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Is law poorly written?

A constant complaint against lawyers is that they express themselves in unnecessarily complex language. For people whose skills are largely verbal, they stand charged with verbosity, tautology, and poor communication. An American expert in plain legal language, Professor John Lindsey, explains this "chronic ailment", by reference to the fact that lawyers are "continuously exposed to law books, the largest body of poorly written literature ever created by the human race".[1]

Nor is this a new problem. Four centuries ago, the Lord Chancellor of England ordered the drafter of a particularly prolix document to wear it around his head, as a warning to others.[2]

For some years now, in virtually every jurisdiction of the common law, efforts have been made to promote better communication, and simpler expression by lawyers. An impetus was given to this trend by the consumer movement in the 1970s. This led to various attempts by banks and insurers, and later by governments, to promote simple, clear expression in legal drafting.

In Australia, the movement gained support in the work of the Australian Law Reform Commission, and the Law Reform Commission of Victoria. The VLRC produced two reports on the subject: Plain English and the Law[3] and Access to the Law : the Structure and Format of Legislation.[4] The Commission was continuing its work, including a proposed, simplified code of contract law[5], when it was abolished by the Victorian Government in 1992.

In the Australian Capital Territory, initiatives in plain English drafting have been adopted by the Office of Parliamentary Counsel, and by the Communication Research Institute of Australia. The Institute has been responsible for significant improvements in the forms used by Federal authorities, including the tax form, the census form, and the customs declaration form.

In New South Wales, the Law Foundation, in a joint project with the University of Sydney, established in 1990 the Centre for Plain Legal Language. The Centre is established in the Sydney University Law School. Its first co-directors are Associate Professors Robert Eagleson and Peter Butt. The former is a linguist. The latter is a lawyer.

The Centre is committed to encouraging use of plain legal language by lawyers, public officials, and private organisations. It performs research, prepares precedents, provides consultancy services, and develops planning programmes. It has a permanent staff of 5, led by Professor Butt, the Academic Director. Its Executive Director is Malcolm Harrison. Like the Communication Research Institute of Australia, the Centre emphasises layout, as well as expression, as an important means to improve legal communication. Brochures disdain the usual dense text of legal publications. By the use of differential headings, marginal indenting, blank spaces between different ideas and the adoption of simple rules, the Centre practises what it preaches.

As one of its activities for 1993, the Centre sponsored a visit to Australia by Associate Professor Joseph Kimble of the Law School at Lansing, Michigan in the United States. On 17 November 1993 at the Sydney Law School, Professor Kimble led a highly stimulating seminar on "What do judges think of plain legal language?".

The law books are full of judicial criticisms of legal drafting, including legislation. Conferences resound with judicial invocations to simpler

expression. In one of the Centre's pamphlets, Chief Justice Mason of the High Court of Australia, is quoted as saying:

> *"Unfortunately, judgments do not speak in a language or style that people readily understand ... The judgment is so encrusted with the doctrine of precedent that it tends to be forbidding. The lesson to be learned is that if we want people to understand what we are doing, then we should write in a way that makes it possible for them to do so".*

Amen. But how is it to be done? And will judges join this movement, or hold back?

The lessons of plain language

Professor Kimble began his instruction with an attempt to explode a number of myths about plain legal language:

* It does not involve baby talk, street language, or slang;
* It need not debase the literature of legal language;
* There need be no loss of precision;
* Mistakes will still be made; and
* It is not easy - but it can be made easier, by adhering to a few simple rules.

Professor Kimble acknowledged what he called "the profound inertia" of the legal profession. To this must be added the suspicion and fear of changing time-honoured forms, and the multiplier effect of word processors, which, once programmed, are easier left alone, unreformed, than brought into the era of plain English.

To illustrate his themes, Professor Kimble offered a number of examples of simpler legal drafting. The same examples have been placed before judges

and other lawyers in the United States. Faced with the "plain English" version, and the standard unreformed text of statutes, judges consistently preferred the former by percentages averaging 85%. Other lawyers also preferred the plain English version, usually by a majority of 80%[6]. Even allowing for judges who declined to participate, and the element of self-selection in a voluntary survey, these investigations in the United States suggest that legal resistance to simpler expression may be less powerful in practice than is sometimes suggested.

