses are released for consultation and take effect immediately although they will not be enacted until later. We do not believe that this would be acceptable in the UK. If this had applied to the recently published draft legislation on Corporate and Government Debt it would have had serious consequences. For example there have been a number of discrepancies and inconsistencies in the draft legislation, only some of which were corrected prior to 31 December.

If consultation on draft clauses is to be effective, then in order to restrict the element of unfairness and retrospection it is essential to have extensive consultation on tax policy sufficiently early to enable the purpose of the legislation to be clearly understood by everybody. One difficulty is that consultation in the past has resulted in significant changes to the proposals which has itself created significant uncertainty.

Retrospection

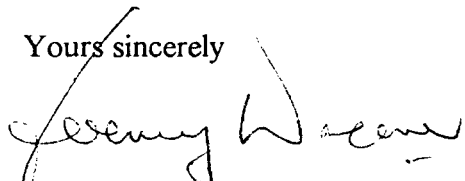
While the lack of advance notice in the Canadian procedure is undesirable, the enactment of retrospective legislation is even more objectionable. It could be argued that the Revenue has effectively made much of the draft legislation retrospective in its effect in that it applies to accounting periods ending after 31 March 1996 and not to accounting periods commencing after that date. We believe that in the interests of certainty, particularly in a move to self-assessment, legislation should not be introduced retrospectively.

Future reports

If you still intend to produce a final report on tax legislation we will of course be happy to provide further input as required. However we feel that the key to simplifying tax legislation is to ensure that the Tax Law Review Committee is represented in any group set up within the Revenue to supervise this whole process.

We are aware that the deadline for responses has passed but nevertheless hope that the points contained within this letter will be taken into account. It is also our intention to make additional comments within the next few days.

Yours sincerely



Jeremy Wagener
on behalf of the Technical Committee

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26th March, 1996

Chris Davidson, Esq.,
TLRC Secretariat,
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THE ASSOCIATION OF CORPORATE TREASURERS

Dear Mr. Davidson,

Interim Report On Tax Legislation - Additional Comments

Thank you for your note of 8 March 1996 acknowledging the points contained in my letter of 7 March 1996. We accept that it takes time for culture change to take place; nevertheless we were under the impression that the legislation on corporate and Government debt was meant to have been one of the first examples of de-regulation and simplification, thus are disappointed in its convoluted drafting. We are also interested in your comments on the inability for a taxpayer to rely on explanatory memoranda in any appeal and may come back to you on this point.

In the meantime we wish to make a couple of additional comments.

1. The most important concerns what it meant by "simplification" in the first place. Focusing on simplification of the language used in legislation is one thing, but will be of limited value - indeed is probably not in reality achievable - without simplifying underlying concepts. To take an example, the introduction of corporation and capital gains tax, both core taxes, in 1965, was contained in what by today's standards was a relatively short Finance Act. It took only a few sections to deal with the meaning of "disposal". By contrast, one could consider the FID legislation, introduced in 1994 which, although covering only a small bit of the dividend legislation, took up almost as much text in legislation as the whole of the rest of the distribution code. Much of the rest of the distribution code meanwhile was taken up with further recent innovations such as statutory demergers.

   In other words, the recent and increasing trend is towards complexity of thought which inevitably leads to complexity of language and understanding, however "plain" the words used may be. There is little point concentrating on the latter and not the former.

   If the Treasury's/Inland Revenue's concern is loopholes, it should be remembered that a complex piece of text designed to close a loophole has been shown again and again to open up others.

2. Even if a root and branch simplification of concepts is out of the question, it would help greatly to pick off a few. There exists a small but important number of problem areas which, for one reason or another, the Inland Revenue always seem to leave in their present

unsatisfactory state. A non-contentious Finance Bill designed to tidy up even some of these doubtful points of legislation would also go a long way to assisting taxpayers in understanding the law.

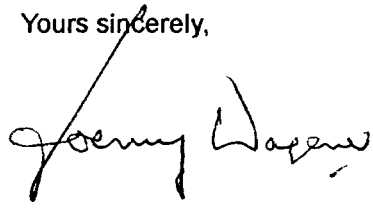
3. There are significant short run consequences of the proposals for change which need to be recognised. These relate to the uncertainty which will be created in what might be called the transition period as practitioners are required to adjust.

4. Another problem of just changing language without changing concepts is whether taxpayers will be able to rely on existing decided cases applicable to those concepts. In many cases this will be doubtful.

Potential difficulties in 3) and 4) need to be viewed in the light of long-term benefits. We believe that only in also reviewing concepts are the latter really likely to occur.

I hope these comments are helpful and apologies for the delay.

Yours sincerely,



Jeremy Wagener
on behalf of the Technical Committee

B

THE CHARTERED INSTITUTE OF TAXATION

Tax Law Review Committee

Interim Report on Tax Legislation

The Chartered Institute of Taxation supports the concept of plain language tax legislation.

It also considers that explanatory memoranda along the lines suggested would be a considerable improvement over the present notes on clauses and accepts that they could be given similar status to ministerial statements in the circumstances in which such statements would be admissible following Pepper -v- Hart. We consider it essential to ensure that the explanatory memoranda are updated to deal with amendments following the passing of the Finance Act. We are concerned about giving status to explanatory memoranda in view of the volume of legislation and quasi-legislation produced each year in the taxation field but consider that the ability to invoke such memoranda in litigation would, on balance, be beneficial and would serve as an aid to the understanding of the legislation to the benefit of all concerned.

We are not opposed to a pilot of a re-write of the existing tax legislation. We are not convinced that in all cases the cost of re-writing would justify the benefits, for example, the legislation relating to foreign exchange gains and losses.

We also doubt whether re-writing would necessarily help to clarify the legislation. There is, for example, a considerable body of case law dealing with the practical effects of Schedule E benefits and expenses wholly, exclusively and necessarily incurred for the purpose of the employment. We doubt whether a mere change of words would improve the fairness of the system or its application in particular circumstances. We suspect that on a re-write the draughtsman would be tempted to re-use words that have been the subject of much judicial debate and, indeed, we do not think that it would be desirable to re-write the legislation in such a way that the existing body of case laws ceased to have any application.

Although we consider that plain language drafting would be a marked improvement we do not think that, of itself, it would assist in the understanding of the tax system which we regard as over-complex and illogical in many areas. We consider that a fundamental review of the tax system should be undertaken prior to the legislation being re-written in plain language.

We consider that the tax system is used to promote what are perceived politically to be socially or economically desirable ends which we believe could better be achieved outside the taxation system. We also consider that legislating for every conceivable avoidance gives rise to enormous complexity as does the wish to preserve fairness between taxpayers. There is obviously a trade-off between simplicity and equity and it is our belief that a greater measure of rough justice in the interests of simplicity would be acceptable.

We also consider that complex areas of legislation should be subject to much more genuine consultation and not rushed through with the Finance Bill. We do not see the requirement to make major changes to the taxation system on an annual basis. Recent examples of undue complexity would include scale benefits for vans and removal expenses. Rushed legislation with inadequate consultation includes the loan relationship legislation. In our view the integration of the contributions agency with the Inland Revenue is both possible and desirable and we consider it unfortunate that the opportunity was not taken in connection with the introduction of self-assessment to do away with the schedular basis of taxation for individuals and to retain the compartmentalisation of different sources of income.

We regard most of the distinctions between different classes of income and between income and capital as largely artificial and unrelated to the economic realities involved.

We therefore believe that re-writing the existing legislation in plain language, while desirable in itself, should not be regarded as a substitute to a thorough review of the tax system. We believe that a pilot scheme to re-write part of the existing legislation in plain language will serve to highlight a number of the features mentioned above and therefore both enhance the prospects of a thorough review of the whole system with the ultimate intention of producing a system which is comprehensible to the user because it is both logical and expressed in terms that can be readily understood.

