

PLAIN LANGUAGE AND LEGAL DRAFTING

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The language of the law is the subject of growing dissatisfaction in many Commonwealth jurisdictions. There is a demand that something be done to improve the quality of legal writing.

Two quotations illustrate the current critical view of the traditional language of legislation.

"The criticism of lawyers' language, running across the centuries to our day, boils down to essentially two: its style is strange, and it cannot be understood." ¹

"The traditional language of the law intimidates the people it is written to serve. Legal language is perceived as hindering, not helping the public gain access to information on their rights and responsibilities ... It is the style of legal writing more than the terms of art that confuse and intimidate." ²

An examination of the elements of this strange and intimidating style is called for. This is not an easy task for persons within the profession. The use of sentence patterns and particular vocabulary tends to be habitual and what is familiar tends to be comfortable.

Criticism of the language of the law has been directed at -

- A. word choice,
- B. sentence structures,
- C. organisation of material, and
- D. visual presentation.

Word choice is criticised particularly for fusty words (such as aforesaid and hereinbefore), for stilted formulas and for using numerous words when one will do. Sentence structures are criticised for length, complexity and awkwardness. Organisation of material is criticised as haphazard and unhelpful to the user and visual presentation is characterised as old-fashioned and odd stylistically.

Because current practices are deeply established, and in some cases have been judicially interpreted, and because complex concepts may require complex language to express them precisely, there is some resistance to change. Defences of current practice do not give sufficient weight to two factors.

First, much of the criticism relates to the quality of writing and there can be no defence of poor quality writing.

Secondly, the arguments against change ignore the interests of the ordinary person who has an interest in content but has no specialist legal knowledge.

A statute has a dual function. As well as establishing some area, great or small, of the law, it needs to communicate its content to the people who need to know of it and understand it. That is what makes the case for improvement of statute law overwhelming. The language of a law is satisfactory only if it is the best language to state the message

accurately and to communicate it effectively to as many people as possible. A strong commitment to plain language would improve greatly the intelligibility of legislation.

PLAIN LANGUAGE - WHAT IS IT AND DOES IT SOLVE COMMUNICATION PROBLEMS?

The essence of "plain language" is to write clearly for your audience.³ Plain language is user-friendly. It communicates the message as clearly and effectively as possible. It never loses sight of the interests of the user. It does not adapt or summarize the message but aims to deliver the full message with the least possible difficulty. The "plainness of a passage is defined in terms of the audience for that passage."⁴ Plain language uses the ordinary language used every day by the audience for the writing in issue. It is based on the established principles of clear writing as set out in the recognised texts such as the classic "The Elements of Style" by Strunk and White and Gower's "Complete Plain Words" (3rd edit).

Plain language is consistent with Einstein's dictum "to make things as simple as possible, but no simpler."

The international plain English movement has brought a vigour and a strength of purpose to the cause of clear writing and has significant achievements to point to. It has also successfully enlisted valuable political support. President Carter's order that "regulations should be as simple and clear as possible" is a landmark and in the United Kingdom Mrs Thatcher has been an enthusiastic supporter. She stated "It is no exaggeration to describe plain English as a fundamental tool of good government."⁵

The prophets of plain English aim high. For example - "Plain language marries content and format to create documents that can be understood by anybody."⁶

How realistic are statements of that kind, particularly as they apply to statute law?

The successful communication of the content of a statute depends on two variable factors in every case.

The first is the comprehension skills of the individual receiver of the message.

Many literate people do not read much and are readily intimidated by the serious written word. For example, recent research found that 73% of Australian adults could not identify the issues in a newspaper article about technology.⁷

Legislation affects also those who are illiterate and those who are literate in a language different from that of the statute.

The second variable factor is the intrinsic complexity and other characteristics of the subject matter of the message. Communication depends on an overlap of the linguistic experience of the sender and receiver of the message. There must be a shared context of both linguistic experience and social experience if ambiguities and other comprehension problems are to be avoided or resolved. To a substantial degree this shared context does not exist for many people when they are faced with a written law. There are so many elements of the context that are strange to them. The use of plain language removes some of the problems but much that is strange remains.