Professor Kimble then took a number of particularly ugly statutory provisions in the United States. He showed how, by the application of some simple rules, and the layout of the provision, the same ideas could be communicated with greater clarity and brevity. Some members of his audience were tempted to set him loose upon some particularly choice local examples. He could, for instance, start with the *Limitation Act* 1969, (NSW) ss 57 and 58, and move on to the *Commonwealth Places (Application of Laws) Act* 1970 (Cth), s 4.

It is worth recording some of the fundamental rules of thumb advocated by Professor Kimble:

(1) Prefer short and medium length sentences to long ones;
(2) Use the active rather than the passive voice;
(3) Do not turn verbs into nouns. Use simple, strong verbs;
(4) Put connection information at the beginning of the sentence;
(5) Put new, emphatic information at the end of the sentence;
(6) Put shorter pieces of information before longer pieces of information;
(7) Go back and eliminate ambiguity; and
(8) Remove unnecessary sexist language.

These rules, of use to lawyers in drafting letters, agreements, and other documents, may also be of use to the drafters of official documents, commercial agreements, and judicial opinions.

Most of the foregoing rules are clear enough. The discipline of shorter sentences is a lesson which Lord Denning taught in his judgment-writing style. Not everybody liked it. But it is certainly clear, and easy to read.

So far as the use of the active voice is concerned, Professor Kimble recommended changing:

"All relevant information must be disclosed by the department", to

"The department must disclose all relevant information"

He acknowledged that, in some cases, the passive voice might be appropriate. None of his proposed rules were inflexible. Allowance must be made for particular circumstances, and for individual style.

Professor Kimble suggested that ambiguity in legal texts is almost always unintended, but nonetheless "is always a sin". In this respect, legal drafting is not a form of poetry where ambiguity and nuance may enhance pleasure. The good lawyer will scrutinise the text to try to eliminate ambiguity. Thus:

> "The board sanctioned his conduct (did they approve or penalise the conduct?);
>
> Doctors must file separately (what kind of doctors?);
>
> The rent must be paid by the fifth day of the month (what if it is paid on the fifth day?);
>
> The option is available between July 1 and July 4 (is it available on July 1? Or on July 4?)".

Professor Kimble distinguished vagueness from ambiguity. Vagueness may sometimes be useful to provide flexibility where the drafter deliberately wishes to preserve room to manoeuvre. Such well known lawyerly phrases as

"for good cause", "reasonable doubt" and "middle aged" are cited. Judges also sometimes opt for vagueness in the exposition of legal principle. They may do so to avoid laying down rules which later come to haunt them in circumstances which they had not imagined.

Professor Kimble gives instances of various forms of ambiguity - of the syntactic, semantic, and contextual varieties. He suggests various simple rules to avoid ambiguity, and to promote clarity in the drafter's intention.

So far as sexist expression is concerned, Professor Kimble proposes a number of options for avoiding the male personal pronoun. Although not all judges in Australia observe this injunction, many do. The High Court of Australia is now usually careful to adopt gender neutral expression in its judgment.

Genetics and communication

In the writer's commentary on Professor Kimble's instruction, mention was made of the general adoption of headings in Australian judicial opinions during the past decade[7]. This, and the now common distribution of appellate judgments with court-prepared headnotes and key words, contributes to the efficient communication of decisions, and clarification of their holding principles.

The abolition of common law pleadings in New South Wales in 1971 represented a delay in modernisation of language of almost a century compared to other jurisdictions of the common law. The "old system" had the merit of concentrating the lawyer's mind upon the precise legal ingredients of the cause of action. But it perpetuated antique expressions, which then penetrated ordinary legal verbiage, and sometimes promoted the self-conception of lawyers as a profession lost in the past. Lawyers of 50 years and more still have engraved on their hearts the old form of the declaration at common law:

"For that at the time of the commission of the grievances hereinafter alleged and at all material times ... and was otherwise greatly damnified".