We think that the result of the pilot scheme should be reviewed carefully as we are by no means convinced that a total re-write of the entire existing system would justify the considerable costs both in the exercise itself and in the retraining necessary within the profession.

With regard to specific paragraphs of the explanatory memoranda we would support in paragraph 5.30 the use of italics for words given special definition but we do not think it is sufficient to italicise a defined word on only the first occasion in which it appears. In our view, if a word is given a specific definition it should be readily apparent that it has such a definition and the details of the definition should be readily accessible.

Paragraph 5.38. We believe that worked examples are helpful but should, wherever possible, be included in the explanatory memoranda.

Chapter 6. With regard to explanatory memoranda I think it would be particularly helpful in the case of new legislation being considered by parliament and may help to increase the understanding of the Committee who have to pass the legislation. In the case of a re-write it would also be necessary to introduce explanatory memoranda for the existing legislation and amending legislation would require the existing explanatory memoranda to be re-written as appropriate. We regard it as appropriate that the explanatory memoranda should be available at the Finance Bill stage and is amended during the course of debate so that the final amended explanatory memoranda is available at the same time as the Finance Act.

It is our view that the explanatory memoranda to have any value will have to be both authoritative and a guide to the legislation as passed not merely as produced in bill form. We also think that explanatory memoranda should be produced for existing legislation as it is re-written in plain language. The re-written legislation will no doubt require parliamentary approval and there seems no reason why its approval should not also be given to explanatory memoranda. To have explanatory memoranda for new and amending legislation only would severely detract from the benefits of plain language re-writing.

We see no reason why explanatory memoranda should not also be prepared for secondary legislation and be tabled at the same time as such legislation is placed before parliament.

So far as Chapter 7 is concerned, we are in favour of a pilot project which could then be considered not only in connection with the comprehensibility of the resulting text but also its relevance and justification in the context of the tax system as a whole and the economic purpose behind the legislation. We think, therefore, that although minor policy changes would be incorporated in the re-write itself, the opportunity should be taken as a result of the project to consider whether the re-write in isolation is likely to provide benefits commensurate with the cost or whether, as we suspect, a more fundamental review should be undertaken to produce a more logical tax base which could then be legislated in plain English.

With regard to Chapter 8, we strongly believe that sufficient resources must be given to produce legislation that is both clear and concise and that sufficient consultation takes place to ensure that the resultant legislation is workable. We also see no reason why the parliamentary timescale from the introduction of the bill should not be extended to give sufficient time for proper consideration of the legislation. The current system of trying to pass complex legislation in the shortest possible time with a minimum of resources and inadequate consultation results in uncertainty, confused and unclear

legislation and substantial costs to taxpayers and their advisers and we suspect also the Inland Revenue in trying to make the system work despite the inadequacies of the legislation as enacted.

With regard to Chapter 9, it is our view that the structure of the UK tax legislation requires careful review but it is difficult not to come the conclusion that the whole basis of the Schedule E system is fundamentally out-dated. We can see no economic distinction between trading income and income from property and no reason why a taxpayer's liability should not be based on the combined net income. It follows that we see no reason why losses or deficiencies in part of the taxpayer's economic activity should not be off-set against profits or gains in another. Obviously any such fundamental structural review would impact upon the structuring and renumbering of the legislation. What area we find particularly objectionable is the procedure adopted for self-assessment where a section is amended for some purposes but not others. For example, businesses commencing before or after 6 April 1994 under self-assessment and rental income for companies and unincorporated businesses. We think it totally unnecessary and extremely confusing to have two different texts parading under the same section number in use at the same time. Apart from that we do not find the present numbering system unduly confusing but feel that it would be preferable to have blocks of numbers with appropriate gaps for future additions and to insert all amending legislation into the appropriate main act rather than leave some provisions in the Finance Act and others by way of amendment of the principal acts.

Chapter 10. As requested, we comment on your summary as follows:

10.2 Agreed
10.3 Agreed
10.4 Agreed
10.5 Agreed
10.6 Noted
10.7 Agreed
10.8 Agreed
10.9 Agreed
10.10 Agreed

10.11 Appendix 1. 1.3. We would prefer defined words to appear in italics wherever they occur.
1.4 We think the examples should be in the explanatory memoranda. We prefer the alternative annexe provisions for paragraphs 5.2 to 5.4. We prefer the drafting style in appendix 1 to that in appendix 6.

10.12 Agreed.
10.13 Agreed

10.14 We would prefer defined words to be italicised whenever they appear.

10.15 Agreed

10.16 We consider that worked examples should be in the explanatory memoranda not in the primary legislation.

10.17 Agreed
10.18 Agreed
10.19 Agreed
10.20 Agreed
10.21 Agreed
10.22 Agreed

10.23 Agreed with the proviso that explanatory memoranda must relate to the final legislation.

10.24 Agreed
10.25 Agreed

10.26 In our view the relevant explanatory memoranda should accompany the Finance Act and related to the Finance Act. They should therefore be available in an official form and be available at the time of publication of the Finance Act.

10.27 Agreed
10.28 Agreed
10.29 Agreed
10.30 Agreed
10.31 Noted
10.32 Agreed
10.33 Agreed
10.34 Agreed
10.35 Agreed
10.36 Agreed
10.37 Agreed
10.38 Agreed
10.39 Agreed
10.40 Agreed
10.41 Agreed
10.42 Agreed
10.43 Agreed

10.44 We do not like the concept of legislation being enforced where the precise wording of the statute is not available. We accept that this is inevitable in certain cases but regard it as important that the delay and uncertainty between implementation and enactment be reduced to an absolute minimum. We think that in all cases the legislation should be enacted within nine months of it coming into effect.

10.45 We have some reservations about legislation to reinforce the Court willingness to interpret legislation purposely. The legislation itself should be clear and what we would not like to see is a situation where the Courts are effectively second guessing the words of the legislation to try and determine parliament's apparent purpose in introducing the legislation in the first place.

10.46 We have commented on this above.
10.47 Agreed

C THE INSTITUTE OF CHARTERED ACCOUNTANTS IN ENGLAND AND WALES

Date:

29 February 1996

Your Ref:

Our Ref:

ENV/sa/14.13.23

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Dear Chris,

INTERIM REPORT OF THE TAX LAW REVIEW COMMITTEE

I set out below our comments on the above interim report.

INTRODUCTION

1. The interim report of the Tax Law Review Committee ("TLRC") issued on 23 November 1995 was followed by "The Path to Tax Simplification" issued by the Inland Revenue on 12 December 1995 as required by section 160, Finance Act 1995.

2. The main proposals of the TLRC interim report are:

   (a) The use of plain language;

   (b) The use of explanatory memoranda which would have a degree of authority but without the force of the legislation; and

   (c) A rewrite of existing legislation following a pilot study.

3. The main conclusion of the Inland Revenue report is to recommend that most existing primary tax legislation should be rewritten in clearer and simpler language. It also recommends that initiatives already underway to improve the Budget/Finance Bill process should be continued, that more legislation should be made available in draft and that there should be a code of practice on consultation.

4. The Inland Revenue report refers to the work of the TLRC and the select bibliography

includes reference to its interim report. Both include as a major recommendation the rewrite of existing legislation. For these reasons we consider it appropriate to include some preliminary comments on the Inland Revenue report, to which we shall shortly be responding.

THE SCOPE OF SIMPLIFICATION

5. We agree with most of the recommendations of the TLRC interim report and the Inland Revenue report which, if adopted and carried out with adequate resources, will be of considerable benefit in achieving a degree of simplification. In particular, we strongly support the proposals for a full rewrite of the tax statutes in plain English.

6. Both reports recognise that there is a limit to the level to which simplification can be achieved merely by the various means recommended. It is not long before a point is reached beyond which the underlying concepts of the tax regime defy further simplification by merely improving their description.