An additional factor inhibiting easy understanding of the effect of a statute is that no law stands alone. A statute is a strand in a complex web. Every statute reaches out and interacts with other statutes and also the common law. A comprehensive understanding will depend on interpretation legislation, criminal practice, the law of evidence, concepts such as natural justice and remedies such as certiorari.

In addition, much statute law amends textually other statute law and the amending statute may make little sense to a reader until it is included in a revised or consolidated text.

Plain language solves some of these problems and reduces the impact of others. Despite the use of plain language in statutes, there will remain a significant sector of the public who will continue to find statute law that effects them totally or partially incomprehensible. For such people, it is not enough that statutes be drafted in plain language. The need to communicate the message of much statute law remains. The fact that the law deems knowledge of the law does not absolve the Government from a double duty - to make and to communicate laws in a manner that is widely comprehended.

The use of plain language in statutes is a large step in the right direction, but no one should believe that its use solves all communication problems. It is very worthwhile because it extends the range of successful communication.

WHAT DOES DRAFTING IN PLAIN LANGUAGE REALLY MEAN?

There is a simple answer to this question.

LAWS SHOULD BE WRITTEN CLEARLY WITH THE USER IN MIND.

There are 4 elements at the core of clear writing.

- A. the use of language that is simple, direct, economic and familiar
- B. the omission of needless words
- C. the use of sentence structures that are evident and unambiguous
- D. the organisation and structure of the material in an orderly and logical way.

None of these points is either new or in dispute but, almost invariably, the drafter is faced with a bundle of factors that as the project proceeds combine to reduce the quality of the product. These are well known and include - inadequate, often ridiculously inadequate, drafting time, inadequate drafting instructions often not thought through properly, frequent variations in drafting instructions, insistence on detail, additional material and complex modifications instructed late in the drafting process or indeed while the Bill is in the throes of the legislative process. These are not excuses or defences but they do help to explain why much of our statute law is as it is. Such matters are the everyday experience of law drafters and they cannot be brushed aside as insignificant.⁸

Perhaps the balance of precision and intelligibility has too often not been adequate. A determination to get it right needs to be accompanied by equal determination to write clearly.

SUGGESTIONS TO SUPPLEMENT A COMMITMENT TO PLAIN LANGUAGE

If plain language is not a complete solution, what else can be done to assist in the communication of statute law?

Point 1 - Governments should vigorously promote an understanding that plain language and clear laws are the responsibility of all persons concerned with the legislative process - not just a technical matter for the drafter.

The achievement of laws in plainer language would be so much easier if the responsibility were shared equitably. It will not do for the drafter alone to be blamed for the state of statute book. Legislation is the responsibility of Governments and the Parliament. This point was stressed by the Renton Committee. "Parliaments cannot have it both ways. If they really want legislation to be simple and clear they must accept Bills shorn of unnecessary

detail and elaboration. We cannot emphasize too strongly that the Government and Parliament have clear responsibility for the state of the statute book."⁹

In addition to supportive words, Governments should show their commitment to the quality of the statute book by abandoning their practice of rushing a torrent of weighty legislation through Parliament in a short time. Drafting instructions should be required to be in plain language and legislative schemes, as well as the words in which they are expressed, should be designed so as to be capable of ready communication.

Year in and year out inadequately developed legislation is rushed to Parliaments in many jurisdictions. It is inevitably found wanting and must be amended. Time and money are wasted.

Real progress in improving the clarity of the statute book depends on a commitment to clear language on the part of all those concerned with legislation and the legislative process. Of course, the drafter has a central and vital role and is in a position to make innovative and progressive suggestions, but alone his or her steps will be small ones.

Point 2 - Governments should accept that a separate duty exists after the enactment of a statute requiring the communication of its content to those affected.

Such a duty is a necessary consequence of the reality that even if a law is drafted in plain language that is not sufficient to get its message across to a significant sector of the persons who have a concern with it.