It was suggested that the participants in the seminar should take away at least two basic starting rules for plain legal language:

* Say "no" to "whereas" and "hereinafter";
* Say "yes" to fullstops, headings and better layout of legal documents.

Behind the rules concerning the structure of sentences, the use of the active voice, and improved layout, lie characteristics of human communication which deserve empirical study. The way in which ideas are efficiently transmitted by verbal and non verbal means deserves more analysis than it has enjoyed. Different messages need different techniques of communication. The special needs of legal texts - accuracy, certainty, and legal correctness add burdens to lawyers which others in the business of communication do not always carry. Plus, intra-family communication, talkback broadcasters, and politicians will not normally concern themselves with Professor Kimble's rules. Yet a misplaced word in a family may cause hurt. A broadcaster may face proceedings for defamation for a lapse. And a politician may be embarrassed by choice of a single word, as Mr Keating discovered when he recently described the Prime Minister for Malaysia as "recalcitrant". At the Sydney seminar, it was suggested that empirical research should extend to the question why some people are better communicators than others. Is this genetic or learned behaviour? Professor Kimble's instruction is that simple rules can greatly help the clarity of legal writing.[8]

Observance of simple rules

If you felt, after a study of the Kimble rules, that you were on top of plain English, the Communication Research Institute of Australia in February

1994 conducted a seminar in Canberra on "Beyond Plain English". According to Dr David Sless, Executive Director of the Institute, research has shown that in most cases, there is little or no improvement in the performance of plain English documents, over those which they were meant to replace. Professor Peter Muhlhausler of the University of Adelaide tackled the topic "What makes language simple?". Once again, the Institute laid emphasis on "making it work visually".

Meanwhile, the word processors churn out the old texts. The lawyers hesitate to take the risks of change. The judges hold back from unorthodox innovations in the expression of their opinions. Statutes of great detail come pouring out of the legislature.

It seems likely that the Centre for Plain Legal Language, and the Communication Research Institute of Australia, will continue to face an uphill battle, as they struggle to interest judges and lawyers in clearer communication.

Let Professor Kimble have the last word:

> *"Everyone likes plain English from other people. Somehow, they forget about all that when they sit down to write themselves. Then they revert to all the old forms and the long clumsy sentences. A big part of the reason is that they don't know how to write well, because they have never been taught."*[9]

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1. J M Lindsey, "The Legal Writing Malady : Causes and Cures", NYLJ, December 12, 1990, 2. See also R Evans "Telling it like it is" (1994) 68 Law Inst J (Vic) 32 and P Butt "Why can't conveyancers use plain language?" (1993) 31 Law Soc J (NSW) 46

2. Described R Wydick Plain English for Lawyers (2nd ed 1985), 3.

3. Law Reform Commission of Victoria Plain English and the Law (1987), Report No 9, 4 volumes

4. Law Reform Commission of Victoria Access to the Law: the Structures and Format of Legislation May 1990, Report No 33

5. An Australian Contracts Code, September 1992, Discussion Paper No 27 noted (1992) 66 ALJ 780

6. J Kimble and J A Prokop, "Strike Three for Legalese", [1990] 69 Michigan Bar J, 418

7. See instances cited M D Kirby, "On the Writing of Judgments" (1990) 64 ALJ 691, 702. For typical judicial complaints, see Ditchburn v Seltsam Ltd (1989) 17 NSWLR 697 (CA) 698

8. See J Kimble, "Plain English; a Charter for Clear Writing", 9 Thomas M Cooley L Rev, 1, (1992). "The Elements of Plain English" for the purpose of legal drafting set out ibid 11-14 in a series of 36 rules concerned, amongst other things, with matters such as the design of the document, the organisation of its parts, the construction of sentences, the choice (and avoidance) of words, and other simple propositions.

9. Quoted Evans, above n1, 33