7. To cite but one example: the schedular system no doubt had its advantages 150 years ago, but has given rise to a regime which divides income into various categories each with its own rules. Simplicity can be achieved only by sweeping away these divisions on the basis that what matters is the quantum of profits, income and losses which arise rather than how they have arisen.

DETAILED COMMENTS

8. The following comments are made in response to the numbered paragraphs in Chapter 10.

General principles drafting (paras 10.2 - 10.4)

9. In general we agree with the conclusion summarised in these paragraphs: we are not in favour of a move towards general principles drafting or the increased use of secondary legislation. Although the latter may be less unacceptable if allied to an improvement in Parliamentary scrutiny procedures we see no signs that such improvements are likely to be forthcoming.

Statements of purpose (paras 10.5 - 10.6)

10. There seems little point in statements of purpose if the courts do not apply them: in general section 776(1) ICTA 1988 (Transactions in land: taxation of capital gains) has not had much influence on the interpretation of the section. There needs to be further research and discussion before purposive statements are used.

Language (paras 10.7 - 10.11)

11. In general we agree with the comments and in response to the specific question in paragraph 10.11 we prefer the style in Appendix 1 (roll-over relief) as it makes more radical improvements to the structure of the original legislation. This approach would be satisfactory for a general rewrite of the legislation. We consider, however, that the style of Example 1 in Annex 8 of the Inland Revenue report, with its use of the second person and simplified grammatical structure, is even better.

12. There may be some areas, such as the forex legislation, where a plain language drafting stye cannot be used but, in such cases there might be no difficulty in adopting the style used in Appendix 1.

Aspects of drafting technique (paras 10.12 - 10.16)

13. We agree with the comments and in particular, as regards paragraph 10.16, we consider that worked examples could be of assistance.

Explanatory memoranda (para 10.17 - 10.26)

14. Explanatory memoranda would clearly be helpful in understanding the legislation, although, in theory, if legislation is presented in the clearer style recommended in the interim report, they should not be needed.

15. We are concerned, however, with the status of such memoranda. Even the report seems undecided in this respect: para 6.14 considers that the memoranda should have a higher status in the courts than other explanatory material, but we find it difficult to see the distinction which seems to be implied in para 6.8 between "aids to understanding" and "an aid to interpretation"

16. If, as suggested in para 6.7, they were merely intended to help a new reader of the legislation, by providing an initial rough understanding of its intended effect, it is not clear what they would add to the press releases which are now routinely issued on proposed tax legislation. If they were intended as an aid to construction, which the courts could rely on in resolving ambiguities in the actual legislation, they would have to be given this level of authority by statute (as is suggested in para 6-10 - 6-.13). But they would have to be one thing or the other. It would clearly be impracticable to proceed on the basis that in some cases they are authoritative and in others they are not, as seems to be contemplated in para 6.8.

17. On balance, despite their superficial attraction, we are not in favour of explanatory memoranda because of the difficulty in defining their status in relation to the legislation, quite apart from the numerous mechanical difficulties identified in Chapter 6 of the interim report.

Rewriting existing legislation (paras 10.27 - 10.37)

18. We strongly support the proposals for a rewrite of existing legislation and we are pleased to see that the Inland Revenue report considers that such a rewrite is technically feasible and that its benefits will substantially outweigh its costs.

19. We accept that the only practical method of proceeding is for the project to be run by the Inland Revenue although we would want to be sure that there is adequate representation by professional and other bodies.

Constraints (paras 10.38 - 10.45)

20. We agree with the comments under this heading, and in particular as regards para 10.44 we consider that the delay would be acceptable within this context.

Other issues (paras 10.46 - 10.47)

21. We agree with the comments made here. As regards para 9.7 we consider that there are advantages in following a system under which the legislation is divided into parts with sections separately numbered within each part so that these numbers can be used for new legislation within each part along the lines of that to be used in Australia referred to in para 2.16.

Yours sincerely

E N Vidler
Technical Secretary
Direct Line: 0171 920 8495
Direct Fax: 0171 628 1791

Date:

25 April 1996

Your Ref:

Our Ref:

ENV/sa/14.13.23

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Dear Chris

INTERIM REPORT ON TAX LEGISLATION

Further to my letter of 15 April I am now in a position to respond in detail to your letter of 1 March.

I am not sure that we made our objections to your proposals in relation to explanatory memoranda clear. It is the words of a Bill to which Parliament assents. In general, we think that anything which detracts from the absolute primacy of clear statutory authority in imposing taxation is not to be welcomed.

It is clear that explanatory memoranda would be far more voluminous and of a more precisely technical nature than Ministerial statements. Whether or not one considers the principle in *Pepper v Hart [1992] STC 898* a welcome development it is clear that the Courts could have recourse to explanatory memoranda to a far greater extent than they currently do to Hansard statements under the *Pepper v Hart* principle. We are therefore not in favour of setting up a new source of material as a uniquely authoritative aid to interpretation.

We did understand that it was proposed that all of the memoranda would have the same status but it was the nature of that status with which we found difficulty.

The proposals for explanatory memoranda raise many practical difficulties. As para 6.8 states, recent Court judgements have increasingly adopted a purposive approach to statutory interpretation. Sometimes this has taken the form of straining to identify artificial ambiguities which the Court then resolves by reference to a presumed legislative purpose (the case of *O'Rourke v Binks [1992] STC 703* is a good example). The existence of authoritative explanatory memoranda can only encourage that process.

Then again, as the report explains, legislation will alter as it goes through parliament. Explanatory memoranda may therefore illustrate legislation which has been partially altered. Unless the memoranda are rewritten each time an amendment is made then it will be necessary for the Courts to take account of memoranda which partially reflect the legislation as passed and partially reflect the rejected provisions.

Of course, that problem would be dealt with if there were a consolidation (a possibility mentioned in the report); but a consolidation raises the objection that authority will be given to something which would not have been available to Parliament at the time the legislation was considered.

There would also be difficulty in deciding at what level to pitch the explanation. We believe the report is confused in considering this question. The explanatory memoranda are to be used by the Courts in resolving ambiguities. Ambiguities in legislation usually raise difficult questions of construction and are only likely to be the subject of litigation where they involve commercially important areas. Para 6.21 suggests that the target audience will be generalist practitioners. That is precisely the audience which very rarely deals with those issues considered by the Courts.

In para 6.14 the report says that it does not recommend that the Finance Committee "should consider, and if necessary amend [the explanatory memoranda]". If the Finance Committee cannot be expected to do this it is extraordinary that para 6.15 suggests that Parliament "could be said to have passed that legislation with full knowledge of their contents". That illustrates a danger of giving authority to subsidiary material of this sort. Members of Parliament would almost certainly not consider the cumulative effect of the explanatory memoranda in interpreting the legislation which they are considering. Yet because the explanatory memoranda are to be given an interpretative authority there would be a fiction that Members of Parliament had considered them.

In para 6.11 of the report it is said: "If an explanatory memorandum was in conflict with the legislation and it was impossible to find an interpretation consistent with it...". That illustrates the danger which we find in setting up a new source of authority in interpreting statute. The Courts' task is not to find one possible interpretation which is consistent with subsidiary materials regardless of other and possibly more plausible constructions. It is to construe the words used by Parliament in their natural meaning.

The difficulty of arriving at a resolution of the practical difficulties of these proposals may explain the confusion which we found in the report's discussion of the proposal.

For example, in para 6.13 the report refers to Hansard as "the Courts' main interpretive tool". Even after Pepper -v- Hart Hansard is still only relevant in a minority of cases. Para 6.14 states "they [explanatory memoranda] would not represent the will of Parliament as such". Plainly, they would not be regarded as representing the will of Parliament at all. They could only be an aid in determining the will of Parliament in construing Parliament's statutory words.