The importance of the duty of post-enactment communication is so great that formal recognition of it is desirable. Unless there is a mechanism to monitor performance of the duty, it is likely to be performed spasmodically and inconsistently.

One possibility would be for Standing Orders of Parliament to require the Minister who has piloted a Bill through Parliament to inform Parliament within a fixed period of the steps taken to communicate the content of the law.

Alternatively, the duty of monitoring the Minister's performance might be imposed on some person outside Parliament but given the duty of reporting from time to time to Parliament. In New Zealand this duty might be given to the Law Commission which already has a statutory duty to propose ways of making legislation as understandable and accessible as practicable.

The duty might also extend to comment on the clarity of the law.

Point 3 - Law drafters should be enabled and encouraged to make use of modern technology.

The advantages of having current statute law on a computerized data base are huge. To be able to search the entire statute book in a few seconds is a powerful weapon in the struggle for consistency of style and language. The achievement of consistency and harmony in the statute book has traditionally been tantalisingly difficult. Similarly, the availability of search techniques is a marvellous aid to achieving consistency within a draft.

The manner of presentation of written material can assist or inhibit communication. This factor has generally been neglected in the publication of statutes. The style of the legislative page in many jurisdictions is archaic and would benefit greatly from the advice of an expert in graphic design.

In particular, print style should be modern and easy to read. There is enough discouragement in the content of many statutes and it does not need to be added to by forbidding print. Practice concerning capitalization, punctuation, headings and indentations should follow familiar usage, unless there is good reason for change.

Point 5 - Stylistic practices and precedents of commonly recurring provisions should be kept under continuing review and should be recorded and made available in a practice manual.

The nature of the legislative process and the ordinary usage of statutes require that legislation be structured and presented in accordance with established conventions. Numbering practice, for example, must be consistent within a jurisdiction to avoid total confusion. A programme of review should aim to develop and adopt practices that best facilitate easy communication.

A practice manual is a vital tool for a law drafting office. It promotes consistency, constitutes a valuable training resource and facilitates stylistic development and improvement.

Point 6 - Greater attention should be paid in legal training to the teaching of written communication skills.

Point 7 - A statute book must be kept up to date by an effective system of reprints or revision.

Most statutes amend other statutes textually. Until an amending statute is printed with the text integrated with that of the principal statute, the amending text makes little sense to a person not used to dealing with statutes. The problem arises whether or not the statutes are drafted in plain language. This is a problem of enormous proportions and one that is not being faced up to adequately in many jurisdictions. To solve it is not technically difficult, especially in these days of computer technology, but it is costly for a small jurisdiction and uses scarce and expensive expertise. Nevertheless, it has to be recognised that successful communication of a statute after amendment is very seriously inhibited until an integrated text is made available.

Point 8 - Existing statutes in consumer-oriented areas should be the subject of a programme of review and to the extent found necessary should be redrafted in plain language.

Such a programme should give priority to legislation on topics of concern to large sectors of society, particularly sectors that might be expected to face difficulties in dealing with statute law. Examples of suitable subjects are found in the fields of road traffic law, hire purchase, fair trading, credit, residential tenancies, door to door trading, family law, resolution of small disputes, equal opportunities and wills.

Footnotes

1. R W Benson, The End of Legalese: The Game is Over, (1986) 13 N Y U Rev L & Soc.Change 520.
2. G S Dykstra, Plain Language, Legal Documents and Forms: Background Information, A paper presented at the Canadian Institute for the Administration of Justice Seminar on Legislative Drafting and Interpretation, Ottawa, 1987. Published in the Loophole Vol 2 Part 2.
3. R Thomas, Plain English and the Law (1985) Stat. L R 139.
4. R D Eagleson, Efficiency in legal drafting, Essays on legislative drafting in honour of J Q Ewens, 14.
5. Foreword to Making it Plain, HMSO, 1988.
6. G S Dykstra, op cit, 4.
7. As reported in The West Australian, November 10, 1989.
8. See I I L Turnbull, Problems of Legislative Drafting, (1986) Stat. L R 68.
9. Cmnd 6053 (para.1.10).