Para 6.7 suggests that "the Courts would be able, if they wished, to use the explanatory memoranda simply as a map to assist the initial stages of the interpretation process - an aid to understanding - in the same way that any user of tax legislation could. In para 6.8 the report goes on to suggest "that explanatory memoranda should be used to help

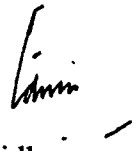
the Courts discover the statutory purpose". Perhaps para 6.7 is simply trying to say that if the explanatory memoranda do not have a special interpretative authority they could be used by the Courts and all other users as a tool to help them approach their own examination of the legislation. But the form of paras 6.7 and 6.8 suggests that the Courts could choose whether to regard the explanatory memoranda as authoritative or not. That of course would create tremendous uncertainty in the interpretation of tax legislation by practitioners.

So we find that the giving of a special interpretative authority to explanatory memorandum is objectionable in principle impractical in application and the source of confusion in the TLRC's report. We therefore found the Committee's proposals on explanatory memoranda unconvincing and the least satisfactory part of its report.

We do consider, however, that the publication of detailed explanatory material by the Inland Revenue would be useful. But only as an aid to the use of legislation by practitioners, not as an authoritative aid to interpretation by the Courts. In this lesser role explanatory memoranda could indeed act as a "map" to assist the initial stages of the interpretation process.

I hope this letter has served to set out our reservation about the report's proposals on explanatory memoranda more clearly. I have no objection to your annexing a copy of it to your final report.

Yours sincerely



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Comments on the Tax Law Review Committee's

INTERIM REPORT ON TAX LEGISLATION

General comments

The IoD congratulates the Tax Law Review Committee (TLRC) on an excellent first report, which is an important contribution to the current debate on simplifying and improving the quality of UK tax legislation.

The Report concludes with a demonstration of two approaches to writing legislation in plain English. The TLRC Report taken together with similar exercises conducted by the Special Committee of Tax Law Consultative Bodies and the Inland Revenue provides incontrovertible evidence that writing in plain English is feasible, at least for stand-alone legislation, and can be a great improvement. Re-writing one very small bit of the Taxes Acts in plain English might prove little on its own (it could just happen to be an especially easy bit), but the existence now of examples of four different styles of plain English writing covering four different bits of the Taxes Acts makes it reasonable to conclude that plain English has the versatility and robustness needed to meet a wide variety of legislative situations. The questions, therefore, are not whether it can be done at all, but the second order issues of:

- which plain English style is best,
- how far can it be extended,
- how can the rewriting process best be managed, especially where new style legislation has to interact (either temporarily during transition or permanently) with old style legislation
- how can the implementation of rewritten legislation best be managed

and, last but not least,

- whether the expected benefits justify the costs of change.

It is no criticism of what is an Interim Report to note that it does not provide all the answers to the second order questions.

Specific comments on the Report's conclusions and recommendations

The references below are to paragraph numbers in Chapter 10, which lists the conclusions and recommendations.

10.2-4 We agree that general principles drafting is not the way forward.

10.5 We agree that statements of purpose at the beginning of a section of legislation can be useful and should be encouraged where appropriate.

10.6 We strongly disagree with the suggestion that purposive anti-avoidance legislation may be a useful way forward, if by "purposive" is meant general rather than specific anti-avoidance provisions. We do not accept that specific anti-avoidance provisions are in principle any different from other provisions so far as writing in plain

English is concerned (see also 10.7-10 below) . We would respectfully suggest that there are many important issues arising more directly from the Interim Report where the TLRC could deploy its resources more fruitfully.

10.7-10 We disagree with the recommendation that the target audience should be tax professionals (even though that would be an improvement on the present position in many cases). Understandability by tax professionals should be the *minimum* acceptable standard, with the aim being to achieve the widest possible understandability compatible with certainty. With self assessment in the process of being introduced, as much as possible of the system should be understandable by the reasonably intelligent layman. Clearly, there are parts of the tax system where wider understandability will be more or less valuable and this should influence the time and effort devoted to exceeding the minimum standard; for example, only specialist tax professionals are likely to be interested in the legislation on controlled foreign companies or stock lending. Clearly also, anti-avoidance rules often relate to more complex arrangements, where the complexity and nature of the arrangements mean that tax professionals are likely to be fully involved anyway and the scope for simpler language is inherently more limited. Nevertheless, as the Report recognises (10.9), tax legislation can be clearer, more accessible and more comprehensible, even when dealing with highly detailed matters. If it can be done without disproportionate additional cost or delay, it should be done.

10.11 Both the redrafts are substantial improvements on the originals. We support taking the opportunity, as in the first redraft, to incorporate, so far as can reasonably be done, existing case law and (to the extent they are of a permanent not temporary nature) extra-statutory concessions and Statements of Practice. However, where this is done, it is essential that the Government treats this clarification or amplification of the law as a substantive change; in other words it should explain exactly what is being done and should consult beforehand and seek Parliamentary approval as though the law were being changed. There will be instances where the interpretation of a court decision is highly controversial or where taxpayers and their advisors dispute the Revenue's view embodied in a Statement of Practice but have not to date had occasion or found it economic to test that view in the courts. If these controversial points can be cleared up, so much the better, although we would not anticipate this being possible in every case. To the extent that existing case law can be incorporated, the less need there will be to interpret new legislation in the light of old case law, something which can be a problem even with consolidations where there is a clear presumption that the law is not being changed and stylistic changes are deliberately minimised.

Our comments on other aspects of the redrafts are covered in 10.12-26 below.

10.12 We agree that clarity and hence the speed with which the legislation can be understood is far more important than brevity.

10.13 Marginal notes are useful.

10.14 In our view, defined words should appear in italics *wherever* they are used. The reader will usually be jumping about and dipping into the legislation rather than reading whole chapters straight through and would welcome the prompt at whatever point he is. In any event, it may be difficult to keep track of where a defined word first appears, once a piece of legislation has been on the statute book for a number of years and subject to divers alterations; and where one definition is used in a variety

of unrelated provisions, would it be put in italics the first time used in each of those provisions or only the first time in the first of those provisions?

10.15 Modern typography would be a great help.

10.16 Worked examples are extremely useful as an aid to comprehension. Because they are an aid not the primary provision, the proper place for them is in the Explanatory Memorandum. That said, they should be treated by the courts as binding except in the most extreme circumstances, such as blatant inconsistency of the example, typographical errors, or inconsistency between the example and the primary provision (read together with any statement of purpose at the front of the legislation); in other words, where there is a degree of ambiguity in the primary provision, the worked example should be followed unless it leads to an absurd result in the light of the overall purpose.

10.17-18 We agree that, whether or not the style of legislative drafting is changed, there is a need for more authoritative and informative Explanatory Memoranda to be published at the same time as the legislation.

10.19 See 10.16 above.

10.20-26 We agree with the detailed recommendations on Explanatory Memoranda and the integration of their publication in draft and final form into the Finance Bill procedure. This last point is particularly important, if they are to have the status suggested in 10.16 above.

10.27-29 We strongly support the recommendation that there should be a pilot rewrite of one part of the Taxes Acts before the decision is taken to proceed with a systematic rewriting of the whole or major part of UK tax legislation. Not only are there a mass of detailed methodological, procedural and logistical problems which can only be resolved by a "live" exercise, but both the costs and the benefits can only be a matter of conjecture at the present time.

In our view, the subject of the pilot should be a reasonably substantial and largely self-contained part of the Taxes Acts, where there are significant difficulties of interpretation at present, which affect a large number of taxpayers and where radical change is not likely in the next few years. The Schedule E rules do not meet these criteria: the core Schedule E provisions are all too clear. The problem there is that the rules can only be made to work by the Revenue in effect disapplying the full rigour of the law. The remedy, therefore, lies in reviewing the structure of the law not in looking for even clearer language in which to express bad law. The rules on capital gains and the legislation on National Insurance Contributions would be obvious candidates, if the political future of both in their present form were not so uncertain. In the corporate tax field, the legislation on controlled foreign companies, foreign exchange gains and losses, financial instruments and oil taxation are all highly complex but of interest only to specialist tax professionals who will always find a way of coping. We would recommend instead that either the capital allowances legislation or the corporation tax group relief rules would be a good place to start.

10.31-32 We strongly agree that the project team for a rewrite should be subject to control by a steering group including private sector as well as Revenue representation. In addition, we consider that the project team should not be led nor the steering group chaired by Treasury counsel. We are concerned about how easy it will be to attract to the project team those people who have the combination of intellectual calibre, practical tax expertise and creativity to perform the task well; such people we

suspect are rare both inside and outside government and considerable flexibility will be required in the terms and contract periods on which team members are recruited/seconded, if these people are to leave or be released from their present jobs without jeopardy to their career paths.

10.33 Complexity and incoherence in the underlying structure of a tax are as much a cause of incomprehensible legislation as the use of convoluted and archaic language. Ideally, therefore, the structure of the tax should be reviewed before a rewrite. We realise, however, that this could extend the timescale to the point where neither review nor rewrite would ever get completed. Clearly, the opportunity of a rewrite should be taken to iron out existing anomalies and inconsistencies, as the Report recommends. Procedurally this should be handled in the same way as the incorporation of existing case law etc as discussed in 10.11 above. Nevertheless, there are parts of tax law, where a full review will be inevitable, because of political or other developments in the course of the minimum five years required for rewriting the Taxes Acts, and there may be parts where the present structure is so unsatisfactory that reform first will speed up rather than delay the rewriting - for example, trying to replicate precisely in plain language all the present differences between the law on national insurance contributions and PAYE income tax would be a nightmare. The scheduling of the rewrite of the various parts of the Taxes Acts would need to take account of which parts were likely to require more extensive review before rewriting as well as which parts would gain most from being rewritten.

10.33-37 We endorse the recommendations on public consultation and Parliamentary procedure.

10.38-43 We endorse the comments on the constraints facing the draftsman and outside commentators, where Ministers take decisions at the last moment, but we are sceptical about Ministers changing their ways.

10.44 We do not support the suggestion of adopting the Canadian practice whereby draft legislation takes effect from the date it is released for consultation. Clearly, there are emergency situations where the Government has to act immediately to stop a substantial loss of tax through some new and unforeseen avoidance route or to correct a legislative provision found to have an unintended and damaging, and in such cases the change may be backdated to the date of the announcement; indeed, draft legislation may not be made available until some time later. That, however, is entirely different from a rewriting exercise or the drafting of less urgent provisions. The normal situation should be, as now, that legislation should apply from the date the legislative process is completed not the date of the announcement and that exceptions to the normal procedure, such as the announcement of immediate changes in excise duty rates or anti-forestalling measures, should be accompanied by publication of draft legislation and, where possible (ie when Parliament is sitting), be approved by a Parliamentary resolution.

10.45 We are not convinced of the case for a statutory provision to reinforce the courts' willingness to interpret legislation purposively. The UK courts have a long tradition of looking at the "mischief" at which legislation is directed and, if anything, have moved further in this direction in recent years. As more legislation incorporates the sort of explicit statement of purpose recommended in 10.5, the courts could naturally be expected to take more note, because Parliament's intention would be that much clearer.

10.46 The method of numbering and structuring the Taxes Acts is less of an issue than it was. Until recently, we argued for adoption of something like the US style of numbering tax legislation (a) to avoid section numbers having to be relearned roughly every ten years following consolidations, (b) to facilitate consolidation-as-you-go and (c) to facilitate location of the item being looked at and cross-reference to all associated provisions. The advent of CD-ROM computer technology, however, means that in future most users of tax legislation are likely to do so via a computer screen, where they will have the facility to locate anything instantly and view together on the screen extracts drawn from completely different parts of the legislation or different vintages of the same legislation. In fact the balance of advantage may now lie in favour of shorter, more memorable section/paragraph numbers rather than the lengthy numbers required by the US system.

10.47 Clearly, the differences in the general law in Scotland and Northern Ireland can make it difficult to draft legislation which is universally applicable and has the same effect throughout the UK. Those drafting tax law have to accept this difficulty and accommodate it as best they can by incorporating appropriate modifications to the rules affecting Scotland and Northern Ireland.

March 1996

INSTITUTE OF DIRECTORS

16 April 1996

Chris Davidson Esq
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Dear Chris

Interim Report on Tax Legislation

Further to your letters of 13 March and 11 April:

1. We would be happy for our response to be published as an annex to the TLRC's final report.

2. I hope the following clarifies our response to para 10.45 of the Interim Report.

Our concern with the suggestion of introducing a statutory requirement for the courts to interpret legislation purposively is as follows. Either it is intended merely as an explicit authorisation of what is happening already or it is intended to change the way the courts behave. If the provision is intended to be merely ratificatory, it would theoretically be otiose and should make no difference. In practice, however, it is difficult to envisage it making no difference to what happens in the courtroom, even if the draftsman succeeded in his aim on paper. This is because, first, the courts are well aware that Parliamentary time is too valuable to be wasted on legislation intended to have no real effect and so may paradoxically read into the provision an unintended purpose and, second, the provision would provide a more formal basis to and so change the nature of the argument in court.

If the provision is intended to change behaviour, it would amount to retrospective amendment of the entire existing body of statute law and render potentially obsolete much existing case law. Admittedly, some retrospective impact is inherent in case law, especially where there is an evolving trend in court decisions on a particular issue, but there is a world of difference between gradual evolution forcing a reassessment in stages of some cases decided in the past and an overnight change forcing immediate reassessment of them all.

Either way there would be an increase in uncertainty until a new body of case law was built up.

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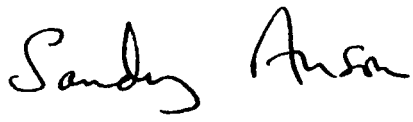
If the intention were to confine the provision to future legislation incorporating a more explicit statement of purpose than has been the norm to date, it would still seem to us not just unnecessary but damaging. As we said in our original response, the courts have always taken some cognisance of the purpose of legislation where it is appropriate and the purpose can be ascertained from the legislation (and, since Pepper v Hart, from Ministerial statements in the debates on the Bill), and on trends in recent years could be expected to take correspondingly more note of the purpose if Parliament has included an explicit statement in the legislation. The fact that it was thought necessary to make such a provision in respect of future legislation might throw doubt on the validity of past decisions where the purpose had been taken into account and which would still be being relied upon in respect of older legislation.

Yours sincerely



Sandy Anson
Taxation Research Executive

E THE LAW SOCIETY

LAW SOCIETY REVENUE LAW COMMITTEE: COMMENTS ON THE TAX LAW REVIEW COMMITTEE INTERIM REPORT ON TAX LEGISLATION

Generally

We congratulate the Committee on its excellent report and for promoting the public debate on this important issue. The Law Society fully supports the Report's proposals for the use of plain language in legislation and for the introduction of explanatory memoranda as part of the enactment process. However, we have reservations about the value of conducting even a pilot study for re-writing the whole of the existing legislation. We believe that the benefit would not justify the upheaval that would be caused, for the reasons set out below, and think that a different approach is required to solve the problem of bad drafting.

An enormous effort would be required to re-write all existing legislation. On the Revenue's figures in Table B of their Report, there were before the latest Finance Bill about 6,000 pages of primary and secondary legislation on income tax, corporation tax and capital gains tax (excluding double taxation agreements). At the 12 per cent per annum compound rate of increase which has occurred since 1992, this would increase to about 10,700 pages in 5 years time while the re-write is being carried out. We question whether all this legislation is worth rewriting. It is said in paragraph 26 of Annex 7 of the Revenue's Background Paper that by rewriting the legislation the need for changes will become clear and change is then more likely to occur. This seems doubtful. The same resources could much more productively be spent directly on simplification of the policy, making changes to modernise selected parts of the legislation and, most importantly, improving the quality of new (Finance Bill) drafting. If there is to be a total re-write it should be after and not before these changes have been made, by which time there would be less need for one. Moreover, we think it would be counter-productive to pursue a total re-write - with all the consequent costs and disruption - if Finance Bills published during the re-write process, and, indeed, after it is completed, were to be produced in the same, often unintelligible, form as before.

The problem of rewriting from the point of view of users is not merely the transitional one described in paragraph 7.11 (and in paragraph 15 of Annex 7 of the Revenue's Background Paper), that it will not be safe to rely on one's knowledge of any existing provision because it may have been changed, and the difficulty of researching any point until textbooks are rewritten. These difficulties should not be underestimated; getting to grips with 400 pages of a Finance Bill is bad enough, but the re-write could involve over 10,000 pages of new legislation in which any changes would not be immediately obvious. The difficulties do not end there. Until new provisions have been considered by the courts it will be difficult to see whether existing cases are still relevant. We assume that the loss of the entire body of case law would not be contemplated as a sensible way forward and that language which the courts have interpreted will in general be preserved. There will be many existing cases which are still relevant. However, to check whether this is so will require looking at the old legislation, comparing it with the new and then forming a view about whether the changes mean that the case is no longer relevant. The courts will therefore always need to consult the old legislation. At present after a consolidation, it can be assumed that case law is still valid with rare exceptions. We find the Revenue's cost and benefit analysis in Annex 7 of their Background

Paper unconvincing. A re-write would, we believe, result in very substantial compliance costs for both taxpayers and the Revenue Departments.

Although we completely support the proposals for future legislation being in plain language we have doubts whether this would be achieved under the present system, because of the constraints described in Chapter 8 - in particular, the lack of time. Mere changes in style will do nothing to lessen the present difficulties of late instructions to the draftsman and changes in policy while the provisions are in course of drafting. If anything, it will make it worse because plain language drafting probably takes longer to achieve.

What is required is more time for drafting of and consultation on Finance Bills. This is amply demonstrated by the way in which the new legislation on corporate and government debt has been introduced; the problems caused by five months private work by the Inland Revenue and Parliamentary Counsel, with little time for adequate review and consultation between publication and consideration by the Standing Committee, were exacerbated by the publication of no less than 30 pages of amendments two days before the Standing Committee debate! The resultant legislation is far from clear in many respects. The disease of bad drafting will, in our view, only be cured by providing the resources required to produce better legislation. The additional time required could, in part, be provided by additional resources without stretching the timetable; more can be done in the same period of time by more people. It is sometimes said that late decisions by Ministers contribute to time constraints and unclear drafting; no doubt this is true, but only partly so. Over 40 per cent of the content of the Finance Bill 1996 resulted from announcements made before (in many cases, some months before) Budget Day. If more policy and drafting staff were available to work on proposed legislation, decisions on detailed aspects could be taken earlier and consultation advanced in order to identify problems; more time would be available for clearer drafting. We think that the provision of additional resources in this way - a recognition of the importance to taxpayers and the Revenue Departments of legislation being clear and readily understandable - would be a more effective use of public funds than the cost of an extensive re-write project; this approach would not have the additional compliance costs or problems of Parliamentary procedure and timetabling, and it would result in a permanent cure of the disease.

As another possible improvement in the present system, we would support further consideration of the Canadian method described in paragraph 8.24 onwards, despite the additional uncertainty during the consultation process. That uncertainty frequently exists already. At present when an announcement takes effect from Budget Day it can be five months before the Act is passed and one can be certain of the final form of the legislation. New legislation is often announced up to a year (or in some cases more) before Budget Day, and increasingly draft clauses are made available before publication of the Bill; but omission to publish and consult early only serves to increase uncertainty. If announcements were made at other times of the year accompanied by draft legislation, a few months extra before the legislation was passed would, in many cases, not cause much additional uncertainty. We recognise that this approach would not be suitable for transactional taxes, such as VAT and stamp duty, and we accept that some changes have to be brought into force without the possibility of longer consultation.

We support the system of natural renewal described in paragraph 7.3 onwards with regard to existing legislation. We do not think it possible to express a preference between the two approaches in paragraphs 7.4 and 7.5, as the choice will depend on the degree of

alteration; but we see no objection in principle to the continuation of a hybrid system of drafting. We do not, however, think that, as is feared in paragraph 7.6, there will be a "mixture of old and new drafting styles"; there will merely be degrees of good and bad drafting, though for a period of time this will be more marked than at present if, as we hope, there will be increasingly clearer drafting. We do think, however, that it would be sensible for selected areas of the legislation - particularly those which are relatively self-contained and of general application but contain difficult drafting - to be rewritten in a clearer style; apart from the obvious benefit to the users of the legislation (which would be enjoyed much sooner than if a total re-write were to be undertaken), such an exercise would provide a useful way of exploring and developing clearer drafting techniques which could be immediately applied to Finance Bill drafting. We believe that such selected re-writing should be under the control of a committee independent of the Revenue and Parliamentary Counsel, perhaps under the chairmanship of a High Court Judge.

Detailed points

We would be disappointed if explanatory memoranda could not be published with the Bill. One of their main uses is to aid understanding of the provisions of the Bill both when they are debated and later when they have been enacted. It is obviously highly desirable that the draftsman should approve the explanatory memoranda if they are to be relied upon by the courts as an aid to interpretation. However, we see no reason why explanatory memoranda should not be published with the Bill. Much material is already available before (ie. Budget Day press releases) and upon (ie. publication press releases and Notes on Clauses) publication of the Bill. It should be possible to combine and extend these; if those responsible for preparation of the Bill cannot produce a clear explanation of the provisions in it (which in most cases would, we expect be required by Ministers before publication of the Bill is approved), we question whether those provisions should be included in the Bill at all.

We would also expect Government amendments (and, preferably, non-Government amendments) to be accompanied by explanatory memoranda. Properly resourced, the Revenue Departments should not, in our view, be in a position where they cannot produce a clear explanation of an amendment when it is tabled. We agree with the conclusion in paragraph 6.41 that the Revenue Departments should not produce Notes on Sections. But we think that all explanatory memoranda, even if effectively superseded because of subsequent amendment of the Bill or the amendment to which the memorandum relates not being enacted, should be published; reference might be made to them in Hansard, and an explanation of a provision which was not enacted might shed light on the meaning of a provision which was enacted in its place.

Much of the difficulty of reading Finance Bills at present is that their provisions are mainly textual amendments which are much easier to read when they have been inserted into the existing legislation by publishers of the annual tax handbooks. It would be helpful to include in the explanatory memoranda the textual memorandum referred to in paragraph 13.12 of the Renton Committee report setting out the provision as amended (or to have a Keeling Schedule, but this is not normally used in tax legislation). This would be of particular value in the case of the Government amendments to the Finance Bill, such as those recently tabled in relation to the provisions on corporate and government debt. We assume that the Revenue already have an amended version of the legislation which is being changed in a Bill for their

internal use. Customs and Excise helpfully made available a revised version of Schedule 3 of the current Finance Bill which was subject to substantial amendment during the committee stage.

We like the style of the new drafting and the use of italics for defined expressions in Appendix 1, although the use of initial capitals for some, and not all, defined expressions seems odd. We would prefer definitions to be at the beginning. In Appendix 6 we do not like the full stop in the subsection numbers or the square brackets in the subsection headings. Appendix 6 shows that considerable improvements to the intelligibility of legislation can be achieved with little change to existing techniques.

TLRC - 27.3.96

F THE LAW SOCIETY OF SCOTLAND

Response by the Law Society of Scotland Tax Law Committee to the Interim Report on Tax Legislation of the Tax Law Review Committee dated 23rd November 1995.

The Tax Law Committee of the Law Society of Scotland welcomes the opportunity to comment on the Report. In principle we find ourselves in agreement with many of the general conclusions reached in the Report and record our general agreement with the Report's conclusion on the general principles approach to drafting, but subject to our concern that any proposed re-writing of the legislation in targeted tranches, whilst recognised as realistic by reference to available resources, may not address what we perceive as a fundamental issue, namely consideration of the basic underlying system and structure of tax legislation. We believe that any re-writing process must attempt to result in a coherent structure to the system rather than simply a re-writing of isolated areas based on the presently historic and casuistic structure. Consideration of the constraints and analogous questions addressed in the Report lead us to conclude also that the present system for enactment of tax legislation needs to be considered and reappraised if many of the changes recommended in the Report are to be progressed. With these introductory comments we turn to a detailed response to the conclusions and recommendations contained in Chapter 10 of the Report.

General Principles Drafting: Paras 10.2-10.6:

We find ourselves in agreement generally with Paragraphs 10.4 and 10.5. As Scots Lawyers we are more in empathy with the general purpose approach than the more detailed common law approach which drafting currently adopts, but we accept that the reality of the situation probably results in the compromise solution proposed in paragraphs 10.4 and 10.5. We believe it will be necessary, however, to consider further the interaction of marginal headings with statements of practice and whether expanded marginal headings could in fact have the status of statements of practice themselves with legal effect.

We also believe that, if the introduction of statements of purpose is to constitute an effective change, they must be clearly drafted and to the point, but not abbreviated to the point of being delphic or inconsequential.

We have noted the proposed future research in paragraph 10.6 and look forward to the opportunity of commenting.

Language: Paras 10.7-10.11:

We believe that the language of tax statutes should be clear and comprehensible so far as possible to the intelligent man in the street and if there is any ambiguity this should be capable of construction in favour of the tax payer. We find ourselves in this following the views expressed by Lord Mackay in Pepper -v- Hart and would take the view that if there is a lack of clarity or ambiguity it is a matter for the Courts to decide. We agree with the views expressed in paragraph 10.8 and following 10.10 agree that no standard style can be developed since there may be different or more appropriate styles necessary for particular topics e.g. compliance matters which are to be understood by the average tax payer as compared with more technical issues while may only be considered by specialist professionals. We do agree, however, under reference to the various examples of re-drafting

currently in circulation and particularly in relation to those produced with the Report that it is possible to draft legislation in a more user friendly manner than the customary style of drafting previously employed. In particular we appreciate the use of the worked examples appearing in Schedule I to Appendix I (Roll-over relief re-drafting), although we would be equally content to see these in explanatory memoranda if published contemporaneously with the legislation.

Aspects of drafting Technique: Paras 10.12-10.16:

Having regard to the expansion and volume of tax legislation we find ourselves in sympathy with any attempt to shorten the legislation, although we do appreciate that this is not necessarily a means of achieving clarity. Because of the nature of our tax system and the constitutional requirement for an annual Finance Act, tax legislation has inevitably grown in volume and this might be one of the factors to be addressed in any fundamental review of the system to which we have referred above. There are few other areas of legislation where it is necessary to have such a frequent revision of previous years' legislation, sometimes even extending to the immediately previous year. We are concerned that unless these fundamental questions are addressed any re-writing may very soon be overtaken by events in the form of the annual Finance Bill exercise.

Explanatory Memoranda: Paras 10.17-10.26:

We like the idea of explanatory memoranda to be published with the legislation when it is first enacted, as recommended by paragraph 10.17. We agree with the conclusion in 10.19 and believe, in particular, that the aim of explanatory memoranda should be as an "aid to construction" (see paragraph 6.11). We are, however, concerned that if the explanatory memoranda cannot be expandable to take account of ministerial statements, then there must be room for Pepper -v- Hart judicial interpretation to take such into account subsequently and that provision should be made for this.

If explanatory memoranda are introduced, we agree that there must be a more realistic timescale for the consideration of these along with the Finance Bill and indeed take the view that the present timescale is one of the main reasons for difficulties in the legislation. We would also hope that explanatory memoranda would be fuller than the style of the present Notes on Clauses, which again, because of time constraints, can necessarily be very brief and indeed in many cases contain no commentary or explanation on a particular clause or set of clauses in detail.

Under reference to paragraph 6.37 (which we do not see commented on in the conclusions) we believe that in practice many of the difficulties with enacted legislation only become apparent at a later date after practitioners (and the Revenue) have had time to assess the implications in practice and in particular the interaction with other taxes or areas of activity. We believe that paragraph 10.25 does not necessarily address that and that it may even be desirable to have some facility for an independent later review, perhaps even an automatic review, of tax legislation after, say, 2 years from enactment to assess and review the implications in practice. It is appreciated that many of the professional bodies presently make budgetary observations on such issues, but for all that many of the observations are of a technical nature it is our impression, however, that there is little opportunity for these to be taken into account.

Re-writing existing legislation: Paras 10.27-10.37

In the light of our above expressed concerns about the fundamental structure question, we would favour a re-writing of the whole legislation, but appreciate the cost/time implications and conclude necessarily that a pilot project as suggested in paragraph 10.30 may be the only realistic way of proceeding. We would suggest Schedule E as a suitable topic for such a pilot project.

We believe the re-writing exercise should, however, extend to other taxes as well, particularly having in mind a preference for establishing, so far as possible, common definitions and assessing the interaction of taxes/duties. For example, if Schedule E were to be a pilot project it would seem anomalous that the existing different rules which can apply for Schedule E and National Insurance purposes should not be examined in parallel. We suggest therefore that any re-writing should take account of and extend to such lateral interaction. We agree with the conclusion of paragraph 10.34 that the more consultation there is the better and with paragraph 10.35 which seems to us necessarily to arise from consideration of the constraints in the later conclusions of the Report.

Constraints: Paras 10.38-10.45:

We agree with the conclusions of paragraphs 10.38, 10.39 and 10.40. Given the time of year at which the Finance Bill is published and the very limited consultation time available and what appears to be even more limited time for amendment or comment on amendment we cannot believe that this can objectively be supported as the most appropriate way to enact complicated legislation. This leads to the conclusion that the present system, in our view, needs fundamental reappraisal.

We agree however that more consultation time would be helpful before the Bill as suggested by paragraph 10.40, but we suggest also that there may be two further constraints, namely:- (1) that there is a considerable lack of time after the publication of the Bill for adequate consultation or amendment; and (2) we are particularly concerned (although we appreciate that the Revenue and Customs have endeavoured to address this in recent years) that there is, however, still not, particularly within the timescale, an adequate forum for discussion of particular Scottish technical issues in relation to primary or secondary tax legislation. We return to this aspect below.

Under reference to paragraph 10.44 we favour maximum pre-enactment consultation, but believe that delay, such as in Canada, would not be an acceptable price to pay for consultation and that if possible consultation should be swift and effective and legislation should not have effect until the consultation process is completed. We appreciate this again raises considerations of the fundamental system for enacting tax legislation. We do not believe (under reference to paragraph 8.18) that the special interest group argument should detract from this since at the end of the day the final decision on policy is a matter for Government alone. We would like to think that much of the time and effort, which is freely given by the professional bodies and others, could actually be more productively absorbed into the system without necessarily expecting that any such consultations should expect to affect policy issues. In particular we see improved consultation as necessary if particular topics or problems are to be properly identified and discussed.

With regard to paragraph 10.45 we would prefer to reserve our position on this until we see the style of any re-write and indeed the need or desirability for a statutory provision might depend on whether it was to apply to old or new legislation.

Other issues: Paras 10.46

We agree that it is desirable to consider the restructuring and re-numbering aspects, but do not see these as major issues other than as attempting to achieve clarity. What can be irksome in practice is where existing numbers are changed in a consolidation process which necessarily results in amendments being required to existing standard documents or styles for that reason alone.

Scotland: Paras 9.8-9.10:

We would have preferred the Report to give more consideration to the Scottish issue. We do not see this in the same light as is suggested by comparison with other non-UK jurisdictions as we believe Parliament has a duty, so far a possible, to ensure that taxation applying in all parts of the United Kingdom has a uniform fiscal result.

We are concerned that the present approach to drafting, which appears to start with rules and language which are appropriate to English law and then at a later stage to have these revised for Scotland is often an inadequate way of dealing with the particular rules of Scots Law. We find ourselves in agreement with Lord Renton's Report, which observed that "if you were designing a tricycle it is better to start with a vehicle that has 3 wheels and not with a bicycle and add a third wheel later".

In practice the present drafting often simply does not address the question of the Scottish aspects. Our Committee is sufficiently concerned about this to have already commenced an exercise which has identified a considerable number of instances where enacted rules are inappropriately expressed in relation to Scots Law or at the very least misleadingly ambiguous. As an example even Appendix III of the TLCR Report, paragraph 9, referring to options over land, states that "an option over land is an equitable interest in the land" which we understand to be an English conveyancing term of art and the opposite of the general law in Scotland.

We are of the view, too, that it is inappropriate for the conclusion in 9.9 to be drawn that "if a differential impact arises it must either be deliberate or accidental. The former would be a policy matter....". We are very concerned that it may, even by implication, seem acceptable that there be any deliberate variation in the tax incidence as between the two jurisdictions. Long established case law (such as for example Ld Adv v Moray (Countess) 1905AC531 or Saltoun (Lord) v AG (1860) 3 MacG 659), following the Act of Union, appears to us to support our view on this. Existing sections, such as the Taxation of Capital Gains Act S.62 (10) cannot be regarded as user friendly to the Scots Tax payer who cannot rely exclusively on Scots Law, but is referred to the rules of English Private Law to determine his tax position. We believe, therefore, there may be a need for some properly constituted forum to consider technical Scottish aspects of legislation perhaps comprising the Revenue, Customs and professional bodies and organisations. As a recent example, which has caused concern, we would refer to the recent Inland Revenue Tax bulletin which comments on interest in possession trusts and demergers and enhanced scrip dividends and cannot see that it is appropriate

that Scottish interest in possession trusts (and their beneficiaries) should pay more tax than English interest in possession trusts (and their beneficiaries) in similar circumstances.

We would strongly recommend this aspect be taken into account by the Tax Law Review Committee not only in their recommendations regarding any new legislation, but also on the implement of any re-writing exercise. A very recent example at Finance Bill/Finance Act stage has been the changes necessarily introduced on Agricultural property relief for Scotland in the Finance Act 1995 to try to ensure level playing field treatment between the two jurisdictions and which have required subsequently to be even further extended by Clause 171 of the current Finance Bill to take account of particular Scottish rules of succession to agricultural tenancies.

Conclusion:

In conclusion we would wish to express our appreciation at the considerable effort which has gone into producing the Report which we have found both stimulating and interesting. In general, as we have indicated, our working party found itself in agreement with many of the specific conclusions subject to the concerns which we have expressed above and we would thank the TLRC for permitting us the courtesy of making comments on the Report, which we hope will be of interest and assistance.

G THE SPECIAL COMMITTEE OF TAX LAW CONSULTATIVE BODIES

TAX LAW REVIEW COMMITTEE

INTERIM REPORT ON TAX LEGISLATION

Comments by the Special Committee of Tax Law Consultative Bodies

The Special Committee has read with interest the Tax Law Review Committee's interim report on tax legislation. Its comments on the conclusions and recommendations summarised in Chapter 10 of the report are set out below. We should emphasise that these comments should be regarded as representing the views of the Special Committee as a whole. The individual bodies represented on the Special Committee may have different views which will be independently submitted.

General Principles Drafting

10.2 We agree that a sacrifice of certainty is unacceptable in fiscal legislation.

10.3 It is stated that it could be attractive to have shorter primary legislation based on general principles, with detail supplied by regulations if an alternative process of scrutiny for the regulations could be established. We consider that it is of paramount importance for primary legislation to be clear. This would diminish the necessity to supply additional detail in regulations or in any other supplementary form.

10.4 We accept that general principles drafting may be appropriate for some provisions, but emphasise that clarity and certainty in primary legislation is of overriding importance.

Statements of Purpose

10.5 We agree that statements of purpose may be helpful. Where such statements effectively state policy, they are to be welcomed, if the result is to clarify the minds of the draftsmen the politicians who will be interpreting the legislation, and the ultimate users of the legislation.

`10.6 If a rewrite of the legislation is a contemplation, we consider that the issue of tax avoidance will have to be addressed at a reasonably early stage in the process. We have serious reservations about a general anti-avoidance provision and its operation in practice, which in our view would entail an unacceptable degree of uncertainty even if it offered the opportunity of repealing much of the existing anti-avoidance legislation.

Language

10.7 We do not accept that it should be the aim for legislation to be written in a style which is capable of being understood only by professionally-qualified users. The language should be as clear as the English language is capable of being without sacrificing accuracy and precision. It should be appropriate to its target audience, once that target has been established (bearing in mind that the target will not be the same for all parts of the legislation). For example, if legislation is aimed at an employee, an employee should be able to understand the legislation in question. Realistically, we would suggest that the language should be capable of being understood by those who produce secondary texts for the guidance of the ultimate user. The redrafted version of Schedule 10, Finance (No 2) Act 1992 (the "rent-a-room" relief) by Martin Cutts shows that the objective can be achieved.

10.9 and
10.10 We agree that tax legislation can be clearer, more accessible and more comprehensible without losing accuracy and that there is a range of different styles which can be adopted.

10.11 We consider that the approaches taken to the redrafts of rollover relief and post-cessation expenditure relief are better than the originals. We do not believe that these redrafted versions are as clear as the redraft, carried out by Martin Cutts (see above), although we appreciate that the approach taken in that redrafting exercise was different.

Aspects of Drafting Technique

10.12 to
10.16 Broadly, we agree with the statements in these paragraphs.

Explanatory Memoranda

We consider that there could be a greater role for explanatory memoranda, provided that their legal status is made clear and comprehensive. We agree that explanatory memoranda to accompany a Finance Bill and to replace or constitute the Notes on Clauses (which are at present inadequate) must be available to members of the Finance Bill Standing Committee at Committee Stage so they know precisely what they are being asked to enact. Such memoranda could then be available as interpretative aids for the courts if necessary.

Rewriting Existing Legislation

While we accept that such an exercise would impose costs, we believe that rewriting the legislation is potentially sufficiently desirable to warrant a pilot exercise. However, we believe this issue requires further consideration in the light of the Revenue's thinking in the forthcoming Consultative Document before any commitments are made. Any rewrite must

not be allowed to crowd out other procedural reforms or examination of policy issues in specific areas.

Constraints

10.41 We agree that wherever possible, Ministers should take early decisions on tax changes. Although in practice this is a problem which is difficult to overcome, part of the difficulty is that timely decisions are not made. The Special Committee has previously advocated a 2-year cycle. A system which permitted review and rewriting of legislation which emerged in a "raw" state in the Bill, to remove ambiguities and anomalies, would be welcome, so that the legislation in its final state would be a "fine-tuned" version.

10.44 While we can see some advantages in the Canadian approach whereby draft clauses are released for consultation and take effect immediately, we believe that this could create uncertainty, particularly as draft clauses might be changed or ultimately not enacted.

10.45 We believe that the courts are beginning to follow an approach whereby legislation is interpreted more flexibly (see 10.5 above), although such an approach is currently not without difficulties. If the legislation contained a statement of purpose, then judges would have a clearer guide to the policy objective.

Other Issues

We would welcome sight of the different examples drawn form around the world which have been assembled. After seeing these we feel we would be better placed to comment.
Our view is that "descriptions" of foreign practice are no substitute for sight of the real thing.

Spec.Comm.TLRC